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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIS FREDERICK WILLIAMS,

Defendant and Appellant.

A105477

(Contra Costa County  
Super. Ct. No. 050315424)

Defendant Ellis Frederick Williams appeals from a judgment convicting him of first degree burglary. Because the jury failed to designate the degree of the offense on the special verdict form it was provided, defendant contends the trial court erred in denying his motion to fix the verdict as burglary in the second degree. He also contends the trial court erred in instructing the jury on flight. We find merit in the first of these contentions, but not the second, and shall remand for resentencing for the lesser offense.

**Factual and Procedural History**

Defendant was charged by information with first degree residential burglary (Pen. Code,<sup>1</sup> §§ 459, 460, subd. (a).) The testimony at trial showed the following facts: On March 11, 2002, Donise Keller heard noises coming from the Antioch home of her neighbor, Delcie Rottman. She stepped outside and saw a man on the sidewalk, approximately 25 feet away, walking in the opposite direction. The man turned to look at Keller and then ducked behind a boat parked in a nearby driveway. She saw he was a

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

young, Black male in his twenties with light skin complexion and braided hair. The man was not carrying anything.

Delcie Rottman's son, Travis, testified that he arrived home from school that afternoon and found his motorized scooter missing from the garage, his bedroom window broken, and a DVD player and some DVDs missing. He called his mother to notify her that the house had been broken into.

Officer Chris Ernst arrived on the scene and determined the broken bedroom window was the likely point of entry and an unlocked door the likely point of the burglar's exit. He dusted the exterior of the window for latent fingerprints. Keller informed Ernst that she had seen an individual walking away from the Rottman residence earlier that day.

In October 2002, a fingerprint analyst matched the fingerprints taken from the window with those of defendant. Detective Ron Myers then compiled a photo lineup and asked Keller if she could identify the person she saw walking on the sidewalk. He told her "to pick the person that [she] saw, and if [she] was not completely sure, do not guess." Keller chose defendant's photograph. She told Meyers she was not completely sure of her identification but selected the person she thought it might be.

In December 2002, Myers located defendant at his mother's house. He told defendant his fingerprints had been found at the scene of the burglary and that he had been identified in a photo lineup. Defendant's mother informed Myers that defendant had been heavily involved in drugs nine months earlier and might not remember committing the burglary. Defendant said he could not remember committing the burglary but informed Myers the stolen property probably had been sold.

In January 2003, defendant called Myers and said, "I remember now that I did the burglary." Defendant informed Myers he could probably recover the scooter but not the DVD player. Meyers did not record this telephone call.

The instructions given to the jury at the close of trial advised, in accordance with CALJIC No. 14.50, that "defendant is accused in count one of having committed the crime of burglary, a violation of section 459 of the Penal Code. Every person who enters

any building with the specific intent to steal . . . is guilty of the crime of burglary in violation of Penal Code section 459. [¶] A building is a structure. [¶] . . . [¶] In order to prove this crime,” the jury was told it must be proved that “a person entered a building.” Using CALJIC No. 14.51, the jury was further instructed, “If you find the defendant guilty of burglary, you must determine the degree thereafter and state that degree in your verdict.” The jury was provided a verdict form upon which to find that defendant was either guilty or not guilty of “a Violation of Penal Code section 459 (BURGLARY), a felony as charged in Count One of the Information.” The jury was also provided a separate form entitled “Special Findings,” which it was instructed to complete “if the defendant is found guilty of Count One,” and which read: “We, the jury find that defendant, did commit as follows: [¶] A) FIRST DEGREE BURGLARY ( ) [¶] OR [¶] B) SECOND DEGREE BURGLARY ( ).”

After initially advising that it could not reach a verdict and hearing a read-back of portions of the trial testimony, the jury returned a verdict finding defendant guilty of burglary, but it failed to complete the special findings verdict form specifying the degree. Thereafter, defendant moved pursuant to section 1157 to set the verdict as second degree burglary. The court denied the motion, fixed the degree of the burglary as first degree, and sentenced defendant to the middle term of four years in state prison. Notice of appeal was timely filed.

### **Discussion**

1. The trial court erred in refusing to apply section 1157 and fix the burglary as second degree.

Defendant contends that because the jury failed to specify the degree of burglary in its verdict, the court erred in refusing to fix the burglary as second degree, pursuant to section 1157. Section 1157 provides, “Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or the attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime

or attempted crime of which the defendant is guilty, shall be determined to be of the lesser degree.”

Burglary may be one of two degrees, the more serious being first degree, which includes burglary of an inhabited dwelling house.<sup>2</sup> Despite the jury’s failure to specify the degree of the offense in this case, the trial court refused to apply section 1157 because under the evidence there was no basis to find the burglary was anything other than the burglary of an inhabited dwelling.<sup>3</sup>

The trial court was correct that the evidence left no room to question that if defendant committed the burglary, it was burglary in the first degree. Nonetheless, the court was compelled by the explicit language of section 1157 and the holding of our Supreme Court in *People v. McDonald* (1984) 37 Cal.3d 351, 381 (*McDonald*), overruled in part by *People v. Mendoza* (2000) 23 Cal.4th 896, 914, to treat the conviction as burglary in the lesser degree. *McDonald* held that in order to avoid application of section 1157, the jury must *explicitly* specify the degree of the crime in its verdict. In *McDonald*, the defendant was charged with murder which he was alleged to have committed during a robbery. (*McDonald, supra*, at p. 355.) The jury found the defendant guilty of murder “as charged in the information” and found a special circumstance allegation to be true. (*Id.* at p. 381.) The defendant argued that the verdict should be fixed as second degree murder pursuant to section 1157 because the jury failed to specify the degree in its

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<sup>2</sup> Section 460 reads, “(a) Every burglary of an inhabited dwelling house . . . is burglary of the first degree. [¶] (b) All other kinds of burglary are of the second degree.”

<sup>3</sup> The court explained, “In this case it was not even argued during the trial that this was not . . . a first degree. [¶] It was an issue of identity. It was not a conduct issue. There was no argument by either side and the information charged this as a first degree residential burglar[y]. The jury came back guilty of the burglary charge. [¶] You’re correct that there was no signature on the jury form, which I actually did not notice until I looked at your papers. And, where the appellate court will take that up is up to them. And in fact, the record is there for them, the jury was polled, and it will be interesting to see what, if anything, comes when you do take an appeal on this case. [¶] But I think that when I look at [*People v. Preciado, supra*, 233 Cal.App.3d 1244], and I look at what happened here, that there was not — there was no factual dispute about the type of building that it was, and for that reason the motion is denied, and the Court is going to fix the degree of the burglary at first degree.”

verdict. (*Ibid.*) The Attorney General argued that the jury sufficiently specified the degree of the crime by finding the special circumstance true. (*Id.* at p. 380.) The court held that section 1157 applied and that the crime should have been fixed as second degree murder. (*Id.* at p. 382.) “[T]he key is not whether the ‘true intent’ of the jury can be gleaned from circumstances outside the verdict form itself; instead, application of [section 1157] turns only on whether the jury specified the degree in the verdict form.” (*Ibid.*; see also *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2.)

“[T]he *McDonald-Beamon* rule, although criticized for its inflexibility, continues to be the law of this state.” (*In re Birdwell* (1996) 50 Cal.App.4th 926, 929.) “Under the *McDonald-Beamon* rule, a jury in a criminal case is required to determine the degree of the crime and if it does not, the offense is deemed to be of the lesser degree.” (*Id.* at p. 928.) The Attorney General argues here, as he did in *Birdwell*, that “when one looks at the entirety of the record, it is obvious that the jury intended to convict [defendant of the crime in the first degree]. Even if it is obvious that the jury intended to find [the greater degree], the *McDonald-Beamon* rule focuses solely on the actual verdict and does not take into account any extrinsic evidence or findings.” (*Id.* at p. 930.)

Other cases on which the Attorney General relies have placed limitations on the scope of the *McDonald-Beamon* rule, but none apply to the facts of the present case. Where the verdict includes language equivalent to “first degree,” the degree of the crime has been sufficiently specified. (See, e.g., *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1250 [“the verdict form, specifically finding burglary of a residence, was just another way of saying first degree burglary”]; *People v. Anaya* (1986) 179 Cal.App.3d 828, 831-832 [the jury’s use of the words “committed upon an inhabited building and a residence” precluded application of section 1157 because “[t]he jury should not be faulted for having used the long form rather than the label. . . . [¶] We need not look beyond the verdict forms to discover the jury’s ‘true intent’ ”]; *People v. Goodwin* (1988) 202 Cal.App.3d 940, 947 [section 1157 does not apply when the verdict form refers to “residential burglary” as there is “no logical reason to compel the fact finder to articulate a numerical degree when, by definition, ‘first degree burglary’ and ‘residential burglary’

are one and the same thing”].) Here, unlike the situation in *Preciado, Anaya*, and *Goodwin*, the verdict form which the jury signed and returned did not include any language equivalent to an express finding of first degree burglary.

The Attorney General argues that *McDonald* was overruled by *People v. Mendoza*, *supra*, 23 Cal.4th 896. *McDonald* was overruled, however, only in part, to the extent it applied when “the trial court correctly instructs the jury only on first degree murder and to find the defendant either not guilty or guilty of first degree murder.” (*People v. Mendoza*, *supra*, at p. 910.) “Under these circumstances, as a matter of law, the *only* crime of which a defendant may be convicted is first degree murder, and the question of degree is not before the jury. As to the degree of the crime, there is no determination for the jury to make.” (*Id.* at p. 910.) In *Mendoza* the jury was instructed solely on first degree murder. The question of degree was removed from the jury not because of the evidence presented at trial but because defense counsel stipulated to the jury being instructed only on the offense in the first degree. (*Id.* at p. 901.) As the majority opinion in *Mendoza* explained in rejecting the views of the dissenting justices, “We are not establishing a rule that depends only on ‘the theory or theories argued by the prosecution’ (dis. opn. of Mosk, J. . . .) or ‘the evidence presented by the prosecution.’ (Dis. opn. of Kennard, J. . . .) Rather, . . . section 1157 does not apply where the *jury instructions* accurately and correctly given do not permit the jury to consider or return a . . . conviction other than of the first degree.” (*Id.* at p. 910, fn. 5.) In the present case, the issue of the degree of the burglary was never removed from the jury. No stipulation as occurred in *Mendoza* was entered here<sup>4</sup> and the jury was properly instructed on both first

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<sup>4</sup> The Attorney General relied on page 484 of the reporter’s transcript originally filed in this court to assert that “defense counsel conceded that the crime committed was burglary of ‘a house or an inhabited dwelling.’ ” However, in response to a written inquiry from this court, the parties confirmed that the transcript was corrupted and misidentified the speaker on page 484. The corrected transcript discloses that at page 484 defense counsel was not conceding the degree of the burglary, but the prosecutor was arguing why the jury should find the burglary to have been first degree.

degree and second degree burglary. Thus, *Mendoza's* limited overruling of *McDonald* has no application to the present case.

For the same reason, the Attorney General's reliance on *People v. Savala* (1969) 2 Cal.App.3d 415, disapproved on another point in *People v. Beagle* (1972) 6 Cal.3d 441, 451-452, is unavailing. In *Savala* the information charged the defendant with first degree robbery. (*Id.* at p. 418.) Defense counsel stipulated that each charge of robbery was first degree and the jury proceeded to find the defendant guilty "as charged in the information." (*Id.* at pp. 418-419.) The court held the jury sufficiently specified the degree of the crime in its verdict and refused to apply section 1157. (*People v. Savala, supra*, at p. 419.) Although the defendant here was charged with first degree residential burglary and found guilty "as charged in count one of the information," defense counsel did not stipulate that the burglary was first degree. As indicated in footnote 4, *ante*, the Attorney General's argument based on a contrary assertion was predicated on an erroneous transcript of the proceedings. Furthermore, *Savala's* assertion that " '[t]he form of the verdict is regarded as immaterial so long as the jury's intention to convict of the crime charged . . . is unmistakably expressed' " (*id.* at p. 419) conflicts with *McDonald's* narrow reading of section 1157 and does not state the standard that the Supreme Court has since enunciated.

2. The trial court did not err in instructing the jury on flight.

Defendant argues the court erroneously instructed the jury on flight. The court instructed the jury pursuant to CALJIC No. 2.52 as follows: "The flight of the person immediately after the commission of a crime, or after he is accused of the crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which such circumstances is entitled is a matter for the jury to determine." Defendant argues that this instruction was given in error because there was no evidence that he engaged in flight.

Instruction on flight is proper "whenever evidence of the circumstances of defendant's departure from the crime scene . . . logically permits an inference that his

movement was motivated by a guilty knowledge.” (*People v. Turner* (1990) 50 Cal.3d 668, 694.) “[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.” (*People v. Crandell* (1998) 46 Cal.3d 833, 869, overruled on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 361.)

Keller testified she heard noises coming from the Rottman home and when she looked outside saw defendant walking on the sidewalk near the house. Defendant turned to look at her, then ducked and hid behind a boat in a driveway. This conduct arguably evidenced a purpose to avoid being observed by Keller. Furthermore, Keller’s eyewitness identification, defendant’s fingerprints, the evidence of a broken window and testimony that items had been stolen from the house logically permit the inference that defendant was attempting to hide because of his guilt. (See *People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477 [Witness heard noises coming from crime scene and saw defendant running from the area of the crime scene. “[T]he jury could rationally draw a consciousness-of-guilt inference from defendant’s actions, since defendant’s flight from the vicinity of the crime scene at or near the inception of the [crime] did ‘ “connect an accused with the commission of an offense” ’ ”].)

The fact that defendant may have been returning to his home, located only two doors from the Rottman residence, does not alter this conclusion. Although returning to one’s home following the commission of a crime is not in itself sufficient to warrant an instruction on flight, the circumstances of the departure from the crime scene may be. (See *People v. Turner, supra*, 50 Cal.3d at p. 695 [evidence that the defendant hastily departed the crime scene and returned home warrants the inference that the defendant’s return home was motivated by guilt].) Hence, there was no error in giving the flight instruction.

Nor did the instruction “tell” the jury to infer “that ‘flight’ was relevant to prove [defendant’s] guilt,” as defendant argues. CALJIC No. 2.52 does not compel the jury to find that defendant engaged in flight nor to find that defendant’s flight had any bearing on his guilt. Rather, the instruction tells the jury to first consider whether defendant

engaged in flight and second to determine what weight if any to assign to defendant's flight. CALJIC No. 2.52 permits the jury to find that a defendant did not engage in flight or, if he did, that his conduct did not reflect on his guilt. (See *People v. Escobar* (1996) 48 Cal.App.4th 999, 1029, overruled on other grounds in *People v. Mendoza, supra*, 23 Cal.4th at pp. 923-925 ["It was for the jury to determine whether flight occurred and at what point it commenced"]; "the instruction 'left it to the jury to determine whether there had been flight. The instruction assumes neither the guilt of the accused nor that flight occurred' "); see also *People v. Rhodes, supra*, 209 Cal.App.3d at p. 1477 ["Alternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide"].)

Even if the instruction on flight were given in error, it is clear under any standard that the instruction resulted in no prejudice. (See *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.) Defendant's fingerprints were found at the scene of the crime, he confessed to "doing the burglary," and Keller identified him as the man she saw walking on the sidewalk near the Rottman's residence. The fact that the jury requested read-back of testimony and took more than six hours to reach a verdict does not indicate any realistic possibility that a result more favorable to defendant would have resulted in the absence of the disputed instruction. (See *People v. Johnson* (1988) 47 Cal.3d 576, 601 [" 'fingerprint evidence is the strongest evidence of identity and is ordinarily sufficient alone to identify the defendant' "].)

### **Disposition**

The judgment is modified to reflect that defendant was found guilty of second degree burglary. As modified, the judgment of conviction is affirmed. The matter is remanded for resentencing.

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Pollak, J.

We concur:

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Corrigan, Acting P. J.

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Parrilli, J.