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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN BOWIE et al., Defendants and Appellants.	B281581 (Los Angeles County Super. Ct. No. TA141442)

APPEAL from judgments of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Reversed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant Allen Bowie.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant Dominique Chambers.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Jurors found defendants Allen Bowie and Dominique Chambers guilty of using a fortified house to suppress law enforcement entry in order to sell cocaine base. Jurors acquitted defendants of the sale of a controlled substance and found a gang enhancement not true. We conclude the judgments of conviction must be reversed because the jury instruction on the use of a fortified house misidentified two of the three elements of the offense. The partial acquittal demonstrated that jurors did not credit all of the prosecution's evidence. The error was not harmless beyond a reasonable doubt. We reject Chambers's challenge to the sufficiency of the evidence.

BACKGROUND

Informant Randy Morris, who has an extensive criminal history, testified that while working as an informant, he purchased a controlled substance at a townhouse on Clovis Avenue on October 4, 2016. According to Morris, he knocked on the door, said "I need a dub," put money in a slot, and received "dope" from the slot. Morris testified that he heard a male voice, and saw the seller's fingers sufficiently to know that the seller was African American. Morris further testified that he gave the "dope" to the police, and subsequent tests showed that it was 0.39 grams of cocaine base.

Officer Richard Larson testified that he watched Morris purchase the cocaine base at the Clovis Avenue townhouse. He saw Morris knock on the door, slide money through a slot in the door, and receive something from the slot. Larson had given Morris prerecorded currency to make the purchase and had searched Morris to make sure that he did not have any currency or contraband prior to the interaction. According to Officer

Larson, just after Morris gave him the cocaine base, Larson notified other officers who served a search warrant.

According to Officer Saipele Tuialii, he served the search warrant on the front door, the only entrance to the townhouse. He announced "police" and heard footsteps running up the stairs, causing him to think that the occupants were destroying evidence. He testified that he attempted to gain entry using tools which generally allow entry in 10 to 15 seconds. According to Officer Tuialii, he was unable to gain entry, and did not enter until approximately five minutes later when Bowie opened the door. Chambers was the only other person inside the townhouse.

Officer Tuialii searched the townhouse, and testified that he found the following in the kitchen: over 20 empty sandwich bags, additional sandwich bags with residue consistent with cocaine base, and a razor containing a white powdery substance. While there was a pizza in the refrigerator, there was no other food in the kitchen, and the kitchen cabinets were empty. The townhouse contained only minimal furnishings and minimal toiletries. There was no indication that it was either Bowie's or Chambers's residence. There was a chair in front of the entrance door in a very small entryway. The position of the chair blocked an interior door.

The prerecorded currency given to Morris was not found despite a thorough search of the townhouse. Other currency totaling $221 was found on the floor.

It was undisputed that the door at the Clovis Avenue townhouse was fortified. It was made of heavy gauge metal. Large metal bolts held the door to the surrounding structure. The door had replaced another, which was found in a bedroom. Only one of the four bedrooms had a bed.

Officer Francis Coughlin testified about the Bounty Hunter Blood gang. According to Officer Coughlin, gang members commit crimes including "selling dope." The Bounty Hunter Blood gang makes the majority of its money through narcotic sales. The Clovis Avenue townhouse was in an area claimed by a gang associated with the Bounty Hunter Blood gang. Officer Coughlin knew defendant Bowie for over a decade and testified Bowie was an active member of the Bounty Hunter Blood gang.

Officer Nicholas Casey testified that the most common criminal activity of the Bounty Hunter Blood gang was selling narcotics. According to him, the sale of narcotics provided income for the gang. Officer Casey testified that "Bounty Hunters are known for using a team of between two and four gang members working together selling narcotics [from] inside a building." Officer Casey also testified that gang members often used fortified doors to facilitate narcotic sales. He further explained that the sale of narcotics benefits a gang because it provides employment to gang members and permits the gang members free time to commit other crimes. It would be "almost impossible" for one gang member to sell drugs from a house without telling other present gang members. Based on his contacts with defendant Chambers, Officer Casey opined that Chambers was a member of the Bounty Hunter Blood gang.

PROCEDURE

Bowie and Chambers were charged with the sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and the use of a fortified space designed to suppress law enforcement entry to sell a controlled substance (Health & Saf. Code, § 11366.6 (section 11366.6)). A gang enhancement pursuant to Penal Code section 186.22, subdivision (b)(1)(A) was alleged with

respect to both counts. It was alleged that Bowie suffered five prior convictions within the meaning of Penal Code section 667.5, subdivision (b).[1]

The court instructed jurors on the elements of the use of a fortified space. It is undisputed that the instruction did not accurately describe the elements of the offense. The prosecutor argued to jurors based on the court's instruction.

Jurors found that defendants used a fortified space in violation of section 11366.6. Jurors found defendants not guilty of selling a controlled substance and found the gang enhancement not true. Bowie admitted to suffering five prior convictions within the meaning of Penal Code section 667.5, subdivision (b).

The court sentenced Bowie to six years in county jail. The court sentenced Chambers to four years in county jail. This appeal followed.

DISCUSSION

Defendants argue that the jury instruction identifying the elements of utilizing a fortified house was incorrect and prejudicial. Respondent concedes that the instruction was erroneous but argues the error was harmless beyond a reasonable doubt. The parties dispute whether substantial evidence supported Chambers's conviction for using a fortified door.

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[1] It was alleged that Bowie suffered two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a) and Penal Code section 1203.07, subdivision (a)(11). However, those priors were relevant only if Bowie had been convicted of the sale of a controlled substance.

1. The Instructional Error Prejudiced Defendants

Section 11366.6 provides: "Any person who utilizes a building, room, space, or enclosure specifically designed to suppress law enforcement entry in order to sell, manufacture, or possess for sale any amount of [designated controlled substances] shall be punished by imprisonment . . . for three, four, or five years."

Without the benefit of a standardized and settled CALCRIM instruction for the charged offense, the trial court instructed jurors that defendants violated section 11366.6 if the People prove that:

"1. The defendants *opened* or utilized the location of [the townhouse at] Clovis Avenue, Los Angeles, CA;

"2. The defendants did so with the specific intent to sell, *give away*, manufacture, or possess for sale cocaine base;

"AND

"3. That place was specifically designed and fortified to suppress law enforcement entry, in order to sell cocaine base." (Italics added.)

Based on this jury instruction, the prosecutor argued that "[t]he elements of this [offense] is [*sic*] defendants *opened* or utilized in this case the . . . Clovis Ave. [townhouse]. They did so with the intent to sell, *give away*, manufacture, or possess for sale cocaine base and that place . . . was specifically designed and fortified to suppress law enforcement entry in order to sell cocaine base." (Italics added.) The prosecutor further argued that "[w]hat it says is that they either opened it or utilized it, meaning they were using this location. They were present. They were in the building. They were using it."

On appeal, it is undisputed that the italicized language in the instruction is inconsistent with the statute. It is also undisputed that an instructional error that improperly describes an element of an offense must be evaluated to determine if the error was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 475, 502-503.)

The parties dispute whether defendants suffered prejudice. Defendants argue that the instruction was prejudicial because the broadened definition allowed jurors to convict defendants on a legally incorrect theory. Respondent argues that the error was harmless beyond a reasonable doubt because "the evidence showing that appellants Chambers and Bowie utilized a fortified house with the specific intent to sell drugs was of 'compelling force.' " As we shall explain, we conclude the error was prejudicial.

" 'When one of the theories presented to a jury is legally inadequate, such as a theory which " 'fails to come within the statutory definition of the crime' " [citation], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless "it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." [Citation.]' " (*People v. Franco* (2009) 180 Cal.App.4th 713, 725.)

The fact that jurors could have convicted defendants on elements other than those identified in the statute is significant. Specifically, jurors could have convicted defendants if they concluded that defendants gave away contraband in contrast to

selling it. Another jury instruction defined "selling" as "exchanging a controlled substance for money, services, or anything of value." In contrast to exchanging for something of value, "giving away" does not require the receipt of something of value in return.[2] In light of the jurors' conclusion that defendants were *not* guilty of selling a controlled substance, jurors could have concluded that defendants gave Morris the cocaine base. The undisputed fact that officers never recovered the $20 Morris allegedly paid defendants further supported that inference.

In addition to adding the phrase "give away," the jury instruction also added the word "open." As the parties agree,

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[2] Respondent incorrectly argues that the case law holds that the sale of contraband is equivalent to a gift of contraband. A sale may include " 'transfers other than for money' " (*People v. Peck* (1996) 52 Cal.App.4th 351, 357), but none of the authority cited by respondent equates a sale with a gift. For example, in *People v. Franco, supra*, 180 Cal.App.4th 713, the court considered Health and Safety Code section 11366, not section 11366.6. Health and Safety Code section 11366 provides: "Every person who opens or maintains any place for the purpose of unlawfully selling, *giving away*, or using any controlled substance . . . shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison." (Italics added.) *Franco* interpreted a statute that included "giving away;" it did not hold that "giving away" was the same as "selling." Moreover, the use of both "selling" and "giving away" in Health and Safety Code section 11366 undermines respondent's argument that the terms have the same meaning. If they did, section 11366 would be redundant. (*People v. Valencia* (2017) 3 Cal.5th 347, 357 [statutory construction requires " 'accord[ing] significance, if possible, to every word, phrase and sentence' "].)

"open" differs from "utilize." *People v. Franco*, *supra*, 180 Cal.App.4th at page 721, defined "open" to mean " ' "to make available for entry" or "to make accessible for a particular purpose"[.]' " (*Id.* at pp. 721-722.) Opening a place means making it available or accessible to others. (*Ibid*.) In this context, opening must be based on more than a single sale; it must include successive illicit conduct. (See *People v. Hawkins* (2004) 124 Cal.App.4th 675, 682; *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) Based on the given instruction, jurors could have improperly convicted defendants if they concluded defendants opened the townhouse with the intent to give away cocaine base.

In short, the record does not support respondent's argument that "[i]t is beyond a reasonable doubt that the jury reached its verdict because" defendants " 'utilized' the fortified house" to sell cocaine base. Although this would have been a legally correct theory on which jurors could have based their conviction, we cannot ascertain that it was the basis for their verdict. (See *People v. Johnson* (2015) 61 Cal.4th 734, 774 [reversing special circumstance theory when jurors given erroneous instruction and court could not determine basis for jury verdict].)

Significant to this conclusion is the jury's acquittal of both defendants of the sales charge, which undermines respondent's argument that the evidence overwhelmingly showed defendants used the townhouse to sell cocaine base. Because the instructional error was not harmless beyond a reasonable doubt, both Chambers's and Bowie's judgments of conviction must be

reversed.[3] (See *People v. Ngo* (2014) 225 Cal.App.4th 126, 154-155 [reversing conviction where improper jury instruction prejudiced defendant].)

2. Substantial Evidence Supported Chambers's Conviction

Chambers argues that mere presence at the scene of a crime is insufficient to support his criminal conviction for utilizing a fortified space, and the prosecution offered nothing more. According to him, his conviction must be reversed for lack of sufficient evidence.

The standard of review of a challenge to the sufficiency of the evidence is well established. "[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also

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[3] Because the judgments are reversed, the issue whether the court correctly imposed a laboratory analysis fee is moot.

reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

Chambers is correct only insofar as he argues that mere presence is insufficient to support a criminal conviction. As Chambers argues, presence is insufficient to show constructive possession of a controlled substance. (*People v. Johnson* (1984) 158 Cal.App.3d 850, 854.) More importantly for purposes of this case, section 11366.6 requires the *utilization* of a building, room, space, or enclosure, not simply a person's presence in it.

Here, the evidence supported the conclusion that Chambers utilized the townhouse to sell a controlled substance. The townhouse did not appear to be anyone's residence as evidenced by the dearth of furniture, food, and clothing. This evidence supported the inference that Chambers was not merely present in the house but was using the townhouse to sell a controlled substance. Other evidence also supported that inference. There were many plastic baggies in the kitchen, and some had residue of cocaine base. A razor was found in the kitchen, where the cabinets were all empty. The front door, which was the only entrance, had a slot designed for the transfer of controlled substances. Additionally, a chair had been placed directly in front of the fortified door. The jury heard expert gang testimony that Bounty Hunters generally sold drugs in teams of two or more, and there was evidence that both defendants were members of that gang. Additionally, Chambers did not immediately open the door when officers knocked but instead allowed time for possible disposal of evidence. Chambers's self-portrayal as a mere occupant present but uninvolved in the use of the townhouse is not the sole available inference from the

evidence.[4] A reasonable trier of fact could have concluded Chambers used the fortified house to sell cocaine base.

DISPOSITION

Bowie's judgment of conviction is reversed. Chambers's judgment of conviction is reversed.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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[4] Because we conclude that the judgment must be reversed we need not consider the parties' remaining arguments.

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.