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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY SACHER,

Defendant and Appellant.

A106561

(Contra Costa County  
Super. Ct. No. 05-032510-0)

**INTRODUCTION**

At his jury trial, defendant Kenny Sacher was convicted of first degree burglary (Pen. Code, § 459<sup>1</sup>), resisting an officer (§ 69), and misdemeanor possession of burglar's tools (§ 466). He appeals, contending: (1) the trial court erred in failing to instruct sua sponte on the defense of unconsciousness, and (2) the flashlights, glasscutter and railroad spike he possessed are not burglar tools as a matter of law.

**FACTS**

At approximately 8:30 p.m. on November 12, 2003, uniformed police officers responded to a 911 report of someone breaking into 663 Winslow Street in Crockett, California. Contra Costa County Deputy Sheriff Timothy Allen testified that as he approached a partially opened security gate leading to the backyard, he heard footsteps across a wooden deck. He and his partner, Deputy David Hall, drew their firearms. Allen held his gun in his right hand and a flashlight in his left. Scanning the yard with his

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

flashlight, he saw clothing and boots about four to five feet away. He illuminated the boots with his flashlight, identified himself, and yelled, "Show me your hands." As he did so, the person moved toward him, reached out, knocked Allen's gun hand to the side, and ran past him. Allen holstered his gun and shined his flashlight at defendant, who was running toward the back of the multi-tiered yard. Allen yelled at defendant to stop. Chasing defendant through the yard, Allen caught up with him when they reached a four-foot retaining wall. Allen grabbed defendant from behind by his belt and defendant "mule kicked" him, knocking Allen off balance. The yard was wet, slippery, and muddy. Defendant continued to run up the hill to the back end of the yard. Unable to get over a fence at the rear, defendant turned and charged back down toward the gate.

Hall testified that he saw a brief struggle between Allen and defendant at the security gate entrance and then saw defendant run up the backyard. Unable to get over the fence, defendant turned and charged toward Hall at a "full board run." Hall ordered defendant to give up and to stop resisting. (Hall did not recall whether he or Allen had identified themselves as law enforcement officers at this point, but Hall had commanded defendant to stop resisting at least 10 times by the time defendant reached the fence.) Defendant charged Hall with arms "flying" and attempted to hit Hall with his fists. Hall struck defendant several times on the left shoulder with his metal flashlight. At one point, as defendant charged, Hall unintentionally struck him in the head with his flashlight. He had aimed at defendant's shoulder, but defendant ducked down. Defendant was about six feet tall and weighed 200 pounds. When Hall attempted to grab defendant's sweatshirt sleeve, defendant flailed his arms and shook off Hall's grasp. Charging past Hall, defendant encountered Allen further down the hill. Allen told defendant to stop and grabbed him. Defendant struck Allen in the face with his fist. The blow knocked Allen off his feet and as he fell he dragged defendant over a retaining wall. By this time, Allen had identified himself as a sheriff deputy at least four or five times and continued to command defendant to stop and "give it up." Allen and defendant hit the ground at the same time. By the time Allen was on his feet, defendant was again up and struggling with Hall.

As the deputies pinned defendant against the retaining wall, defendant kicked at them, throwing his elbows and twisting his body to free himself from their grasp. Allen radioed for assistance as they attempted to restrain defendant at the retaining wall.

Hall testified he could not see whether defendant had a weapon in his hands because it was dark and defendant's hands were tucked underneath his body. Defendant ignored the deputies' repeated orders to give up and to show his hands. Hall struck defendant with his flashlight more than 10 times. He was not able to secure defendant's hands in order to handcuff him. Hall hit defendant in the legs and upper arms to subdue him. Allen also hit defendant in his lower extremities six to ten times with his metal flashlight. Allen denied hitting defendant on the head at any time. Allen sprayed several bursts of pepper spray in defendant's face, but it had no effect on defendant. Defendant eventually "squirmed away" from the deputies and again started running toward the gate. Allen and Hall were extremely winded and exhausted at that point. Nevertheless, Allen caught up with defendant before defendant got out of the backyard and defendant again turned and punched Allen in the face with his fist. Allen fell to the ground and defendant ran toward the gate. The pepper spray used on defendant was beginning to affect the deputies, causing eye irritation.

Defendant ran through the gate, but hit a mailbox in the front yard, allowing Hall to tackle him. Defendant again ignored commands to surrender and continued to struggle as the officers attempted to subdue him. He was on his stomach with his arms under his body, and he refused to stop struggling or to reveal his hands. Trying to gain control of defendant's arms, Hall administered several more "distraction" blows with his flashlight, then dropped it and hit defendant four or five times in the side of the face with his fists. Hall hit defendant more than 10 times in the lower back. The blows did not appear to weaken defendant's resistance. Hall testified he used "medium force" when he punched defendant and he was not trying to "knock out" defendant.

As Hall and Allen were trying to pin defendant and handcuff him, Deputy Marvis Haley arrived. Haley was able to extract defendant's arms by placing his ASP (similar to a baton) under defendant's arms and prying them out. Defendant refused to comply with

the orders to stop resisting and show his hands. However, defendant said he could not breathe. There was nothing in defendant's behavior that led Haley to believe defendant was too dazed to act intentionally when he was struggling with the other deputies. Eventually, the deputies were able to handcuff defendant. He was wearing gloves when handcuffed. Allen acknowledged that he and Hall used an "extreme amount of force" because defendant would not give up and allow himself to be taken into custody. Defendant was bleeding from the head after he was taken into custody. Allen did not see defendant bleeding as defendant charged down the hill at him. However, after defendant was handcuffed, Allen saw defendant bleeding from his head area. Haley did not recall seeing any blows to the top of defendant's head.

Defendant was taken to the hospital. Photographs showed injuries to the top and side of his head. About 45 minutes after being admitted to the hospital, defendant said to himself, "Stupid, stupid, stupid."

The deputies found two flashlights and a glass cutter in defendant's pants pocket. There was an eight- to ten-inch metal stake or spike on the hill in the backyard in an area where defendant and Allen had fallen during the struggle. A rear window leading to the bathroom, about two feet from the security gate, was broken out. The owner of the residence testified the house was for sale, although her son lived there. She had worked in the yard on November 12, 2003, leaving around 2:00 p.m. after locking the windows and doors. The owner also locked the security gate leading to the rear of the yard. The owner's son returned around 9:00 p.m. that night. He testified the security gate had been locked when he left earlier that day. When he inspected the gate, he noticed the framing was "messed up" and the fence swayed as if someone had applied force to it. He also noticed the outer pane of the bathroom window was broken, the inner pane had scratches in a circular pattern, and the window screen had been removed. His mother did not return to the house until December 6, and found the screen removed from the rear bathroom window and the outer glass pane broken out. The inner pane of the double pane window was scratched as if by a glasscutter.

## Defense

Defendant testified he had been working on his truck at his residence at 647 Winslow, across the street and “two houses down” from 663 Winslow. He was wearing welding gloves as he worked on his truck and he had two flashlights with him. As he was finishing work on the truck, he heard the sound of breaking glass coming from 663 Winslow and saw what looked like a flashlight beam on the side of the house. He decided to investigate. He walked to the front of the residence and heard footsteps on a deck. He saw that the security gate was open and went through the gate toward the backyard. As he walked two or three steps into the backyard, someone shined a flashlight directly into his face and hit him in the back of the head. He was knocked out by the blow. As he woke up, he was disoriented. Turning back toward the gate, he tried to stand up to get out. He saw a flashlight coming toward him. He panicked, turned and ran. He was tackled from behind and fell forward. He could not recall anything further until he came to in the hospital. He did not recall any blows other than the first. He did not know the person tackling him was a deputy sheriff and had not heard any commands to stop. He had never seen the 10-inch metal “stake” found in the backyard. He denied carrying the glasscutter the police claimed to have found in his pants pocket. He denied using alcohol or drugs that day and denied telling the hospital staff that he had. He could not remember punching or taking a swing at anyone. He admitted being convicted of possession of methamphetamine for sale in 1994 and 1995.

Defense witnesses testified they saw and heard the police beating someone that night. Raymond Ford, who lived across the street from defendant, heard noise and voices hollering, but did not pay attention until he heard someone screaming, “help me!” He described the tone as someone “screaming for their life.” He went outside and saw police cars and numerous flashlights moving around the building. Christy Wallace testified that she lived on a street behind Winslow. She was outside on her balcony with a friend when she heard yelling and what appeared to be fighting. She could see that someone was using a flashlight to strike another person. She yelled to stop and someone yelled back, “shut up, stay out of this.” The person did not identify himself as a police officer. She

then went inside and dialed 911. When she returned, she could see two people were hitting another and that the person on the ground was trying to protect himself from the blows. Wallace's friend, Maureen Gohan, also testified that she heard a male voice calling for help, in obvious distress. She heard scuffle noises. When she screamed at them to stop, a person yelled out to her and Wallace to "shut up". As the person stood up, she saw it was an African-American police officer in uniform. She saw several people she assumed were all officers, focusing their attention on the person on the ground. She saw that their flashlights were going down on or around the person on the ground. The man on the ground called out for help, then stopped after a while as the officers continued their activity.

### **PROCEDURAL BACKGROUND**

The jury returned verdicts of guilty on the charges of first degree residential burglary, resisting an officer, and possession of burglar's tools. At sentencing, the court found defendant ineligible for probation, denied probation, and imposed the low term of two years on the first degree burglary offense (count 1) and a consecutive eight-month term for resisting an officer (count 2). The misdemeanor possession of burglar's tools offense (count 3) was deemed discharged with credit for time served. Various fines and restitution amounts were ordered and custody and conduct credits were determined. This timely appeal followed.

#### **I.**

Defendant contends that he was denied due process by the failure of the trial court to instruct sua sponte on the defense of unconsciousness.<sup>2</sup> This claim is meritless.

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<sup>2</sup> CALJIC No. 4.30 provides: "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime. [¶] This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium of fever, or because of an attack of [psychomotor] epilepsy, a blow on the head, the involuntary taking of drugs or the involuntary consumption of intoxicating liquor, or any similar cause. [¶] Unconsciousness does not require that a person be incapable of movement. [¶] Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission of the

“Where not self-induced, as by voluntary intoxication or the equivalent . . . , unconsciousness is a complete defense to a charge of criminal homicide. [Citations.] ‘Unconsciousness,’ as the term is used in the rule just cited, need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist—and the above-stated rule can apply—where the subject physically acts in fact but is not, at the time, conscious of acting.” (*People v. Newton* (1970) 8 Cal.App.3d 359, 376-377 (*Newton*); §§ 22, 26; see also *People v. Heffington* (1973) 32 Cal.App.3d 1, 9 [“unconsciousness includes not only a state of coma or immobility, but also a condition in which the subject acts without awareness”].) “An unconscious act within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional. [Citation.]” (*People v. Sedeno* (1974) 10 Cal.3d 703, 717 (*Sedeno*), disapproved on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 148, 178, fn. 26 (*Breverman*); *People v. Ray* (1975) 14 Cal.3d 20, 25, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89-91.)

“ ‘It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citation.]” (*Sedeno, supra*, 10 Cal.3d at p. 715.) That sua sponte obligation “encompasses an obligation to instruct on defenses, including . . . unconsciousness, and on the relationship of these defenses to the elements of the charged offense.” (*Id.* at p. 716.) The trial court’s duty to instruct sua sponte on particular defenses arises “only if it appears that the defendant is relying on

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alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, [he] [she] must be found not guilty.” (CALJIC No. 4.30 (7th ed. 2003).)

such a defense, or if there is substantial evidence supportive of such a defense *and the defense is not inconsistent with the defendant's theory of the case.*" (*Id.* at p. 716, italics added; *People v. Barton* (1995) 12 Cal.4th 186, 195; see also *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

Our California Supreme Court has recently reiterated that the trial judge has a duty to instruct sua sponte as to defenses “ “that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense *and the defense is not inconsistent with the defendant's theory of the case.*” ’ (*Breverman*[, *supra*,] 19 Cal.4th [at p.] 157.)” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669.)

Here, defendant did not rely on a defense of unconsciousness. However, such a defense was supported by substantial evidence. It was uncontroverted that defendant had received at least one blow to the head. He testified that he was knocked out by the initial blow to the head, that when he came to he tried to run away, and that he did not remember anything after he was tackled from behind until he woke up in the hospital.

The critical question is whether the defense of unconsciousness was inconsistent with his theory of the case presented at trial. Our review of the record persuades us that the defense of unconsciousness was inconsistent with defendant's theory of the case that he was acting reasonably in protecting himself from excessive force used by the deputies, and that the deputies' testimony regarding defendant's mule kicking, punching, and otherwise actively resisting, was false.

Defense counsel requested and received instructions on the use of excessive force by peace officers and the burden of proof on the issue of the officers' lawful performance of duties. (CALJIC Nos. 9.26,<sup>3</sup> 9.28,<sup>4</sup> and 9.29.<sup>5</sup>) Defense counsel challenged the

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<sup>3</sup> “A peace officer who is making an arrest or detention may use reasonable force to make the arrest or detention, or to prevent escape, or to overcome resistance. [¶] The officer need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested or detained. [¶] Where a peace officer is making an arrest or detention, and the person being arrested or detained has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested or detained by peace officer, it is the duty of the person to refrain from using force or any weapon to

credibility of the deputies during closing argument, pointing out discrepancies in their testimony and arguing that after arriving at the dark backyard, and seeing someone stumbling around, the deputies panicked.

Among the discrepancies, defense counsel pointed out that neither Hall nor Allen had mentioned the significant injury to the top of defendant's head or accounted for it in either their initial reports or in the supplemental reports. Moreover, contrary to the testimony of neighbor witnesses, none of the deputies testified that defendant had yelled for help. Counsel argued, "If he's fighting and struggling, as the deputies said, why was he yelling for help? You never heard the deputies say that." "Now, the deputies have

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resist the arrest or detention unless unreasonable or excessive force is being used to make the arrest or detention. [¶] However, if you find that the peace officer used unreasonable or excessive force in making the arrest or detention, the person being arrested or detained has no duty to refrain from using reasonable force to defend himself against the use of the excessive force." (CALJIC No. 9.26.)

<sup>4</sup> "A peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning. [¶] If an officer does use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning, the person being arrested or detained may lawfully use reasonable force to protect himself. [¶] Thus, if you find that the officer used unreasonable or excessive force in making or attempting to make the arrest or in making or attempting to make the detention in question, and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the crime charged in Count 2 or of the lesser-included offense of Penal Code 148(a)(1) resisting, delaying, or obstructing a peace officer." (CALJIC No. 9.28.)

<sup>5</sup> "In a prosecution for the violation of Penal Code section 69, . . . the People have the burden of proving beyond a reasonable doubt that the peace officer was engaged in the . . . performance of his duties. [¶] A peace officer is not engaged in the performance of his duties if he makes or attempts to make an unlawful arrest or detention or uses unreasonable or excessive force in making or attempting to make the arrest or detention. [¶] If you have a reasonable doubt that the peace officer was making or attempting to make a lawful arrest or detention or using reasonable force in making or attempting to make the arrest or detention and thus a reasonable doubt that the officer was engaged in the performance of his duties, you must find the defendant not guilty of any crime which includes an element that the peace officer was engaged in the performance of his duties." (CALJIC No. 9.29.)

come up w[ith] their testimony about [defendant] doing this and doing that in the backyard and [defendant] mule kicking me and [defendant] wrestling me over a retainer fence to compensate for all of these injuries that you see.” Consistent with the instructions requested by the defense, counsel argued, “When there is all this wrestling going on in the backyard, you heard that from the deputies, the only thing that we know for sure, unless you are dealing with—dismiss the civilians, the only people that have no interest in this case is Ms. Wallace and Ms. Gohan, is the fact that there is brutality occurring on the front yard by the mailbox, which again is consistent with what [defendant] had to say about on the east on the sidewalk four feet away from the fence. [¶] He is hit, he comes to, he sees more lights. He runs to get away from the lights and he is tackled. That’s exactly consistent with what was happening in the circumstances in which he was found.” Defense counsel summarized: “The police officers used excessive and brutal force. They made a mistake. Human nature trying to compensate and trying to cover that mistake. They needed to provide a story, an account, of how [defendant] was doing this brutally, never yelling for help, and they were justified in what they did.”

The defense theory—that defendant did nothing but try to run away, not knowing the deputies were police officers, and that he was beaten with excessive force while yelling for help and trying to protect himself from their blows—was patently inconsistent with the theory that he actively, vigorously and forcefully resisted the officers while in an unconscious state.

Were we to find the trial court erred in failing to instruct sua sponte on unconsciousness, we must conclude that any error was harmless both because “the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions” (*Sedeno, supra*, 10 Cal.3d at p. 721; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 96-97 [error in omitting instruction harmless when factual question posed by that instruction was necessarily resolved adversely to defendant under other, properly given instructions]; see *Breverman, supra*, 19 Cal.4th 142, 175), and additionally because defendant has failed to prove that but for such asserted error he would have received a more favorable result (*Breverman*, at

p. 175 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of reversal for instructional error on lesser included offenses]).

Defendant argues that error here would have been “structural” requiring automatic reversal. He cites primarily cases where the requested instruction was refused. “Where evidence of involuntary unconsciousness has been produced in a homicide prosecution, the *refusal* of a requested instruction on the subject, and its effect as a complete defense if found to have existed, is prejudicial error.” (*Newton, supra*, 8 Cal.App.3d at p. 377, italics added.) For example, in *People v. Bridgehouse* (1956) 47 Cal.2d 406, disapproved on other grounds by *People v. Lasko, supra*, 23 Cal.4th 101, 110, and in *People v. Wilson* (1967) 66 Cal.2d 749, it was held error to refuse an unconsciousness instruction where the defendant testified he did not remember crucial aspects of the incident. In *Bridgehouse*, the defendant testified he had only a vague or hazy memory of the shooting because “ ‘the whole action was of such an explosive nature, . . . and so distorted by a haze of mental void.’ ” (*Bridgehouse*, at p. 410.) In *Wilson*, the defendant claimed he had no memory of firing the shots that killed his wife and another person. (*Wilson*, at p. 755.) In both cases, the instruction was requested and refused.

In *Newton, supra*, 8 Cal.App.3d 359, failure to give the instruction sua sponte was held prejudicial per se because “the omission operated to deprive defendant of his ‘constitutional right to have the jury determine every material issue presented by the evidence.’ [Citations.]” (*Id.* at p. 378.) Moreover, the appellate court went on to state that “[a]ctual prejudice” was also shown where under the circumstances presented it was “ ‘reasonably probable’ that a result more favorable to [the defendant]—i.e., a verdict acquitting him of the homicide, based upon unconsciousness as a complete defense—would have been reached if the omitted instruction had been given. (See *People v. Watson*[, *supra*,] 46 Cal.2d [at p.] 836.)” (*Newton*, at p. 378.)

However, more recently in *Breverman, supra*, 19 Cal.4th 142, the California Supreme Court “abrogate[ed] the *Sedeno* standard of reversal for instructional error on lesser included offenses in noncapital cases” (*Breverman*, at p. 178, fn. 26) and determined that “error in failing sua sponte to instruct, or to instruct fully, on all lesser

included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*.” (*Breverman*, at p. 178.)

The jury here was instructed that section 69 required defendant act “willfully” or “knowingly” to resist an officer in the performance of his or her duty. The jury was also instructed that in order to prove a violation of section 69, it must be proved that the “person knowingly and unlawfully resisted an executive officer in the performance of his or her duty.” The instructions defined “willfully” and “knowingly” as follows: “The word ‘willfully’ when applied to the intent with which an act is done or omitted means with the purpose or willingness to commit the act or to make the omission in question. The word ‘willfully’ does not require any intent to violate the law, or to injure another, or to acquire any advantage. [¶] The word ‘knowingly,’ means with knowledge of the existence of the facts in question. Knowledge of the unlawfulness of any act or omission is not required. The requirement of knowledge does not mean that the act must be done with any specific intent.”

In light of these accurate instructions, the jury necessarily rejected any possibility that appellant was unconscious at the time he committed the offense, finding defendant *knowingly* and *willfully* resisted the deputies by force in the lawful performance of their duties. The jury could not have found defendant knowingly resisted a peace officer in the performance of his duties if defendant was not conscious.

Any error in failing to instruct sua sponte on the defense of unconsciousness was necessarily harmless.

## II.

Defendant contends that as a matter of law the items he possessed did not qualify as burglar tools. The Attorney General does not dispute that the flashlights and glasscutter did not meet the statutory definition. However, he contends that the metal stake, which could be used to pry open a locked door or gate, does qualify as a burglar tool.

Section 466 provides, in pertinent part: “Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers,

water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code . . . is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.”

Before the 2002 amendment of the statute added “porcelain spark plug chips or pieces” to section 466, the Court of Appeal in *People v. Gordon* (2001) 90 Cal.App.4th 1409 (*Gordon*) held that such did not fit the definition of burglar tools. In *Gordon*, the defendant was convicted of violating section 466 based on the discovery of two pieces of porcelain from a spark plug in his pocket, pieces found when he was observed with two other men doing something to the interior of a car bearing no license plates. A police detective testified that “pieces of ceramic spark plugs are used by thieves to throw at car windows and shatter them, because the spark plug pieces make very little sound in doing so.” (*Id.* at p. 1411.) The appellate court reversed, explaining: “Ceramic pieces from a spark plug are not specifically listed in section 466; thus, the issue is whether they come under the meaning of ‘other instrument or tool’ as used in the section. In making this determination we are guided by the rule of construction known as *ejusdem generis*—which applies when general terms follow a list of specific items or categories, or vice versa. [Citation.] Under this rule, application of the general term is ‘ “restricted to those things that are similar to those which are enumerated specifically.” ’ [Citations.] Moreover, ‘[i]n construing criminal statutes, the *ejusdem generis* rule of construction is applied with stringency. [Citation.]’ Thus, the meaning of the words ‘or other instrument or tool’ in section 466 is restricted to a form of device similar to those expressly set forth in the statute. [Citation.] [¶] The items specifically listed as burglar’s tools in section 466 are keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up or out. None of the devices enumerated are those whose function would be to break or cut glass—e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be

thrown at a car window to break it. Nevertheless, the People liken a ceramic spark plug piece to a ‘shaved’ key because both provide for quiet breaking and entering, and argue that a spark plug piece is an ‘other instrument or tool’ which satisfies the statutory definition in section 466 because ‘it operates as effectively in breaking into a vehicle as unlocking the vehicle door with a metal tool . . . .’ However, the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be *similar* to those specifically mentioned. Here, a ceramic piece of a spark plug that can be thrown at a car window is not similar to the burglar’s tools listed in the statute.” (*Gordon*, at pp. 1412-1413.)

As stated above, in 2002 the Legislature amended section 466 to add “porcelain spark plug chips or pieces” to the list of tools or instruments. In adding that language, the Legislature expressly stated its intent that only ceramic or porcelain spark plug chips or pieces be added to the statute and “not other common objects such as rocks or pieces of metal that can be used to break windows.” (Stats. 2002, ch. 335, § 2, p. 1036.)

Respondent argues that, under the *Gordon* analysis, the railroad stake qualified as a burglar’s tool under section 466 because it could be used to pry open a locked door or gate. Although respondent urges that there was evidence that the stake may have been used to pry open the security gate, it cites only the evidence that the security gate was locked when the owner’s son left the residence earlier in the day and that when he returned, after the burglary, he found the framing was “messed up” and the fence swayed as if someone had applied force to it. However, respondent points to no evidence that the metal stake was actually used or could have been used to “jimmy” the latch or to force open the gate. There was no evidence that the stake was similar to a crowbar or to any of the other listed items in this regard and no analysis of how an eight- to ten-inch spike is similar to tools that can be used to pry open doors, pick locks, or pull locks up or out. As *Gordon* stated, the test is not whether the object can be used to accomplish the same purpose, the test is whether the device itself is *similar* to the items enumerated in the statute. (*Gordon, supra*, 90 Cal.App.4th at p. 1413.)

In amending the statute, the Legislature did not indicate disagreement with the *Gordon* analysis. Indeed, it clarified that the amendment was not intended to expand the reach of the statute to include “common objects” that can be used to break windows.

On this record we must conclude that defendant’s conviction for possession of burglar’s tools under section 466 cannot stand.

**DISPOSITION**

Defendant’s conviction for possession of burglar’s tools in count 3 is reversed. The judgment is affirmed in all other respects.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.