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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SCOTT,

Defendant and Appellant.

F062914

(Super. Ct. No. TF005619A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Gregory W. Brown, 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, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

Between June 21, 2010 and August 1, 2010, four fires of incendiary origin occurred in the City of Taft. Appellant Richard Scott was charged with setting all four

fires. He was convicted after jury trial of arson to an inhabited structure (count 2), arson to forest land or structure (count 3) and arson to property belonging to another (count 4). (Pen. Code, § 451, subds. (b)- (d).)<sup>1</sup> The jury found true special allegations attached to counts 2 and 3 that appellant caused multiple structures to burn. (§ 451.1, subd. (a)(4).) The jury found appellant not guilty of two additional counts of arson to forest land or structure (counts 1 & 5) and one additional count of arson to an inhabited structure (count 6). The jury's verdicts reflect a determination that appellant was guilty of setting one of the fires but not guilty of setting the three other fires.

Appellant was sentenced to an aggregate term of nine years' imprisonment, calculated as follows: the five-year mid-term for count 2 plus a consecutive four-year term for the enhancement attached to count 2; the sentences imposed for counts 3 and 4 were stayed pursuant to section 654.

Appellant argues the corpus delicti rule was not satisfied as to counts 2, 3 and 4. He also contends that two of the arson convictions must be reversed because he cannot be convicted of multiple counts of arson for setting a single fire. Neither argument is persuasive. The judgment will be affirmed.

## **FACTS**

### **The North Street Fire**

On June 21, 2010, a grass fire started along a fence line between two houses on North Street in Taft (the North Street fire). One of the houses was not occupied; Tina Montoya lived in the other house. Kern County Fire Captain Shawn Whittington investigated the North Street fire. He concluded "it was an incendiary fire." He eliminated all other potential causes for the North Street fire.

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<sup>1</sup> Unless otherwise specified all statutory references are to the Penal Code.

Montoya testified that on the day of the fire she smelled smoke and went outside. Montoya's dog was barking and growling at someone hiding in the nearby empty house. She went inside her house and called emergency assistance. Montoya walked outside again and saw appellant "c[o]me out of the side of the fire after it blew -- it went up." Appellant was running. When he saw Montoya he started walking towards an alley.

Montoya also testified that on a prior occasion appellant and another man walked through her yard. While inside her house, Montoya "asked [appellant] not to come by my house anymore. And [appellant] was cussing at me and threatened he was going to kill me and burn my house down." Appellant "took his shirt off and he got very violent with me." He banged on her window.

Captain Whittington testified that Montoya told him that "[s]he saw [appellant] walking away from the emerging fire." Montoya also told him that she had problems with appellant trespassing on her property. She did not tell him that appellant threatened to burn her house down.

#### **The Kern Street Fire (counts 2, 3 & 4)**

On July 6, 2010, a fire occurred on property located on Kern Street in Taft (the Kern Street fire). Kern County Fire Department Captain Kain Linville testified that when he arrived at Kern Street in response to an emergency call, "the Welcome Inn which was on fire, a shed, an alley, [a recreational vehicle (RV)], a two-story apartment, and additional house to the south of that, all burning." The shed was "on the south side of the alley, directly west of the [Welcome Inn]." Captain Linville testified that "[i]t seemed very likely" that the shed was "the source of the fire." The fire was suppressed in three and one-half hours. The shed was completely destroyed; the house, the RV and the Welcome Inn sustained fire damage. No one was injured but 25 people were displaced from the Welcome Inn.

Kern County Fire Department Captain Thomas Patlan investigated the Kern Street Fire. He concluded that the fire originated in the shed. Captain Patlan eliminated every

possible potential cause of the fire “except a possible incendiary cause from the transients that were there.” He “could not rule out that the fire was caused by a human being.” He was unable to determine if the fire was intentionally or accidentally set.

Captain Patlan also testified that he spoke with Russell Lacey. Lacey told him that he heard popping noises. He looked outside and saw the glow of the fire. He saw a white car in an alley pull up, pause and then drive away. He did not see anyone run away.

### **East Kern Street Fire**

On July 18, 2010, a fire broke out in a wooden structure that was attached to an abandoned commercial building on East Kern Street (the East Kern Street fire). The structure was used by vagrants and previous fires had been set at this location. Kern County Fire Department Captain Greg Ochoa investigated the fire. He found multiple fire sets in the structure, indicating that a person deliberately caused the fire. He opined that the East Kern Street fire was of incendiary origin.

### **The 4th Street Fire**

On August 1, 2010, a fire occurred at a house located on 4th Street (the 4th Street fire). Captain Ochoa investigated the 4th Street fire. He opined that it was of incendiary origin.

Steve Berkey testified that he periodically stayed in the house prior to the 4th Street fire. On the day before the fire started, Berkey and appellant were walking down an alley. Berkey testified that appellant began arguing with a woman named Karen Shelby. Appellant threw a rock at Shelby and hit her on the back of the head. Berkey said to appellant, “‘Don’t touch her,’ and, ‘Shut up.’” Berkey threatened to “duct tape [appellant] to a tree and call the police” if he refused to comply. Berkey testified that appellant said, “I know who you are, Steve Berkey, and I will fucking kill you, and I will burn down your house, and I will tell your girlfriend you are running around with Karen

Shelby.” Another woman intervened and said to Berkey, “[J]ust let it go and keep walking down the alley.” Berkey left with that woman.

Captain Ochoa testified that he interviewed Berkey on August 1, 2010. Berkey identified appellant as the person who might have started the fire. On the next day Berkey told Captain Ochoa that appellant threatened to assault him.

### **Appellant’s Statements Concerning the Fires**

Margo Enos testified that she and appellant were friends “[f]or a couple years” before the fires started. During conversations that took place while the fire activity was occurring, appellant told her “[m]ultiple times” that he started all four fires. Enos testified that appellant said he set the North Street fire “[b]ecause [Montoya] called the police on him.” Enos and Captain Ochoa rode in a car together; Enos pointed out locations where appellant told her that he started fires.

On August 23, 2010, appellant participated in a conversation with Enos and Gerald Johnson. Police officers monitored the conversation. Johnson wore a recording device inside a fanny pack. During this conversation appellant said, “I want that Cadillac, and that’s why I burned his old lady’s fucking garage down.” Johnson said, “You burned his old lady’s garage down?” Appellant replied, “Damn right. I got her fucking camper with it.”

On August 24, 2010, appellant participated in a conversation with Johnson and Candace Lansford. Johnson and Lansford each wore a recording device. During this conversation, appellant said, “I’m a fireman.” Lansford replied, “You’re a fireman?” Appellant answered, “I start fires. [¶]...[¶] If the price is right.” Later, Lansford said that Berkey stole her child’s bike; appellant responded, “I’ll burn his house down.” Lansford asked, “But you’ve already done it, is that what you said?” Appellant replied, “No.” But then he said, “I burned trash cans *too*.” (Italics added.)

Later in the conversation, Lansford challenged appellant saying, “You probably never started a fire in your life.” Appellant answered, “I’m an arsonist.” Appellant said

that he is owed \$10,000 for setting the Kern Street fire. Appellant said he set used a lighter, a cigarette and a candle to set the fire. Then he said, "It blowed up." Lansford asked, "And then how did you get away so fast [because] your knees [are] old[?]" Appellant replied, "I went around the corner to the Chevron."<sup>2</sup> Lansford challenged appellant again by saying, "Chances are probably an accident you were walking down the alley." Appellant said, "I wasn't in the alley." Lansford asked appellant where the fire started. He replied, "In the garage." Appellant said, "I lit a cigarette and put the light[er] [and] there was a lot of fire." He continued, "I went across the street and sat there and watched it blow up, everything, motor home and everything." Lansford asked, "Have [you] spent any of the money yet?" Appellant replied, "My money's in the bank." He also said, "Arson probably wants to talk to me about it."

Soon thereafter, Lansford said to appellant, "One more, name another one. I don't believe you. [¶]...[¶] Did you do that one we walked through?" Appellant replied, "Yes." He said that he "got five thousand." Lansford asked, "Was that a cigarette too?" Appellant said, "Yeah" and he added, "A candle." Shortly thereafter it can be inferred that appellant displayed an old photograph of himself. He said, "Let me show you something you've never seen. I'm the best mother fucken fireman, best alcoholic you've ever seen."<sup>3</sup>

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<sup>2</sup> There is a Chevron gas station around the corner from the Welcome Inn.

<sup>3</sup> Audio CDs of the two recorded conversations and transcripts of portions of the CDs were received into evidence.

## DISCUSSION

### I. The Corpus Delicti Of Counts 2, 3 And 4 Was Adequately Proved.

#### A. Facts.

Appellant filed a motion for new trial based in part on the ground that the corpus delicti of the arson crimes charged in counts 2, 3 and 4 was not proved. The prosecutor opposed the motion.

The trial court denied the new trial motion after hearing. In relevant part, it found the corpus delicti of counts 2, 3 and 4 was proved. The court explained this ruling, as follows:

“... I do believe the evidence provided a sufficient basis for the jury to find that the defendant’s conduct in setting the shed on fire actually and proximately caused both the hotel and the RV to be burned. And I also believe that there’s substantial evidence to support the jury finding that setting fire to the shed created a substantial and unjustifiable risk that both the hotel would burn as well as the RV would burn. [¶] So, again, this isn’t a matter of starting a shed fire and somehow the strong wind carries burning embers a great distance to the hotel. The hotel was right next to the shed.... [T]here was sufficient evidence for the jury to find that setting the shed on fire did create a substantial and unjustifiable risk that the other two fires would also result as a natural and probable consequence of the defendant’s conduct. [¶] ... The corpus delicti of a crime may be proved by circumstantial evidence and by the reasonable inferences which may be drawn therefrom. [¶] ... There was credible circumstantial evidence that the fire in the shed was started intentionally was not the result of an accident or an act of nature and that reasonable inference may be drawn that it was arson and, that is sufficient evidence which need only be slight to satisfy the corpus delicti rule.”

In assessing the sufficiency of evidence proving the corpus delicti of counts 2, 3 and 4 the trial court considered only evidence pertaining to the Kern Street fire. It did not rely on evidence about the other three fires “[b]ecause the jury found him not guilty” of arson charges based on those fires.

**B. The corpus delicti rule was satisfied.**

Every crime includes three component parts: (1) the occurrence of a specific type of injury or loss; (2) a person's criminality as the source of the loss; and (3) the accused's identity as the perpetrator. "By the great weight of authority, the first two without the third constitute the *corpus delicti*." [Citation.] (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107.) The corpus delicti rule requires the prosecution to "prove the corpus delicti, or the body of the crime itself--i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169.) "The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues." (*People v. Alvarez, supra*, 27 Cal.4th at p. 1181; *People v. Miranda, supra*, 161 Cal.App.4th at p. 108, fn. 9.) The corpus delicti "rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Alvarez, supra*, at p. 1169.)

Counts 2, 3 and 4 are based on the Kern Street fire. In count 2 appellant was convicted of arson of Welcome Inn. In count 3 he was convicted of arson of the shed and in count 4 with arson of the RV. "All that is needed to establish the corpus delicti, in addition to the actual burning, is that the fire was intentional or of incendiary origin." (*People v. Clagg* (1961) 197 Cal.App.2d 209, 212.)

It is not necessary for "the prosecution to rule out all possible or imaginary causes of the fire[]" to prove the corpus delicti of arson. (*People v. Andrews* (1965) 234 Cal.App.2d 69, 74.) "When related to the crime of arson, the word 'malice' denotes nothing more than a deliberate and intentional firing of a building, or other defined structure, as contrasted with an accidental or unintentional ignition thereof; in short, a fire

of incendiary origin.” (*Id.* at p. 75.) “[T]here was no requirement that the whole gamut of speculative possibility as to the cause of the fires be run, and then each, in turn, be ruled out.” (*Id.* at p. 76.) For example, in *People v. Andrews, supra*, 234 Cal.App.2d 69, the Third Appellate District held that the corpus delicti of arson was proved where three fires occurred in a two-week period, the weather was cold and damp and fire experts testified there was no indication that the fires were caused by an accidental cause. (*Id.* at pp. 73-77.) And in *People v. Maas* (1956) 145 Cal.App.2d 69, the Second Appellate District held that the corpus delicti of arson was proved where the fire occurred in an isolated area, no lightning struck the area in which the fire originated for three days and atmospheric conditions made it unlikely that the fire was accidentally caused by a spark or cast-off match. (*Id.* at pp. 75-76.)

At the outset, we must address appellant’s assertion that evidence pertaining to the other three fires cannot be used to prove the corpus delicti of counts 2, 3 and 4 because the jury acquitted him of arson in connection with those fires.<sup>4</sup> Appellant’s position lacks merit. Evidence about the other fires was relevant, inter alia, to prove that the Kern Street fire was part of a series of fires; this supports a finding that the Kern Street fire was not accidental. The evidence pertaining to the other fires was not admitted for a limited purpose. The jury was not instructed that it could consider evidence about the other fires only in the context of certain charges and not others. Evidence of other wrongful acts is not subject to the corpus delicti rule, unless it is introduced in the penalty phase of a

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<sup>4</sup> Appellant did not offer any decisional or statutory authority supporting this position. The trial court also did not refer to any legal authority when it decided that considering evidence pertaining to the other fires would not be “proper.” It is well-established that appellate arguments must be supported by citation to pertinent legal authority as well as reasoned argument or it is deemed to be without merit “and [we] pass it without consideration. [Citations.]’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029.) Although we could have summarily rejected appellant’s argument on this basis, we elected to substantively resolve the issue.

capital trial. (*People v. Davis* (2008) 168 Cal.App.4th 617, 637-638.) Accordingly, we conclude that the jury's not guilty verdicts on counts 1, 5 and 6 did not have any effect on the admissibility of evidence pertaining to the other three fires. Such evidence can be used to prove the corpus delicti of counts 2, 3 and 4.

We turn to an examination of evidence proving the corpus delicti of the arson charges in counts 2, 3 and 4. As we have previously explained, “[a]ll that is needed to establish the corpus delicti, in addition to the actual burning, is that the fire was intentional or of incendiary origin.” (*People v. Clagg, supra*, 197 Cal.App.2d at p. 212.) Captain Patlan testified that when he arrived at Kern Street in response to an emergency call, he observed that the shed, Welcome Inn, an apartment and RV were burning. After investigation, Captain Patlan excluded all potential causes of the fire except that it was “caused by a human being.” Three other fires occurred in close temporal and spatial proximity to the Kern Street fire. Those fires were all determined to be of incendiary origin. There is no evidence in the record showing that transients were inside the shed immediately prior to the Kern Street fire or other evidence pointing to an accidental human cause for the Kern Street fire. Considered in its entirety, there is sufficient proof establishing the corpus delicti of counts 2, 3 and 4.

We are not convinced by appellant's argument that the corpus delicti was not proven because Captain Patlan could not rule out an accidental human cause. This contention is premised on a misunderstanding of the corpus delicti rule. To adequately prove the corpus delicti of a crime “the prosecution need not eliminate all inferences tending to show a noncriminal cause of [the harm.] Rather, the foundation may be laid by the introduction of evidence which creates a reasonable inference that the [harm] could have been caused by a criminal agency [citation], even in the presence of an equally plausible noncriminal explanation of the event.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 405.)

*People v. Andrews, supra*, 234 Cal.App.2d 69 is directly on point. In *Andrews*, the defendant argued that the corpus delicti of arson charges a series of fires was not proved because “there could have been other possible causes of the fires in question, such as mice igniting matches, a carelessly dropped cigarette, sparks from automobiles (exhaust), etc.” (*Id.* at p. 74.) The appellate court held that while the People were required to produce evidence “that the fires were of incendiary origin” (*id.* at p. 76), “[t]he proposition that it was incumbent on the prosecution to rule out all possible or imaginary causes of the fires cannot be upheld.” (*Id.* at p. 74.) Reasonable inferences based on circumstantial evidence are adequate to prove that the human cause of the fire was intentional and not accidental. (*Id.* at pp. 74-76.) “[T]here was no requirement that the whole gamut of speculative possibility as to the cause of the fires be run, and then each, in turn, be ruled out.” (*Id.* at p. 76.) The court explained, “Common experience reminds one that such crimes generally are committed in stealth, without warning and often under the cloak of darkness. It is not surprising then that perpetrators of such clandestine acts frequently escape detection by human eye. Were it not permissible legally to prove the corpus delicti by circumstantial evidence, the prosecution of such offenses often would be well-nigh a hopeless undertaking.” (*Id.* at p. 75, italics omitted.)

Considered in its entirety, we conclude that the corpus delicti of counts 2, 3 and 4 was adequately proven. The People produced evidence establishing: (1) actual burning; and (2) incendiary origin. (*People v. Clagg, supra*, 197 Cal.App.2d at p. 212.) The record contains evidence supporting a prima facie finding that the Kern Street fire was caused by an intentional human act. As in *Andrews*, reasonable inferences based on the evidence sufficiently proved that the fire was intentionally caused and was not accidental. (*People v. Andrews, supra*, 234 Cal.App.2d at pp. 71-76; *People v. Maas, supra*, 145 Cal.App.2d at pp. 75-76.)

## **II. Appellant Was Properly Convicted Of Three Counts Of Arson.**

Section 954 provides, “An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts .... The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of offenses charged ....”

Nonwithstanding section 954, appellant argues that “the actus reus, setting the fire in the shed, occurred only once, and was done pursuant to only one intention, one general impulse, and one plan. Allowing multiple convictions to result from that one act and intent, therefore, is not appropriate.” Appellant asserts that he can only be “convicted on the one count of arson which contains the highest penalty: arson of an inhabited structure ....” We disagree.

This argument fails because the gravamen of arson is not “setting a fire which *might cause* certain damage.” Section 451 proscribes an act of burning that is directed against specific types of structures or lands. The crime of arson is committed by setting fire to, burning or causing to burn a specific type of structure, forest land or property. Each separate structure or item of property harmed represents a distinct injury that the arson statute was designed to prevent. (§ 451, subs. (b)-(d).) In this case, any possible hardship that could have arisen from multiple convictions for the same underlying act was ameliorated by application of section 654’s prohibition against double punishment. (*In re Arthur V.* (2008) 166 Cal.App.4th 61, 67.)

*People v. Ramirez* (1992) 6 Cal.App.4th 1762 and *People v. McCoy* (1992) 9 Cal.App.4th 1578, are instructive. In *Ramirez*, the defendant threw a Molotov cocktail into an apartment where his former girlfriend and her mother lived. The defendant was convicted of, inter alia, two counts of exploding a destructive device with intent to commit murder. The appellate court upheld the convictions, explaining: “The

prosecution correctly charged appellant with the commission of an act of violence directed against the person of Dora Navarro and of an act of violence directed against the person of Theresa Caudillo.” (*People v. Ramirez, supra*, 6 Cal.App.4th at p. 1767.)

In *McCoy*, the defendant absconded with his three minor children in violation of custody orders. The court held that he was properly convicted of three counts of violating a custody order. The court reasoned that the actus reus was detaining or concealing a child in violation of a court order. “Defendant’s absconding with the three children violated three separate court orders, namely two custody orders as to his daughters and a visitation order as to his son.” (*People v. McCoy, supra*, 9 Cal.App.4th at p. 1583.) It was irrelevant that the defendant made only one trip to Florida with the three children. (*Id.* at p. 1583, fn. 6.)

Respondent calls our attention to *Passerin v. State* (1980) 419 A.2d 916. Although this decision emanates from the Supreme Court of Delaware and is not binding authority in California state courts, we find it persuasive. There, the defendant set a fire in a large apartment building that burned five units. He was convicted of five counts of arson. The court held that even though only one fire had been set, the defendant could properly be convicted of multiple counts of arson. It reasoned that the gravamen of the crime of second degree arson is the intentional damaging of a building by starting a fire or causing an explosion and “[i]t seems clear to us that the legislature intended by our arson statutes to provide for just the situation at hand whereby five separately occupied units, i.e., buildings, have been damaged by the starting of a fire.” (*Id.* at p. 925.)

Appellant’s reliance on cases considering crimes such as drunk driving (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345) and evading a pursuing peace officer (*People v. Garcia* (2003) 107 Cal.App.4th 1159), is misplaced. Those crimes are not analogous to arson. Appellant’s culpability in causing different items to burn (i.e., a shed, a hotel, an RV and an apartment) is distinguishable from an act of drunk driving or evading the

police. Each separate structure or item of property harmed represents a separate injury that the arson statute was designed to prevent.

Appellant also cites *People v. Bailey* (1961) 55 Cal.2d 514. Yet, he did not develop a separate argument attempting to apply the *Bailey* rule, which authorizes aggregation of separate acts of misdemeanor theft into a single offense for the purpose of bringing a felony allegation when the thefts were committed pursuant to a single intent, impulse and plan. (*Id.* at pp. 518-519.) The *Bailey* rule has been extended to prevent a defendant from being convicted of more than one count of grand theft where the takings were committed against a single victim and the evidence discloses only one general intent. The *Bailey* rule remains limited to theft crimes involving a single victim and, in some appellate districts, vandalism. (Compare *In re David D.* (1997) 52 Cal.App.4th 304, 309 with *People v. Carrasco* (2012) 209 Cal.App.4th 715, 717.) The *Bailey* rule is not pertinent to the crime of arson because, unlike theft and vandalism, arson is not chargeable either as a misdemeanor or a felony based on the monetary value of damages. Aggregation principles do not have any application to this case.

For all of these reasons, we hold that appellant was properly convicted of three counts of arson. Application of section 654 ameliorated any harshness arising from this result. Appellant was only punished for one of the arson crimes (count 2); the sentences imposed for counts 3 and 4 were stayed.

**DISPOSITION**

The judgment is affirmed.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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POOCHIGIAN, J.