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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.

CLIFFORD HARRISON DIXON IV,

Defendant and Appellant.

E059548

(Super.Ct.No. RIF1300755)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Paige B. Hazard and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Clifford Dixon, of first degree residential burglary. (Pen. Code, § 459.) He was sentenced to prison for four years and appeals, claiming ineffective assistance of trial counsel and contesting the restitution fine that was imposed by the sentencing court. We reject his contentions and affirm.

FACTS

In January 2013, defendant, who lived adjacent to an apartment the victim moved into, broke into the apartment and removed several of the victim's possessions and moved others around. More facts will be disclosed as they are pertinent to the issues discussed.

ISSUES AND DISCUSSION

1. *Ineffective Assistance of Counsel*

Before trial began, the trial court went over the jury instructions that had been submitted, primarily by the prosecutor, and noted that the parties were disputing whether the victim's apartment was inhabited by individuals. Later, the trial court noted that during opening statement, the prosecutor or defense counsel or both had said that the victim was moving into the apartment when the crime occurred.¹ The prosecutor proposed two special instructions—one was based on *People v. Hernandez* (1992) 9 Cal.App.4th 438, 440, 442, in which this court held that where the victims had moved all their furniture and personal belongings to an apartment, even though the belongings

¹ Opening statements were not transcribed.

remained packed, all the utilities had been turned on and the move had been completed, although the victims spent the night with relatives and not at the apartment, the jury could reasonably conclude that the victims occupied the apartment. The proffered instruction stated, “With respect to a first degree residential burglary, a dwelling can be found to be inhabited even though the tenants had just moved in, had never slept in the dwelling, and had not unpacked their belongings. Other indicia of habitation can be considered such as evidence of intent to occupy the dwelling as their residence.” The prosecutor represented to the trial court that the crime here had been committed on moving day—that the victim and his family intended to sleep in the apartment that night and he had been moving the family’s possessions into the apartment before the crime. At the close of evidence, defense counsel moved for acquittal on the basis that the apartment was not inhabited. The prosecutor cited the holding in *Hernandez* as support for denial of the motion. The trial court asked defense counsel to distinguish the facts in *Hernandez* from those of the instant case and counsel said, “I think the facts are very similar, that those parties intended to move into the apartment. The only thing that’s unclear in that case holding is the condition of the apartment [¶] And I’m speculating with respect to that, the condition of the apartment. In *Hernandez*, it doesn’t have boarded windows, sort of the condition that I’m asking the [c]ourt to look at in terms of the actual state of the apartment complex on January 29, 2013. We notice windows being boarded up and appliances not plugged in. I would distinguish that and the current case law with *Hernandez*. [¶] And I think I’m just speculating, because *Hernandez* . . . doesn’t have

the pictures. But I'm assuming that the condition of the apartment in *Hernandez* is a little bit different than the one that is here, given the fact that there was no mention in *Hernandez* about any remodeling done by the tenant or the manager; whereas in this case, we're actually talking about a project in progress. And that would be the only thing. [¶] . . . [¶] I will concede, I think [in] both cases, both parties, according to the testimony, . . . had [the] intention of moving in, but [it is] unclear in . . . *Hernandez* what the state of the apartment is. Whereas in this case, we know through the pictures . . . that were brought in as evidence, and also the testimony of [the victim], I don't believe that apartment [wa]s in a . . . livable condition on January 29, 2013."

The trial court declined to give the instruction proffered by the prosecutor, after defense counsel said he did not intend to argue that the apartment was uninhabited, only that defendant lacked the intent to commit a felony when he entered it. The trial court said, "I'm satisfied that we've handled this issue of whether or not the property was inhabited. There were inhabitants in the property, the [victim and his] family specifically. The jury was instructed that defendant was guilty of first degree burglary of an inhabited house if "someone uses [the house] as a dwelling" and "inhabited means currently being used for dwelling purposes, whether occupied or not."²

² Given this broad language, as well as the evidence defense counsel had solicited from the victim about the condition of the apartment, the victim's intent to stay there and the continuing existence of the lease on the victim's former home (see discussion, *infra*), it is no wonder that the jury asked during deliberations for "a legal definition [of] an inhabited dwelling" which triggered the second definition given.

Earlier, during direct examination of the victim, he had testified that he was “moving in” to the apartment before the crime, but on the same day that it occurred, which was January 29, 2013. He also testified that he first paid rent “by” January 15 or 16, the water, gas and electricity had always been on during the period beginning January 13, when he began performing maintenance work in the apartment and others in the building, as well as outside, and most of the possessions belonging to himself and his family that he had brought to the apartment during three trips before the crime had been unpacked before it had been burglarized, including beds for each of the two bedrooms and a crib set. He also said that his wife and three children (ages six months, three and six) were in the car when he arrived at the apartment the last time, which is when he saw defendant in the apartment’s back patio, from which the jury could infer that the family intended to enter the apartment at that time, but were interrupted by the victim seeing defendant. During his direct testimony, the victim spoke of “coming home” to find defendant in the patio and he said of the place he occupied before this apartment the “other house . . . where I used to live” During cross-examination, defense counsel asked the victim, “Now, first I’m going to deal with this issue of inhabited dwelling, the apartment that you said that you were moving into; you said that you were planning to move into that night.” Defense counsel showed the victim pictures of the inside of the apartment and said, “This was the state of the apartment on January 29th [showing that an

“extra” stove was unplugged,³ two windows had been boarded up and there were no dishes visible] . . . [¶] . . . when you said that you intended to move in and stay the night; right? [¶] . . . [¶] And that’s the state of the apartment that you are telling the jury that you and your family . . . were planning to stay that night, right?” The victim answered in the affirmative. When questioning the victim about the fact that the victim and his family did not actually move into the apartment until two weeks after the crime, defense counsel asked the victim if he still had a lease on his former residence on January 29. The victim said he did. Counsel then asked the victim if he continued to stay at the former residence for two weeks after the crime. The victim said he did not—that he and his family moved in with his sister-in-law for the period. Counsel again solicited from the victim the fact that the victim did not move into the burglarized apartment until two weeks after the crime. Then counsel asked the victim when his lease on the former residence ended and the victim said it was January 29.⁴

Defendant here criticizes his attorney for soliciting the victim’s testimony that the latter was planning to spend the night at the apartment and that the lease on the victim’s former residence expired January 29. The evidence concerning the plan to spend the night, however, was solicited in an attempt to undermine the victim’s claim that he and

³ On direct, the victim testified that the stove was for another apartment.

⁴ In his reply brief, defendant, *for the first time*, asserts that defense counsel “established [the] fact that all of [the victim’s] belongings had been moved into the new apartment.” He cites no portion of the record for this assertion and we find no such reference in the record.

his family intended to spend the night there the day the crime occurred. Although the victim did not specifically testify that he intended to spend the night there, as pointed out, he made clear during his direct examination that he considered the apartment to be his at the time it was burglarized. Moreover, and as to the testimony about the expiration of the lease of the victim's former residence, it is clear that while counsel may have originally planned a defense that the apartment was not inhabited, once the trial court denied his motion to acquit, he abandoned this defense. Defendant fails to convince us that this tactical decision constituted incompetency of counsel.⁵ Finally, abandonment of this defense also means that defendant cannot have been harmed by the solicitation of this evidence. Defendant cannot possibly carry his burden of demonstrating that absent these two items of evidence, there is a reasonable probability he would have enjoyed a better outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

2. Restitution Fine

The probation report recommended a restitution fine of \$1,120. Defendant did not submit a sentencing brief. When the sentencing court solicited defense counsel's comments on the proposed restitution fine, counsel said, "Submitted." The sentencing court imposed the fine recommended in the probation report, which, as the People point out, represents the minimum fine of \$280 (Pen. Code, § 1202.4, subd. (b)(1) multiplied by 4, the number of years the imprisonment imposed, as suggested by Pen. Code,

⁵ Therefore, we reject defendant's contention that he was denied his Sixth Amendment right to competent counsel.

§ 1202.4, subd. (b)(2)). Defendant here contends that the trial court abused its discretion in considering the non-exclusive factors listed in Penal Code section 1202.4, i.e., his inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by him, the extent to which anyone else suffered a loss and the number of victims. (Pen. Code, § 1202.4, subd. (d).) Bypassing defendant's argument that his attorney was incompetent for failing to object below to the restitution fine, we disagree with his argument that the trial court abused its discretion or that his right to due process was violated because the trial court misapplied the factors governing the determination of the fine. Defendant asserts that the court should have been governed by Penal Code section 1203.1, subdivision (b)'s limit of one year from the date of the sentence for probationers in determining a defendant's future ability to pay, and he points out that he was appointed counsel at trial and therefore, was indigent at that time. However, Penal Code section 2085.5 permits fines imposed under Penal Code section 1202.4 to be collected from an inmate's wages. Defendant does not assert that he will be unable to pay the amount imposed during his four years in the custody of the Department of Corrections and Rehabilitation. Although as defendant correctly points out, the victim made no restitution claim because all his property was recovered, we disagree with defendant that his crime was not serious and that he did not victimize all members of the victim's family. They felt sufficiently alarmed by defendant's actions that they were unable to move into the apartment for two weeks after the crime. Additionally, the victim expressed fear that since defendant knew where they lived, he

would, one day, come after them. Defendant does not persuade us that the trial court acted outside the bounds of reason or misused the factors listed in Penal Code section 1202.4 in imposing the restitution fine it did.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.