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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.

DON MINH BUI,

Defendant and Appellant.

E053538

(Super.Ct.No. FVI801700)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret,
Judge. Affirmed.

John Derrick, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Donald W.
Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Don Minh Bui appeals the trial court's decision to exclude the testimony of his parents. We will affirm.

FACTS AND PROCEDURAL HISTORY

Husband and wife, Hellen Nguyen (Nguyen) and Tom Tran (Tran), owned a furniture store in Victorville. In 2008, defendant worked at the store and lived with them at their home. Nguyen and Tran had a safe in their master bedroom closet where they kept documents, valuables, and cash for their business. Defendant knew the location of the safe because in the past Nguyen had paid him his wages in the bedroom with cash from the safe.

Late in the evening on January 27, 2008, Tran argued with defendant over his drug use, and defendant packed his belongings and moved out. According to Tran, defendant did not return his house key. As soon as defendant left, Tran deleted defendant's access code from the burglar alarm system in the house. Nguyen, Tran, and defendant were the only people who had a key to the house.

Two days later, January 29, 2008, Tran left home about 6:00 a.m. for his biannual trip to a Las Vegas furniture show. Nguyen left about 9:30 a.m. to go to work in the store. As was her routine, before leaving she locked the back door, the screen door, and the door to the master bedroom, and set the alarm. About 2:00 p.m. that afternoon Tran received a call from the burglar alarm company telling him that his house had been entered and the alarm triggered. Tran immediately called Nguyen and told her to go to

the house and to call the police. When Nguyen arrived at the house, she found the front door open and the alarm going off.

Scott Stafford (Stafford), a ten-year veteran of the San Bernardino County Sheriff's Department who had investigated about 500 burglaries, responded to a dispatch call from the alarm company. He met Nguyen at her house and they walked through it together. The house was undisturbed except for signs that the master bedroom door had been forced open. A computer worth about \$1,800 was missing from the kitchen table and the safe was missing from the master bedroom closet. When it was taken the safe contained, among other things, about \$10,800 in cash and a bracelet worth about \$6,500. In Stafford's opinion, because there was no sign of forced entry to the house, the burglary appeared to have been committed by someone who had a key or who was familiar with the house.

After he and Nguyen finished inspecting the house, Stafford went across the street to interview two of the victims' neighbors, husband and wife Lateef Teel (Teel) and April Hunter (Hunter). Both had been at home at the time of the burglary and had noticed activity at the house. Hunter had been getting ready to pick her children up at school about 2:00 p.m. when she saw a car with two occupants pull up in front of Tran and Nguyen's house. She recognized the passenger as defendant. She had never seen the other person before the incident. As she drove away, she saw the two men walking to the front door. Hunter was not suspicious because she knew defendant lived there.

About the same time, Teel was upstairs looking out a window watching his wife leave when he noticed a car parked in front of Tran and Nguyen's house. He saw

defendant coming out of the house carrying a large rectangular object that looked like a computer tower. Defendant got into the car with the object and he and his companion drove away. Teel did not think much about what he had seen because he knew defendant lived in the house.

In an information filed May 11, 2009, defendant was charged with first degree residential burglary (Pen. Code, § 459). Jury trial began on March 28, 2011. Nguyen and Tran, Hunter, Teel, and Stafford testified for the prosecution to the facts as outlined above.

Defense

Two long-time friends of defendant, Johnson Nguyen (Johnson) and Mai Bui (Mai) testified for the defense. Both said that he had arrived at Mai's apartment in Las Vegas, Nevada,¹ about 4 a.m. on January 28, 2008, and had stayed with them continuously most of the week.² Mai remembered having lunch with Johnson and defendant between 12:00 and 1:30 p.m. on Tuesday, January 29, 2008. She could not remember where or with whom she had lunch on any other day of the week of January 27, 2008. Johnson could remember their lunch on Tuesday and was sure defendant had been with him the whole day. He could not remember where he had lunch on any other day that week.

¹ Johnson and Mai were boyfriend and girlfriend. They lived at an apartment Mai shared with Maria Flores and Maria's young son.

² Mai Bui is not related to defendant.

Defendant admitted that his drug test was positive the night he moved out of the victims' house, but insisted that it could only have been for marijuana, not heroin or cocaine because he never used those drugs. He also insisted that he had returned the house key to Tran before he left and drove to Las Vegas to stay with Johnson and Mai. Defendant recalled specifically that the three of them had eaten together on Tuesday January 29, 2008, and that they were at lunch at 2:00 p.m. on that date.

Excluded evidence

Twice—once as a motion in limine and again at the close of trial—defense counsel attempted to introduce testimony from defendant's parents relating to past lies Tran had allegedly told them about their son's whereabouts and drug use. Initially, the court indicated that it was not inclined to allow the testimony because it considered past animosity between the victims and defendant's family "collateral" to the question of whether defendant had committed the burglary. "How is that relevant to whether there was—that is impeachment on a very collateral issue. That's not direct impeachment about the circumstances of the offense." Defense counsel admitted "No, it is not[,]" and the court continued: "And so that kind of collateral impeachment, we'd really have to weigh the probative value against the amount of time that would be consumed in hearing that testimony." The court agreed, however, to reserve its ruling pending some indication emerging as the trial progressed that the testimony would be relevant to the burglary. ". . . I'm not going to allow you to call those witnesses unless you can come up with a very clear and succinct explanation that focuses more in on the issues in this case. What you've said so far, and you've actually conceded, is that it is collateral. So we're not

going to arrange for an interpreter for Wednesday. As you develop information on cross-examination of the victims, we'll see where it goes.”

At the end of testimony, with frequent interruptions by defense counsel, the court explained its decision to exclude the proffered testimony: “I have not heard anything . . . [¶] . . . during the course of trial that would make that . . . [¶] . . . would make it other than a collateral issue and would not be proper impeachment. [¶] Okay. So I'll sustain the objection on the grounds of relevance.”

Verdict and Sentence

On April 5, 2011, a jury found defendant guilty of residential burglary. On May 6, 2011, the court granted him three years' formal probation with terms and conditions, including one year in county jail. At a restitution hearing on May 16, 2011, defendant agreed to pay Nguyen and State Farm Insurance Company \$10,000.

DISCUSSION

Defendant argues that the trial court prejudicially erred by excluding testimony from his parents. He claims here, as he did below, that the excluded testimony was intended to impeach Tran's veracity by showing that there was “bad blood” between Tran and the Bui family and that that he had lied to them in the past.

Section 352 and the Standard of Review

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” We review a trial

court's decision to admit or exclude evidence under section 352 for an abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th. 547, 558.) “[A] trial court’s determination ‘will not be overturned on appeal in the absence of . . . a showing that the trial court’s decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.’ [Citation.]” (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582, quoting *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.)

Analysis

As defendant points out, while the trial court did not specifically invoke Evidence Code section 352, its words demonstrate that it had that section in mind.

The court was particularly concerned that testimony by defendant’s parents would consume an undue amount of time on an issue that even defense counsel admitted was collateral. If they testified that Tran had lied to them in the past, and Tran testified to the contrary, it would become necessary to prove who was telling the truth. And, as the People note, this would have invited a “trial within a trial.” We cannot say that the court erred in determining that such an event would have involved an undue consumption of time. The decision was certainly not arbitrary or capricious.

Nor, as defendant suggests in his reply brief, did the court demonstrate inflexibility in deciding that defendant’s proffered testimony amounted to impeachment on a collateral matter irrelevant to the charges in the case. It reserved a ruling until defense counsel had had the opportunity to elicit something that would make the parents’ testimony relevant, and did not make a decision until all the witnesses had been heard.

Finally, the exclusion did not amount to a miscarriage of justice. Even if the court somehow erred by excluding parental testimony intended to favor a son's case, the cumulative evidence against defendant was of such magnitude that an outcome more favorable to him was highly improbable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant left the victims' house in the middle of the night after testing positive for drugs; the burglary appeared to an experienced law enforcement officer to have been committed by someone with access to the house; two unrelated eyewitnesses who knew him placed defendant at the house at the time of the burglary; one of the witnesses had seen him carrying an object similar to the stolen safe out of the house; and defendant's friends' testimony that he was with them in Las Vegas at the precise time of the burglary appeared less than credible.

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.