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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORDAN MICHAEL WILLIAMS,

Defendant and Appellant.

F063267

(Super. Ct. No. BF135018B)

**OPINION**

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

Oliver J. Northup, Jr., and Charles M. Bonneau, 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, Michael A. Canzoneri and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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Jordan Michael Williams was convicted of two counts of receiving property stolen from neighbors at the mobile home park where he lived. He argues now that the trial court improperly allowed his trial to proceed even though he vanished after the first day

of jury selection and did not reappear in court until after the jury returned its verdict. He also claims the evidence was insufficient to support the convictions. We affirm.

### **FACTUAL AND PROCEDURAL HISTORIES**

Two burglaries were reported at a mobile home park in Bakersfield on December 22, 2010. First, Charlotte Poteet returned from her work at Walgreens and found that her home had been ransacked. The back door had been broken open. Christmas presents she had wrapped had been taken, along with other property. The missing items included a TV set, a laptop computer, a camera, jewelry, a checkbook, a red wallet, a coin purse, a duffel bag, two pairs of boots, a Cuisinart cookie cutter, a Juicy Couture perfume set, a hair curler, a drill, and a set of barbecue utensils in a case. Poteet had bought some of the Christmas presents using her employee discount at Walgreens. An envelope in which she had placed receipts for the gifts was taken.

Next, while an officer was investigating at Poteet's home, Pamela Jones discovered the burglary of her car. Jones had been cleaning out her car and then went in her home, leaving the car unlocked. Poteet's son called Jones and said Poteet's home had been burglarized. As Jones departed to go visit Poteet, Jones saw that items had been taken from her car sometime during the last two hours. Missing were some DVD's, a DVD player's remote control, an LED light, two cases containing 30 CD's, and an ashtray containing about \$15.

The same day or the next day, three young men appeared at Walgreens with a hair curler and a perfume set. They wanted to return the items using a receipt showing that the items had been bought with an employee discount. Another employee later told Poteet of this and Poteet viewed video of the men from the store's surveillance system. She told Kern County Sheriff's Detective Jason Balasis that one of the men lived in the same mobile home park, in space No. 155. Balasis took still photos from the surveillance video to No. 155, where he spoke with Shelley Leach. Leach identified two of the men

in the picture as Ryan Coates (her boyfriend) and Josh Hill. She said the third was named Jacob. Leach said Hill and Jacob could be found at space No. 99.

Balasis went to the trailer at space No. 99 and knocked at the door. Jones's ashtray and DVD player remote were on the front steps. Williams answered the door. He consented to a search of the trailer. In the trailer and two sheds outside, Balasis found many of the items taken from Poteet and Jones. Some were in Williams's bedroom.

The district attorney filed an information charging Williams with one felony count and one misdemeanor count of receiving stolen property (Pen. Code, § 496, subd. (a)).<sup>1</sup> The felony count was for Poteet's property and the misdemeanor count was for Jones's property.

The trial court called the case on August 1, 2011, and stated that the matter had been assigned to it for jury trial. It had discussed motions in limine with counsel in chambers and had not yet sent for a venire panel. It was late in the afternoon, and the court decided to recess for the day without further proceedings. The court told Williams he was required to come back:

“THE COURT: And the defendant is present, out of custody. [¶] And Mr. Williams, because you are out of custody I need to give you my standard lecture to defendants in jury trials who are out of custody. It's very important that you always be here on time anytime the Court returns after recess. Because if you fail to appear here on time you are running the risk of the Court's going to exonerate your bond and take you back into custody. [¶] Do you understand?

“THE DEFENDANT: Yes, your Honor.

“THE COURT: So always keep in touch with your attorney. Make sure you know what time you need to be here. Be here early.”

The court recessed until the following morning.

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<sup>1</sup>Subsequent statutory references are to the Penal Code unless otherwise stated.

On August 2, 2011, the court heard motions in limine and began jury selection. Williams was present. The court recessed until the following morning.

Williams did not appear when the proceedings resumed the next day. Defense counsel had made several attempts to contact Williams, had checked voice mail and had checked with his receptionist for messages. There were no messages from Williams. After waiting an hour, the court decided it needed “to trail this matter at least several hours in order for further efforts to be made to locate the defendant or to give him an opportunity to contact defense counsel or contact the Court, if that’s what he chooses to do, to explain his absence.” The court recessed until the afternoon.

That afternoon, Williams still had not appeared. Defense counsel had called several phone numbers, but no one answered and there was no voice mail. Counsel also contacted Williams’s bail bondsman, whose staff said they would try to reach Williams’s cosigners. Counsel received no calls or messages from Williams. A woman had been seen sitting with Williams throughout the proceedings. Defense counsel believed she was a friend or girlfriend of Williams, but had no contact information for her. The court checked with the California Justice Information Service to find out whether Williams had been taken into custody; he had not. The prosecutor had not heard from Williams.

The court ruled that Williams was voluntarily absent after the commencement of his trial within the meaning of section 1043, subdivision (b), and that the trial therefore could continue in his absence. Defense counsel moved for a mistrial, saying that, after court the previous day, Williams had “indicated that he had serious pains coming from his teeth.” Counsel said “the pain from his mouth did seem to physically impair him and distract my client while I was talking to him.” He believed Williams’s absence was not voluntary. Further, counsel’s office had been having “brief outages at our phone desk.” After confirming that defense counsel’s phone had in fact worked at several points during the day, the court denied the motion. The court issued a bench warrant for Williams and resumed jury selection.

Williams continued to be absent the next morning. Defense counsel had again tried and failed to reach Williams by phone, and Williams had not contacted his counsel. The prosecutor had not heard from him. He was not in custody. The court found Williams was still voluntarily absent. Jury selection resumed. Later that day, opening statements were given and the presentation of evidence began.

The next day, August 5, 2011, Williams again did not appear in court. Defense counsel had not heard from him. He was not in custody. The trial court again found him voluntarily absent. Counsel still had not heard from Williams that afternoon after the jury had retired.

During the trial, Detective Balasis testified about his encounter with Williams and his search of the trailer and sheds. After seeing Jones's ashtray and DVD player remote on the front steps, Balasis knocked on the door and heard movement inside. No one answered the door for about a minute and a half. Then Williams appeared. Balasis said he was investigating a theft and showed Williams a picture of the three men from the Walgreens surveillance video. Williams looked over his shoulder, "hesitated for a long period of time," and said he did not know who the men were. Balasis handcuffed Williams, read him his rights and continued to question him. In response to questioning, Williams denied there was any stolen property in the home. After a few minutes, however, Williams identified the men in the photo. He consented to a search of his residence.

Williams had a housemate, who was home, and there were three other people in the trailer: Josh Hill, Jacob Lopez, and a woman. In the housemate's room, Balasis found a pair of the boots taken from Poteet's house. The housemate said they were hers. In Williams's room, Balasis found the CD's and CD cases that had been taken from Jones's car.

Balasis separated Williams from the other people in the house, said he had found property that had been stolen, and asked Williams who was responsible for stealing the

property. Williams denied knowing the CD's and boots were stolen, but said Josh Hill was responsible for the theft of items that were in the sheds. He said Hill and Lopez had arrived about 20 minutes before Balasis with stolen property and had hidden it in the sheds. Balasis searched the sheds. Scattered among much other property, he found the hair curler, a box from one of the pairs of boots, the perfume set, the Cuisinart cookie cutter, the case for the barbecue utensils, the duffel bag with the checkbook and wallet inside, the drill, an envelope labeled "Xmas receipts 2010," and wrapping paper. While he was searching, Balasis asked Williams to help. He asked Williams to tell him "what belonged in that shed and what doesn't." Williams did so, and even found two or three of the items himself. Jones and Poteet identified the items.

On August 5, 2011, the prosecution and defense rested. The jury found Williams guilty of both counts.

The probation officer filed a report on September 2, 2011. On count 1, the report recommended that imposition of sentence be suspended and that Williams receive three years' probation, including one year in county jail. On count 2, the report recommended that probation be denied and that Williams be sentenced to 180 days in county jail, concurrent with the jail time on count 1.

Williams appeared in court the same day, September 2, 2011, for the first time since August 2. The court gave the defense an opportunity to make a record about why Williams had been absent. This exchange followed:

“[Defense counsel]: Your Honor, my client has indicated that he did suffer from a serious toothache and that he suffered from an abscess and that it was debilitating pain. But, in light of probation's recommendation, we are prepared to move forward.

“THE COURT: So you are not asking for leave to make a motion for new trial.

“[Defense counsel]: No, your Honor.

“THE COURT: You have had a chance to discuss this with your client.

“[Defense counsel]: Yes.

“THE COURT: All right. [Defense counsel], is there any good cause why judgment should not now be pronounced?

“[Defense counsel]: No, your Honor.”

The court sentenced Williams in accordance with the probation officer’s recommendation.

### **DISCUSSION**

#### ***I. Williams’s absence from the trial***

Williams maintains that the trial should not have proceeded in his absence. The People argue, as a threshold matter, that Williams waived this claim when he declined to make a motion for a new trial after the court inquired about the matter before sentencing.

Williams relies on the principle that an issue is not waived or forfeited by a failure to assert it in the trial court if asserting it would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) He says it would have been futile for defense counsel to have made a new trial motion because the court had already decided Williams’s absence was voluntary and the defense “had nothing new to show” otherwise.

We do not agree that it would have been futile for the defense to make a new trial motion. True, the court had already found Williams was voluntarily absent after defense counsel guessed Williams’s tooth pain might have been the reason. At the sentencing hearing, however, defense counsel was no longer speculating. He said Williams told him he had experienced debilitating pain, and Williams was now present and able to testify to that effect. There is no reason to think the court would have refused to consider his testimony. Counsel chose to forgo a new trial motion not because it had no chance of succeeding, but because the probation officer had recommended granting probation. We

conclude that, in making this decision and choosing not to pursue the issue of absence from trial, the defense forfeited the issue for purposes of appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590 [appellate court ordinarily will not consider claim of erroneous ruling where objection could have been but was not presented to trial court].)

If the issue had been preserved for appeal, we would have upheld the trial court's ruling. Section 1043 provides:

“(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.

“(b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] ... [¶]

“(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.”

Williams argues that his trial had not “commenced” within the meaning of section 1043 at the time when he became absent and that the evidence did not show his absence was voluntary.

The court did not err in concluding that Williams's trial had commenced before he became absent. Williams was present during the first day of jury selection. We agree with *People v. Granderson* (1998) 67 Cal.App.4th 703, 707-709, in which it was held that a trial commences for purposes of section 1043 no later than the beginning of jury selection. We disagree with *People v. Molina* (1976) 55 Cal.App.3d 173, 177 (*Molina*), which held that the trial commences within the meaning of section 1043 when the jury is sworn or when the first witness is sworn. As the court explained in *Granderson*, jury selection is commonly understood as part of the trial and is a critical stage of it. (*Granderson, supra*, at p. 707.) Further, the purpose of section 1043 is to prevent a defendant from frustrating the orderly processes of his trial by absenting himself from the courtroom, and this purpose is better served by including jury selection as part of the trial than by deeming the trial to begin at some later point. (*Granderson, supra*, at p. 708.)

*Molina* relied on section 12, subdivision (b)(1), of the Evidence Code (a “trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence”) and on cases stating that a trial starts when the jury is sworn for purposes of double-jeopardy analysis. (*Molina, supra*, 55 Cal.App.3d at p. 177.) These definitions, however, are unrelated to the purposes of section 1043. The definition in Evidence Code section 12, subdivision (b), was meant to be used only “[f]or the purpose of this subdivision.” The purpose of the subdivision was to explain that the Evidence Code as a whole applied only to trials that commenced on or after January 1, 1967. (*People v. Lewis* (1983) 144 Cal.App.3d 267, 278.) The definition applicable to double-jeopardy analysis is based on the notion that, “[i]n jury cases, an accused cannot be said to have been truly in ‘jeopardy’ until the judge swears a jury empowered to convict that defendant. Hence, the swearing in of the jury becomes the critical point for purposes of a ‘once in jeopardy’ defense.” (*Ibid.*)

The court could reasonably find that Williams’s absence was voluntary. Williams was in court on the first day of jury selection and was ordered to return. Even if he was experiencing debilitating tooth pain, he could have contacted his lawyer if he was unable to come back to court. Williams argues that the pain could have “progressed to the point that he was unable to talk, or answer the phone,” but even if that were the case (and there is no indication that it was), there was nothing preventing Williams from having someone else contact his lawyer. A companion had been coming to court with Williams each day.

The facts showed that Williams was aware that his trial was underway, knew when the proceedings were to resume, and knew how to find the courthouse. The only excuse offered for his absence was that his teeth hurt. Those facts, combined with Williams’s failure to make contact with his attorney or the court for the remainder of the trial, supported a reasonable inference that Williams was voluntarily absent.

## ***II. Sufficiency of the evidence***

A conviction for receiving stolen property requires proof that (1) the defendant received, concealed, or withheld property; (2) the property was stolen; and (3) the defendant knew it was stolen. (*People v. Myles* (1975) 50 Cal.App.3d 423, 428.)

Williams argues that the evidence did not prove he ever had possession of property taken from Poteet (count 1) and did not prove he knew the property taken from Jones (count 2) was stolen.

The standard of review for a challenge to the sufficiency of the evidence supporting a conviction is well-established:

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ... We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility. [Citation.]’ [Citation.]” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 293.)

### ***A. Count 1***

The items found in the sheds belonged to Poteet and were the basis for count 1, the felony charge. The evidence supported the finding that Williams knew those items were stolen: Williams told Detective Balasis that Josh Hill was responsible for a burglary and that Hill and Jacob Lopez had deposited the proceeds in the sheds 20 minutes before Balasis arrived.

Williams argues, however, that he did not have possession of the property in the sheds. He says he “never indicated he had control over any of the items” in the shed. He also says:

“[T]here is no testimony regarding to whom the sheds belonged. While the location of the sheds was within eight feet of the trailer house, there is no testimony that use of the two sheds was an incident of occupancy of the trailer house. It is not unknown in mobile home parks for the trailers themselves to be within sixteen feet of one another, so that the sheds themselves might have been part of another trailer space.”

We disagree. Hill and Lopez were in the trailer as Williams and Balasis were speaking. They had arrived at the trailer 20 minutes earlier and had placed the property in the sheds. This supported an inference that the sheds and trailer were parts of the same residence. Likewise, Williams was familiar with the contents of the sheds; he was able to show Balasis what property belonged in them and what did not. This also supported an inference that the sheds belonged to Williams’s residence, not a neighboring one. Williams does not argue that property stored in the sheds with his knowledge was not in his possession even if the sheds were part of his residence.

***B. Count 2***

Items from Jones’s car were found in Williams’s room. These were part of the basis for count 2, the misdemeanor charge. Williams does not argue that he was not in possession of these. Instead, he maintains it was not shown that he knew the items were stolen.

It is a “well-established principle” that “the possession of stolen property, accompanied by no explanation or unsatisfactory explanation, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. Corroboration need only be slight and may be furnished by conduct of the defendant tending to show his guilt.” (*People v. Myles, supra*, 50 Cal.App.3d at p. 428.) Here, Williams knew property from a burglary (the burglary of Poteet’s home) had been delivered to his home 20 minutes before the police arrived. The burglary of Jones’s car happened close to the same time and the proceeds of that burglary had already made it into Williams’s room when Detective Balasis searched it. It is unlikely that, although Williams knew of the property entering the sheds from one

burglary, he was ignorant of the proceeds of the other burglary being transferred to his own room at the same time. Williams offered no explanation of how it got there. The jury could reasonably infer that Williams knew the CD's in his room were stolen.

**DISPOSITION**

^ The judgment is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Gomes, J.

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Kane, J.