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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA HERNANDEZ, Defendant and Appellant.	B232673 (Los Angeles County Super. Ct. No. BA369107)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed in part and reversed in part.

Maggie Shrout, 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, Scott A. Taryle, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Joshua Hernandez appeals his conviction for two counts of burglary of a house occupied by students near the University of Southern California. (Pen. Code, § 459.)[1] He contends (1) the evidence supports conviction for only one burglary charge because although the students had their own rooms in the house, there was no evidence they kept their doors locked and had separate expectations of protection from unauthorized entry into their rooms, and (2) the trial court erred in instructing the jury on a legally incorrect theory of burglary, thus requiring reversal of his conviction on the second count of burglary. We reverse defendant's conviction on count two, and affirm on count one.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 22, 2009, defendant burgled a single-family residence shared by several nonfamily college students. Defendant took a television set from one bedroom, and a cell phone from the kitchen. In a December 2, 2010 information, defendant was charged with two counts of burglary. The information further alleged a prior rape conviction as a strike (§ 1170.12, subd. (a)–(d)) and as a prior serious felony (§ 667, subd. (a)(1)); it also alleged a term of incarceration stemming from a prior burglary conviction as a prior prison term (§ 667.5, subd. (b)).

1. Prosecution Case

Veronica Thomas's house is on 1358 West 29th Street. It is a two-story residence with six bedrooms; seven people, all students, live in the house.[2] Thomas does not consider the residence to be a dormitory, but a house with six different bedrooms. Two girls shared one bedroom, but the other bedrooms all had single occupants. Each bedroom had its own door. The students shared the kitchen and living room. Each

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

[2] Praveen Gnanam testified there were eight bedrooms in the house; Kendra Lavelle testified there were five. Exhibit 1, the floor plan of the first floor of the house, shows two bedrooms on the first floor; exhibit 2, the second floor plan, shows four bedrooms upstairs, for a total of six bedrooms.

resident of the house had their own room locks. The record does not reflect whether the room locks had different keys.

On November 22, 2009, about 2:00 a.m., Thomas had left her purse on the kitchen countertop. Her cell phone lay next to her purse. Thomas sat in the living room with several of her friends, including Duncan Wilson and Gnanam.

From his chair, Gnanam saw defendant, wearing an Ed Hardy T-shirt, walk through the kitchen and out the back door. Defendant was carrying a large-screen television on his shoulders. At trial, Gnanam testified that there is a corridor (as shown on exhibit 1, the floor plan of the first floor) leading to the side door of the house and the driveway.[3] Defendant exited with the television through that door.

Thomas heard Gnanam say that someone was walking out of the house with a television (which belonged to Lavelle, who lived in one of the two bedrooms on the first floor), but Thomas did not believe him. Thomas, who routinely went into Lavelle's room when Lavelle was not in the house, went to Lavelle's room on the first floor to check whether Lavelle's television was still in the room; it was not. Lavelle's room has its own outside door. In addition to the TV, some of Lavelle's bracelets were missing and a power cord to the television had been taken.

Thomas went to the kitchen to retrieve her cell phone in order to call campus security, but she did not find it. She thought she might have left the phone somewhere else. She borrowed Wilson's phone and dialed her cell phone number to see if she could locate it via its ring, but did not hear it ringing. Later, when she went into Lavelle's room, Thomas saw a can of beer on Lavelle's bed. No one at the house was drinking beer.

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[3] Exhibit 1 depicts a large front entry hall adjacent to the living room; the kitchen also accesses this entry hall. There is an exterior door from the kitchen to the side of the house. This exit is adjacent to the wall between the kitchen and the entry hall. Defendant would have been visible to some occupants of the living room using this exit to leave the house.

At some point Wilson went upstairs to use the restroom; when he returned to the living room, everyone had gone except for one woman. She told him that someone had stolen a television and everyone else had gone out to take care of it. Wilson went outside, found Gnanam, and asked him what had happened. Gnanam reported that someone wearing an Ed Hardy T-shirt had taken a television.

Gnanam went as far as 29th Street in search of the thief, but he did not see him. The neighbors told Gnanam that the thief had gone to the back alley behind the house; Gnanam walked to the alley along with several other people from the house; there, Gnanam saw the television on the ground. A young woman on a balcony told Gnanam that she had seen someone leave the television there, and then go into the building next door.

While standing on 29th Street near Vermont, Wilson observed defendant walking; defendant was talking on a cell phone. Defendant was shirtless, and had a white T-shirt hanging off the side of his pants. Wilson approached defendant and asked questions about his shirt. Defendant told Wilson to go away. Defendant ran, and Wilson chased after him. Gnanam had also followed defendant onto the street to the intersection of 29th Street and Menlo, and from about six feet away, saw that defendant had another cell phone, and that phone started to ring. Wilson also heard another phone ringing in defendant's pocket, and saw that the phone indicated that Wilson's phone was calling. Wilson took the phone from defendant and answered the call; Thomas was the caller. Defendant left. One of Gnanam's friends called police. After they lost defendant, Gnanam and Wilson returned to Thomas's house.

Later, after police caught defendant, Gnanam and Wilson identified defendant at a field show-up, and at trial.

Police used a canine to search for defendant; the police found defendant hiding in a doghouse nearby. The police recovered some women's bracelets, a cell phone, and an electrical power cord from defendant.

Defendant dropped off a letter with Lavelle sometime later. After she moved out of the house, Thomas received a letter from defendant that said he did not take the television or cell phone from the house, but that he was being framed.

2. Defense Case

At trial, defendant offered the testimony of Ana Esmeralda Martinez to establish that he had been too intoxicated to possess the specific intent required for burglary. Martinez testified that on November 21, 2009, she hosted her daughter's 13th birthday at her West 25th Street home. Defendant, whom she has known for many years, was a guest at the party. Martinez observed defendant consume alcohol at the party. Defendant began drinking beer and tequila about 2:00 p.m. or 3:00 p.m. At about 7:00 p.m., Martinez became concerned about defendant's drinking. She last saw defendant about 10:00 p.m., and he looked intoxicated. Martinez and defendant's wife drove around looking for him and called him on his cell phone, but they did not find him.

The jury convicted defendant of two counts of burglary. Defendant admitted both prior convictions. The court sentenced him to the midterm on count 1, doubled pursuant to section 1170.12, subdivisions (a) through (d) to eight years, with a consecutive five-year term pursuant to section 667, subdivision (a)(1) and a consecutive one-year term pursuant to section 667.5, subdivision (b). On count 2, the court sentenced defendant to the midterm of four years, doubled pursuant to section 1178.12, subdivision (a) through (d), and concurrent with count 1.

DISCUSSION

I. INSUFFICIENT EVIDENCE SUPPORTS TWO COUNTS OF BURGLARY

Defendant contends count two, which was based upon the taking of Veronica Thomas's cell phone from the kitchen (one of the common areas in the house), must be reversed because defendant only entered one residence for purposes of section 459. He argues the house was akin to a single-family residence, and there was no indication that the students separately locked their doors such that the house was comparable to a dormitory sufficient to support two separate convictions.

Section 459 defines burglary in relevant part as accomplished by "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, . . . with intent to commit grand or petit larceny or any felony . . . . " (§ 459.) Although section 459 defines "room" as one of the areas that may be entered for purposes of burglary, and each room within a structure may constitute a separate "room" for purposes of section 459 (*People v. O'Keefe* (1990) 222 Cal.App.3d 517, 521), "a thief who enters a house and steals articles belonging to different members of the same family can be punished for only one burglary." (*People v. James* (1977) 19 Cal.3d 99, 119.) "[W]here a burglar enters several rooms in a single structure, each with felonious intent, and steals something from each, ordinarily he or she cannot be charged with multiple burglaries and punished separately for each room burgled *unless* each room constituted a separate, individual dwelling place within the meaning of sections 459 and 460." (*People v. Thomas* (1991) 235 Cal.App.3d 899, 906, fn. 2.)

Entry into multiple rooms within one apartment or house will not support multiple burglary convictions unless the prosecution establishes each room is a separate dwelling place whose occupant has a reasonable, separate expectation of protection from unauthorized entry. (*People v. Richardson* (2004) 117 Cal.App.4th 570, 575.) Thus, hotel rooms, separate, individual offices, and dormitory rooms can constitute "rooms" for purposes of supporting an independent burglary conviction even where such rooms or offices are located within the same building. (See, e.g., *People v. O'Keefe*, *supra*, 222 Cal.App.3d at p. 521 [individual dormitory rooms]; *People v. Church* (1989) 215 Cal.App.3d 1151, 1159 [separate offices within same building].)

In *People v. Elsey* (2000) 81 Cal.App.4th 948, the defendant and his accomplice entered five separately secured classrooms and a common area in a school and committed thefts. (*Id.* at p. 952.) *Elsey* concluded defendant was properly convicted of six separate burglaries. "'[T]he burglary statute is designed to protect against unauthorized entry and its attendant dangers, the ultimate test of whether a burglarious entry has occurred must focus on the protection that the owners or inhabitants of a structure reasonably expect.

The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions. A structure with a locked door or window clearly affords a reasonable protection from invasion.' [Citation.]" (*Id.* at p. 960.) Thus, *Elsey* observed that family members living in the same house together are not likely to have "a separate or different expectation of protection against unauthorized entry as to each interior room once the house itself has been violated: Family members are unlikely to lock interior doors against each other; they share common access to all rooms within the house; and the size of an average single-family house does not ordinarily support an expectation of protection against intrusion in one part of the house if a burglar has already invaded another." (*Id.* at pp. 960–961.) *Elsey* contrasted the single-family dwelling with neighboring offices and dormitory rooms. "Hence, while the underlying objective of the burglary statute may not be furthered by a finding of multiple burglaries from the single entry into a house, it certainly is furthered by a finding of multiple burglaries by reason of separate entries into individually secured classrooms dispersed among several buildings on a school campus." (*Id.* at p. 961.) As a consequence, *Elsey* found that because the main office and the five classrooms were assigned to different people, locked to the outside, and located in different buildings on the school campus, the occupants of those classrooms and the office had a reasonable expectation of protection from intrusion from the outside, and thus supported multiple burglary convictions. (*Id.* at pp. 961–962.)

In *People v. O'Keefe*, *supra*, 222 Cal.App.3d 517, the defendant entered several rooms within a college dormitory building and took photographs of the victims and other items; defendant later made obscene phone calls to the victims. (*Id.* at pp. 519–520.) "Although students may share a kitchen and bathroom facilities within [the dormitory], this does not make them one big family. In many apartment and hotel complexes, facilities are shared but separate burglaries of the individual rooms may still occur. At [the subject dormitory] each student lives and enjoys separate privacy in each of their individual dormitory rooms. These rooms are their homes while attending school.

Unauthorized entry into each dormitory room presents a new and separate danger to each of the occupants." (*Id.* at p. 521.) *O'Keefe* upheld defendant's conviction for separate burglaries based upon his entry into each dormitory room. (*Ibid.*)

In *People v. Wilson* (1989) 208 Cal.App.3d 611, defendant entered a house containing four bedrooms, each with its own lock and key. (*Id.* at p. 613.) Defendant entered one of the bedrooms by prying open the door, and took several items, including firearms. (*Ibid.*) *Wilson* rejected the defendant's argument that if defendant formed the intent to steal after entry into the main house, he could not be found guilty of first degree burglary based upon a subsequent entry into the victim's bedroom. (*Id.* at p. 614.) Relying on the rationale for burglary laws—the danger to safety posed by entry into an inhabited dwelling—the court found that defendant had no way of knowing whether the victim was in the locked room and thus the danger of a confrontation was no less than that of an unauthorized entry into the residence itself. (*Id.* at pp. 615–616.)

In *People v. Richardson*, *supra*, 117 Cal.App.4th 570, upon which defendant relies, the defendant stayed with his sister and her roommate, and the court held that defendant's entry into two separate, unlocked bedrooms of a shared apartment constituted only one act of burglary. "The policy of protecting occupants of separate dwellings will not be forwarded by characterizing the crime as a multiple burglary. Since the two women shared a two-bedroom apartment, without locks on their doors, they cannot have a separate, reasonable expectation of protection against an unauthorized entry . . . . Even though [defendant] knew that the two women occupied different rooms and, therefore, theoretically a new and separate danger could be posed to each women on each entry, the typical burglar of a single-family residence will not have the benefit of that foreknowledge." (*Id.* at p. 575.)

Here, insufficient evidence supports defendant's conviction on the second count of burglary of Thomas's cell phone because the circumstances of this case illustrate that the students sharing the house did not view it as a dormitory and had no separate expectation of protection from unauthorized entry into their rooms. Although each resident had their

own room for which they paid rent, each room had a lock, each resident had their own keys to the house, the roommates are not related to one another, and Lavelle's bedroom had its own door to exit the house, this does not transmute the house into a dormitory or office-like structure for purposes of section 459. The roommates shared the common areas of the house, including the bathrooms, kitchen, and living room. The evidence suggests the roommates were friends living together in a house and were not a group of disconnected students assigned to discrete, separate dormitory rooms wholly independent of one another. Thus, their living arrangement in Thomas's house more closely resembles a single-family home than that of a dormitory.

Furthermore, while the record reflects there were locks on the bedroom doors, there is nothing in the record to indicate whether the doors were routinely kept locked to exclude other residents of the house or whether Lavelle's room was locked at the time of the burglary. To the contrary, testimony would support an inference that Lavelle's room was not routinely kept locked: After Thomas was informed of the burglary, she entered Lavelle's room to investigate, and noted the room was messy because "Lavelle usually kept her room pretty clean." Thomas also knew that only she and Lavelle had televisions larger than 20 inches, supporting an inference that it was not uncommon for the roommates to be in each other's rooms. Thus, there is no evidence to demonstrate each roommate had a separate, reasonable expectation of protection from unauthorized entry to establish each bedroom was a dwelling for the purposes of 459 such that the entry into Lavelle's bedroom would support a separate burglary conviction apart from defendant's entry into the house at large to take the call phone from the kitchen. As a consequence, defendant's conviction on count two, the theft of the cell phone from the kitchen area of the house, must be reversed for insufficient evidence.

II. INSTRUCTIONAL ERROR

Defendant argues under *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), the trial court instructed on two theories of burglary, one of which was legally incorrect, and because we cannot determine which theory the jury convicted defendant on as to either

count, both convictions must be reversed. Respondent contends that under *People v. Sparks* (2002) 28 Cal.4th 71 (*Sparks*), we should uphold at least one conviction because even if defendant entered the house without requisite intent, he formed such intent prior to entering Lavelle's bedroom.[4]

A. Factual Background

The court instructed the jury on burglary with CALCRIMM No. 1700[5] and an additional pinpoint instruction (#1) prepared by the prosecution that stated: "A 'room' is one of the areas that maybe entered for purposes of burglary. Each unit within a structure may constitute a separate 'room' for which a defendant can be charged with an convicted of separate counts of burglary. [¶] Entry into a bedroom within a house with the requisite intent can support a burglary conviction even if that intent was formed after entry into the house."

The prosecution argued that in order to be guilty of burglary, the defendant had to "enter a room within a house or enter a building" with the intent to commit theft. The prosecution argued: defendant "walked in, he entered a room within this building, within this house, which belonged to Kendra Lavelle. And as the instruction was read to you by the judge, a room is one of the areas that might be an area for purposes of burglary. And in this case, Kendra Lavelle's bedroom is a room within that compound."

The prosecution continued: "Now, let's look at Vanessa Thomas's items. [Defendant] then walks out of [Lavelle's] bedroom, or [defendant] walks into the kitchen first and then into the bedroom, it doesn't matter. [Defendant] stole the cell phone. Whether he stole the TV first or vice versa, it really doesn't matter."

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[4] We requested the parties to separately brief the issue of whether *Guiton*, *supra*, 4 Cal.4th 1116 required the reversal of not just one, but both, convictions.

[5] CALCRIM No. 1700 as given stated in relevant part: "The defendant is charged in Counts one and two with burglary in violation of Penal Code section 459. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant entered a building and/or a room within a building; [¶] AND [¶] 2. When he entered [a] building and/or a room within a building, he intended to commit theft."

The defense argued with reference to CALCRIM No. 1700: "[L]ook toward the end of that instruction and that instruction will tell you that you can't find this defendant guilty of burglary unless all of you agree that he intended to commit one of these crimes . . . [a]t the time of entry. [¶] So if you cannot agree that he formed that intent when he entered the premises, okay, you can't find him guilty of burglary."

In rebuttal, the prosecution returned to the pinpoint instruction: "And there's something else that's very important. There is a pinpoint instruction that says entry into a bedroom, into a room within the house with the intent can support a burglary conviction, even if the intent was formed after entry into the house. So even if, for some reason, for some of you might think, . . . [defendant] might have walked in [to the house] and he really didn't want to steal anything when he walked in, when he walks from that kitchen area to the bedroom or vice versa, from the bedroom area to the kitchen, trying to get out of the house, walking from one room to the other with the item, with the intent to steal, that's burglary."

Defendant did not object to the giving of CALCRIM No. 1700 and the special pinpoint instruction.

B. No Instructional Error

As set forth above, section 459 defines burglary in relevant part as accomplished by "[e]very person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, . . . with intent to commit grand or petit larceny or any felony . . . ." (§ 459.) The requisite intent to commit theft or any felony must be formed at the time of entry into the statutorily specified structures. (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

In *Sparks*, *supra*, 28 Cal.4th 71, the court held that a defendant, who entered the victim's home upon the victim's invitation, and who later raped the victim when she retreated into a separate bedroom within the house, could be guilty of burglary even though he lacked intent to commit a felony upon first entering the house. (*Id.* at pp. 73–74, 87.) *Sparks* partially relied on a statement in *Elsey*, *supra*, 81 Cal.App.4th 948 that

where there was entry into a house without the requisite intent, the court could focus on rooms within the house to support a finding of burglary. (*Sparks*, at p. 85.) *Sparks* found that "treating the entry at issue here as an entry for burglary is consistent with the personal security concerns of the burglary statute, because entry, from inside a home, into a bedroom of the home 'raise[s] the level of risk that the burglar will come into contact with the home's occupants with the resultant threat of violence and harm.' [Citation.] . . . Accordingly, consistent with California decisions construing section 459, reaching back to *People v. Young* [1884] 65 Cal. 225, and consistent with the common law and the history of section 459, we conclude that the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning." (*Sparks*, at p. 87.)

Here, as discussed above, the evidence at trial established that Thomas's house was not a dormitory or office-like living arrangement sufficient as a matter of law to support two separate burglary convictions based upon entry into a common area of the house and a student's bedroom. However, based upon *Sparks*, *supra*, 28 Cal.4th 71, defendant could have formed his intent after entry into the house, if he entered through the kitchen, but before he entered Lavelle's bedroom; this fact pattern is correctly reflected in the pinpoint instruction. On the other hand, if defendant formed the intent to commit a felony before first entering into Lavelle's bedroom from the outside, this fact pattern would be supported by CALCRIM No. 1700. Thus, the court did not err in giving the pinpoint instruction because the facts support at least one burglary—either Lavelle's bedroom or the kitchen, based upon a single entry into the house. Under *Sparks*, where defendant formed his intent is immaterial. Thus, *Guiton*, *supra*, 4 Cal.4th 1116, which governs the analysis where there are two instructions, one legally correct and one legally incorrect, and we cannot determine on which instruction the jury based their verdict, does not apply here because both instructions given the jury were legally correct. Nonetheless, only one conviction is proper.[6]

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[6] We point out that under the circumstances of this case, *Sparks* recognizes that only one burglary conviction should have been charged. (*People v. Sparks*, *supra*, 28

DISPOSITION

The judgment of conviction is affirmed on count one, and reversed on count two; defendant's sentence on count two is vacated. On remand, the superior court clerk is to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

Cal.4th at p. 87, fn. 21.) *Sparks* in dicta stated, "we emphasize that our holding does not signify that a defendant who, with the requisite felonious intent, enters multiple unsecured rooms in a single-family house properly may be convicted of multiple counts of burglary. As noted above, some California decisions have questioned whether multiple convictions might be sustained *on such facts.* ([*People v.*] *Thomas* [(1991)] 235 Cal.App.3d 899, 906, fn. 2; see also *Elsey, supra*, 81 Cal.App.4th 948, 959)." (*Sparks*, at p. 87, fn. 21, italics added.)