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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL GONZALEZ,

Defendant and Appellant.

E052000

(Super.Ct.No. RIF136371)

OPINION

APPEAL from the Superior Court of Riverside County. Richard J. Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant guilty of two counts of first degree burglary. (Pen. Code, § 459.)<sup>1</sup> As a result, defendant was sentenced to a total term of four years in state prison with credit for time served. On appeal, defendant contends: (1) the trial court prejudicially erred in excluding the testimony of his proffered expert; and (2) one of his burglary convictions should be reduced to second degree burglary because there was insufficient evidence, as a matter of law, to show that the premises were inhabited. We reject these contentions and affirm the judgment.

## I

### FACTUAL BACKGROUND

#### A. *Canyon Crest Drive Burglary*

In 2006, victim 1 was a student at the University of California at Riverside (UCR) and lived in an apartment on Canyon Crest Drive with a roommate. During the summer break, around June 26, 2006, victim 1 stayed with her parents in their home, but she was still paying rent for her apartment.<sup>2</sup> Victim 1 intended to return to her apartment in the fall. She left most of her belongings in the apartment and would periodically check on her apartment. Victim 1's roommate had moved out after graduation.

On July 18, 2006, victim 1 checked on her apartment and discovered that it had been burglarized. After calling the police, she entered the apartment and observed that

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Victim 1 clarified that rent for the summer months would be free, if she stayed for the next year.

the front door handle “was off-centered,” her bathroom light was on, and there was a steak knife stuck in the doorframe of her separately locked bedroom door. The knife appeared to have been used to force open the latch of her bedroom door. Inside the bedroom, victim 1 noticed that items were strewn around the floor and bed, and some of her clothes and textbooks were missing.

A UCR police officer investigated the crime. Upon arrival, the officer noticed that the front door handle was broken and had been jammed. The officer believed a suspect might still be inside the apartment. Accordingly, the officer called for backup. While searching the apartment, the officer noticed a fingerprint on the steak knife and lifted the latent print from it. An analysis of the fingerprint matched defendant’s right middle finger.

B. *Highlander Drive Burglary*

In October 2006, victims 2 and 3, who were sisters, lived together in a house on Highlander Drive in Riverside. On October 11, 2006, victim 2 returned home from work around 4:00 p.m. and noticed indications of the house being burglarized. She found her dog in the garage, even though her dog is normally kept in the backyard. She also noticed that the sliding glass door to the backyard was ajar. Once victim 3 arrived home, both victims walked through the house and discovered that it had been ransacked. They also determined that thousands of dollars worth of property had been stolen from the home.

A UCR police officer investigated the scene. The officer lifted several fingerprints found at the scene, including one found on a jewelry box, and submitted them for analysis. The analysis revealed a match of a fingerprint from the jewelry box to defendant's right thumb.

Defendant testified on his own behalf. He denied having committed either burglary.

## II

### DISCUSSION

#### A. *Exclusion of Expert Testimony About Fingerprint Evidence*

Defendant contends that the trial court committed prejudicial error when it excluded the expert testimony of Simon Cole, Ph.D., (Cole) who would have testified regarding the validity of fingerprint evidence. We disagree.

Prior to trial, defense counsel informed the trial court that he wanted to present expert testimony from Cole, who believed that there is no adequate scientific data on the reliability of latent fingerprint individualization. That is, defendant sought to use Cole's testimony not to challenge the reliability of the fingerprint comparison made in this case but, instead, to challenge the reliability and validity of fingerprint identification in general. In support of the motion, he filed voluminous exhibits attempting to show that sufficient criticism of fingerprint analysis techniques exists within the scientific community to warrant Cole's testimony, despite the long established acceptance of such evidence in the courts. On appeal, defendant does not challenge the denial of the "*Kelly-*

*Frye*<sup>3</sup> motion, but analogizes Cole’s testimony to calling an expert witness to testify about the factors that may affect the accuracy of an eyewitness identification. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

The prosecutor objected to the proffered testimony. The trial court agreed to conduct an evidentiary hearing.

At the hearing, Cole testified that he was an associate professor at the University of California at Irvine. He had authored a book and many articles on the reliability of latent fingerprint individualization. (See Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (President & Fellows of Harvard College, 2001).) He received his doctorate in science and technology studies, which “uses the tools of the social sciences—history, sociology, anthropology, political science—to study the social phenomena of our science and technology.” He has never worked in law enforcement, never lifted a fingerprint, and never made a fingerprint comparison. He is not qualified to lift or compare fingerprint evidence. He has not taken any courses to learn how to lift or compare fingerprints in order to qualify in court as a fingerprint expert. He did not analyze the latent fingerprints in this case.

Cole had testified in approximately nine trials and about 17 admissibility hearings around the country. However, Cole did not explain the nature of his testimony in those proceedings, but generally stated that his expertise was “on the validity or lack thereof of

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<sup>3</sup> *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

latent print identification.” Cole admitted that law enforcement routinely uses fingerprints as a source of identification.

Cole’s belief that fingerprint evidence is not reliable is based upon several factors. The first is that he has searched for but found no studies validating the accuracy of fingerprint identification. In addition, he noted that there are no accepted standards for determining a match. The second is the conclusions of the prepublication version of a report from the National Academy of Sciences entitled “Strengthening Forensic Science in the United States.” The report was compiled by a committee of forensic scientists, statisticians, judges, and lawyers but no fingerprint examiners. The report indicates that there is insufficient information to determine whether fingerprint comparison evidence is accurate and reliable. Cole considers that report to be a statement of the relevant scientific community.

In 2005, Cole was able to document 22 known fingerprint misidentifications in the United States and United Kingdom. A follow-up study by Cole later revealed between 30 and 40 misidentifications. He, however, has not personally conducted studies of fingerprints to measure the accuracy or validity of latent fingerprint identification.

After reviewing defendant’s motion and the documents attached to the motion, listening to Cole’s testimony, and hearing argument from counsel, the trial court ruled that Cole could not testify in defendant’s trial because his proposed testimony would not assist the jurors. It explained: “I really respect Dr. Cole. He’s very, I think, very objective and knowledgeable. . . . [¶] On the other hand, I do not think his testimony would assist the jurors. In essence, what it amounts to is saying, ‘They can make a

mistake.’ Well, I don’t think you need an expert to say somebody can make a mistake. And you can cross-examine the people who testify. You can bring your own expert if you want on the issues. [¶] But what it is, is somebody making a study of the studies and saying, ‘Well, there really isn’t a study out there to validate it.’ And I don’t think that is the kind of evidence that would assist the jurors in deciding.”

The trial court has broad discretion to determine the relevancy and admissibility of evidence. (Evid. Code, § 352.) A claim that it improperly precluded expert opinion testimony is reviewed under the deferential abuse of discretion standard. (*People v. Page* (1991) 2 Cal.App.4th 161, 187.) Consequently, its ruling “will not be disturbed except on a showing [it] exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court did not abuse its discretion in precluding Cole’s testimony. The relevant issue was whether the fingerprints found on the steak knife in victim 1’s apartment and the jewelry box in victim 2’s home belonged to defendant. Cole had no specific opinion(s) to offer on that issue. He was not qualified to lift fingerprints and, therefore, could not (and did not offer to) critique the officers’ work at the crime scenes when they lifted the fingerprints, which were subsequently identified as belonging to defendant. Because Cole was not qualified to make a fingerprint comparison, he could not (and did not offer to) examine the fingerprints and opine whether they were defendant’s. In view of all of these circumstances, the trial court did not abuse its discretion in finding that Cole’s testimony—testimony that, according to defendant,

would merely explain to the jury that “the science and standard methodology in this area are entirely fallible and not worthy of 100 percent, or near 100 percent, confidence.”

Fingerprint analysis is not “new” to either science or the law in any sense. At most, defendant proffered evidence criticizing the lack of uniformity or set standards within the community of fingerprint examiners. He concluded that mistakes do occur, but did not show that the reliability of fingerprint identification techniques is no longer in general acceptance within that community. Moreover, as the California Supreme Court stated in regard to a similar challenge to evidence based on the use of the state’s computerized fingerprint matching system, “[t]he jury could make its own comparisons between the latent prints . . . and defendant’s fingerprints.” (*People v. Farnam* (2002) 28 Cal.4th 107, 160.) As such, defendant’s reliance on *People v. McDonald, supra*, 37 Cal.3d 351 is misplaced.

Citing *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], among other cases, defendant contends that the trial court’s ruling precluding Cole’s testimony violated his constitutional right to present a defense. We disagree. “A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court’s application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon this right [citations]. . . . Although the high court in *Chambers* determined that the combination of state rules resulting in the exclusion of crucial defense evidence constituted a denial of due process under the unusual circumstances of the case before it, it did not question ‘the respect traditionally accorded to the States in the establishment

and implementation of their own criminal trial rules and procedures.’ [Citation.]”  
(*People v. Cornwell* (2005) 37 Cal.4th 50, 82, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The trial court’s decision to exclude Cole’s testimony was not so vital to the defense that its exclusion violated defendant’s right to due process. As explained above, defendant did not establish that the proffered expert testimony would have significant probative value in the case. Further, the trial court’s ruling did not preclude defendant from presenting the defense that the fingerprints found at the scenes of the crimes were not his. The trial court gave defense counsel broad latitude in his cross-examinations of the officers and fingerprint examiner. Counsel used the answers of the officers and fingerprint examiner to argue to the jury that it should question the accuracy of the fingerprint comparisons. For instance, counsel argued, “you don’t hear any testimony from any of the three examiners regarding what it means to make a match,” and emphasized their “refusal to consider critical scholarly literature” in regard to fingerprint evidence. Counsel also pointed out that misidentifications have occurred and gave examples of the misidentifications in certain cases. Lastly, defense counsel argued the methodology used by the fingerprint examiners was not conclusive proof defendant committed the burglaries because they failed to provide any statistical basis for what a match means and there was no other corroborating evidence in this case. Taking all of these circumstances together, defense counsel urged that there is a reasonable doubt in this case.

In sum, exclusion of Cole’s testimony did not violate defendant’s due process right to present a defense.

B. *Sufficiency of the Evidence of the Canyon Crest Drive Burglary*

Defendant contends the evidence was insufficient as a matter of law that the burglary of victim 1’s apartment was first degree burglary and, therefore, that count must be reduced to second degree burglary because the apartment was not an inhabited dwelling when he burglarized it. We disagree.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence—that is, evidence that is reasonable, credible and of solid value—supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

However, as defendant points out, the legal sufficiency of undisputed evidence, as in this case, to support the verdict of first degree burglary is a question of law, which we review de novo. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 316, fn. 3 [Fourth Dist., Div. Two]; see also, *People v. Groat* (1993) 19 Cal.App.4th 1228, 1231.)

Burglary involves the act of unlawful entry accompanied by the specific “intent to commit grand or petit larceny or any felony.” (§ 459; see also *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) First degree burglary requires entry into an “inhabited” dwelling house. (§ 460, subd. (a).) For purposes of the statute, the term “‘inhabited’ means currently being used for dwelling purposes, *whether occupied or not.*” (§ 459, italics added.)

The fact that a dwelling is not the regular residence of its occupants is not dispositive. Vacation homes and second homes remain inhabited even where they are used sporadically by their residents. (*People v. DeRouen* (1995) 38 Cal.App.4th 86, 90-92, disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 864-866.) This is consistent with the well-established principle that “a house remains inhabited even if the burglary occurs while the residents are away for an extended period of time.” (*People v. Cardona* (1983) 142 Cal.App.3d 481, 483.) “A structure that was once used for dwelling purposes is no longer inhabited when its occupants permanently cease using it as living quarters, and no other person is using it as living quarters.” (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 132.)

Prior cases have found rental dwellings to be uninhabited where the current tenants have left without intending to continue living there. (See *People v. Cardona*, *supra*, 142 Cal.App.3d at pp. 482-484; *People v. Valdez* (1962) 203 Cal.App.2d 559, 561-563; see also *People v. Hughes* (2002) 27 Cal.4th 287, 354.) In one case, the fact that the landlord had signed a new lease with another tenant who had not moved in was not found to be sufficient. (*People v. Valdez*, at pp. 562-563.) In another case, the court emphasized: “The dispositive element is whether the person with the possessory right to the house views the house as his dwelling. The [prior tenants] no longer used the . . . house as their dwelling and thus it was not inhabited when the burglary occurred.” (*People v. Cardona*, at p. 484.)

*People v. Hughes, supra*, 27 Cal.4th 287, is instructive. In that case, the California Supreme Court held that an apartment remained inhabited when the tenant had moved some of her personal possessions to her boyfriend's home in preparation for vacating her own apartment, where she had not slept for the past two weeks. (*Id.* at pp. 316, 354-355.) The victim was killed when she returned to the apartment to clean it. (*Ibid.*) The Supreme Court noted that "although most of [the victim's] clothing had been moved to her boyfriend's house, none of her furnishings had been moved" and, thus, the evidence did not reflect that she had "already" moved. (*Id.* at p. 354.)

Here, there is no question that victim 1's apartment was an inhabited dwelling when defendant burglarized it. She was a student at UCR. She testified that during the summer break, she went to stay with her parents in their home, while still leaving most of her belongings behind and paying rent for the apartment. She also explained that she was *intending* to return to her apartment in the fall, and that she would periodically check on her apartment. Although it is undisputed that victim 1's roommate had moved out after graduation, the evidence clearly established that victim 1 still inhabited the apartment intermittently. We find that this evidence is sufficient as a matter of law to conclude beyond a reasonable doubt that the apartment was inhabited for purposes of the burglary statute. (See, e.g., *People v. Hernandez* (1992) 9 Cal.App.4th 438 [Fourth Dist., Div. Two] [apartment was inhabited when tenants moved all of their belongings into it, but had not yet slept in it or unpacked]; *People v. Jackson* (1992) 6 Cal.App.4th 1185 [dwelling continued to be inhabited because tenant who intended to move out had not vacated premises and was still using the house at the time of the robbery]; *People v.*

*Marquez* (1983) 143 Cal.App.3d 797 [house was inhabited because resident intended to return, even though the resident, under conservatorship, had been absent for two and a half years].)

Defendant's reliance on *People v. Hines* (1989) 210 Cal.App.3d 945, disapproved on other grounds in *People v. Allen, supra*, 21 Cal.4th at page 864 and *People v. Cardona, supra*, 142 Cal.App.3d 481, is misplaced. Defendant's assertion that "the *Hines* court suggested that it would be second degree burglary, to enter 'a summer cottage with a[n] identifiable resident who was away for the winter but planned to move in and start sleeping there in June'" is incorrect. The *Hines* court was merely comparing the facts in *Hines* with a summer cottage situation. It did not state or imply that the summer cottage scenario was second degree burglary. (*Hines*, at pp. 949-951.) In *Cardona*, unlike here, the occupants of the home had moved out the day before and no longer intended to use the house as their dwelling. (*Cardona*, at p. 483.)

Lastly, defendant argues that the phrase "currently being used for dwelling purposes" is unconstitutionally vague. We find this contention unmeritorious.

The due process clauses of the federal and state constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15) mandate that no one should be required to speculate as to the meaning of penal statutes. (*Katzev v. County of Los Angeles* (1959) 52 Cal.2d 360, 370.) "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. [Citations.]" (*People v. McCaughan* (1957) 49 Cal.2d 409, 414.)

Section 459 provides in relevant part that, “[a]s used in this chapter, ‘inhabited’ means currently being used for dwelling purposes, *whether occupied or not.*” (Italics added.) The fallacy of defendant’s argument is the incorrect assumption that if a dwelling is “currently being used for dwelling purposes,” then it must be presently occupied. However, the statute clearly indicates that “‘inhabited’” and “‘occupied’” have different meanings, and that it is possible that a dwelling is “currently being used for dwelling purposes” even though it is temporarily unoccupied. The statutory language is supported by the lengthy history of judicial interpretations of the definitional phrase at issue. (See *People v. Brooks* (1982) 133 Cal.App.3d 200, 204.) In *People v. Allard* (1929) 99 Cal.App. 591 at page 592, the court held that a residence did not become uninhabited simply because the occupants were briefly absent from the house and had not indicated an intention to go live somewhere else. Numerous cases following *Allard* have held that a residence is still “inhabited” for purposes of section 460 even though the residents of the house are temporarily away from the premises but intend to return. (See, e.g., *People v. Harris* (1968) 266 Cal.App.2d 426, 430; *People v. Tittle* (1968) 258 Cal.App.2d 518, 520, 524; *People v. Gilbert* (1961) 188 Cal.App.2d 723, 726; *People v. Loggins* (1955) 132 Cal.App.2d 736, 738; *People v. Valdez, supra*, 203 Cal.App.2d at p. 563.)

Based on the foregoing, we conclude that the statutory language is not unconstitutionally vague, and defendant was properly convicted of first degree burglary of victim 1’s apartment.

III

DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.