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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ARTURO MEJIA,

Defendant and Appellant.

2d Crim. No. B231932
(Super. Ct. No. GA076078)
(Los Angeles County)

Jorge Arturo Mejia appeals from the judgment following his conviction by jury of attempted murder, assault with a deadly weapon, shooting at an occupied vehicle, and two residential burglaries. (Pen. Code, §§ 664/187, subd. (a); 245, subd. (a)(1); 246; 459.)[1] The jury also found true the allegation that in committing the attempted murder, appellant personally used and intentionally discharged a handgun (§ 12022.53, subd. (c)). The trial court sentenced him to state prison for 29 years 8 months. Appellant contends that the court erred because it did not instruct the jury sua sponte on the lesser included offense of attempted burglary and that the abstract of judgment contains three incorrect dates. We remand with directions to correct the abstract of judgment and otherwise affirm the judgment.

[1] All statutory references are to the Penal Code.

BACKGROUND

November 19, 2008 Burglary[2]

Prosecution Evidence

In 2008, Lauren and Jerry Shen shared a two-bedroom home. They kept their doors and windows locked when they were away, and Lauren checked the windows on a weekly basis. They used the spare bedroom on the west side of their home as an office.

On November 19, 2008, a weekday, Jerry left their home first. Before leaving at about 8:00 a.m., Lauren opened the curtains on the office window, as she did daily. She "did not notice the screen missing that morning." She also checked and locked the doors before she left.

Lauren returned home on November 19, between 5:00 and 5:30 p.m. She found a cut in the screen on the door adjacent to the driveway, on the east side of the house. The alarm system had not been activated that day. Concerned, she called Jerry and asked him to come home. It was dark outside, and she waited for him inside.

While waiting for Jerry, Lauren checked the house interior but found no broken windows. When Jerry arrived, he checked the exterior of the house. The screen that always covered the office window was leaning against the side of the house. There was a small tear in that screen, and Jerry saw fingerprints and handprints on the window. When Lauren viewed that window from the exterior, she noticed that it was dirty and dusty, and had visible fingerprints.

Jerry testified that before November 19, he had not seen the office window without a screen. That window is on the side of the house where he often spends time on weekends, while gardening and retrieving balls for the neighbors'

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[2] Because appellant's instructional error claim involves only this offense, we omit facts concerning the other offenses.

children. He did not recall the specific date when he last saw the office window with its screen in place, or whether he was on that side of the house on the weekend immediately before November 19. Lauren testified that they never removed that screen to clean the window.

Pasadena Police Department (PPD) forensic specialist Alex Padilla dusted the outside of the Shens' office window for fingerprints and recovered three latent prints. Dave Miranda, a PPD latent print examiner, examined those prints and concluded that they belonged to appellant. PPD forensic specialist Danielle Biglin testified at trial. Biglin compared appellant's fingerprints with the latent prints from the Shens' office window and verified Miranda's conclusion that the prints belonged to appellant. At least two other specialists also verified Miranda's conclusion.

Defense Evidence

Appellant testified at trial. When the prosecutor questioned him about the 2008 burglary of the Shens' home, he responded, "I have drug problems and I don't remember that happening to me."

DISCUSSION

Appellant contends that the trial court committed prejudicial error by failing to instruct the jury sua sponte on the lesser included offense of attempted burglary for the Shen burglary, because the evidence presented a question whether he entered the Shen residence and committed burglary, or merely attempted to do so. We disagree.

Trial courts are required to instruct sua sponte on a lesser included offense when the evidence presents a question whether all the elements of the charged offense are present, and there is evidence that would justify conviction of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Appellant recognizes that "when a screen is attached to the window frame, it becomes the outer boundary of a building and that if a person goes beyond the

screen, a burglary has been completed." He asserts that "the jury could have found that [he] did not remove the screen, but rather found it already on the ground," and convicted him of the lesser attempt offense, because "if he touched a window that did not have a screen, then the window itself would have been the outer boundary of the house and not the screen." However, there was not evidence that would justify conviction of the lesser offense of attempted burglary of the Shens' home. (*Ibid*.)

At trial, appellant neither requested an attempted burglary instruction regarding the Shen burglary, nor argued to the jury that the evidence might support an attempted burglary of the Shens' home. For example, he did not argue that the prosecution showed only that he touched the Shens' window, but failed to show that he removed the window screen and thus entered their home unlawfully by crossing its outer boundary. Instead, his argument challenged the integrity of the fingerprint evidence, suggesting that the prosecution had failed to prove that he was at their home.

Moreover, the evidence eliminated any reasonable possibility that the jury could have found that appellant did not remove the screen from the Shens' office window to penetrate the outer boundary of their home. Lauren Shen testified that they never removed the screen to wash the office window. She recalled that on the morning of the burglary, she opened the curtains on the office window and did not notice that the screen was missing. That night, Lauren and Jerry found the office window screen leaning against the house, and saw handprints and fingerprints on the window. Those prints belonged to appellant.

There is no reasonable probability that appellant would have obtained a more favorable result had the trial court given a lesser included instruction on attempted burglary. Thus, any error in failing to give that instruction is harmless. (*People v. Flood* (1998) 18 Cal.4th 470, 490.)

Appellant and respondent agree that the abstract of judgment incorrectly states that counts 3 (residential burglary), 4 (assault with a deadly weapon) and 6 (shooting at an occupied vehicle) occurred in 2008, while the record shows that they occurred in 2009. We will direct the trial court to amend the abstract of judgment to reflect that counts 3, 4 and 6 occurred in 2009.

DISPOSITION

The trial court shall amend the abstract of judgment to reflect that counts 3, 4 and 6 occurred in 2009, and transmit a certified copy to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Michael D. Carter, Judge

Superior Court County of Los Angeles

Katharine Greenebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay, Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.