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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARCHIE ANTHONY DEWS,

Defendant and Appellant.

F061363

(Fresno Sup. Ct. No. F09906781)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

James Bisnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On the night of December 1, 2009, Gerald McCarter (Gerald)¹ arrived at a residence he owned on West Belmont in Fresno County and found the front door was broken open. He produced his nine-millimeter handgun, entered the residence, and found appellant/defendant Archie Dews (Archie) and his brother, codefendant Clarence Dews (Clarence), inside the house. Gerald fired a warning shot and held them at gunpoint until sheriff's deputies arrived, and defendants were arrested for burglary. When they were searched, they were in possession of personal property which had been taken from Gerald's house.

Gerald's house had been burglarized a few weeks before defendants were arrested. At that time, a distinctive white car with a black spoiler was parked in front of the house. On the night defendants were arrested, the same white car with a black spoiler was parked in front of the house. The car belonged to Archie and the registration had expired. The deputies impounded the vehicle, conducted an inventory search, and found personal property that had been taken from Gerald's house during the prior burglary, which occurred on November 14, 2009.

Archie was charged with count I, first degree residential burglary (Pen. Code,² §§ 459, 460, subd. (a)); and count II, grand theft of personal property (§ 487, subd. (a)), with both offenses committed on November 14, 2009. Archie and Clarence were jointly charged with count III, first degree residential burglary, with the special allegation that the offense was a violent felony because it was committed while a person, other than an accomplice, was present (§ 667.5, subd. (c)(21)); and count IV, receiving stolen property, (§ 496, subd. (a)), with both offenses committed on December 1, 2009. As to Clarence, it

¹ We refer to the defendants and some of the parties by their first names for the sake of clarity; no disrespect is intended. We will refer to Gerald's father as Mr. McCarter, Sr., given the lack of further identifying information in the record.

² All further statutory references are to the Penal Code unless otherwise indicated.

was further alleged that he had one prior strike conviction (§ 667, subds. (b)-(i)); one prior serious felony conviction (§ 667, subd. (a)(i)); and nine prior prison term enhancements (§ 667.5, subd. (b)).

After a joint jury trial, Archie was convicted as charged of counts I, III and IV, and the jury found the special allegation true as to count III. As to count II, Archie was convicted of the lesser included offense of misdemeanor petty theft (§ 484). Archie was sentenced to an aggregate term of seven years four months.

Clarence was found not guilty of count III, and guilty of count IV. The court found the special allegations true. He was sentenced to 15 years.

In this appeal, we address Archie's contentions the superior court improperly denied his motion to suppress evidence seized during an inventory search of his vehicle; the court had a sua sponte duty to instruct the jury on mistake of fact as a defense to burglary, based on his trial testimony that he thought the house was abandoned; and there is insufficient evidence to support the jury's special finding as to count III, residential burglary, that the offense was committed while a person, other than an occupant, was present.³

FACTS

For many years, Gerald's father, Mr. McCarter, Sr., lived in a house on an 18-acre parcel on West Belmont in a rural part of Fresno County. Mr. McCarter, Sr., collected and kept numerous memorabilia in his house, and the interior was very cluttered and run-down.

³ Archie also seeks to join in any appellate issues raised in Clarence's appeal that may benefit him. Clarence's appeal, however, raises only one issue: the superior court's denial of his motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. This issue is based on the court's alleged violation of Clarence's Sixth Amendment rights and is not applicable to Archie.

Mr. McCarter, Sr., had two sons. One son and his wife (Veronica) lived in a house located directly next to Mr. McCarter, Sr.'s, house. Gerald, his other son, lived about four miles away.

In 2006, Mr. McCarter, Sr., died and left his West Belmont house to Gerald. Gerald, a retired carpenter, planned to remodel the house so that he and his wife could eventually move in. Gerald's primary residence was still four miles away, but Gerald considered the West Belmont house as his own residence.⁴

Gerald testified he visited the West Belmont house nearly every day. At trial, Gerald conceded the house looked rundown and abandoned from the outside, and the interior was still cluttered with his father's clothing and possessions. There were mice in the house. Gerald brought in construction materials and planned to remodel the house, but he had procrastinated because of the amount of work required.

Gerald testified the West Belmont house had running water and electricity, an operable hot water heater, a microwave, an operable TV and DVD player, and it was heated with natural gas. The telephone service was disconnected. Gerald stored his fishing poles, camping supplies, and canoe at the house. He also stored his tools in the garage and used it as his workshop. Gerald occasionally ate at the house and used the microwave, but he never stored any perishable food. Gerald testified the bathroom sink and toilet were functional but "pretty unsanitary." He never used the shower. Gerald slept overnight in the house about once a month, usually when he was working late or trying to clean up the clutter. Gerald slept in a sleeping bag placed either on the floor or the living room couch.

Veronica, Gerald's sister-in-law, lived next door to the West Belmont house and testified that Gerald spent time there every day. Victoria testified Gerald stayed

⁴ At trial, Gerald admitted he had been convicted of two misdemeanors: annoying a minor in 1982, and soliciting a prostitute in 1991.

overnight at the West Belmont house about once or twice a month as he worked on the house.

The West Belmont house was surrounded by a chain-link fence and a locked driveway gate. However, the McCarters had left a hole in part of the chain-link fence that was large enough for the PG&E meter reader to walk through and enter the property. The house was locked and secured with a deadbolt.

Counts I and II (Archie)—November 14 & 15, 2009

On the evening of November 14, 2009, Veronica was driving home when she noticed a white vehicle parked on the side of West Belmont in front of, and between the McCarters' two houses. The white vehicle was distinctive because it had a black "spoiler" on the trunk. The vehicle's headlights were on. Veronica stayed in her own car for several minutes, and watched as the headlights on the white vehicle were switched off. After about five minutes, the white car's headlights were again activated and it drove away. She did not see anyone in the car or around Gerald's house, and she went into her own home.

On the morning of November 15, 2009, as Veronica left her house, she looked at Gerald's adjacent house and saw the front door was wide open. She discovered the door had been forced open. The house had been ransacked and several items were missing, including Mr. McCarter, Sr.'s, antique Victrola phonograph.

Veronica contacted the Fresno County Sheriff's Department and reported the burglary. She also called Gerald and told him about the incident.

Gerald testified that the dead bolt on the front door had been broken out of the wood, and the lock in the door handle had been pried open. Gerald also determined that several other items were missing from the house, including his own fishing poles, an old-style wrench, and other personal items which had belonged to his father. These missing items were reported to the sheriff's department. Gerald repaired the dead bolt and made sure the house was again secure.

Deputy Jared Mullis investigated the burglary and determined the house had been ransacked, the TV/DVD player had been moved from its normal position, and an antique Victrola and several fishing poles were missing. The Victrola's estimated value was \$10,000, while the fishing poles were worth about \$500.

Counts III and IV (Archie and Clarence)—December 1, 2009

On the afternoon of December 1, 2009, Gerald arrived at his West Belmont house and discovered the front door had been forced open again. The interior had been ransacked and some of his father's personal property was missing. Gerald noticed that some property had been moved and stacked by the front door, as if someone was going to return and take the items.⁵

Gerald stayed at the house for about four hours, hiding in the living room "with a loaded handgun waiting for whoever it was to come back." No one appeared. Around 6:30 p.m., Gerald locked up the house, the front door, and the driveway gate, and left.

Around 10:30 p.m., Gerald drove back to the house to make sure everything was okay. He noticed a car parked on the street in front of the house. He also noticed the front screen and door were open.

Gerald parked at his brother's house and retrieved his nine-millimeter semiautomatic handgun from his car. He loaded his handgun and "jacked one in the chamber." He walked through the hole in the fence, approached the open front door, and walked two to three feet inside the house. The kitchen light was on.

Gerald testified he saw a man, later identified as Archie, going through some electrical equipment in the living room. Archie was about seven-to-eight feet away from Gerald. Archie was wearing a stocking cap. Gerald asked Archie what he was doing in his house. Archie did not respond and continued to look through various items.

⁵ Defendants were not charged with any offenses based on the apparent burglary that Gerald discovered on the afternoon of December 1, 2009.

Gerald testified that he pointed his handgun at Archie and said, "I have a legal right to shoot you. You are in my home." Gerald testified Archie stared at him and moved "a little bit," and Gerald felt threatened. Gerald pointed his handgun to Archie's right side and fired a "warning shot" into the wall. Gerald explained why he did so:

"Most people with a loaded handgun are generally hesitant to pull the trigger. And I didn't want this guy jumping me. I wanted him to understand that the gun was loaded and I was capable of pulling the trigger."

Gerald testified that as a result of the warning shot, Archie "immediately stayed put," and another man, later identified as Clarence, emerged from the back bedroom. Clarence raised his hands and said "don't hurt us." Gerald was shocked that another person was in the house. He ordered both Archie and Clarence to lie on the floor with their hands in front of them, and they complied. Gerald called 911 and reported that he was holding two burglars at gunpoint.

Gerald testified he held defendants at gunpoint for the 10-to-15 minutes it took until the sheriff's department arrived. Defendants stayed on the floor and did not move. Gerald asked them if someone else was outside, and they assured him that no one else was there.

When the deputies arrived, Gerald shouted that he had a gun and not to shoot him. Gerald backed out of the house through the front door, turned his handgun over to a deputy, and defendants were taken into custody.

The arrest of defendants

Fresno County Sheriff's Deputies Coningsby and O'Neill responded to the dispatch indicating a burglary and shots fired. They found Gerald standing in the front doorway, aiming his handgun inside the house. Gerald said there were two guys in the house. A deputy took Gerald's gun and escorted him from the area.

Deputy Coningsby testified that defendants were still in the house and lying on the floor. The deputies ordered Archie and then Clarence to crawl out of the front door.

Both defendants complied with the orders and were taken into custody. The deputies used a canine unit to clear the house. One of the dogs made contact with Archie and inflicted minor injuries on him.

Searches of defendants

Both Archie and Clarence were searched incident to their arrests. Archie was found in possession of five wooden smoking pipes and a very old electric razor. He had a bracelet on his wrist, and voluntarily said that the bracelet did not belong to him. Gerald looked over the items, and said they had belonged to his late father and been taken from the house. Clarence was also found in possession of distinctive items which Gerald identified as having belonged to his late father, and which had been removed from the house.

Search of Archie's car

Veronica testified she went outside when she saw the patrol cars, and saw a vehicle parked on the street in front of the two houses. She immediately recognized the vehicle as the same white car with the black spoiler that she saw parked there on the evening of November 14, 2009. She told a deputy that she was "100 percent sure" it was the same white car with the black spoiler.

Deputy Coningsby testified he noticed the white vehicle after defendants were arrested. The vehicle was registered to Archie, but the registration was expired and deputies decided to impound and tow the vehicle. Deputy Centeno conducted an inventory search of the car before it was towed.⁶

Deputy Centeno found several fishing poles and an old-style wrench in the trunk. The deputies asked Gerald to look over the property, and Gerald identified the fishing

⁶ In section I, *post*, we will discuss Archie's contentions that the warrantless search of his vehicle was illegal.

poles and the wrench as items which had been taken from his house during the November 14, 2009, burglary.

Defense evidence

Clarence did not testify or present any defense evidence. It was stipulated that on November 14 and 15, 2009, Clarence was not in Fresno County and he could not have committed the offenses charged in counts I and II.

Archie testified he was convicted of marijuana sales in 1994, and felony possession for sale and the sale of drugs in 2000. Archie was homeless and usually spent the night in a tent in West Fresno. Archie owned an older model white Volvo. Archie testified that he had never been to the house on West Belmont prior to the evening of December 1, 2009.

Archie testified that on December 1, 2009, someone had stolen his sleeping bag and tent. It was too cold to sleep outside, it was too late to go to a shelter, and he had nowhere to go.⁷ Archie testified that he met “Dave” on the street. Dave was a homeless man and a crack user. Dave told him about Gerald’s house on West Belmont, and that there was a big hole in the fence. Dave said the house was vacant, he had stayed there before, and there was a lot of trash and junk there. Dave also said there may be some things that he could get a few dollars for, and provided directions to the house. Archie gave marijuana leaves to Dave, and Dave gave him three fishing poles in exchange.

Archie testified that he later met his brother, Clarence, and they drove to the West Belmont house in Archie’s car because they were looking for someplace to sleep inside. Archie and Clarence walked through the hole in the fence. The front door was already open, but Archie did not suspect anything was wrong because Dave said he had already slept there. There was a lot of junk inside and Archie thought it was abandoned. Archie

⁷ Archie admitted his mother lived in the vicinity, but testified that he decided not to go to her house. Archie’s sister testified that she cared for their elderly mother, they had a small house, and there was no room for Archie.

and Clarence sat down and talked, and then they looked for someplace to sleep. Clarence went into a rear bedroom and cleaned an area to sleep. Archie looked through some boxes in the front room for a blanket.

Archie testified he was still looking for a blanket when Gerald arrived and fired a shot in his vicinity. He said Gerald never gave any warning before he fired the shot. Archie testified that Gerald never entered the house, and he stood outside the doorway when he fired the gun. After he fired, Archie and Clarence told him to stop, and they complied with his orders to get on the floor. They never tried to escape or resist.

Archie testified he did not enter the house with the intent to steal anything. He just needed a place to sleep because it was so cold. He did not look through property, collect items, or move things in the house with the intent to steal them. However, Archie admitted he told a deputy he was looking for things in the abandoned house that he could recycle for a few dollars.

Archie admitted that when he was arrested, he had five smoking pipes and an old razor in his pockets, and he had found those items in the house. Archie explained that he intended to use the pipes to smoke a combination of tobacco and marijuana leaves, and he intended to shave his beard with the razor until he realized it didn't work. Archie was also wearing a bracelet when he was arrested, but testified his wife gave him the jewelry.

Archie further testified the items found in Clarence's pockets belonged to Clarence.

Archie admitted his white car was parked in front of the house and the deputies searched it. Archie testified the old wrench found in the trunk used to belong to his own father, and now belonged to him.

Archie also admitted there were about eight fishing poles in the trunk of his car. Archie denied taking the fishing poles from the house, and testified he had never been in the house prior to December 1, 2009. Archie testified he had received three fishing poles

from Dave in exchange for marijuana leaves. Archie further testified the other fishing poles in the trunk belonged to him, and he had inherited one from his father.⁸

Rebuttal

Deputy Hamilton testified he interviewed Archie after he was arrested, and asked about the fishing poles in the car trunk. Archie said he had just received three poles from Dave in exchange for marijuana. Archie never said the other fishing poles belonged to him or that he had inherited them from his father.

Deputy Hamilton asked Archie how he found Gerald's house on West Belmont. Archie said Dave, who used crack, told him about the house. Dave said there was a lot of stuff there, including some pretty good fishing poles. Archie said he was looking for a place to sleep, and for some stuff that he could get a few dollars for. Hamilton asked Archie about the items found in his pockets. Archie said he found them in the house, and he thought he could get a couple of dollars for them.

Convictions

Based on the November 14, 2009, incident, Archie was charged and convicted of count I, first degree residential burglary. In count II, he was charged with grand theft of personal property; the jury found him guilty of the lesser included offense of misdemeanor petty theft (§ 484).

Based on the incident that occurred on the evening of December 1, 2009, Archie and Clarence were jointly charged with count III, first degree residential burglary, with the special allegation that a person, other than an accomplice, was present during the commission of the offense; and count IV, receiving stolen property.

Archie was convicted of counts III and IV, with the special allegation found true as to count III. Clarence was found not guilty of count III and guilty of count IV.

⁸ Archie's sister testified that Archie inherited one fishing pole from his father. Archie's sister admitted she had a misdemeanor conviction for obtaining aid by fraud in 1980.

DISCUSSION

I. The court properly denied Archie's suppression motion

Archie contends the court improperly denied his pretrial motion to suppress the fishing poles and other items found during the warrantless inventory search of his car trunk. Archie asserts the deputies' decision to impound his vehicle and conduct an inventory search was a pretextual ruse, and they lacked probable cause to conduct a warrantless search of the vehicle.

A. The suppression hearing

Prior to trial, Archie moved to suppress the fishing poles and other items seized during the warrantless search of his vehicle's trunk.⁹ At the suppression hearing, Deputy Coningsby testified that when he responded to Gerald's residence, he found Gerald standing at the front door, aiming his handgun inside the house. Defendants were inside the residence, and they were lying on the floor. Archie was about 10 feet away from the front door, while Clarence was further down the hallway. Gerald advised Coningsby that the two men had been burglarizing his residence, and they were complying with his orders to remain still and on the floor. Gerald advised the deputies that Archie had not left the house since he had arrived.

Deputy Coningsby testified that defendants were taken into custody. Defendants were searched and found in possession of items which Gerald identified as having been taken from the residence.

Deputy Coningsby testified a vehicle was parked in front of Gerald's residence. The vehicle was registered to Archie, and the registration had expired.

Coningsby testified that around the same time he discovered Archie's parked vehicle, Gerald advised the deputies his residence had been burglarized about two weeks

⁹ The suppression motion was only brought as to Archie, who was the registered owner of the white car. Clarence conceded he did not have any privacy interests in the vehicle.

earlier, and burglarized again the previous day. Gerald further stated that his sister-in-law, who lived next door, thought the white car parked in front of Gerald's house was similar to a vehicle she saw during one of the prior burglaries.

Coningsby testified he asked Deputy Centeno to impound and store Archie's vehicle because the registration had been expired for over six months. Centeno agreed and conducted an inventory search of the vehicle prior to storage. Coningsby testified the only reason the vehicle was impounded and subject to an inventory search was because the registration had been expired for over six months.

Deputy Centeno testified that after defendants were in custody, the deputies asked him to conduct an inventory search on the vehicle parked in front of the house. Centeno ran a registration check on the vehicle through the main dispatch operator of the sheriff's department, which was linked to the Department of Motor Vehicles' system. He learned the car was registered to Archie "with a pending master file," and the registration expired on January 2, 2009.

Centeno testified the deputies decided to tow Archie's vehicle because of the expired registration, and he conducted an inventory search of the car. Centeno explained: "Basically, what we do is we have a CHP 180 form. We run the license plate if it was expired for six months. And in this case it was expired for a little over a year."

Centeno testified that when he searched the vehicle, he found certain property in the trunk and he placed those items on the side of the vehicle. Centeno testified he filled out the appropriate forms with information to have the vehicle towed.

Coningsby testified that during the inventory search, Centeno found several fishing poles and an antique wrench in the trunk. Gerald identified the fishing poles and the wrench as property which had been taken from the house during the earlier burglary.

B. The court's ruling

After the deputies testified at the suppression hearing, Archie's attorney argued the deputies improperly conducted a warrantless search on the vehicle because both

defendants had already been taken into custody inside the house and they did not have access to the vehicle. Archie's attorney also argued the deputies used the excuse of the inventory search as a pretext to conduct a warrantless search of the car.

The prosecutor argued there was sufficient probable cause to believe the vehicle was being used in a burglary that night, and it was properly searched incident to Archie's arrest. In the alternative, the prosecutor argued the deputies were entitled to impound the vehicle because the registration had expired, and conduct an inventory search.

The court denied Archie's suppression motion and held the evidence seized from the vehicle was admissible, stating:

“Seems to me you are not asserting that the reason for the inventory search, meaning that there was an expired tag, was a lie. While the officers' motives may have been to do something more than take an inventory, that's not the test. The test is an objective one about whether there [are] grounds to conduct the search. And whatever the officers' motivations may be in conducting an inventory search, it's demonstrated in the evidence here that they had a legal right to do so. Once they discovered those [fishing] poles that have been described by [Gerald], they are entitled to show them to them to determine whether it's stolen property.”

C. Impoundment and inventory search

In reviewing a suppression ruling, “we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, [but] we exercise our independent judgment in determining the legality of a search on the facts so found. [Citations.]” (*People v. Woods* (1999) 21 Cal.4th 668, 673-674.) A warrantless search is presumed to be illegal, and the prosecution has the burden of justifying the search by proving the search fell within a recognized exception to the warrant requirement. (*People v. Williams* (2006) 145 Cal.App.4th 756, 761 (*Williams*).)

An inventory search is a well-recognized exception to the requirement for a search warrant, and the probable cause/reasonable suspicion requirement. (*Colorado v. Bertine* (1987) 479 U.S. 367, 372 (*Bertine*).) When the police lawfully decide to impound a vehicle or otherwise take it into custody, the police may conduct an inventory of the

vehicle's contents "aimed at securing or protecting the car and its contents." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 373 (*Opperman*); *People v. Redd* (2010) 48 Cal.4th 691, 721 (*Redd*)). An inventory search is constitutionally reasonable if conducted in accordance with " 'standardized criteria' " or " 'established routine' " and is not merely a pretext or ruse for an investigatory search. (*Brigham City, Utah v. Stuart* (2006) 547 U.S. 398, 405; *Florida v. Wells* (1990) 495 U.S. 1, 4; *People v. Williams* (1999) 20 Cal.4th 119, 127.)

The record in this case establishes all the requirements for a proper impoundment and warrantless inventory search. A peace officer may impound a vehicle if it is found with a registration expiration date in excess of six months. (Veh. Code, § 22651, subd. (o)(1)(A); see, e.g., *Leslie v. City of Sand City* (N.D. Cal. 2009) 615 F.Supp.2d 1121, 1126; *U.S. v. McCartney* (E.D. Cal. 2008) 550 F.Supp.2d 1215, 1225.) A peace officer may also impound a vehicle when the officer "arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody." (Veh. Code, § 22651, subd. (h)(1).)

Archie was the registered owner of the vehicle, and the registration had been expired for well over six months. Archie and Clarence were arrested and taken into custody for burglary of Gerald's house. The vehicle was parked in front of Gerald's house. Archie testified he was homeless. There was no evidence introduced at the suppression hearing that Archie could have contacted anyone to assume responsibility for the vehicle. (See, e.g., *People v. Green* (1996) 46 Cal.App.4th 367, 373.) "Because [the deputies] had arrested defendant, and because the vehicle's registration had expired more than six months earlier, [the deputies] had authority under state law to impound defendant's vehicle. [Citations.] Having impounded the vehicle, [the deputies] had authority to conduct an inventory of the vehicle's contents 'aimed at securing or

protecting the car and its contents.’ [Citation.]” (*Redd, supra*, 48 Cal.4th at p. 721, fn. omitted.)

Deputy Centeno testified he conducted the inventory search pursuant to California Highway Patrol (CHP) Form 180, “which documents the condition and contents of a vehicle to be towed.” (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 540.)¹⁰ The inventory was conducted pursuant to standard criteria, and Deputy Centeno “was ‘not allowed so much latitude that [the search could turn] into “a purposeful and general means of discovering evidence of crime,” [citation].’ [Citations.]” (*Redd, supra*, 48 Cal.4th at pp. 721-722.)

Archie argues the deputies’ decision to impound the vehicle and conduct the inventory search were mere ruses to discover evidence of criminal activity, and the superior court should have considered the deputies’ subjective motives. “[I]n *Florida v. Wells*, 495 U.S. 1, 4 ... (1990), we stated that ‘an inventory search’ must not be a ruse for a general rummaging in order to discover incriminating evidence’; that in [*Bertine, supra*], in approving an inventory search, we apparently thought it significant that there had been ‘no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation’....” (*Whren v. U.S.* (1996) 517 U.S. 806, 811.) “[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes. [Citations.]” (*Id.* at pp. 811-812, italics in original.) In this case, however, the deputies testified without contradiction that the registration on Archie’s car had been expired for well over six months. Archie and his brother were both arrested and taken into custody, and there is no

¹⁰ “The CHP manual provides guidelines of standard practices once a car is impounded or stored. The ... officer will conduct an inventory of the owner’s property to protect the Department from claims of lost, stolen or vandalized property. This inventory of items in a legally accessible area is to be included in the ‘CHP 180 Vehicle Report.’ ” (*People v. Shafir* (2010) 183 Cal.App.4th 1238, 1241, fn. 1 (*Shafir*.)

evidence that someone else could have assumed responsibility for the vehicle, which was parked in front of the residence where defendants were arrested for burglary.

Archie further argues that even if the impoundment of his vehicle was statutorily authorized, the deputies' decision to impound and conduct the inventory search was not reasonable under the Fourth Amendment because the prosecution failed to present any evidence the deputies were following established procedures from the Fresno County Sheriff's Department.¹¹

The premise of Archie's argument is apparently based on *Opperman* and *Bertine*, *supra*, that the Fourth Amendment *requires* evidence that law enforcement officers followed "standardized procedures" when they decided to impound and conduct an inventory search of a vehicle. As explained in *Shafir*, *supra*, 183 Cal.App.4th 1238, however, this premise is false:

“[T]he court in [*Bertine*] stated that the Fourth Amendment does not prohibit the exercise of police discretion to impound a vehicle ‘so long as that discretion is exercised according to standard criteria.’ [Citation.] It is notable, however, that the court went on to state that its decision was governed by the principles enunciated in [*Opperman*]. [Citation.] Thus it seems clear that the majority in *Bertine* did not intend to impose a categorical test—requiring that a decision to impound a vehicle be governed in all instances by ‘standard criteria’—that would supplant the governing principles stated in *Opperman*. In other words, the overarching test under the Fourth Amendment remains the same as for any other challenged search—whether it was ‘unreasonable’ under all the circumstances. As the majority in *Opperman* noted, applying the Fourth Amendment standard of reasonableness to inventory searches is constitutionally permitted. [Citation.]” (*Shafir*, *supra*, 183 Cal.App.4th at pp. 1245-1246.)

Shafir further held: “We ... read *Bertine* to indicate that an impoundment decision made pursuant to standardized criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to standardized criteria. [Citation.] However,

¹¹ We note that Archie did not raise this argument about the alleged evidentiary omission at the suppression hearing.

the ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances. [Citation.]” (*Shafrir, supra*, 183 Cal.App.4th at p. 1247.)

Shafrir cited several cases in support of its analysis, including *United States v. Smith* (3d Cir. 2008) 522 F.3d 305 (*Smith*). (*Shafrir, supra*, 183 Cal.App.4th at p. 1246.) *Smith* held that a police officer’s decision to impound a vehicle was reasonable under the Fourth Amendment, despite the fact that the police department had no “standard policy regarding the impoundment and towing of vehicles” at the time. (*Smith, supra*, 522 F.3d at pp. 310, 314-315, fn. omitted.) *Smith* concluded that the officer’s decision to impound—in order to avoid leaving the vehicle in an area where it was subject to being damaged, vandalized, or stolen—was reasonable under the circumstances. (*Id.* at pp. 314-315.)

In this case, as in *Shafrir* and *Smith*, the deputies’ decisions were reasonable under all the circumstances. Two different deputies checked the registration on Archie’s car and determined it was expired. Archie and his brother were arrested and taken into custody, the vehicle was parked in front of the house they had been burglarizing, and there was no evidence that someone else could have assumed responsibility for the vehicle.

Moreover, even if the Fourth Amendment, as interpreted in *Bertine*, requires that the impoundment and subsequent inventory search be conducted pursuant to “standardized procedures” and/or “standard criteria,” our conclusion would be the same. The deputies testified that they decided to tow the vehicle because of the expired registration. As we have explained, that action was authorized by Vehicle Code section 22651, subdivision (o)(1)(A), which permits a law enforcement officer to tow a vehicle under certain circumstances, and thus provided the standard impound procedure in this case. (See, e.g., *Shafrir, supra*, 183 Cal.App.4th at p. 1248 [if *Bertine* requires a standard police procedure, Veh. Code, § 22651, subd. (h), provides such a procedure].) The

subsequent inventory search was conducted pursuant to the CHP's standard form, and was thus sufficient to establish inventory searches are standard police procedure.

In further support of his reasonableness argument, defendant relies on *Williams, supra*, 145 Cal.App.4th 756, where the court held that an officer's decision to impound a vehicle and conduct an inventory search was unreasonable under the Fourth Amendment. In *Williams*, officers saw the defendant driving without a seatbelt, and attempted to perform a traffic stop. Defendant continued driving and parked in front of his residence. Defendant failed to produce his registration documents. The officers determined the car was properly registered, but they also learned there was an outstanding warrant for his arrest. Defendant was arrested, and the officers decided to impound his vehicle and conduct an inventory search, even though the car was lawfully registered and parked in front of defendant's residence. (*Id.* at p. 759.)

Williams acknowledged that the impoundment was authorized by Vehicle Code section 22651, subdivision (h)(1), since defendant had been in control of the vehicle and was taken into custody. However, *Williams* held the superior court should have granted defendant's motion to suppress because the officer's decision to impound the vehicle was not reasonable under the Fourth Amendment.

“No community caretaking function was served by impounding [defendant's] car. The car was legally parked at the curb in front of appellant's home. The possibility that the vehicle would be stolen, broken into, or vandalized was no greater than if [the officer] had not stopped and arrested [defendant] as he returned home. In this regard, it is significant that other cars were parked on the street and that it was a residential area. The prosecution made no showing that the car was blocking a driveway or crosswalk, or that it posed a hazard or impediment to other traffic. *Because [defendant] had a valid driver's license and the car was properly registered, it was not necessary to impound it to prevent immediate and continued unlawful operation.* [Citations.] No other justification that would further a community caretaking function was offered or supported by evidence. Indeed, [the officer] admitted he decided to impound the car simply because he was arresting [defendant] and almost always impounded the cars of drivers he arrested. The prosecution simply did not establish that impounding [defendant's] car served any community caretaking

function. It therefore failed to establish the constitutional reasonableness of the seizure and subsequent inventory search.” (*Williams, supra*, 145 Cal.App.4th at pp. 762-763, italics added.)

In this case, in contrast to *Williams*, the deputies testified without contradiction that the registration on Archie’s vehicle had been expired for well over six months. Archie never introduced any evidence to refute the registration status of his vehicle, or to suggest that someone else could have arrived to assume responsibility to remove the unregistered vehicle from the location where he and his brother had been arrested for burglary, an area to which they had no apparent connection.

We find the impoundment and inventory of Archie’s vehicle were constitutionally reasonable, and the superior court properly denied the suppression motion.¹²

II. Mistake of fact instructions

Archie contends the court had a sua sponte duty to instruct the jury on mistake of fact as a defense to count III, residential burglary of the West Belmont house on December 1, 2009. Archie argues that a mistake of fact instruction would have been based on his trial testimony, that he believed the residence was abandoned, because of the information he received from “Dave” and the residence’s rundown condition.

A. Burglary

“Burglary is defined as entry into a building or certain structures and vehicles ‘with intent to commit grand or petit larceny or any felony.’ (§ 459.) First degree burglary is defined as ‘burglary of an inhabited dwelling house, vessel, ... which is inhabited and designed for habitation, floating home, ... or trailer coach, ... or the inhabited portion of any other building’ (§ 460, subd. (a).) Section 459 defines ‘inhabited’ as ‘currently being used for dwelling purposes, whether occupied or not.’

¹² Given our conclusion as to the validity of the impoundment and inventory search, we need not reach the other issues raised by the prosecutor at the suppression hearing as to whether the vehicle was properly searched incident to defendant’s arrest or there was probable cause to believe the vehicle contained evidence pursuant to *United States v. Ross* (1982) 456 U.S. 798.

“ “[I]nhabited dwelling house” means a structure where people ordinarily live and which is currently being used for dwelling purposes. [Citation.]’ [Citation.]” (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 131-132 (*Rodriguez*).

“For purposes of the California first degree burglary statute, a structure ‘need not be occupied at the time; it is inhabited if someone lives there, even though the person is temporarily absent.’ [Citations.]” (*Rodriguez, supra*, 122 Cal.App.4th at p. 132.)

“ “[A]lthough an inhabited dwelling house is a place where people ‘ “ordinarily live and which is currently being used for dwelling purposes” ’ [citations], it ‘need not be the victim’s regular or primary living quarters’ in order to be deemed an inhabited dwelling house. [Citation.]” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 317-318.) “The use of a house as sleeping quarters is not determinative, but instead is merely a circumstance used to determine whether a house is inhabited.” (*People v. Hughes* (2002) 27 Cal.4th 287, 354-355.) “[A] temporary place of abode, such as a weekend fishing retreat [citation] ... may qualify.” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 318.)

“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. [Citations.]” (*Rodriguez, supra*, 122 Cal.App.4th at p. 132.)

“Burglary of a structure that is not an ‘inhabited dwelling house’ is burglary of the second degree [citation].” (*Ibid.*)

B. Mistake of fact

“ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” [Citation.]’ ... [Citation.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This includes the court’s sua sponte duty to

instruct on any affirmative defense for which the record contains substantial evidence, unless the defense is inconsistent with the defendant's theory of the case. (*Id.* at p. 157; *People v. Salas* (2006) 37 Cal.4th 967, 982.)

“As a general matter, however, a mistake of fact defense is not available unless the mistake disproves an element of the offense. [Citations.]” (*In re Jennings* (2004) 34 Cal.4th 254, 277.) “[G]enerally a ‘mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed.’ [Citation.] Hence, in burglary prosecutions, a defendant’s own beliefs concerning the residential nature of a building have nothing to do with the question of the degree of the burglary. [Citations.]” (*People v. Ervin* (1997) 53 Cal.App.4th 1323, 1330, italics added.) “‘[I]n a prosecution for first degree burglary, the fact that a defendant does not know that the building he is about to burglarize is a residence is irrelevant.’ [Citations.]” (*People v. Hines* (1989) 210 Cal.App.3d 945, 949, disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 864-867.)

For example, in *People v. Parker* (1985) 175 Cal.App.3d 818 (*Parker*), the defendant illegally entered a structure and allegedly believed it was a commercial building. However, the defendant was charged with and convicted of first degree burglary because the structure was in fact a residence. On appeal, the defendant argued the trial court should have instructed the jury that his mistaken belief the building was an uninhabited structure constituted an affirmative defense to the first degree burglary charge. (*Parker, supra*, 175 Cal.App.3d at p. 821.)

Parker rejected the defendant’s argument and held that the prosecution was not required to prove the defendant knew the building entered was a residential one in order to convict someone of burglary, and that “ignorance concerning the residential nature of a building does not render a defendant’s unlawful entry into it with a felonious intent innocent conduct.” (*Parker, supra*, 175 Cal.App.3d at p. 822.) *Parker* further explained:

“Although ... sections 459 and 460, subdivision 1, require proof that the defendant entered what in fact was an ‘inhabited dwelling house’ or the ‘inhabited portion of any other building,’ the language of these sections does not imply, and we do not infer therefrom, that to commit first degree burglary a defendant must have any particular knowledge about the building before he burglarizes it. [Citation.] [¶] Section 459 defines the crime, viz., the unlawful entry of any building with a felonious intent. On the other hand, section 460, subdivision 1, prescribes the punishment by providing a greater punishment when the defendant enters a residence.... [¶] The greater punishment for burglary of a residence reflects the Legislature’s recognition of ‘the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.’ [Citation.] [¶] *These dangers arise whenever a burglar enters a residence and are not eliminated or even diminished simply because the burglar does not know that he is entering a residence. On the contrary, his surprise at having unexpectedly entered a residence may make the situation more volatile.*” (*Parker, supra*, 175 Cal.App.3d at p. 823, italics added, fn. omitted.)

C. Analysis

In the instant case, there was uncontroverted evidence that Gerald considered the West Belmont house to be one of his residences, that he was there nearly every day, he ate there, and he slept overnight there at least once a month. Archie claims that Gerald’s admissions about the run-down nature of the exterior and interior of the residence supported Archie’s trial testimony, that he believed the house was abandoned when he entered it, and that such evidence triggered the court’s sua sponte duty to instruct on Archie’s purported mistake of fact as to whether the house was an inhabited dwelling on December 1, 2009.

However, Archie’s arguments as to his purported mistake of fact defense to burglary are identical to the arguments that were rejected by *Parker*. Archie’s claim that he thought the house was not an inhabited dwelling was not related to an element of the offense. As in *Parker*, the court did not have a sua sponte duty to give a mistake of fact instruction as to the degree of burglary committed in this case. (*Parker, supra*, 175 Cal.App.4th at p. 823.)

III. The jury's finding on the violent felony allegation

In count III, Archie was charged and convicted of the December 1, 2009, residential burglary of Gerald's house. In addition, the jury found true the special allegation, that the offense was a violent felony because the burglary was committed while a person, other than an accomplice, was present (§ 667.5, subd. (c)(21)), based on Gerald's entry into the house while Archie was inside.

On appeal, Archie contends the violent felony allegation is inapplicable to count III because it was not intended to address a situation when a homeowner enters a residence, armed with a weapon, while acting as a law enforcement officer with the intent to confront burglars and take them into custody.

A. First degree burglary

As explained *ante*, "First degree burglary is defined as 'burglary of *an inhabited dwelling house*, vessel, ... which is inhabited and designed for habitation, floating home, ... or trailer coach, ... or the inhabited portion of any other building ...' (§ 460, subd. (a).) Section 459 defines 'inhabited' as 'currently being used for dwelling purposes, *whether occupied or not.*' " (*Rodriguez, supra*, 122 Cal.App.4th at pp. 131-132, italics added.)

"The burglary of an inhabited dwelling is more serious than other types of burglaries because it violates the victim's need to feel secure from personal attack. People simply need some place where they can let down their guard and where they can sleep without fear for their safety." (*People v. Fond* (1999) 71 Cal.App.4th 127, 131.)

" "[T]he Legislature's distinction between first and second degree burglary is founded upon the risk of personal injury involved." [Citations.] Burglary of business premises, even though such premises might have people on them, is not burglary of the first degree because it does not carry the peculiar risks of violence and resulting injury which inhere in the burglary of a home. [Citation.] "[T]he fact that a building is used as a home ... increases such danger: a person is more likely to react violently to burglary of his living quarters than to burglary of other places because in the former case persons

close to him are more likely to be present, because the property threatened is more likely to belong to him, and because the home is usually regarded as a particularly private sanctuary, even as an extension of the person.” [Citation.]’ [Citations.]” (*Rodriguez, supra*, 122 Cal.App.4th at pp. 132-133.)

B. Section 667.5, subdivision (c)(21)

“Enacted as part of Proposition 21 in 2000, section 667.5, subdivision (c)(21) elevates a first degree burglary (§ 460) to the status of a violent felony if a person other than an accomplice is ‘*present in the residence*’ during the burglary. [Citation.] A defendant convicted of a violent felony is limited as to the amount of presentence and postsentence custody credits that can be earned. [Citations.]” (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336-1337 (*Singleton*), italics added.)

“Section 667.5, subdivision (c)(21) is plain on its face, and it requires a person, other than an accomplice, be ‘*present in the residence* during the commission of the burglary.’ [Italics in original.] The plain meaning of ‘present in the residence’ is that a person, other than the burglar or an accomplice, *has crossed the threshold or otherwise passed within the outer walls of the house, apartment, or other dwelling place being burglarized.* ‘The threshold line of the building is located at the doorways into the [residences].’ ” (*Singleton, supra*, 155 Cal.App.4th at pp. 1337-1338, italics added.)

“Thus, one can be found guilty of first degree burglary even when the perpetrator gains unlawful entry to an unoccupied building. ‘Occupied burglary,’ the term we have used to describe the form of burglary defined in subdivision (c)(21) of ... section 667.5, is a first degree burglary where ‘it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.’ [Citation.]” (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 987 (*Doe*).)

“Occupied burglary does not require the use or threat of force. Indeed, the crime does not require any contact between the defendant and the occupant. The mere presence of a nonaccomplice in the dwelling is sufficient. Further, knowledge that a dwelling is

occupied is not an element of occupied burglary. Thus, a burglary may qualify as an occupied burglary under ... section 667.5(c)(21) even though the defendant had no contact with the occupant and though no one was present in the home during the burglary.” (*Doe, supra*, 140 Cal.App.4th at p. 987.) As defined by section 667, subdivision (c)(21), “[o]ccupied burglary plainly presents a potential for violence and consequently merits enhanced punishment. [Citations.]” (*Doe, supra*, 140 Cal.App.4th at p. 988.)

C. Singleton

In *Singleton, supra*, 155 Cal.App.4th 1332, the court squarely addressed the meaning of “present in the residence” for purposes of section 667.5, subdivision (c)(21)’s violent felony allegation. In that case, the defendant entered an apartment building, and obtained access through a locked gate to a secure stairwell, which led to the victim’s third floor apartment. The victim followed the defendant, and stood at the top of the stairs, in the hallway which led to his apartment, and waited around the corner for nearly half an hour while the defendant was inside the apartment. The defendant walked out of the apartment with a duffel bag, the victim confronted him in the hallway, and the defendant ran away. The defendant was convicted of first degree burglary, with the special finding the offense was a violent felony pursuant to section 667.5, subdivision (c)(21), based on the victim’s presence in the hallway outside the apartment. On appeal, the defendant argued there was insufficient evidence to support the violent felony allegation because the victim was not actually inside the apartment during the burglary. (*Id.* at pp. 1335-1336.)

Singleton reversed the jury’s finding on the violent felony allegation because the victim stayed outside the apartment and never crossed “the threshold or otherwise passed within the outer walls” of the apartment while it was being burglarized. (*Singleton, supra*, 155 Cal.App.4th at p. 1337, 1339-1340.) *Singleton* further held “ [t]he threshold line of the building is located at the doorways into the apartments. One who stands on

the stairway would not be considered “inside” the building under ordinary parlance.’ [Citation.] Certainly, it would not comport with the ordinary and plain usage to consider someone standing outside, around the corner, and down the hall from an apartment to be present in that apartment.” (*Id.* at pp. 1337-1338.)

In reaching this conclusion, *Singleton* rejected the People’s argument that the violent felony allegation should be broadly defined. *Singleton* noted the distinction between the broad interpretation of an “inhabited dwelling” as used to define a first degree burglary, with section 667.5, subdivision (c)(21)’s use of “present in the residence” during the commission of the burglary. “[T]he Proposition 21 drafters chose the term ‘residence,’ not ‘inhabited dwelling,’ for purposes of the violent felony allegation. The latter term defines the predicate crime of first degree burglary. When a statute uses different, albeit similar, words to those in related statutes, there is a compelling inference that different meanings were intended. [Citation.] Although a residence may be an inhabited dwelling, the latter term has acquired specialized meaning with reference to burglary under this state’s precedent. In keeping with the purpose of the statute in providing heightened protection to dwelling places and in recognition of the increased danger of violence when such places are burglarized, the term ‘inhabited dwelling house’ has been given a ‘ “broad, inclusive definition.” ’ [Citations.]” (*Singleton, supra*, 155 Cal.App.4th at p. 1338.)

“Section 667.5, subdivision (c)(21), neither equates ‘residence’ with ‘inhabited dwelling,’ nor gives a special definition to the former term.... ‘A residence’ is a term unused in other statutory references to burglary, strongly indicating the term was intended to refer to a location different than the broadly interpreted ‘inhabited dwelling.’ ” (*Singleton, supra*, 151 Cal.App.4th at pp. 1338-1339.)

“In addition, the drafters of Proposition 21 were aware of the special terminology used in our burglary statutes, since section 667.5, subdivision (c)(21) specifically refers to section 460 for purposes of defining the predicate offense. Again, the drafters had the

clear opportunity to employ the specialized term ‘inhabited dwelling’ for purposes of defining the nature of an occupied burglary for violent felony purposes, but chose the non-technical term instead.... In accordance with the appropriate canons of construction, we cannot ascribe to the commonplace term ‘residence’ the broad, technical meaning given by case law to ‘inhabited dwelling.’ It would be unreasonable to find the voters understood ‘present in the residence’ to apply when a person was standing in the hallway, outside an apartment unit.” (*Singleton, supra*, 151 Cal.App.4th at p. 1339.)

D. Analysis

Based on *Singleton*’s statutory interpretation of section 667.5, subdivision (c)(21), we find that the violent felony allegation is applicable to the situation which occurred in the instant case, when a homeowner is not present in the residence at the initiation of a burglary, but returns to the house while the burglary is still being committed. Such a conclusion is consistent with the intent behind section 667.5, subdivision (c)(21), that a burglary committed while someone other than an accomplice is present “plainly presents a potential for violence and consequently merits enhanced punishment. [Citations.]” (*Doe, supra*, 140 Cal.App.4th at p. 988.) Indeed, a person who enters his or her residence and surprises perpetrators who are in the midst of committing a burglary is perhaps at greater risk of harm than a resident who is present in the house and has no idea that a burglar has entered another part of the structure. (See, e.g., *People v. Garcia* (2004) 121 Cal.App.4th 271, 281 [violent felony allegation supported by substantial evidence where residents heard noises in the house, they didn’t realize defendants were breaking in, and they remained in the house for an undetermined length of time during commission of burglary].)

Archie argues that the violent felony allegation should not be applicable in this case because Gerald entered the house with a loaded weapon and the intent to apprehend the burglars. Archie contends that Gerald “deliberately chose to precipitate a violent confrontation” within the house by engaging in “an intentional police-like action on his

part.” Such an argument ignores the fact that Archie had already committed a residential burglary, when he broke into the residence by prying open the deadbolt on the front door which Gerald had just repaired hours earlier. In addition, there is no evidence that Gerald was acting on behalf of law enforcement officials when he entered the residence with his loaded handgun. We do not pass on the wisdom of Gerald’s actions that night, but simply acknowledge that he returned to his residence, found the front door had been forced open again, and went inside to find out what had happened. It was merely happenstance that Archie was still in the residence and going through a box of Gerald’s personal property when he entered. Indeed, Gerald testified that Archie continued to look through the box after Gerald announced his presence.

We further find the jury’s finding on the violent felony allegation is supported by substantial evidence. “ ‘In reviewing the sufficiency of the evidence, we must draw all inferences in support of the verdict that can reasonably be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.’ [Citation.]” (*People v. Kelly* (1992) 1 Cal.4th 495, 528.)

At trial, Archie testified that he was looking for a blanket when Gerald arrived, Gerald never entered the house, Gerald never gave any warning before he fired the warning shot, and Gerald remained outside the front doorway when he fired his gun. However, Gerald testified that he entered the house through the open front door, walked two-to-three feet across the threshold and inside the house, and saw Archie going through some personal property in the living room. Gerald asked Archie what he was doing in his house. Archie did not respond and continued to look through various items. Gerald announced his intent to shoot, Archie slightly moved, and Gerald fired the warning shot into the living room wall.

Gerald’s trial testimony thus provides substantial evidence to support the jury’s finding on the violent felony allegation, that he crossed the threshold of the front door

and entered the house during the commission of the burglary. Indeed, the location where his warning shot landed further supports his testimony, since it implies that he was standing inside the living room, rather than outside the front door, when he fired the shot into the living room wall.

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.