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

THE PEOPLE,

Plaintiff and Respondent,

v.

GUADALUPE LOERA COVARRUBIAS,

Defendant and Appellant.

F069982

(Fresno Super. Ct. No. F13911395)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County.

James Petrucelli, Judge.

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Peter H. Smith and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Detjen, J. and Peña, J.

Following a bench trial, the court convicted appellant Guadalupe Loera Covarrubias of first degree burglary (count 1, Pen. Code, § 460, subd. (a))<sup>1</sup> and receiving stolen property (count 2, § 496, subd. (a)). In a separate proceeding, Covarrubias admitted a prior prison term enhancement (§ 667.5, subd. (b)) and allegations that he had a prior conviction within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)).

On July 25, 2014, the court sentenced Covarrubias to a 13-year prison term—the upper term of six years on his burglary conviction, doubled to 12 years because of his strike conviction, a one-year prior prison term enhancement, and a stayed term on his receiving stolen property conviction.

On appeal, Covarrubias contends: (1) the evidence is insufficient to sustain his burglary conviction and (2) his receiving stolen property conviction must be reduced to a misdemeanor. We affirm.

### **FACTS**

The evidence at Covarrubias's trial established that Covarrubias and Alfonso Elizondo were roommates. For approximately a year and three months prior to December 1, 2013, Robert Posas lived in a house on Third Street in Orange Cove, California that had been rented out by Elizondo's mother. After her death in November 2013, Elizondo collected the rent for a trust and he stood to inherit the property. In the six months prior to December 2013, Posas paid only \$200 in rent. Elizondo had asked Posas to move out but had not served him with an eviction notice.

On November 19, 2013, per Elizondo's instructions, Covarrubias went to Posas's residence to collect the rent but was unsuccessful. Covarrubias returned nine days later and Posas told him that he was in the process of moving out and would vacate the house by December 1, 2013.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

During Thanksgiving week, Posas left his residence and visited his in-laws in Fresno. He left his belongings packed in anticipation of moving. On December 2, 2013, Posas returned to his home and found it in a shambles and several items missing, including a 50-inch television, a stereo amplifier, and a CD player. Posas flagged down Orange Cove Police Officer Jesus Rivera. Officer Rivera walked through the house but did not find any signs of a forced entry. Posas told Rivera he suspected Covarrubias took his property.

Officer Rivera located Covarrubias at his residence and told him he was investigating a residential burglary. Covarrubias lowered his head and remained quiet for several seconds. Rivera then noticed a 50-inch television, a stereo amplifier, and a CD player that matched the descriptions provided by Posas of items taken from his house. Rivera asked Covarrubias if the items belonged to him and he replied that he purchased the television at a yard sale for \$50. Officer Rivera told Covarrubias he suspected the property was stolen and he was going to contact Elizondo and ask him to respond to their location so Rivera could conduct an infield lineup. Covarrubias then told Rivera he did not want him to contact Elizondo because he felt embarrassed and did not want Elizondo to know what happened. Covarrubias told Rivera the property was stolen, and that he would like to return it. Covarrubias loaded the television, stereo amplifier and CD player into Officer Rivera's patrol car and Rivera drove Covarrubias and the stolen property to Posas's residence where Posas identified the property as belonging to him.

During an interview at the police station, Covarrubias told Officer Rivera that on December 1, 2013, he went to Posas's house at 7:00 or 8:00 p.m., to see if Posas had left. After knocking on the door and receiving no answer, he spoke to a neighbor who told him she had not seen Posas for a few days. Covarrubias again knocked on Posas's door, wiggled the doorknob, and the door opened. In addition to seeing that the interior was "thrashed," Covarrubias saw a 50-inch television and said to himself that he was going to take it. He then asked himself, "Is he home? Is he home?" Covarrubias yelled into the

house to see if Posas was there and again thought to himself that he would take the television. Covarrubias then walked in the house, tied a stereo amplifier and a CD player to the television with an extension cord and took the three items.

Later during the interview, Covarrubias told Rivera that he actually went to Posas's residence twice the day before. Covarrubias first went there at around 5:00 p.m. Later that evening he went there a second time, wiggled the doorknob, and the door opened. Covarrubias admitted entering the house with the intention of taking the television and knowing that Posas would not have "left" the television there while at the same time hoping that he had. Towards the end of the interview, when Officer Rivera asserted that Covarrubias entered the house with the intent to take Posas's television, Covarrubias did not deny Rivera's assertion.

## **DISCUSSION**

### ***The Sufficiency of the Evidence Issue***

“Where, as here, a defendant challenges the sufficiency of the evidence to support his conviction, ‘[t]he standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.] “ ‘[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.’ ” [Citation.] “The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] ‘Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.’ ” ’ [Citation.]

‘An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.’ [Citation.] ... ‘Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is

there sufficient substantial evidence to support the verdict of the [finder of fact].’ [Citation.]

‘A person who “enters any house ... with intent to commit ... larceny or any felony is guilty of burglary.” [Citation.] It has long been settled that the slightest entry by any part of the body or an instrument is sufficient ....’ [Citation.] ‘For an entry to occur, a part of the body or an instrument must penetrate the outer boundary of the building.’ ” (*People v. Goode* (2015) 243 Cal.App.4th 484, 488-489.)

“Possession alone of property stolen in a burglary is not of itself sufficient to sustain the possessor’s conviction of that burglary. There must be corroborating evidence of acts, conduct, or declarations of the accused tending to show his guilt. [Citations.] When possession is shown, however, *the corroborating evidence may be slight* [citations], and the failure to show that possession was honestly obtained is itself a strong circumstance tending to show the possessor’s guilt of the burglary.” (*People v. Citrino* (1956) 46 Cal.2d 284, 288-289, italics added.)

Here, not only was Covarrubias found in possession of stolen property within 24 hours of when it was stolen, he admitted entering Posas’s residence and taking the property. Thus, the only issue was whether he entered Posas’s house with the intent to commit a theft.

When Officer Rivera initially asked Covarrubias where he obtained the television, Covarrubias falsely told him that he bought it at a yard sale for \$50. (Cf. *People v. Citrino, supra*, 46 Cal.2d at p. 289 [false statement regarding receipt of stolen property, considered in conjunction with recent possession of property, supported burglary conviction].) During questioning by Officer Rivera, Covarrubias expressly admitted that he entered the house with the intent to take the television and later he remained silent in the face of the officer’s assertion that Covarrubias entered the house with such intent. (CALJIC No. 2.71.5 [when a defendant who has opportunity to reply, fails to deny accusation that he heard and understood, his silence “may be considered against him as indicating an admission that the accusation was true”].) Thus, the evidence that Covarrubias entered Posas’s residence with the intent to commit a larceny is overwhelming.

Covarrubias contends that entry into Posas's house "occurred and was complete" when he jiggled the doorknob to open the door because he had to extend his hand past the doorway's threshold when he opened it. Covarrubias further contends that when he opened the door to Posas's house he had an honest belief that he was acting pursuant to a claim of right to enter for the purpose of cleaning. This he posits further negated an inference that he had felonious intent at the moment he pushed open the door. Thus, according to Covarrubias, the evidence is insufficient to support his first degree burglary conviction because there was no evidence that he entered the residence with the intent to commit a felony. We disagree.

Even without considering the evidence discussed above, we would nevertheless find the evidence sufficient to sustain Covarrubias's burglary conviction.

"[T]he crime [of burglary] is complete, i.e., one may be prosecuted and held liable for burglary, upon entry with the requisite intent. [Citation.] It follows, therefore, that every entry with the requisite intent supports a separate conviction." (*People v. Washington* (1996) 50 Cal.App.4th 568, 578-579.)

The court could reasonably conclude from Covarrubias's statements to Officer Rivera that he formed the intent to take the television upon seeing it inside before he wondered whether Posas was home and then yelled out to see if he was. That Covarrubias may have also gone to the house and entered it with the intent to clean does not absolve him of criminal liability for the burglary because he also entered with the intent to commit a larceny. The evidence is sufficient to sustain the conviction for burglary.

### ***The Receiving Stolen Property Offense***

In 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect November 5, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reclassified certain drug- and theft-related offenses

(including violation of § 496, subd. (a)) as misdemeanors, except for certain ineligible defendants. (*People v. Rivera, supra*, at p. 1091.)

In addition, Proposition 47 added section 1170.18, which provides a mechanism for a person serving a felony sentence for a reclassified offense to petition for a recall of his or her sentence. Under section 1170.18, subdivision (a), “[a] person currently serving a sentence for a conviction” of a felony “who would have been guilty of a misdemeanor under [Proposition 47] ... had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with,” among other statutes, section 496, subdivision (a), as amended by Proposition 47.

On appeal, Covarrubias argues Proposition 47 operates retroactively and, thus, his conviction for receiving stolen property must be reduced to a misdemeanor because the judgment in this case is not final. Covarrubias is wrong.

Section 3 provides, “No part of [the Penal Code] is retroactive, unless expressly so declared.” “[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, ‘in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature ... must have intended a retroactive application.’ ” (*People v. Brown* (2012) 54 Cal.4th 314, 324 (*Brown*).

There is, however, “an important, contextually specific qualification to the ordinary presumption that statutes operate prospectively,” recognized by our Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). (*Brown, supra*, 54 Cal.4th at p. 323.) This exception to the presumption that new statutes operate prospectively only has been stated as follows: “When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants

whose judgments are not yet final on the statute's operative date.” (*Ibid.*, fn. omitted, citing *Estrada, supra*, 63 Cal.2d at pp. 742-748.)

“The rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 793, fn. omitted.)

In *People v. Yearwood* (2013) 213 Cal.App.4th 161, 172 (*Yearwood*), we held the rule of *Estrada* did not apply to Proposition 36, which changed the requirements for sentencing a defendant as a third strike offender under the Three Strikes law. Proposition 36 also added section 1170.126, which provides a procedure for a prisoner serving an indeterminate life sentence imposed pursuant to the Three Strikes law for a crime that would not have subjected the prisoner to a life sentence under Proposition 36 to file a petition for recall of sentence and resentencing in accordance with the Three Strikes law, as amended by Proposition 36. (§ 1170.126, subd. (b).) We held the *Estrada* rule did not apply and Proposition 36 was not retroactive “because section 1170.126 operates as the functional equivalent of a saving clause.” (*Yearwood, supra*, 213 Cal.App.4th at p. 172.) We explained, “The voters intended a petition for recall of sentence to be the sole remedy available under [Proposition 36] for prisoners who were serving an indeterminate life sentence imposed under the former three strikes law on [Proposition 36’s] effective date without regard to the finality of the judgment.” (*Ibid.*)

It has been observed that “ ‘the basic structure of Proposition 47 is strikingly similar to Proposition 36’ and ‘much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47.’ ” (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 452, fn. 4.) We further observe that the procedure of petitioning for a recall of sentence provided by section 1170.18, subdivision (a), of Proposition 47 is strikingly similar to the petition procedure of section 1170.126, subdivision (b), of Proposition 36. Following our reasoning in *Yearwood*, we conclude section 1170.18

operates as the functional equivalent of a saving clause, the *Estrada* rule does not apply, and Proposition 47 does not operate retroactively.<sup>2</sup>

Covarrubias contends *Yearwood* is inapposite because unlike Proposition 36, Proposition 47 states that it “shall be liberally construed to effectuate its purposes.” (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 18, p. 74.) However, Proposition 36 also provides that it is to be liberally construed to effectuate its purposes. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 7, p. 110.) Thus, we reject Covarrubias’s contention that his receiving stolen property conviction should be reduced to a misdemeanor.

### **DISPOSITION**

The judgment is affirmed.

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<sup>2</sup> The question of the retroactivity of Proposition 47 is currently before the California Supreme Court. (*People v. DeHoyos*, review granted Sept. 30, 2015, S228230.)