Filed 11/2/10 P. v. Surico CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER SURICO, Defendant and Appellant.	B217884 (Los Angeles County Super. Ct. No. GA073764)

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

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Surico appeals the judgment entered following his conviction by jury of two counts of first degree burglary. (Pen. Code, § 459.)[1] The evidence indicated Surico made multiple felonious entries into a single residential carport. On appeal, Surico contends the carport was not part of an inhabited dwelling and even if it were, he can only be convicted of one count of burglary. He further contends the trial court committed instructional error and abused its discretion in refusing to strike a prior conviction in the interests of justice. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Evidence adduced at trial*.

On June 24, 2008, at about 6:00 p.m., Steven Reedy saw appellant Surico in the carport that faces the living room window of Reedy's apartment on Arroyo Drive in South Pasadena. Surico, whom Reedy did not recognize, was looking at a Volvo parked in the space assigned to John Accornero, the tenant of apartment three. Accornero had property stacked under a sheet in front of his Volvo. When Surico went to the front of the Volvo and lifted the sheet, Reedy called 911 from the bedroom of his apartment. Reedy's roommate, Jennifer Gregg, remained at the living room window and reported her observations to Reedy who relayed them to the 911 dispatcher.

Gregg saw Surico reach inside a plastic container in front of the Volvo and momentarily lift an air compressor. Surico then left the carport and walked south on Arroyo Drive. Seconds later, a van parked in front of the apartment building on Arroyo Drive. Gregg could see the right front quarter panel of the van. Surico again appeared at the carport. He entered the carport and took the air compressor to the van, then returned and took a table saw from the area in front of the Volvo to the van. The van then drove north on Arroyo Drive.

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[1] Subsequent unspecified statutory references are to the Penal Code.

City of South Pasadena Police Officer Matt Peterson received radio broadcasts regarding a person removing items from a carport on Arroyo Drive. As Peterson arrived at the apartment complex, the dispatcher advised him the suspected vehicle, a van, was leaving the scene travelling north. Peterson followed a van driven by Surico from the front of the complex and stopped it approximately 200 yards away. Reedy identified Surico at the scene of the traffic stop as the individual he had seen in the carport. Peterson found the air compressor and the table saw in the van. Surico waived his rights and admitted he took the items intending to sell them and "make a few dollars[.]" Peterson recorded Surico's statement and it was played for the jury as was a tape recording of Reedy's 911 call.

The air compressor and table saw were returned to Accornero the next day. Accornero's assigned space in the carport is underneath his apartment and the apartment next to his. Stairs from the carport lead to the apartments on the second floor. On the evening of June 23 or 24, 2008, Accornero placed the air compressor and the table saw in the storage area directly in front of his Volvo. The air compressor was in a container and the table saw was on top of it covered by cardboard, a piece of plywood and a sheet. The property was flush against the carport wall and was fully covered but was not secured by a lock.

2. *Ruling of the trial court, argument and verdicts*.

Prior to submitting the matter to the jury, the trial court addressed defense counsel's assertion Surico had committed, at most, a single count of burglary. The trial court indicated it believed there technically had been three burglaries, one for each taking and one when Surico entered the carport to look around. The trial court indicated it would instruct the jury on unanimity.

In argument to the jury, the prosecutor indicated two counts of burglary were charged even though there had been three entries with the required intent and thus three burglaries. The prosecutor indicated the jury would be instructed on unanimity and it could use any two of the entries to support the charged counts of burglary.

The jury convicted Surico as charged.

3. *Court trial on prior conviction allegations and sentencing*.

The trial court found Surico had a 1994 conviction of first-degree residential burglary within the meaning of the Three Strikes law and section 667, subdivision (a)(1). The trial court further found Surico had served three prior prison terms within the meaning of section 667.5, subdivision (b).

The report of the probation officer prepared for the sentencing hearing indicates that in 1993, in four separate incidents, Surico was convicted of shoplifting, attempted petty theft, forgery (§ 470, subd. (a)) and receiving stolen property. In 1994, Surico was convicted of first degree burglary and was sentenced to prison for four years. Also in 1994, Surico was convicted of taking a vehicle without the owner's consent (Veh. Code, § 10851) and was granted probation with 150 days in jail. Surico was arrested for burglary in September of 1996 but this case was dismissed, apparently after being used as a violation of parole in the first degree burglary case. In 1998, Surico was convicted of second degree burglary and was sentenced to prison for 32 months. In 2003, Surico was convicted of attempted burglary and was sentenced to prison for 28 months. Surico was found to be in violation of parole in that case in 2003, 2007 and 2008. The report of the probation officer noted Surico has a lengthy history of theft related offenses, he was on parole for a similar offense at the time of the current offenses and he admitted being addicted to heroin.

The trial court indicated it had read and considered Surico's *Romero* motion (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497), as well as the People's opposition. Defense counsel argued Surico's crimes were not of increasing seriousness and the current offense is "the most tenuous type of residential burglary" in that it involved a carport that was open on three sides and the property was not in a locked container.

Defense counsel noted Surico had been out of custody from 2004 to 2007 and during that time he moved to Kentucky and started his own painting business, he was a productive member of society and he supported his wife and four children. Surico returned to California when his mother underwent serious surgery but was unable to find

comparable employment here, lost his business and relapsed into heroin abuse. He attempted to address the drug problem before his arrest on this case and contacted a rehabilitation center but no beds were available. While in custody on this case, Surico was admitted to the Delancy Street program and would be able to participate in that program if the trial court granted Surico probation. Defense counsel noted Surico had been promised drug rehabilitation when he was sentenced on the 1994 burglary conviction and again when his parole was violated in that case. However, for unknown reasons, he did not participate in either program. Defense counsel asked the trial court to give Surico an opportunity to enter a drug rehabilitation program rather than sentence him to prison.

Defense counsel noted Surico's prior convictions all related to his drug dependence and were crimes of theft rather than violence. Also, the prosecutor had offered Surico a plea bargain for seven years prior to trial with the prior conviction stricken. Defense counsel argued Surico should not be punished for exercising his constitutional right to a trial.

The trial court indicated it was willing to assume "the genesis of Mr. Surico's problems is drug addiction . . . . [However, t]hat's not an unusual situation unfortunately . . . ." The trial court found it "distressing" that Surico had either not been given an opportunity to address his drug problem or had not availed himself of an opportunity to address the problem. The trial court noted that from the time Surico was received in prison in 1994 until June of 2008, he had been free of custody or parole for less than three years. The trial court indicated it was aware of Surico's efforts to get into Delancy Street but refused to grant him probation in order for him to participate in the program, noting rehabilitation would "be available to him hopefully at a later point in time . . . ."

Regarding Surico's request to strike the prior conviction in the interests of justice, the trial court indicated, "I don't believe that it is an appropriate case for me to exercise that discretion." The trial court agreed Surico's prior convictions were not violent felonies but found they were numerous. Further, Surico was on parole at the time of the

current offenses and he has been involved in criminal activity "almost continuous[ly] since 1994."

The trial court denied probation and sentenced Surico to prison for the low term of two years, doubled to four years pursuant to the Three Strikes law, plus a consecutive five-year term under section 667, subdivision (a)(1). The trial court imposed one of the prior prison term enhancements, struck one and stayed another, for a total prison term of 10 years.

CONTENTIONS

Surico contends the carport at issue did not qualify as an inhabited structure and thus the evidence is insufficient to support a conviction of first degree burglary. He further contends the evidence warrants conviction of only one count of burglary, the trial court's instruction on the recent possession of stolen property unconstitutionally lightened the People's burden of proof, and the trial court abused its discretion in refusing to strike his prior conviction.

DISCUSSION

1. *Accorenero's carport was part of an "inhabited dwelling house" for the purposes of the burglary statute.*

A conviction of first degree burglary requires "entry" of an "inhabited dwelling house" with the intent to commit a felony. (§§ 459, 460.) In order to effect the legislative purpose of the burglary statute, namely, "to protect the peaceful occupation of one's residence" against intrusion and violence, the phrase "inhabited dwelling house" has been broadly construed. (*People v. Cruz* (1996) 13 Cal.4th 764, 775, 776.)

"In determining whether a structure is part of an inhabited dwelling, the essential inquiry is whether the structure is 'functionally interconnected with and immediately contiguous to other portions of the house.' [Citation.]" (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107.) " 'Functionally interconnected' means used in related or complementary ways. 'Contiguous' means adjacent, adjoining, nearby or close. [Citations.]" (*Ibid.*)

Applying this definition, garages attached to a residence but lacking an entrance to the residence have been held to constitute inhabited dwelling houses for the purposes of the burglary statute. (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1404, overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 560; *In re Edwardo V.* (1999) 70 Cal.App.4th 591, 594-595; *People v. Moreno* (1984) 158 Cal.App.3d 109, 112.) Similarly, and more to the point here, carports attached to a residence have been held to be functionally interconnected to the residence and thus part of the inhabited dwelling house. (*People v. Thorn* (2009) 176 Cal.App.4th 255, 263 [carport area was part of the inhabited dwelling where it comprised the entire ground floor of an apartment building and was roofed by the apartments above]; *In re Christopher J.* (1980) 102 Cal.App.3d 76, 80 [carport constituted an inhabited dwelling where it was attached to a residence and was walled on one side and roofed].)

The carports at issue in *Thorn*, located directly underneath the apartments, provided parking facilities only for designated residents of the apartment complex. This allowed the designated residents to park their vehicles off the street "in a covered location with convenient access to their living space in the apartments above via the communal stairways adjacent to the carports." (*People v. Thorn*, *supra*, 176 Cal.App.4th at p. 263.) *Thorn* concluded the use of these carports by the designated residents was "inextricably related or complementary to their living space in the apartments above. Thus, the carports [were] 'functionally interconnected' with the inhabited dwelling." (*Ibid.*)

We reach a similar conclusion with respect to Accornero's carport. Surico seeks to avoid this result by noting the carports in *Thorn* were enclosed on three sides. Further, the carport in *In re Christopher J.* was attached to a single family residence. Accornero's carport, on the other hand, was not directly under his apartment, it was open on three sides and it was accessible from the driveway area. Also, the parking spaces next to Accorenoro's area were open to anyone passing through the carport area.

Although the carport in *Thorn* was enclosed on three sides, the individual parking spots within the carport were not separately walled. Thus, Accornero's parking space was substantially similar to the carport and parking spaces at issue in *Thorn*.

In any event, the minor factual differences pointed out by Surico between the carport in *Thorn* and Accornero's carport, in our view, do not justify a result different than the results reached in *Thorn* and *In re Christopher J*.

Accornero testified the carport area was below his apartment and the apartment next to his. In Accornero's words, his apartment "straddled" the carport. Thus, the carport and the apartment were contiguous. Moreover, Accornero accessed the carport by stairs from the carport area on the ground floor to the apartments on the second floor. For the reasons cited in *Thorn*, this evidence demonstrates a "functional interconnection" between the carport and the apartment such as to render the carport an integral part of Accornero's living space. (*People v. Thorn, supra*, 176 Cal.App.4th at p. 263.)

Surico also argues no reasonable person would expect protection from unauthorized intrusions, given that the carport was entirely open to the public with nothing demarcating an area into which social convention would preclude entry. Surico compares Accornero's carport to the front porch addressed in *People v. Brown* (1992) 6 Cal.App.4th 1489, 1497-1498. *Brown* noted the porch had no barrier to prevent entry by a member of the general public. Thus, it could not be considered part of the inhabited dwelling. Surico argues a similar result must obtain for Accornero's carport.

This argument goes to the second issue addressed in *Thorn*, that is, whether the carport carried a reasonable expectation of protection from intrusion. *Thorn* applied the principles stated in *People v. Valencia* (2002) 28 Cal.4th 1, in rejecting this argument. *Valencia* addressed "whether penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the window itself is closed and is not penetrated." (*Id.* at pp. 3-4.)

Valencia held that where "the outer boundary of a building for purposes of burglary is *not* self-evident, . . . a reasonable belief test generally may be useful in defining the building's outer boundary. Under such a test, in dealing with items such as a window screen, a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. . . . The test reflects and furthers the occupant's

possessory interest in the building and his or her personal interest in freedom from violence that might ensue from unauthorized intrusion." (*People v. Valencia, supra,* 28 Cal.4th at p. 11.)

Valencia concluded "a window screen is clearly part of the outer boundary of a building for purposes of burglary. A reasonable person certainly would believe that a window screen enclosed an area into which a member of the general public could not pass without authorization." (*People v. Valencia, supra,* 28 Cal.4th at p. 12.) Applying the reasonable belief test to the carport at issue, *Thorn* concluded the open entrance to the carport marked the outer boundary of the apartment building for purposes of burglary, finding it "directly analogous to the area behind the window screen in *Valencia* in that a reasonable person certainly would believe that the carport 'enclosed an area into which a member of the general public could not pass without authorization.' [Citations.]" (*People v. Thorn, supra,* 176 Cal.App.4th at p. 265.)

Thorn noted the residents of the apartment building immediately noticed the defendant "lurking" in the carport area and called the police, the same reaction Surico's presence induced in this case. Thus, although no physical barrier prevented Surico's entry into the carport, it was an area into which a member of the general public could not pass without violating social convention. In sum, Accornero's carport constitutes a private, individually designated area in which Accornero had a possessory interest for the purpose of parking his vehicle as well as storing personal possessions. Thus, as in *Thorn,* Surico's entry into the carport amounted to entry into an inhabited dwelling house within the meaning of the burglary statute.

Surico's analogy to a front porch is not persuasive in that a resident does not have a reasonable expectation of freedom from unauthorized intrusions on a front porch. Indeed, generally, the front porch of a residence is an area designated for members of the general public to approach a residence without authorization.

In sum, Surico's entry into the carport with felonious intent constituted first degree burglary.

2. *Surico's multiple entries into the carport supported multiple convictions of burglary.*

Surico contends he engaged in one continuous course of conduct pursuant to a single intent and thus his conduct supports only one count of burglary. He notes it took less than one minute to steal the tools and the entire incident took approximately four minutes. Surico relies on *People v. Bailey* (1961) 55 Cal.2d 514, 519, a case involving theft. The question in *Bailey* was whether a series of petty thefts by false pretenses could be aggregated into one count of grand theft. *Bailey* concluded that because the defendant had a single plan and the various thefts were pursuant to one design, the amounts could be aggregated to form one crime of grand theft.

However, *Bailey* has not been followed in burglary cases. Thus, *People v. Washington* (1996) 50 Cal.App.4th 568, 575-577, and *In re William S.* (1989) 208 Cal.App.3d 313, 316-318, held the *Bailey* rule did not apply to multiple entries charged as burglary. Both of these cases noted each entry with the requisite intent constitutes a separate completed burglary.

Surico claims *Washington* and *In re William S.* are factually distinguishable in that there was significant delay between the entries in those cases. Here, the entries occurred within a minute and were for the same purpose, to take the tools. Also, the intent of the burglary statute is to prevent harm to individuals and, because Surico entered a carport occupied by only vehicles and property, multiple entries did not create increased risk of harm to people. Further, *In re William S.* cautioned that "a series of brief entries into a dwelling for the purpose of loading a getaway vehicle parked in the driveway" might result in a different conclusion. (*In re William S., supra,* 208 Cal.App.3d at p. 317.)

None of these arguments dissuades us from the conclusion Surico committed multiple counts of burglary. The quotation from *In re William S.,* on its face, is dicta and in any event, *In re William S.* observed only that a series of brief entries might result in a different conclusion. Here, with the issue directly presented, we conclude Surico's conduct permitted conviction of multiple counts of burglary. The potential harshness of allowing multiple convictions in circumstances that might be viewed as a single crime is

mitigated by the application of section 654, which "limits the *punishment* for separate offenses committed during a single transaction . . . ." (*People v. Washington, supra,* 50 Cal.App.4th at p. 578, italics added; § 654 ["in no case shall [an] act or omission be punished under more than one provision"].)

Thus, Surico properly was convicted of more than one count of burglary based on his repeated entrance into the carport to steal property.

3. *Instruction on possession of recently stolen property (CALCRIM No. 376).*

Over defense objection, the trial court instructed the jury in the words of CALCRIM No. 376, which addresses the knowing possession of recently stolen property. It indicates such possession is insufficient, by itself, to convict the defendant of burglary. However, if the jury finds slight corroboration of this evidence, the jury "may conclude that the evidence was sufficient to prove he committed burglary."[2]

Surico contends this instruction unconstitutionally lightened the People's burden of proof because it informed the jury that, in addition to conscious possession of recently stolen property, only "slight" corroborating evidence that tended to prove guilt was needed to find him guilty of burglary. Surico concedes this argument has been rejected but argues it is obvious that a requirement of only slight corroborating evidence dilutes the People's burden of proof. He concludes the error requires reversal.

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[2] Stated in full, CALCRIM No. 376 provides: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of burglary based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence [was] sufficient to prove he committed burglary. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of burglary. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

CALCRIM No. 376, and its predecessor, CALJIC No. 2.15, repeatedly have withstood the challenge mounted by Surico. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 130-132; *People v. Prieto* (2003) 30 Cal.4th 226, 248-249; *People v. Holt* (1997) 15 Cal.4th 619, 676-677; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1226; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173-1174.) We agree with these cases and conclude CALCRIM No. 376 did not interfere with the reasonable doubt standard or violate Surico's right to a fair trial.

As these cases point out, the inference permitted by the instruction is permissive based on the jury's evaluation of the evidence, not mandatory. Thus, the instruction does not reduce the People's burden of establishing guilt beyond a reasonable doubt. Further, the last sentence of the instruction reminds the jury it "may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." The quoted language properly correlates the requirement of proof beyond a reasonable doubt with the instruction that possession of recently stolen property combined with "slight" corroborating evidence is sufficient to prove burglary.

The federal cases cited by Surico concern conspiracy instructions (i.e., "slight" evidence necessary to establish participation in a conspiracy), not theft crimes or CALCRIM No. 376. (*United States v. Gray* (5th Cir.1980) 626 F.2d 494, 500; *United States v. Hall* (5th Cir.1976) 525 F.2d 1254, 1255-1256.)

In sum, instruction in the words of CALCRIM No. 376 does not require reversal of Surico's convictions.

4. *No abuse of discretion in the denial of Surico's motion to strike the 1994 conviction of first degree burglary.*

Surico contends the trial court abused its discretion in refusing to strike his prior conviction for the purposes of sentencing. He notes his prior strike conviction occurred 15 years prior to the instant offense. Further, the current offense did not involve entry into a residence but a carport, the crime did not involve violence or weapons, and the property was recovered. Thus, the current offense is a relatively minor felony.

(*People v. Garcia* (1999) 20 Cal.4th 490, 499.) His most recent felony conviction prior to the current offense occurred in 2003, none of his convictions involved violence and all were the result of his ongoing addiction to heroin. Surico had shown himself capable of being a productive member of society by operating his own business and supporting his family. He was involved in a long-term relationship with his girl friend with whom he had four young children, he previously tried to enter rehabilitation programs and he was offered a bed in the Delancy Street program while he was awaiting sentencing in this case.

Further, prior to trial, the People had been willing to strike the prior conviction in order to permit Surico to enter into a plea bargain for seven years at 50 percent. Also, Surico's criminal history is far less serious than the criminal histories of other defendants as to whom courts have held that striking a prior conviction either was or would have been an abuse of discretion. (See, e.g., *People v. McGlothin* (1998) 67 Cal.App.4th 468, 475-477; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055; *People v. Askey* (1996) 49 Cal.App.4th 381, 389.)

Surico concludes the trial court abused its discretion in refusing to strike his prior conviction.

The legal principles applicable to the consideration of a *Romero* motion are well settled. In *People v. Williams* (1998) 17 Cal.4th 148, the California Supreme Court instructed that "in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a) . . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.)

We review a trial court's determination not to dismiss a prior strike conviction pursuant to *People v. Superior Court* (*Romero), supra,* 13 Cal.4th 497, under an abuse of discretion standard. (*People v. Williams, supra,* 17 Cal.4th at p. 162.) However, there is a strong presumption that a sentence conforming to the normal application of the Three Strikes law is rational and proper. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) Only in limited circumstances will a trial court's failure to dismiss a prior strike allegation constitute an abuse of discretion. (*Id.* at p. 378.) A defendant has the burden of clearly showing that the sentencing decision was irrational or arbitrary. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

The record in this case shows the trial court considered the "particulars of [Surico's] background, character, and prospects" (*People v. Williams, supra,* 17 Cal.4th at p. 161), including the evidence presented by Surico in support of the motion to strike. The trial court made note of Surico's long and nearly continuous criminal history after 1994 as well as his numerous failed attempts at probation and parole. The record affirmatively demonstrates the trial court understood its authority to strike Surico's prior conviction and weighed all of the competing factors and, after evaluating all of the available information, the trial court declined to exercise its discretion.

In view of these circumstances, Surico has failed to show an abuse of discretion. The fact Surico's criminal history might be less serious than the criminal histories of other defendants is not a factor a court considers in determining whether to exercise its discretion under *Romero*. Absent any showing of an abuse of the trial court's discretion, we affirm the denial of Surico's motion to strike the 1994 burglary conviction.

DISPOSITION

The judgment in affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.