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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A128601**

v. **(Contra Costa County Super. Ct. No. 050912873)**

TOMMY DEAN ROGERS,

Defendant and Appellant.

_____/

Tommy Dean Rogers (appellant) appeals from a judgment entered after a jury convicted him of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a).) He contends his conviction must be reversed because (1) the prosecutor committed misconduct, (2) the trial court erred when it denied his motions for a mistrial, (3) the court made an erroneous in limine ruling, and (4) the court erred when it admitted certain evidence. We reject these arguments and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gary Jones owned a house located on Lopez Drive in Antioch. Jones's lender had initiated default proceedings and Jones usually slept in a different house, however Jones still stored the majority of his belongings in the Lopez Drive residence.

On November 8, 2009, sometime before noon, Jones received a call from his neighbor, James Bothe, who said that a strange car was parked outside of Jones's house

and that people were inside. Jones called the police to report a break-in and immediately drove to the Lopez Drive residence. When he arrived he saw that a Ford was parked in front of his property and that several items of his personal property, including lights and tools, had been moved to the front and side yards.

Jones looked inside the house through a window. He saw appellant smoking a cigarette. Jones looked through another window and saw a woman whom he later identified as Valerie Sousa walking toward the front door.

Bothe joined Jones and a short time later, appellant and Sousa emerged from the backyard through a side gate. Jones asked what they were doing on his property. Appellant said they were "looking." Sousa wanted to leave and she walked to the Ford. When appellant tried to join her, Jones and Bothe made it clear they would not let them leave.

The police arrived and Jones went inside his house. The whole place had been trashed and his business and personal papers had been moved from a file cabinet into boxes by the front door. The police officer arrested appellant and Sousa and conducted searches pursuant to those arrests. He found a small crowbar in Sousa's purse and a surge protector taken from Jones's house inside the Ford.

Based on these facts, an information was filed charging appellant and Sousa with first degree residential burglary.

The case proceeded to a jury trial where the prosecution presented the testimony we have set forth above. Sousa testified in her own defense and she admitted that she and appellant had entered the Lopez Drive residence through a sliding glass door in the backyard. Sousa claimed she was simply engaging in her "hobby" of following foreclosures in the Antioch area. Sousa said she did not touch anything in the house and she denied moving any property from the backyard to the front.

The jurors considering this evidence convicted appellant and Sousa as charged. Subsequently, the court sentenced appellant to the lower term of two years in prison.

II. DISCUSSION

A. Background

Prior to trial, defense counsel moved to exclude evidence that the Lopez Drive residence had been burglarized the day before the charged crime. Defense counsel argued the evidence "would invite the jury to speculate as to whether or not [appellant] and Ms. Sousa had communicated with the person who burglarized the house before." The prosecutor responded that she did not intend to go into the details of the prior burglary, but that the condition of the house before appellant and Sousa entered it was relevant to explain the photographs of the house that were taken by police. The trial court granted the motion ruling that the "prejudicial value of the evidence of the previous night's burglary would outweigh the probative value of the reason why the house looks like it does."

At trial, the prosecutor asked Jones whether the Lopez Drive residence was secure when he left it the day before the burglary. Jones answered as follows:

"There was a broken window which was right next to the sliding glass doors that someone had broke out the day I was there previous, so I noticed a broken window previous to that day."

Defense counsel objected and the trial court overruled the objection.

Shortly thereafter, the prosecutor questioned Jones as follows:

"Q. After you saw these items . . . by the front door, then did you notice any other items that were out of place?

"A. Basically the whole house was trashed and everything was out of place."

Defense counsel objected again and the court declared a recess to discuss the issue in chambers. Defense counsel asked the court to declare a mistrial arguing that the prosecutor's question and Jones's response had violated the court's in limine ruling. The prosecutor stated that she had not violated the court's ruling and there was nothing wrong with asking Jones about the state of the house after the defendants had entered it.

The trial court declined to grant a mistrial, but agreed to strike the testimony about the house being "trashed." The court also suggested it was rethinking its prior in limine ruling, "the question of even sheltering the burglary — the previous burglary is a very close question. It is not highly prejudicial in my view at all that the house was previously burglarized . . . And even if you take evidence and say that they were doing a burglary, no reasonable person assumes that they are the ones that were there before. It's not all that damaging at all[.]"

Later in the trial, the court did in fact modify its in limine ruling. It instructed the jurors as follows:

"Prior to trial I had ruled that nothing except what happened that day is really relevant to whether there was a burglary that day. But before trial I had learned that one of the reasons that a lot of the things you've seen in the pictures are messy and strewn about and so forth other than what he said changed was that there was some episode . . . somebody came in and vandalized or whatever, threw things around or whatever . . . . [¶] Now, we're still not going to talk about what the episode was. I don't know all the details. I don't want to know them. I have reviewed with both sides, and there is no evidence to implicate the two defendants in the case to any of the mess or change or whatever it was other than the change from the day before when he left to the day."

Subsequently, defense counsel renewed his motion for a mistrial arguing the evidence concerning the prior burglary invited sympathy for Jones. The court denied the motion and added that the defense had "[misled] the court" when making the motion in limine. The court stated, "the picture that ultimately arose is terribly different than the picture that the motion in limine showed."

During final argument, the prosecutor then argued as follows:

"You have this entire trail of evidence. You have lights found in the car, people inside of the house, all indicating that when these defendants showed up on November the 8th, 2009, *or maybe the night* before, they were there intending to steal when they went inside that home[.]" (Italics added.)

1. Prosecutorial Misconduct

Appellant now contends the prosecutor violated the in limine ruling and thereby intentionally committed misconduct when she (1) asked Jones whether his house was secured when he left it the day before the burglary, and (2) elicited an answer from Jones concerning the condition of his home on the day of the burglary.

While it is misconduct for a prosecutor to intentionally elicit inadmissible testimony (*People v. Smithey* (1999) 20 Cal.4th 936, 960), there was no misconduct here. The court ruled that "evidence of the previous night's burglary" could not be admitted. Jones's testimony that "someone" had broken a window at his house the day before the crime and that his house appeared "trashed" on the day of the crime did not violate the court's order. Neither suggested or implied that a burglary had occurred the day before the charged crime. There was no misconduct on this ground.

Appellant also contends the prosecutor committed misconduct when she argued to the jurors that appellant and Sousa might have entered Jones's home on the night before the burglary. Although a prosecutors misstatement or mischaracterization of evidence or reference to facts not in evidence constitutes misconduct (*People v. Hill* (1998) 17 Cal.4th 800, 823-829), during closing argument counsel is accorded wide latitude to urge whatever conclusions can properly be drawn from the evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) Here, the evidence showed Jones had left his home around 5:00 p.m. on the night before the burglary and that he received a call from his neighbor about a possible burglary in progress sometime before noon the following day. Based on this evidence, the prosecutor could reasonably infer that appellant and Sousa might have entered Jones home the night before they were caught. There was no misconduct on this ground.

2. Motions for a Mistrial

Appellant contends the trial court erred when it denied his motions for a mistrial. According to appellant, evidence concerning the prior burglary was prejudicial because "a reasonable person would suspect that [he] was connected somehow to a previous burglary so close in time to the burglary for which he was charged."

A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter and the trial court is vested with broad discretion in ruling on mistrial motions. (*Ibid.*)

Applying this standard, we conclude the trial court did not err. Contrary to appellant's argument, evidence that *something* had occurred at Jones's property on the day before the burglary did not prove or even suggest that appellant (or Sousa) were somehow involved in that prior incident. This is particularly true where the court specifically told the jurors that there was no evidence that appellant and Sousa were involved. We do not hesitate to conclude the trial court did not abuse its discretion when it denied appellant's motions for a mistrial.

3. In Limine Modification

Appellant contends the trial court erred when it modified its original in limine ruling.

A trial court is granted broad discretion to determine the admissibility of evidence and its rulings, including in limine rulings will be reversed on appeal only where the court abused its discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.) We find no abuse here.

As we have just stated, evidence that a burglary had occurred at Jones's house the day before the prior charged burglary did not suggest that appellant was somehow involved in that first burglary. This is particularly true because the court also told the jurors that appellant was not involved in the first incident. The court here did not abuse its discretion.

B. Failure to Exclude Evidence

Prior to trial, defense counsel asked the court to exclude evidence that a flashlight, some screwdrivers, and some gloves were found in Roger's Ford following his arrest. The trial court considered the request and denied it. Appellant now contends the trial court should have excluded the evidence he identified because "each of those items is of

a sort that is commonly stored in a vehicle" and they "would only invite speculation and bias" against him.

As we have stated, the court is granted broad discretion to determine the admissibility of evidence (*People v. Williams, supra,* 16 Cal.4th at p. 197), and the court here did not abuse that discretion. Each of the items appellant complains about have been identified as among those that can be used by individuals who are committing burglaries. (See, e.g., *People v. Southard* (2007) 152 Cal.App.4th 1079, 1088-1090.) The trial court did not abuse its discretion when it ruled appellant's possession of those items could be admitted.

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.