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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.

JUSTIN COLE POWELSON,

Defendant and Appellant.

G051485

(Super. Ct. No. 12WF2588)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Justin Cole Powelson of first degree burglary; entering a residence with the intent to commit theft. (Pen. Code, §§ 459, 460.)¹ The jury acquitted defendant of an underlying grand theft charge. (§ 487, subd. (a).) Because of this apparent inconsistency, defendant argues that his burglary conviction must be vacated. We disagree and find there was substantial evidence to support the residential burglary conviction.

Defendant also argues that trespass was a lesser included offense of the burglary as charged and therefore the trial court should have instructed the jury on the crime of trespass. (§ 602, subd. (k).) He is mistaken. The trial court did not commit instructional error. The judgment is affirmed.

I

FACTS

In September of 2012, Jacquelyn Kopp and her husband left their Huntington Beach townhome for the weekend to go to Las Vegas.

On Saturday, at about 5:00 p.m., Kopp received text messages from an unknown number. The person texting Kopp purported to be Heather Alexander, someone Kopp had known since childhood. The texts indicated that Alexander was in the area of Kopp's home and was having car problems. The texts indicated that Alexander was using a phone belonging to someone named "Justin," purportedly Kopp's neighbor. Kopp was unaware of any neighbor named Justin, nor did she know anyone by that name. Kopp texted that she was out of town. Kopp did not give Alexander or anyone else permission to be inside of her home while she was gone.

¹ All further statutory references will be to the Penal Code.

Sometime on Saturday, one of Kopp's neighbors, David Miranda, saw defendant standing in the doorway of the Kopp home with a backpack.² At about 2:30 a.m., another one of Kopp's neighbors, Esias Rodriguez, was returning to his home after being out with his wife. As the couple walked to their home, Rodriguez saw a man he had never seen before leaving the Kopp home. The man was dressed in black carrying a duffel bag and as he walked by the couple, he said, "That bitch in here is fucking crazy."

On Sunday, Kopp and her husband returned home about midday. When she entered, Kopp noticed that the television cabinet had been opened and "the Play Station was on like somebody was just there." She also noticed that there were used and cleaned dishes on the counter, "like someone had just made a meal." Kopp went back outside and told her husband that someone had been in their home. The couple then started looking around their home and noticed several things were missing: watches, a computer bag, a gift card, and a number of computer memory cards. The total value was about \$5,000.³ There were also several things left in the home that did not belong there including cigarette butts, water bottles, and laundry bags.

A crime scene investigator photographed the home, collected potential items of evidence, and dusted for prints. While trying to determine a point of entry, the investigator walked out of the kitchen through the back door into a patio area, which was surrounded by a six-foot-high fence with no gate. The investigator saw a metal-framed window leading to a downstairs bathroom. The investigator noticed that there was a screen within the window frame, but "the screen was sticking out just a little bit." The investigator removed the screen to get a better look at the window and noticed a smudged

² Miranda identified defendant in a six-pack photographic lineup. When Miranda pointed to defendant's picture he said words to the effect of "if it's any of these guys, it's him." However, Miranda recalled defendant having a darker complexion, and he was unable to identify defendant in court.

³ There was no dispute as to the value of the property.

hand and fingerprints on the sliding pane of the window. This indicated to the crime scene investigator that the window had been the probable point of entry because it was of an older type that could be opened by the use of force of hands. The lifted prints matched the defendant's palm print and fingerprints.

Huntington Police Department Detective Trent Tunstall did a records check and determined that the text messages purportedly sent by Alexander to Kopp were from a phone number previously used by defendant. Tunstall later interviewed defendant after he had been arrested. When Tunstall looked at defendant's cell phone, he saw the string of text messages that had been described by Kopp. Tunstall told defendant he was investigating a burglary. Defendant said that he had met Alexander at a nearby street, and he had gone with her to the Kopp home to have sex. Defendant said Alexander had told him that she was essentially house sitting. Defendant said he entered through the front door, was there briefly, and had no further contact with Alexander. When Tunstall asked defendant if his DNA or fingerprints would be found on any of the windows, he said they would not be found.

Tunstall then showed defendant the photos of his palm print and a fingerprint on the back window. Defendant then said that Alexander was not able to get in the front door so they unsuccessfully tried to open the back window. Defendant said he left and later returned, at which time Alexander let him in through the front door. Defendant said that Alexander told him that she was able to get into the home through an upstairs window. Defendant denied taking any property from the home.

At trial, defendant presented one witness, a Huntington Beach police officer who had stopped a vehicle about a month after the burglary. The officer had found some of the property that had been taken from the Kopp home. Defendant introduced court records showing that a man and a woman in the vehicle had each pleaded guilty to possessing stolen property. The man roughly matched the general height and weight

description of the burglary suspect that had been provided by one of the Kopp's neighbors.

The prosecution charged defendant in an information with first degree residential burglary (an entry "with the intent to commit larceny") and grand theft. (§§ 459, 460, subd. (a), 487, subd. (a).) The court instructed the jury as to both counts. Defendant did not request instructions on any other offenses. The jury convicted defendant of the residential burglary charge and acquitted him of the grand theft charge.

II

DISCUSSION

A. Burglary Conviction

Defendant argues that the jury's not guilty verdict on the grand theft charge requires that his burglary conviction be vacated. While defendant recognizes the general rule that permits inconsistent verdicts, he argues that this situation falls within a limited exception. He is mistaken.

"An accusatory pleading may charge two or more different offenses connected together in their commission . . . under separate counts. . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count." (§ 954.) A jury in a criminal case may feel compelled to return apparently inconsistent verdicts for a variety of reasons including lenity. (*Dunn v. United States* (1932) 284 U.S. 390, 393–394.) However, each count must stand on its own, and an acquittal on one count does not compel reversal any other count "if there is substantial evidence to support the conviction." (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657.)

Defendant is correct that there is a limited judicial exception to the rule allowing for inconsistent verdicts when "proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty." (*People v. Hamilton* (1978) 80 Cal.App.3d 124, 130, (*Hamilton*) overruled

on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481.) “This occurs, for example, where a conspiracy count alleges as the only overt act a crime set forth specifically in another count, and the defendant is found not guilty of the specific crime, but is found guilty of conspiracy; such an inconsistency invalidates the conspiracy conviction.” (*Hamilton*, at p. 130.)

Conversely, a burglary conviction does not depend on proof of any other crime. “One may be liable for burglary *upon entry with the requisite intent* to commit a felony or a theft . . . regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042, italics added.)

In other words, the jury’s acquittal on defendant’s grand theft charge has essentially no bearing on our review of his burglary conviction. It must stand or fall on its own. Therefore, we review the record as we normally do to determine whether there is sufficient evidence to support defendant’s burglary conviction.

As always, in reviewing a challenge to the sufficiency of the evidence, we examine the entire record in the light most favorable to the judgment and determine whether it discloses substantial evidence to support the jury’s finding. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Substantial evidence is that which is reasonable, credible, and of solid value. (*Ibid.*) We presume the existence of every reasonable fact and every reasonable inference necessary to support the finding. (*Ibid.*) Even if the circumstances reasonably support a contrary finding, reversal is not required so long as substantial evidence supports the jury’s verdict. (*Id.* at pp. 1053-1054.) ““This standard applies whether direct or circumstantial evidence is involved.”” (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.)

Generally, a person commits a residential burglary by entering a residence with the intent to commit either a theft or any felony. (§ 459.) Here, the People alleged defendant solely intended to commit theft. Thus, defendant’s burglary conviction must

be affirmed if the record reveals substantial evidence in support of two elements:

1) defendant entered a residence, and 2) when he entered that residence he intended to commit theft. (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261.)

Further, the prosecution presented two alternative theories of liability, either of which will support a conviction. Defendant's conviction will stand if there is substantial evidence that he acted either as a direct perpetrator or as an aider and abettor. (*People v. Davis* (1992) 8 Cal.App.4th 28, 45 [jurors need not unanimously agree on whether defendant is a direct perpetrator or an aider and abettor "even when different evidence and facts support each conclusion"].) "If the defendant himself commits the offense, he is guilty as a direct perpetrator. If he assists another, he is guilty as an aider and abettor." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

As far as the first element—an entry—there is direct and circumstantial evidence supporting defendant's conviction. The direct evidence: defendant told Tunstall that he had entered the Kopp home through the front door. The circumstantial evidence: the crime scene investigator found the screen to a back window had been disturbed and defendant's palm print and fingerprints were on the exterior. As a result, the crime scene investigator determined that this was the probable point of entry. Thus, the jury could have reasonably inferred that defendant entered the home either through the front door or the back window.

As far as the second element—an intent to commit a theft at the time of the entry—the People relied exclusively on circumstantial evidence, as is usually the case. "While the existence of such an intent at the time the entry [is] necessary, in order to sustain a conviction of burglary, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence." (*People v. Smith* (1948) 84 Cal.App.2d 509, 511-512.) Circumstantial evidence "such as theft of property from a dwelling may create a reasonable inference that there was intent to commit theft at the time of entry." (*In re Leanna W.* (2004) 120

Cal.App.4th 735, 741.) Indeed, the requisite intent for a burglary conviction may reasonably be inferred through an unlawful entry alone. (*People v. Wolfe* (1967) 257 Cal.App.2d 420, 425.)

Here, there is substantial evidence supporting a reasonable inference that defendant and Alexander unlawfully entered the Kopp home with the shared intent to commit theft. We need not restate every piece of evidence, but the following summary is adequate: the text conversation with Alexander communicated that the Kopps were out of town and that conversation was found on defendant's phone; defendant's palm print and fingerprints were found on a back window indicating that he made a forced entry into the home; defendant was seen leaving the home with a duffel bag and he was saying that he had just been in the home with a female; and when the Kopp's returned home it was in disarray and their property had been stolen. Moreover, defendant gave an incredulous and conflicting story to the police about his entry into the home once presented with the palm print and fingerprint evidence. This reasonably indicated defendant's consciousness of guilt regarding his intent at the time of the entry.

Defendant argues that his palm print and fingerprints were insufficient to sustain his conviction. But he cites to fingerprint-only cases such as *People v. Johnson* (1984) 158 Cal.App.3d 850, in support of his claim. Those cases are not helpful to defendant because there was evidence beyond his palm print and fingerprints to sustain his conviction.

Defendant also argues that the photographic lineup was unreliable because the witness said, "if it's any of these guys, it's him." While that identification may be somewhat equivocal, our task is not to reweigh the evidence or second guess the credibility determinations of the jury. In any event, defendant admitted to being in the Kopp home, so defendant's presence at the home was never really at issue.

In sum, there was sufficient evidence on both elements of the burglary charge to support the jury's verdict.

B. Instructional Issue

Defendant argues that the burglary offense as charged in the accusatory pleading necessarily included a trespass offense and the trial court should have so instructed the jury on its own motion. He is mistaken.

A judge has a sua sponte duty to instruct a jury on a lesser included offense if there is substantial evidence to support it. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) Basically, if it is not possible to commit offense “A” without also committing offense “B,” then the lesser offense “B” is necessarily included in the greater offense “A.” Conversely, a judge does not have a sua sponte duty to instruct on a lesser related offense that is not necessarily included in the charged offense. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) A lesser related offense is generally less serious than the charged offense, but it is in some way similar to, or transactionally related to the charged offense. “[U]nder the appropriate circumstances a court may choose to grant a defendant’s request for a lesser related instruction if substantial evidence supports the instruction and the prosecutor consents.” (*People v. Lam* (2010) 184 Cal.App.4th 580, 583.)

Courts “have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the ‘elements’ test and the ‘accusatory pleading’ test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.” (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

Under the elements test, it is “well settled that trespass is not a lesser . . . included offense of burglary.” (*People v. Birks, supra*, 19 Cal.4th at p. 118, fn. 8.) Generally, a trespass is an entry unto lands “for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any

lawful business or occupation carried on by the owner of the land, the owner's agent, or the person in lawful possession.” (§ 602, subd. (k).) Again, a burglary is an entry into a specified place with the intent to steal or commit a felony. (§ 459.) Accordingly, a burglary “can be perpetrated without committing any form of criminal trespass.” (*People v. Birks, supra*, 19 Cal.4th at p. 118, fn. 8.)

Under the accusatory pleading test, we look to the ““language describing the offense in such a way that if committed as specified [some] lesser offense is necessarily committed.”” (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) Here, the information charged defendant with entering the Kopp home “with the intent to commit larceny.” An intent to commit larceny is synonymous with an intent to commit theft. (See *People v. Fenderson* (2010) 188 Cal.App.4th 625, 640-641.) Simply put, defendant could have entered the Kopp's home with the intent to commit larceny or theft without also having an intent to commit a trespass under section 602. (See also *People v. Harris* (1961) 191 Cal.App.2d 754, 758 [“it cannot be said that the intent charged in the information, namely, an intent to commit theft, embraces any intent described in section 602, subdivision (j), namely, a purpose to injure property or property rights or an intent to interfere with, obstruct, or injure a lawful business ‘carried on by the owner of such land, his agent or by the person in lawful possession’” (fns. omitted)].)

In sum, an uncharged trespass offense was not necessarily included in the charged burglary offense under either the elements test or the accusatory pleading test. Additionally, defendant never requested a trespass instruction as a lesser related offense, the prosecutor never consented to such a request, and the trial court had no sua sponte duty to instruct on it. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344 [defendant has no federal constitutional right to compel giving of instruction on lesser related offense]; see *People v. Birks, supra*, 19 Cal.4th at pp. 117-118 [defendant charged with burglary was not entitled to instructions on lesser related offense of trespass; court may

not instruct on uncharged lesser related crime unless agreed to by prosecution].) Thus, the trial court did not commit instructional error.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.