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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONG VAN PHAN,

Defendant and Appellant.

G050825

(Super. Ct. No. 13WF2213)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted defendant of three counts of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a))¹ and, as to each count, found the residence was occupied at the time (§ 667.5, subd. (c)(21)). The jury also convicted defendant of resisting arrest. (§ 148, subd. (a).)² The court sentenced defendant to concurrent two-year prison terms for the burglary convictions, with presentence credit of 504 days. The court suspended imposition of sentence on defendant's resisting arrest conviction.

Defendant appealed the judgment and we appointed counsel to represent him. Counsel did not argue against defendant, but advised he was unable to find an issue to argue on defendant's behalf. Defendant was given an opportunity to file written argument on his own behalf, but he did not do so.

We have examined the entire record but have not found an arguable issue. (*People v. Wende* (1979) 25 Cal.3d 436.) Accordingly, we affirm the judgment.

FACTS

On the afternoon of July 17, 2013, Megan Pasternak³ was out by her family pool when she saw a man enter the sliding glass door of their home on Niagara Drive in

¹ All statutory references are to the Penal Code.

² The jury acquitted defendant of making a false representation to a police officer. (Count 5; § 148.9, subd. (a).) The jury could not reach agreement on an additional residential burglary count (count 2); the court declared a mistrial as to count 2 and dismissed it in furtherance of justice pursuant to section 1385. During the trial, on the People's motion, the court dismissed count 7 (failure to provide a blood and saliva sample; §§ 298.1, subd. (a), 296).

³ For brevity we refer to the Pasternaks by their first names. We mean no disrespect.

Huntington Beach.⁴ Megan phoned her sister, Rachael, and warned her to get out of the house.

Rachael ran out the front door to the front yard. She saw a man in the back yard walking toward a closed side gate. Rachael held the gate shut, but then allowed him to leave. She asked him to open his backpack. He opened it and took out two straw hats. Rachel asked him why he went into the Pasternak house. He replied he had seen a bench on the “front porch that was painted blue and had three hearts on it, and that he had once had a dream, that if he saw the three hearts, Jesus said he could go in the house.” Rachel let the man leave. She testified at trial there was indeed a bench with three hearts on her front porch.

Megan’s Jeep Liberty was parked across the street from their home. After the man left, Megan noticed that the spare key to the vehicle was missing. It had been hanging on a key rack about eight to 10 feet from the sliding door.

Later that afternoon, Shelly Peters was upstairs in her Huntington Beach townhouse, which has a sign outside that says “Stop and smell the roses” to the right of the front door. Peters heard a noise downstairs. She grabbed her cell phone and started slowly descending the stairs. She saw a window screen on her living room floor and a man’s head and shoulders coming in through the window. He wore a straw hat. She yelled, “What are you doing?” He said, “I need sandals.” She told him she was calling the police. He backed out. She came downstairs and watched through the window as he slowly walked away. He was barefoot.

Four days later, Jill Rosoff “heard a thump and then a shattering of glass” in her Costa Mesa residence. She went downstairs and saw a hand coming in through the window next to her front door. She yelled, “What the blank are you doing?” The hand was pulled out. She never saw who the hand belonged to. Rosoff phoned the police.

⁴

All dates refer to the year 2013 unless otherwise stated.

Officer Martha Ortiz responded to Rosoff's call. Ortiz observed Rosoff's living room window was broken and that a window screen was propped up against the house.

Officer Kelly Benjamin also responded to the call. She drove in a marked police vehicle to Rosoff's home and saw defendant walking on the sidewalk directly across the street. She put her car in reverse, drove backwards toward defendant, and got out of the vehicle. Defendant looked at her and ran into a park. Benjamin chased him in her car and then on foot. As she searched for him, defendant emerged from some bushes and immediately complied with Benjamin's commands.

Benjamin interviewed defendant after reading him his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Defendant had rose petals in his nose during the interview. Defendant was limping and his feet were scuffed up like he had been walking barefoot. He said he had no shoes and was breaking into homes to steal shoes, food, and money. He was going to continue until he was stopped. He said he was living in the Santa Ana River bed. The riverbed forms the border between Huntington Beach and Costa Mesa. Defendant admitted that he broke into Rosoff's Costa Mesa home. He said he saw the vehicle on Niagara Drive, wanted to take it, walked into the house, and found the keys. He fled when confronted by the homeowner and threw the keys away.

Defendant testified that on the morning of July 14, he heard voices telling him to get out of the house and not tell anyone. He could not refuse. The voices became more powerful and told him to throw away his bike, to drop his bag in which he had packed the belongings he valued most, and to throw away his shoes and most of his clothing. Barefoot, he walked toward the Santa Ana River.

Around July 17, he went into a pizza restaurant, ordered a pizza, and took it without paying for it. He went to a house that had an American flag, signifying in his mind that it was God's house, as well as to the house on Niagara Drive that had a bench

with three hearts and a house with a sign that said “Stop and smell the roses,” where he put “roses” in his ears and nose because he started to hear demonic voices.

Defendant testified he did not have an intent to take items from people when he went in the houses. Defendant went in because he “was told to.” He lost control over his behavior between July 17 and July 21. Defendant told the officer he tried to take a vehicle because he “was trying to figure out why [he] did it. And that would be the most rational choice.” He told her he went into the houses to take food, sandals, and clothes, because he figured that would be the reason for him to do “stuff like that.” Defendant’s parents provided him a house to live in. He had money sent to him by his brother in Australia for work defendant had previously done for him. He had clothing at home. He had no reason to steal.

Dr. Daniel Lee, a clinical and forensic psychologist, testified that defendant’s test results show he suffers from attention deficit disorder, delusions, and hallucinations. Dr. Lee reviewed an Orange County Jail healthcare report dated July 21, in which a clinician found defendant was actively psychotic and gravely disabled. The jail report also stated defendant urinated on himself, his behavior was bizarre, his cognition was confused, and his thought content consisted of delusional and paranoid ideation. Dr. Lee diagnosed defendant with a psychiatric disorder with delusion. Dr. Lee opined that defendant believed he had permission to enter the houses on July 17 and 21, and suffered from command hallucinations and psychosis between July 14 and 21.

The jury convicted defendant of three counts of burglary and of resisting arrest. At the time set for sentencing, the court indicated its tentative sentence was to concur with the probation officer that defendant should be placed on probation and released to his family. Defendant stated he did not want to spend any more time in jail and would rather go to prison.

At trial counsel’s request, the court declared a doubt as to defendant’s mental competence and suspended the proceedings pursuant to section 1368. On March

24, 2014, based on the report filed by Dr. Kara Cross, the court found defendant was not presently able to understand the proceedings or to assist and cooperate in his defense. On May 2, 2014, pursuant to section 1370, the court ordered defendant sent to Patton State Hospital until his competency was restored. On September 19, 2014, the court found defendant's competency had been restored and reinstated the proceedings.

At the October 3, 2014 sentencing hearing, the court was inclined to sentence defendant to probation as recommended in the probation report. Defendant's trial counsel had reviewed the probation report with defendant, but defendant chose to reject probation, knowing he would be sent to prison and would be on parole when released. Defense counsel moved for dismissal of count 2 (on which the jury had hung) under section 1385 in furtherance of justice; the court granted the motion. The court inquired of defendant whether he understood the court could sentence him to probation on the remaining counts, which would mean he would be released that day. Defendant stated he understood, but was rejecting probation. Both the court and defense counsel agreed it was defendant's right to reject probation.

The court imposed the low term of two years for each of defendant's three burglary convictions, to be served concurrently, and awarded defendant 439 actual days plus 65 conduct days, for a total presentence credit of 504 days. The court suspended imposition of sentence on the resisting arrest misdemeanor conviction.

DISCUSSION

Pursuant to *Anders v. California* (1967) 386 U.S. 738, defendant's appellate counsel has suggested we review the entire record to determine whether defendant's three burglary convictions are supported by substantial evidence. We have done so. Residents of the three burglarized homes testified defendant entered their dwelling. Defendant admitted to a police officer that he intended to steal sandals, food, money, and the key to

a vehicle. The convictions are supported by substantial evidence, and the potential lack thereof is not reasonably arguable on appeal. Upon our independent review of the entire record we are unable to find an arguable appellate issue.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.