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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KATAE SOUMPHOMHPHACKDY,

Defendant and Appellant.

D059633

(Super. Ct. No. SCD226468)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Katae Soumphomhphackdy (Appellant) of unlawful taking and driving a vehicle (Veh. Code, § 10851, subd. (a); count 1), possession of burglary tools (Pen. Code,¹ § 466; count 3), resisting an officer (§ 148, subd. (a)(1); count 4) and first degree burglary (§§ 459, 460, subd. (a); count 5). The court found true two prison priors (§ 667.5, subd. (b)) and three previous convictions for violations of Vehicle Code section 10851 (§ 665, subd. (a)).

¹ All further statutory references are to the Penal Code unless otherwise specified.

Appellant was sentenced to a determinate term of six years in prison.

Appellant appeals challenging only his conviction for first degree burglary. Even that challenge is narrow. Appellant does not contest either the admissibility or the sufficiency of the evidence to support his burglary conviction. Instead he contends the trial court prejudicially erred in allowing the codefendant to claim his Fifth Amendment privilege against self-incrimination. We will find no error and affirm the judgment.

STATEMENT OF FACTS

Recognizing the narrow scope of this appeal we will set forth a limited statement of facts regarding the burglary in order to provide context for the discussion which follows.

On March 3, 2010, Francisco and Sandra Herrera returned to their home in San Diego. They discovered their home had been broken into and a number of items had been stolen. The Herreras discovered the glass in the kitchen window and laundry room door had been broken. They found a cigarette butt on the floor.

On March 5, 2010, a San Diego Police detective took two fingerprints from the broken glass in the laundry room door. The fingerprints matched Appellant's fingerprints.

Defense

Appellant argued that the burglary was committed by the codefendant Choy Kong acting alone. Kong's DNA was discovered on the cigarette butt found on the floor. He

also argued that his fingerprints must have been on the outside of the window and thus there was no evidence he was inside the house.

DISCUSSION

At trial, and on appeal, Appellant contends he was denied his Sixth Amendment right to present a defense. He argues that the trial court erroneously allowed Kong to invoke his Fifth Amendment right against self-incrimination. Appellant specifically claims that Kong had pled guilty to the current offense and to a federal offense; that he had been sentenced in both cases, and therefore he had no legitimate claim of self-incrimination. We are satisfied that Kong properly invoked his privilege and that the trial court was correct in permitting him to do so.

A. Background

When this case was called for trial in January 2011, the defense requested a continuance so that the codefendant could be called after trial. Defense counsel represented that Kong would be sentenced by that time and that he would testify that he committed the burglary alone. Kong's defense counsel said, "I think that goes a little beyond what was suppose[d] to be stated on the record about what he would or would not testify to." The trial court granted Appellant's request for a continuance.

After the close of the prosecution's case in trial, defense counsel said he would call Kong as a witness. The court appointed counsel for Mr. Kong (Mr. Wagner). Following the completion of other discussions, the court addressed the question of whether Kong would testify. The following exchange occurred:

"THE COURT: Mr. Wagner, is Mr. Kong going to invoke his Fifth Amendment privilege?

"MR. WAGNER: I believe he is, Your Honor. I'd just ask the Court to inquire.

"THE COURT: All right. Mr. Kong, if questions are put to you regarding the incident here in question with Katae Soumphomhphackdy, would it be your intention to invoke your Fifth Amendment privilege against self-incrimination?

"MR. KONG: Yes, Your Honor. I take the Fifth. I don't feel comfortable.

"MR. BRITT: Your Honor, if I can ask a couple of followup questions. Kong was in federal custody as a sentenced prisoner.

"THE COURT: Sure.

"MR. BRITT: Mr. Kong, you've already pled guilty to this case; correct?

"MR. KONG: Yes.

"MR. BRITT: And you've already received a sentence?

"MR. KONG: Yes.

"MR. BRITT: And at the same time you had a federal case as well; right?

"MR. KONG: Yes, I did.

"MR. BRITT: And you already pled to that case; right?

"MR. KONG: Yes.

"MR. BRITT: I'm sorry.

"MR. KONG: Yes.

"MR. BRITT: And you were already sentenced on that case as well; right?

"MR. KONG: Yes.

"MR. BRITT: So right now there are no pending cases against you; is that right?

"MR. KONG: No.

"MR. BRITT: Your Honor, it is my position that based on that information, Mr. Kong actually doesn't have a Fifth Amendment right based [on] the questions that I intend to ask him about this offense for which he's already pled guilty. He doesn't have another pending matter that would affect his Fifth Amendment rights as it relates to another case or there being some collateral or adverse consequences. [¶] So I don't believe he has a Fifth Amendment right as it relates to this case.

"THE COURT: Mr. Wagner.

"MR. WAGNER: Well, Your Honor, I don't know this case and I don't know what is going on, if there's any further case. But for future cases, my client is concerned about he might be in -- making statements that could incriminate him in other crimes. There might be other pending charges we don't know about. [¶] I've ask[ed] the district attorney. He has been very forthright saying he doesn't know himself. But I believe my client just doesn't feel comfortable because it might open up a door that we don't know might lead to a crime or might lead to some other issue.

"THE COURT: So basically it's because he may say something that would lead to additional charges being raised against him by either state or federal authorities?

"MR. KONG: Yes.

"MR. WAGNER: Right.

"MR. BRITT: And, again, Your Honor, for the record, I understand that he may be uncomfortable, there is nothing pending, and he has

already pled to this. So it's not as if he is going -- and I believe he actually pled to two residential burglaries on -- it's this case plus another one for which they found, I think, his DNA also on. [¶] And so he pled to both of them. So it's not as if there is something outstanding that the state didn't know about. [¶] And, again, when we ask - when I ask the questions, they're going to be very specifically targeted. Literally, I'm going to wrap this up in about five questions. Does he know Mr. Soumphomhphackdy? Did he commit a burglary on March 3rd? Was he alone at the time that he completed the burglary? And was Mr. Soumphomhphackdy present at the time that he committed the burglary? Four questions. None of which I think open the door -- again, now, the cross may -- it's going to be, I think, limited to that aspect. [¶] . . . [¶] So I don't believe there is any additional information that is going to come up based on my four questions, and I would ask that the Court find that the invocation of his Fifth Amendment is a ruse or a sham to avoid trying to testify for which there is nothing, any collateral consequences that are going to come up based on my four questions.

"THE COURT: Mr. Doyle.

"MR. DOYLE: I certainly don't want to represent if there are collateral consequences that may result as a result of Mr. [Kong] testifying. All I know is that the district attorney's office is not aware of additional charges that Mr. Kong could be facing at this time. [¶] I don't know what state investigating agencies are developing. I would note that Mr. Kong was made off the DNA hit. There is certainly no preclusion to his DNA, which is in the database, coming up in other crimes. [¶] Certainly, I have no idea what the federal agencies are involved in or developing against Mr. Kong at this point in time. [¶] I know he has a lengthy immigration history, and I know questions that come out in this case may prejudice him in future immigration cases. And I would hate for that to happen. [¶] As far as my cross, it may stray into all sorts of matters regarding Mr. Kong's prior history, his associations with the defendant, his prior convictions. And there is always the likelihood of Mr. Kong developing perjury charges as a result of testimony he may or may not give on direct. So to say that there is no potential for Mr. Kong to run into future criminal consequences as a result of his testimony, I don't think it's a fair statement of the facts as they exist right now."

Defense counsel replied to the prosecution's argument and added:

"MR. BRITT: . . . And, in fact, Mr. Kong, when he was here last, which was back in February, I believe, which was right before he was sentenced, he had a conference with his attorney, I believe the DA investigator, and it wasn't Mr. Wagner; it was his federal attorney, and at which time he indicated that he would testify after his federal matter was resolved. And that is the reason why we continued the case. And part of the reason why Mr. Soumphonhphackdy agreed to a continuance was because Mr. Kong had indicated that he was going to come in and testify that Mr. Soumphonhphackdy was not present when Mr. Kong committed this burglary. [¶] And so, again, by allowing this, you're going to be denying my ability to present a defense and you're going to be denying my client the right to due process and the right to, again, present an affirmative defense.

"THE COURT: All right. Anything further, Mr. Wagner?"

"MR. WAGNER: Well, I would just indicate that my client tells me that he didn't agree to anything, and he was just listening to the conversation at the time when he was being interviewed by the federal people. [¶] Mr. Britt there -- my client is really concerned about things that happened since he last spoke to anybody, and there is always the potential for opening up a door that could cause further problems for my client."

The trial court thereafter ruled on the issue.

"THE COURT: All right. The Court finds that it appears that Mr. Kong is invoking his Fifth Amendment right in good faith, and that is with the advice of counsel, that potential additional charges could possibly be raised once he is subject to full and vigorous cross-examination. Therefore, he will not be invoking his Fifth Amendment right in front of the jury."

B. Legal Principles

A defendant in a criminal case has a Sixth Amendment right to compulsory process and to present a defense. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19.) The

defendant's Sixth Amendment right, however, must yield to a witness's legitimate claim that his or her testimony might lead to self-incrimination. (*People v. Hill* (1992) 3 Cal.4th 959, 993.)

When we review a witness's claim of self-incrimination we must accord the claim of privilege " 'liberal construction in favor of the right it was intended to secure.' " (*People v. Seijas* (2005) 36 Cal.4th 291, 304; Evid. Code, § 404.)

The court in *People v. Lucas* (1995) 12 Cal.4th 415, discussed the approach that should be taken by courts in evaluating a claim of Fifth Amendment privilege by a witness. The court said:

"Witnesses may refuse to answer questions calling for a potential link in a chain of evidence of guilt, as well as questions calling for clear admissions against penal interest. [Citations.] Although the court should make a particularized inquiry as to whether or not a claim of privilege is well founded [citation], in order to approve invocation of the privilege "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." ' [Citation.] Innocent persons, as well as the guilty, are entitled to invoke the privilege. As the high court has declared, ' "[t]he privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." ' [Citations.]" (*Id.* at p. 454.)

C. Analysis

The record demonstrates that Kong legitimately invoked his Fifth Amendment right. After conferring with counsel, Kong made clear that he was afraid of "opening the door" to the possibility of other charges. While there were no other charges then

pending, the prosecution could not guarantee that there were no other investigations pending. Further, while defense counsel attempted to keep his questions very narrow, understandably the cross-examination would likely cover areas designed to explore Kong's possible motives for exonerating Appellant. We gather from this record that Kong has had extensive involvement with the criminal justice system. In the present case he had been recently convicted of both state and federal crimes and had "immigration problems" in the past. Only Kong knows what other crimes he may have been involved in and with whom he may have been involved. As his attorney observed, "But I believe my client just doesn't feel comfortable because it might open up a door that we don't know might lead to a crime or might lead to some other issue."

Kong was seeking to prevent compelled testimony that might provide a " 'link in a chain' of evidence tending to establish guilt of a criminal offense." (*Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 326; disapproved on other grounds in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 370-371.) The trial court was not required to compel Kong to disclose the nature of any criminal activity about which he was concerned in order to determine if the claim of privilege was legitimate. The court appointed counsel for the witness, held a hearing to explore the witness's claim and reasonably concluded that Kong had a legitimate claim of privilege that should be upheld. We are satisfied that the trial court correctly allowed Kong to rely on his Fifth Amendment privilege against compelled self-incrimination.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.