Filed 10/11/16 P. v. Humphry CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD HUMPHRY, Defendant and Appellant.	B263812 (Los Angeles County Super. Ct. No. NA099261)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesus I. Rodriguez, Judge. Affirmed; remanded with directions.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant James Edward Humphry[1] of first degree residential burglary (Pen. Code, § 459; count 1),[2] and first degree attempted residential burglary with a person present (§§ 664, 459, 667.5, subd. (c); count 2). Appellant admitted two prior strike convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subd. (b)), and two prior serious felonies (§§ 667, subd. (a)(1)). He was sentenced to state prison for a total of 73 years to life as follows: On count 1, 25 years to life plus two consecutive five-year terms for the serious felony priors; on count 2, 25 years to life plus two consecutive five-year terms for the serious felony priors, plus a consecutive three-year enhancement for the person present allegation.

Appellant contends (1) there was insufficient evidence to support his conviction on count 2 for attempted burglary, (2) the trial court erroneously instructed the jury on attempted burglary, and (3) the three-year enhancement on count 2 must be stricken. We agree with appellant's third contention, but otherwise affirm the judgment.

FACTS

Prosecution Case

Charged Acts (May 19, 2014)

Clark Terrace is a three-building condominium complex located on Clark Avenue in Long Beach, California. Each of the buildings contains 30 units and the buildings are connected by bridges. On May 19, 2014, Jocelyn Mack (Mack) moved into her condominium unit on the third floor of building 1655. She watched her belongings being moved to make sure no one took her things out of the elevator. For about three minutes, Mack saw appellant pacing up and down the corridors on the third floor, looking around, and coming near the elevator where her belongings were placed. Mack knew appellant did not live in any of the units on the third floor of building 1655 because she knew the people who lived there.

---

[1] While appellant spelled his last name in court as "Humphrey," he is referred to as "Humphry" throughout the record. We therefore use the latter spelling.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

Around 1:30 p.m. the same day, appellant rang the doorbell of unit 303 on the third floor of building 1635 in the complex. Gloria Jackson (Jackson) had lived in that unit since 2001, served on the board of the homeowners' association, and was familiar with many of her neighbors. When Jackson opened the door, appellant told her that he had met her grandson over the weekend. Jackson told him there was "no way" he could have met her grandson because one lived in Las Vegas and the other was only 10 years old. Appellant also told Jackson that he lived in unit 101. Jackson thought this was strange because she knew the two men who lived in unit 101 were fair skinned and appellant is black. Jackson asked appellant to take a grocery cart "back down." Appellant asked where to take it and Jackson told him to use the elevator down to the garage. Appellant left with the cart.

Jackson called her neighbor, Gloria Atkinson (Atkinson), who lived on the first floor of building 1635 to report the encounter. Atkinson asked if the man had been wearing an olive green shirt and a gold chain because she had seen a man dressed like that walking on the bridge toward their building. Atkinson had also noticed an unfamiliar car in the visitor's parking lot. Atkinson decided to watch for the man to leave.

About 30 to 40 minutes later, Atkinson saw appellant walking back across the bridge away from her building carrying a flat screen TV with a golf bag over his shoulder. Atkinson called Jackson, who told her to record the license plate of the unfamiliar car, which Jackson described as a green convertible with a brownish top. Atkinson, Jackson and Mack each saw appellant place the items in the car. Appellant saw Atkinson watching him, smiled and waved at her, and Atkinson returned his wave. Atkinson also recorded his license plate, which she later reported to the police.

After appellant drove out of the complex, Atkinson and Jackson looked briefly around their building for signs of a break-in, but did not see any. They decided not to call the police, unless someone reported things missing.

When Blanca Almeida (Almeida) returned home from work about 6:30 or 7:00 p.m., she started packing for a trip and noticed that things were missing from her condominium, including a flat screen TV, a golf bag and clubs, pieces of jewelry, a

camera, and a small bottle of perfume. She called Jackson. The police arrived later and interviewed Almeida and Atkinson.

On May 27, 2014, Long Beach Police Officer Maria Clay ran the license plate number provided by Atkinson. It belonged to a green Camaro with a tan rag top that was registered to an apartment address in Long Beach. Officer Clay went to the address and found appellant inside an apartment unit. Appellant denied that he was at Almeida's condominium complex and said he did not know anyone who lived there. He said he was working at a warehouse at the Port of Long Beach at the time of the burglary, but he might have driven by Almeida's condominium complex because his girlfriend attended Long Beach City College. The Camaro was registered to his girlfriend, and both he and his girlfriend drove the car.

Officer Clay searched the apartment and found jewelry, a green polo T-shirt, and a television set. A Ziploc bag inside a suitcase held watches, necklaces, and other pieces of jewelry.

Uncharged Acts

On the morning of May 14, 2014, Rashad Khalilov left his apartment on Warner Avenue in Huntington Beach, California and went to work. His apartment was in a large complex of buildings with more than 100 units. He locked the front door, but he left the sliding door on the balcony a little open because of the warm weather. When he returned home around 6:00 p.m., his television was missing, as well as his laptop, a tablet, some cash, and an iPhone. The police discovered that appellant had pawned the iPhone at a pawn shop in Long Beach.

On May 20, 2014, Dora Jover (Jover) lived in a condominium complex also on Warner Avenue in Huntington Beach. Around 10:50 a.m., someone rang Jover's doorbell nonstop for about a minute, but she was not feeling well and did not answer it. She then heard a rattling sound from her bedroom window and saw someone trying to climb into her condominium through the window. The screen had been taken down and the shutters were pushed in. Jover saw a black man and yelled at him. He ran away.

Security cameras at Jover's condominium complex recorded appellant driving into and out of the complex around the time the person tried to break into her home.

Defense Case

Appellant testified in his defense. On May 19, 2014, around 1:00 p.m., he was at Almedia's condominium complex to meet a friend who lived in unit 101. When he arrived, appellant called his friend, who did not answer the phone. Appellant asked a mover to let him into the complex. Appellant knocked on his friend's door, but no one answered, and appellant left the complex. Appellant denied going to the third floor where Jackson lived. He believed Jackson identified him as the person who rang her doorbell because he was the only person sitting at the defense table.

On May 20, 2014, appellant was in the area where Jover's condominium was located to buy liquor from a friend. His friend lived in an apartment complex with two gates, one to enter and the other to exit. The car shown in the video surveillance belonged to him and he was the driver. Appellant denied knocking on any doors in Jover's condominium complex. After he left the complex, appellant went to a gas station. He bought an iPhone from a man at the gas station for $10 and a bottle of wine. Appellant kept the phone for a few days and eventually took it to a pawn shop.

Appellant denied that he was involved in the thefts of Almeida and Khalilov's possessions. He claimed that his mother gave him the jewelry that was recovered inside the suitcase.

DISCUSSION

I. Substantial Evidence

Appellant contends the evidence was insufficient to support his conviction for the attempted burglary of Jackson's home (count 2), because there was no showing that he had a definite and unambiguous intent to enter Jackson's home prior to the time she answered the door.

A. Standard of Review and Applicable Law

A defendant raising a claim that the evidence was insufficient to support his conviction bears a "massive burden" because this court's "role on appeal is a limited

one." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) "'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Hoang* (2006) 145 Cal.App.4th 264, 275.) We do not reweigh evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence, as these functions are reserved for the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) If the findings of the trier of fact are reasonably justified by the record, our opinion that the evidence could be reasonably reconciled with a contrary finding does not merit reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

"Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "The overt act element of attempt requires conduct that goes beyond 'mere preparation' and 'show[s] that [defendant] is putting his or her plan into action.'" (*People v. Watkins* (2012) 55 Cal.4th 999, 1021; CALCRIM No. 460 ["A direct step indicates a definite and unambiguous intent to commit [burglary]. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt"].)

B. Analysis

Appellant argues that because his modus operandi was to burglarize only unoccupied homes, he never formed the intent to enter Jackson's home to commit theft because she answered the door.

As appellant notes in his reply brief, two courts recently published cases deciding essentially the same issue presented here: *People v. Zaun* (2016) 245 Cal.App.4th 1171 (*Zaun*) (Third Appellate District), review denied and *People v. Weddington* (2016) 246 Cal.App.4th 468 (*Weddington*) (Second Appellate District, Division One), review denied. Appellant acknowledges these courts upheld convictions for attempted burglary where the defendants knocked on doors, but urges us to find the reasoning of both decisions flawed. We decline to do so.

In *Zaun*, the defendant was convicted of burglary, attempted burglary, and receiving stolen property. Defendant and his three companions committed a series of residential burglaries with the same modus operandi: One of them knocked on the door or rang the doorbell, and if no one answered they would enter and steal from the home. (*Zaun, supra,* 245 Cal.App.4th at p. 1173.) On two occasions, one of the defendant's companions went to knock on the door to see if someone was home while the others waited in the car, and they left when someone answered the door after a brief exchange. (*Ibid.*) On appeal, the defendant challenged the sufficiency of the evidence to support his two convictions for attempted burglary on the ground that he and his companions did not have the specific intent to enter the homes because the presence of a person in each home "'was not an intervening circumstance that frustrated an attempt, but the failure of a condition precedent to forming the intent.'" (*Ibid.*)

The *Zaun* court rejected the defendant's claim that an unoccupied residence was a condition precedent to forming the intent to steal. (*Zaun, supra,* 245 Cal.App.4th at p. 1174.) The court noted the defendant had participated in three completed burglaries with the same modus operandi. (*Ibid.*) The court also stated: "While a jury might have concluded that defendant and his associates did not form the intent to burglarize the homes until they determined the homes were unoccupied, that was not the only

reasonable conclusion available to the jury. A jury could also reasonably conclude, as we presume the jury did here, that defendant and his associates had the intent to enter the homes and commit theft when they went to the front door and only abandoned that intent when someone answered the door. Under that scenario, defendant and his associates had the specific intent to commit burglary in each case, and the appearance of the [occupants] at their respective doors served to interrupt the intended crimes, making the actions up to that point ineffectual acts done toward the commission of burglaries. These are logical inferences that this court must accept on review." (*Ibid*.)

Similarly, in *Weddington*, the court upheld the defendants' attempted burglary convictions. The court rejected the argument that the defendants' conduct of approaching and knocking on the front door of each of the targeted homes amounted to no more than preparation to commit burglary. The court found this approach focused too narrowly on the evidence without viewing the entire record, including the reasonable inferences to be drawn from the evidence supporting the judgment. (*Weddington*, *supra*, 246 Cal.App.4th at p. 480.) The entire conduct of the defendants supported the jury's verdicts—the defendants drove significant distances from their homes in south Los Angeles to the San Fernando Valley with burglary tools in their car, drove slowly through the targeted neighborhoods, parked in front of certain houses, knocked on the front doors of the houses, and peered over gates. (*Id*. at p. 480.) This "was not the behavior of an innocent visitor to a neighborhood." (*Ibid*.)

Here, the jury could also reasonably conclude that appellant had the specific intent to steal from Jackson's home when he rang her doorbell but abandoned the intent to enter and steal when she answered the door. The evidence showed that appellant "cased" the buildings of Jackson's condominium complex by walking up and down the third-floor hallway of the 1655 building, where Mack lived. But he did not have an opportunity to enter any unit in that building because Mack was watching him. Subsequently, Atkinson saw appellant walk across the bridge between the 1655 building and the 1635 building, where Jackson and Almeida lived. Appellant rang Jackson's doorbell. When Jackson answered the door, appellant gave her a phony story about meeting her grandson and

falsely claimed to live in unit 101. When Jackson asked him to return the grocery cart, he did not know where it belonged. Thereafter, Atkinson and Jackson saw appellant carrying items from Almeida's unoccupied unit and placing them into his car before driving away. The jury clearly rejected appellant's testimony that he was at the condominium complex to meet a friend and reasonably concluded that he had no legitimate business being there. The evidence showed that the following day, appellant used the same modus operandi in nearby Huntington Beach when he rang the bell on the front door of Jover's condominium. When she did not answer, he attempted to climb through her window and only ran off when she yelled at him. The jury here reasonably concluded that based on appellant's modus operandi, casing the adjacent condominium building, approaching Jackson's door and ringing her doorbell were all steps toward committing a burglary and not merely preparation for the crime that would have succeeded but for Jackson's presence in the home.

We reject appellant's additional argument that the prosecutor "[a]ccepted" that appellant did not form the intent to burglarize a home until after checking to see if anyone was home. Appellant cites to the prosecutor's comments in opening statement:

"[Appellant] figures out whether or not someone is home. Does that various ways, but one way is to ring the doorbell. As he does this, he determines if someone is home. If someone is not home, he finds out if there is a point of entry. Where there is a point of entry, he makes entry, and he burglarizes the residence."

Appellant also cites to the prosecutor's statements in closing argument: "He went up to [Jackson's] door, rang the doorbell. And when he rang the doorbell to find out whether or not someone was home, whether or not he had a good target, Miss Jackson opened the door. . . . [¶] . . . [¶] . . . His real intention, the real reason he was doing that was to figure out whether or not someone was home."

But the prosecutor later said the following:

"Now, count 2, attempted residential burglary. This is a little bit different.

"Did he take a step, a direct or [ineffective] step, towards committing the burglary? As I said before, you have the long version of the instructions. Refer to those if

you have any questions. But, basically, did he take a step, and did he intend to commit the burglary? If he did, he's guilty.

"Well, did he? He did take a step. This wasn't planning or maybe I'll do it; maybe I won't; maybe I'll burglarize a home. This wasn't just planning. He went there. If he just went there with the intent, that would be enough, but he went there, and then he started scoping. When he started scoping and thought, oh, maybe this condo is empty, he went up, and he rang the doorbell. Those are actual multiple steps in trying to commit this crime. He doesn't have to make it in. It could be an ineffective step. It could be a step that failed miserably. If he is trying to, if he does any step, that is a direct step that he's trying to commit this burglary. He commits an attempt. That's why it is called an attempt. He attempted to.

"Did he do that in this case? Yes. He attempted by going up to Miss Gloria Jackson's home, pressing that doorbell and seeing if anyone was home. Did he intend to commit a burglary? Yes. You know that, 1, he had no reason to be there; 2, why is he going to unit 303; 3, all the statements he made to Miss Jackson did not make sense. He had no legitimate reason to be there. So he would be guilty."

Taken in context, the prosecutor's statements show that the prosecutor was making the argument that appellant had the intent to commit burglary before he rang Jackson's doorbell. In any event, the prosecutor referred the jury to the instructions on attempted burglary.

II. Jury Instructions

Appellant contends the trial court committed prejudicial error and denied him his constitutional rights when it failed to instruct the jury with a necessary element of attempted burglary. Specifically, appellant argues that the court's failure to limit the target offense to the *burglary of Jackson's home*, rather than *burglary*, was misleading and allowed the jury to convict him "if ringing Jackson's doorbell was part of an overall plan to commit some burglary at the condominium complex that day."

The jury was instructed with CALCRIM No. 460 as follows:

"The defendant is charged in Count 2 with attempted burglary.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant took a direct but ineffective step toward committing burglary;

"AND

"2. The defendant intended to commit burglary.

"A direct step requires more than merely planning or preparing to commit burglary or obtaining or arranging for something needed to commit burglary. A direct step is one that goes beyond planning or preparation and shows that a person is putting his plan into action. A direct step indicates a definite and unambiguous intent to commit burglary. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

"A person who attempts to commit burglary is guilty of attempted burglary even if, after taking a direct step towards committing the crime, he abandoned further efforts to complete the crime or if his attempt failed or was interrupted by someone or something beyond his control. On the other hand, if a person freely and voluntarily abandons his plans before taking a direct step toward committing burglary, then that person is not guilty of attempted burglary.

"To decide whether the defendant intended to commit burglary, please refer to the separate instructions that I will give you on that crime.

"The defendant may be guilty of attempt even if you conclude that burglary was actually completed."

We find no error because the jury was not misled. First, the prosecutor told the jury during closing argument that count 2 related to Jackson.[3] Second, the verdict form for "Guilty" on count 2 specifically told the jury it had to find that appellant "attempted

---

[3] The prosecutor stated: "Count 1, residential burglary; count 2, attempted residential burglary. The first one related to Miss Almeida. The second one relates to Miss Jackson, who opened the door."

to enter an inhabited dwelling home of GLORIA JACKSON, with the intent to commit theft." Thus, it was clear to the jury that appellant was required to have the intent to burglarize Jackson's home.

III. Enhancement

Appellant contends, and the People agree, that the trial court should not have imposed the three-year enhancement on count 2 pursuant to section 667.5, subdivision (c)(21) because it used the same prior felony conviction to impose the two section 667 five-year enhancements.

The parties are correct that the same prior felony conviction cannot be used to enhance the sentence under both sections 667 and 667.5 in this case. Appellant did not admit and the prosecution did not prove that the two prior first degree burglary convictions were violent felonies under section 667.5, subdivision (c)(21) (requiring that "it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary"). Before a defendant can be sentenced to increased penalties from the finding of fact of a prior conviction, the allegation must be charged in the accusatory pleading and either admitted to by the defendant or found true by the trier of fact. (§ 1170.1, subd. (e); *People v. Ford* (1964) 60 Cal.2d 772, 794; *People v. Lara* (2012) 54 Cal.4th 896, 904.) Section 667, subdivision (a)(1) subjects a defendant who is convicted of a serious felony to a five-year enhancement for each prior serious felony conviction. To impose a three-year enhancement pursuant to section 667.5, subdivision (a), both the defendant's new offense and prior felony conviction must be violent felonies under section 667.5, subdivision (c).

Here, the information alleged that appellant had suffered two prior first degree burglary convictions that were serious felonies under section 667, subdivision (a)(1). But the information did not allege, nor was it proven or admitted, that appellant's two prior first degree burglary convictions included a finding that another person, other than the accomplice, was present in the residence during the commission of the burglary. Accordingly, the three-year enhancement under section 667.5, subdivision (c)(21) was unauthorized and must be stricken.

DISPOSITION

The matter is remanded. The trial court is ordered to strike the three-year enhancement under section 667.5, subdivision (a) on count 2, and forward a corrected copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT