In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

RICHARD GOOLSBY,

Defendant & Appellant.

Case No. S216648

Fourth Appellate District, Division Two, Case No. E052297
San Bernardino County Superior Court, Case No. FSB905099
The Honorable BRYAN F. FOSTER, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Deputy Solicitor General
FELICITY SENOSKI
Deputy Attorney General
State Bar No. 195181
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2607
Fax: (619) 645-2271
Email: Felicity.Senoski@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

Questions Presented 1

Introduction 1

Statement of the Case and Facts 3

Argument 7

I. Appellant's conviction for violating section 451, subdivision (b), should be affirmed 7

A. Additional procedural and factual background 7

B. Appellant's conviction under section 451, subdivision (b), is supported by the jury's verdict, the Court of Appeal's opinion, and appellant's concession that the motorhome was property 11

C. This court should affirm appellant's conviction for section 451, subdivision (b) 16

1. Appellant received adequate notice to prepare a meaningful defense against a charge arson of an inhabited structure or inhabited property 17

2. At no time after the charge was amended was appellant deprived of a meaningful opportunity to defend against the arson count and he cannot claim his due process right to notice would be prejudiced by an affirmance of the conviction 20

II. Penal Code section 654 does not prevent retrial of an offense properly added in the original prosecution, but where an instructional error resulted in no verdict being returned 26

A. Additional relevant procedural background 27

TABLE OF CONTENTS
(continued)

Page

B. Section 654, as construed by this court in *Kellett*, does not apply to prevent retrial of charges properly before the jury in the original prosecution 28

C. Appellant impliedly consented to add the uncharged offense; any claim the jury was improperly discharged when it failed to declare a verdict as to this offense is forfeited, retrial is proper to resolve the question of guilt 33

1. The rule of *Toro* and implied consent controls 33

a. Appellant's tacit agreement to the lesser offense instruction amended the charge 37

b. Appellant's affirmative conduct amended the charge with the lesser offense 37

2. Appellant's trial strategy depended upon the jury's consideration of the lesser offense 38

3. Appellant has forfeited any claim under section 1164 that the trial court improperly discharged the jury without a verdict on the lesser offense 40

D. The principles of double jeopardy do not prevent retrial of a lesser related offense mistakenly identified as a lesser included offense in the jury instructions and for which the jury did not return a verdict as instructed 45

Conclusion 52

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington
(1978) 434 U.S. 497 [98 S.Ct. 824, 54 L.Ed.2d 717] 46

Brown v. Boren
(1999) 74 Cal.App.4th 1303 15

Burks v. United States
(1978) 437 U.S. 1 [98 S.Ct. 2141, 57 L.Ed.2d 1] 51

Cole v. Arkansas
(1948) 333 U.S. 196 [68 S.Ct. 514, 92 L.Ed. 644] 21

Curry v. Superior Court
(1970) 2 Cal.3d 707 50

Downum v. United States
(1963) 372 U.S. 734 [83 S.Ct. 1033, 10 L.Ed.2d 100] 51

Fontana v. Upp
(1954) 128 Cal.App.2d 205 15

Higgins v. Superior Court In and For Los Angeles County
(1960) 185 Cal.App.2d 37 50

In re Colford
(1924) 68 Cal.App. 308 50

Kellett v. Superior Court
(1966) 63 Cal.2d 822 ..... 1 *et passim*

Martinez v. Illinois
(May 27, 2014) ___U.S.___ [134 S.Ct. 2070, ___ L.Ed.2d ___] 51

Ohio v. Johnson
(1984) 467 U.S. 493 [104 S.Ct. 2536, 81 L.Ed.2d 425] 45, 51

Orlina v. Superior Court
(1999) 73 Cal.App.4th 258 ..... 6, 35

People v. Anderson
(2009) 47 Cal.4th 92 46

People v. Anzalone
(2013) 56 Cal.4th 545 ..... 42, 48

People v. Ardoin
(2011) 196 Cal.App.4th 102 25

People v. Birks
(1998) 19 Cal.4th 108 ..... 34, 36

People v. Bolin
(1998) 18 Cal.4th 297 ..... 12, 13

People v. Ceja
(2010) 49 Cal.4th 1 39

People v. Cuevas
(1996) 51 Cal.App.4th 620 32

People v. Fields
(1996) 13 Cal.4th 289 ..... 46, 47

People v. Flood
(1998) 18 Cal.4th 470 14

People v. Francis
(1969) 71 Cal.2d 66 37

People v. Fyfe
(1929) 102 Cal.App. 549 18

People v. Gallego
(1990) 52 Cal.3d 115 24

People v. Garcia
(1984) 36 Cal.3d 539 ..... 14, 50

People v. Greer
(1947) 30 Cal.2d 589 47

People v. Guiuan
(1998) 18 Cal.4th 558 ..... 6, 34

People v. Ham Tong
(1909) 155 Cal. 579 ..... 48, 49

People v. Harris
(1994) 9 Cal.4th 407 16

People v. Haskin
(1992) 4 Cal.App.4th 1434 ..... 34, 35

People v. Holt
(1997) 15 Cal.4th 619 20

People v. Jackson
(1989) 49 Cal.3d 1170 12

People v. Labaer
(2001) 88 Cal.App.4th 289 48

People v. Moore
(1997) 59 Cal.App.4th 168 16

People v. Peters
(1950) 96 Cal.App.2d 671 ..... 13, 14

People v. Pijal
(1973) 33 Cal.App.3d 682 ..... 14, 15

People v. Ramirez
(1987) 189 Cal.App.3d 603 ..... 36, 37, 39

People v. Randazzo
(1957) 48 Cal.2d 484 18

People v. Reed
(2006) 38 Cal.4th 1224 34

People v. Richie
(1994) 28 Cal.App.4th 1347 15

People v. Russo
(2001) 25 Cal.4th 1124 36

People v. Sanders
(1998) 67 Cal.App.4th 1403 30

People v. Saunders
(1993) 5 Cal.4th 580 ..... 41, 45

People v. Schwartz
(1992) 2 Cal.App.4th 1319 38

People v. Seaton
(2001) 26 Cal.4th 598 17

People v. Shirley
(1982) 31 Cal.3d 18 51

People v. Sullivan
(2013) 217 Cal.App.4th 242 49

People v. Taylor
(1969) 273 Cal.App.2d 477 ..... 36, 37, 38, 39

People v. Toro
(1989) 47 Cal.3d 966 ..... 6 *et passim*

People v. Valli
(2010) 187 Cal.App.4th 786 ..... 31, 32, 39

Richardson v. United States
(1984) 468 U.S. 317 [104 S.Ct. 3081, 82 L.Ed.2d 242] 45

Russell v. United States
(1962) 369 U.S. 749 [82 S.Ct. 1038, 8 L.Ed.2d 240] 21

Sanders v. Superior Court
(1999) 76 Cal.App.4th 609 ..... 30, 31, 32

Sheppard v. Rees
(9th Cir.1989) 909 F.2d 1234 ..... 22, 23, 24

Stanley v. Superior Court
(2012) 206 Cal.App.4th 265 49

Stone v. Superior Court
(1982) 31 Cal.3d 503 ..... 49, 52

Wade v. Hunter
(1949) 336 U.S. 684 [69 S.Ct. 834, 93 L.Ed. 974] 51, 52

STATUTES

Penal Code
- § 187 ..... 3, 7
- § 187, subdivision (a) 19
- § 417 28
- § 450, subd. (a) 12
- § 450, subd. (c) 12, 22
- § 451 ..... 11, 12
- § 451.1, subd. (a) 3, 7, 4
- § 451.1, subd. (a)(4) 19, 22
- § 451, subd. (b) ..... 1 *et passim*
- § 451, subd. (d) 3, 4
- § 452, subd. (d) 10
- § 654 ..... 1 *et passim*
- § 664 ..... 3, 7, 19
- § 664, subd. (f) 25
- § 667.5, subd. (b) 4, 7
- § 667, subd. (a) 5
- § 667, subds. (a)(1), (b)-(i) 4
- § 667, subds. (a), (b)-(i) 8
- § 871 18
- § 872, subd. (a) 18
- § 954 ..... 29, 30
- § 1009 18
- § 1023 ..... 46, 47
- § 1025 41
- § 1025, subd. (b) 41
- § 1149 42
- § 1159 34
- § 1161 ..... 43, 47
- § 1164 40
- § 1164, subd. (b) 40, 41, 43
- § 1170.12, subds. (a)-(d) 4, 8
- § 1181, subd. (6) 4, 5
- § 12021 29

CONSTITUTIONAL PROVISIONS

California Constitution
- Art. I, § 14 17

United States Constitution
- VI Amendment 15, 16, 21

OTHER AUTHORITIES

CALCRIM No. 1502 ..... 9, 13

CALCRIM No. 1515 ..... 3, 10, 40

CALCRIM No. 1532 10

CALCRIM No. 3518 3

QUESTIONS PRESENTED

1. Do the jury verdict and Court of Appeal opinion establish that defendant is guilty of violating Penal Code section 451, subdivision (b), which governs arson of "an inhabited structure or inhabited property?"

2. If so, should defendant's conviction for violating Penal Code section 451, subdivision (b), be affirmed?

3. Does Penal Code section 654 and this court's rule in *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*), bar retrial when a defendant impliedly consents to instructing the jury with a lesser related offense, but the jury does not return a verdict on that charge based on erroneously given instructions?

INTRODUCTION

In a first amended information, appellant was charged with arson of an inhabited structure. Penal Code section 451, subdivision (b),[1] proscribes arson of "an inhabited structure or inhabited property." The amendment omitted "or inhabited property" from the original charge. Arson of property, which is a lesser-related offense of arson of an inhabited structure, was not charged by the prosecutor, but following an instructional conference on the issue the trial court instructed the jury on that offense without objection by the defense. During argument, the defense urged the jury to convict appellant of the lesser offense of arson of property, or alternatively mere reckless burning of property. The jury convicted appellant of arson of an inhabited structure, but, as the result of the trial court's instruction, it did not return a verdict as to the lesser related offense of arson of property and that count remained unresolved. The Court of

[1] Future unlabeled statutory references are to the Penal Code.

Appeal reversed appellant's arson of an inhabited structure conviction for insufficient evidence because the motorhome appellant burned was not a structure under the law of arson.

This court should reverse the Court of Appeal's decision and affirm appellant's conviction for violating Penal Code section 451, subdivision (b). The statutory provision sets forth alternative elements for the offense based on arson of either an inhabited structure or inhabited property. The jury's verdict revealed it necessarily found every element of section 451, subdivision (b), save the alternative element of property. However, the Court of Appeal's opinion established the missing element and, in his defense at trial, appellant conceded the alternative element. It follows that appellant's guilt for violating section 451, subdivision (b), has been established. Even if the prosecution had not amended the charge to omit the "or inhabited property" language from the information, appellant's defense would have been the same. Consequently, appellant's due process rights were not violated and the case should be affirmed even though the evidence was insufficient to show a structure was burned.

Alternatively, a retrial of the unresolved arson of property offense is proper because it constitutes a continuation of the original prosecution, rather than a new, successive prosecution barred by Penal Code section 654. When a defendant impliedly consents to be placed in jeopardy for a lesser related offense by failing to object to jury instructions and affirmatively urging the jury to convict on such offense, he necessarily consents to its resolution whether by conviction or acquittal. An instructional error, such as occurred here, merely delays resolution of the charge. Like any other trial error, if a count is left unresolved by instructional error, the defendant's jeopardy on that count has not terminated. A retrial in such a case cannot be deemed a successive prosecution under section 654 and does not violate state or federal double

jeopardy protections. Accordingly, this court should rule that when a defendant consents to be charged with an offense and a trial error subsequently occurs that renders the issue of guilt on that offense unresolved, the prosecutor may retry the offense.

STATEMENT OF THE CASE AND FACTS

After several arguments with his girlfriend one night, appellant used a vehicle to push an inoperable motorhome next to the motorhome in which he and his girlfriend were living, and where his girlfriend was then sleeping. (1 RT 42, 48-54, 95-97.) Appellant doused the inoperable motorhome with gasoline and set it on fire. His girlfriend, who was awakened by her dogs, smelled smoke and gasoline, and heard crackling sounds and glass popping. She looked out the window and saw flames coming from the inoperable motorhome, about four feet away. (1 RT 55-56, 62, 202.) She saw appellant walking from the inoperable motorhome to the other side of the lot. (1 RT 58.) Fleeing the motorhome, she got out with her dogs just before the fire spread and engulfed it. The fire destroyed both motorhomes. (1 RT 63-64, 103, 105, 107-108, 126-129.)

The San Bernardino County District Attorney charged appellant with attempted murder (§§ 664/187) and arson of an inhabited structure (§ 451, subd. (b)), and alleged appellant caused multiple structures to burn (§ 451.1, subd. (a)). (1 CT 69-73 [First Amended Information].) At trial, the court and both parties evidently believed that arson of property (§ 451, subd. (d)) was a lesser included offense of arson of an inhabited structure. (2 RT 284-287.) Accordingly, without an objection by the defense, the trial court instructed the jury on the lesser offense, and instructed the jury not to reach a verdict on that offense if it found appellant guilty of arson of an inhabited structure. (CT 118-119, 122; see CALCRIM Nos. 1515, 3518.) The defense urged the jury to convict appellant of either of the lesser

offenses of arson of property or reckless burning of property. (2 RT 354, 358, 368-369.)

The jury found appellant not guilty of attempted murder, but guilty of arson of an inhabited structure. In accordance with the trial court's instructions, the jury did not return a verdict on the lesser offense of arson of property. The jury also returned a true finding that appellant caused multiple structures to burn (§ 451.1, subd. (a)). (1 CT 126-127, 260.) Subsequently, the trial court found true that appellant had prior convictions for residential burglary and two robberies, which constituted "strikes" and serious felony convictions (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)). It also found true three prison prior allegations (§ 667.5, subd. (b)). (1 CT 97, 262-265.)

The trial court sentenced appellant under the Three Strikes law to a 25-year-to-life sentence plus a determinate term of 23 years. The determinate term was comprised of a five-year enhancement for the burning of multiple structures, plus three consecutive five-year terms for each serious prior felony, and three consecutive one-year terms for each prison prior. (2 CT 297-298, 311-314.) Appellant appealed.

On February 14, 2013, the Court of Appeal filed an unpublished opinion that affirmed, but modified the judgment. The court held that the evidence did not support the arson of an inhabited structure conviction, reasoning the motorhome that was burned in this case was not a "structure" within the meaning of the arson law but was instead property. Having rejected appellant's argument he did not act with malice in burning the motorhome, the court exercised its authority under section 1181, subdivision (6), modified the verdict and reduced appellant's conviction to the lesser offense of arson of property (§ 451, subd. (d)). Because the court concluded the motorhome was property, it struck the burning of multiple structures enhancement. The court also struck two of the serious prior

felony enhancements because the offenses were not brought and tried separately as required by section 667, subdivision (a).

The court subsequently granted appellant's petition for rehearing on the issue of whether arson of property is a lesser included offense of arson of an inhabited structure such that it could properly exercise its discretion under section 1181, subdivision (6), and reduce appellant's conviction from the greater offense to the lesser offense.

In an opinion filed April 30, 2013, the court found that arson of property was a lesser related offense of arson of an inhabited structure and, therefore, outside the scope of its authority to modify the conviction under section 1181, subdivision (6). In reversing and remanding the case with directions to dismiss, the court concluded that permitting a new trial on the lesser related offense "would violate the constitutional prohibition against placing a person twice in jeopardy for the same offense."

Respondent petitioned for rehearing, arguing that double jeopardy did not prevent a retrial of the lesser related offense.

The Court of Appeal granted rehearing and issued a third (now divided) opinion that reversed and remanded to the trial court with directions to dismiss the case. (Slip Opinion, pub. Jan. 14, 2014 (hereinafter, "Opn.").) Writing for the majority, Justice McKinster first held the motorhome was not a structure and, therefore, could not support a charge of arson of an inhabited structure. The majority further concluded that retrial on the lesser related offense of arson of property is barred under section 654's prohibition against multiple prosecutions for the same act following an acquittal or conviction. The majority no longer relied upon principles of double jeopardy. Instead, the majority looked to this court's opinion in *Kellett* and concluded retrial constituted a new and separate prosecution of the same act. (Opn. at p. 9.) The majority acknowledged

that the offense was before the jury in the trial court's instructions, however, it reasoned:

> Had the prosecutor charged the defendant with the lesser related offense in this case, the jury would have been instructed to render verdicts on both the greater and lesser charges. Because the prosecutor did not do so, there is no unresolved or pending charge on which to remand this matter to the trial court.

(Opn. at p. 10.)

In dissent, Justice Richli disagreed with the majority's holding to dismiss the case because a dismissal provided appellant with an unwarranted windfall — a "get out of jail free" card. (Dis. Opn. at p. 1.) The dissent focused its analysis on the impliedly amended charges. Relying on authority from this court and the Fourth District, the dissent concluded that "the prosecution did effectively charge defendant with arson of property, because the jury was instructed on this offense, and because defense counsel did not object." (Dis. Opn. at p. 2, citing *People v. Toro* (1989) 47 Cal.3d 966, 976 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 263-264 (*Orlina*).) Justice Richli reasoned that because the jury did not return a verdict on the offense of arson of property, the charge is "unresolved" and still "pending"; the instructional error mischaracterizing the lesser related offense as a lesser included one did not implicate the concerns articulated in *Kellett.* She therefore would have remanded the matter for a retrial on the arson of property count. (Dis. Opn. at pp. 2-3.)

Respondent petitioned this court for review. On April 23, 2014, this court granted the petition for review. On June 18, 2014, this court ordered briefing on two additional questions.

ARGUMENT

I. APPELLANT'S CONVICTION FOR VIOLATING SECTION 451, SUBDIVISION (B), SHOULD BE AFFIRMED

The jury convicted appellant of arson of an inhabited structure under section 451, subdivision (b). Under the instructions provided, the jury found that appellant willfully and maliciously caused the motorhome to burn, and that it was an inhabited structure. In reversing the conviction on the basis of insufficient evidence, the Court of Appeal concluded that the motorhome appellant burned was property, rather than a structure, within the meaning of that section, which governs arson of "an inhabited structure or inhabited property." Because the prosecutor had charged appellant with arson of an inhabited structure and the jury was so instructed, the court reversed the conviction. However, the jury's verdict, the opinion of the Court of Appeal, and appellant's concession at trial that the motorhome was property all establish that appellant is guilty of arson of inhabited property under section 451, subdivision (b). Moreover, appellant had adequate notice of this alternative basis for his conviction. Therefore, this court should affirm the conviction.

A. Additional Procedural and Factual Background

On December 15, 2009, the District Attorney filed an information charging appellant with arson of an inhabited structure or inhabited property (count 1; Pen. Code, § 451, subd. (b)) and attempted willful, deliberate and premeditated murder (count 2; Pen. Code, §§ 664/187, subd. (a)). The District Attorney alleged that appellant caused multiple structures to burn (Pen. Code, § 451.1, subd. (a).) It was further alleged that appellant had prior convictions within the meaning of section 667.5, subdivision (b). (1 CT 15-17.)

In a first amended information, filed February 1, 2010, the District Attorney amended the charging language in count 1 to arson of an inhabited structure, striking the alternative language of inhabited property. The amended information additionally alleged appellant had prior convictions within the meaning of sections 667, subdivisions (a) and (b) through (i), and 1170.12, subdivisions (a) through (d). In all other respects, the charging language was unchanged. (1 CT 70.)

At trial, appellant maintained that the motorhome was not a structure. (1 RT 230-233, 236-240.) The trial court determined it would instruct the jury on arson of an inhabited structure and provide the statutory definition of structure, allowing the parties to then argue their positions to the jury. (1 RT 240-241.)[2] In that same ruling, the trial court explicitly refused the

---

[2] The trial court instructed the jury on arson of an inhabited structure as follows:

> The defendant is charged in Count One with arson that burned an inhabited structure.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant set fire to or burned a structure;
>
> 2. He acted willfully and maliciously;
>
> AND
>
> 3. The fire burned an inhabited structure.
>
> *To set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.
>
> Someone commits an act *willfully* when he or she does it willingly or on purpose.
>
> Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.
>
> A *structure* is any building, bridge, tunnel, power plant, commercial or public tent.

(continued...)

defense's underlying request to rule that a motorhome was not a structure as a matter of law. (1 RT 241.)

The defense did not call any witnesses. (2 RT 283.) During closing arguments, appellant's counsel focused the jury's attention on the lesser crimes of arson of property and unlawful burning of property. (2 RT 354-356.) Appellant's counsel argued to the jury as follows:

> We've already eliminated the structure part of this because that's not contained in any of the jury instructions; that a motorhome is a structure. What we got is — we got now the property. We're looking at the property because, yeah, there was a crime committed. He burned her property as a result of recklessly setting his own motorhome on fire which is not a crime.

(2 RT 358.) Having conceded that appellant was guilty of unlawfully causing a fire of property, appellant's attorney urged the jury to "[c]onvict him of what he did[.]" (2 RT 369.)[3] Regarding the attempted murder

---

(...continued)

> A structure is *inhabited* if someone lives there and either (a) is present or (b) has left but intends to return.
>
> A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure or property.

(1 CT 118 (italics in original); see CALCRIM No. 1502, Arson: Inhabited Structure.)

[3] The trial court instructed the jury on the lesser offense of arson of property as follows:

> Arson is a lesser included offense to Count One.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant set fire to or burned a structure or property; and
>
> 2. He acted willfully and maliciously.

(continued...)

charged in count 2, the defense argued that appellant did not harbor the mental state required, namely, he did not have specific intent to kill when he set the inoperable motor home on fire. (2 RT 362-364.)

The jury acquitted appellant of attempted willful, deliberate and premeditated murder. (1 CT 128.) However, the jury convicted appellant of arson of an inhabited structure under section 451, subdivision (b), rejecting appellant's arguments he did not cause the motorhome to burn with willful or malicious intent and that the motorhome was a not a structure. (1 CT 126-127; see 1 CT 70.)

On appeal from the conviction, the Court of Appeal noted in its opinion, "[t]he facts are undisputed." (Opn. at p. 3.) The Court of Appeal briefly recounted that appellant and his girlfriend lived in the motorhome

---

(...continued)

> *To set fire to or burn* means to damage or destroy with fire either all or part of something, no matter how small the part.
>
> Someone commits an act *willfully* when he or she does it willingly or on purpose.
>
> Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to defraud, annoy, or injure someone else.
>
> A *structure* is any building, bridge, tunnel, power plant, commercial or public tent.
>
> *Property* means personal property.
>
> A person does not commit arson if the only thing burned is his or her own personal property, unless he or she acts with the intent to defraud, or the fire also injures someone else or someone else's structure, forest land, or property.

(1 CT 118-119 (italics in original); see CALCRIM No. 1515, Arson.) The trial court further instructed the jury on the misdemeanor offense of unlawfully causing a fire. (1 CT 120; see CALCRIM No. 1532, Unlawfully Causing a Fire; § 452, subd. (d).)

that caught on fire after the fire appellant set to the inoperable motorhome spread, destroying both motorhomes. (*Ibid.*)

The Court of Appeal determined that the motorhome was not a structure as a matter of law, but was property. Because there was no evidence to show the motorhome in which appellant and his girlfriend lived "was fixed to a particular location and, therefore, had the attributes of a building," the Court of Appeal held that, "[f]or purposes of the arson statute, defendant's motor home is property[.]" (Opn. at pp. 6-7.) The court reversed the conviction on that basis, because the evidence did not support that appellant committed arson of an inhabited structure. (Opn. at p. 7.)

B. Appellant's Conviction Under Section 451, Subdivision (b), Is Supported by the Jury's Verdict, the Court of Appeal's Opinion, and Appellant's Concession that the Motorhome Was Property

The various subdivisions of section 451 describe different ways of committing the crime of arson.[4] Section 451 fixes the terms of

---

[4] Section 451 states as follows:

> A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.
>
> (a) Arson that causes great bodily injury is a felony punishable by imprisonment in the state prison for five, seven, or nine years.
>
> (b) Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.
>
> (c) Arson of a structure or forest land is a felony punishable by imprisonment in the state prison for two, four, or six years.

(continued...)

imprisonment for the various ways in which arson is committed according to the injury or potential injury to human life involved.

Relevant here, subdivision (b) of section 451 governs the malicious burning of "an inhabited structure or inhabited property." For purposes of arson, "structure" is defined as "any building, or commercial or public tent, bridge, tunnel, or powerplant." (§ 450, subd. (a).) "Property" is defined as "real property or personal property, other than a structure or forest land." (§ 450, subd. (c).)

The oft-cited standard for sufficiency of the evidence review requires an appellate court to "draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Jackson* (1989) 49 Cal.3d 1170, 1199-1200.) Reversal of a conviction for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

(...continued)

> (d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.
>
> (e) In the case of any person convicted of violating this section while confined in a state prison, prison road camp, prison forestry camp, or other prison camp or prison farm, or while confined in a county jail while serving a term of imprisonment for a felony or misdemeanor conviction, any sentence imposed shall be consecutive to the sentence for which the person was then confined.

Here, the jury's verdict reveals that it necessarily found appellant set fire to the motorhome with the requisite intent, and that the motorhome was inhabited. (1 CT 118; see CALCRIM No. 1502, Arson: Inhabited Structure.) The Court of Appeal determined it did not constitute a structure as a matter of law, but was instead property. (Opn. at pp. 6-7.) Appellant conceded this very fact at trial. (2 RT 354-356.) Therefore, all of the facts required for a conviction under section 451, subdivision (b), are present. In its sufficiency of the evidence review the Court of Appeal did not fully contemplate the impact of appellant's concession the motorhome was property when it reversed the conviction. This was error. Under these circumstances, where the record substantially establishes all material facts required to support the conviction, it should be affirmed. (*People v. Bolin, supra,* 18 Cal.4th at p. 331.) Specifically, the doctrine of concession applies in this case so that appellant's concession the motorhome was property, along with the jury's factual findings on the other elements, supports a conviction under section 451, subdivision (b), for arson of inhabited property.

The court's decision in *People v. Peters* (1950) 96 Cal.App.2d 671 (*Peters*), is instructive on the principles underlying the concession doctrine. In *Peters,* the defendant was charged with manslaughter. At trial, he did not contest the fact of the fight and its details that resulted in the victim's death, but claimed instead that he killed the victim in self-defense. Upon conviction, defendant claimed on appeal that there was insufficient evidence of the cause of death but the reviewing court rejected his contention.

Although the facts surrounding the fight including the stabbing were placed in evidence, there was no evidence of the cause of the victim's death. Even so, the court observed "the cause of death is a fact, which, like every other fact, need not be proved, even in a criminal case, if admitted or

conceded by defendant." (*Peters, supra*, 96 Cal.App.2d at p. 675.) The court acknowledged that "[i]n a criminal case a defendant is not called upon to make explanation, to deny issues expressly (his plea of not guilty does that for him), nor is he required to point out to the prosecution its failure to make a case against him or to prove any link in the required chain of guilt." (*Id.* at p. 676.) However, the court recognized that a defendant "cannot mislead the court and jury by seeming to take a position as to the issues in the case and then on appeal attempt to repudiate that position." (*Ibid.*)

The *Peters* court concluded that "[i]t would be a miscarriage of justice to set aside a verdict found by a jury on all issues which defendant at the trial believed necessary to be submitted to the jury. After all, a criminal case or court proceeding is not a game in which participants may be misled by a defendant's attitude and conduct at the trial, and then the verdict be set aside on appeal, because defendant contends there was no proof of a fact which he had conceded, not by express word, but by conduct." (*Peters, supra*, 96 Cal.App.2d at p. 677; see *People v. Pijal* (1973) 33 Cal.App.3d 682, 697 [rule is well established that defendant cannot mislead the court and jury by seeming to take a position on issues and then disputing or repudiating the same on appeal]; see also *People v. Garcia* (1984) 36 Cal.3d 539, 555 [in the context of jury instructions that fail to instruct on an element, this court recognized the "concession exception" as one of several exceptions to automatic reversal based on that type of instructional error]; *People v. Flood* (1998) 18 Cal.4th 470, 505 [defendant effectively conceded peace officer element of offense on which the jury was not instructed in the language of the offense but where defendant requested instruction that included phrasing instructing the jury the officers were peace officers, did not object to the trial court informing the jury of same, did not refer to this element of the offense during trial, did not argue that the prosecution failed to prove it beyond a reasonable doubt, did not ask the

jury to consider it, presented no evidence on the peace officer element and did not contest the prosecution's evidence on the issue]; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1356 [where defendant pursued a trial strategy of conceding guilt on a lesser offense to obtain acquittal on others, failure to instruct on uncontested element of the lesser offense is not reversible].)

The concession doctrine applies in the present case because appellant conceded that the motorhome was property. The jury's conclusion that the motorhome was a structure does not diminish in any way or negate appellant's concession. Appellant's concession supported his defenses at trial, in which he affirmatively argued that he did not cause multiple structures to burn and that he was only guilty of the least offense of reckless burning of *property*. He may not repudiate this position on appeal. Under the concession doctrine, appellant's concession serves to foreclose any claim on appeal that his conviction cannot stand because the evidence introduced at trial does not support it. (*People v. Pijal, supra,* 33 Cal.App.3d at p. 697; accord *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["a litigant may not change his or her position on appeal and assert a new theory"]; *Fontana v. Upp* (1954) 128 Cal.App.2d 205, 211 ["Where parties have taken a certain position during the trial, they cannot adopt a different position on appeal by raising a new issue which the other party was not apprised of at the trial"].) Nor can appellant now claim that *the jury* had to find that that the motorhome was property for the conviction to stand. Under the Sixth Amendment right to a jury trial, a defendant is entitled to have the jury decide every issue of fact material to guilt. The rule is different as to facts that are not at issue in the trial, as here where appellant conceded the fact that the motorhome was property. "'In criminal cases, the right to jury trial is, primarily, a right to have the jury rather than a court decide every "issue of fact" arising in the trial of the criminal charge. But when a fact is undisputed, or the parties have stipulated to its

existence, there is no "issue of fact" for the jury to resolve, and this aspect of the Sixth Amendment right to jury trial is not implicated. Otherwise stated, the federal Constitution gives an accused no right to have the jury decide the truth of a fact that the accused has elected not to contest.'" (*People v. Moore* (1997) 59 Cal.App.4th 168, 185-186, fn. 18, quoting *People v. Harris* (1994) 9 Cal.4th 407, 459, fn. omitted (conc. & dis. opn. of Kennard, J.).) The disputed fact at trial was whether the motorhome was a structure. (2 RT 341, 343-345 [prosecutor's closing argument]; 2 RT 353-354, 359-360 [defense closing argument].) Appellant "elected not to contest" that it was property.

In short, the judgment of conviction should be deemed to incorporate the uncontested fact the motorhome was property and affirmed by this court not only for this reason, but for the reasons discussed below.

C. This Court Should Affirm Appellant's Conviction for Section 451, Subdivision (b)

As discussed in the preceding section, a violation of section 451, subdivision (b) is supported by the jury's verdict, the Court of Appeal's opinion, and appellant's concession. Because appellant had a meaningful opportunity to defend against a charge setting forth section 451, subdivision (b), even in light of the prosecutor's later decision to amend the charge and omit "or inhabited property" from it, his conviction should be affirmed.

The record establishes that appellant received notice of the arson of an inhabited structure *or* inhabited property charge from the evidence presented at the preliminary hearing. Appellant rejected multiple pretrial offers to settle his case, which always contemplated arson of an inhabited structure *or* inhabited property as the charged offense. Following the prosecutor's amendment and at trial, the defense strategy focused on the lack of evidence to support the attempted willful, deliberate, and

premeditated murder count (and the defense prevailed). Appellant admitted he had engaged in unlawful conduct in burning the motorhome. His essential defense, similar to his attempted murder defense, was that he did not harbor the required mental state for arson. He argued his conduct of causing the motorhome to burn was reckless.

To be sure, appellant also argued the motorhome was not a structure. He advanced the argument it *was* property, ultimately conceding he was guilty of recklessly causing property to burn, a misdemeanor. But from the defense arguments it is apparent that even if the prosecutor had not amended the charge to omit "or inhabited property," they would have been the same. It would be illogical to presume any difference; appellant's argument refuting the required mental state for arson would still be pertinent as well as his argument disputing the motorhome was a structure, given the burning of multiple structures enhancement allegation. The facts would still demonstrate that appellant was guilty of unlawful conduct and an argument that his conduct amounted to the least offense possible, would still have been his best defense.

Under these circumstances, appellant could not have been prejudiced by the prosecution's amendment nor can he now claim an affirmance by this court amounts to an ambush of his ability to defend against the charges.

1. Appellant Received Adequate Notice to Prepare a Meaningful Defense Against a Charge Arson of an Inhabited Structure or Inhabited Property

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them." (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) Article I, section 14 of the California Constitution

states that "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information."

As part of the statutory framework for charging a felony, section 871 provides: "If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate shall order the complaint dismissed and the defendant to be discharged." Section 872, subdivision (a), provides in relevant part: "If, however, it appears from the examination that a public offense *has been committed, and there is sufficient cause to believe that the defendant is guilty*, the magistrate shall make or indorse on the complaint an order ... 'that he or she be held to answer to the same.'" (Italics added.)

In order to discharge those duties, the magistrate must, in a case like the current one, hold the accused to answer if the evidence at the preliminary hearing shows that the defendant willfully and maliciously set fire to or caused to burn an inhabited structure or an inhabited property. (§ 451, subd. (b).) The preliminary hearing proceedings not only confer jurisdiction on the trial court but protect the accused by limiting the prosecution's ability to force an accused to trial on an information "which is not within the scope of the evidence taken." (*People v. Fyfe* (1929) 102 Cal.App. 549, 553.) Thus, notice of circumstances of the offense "is given, not by detailed pleading, but by the transcript of the evidence before the committing magistrate. [Citation.]" (*People v. Randazzo* (1957) 48 Cal.2d 484, 489; see § 1009 [prohibiting amendment to an information to charge "an offense not shown by the evidence taken at the preliminary examination"].)

In the current case, the preliminary hearing took place on December 17, 2009. (1 CT 18-65 [Reporter's Transcript of preliminary

hearing proceedings].) At the start of these proceedings, appellant waived arraignment on the first amended complaint. (1 CT 21.) The first amended complaint, filed on December 11, 2009, charged appellant in count 1 with arson of an inhabited structure or property under section 451, subdivision (b), alleged that appellant caused multiple structures to burn within the meaning of section 451.1, subdivision (a)(4), and charged appellant in count 2 with attempted willful, deliberate, and premeditated murder under sections 664 and 187, subdivision (a). (1 CT 9-11.) Appellant's attorney stated, "Your Honor, I've had a new offer on this case, it's eight years. And I've explained to Mr. Goolsby that with the change alleging a first degree attempted murder that's life top. He does not want eight years." (1 CT 21.) Previously, appellant had rejected another offer by the prosecutor to settle the matter. The clerk's minutes of the proceeding on December 10, 2009, state: "OFFER/EXPOSURE PLACED ON THE RECORD; OFFER REJECTED/WITHDRAWN." (1 CT 8.) The only substantive difference between the charges in the original complaint and the first amended complaint concerned the prosecutor's attempted murder allegation. (1 CT 1-3 [original complaint], 9-11 [first amended complaint].)

The evidence presented at the preliminary hearing, which was the same as the evidence set forth at trial, showed that appellant willfully and maliciously had burned the motorhome, which was alternatively referenced as an inhabited structure or inhabited property in the complaint. (1 CT 9-11; § 451, subd. (b).) In argument at the preliminary hearing, the defense contended that when appellant set his motorhome on fire, he was only trying to scare his girlfriend. Focusing on the attempted first degree murder count, appellant's attorney argued that if appellant had the requisite intent to kill, he would have poured gasoline directly on the motorhome in which his girlfriend was sleeping. Appellant's attorney deemed the attempted

murder count "a bit heavy," and stated that appellant should not be held to answer on that count. (1 CT 61-62.) The trial court rejected the defense's interpretation of the evidence, concluded that there was probable cause to believe that appellant committed the offenses alleged in the first amended complaint, and held him to answer to those charges. (1 CT 63.)

The evidence taken at the preliminary hearing establishes appellant had proper notice of the circumstances of the arson offense charged under section 451, subdivision (b). The testimony taken at the preliminary hearing on which the trial court's order requiring appellant to answer is based, clearly set out the offense of arson of an inhabited structure *or* inhabited property. (1 CT 24-26, 36-39, 42-43, 50-55.; *People v. Holt* (1997) 15 Cal.4th 619, 672.) Appellant did not advance any credible arguments to refute the arson count at the preliminary hearing. The defense focus on the attempted first degree murder count cast a theme that continued through the trial and on which he ultimately prevailed: that appellant, who had admittedly burned the motorhomes, did not harbor an intent to kill.

In short, the scope of the evidence taken at the preliminary hearing satisfied the constitutional and statutory pleading and proof requirements.

2. At No Time After the Charge Was Amended Was Appellant Deprived of a Meaningful Opportunity to Defend Against the Arson Count and He Cannot Claim His Due Process Right to Notice Would Be Prejudiced by an Affirmance of the Conviction

As noted above, the basic principles of due process guarantee a criminal defendant the fundamental right to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense against every issue raised by

those accusations. (U.S. Const. Amend. VI; *Cole v. Arkansas* (1948) 333 U.S. 196, 201 [68 S.Ct. 514, 92 L.Ed. 644].) Notice must be sufficiently detailed to enable a defendant to address all the relevant issues in his defense. (*Russell v. United States* (1962) 369 U.S. 749, 766-68 [82 S.Ct. 1038, 8 L.Ed.2d 240].)

After the preliminary hearing and appellant's rejection of the prosecution's offers to settle the case, the prosecutor amended the information by omitting the "or inhabited property" reference from section 451, subdivision (b), in count 1. In this case, the variance between the charging language and the offense on which respondent is asking this court to affirm is of no moment. As discussed above, a conviction under section 451, subdivision (b), is established by the jury's verdict, the Court of Appeal's opinion, and appellant concession. Although the prosecutor proceeded under the theory that appellant burned an inhabited structure, appellant's due process right to an adequate defense was not prejudiced. Appellant reiterated his argument before the jury that he did not have the intent to kill, and he prevailed. Pertinent here, at trial appellant's counsel developed a strategic defense to the arson count. Appellant's counsel recognized that appellant had engaged in wrongful conduct; there were no issues in this prosecution as to the identity of the arsonist or that the act of setting fire was somehow justified. There were two facets to the defense strategy: the absence of the required mental state for arson and the motorhome as property. Appellant's counsel argued to the jury that appellant had not willfully and maliciously set the fire to the inoperable motorhome. Counsel told the jury that appellant was "sending [his girlfriend] a message" when he set fire to the inoperable motorhome because he wanted her to get out. The spreading of the fire to the one in which she slept, counsel argued, was accidental. He told the jury appellant's conduct under the law was, at most, reckless. (2 RT 357.)

Counsel also argued that the motorhome was not a structure but property. As discussed in greater detail below under Argument II, counsel's motorhome-is-property argument provided the jury an alternative lesser count on which to convict appellant. (Arg. II, *infra*, at pp. 37-38.) For purposes of discussion here, it suffices to say appellant's trial strategies allowed him to admit some level of culpability and argue for the jury to convict him of the least offense of recklessly causing a fire of property, a misdemeanor. This argument was also essential to rebut the sentence enhancement that alleged appellant "caused multiple *structures* to burn." (§ 451.1, subd. (a)(4), italics added.) To avoid a true finding of this sentence enhancement, appellant *had* to argue that the motorhome was property. Thus, because the motorhome-is-property argument was critical to this aspect of the case, even if the information had remained unchanged and continued to alternatively charge arson of an inhabited structure or inhabited property, and the jury had been so instructed, the defense arguments would not have been any different. Further, it cannot reasonably be claimed that appellant would have argued the motorhome was neither a structure or property if the information had remained unchanged. The law of arson defines property as real or personal, "other than a structure or forest land." (§ 450, subd. (c).) It is inconceivable that appellant would have argued the motorhome, if not a structure or property, was forest land.

The circumstances of the present case are not the same as those where the prosecution misleads a defendant into believing he will be defending against one theory before raising a new theory for the first time at the conclusion of trial to the detriment of the defense. The latter circumstances are illustrated in the Ninth Circuit's opinion in *Sheppard v. Rees* (9th Cir.1989) 909 F.2d 1234 (*Sheppard*). In that case, the defendant was charged with murder and "[t]he case was tried before a jury on the theory that the killing was premeditated and deliberate." (*Id.* at p. 1235.) "At no

time during pretrial proceedings, opening statements, or the taking of testimony was the concept of felony-murder raised, directly or indirectly." (*Ibid.*) However, on the day set for closing arguments, the prosecutor asked for instructions on robbery and felony murder, and, over strenuous objection by Sheppard's counsel, the trial court agreed to give those instructions. (*Ibid.*)[5] The State of California eventually conceded that under the circumstances of the case, Sheppard was "'denied adequate notice and opportunity to prepare to defend against a charge of felony-murder.'" (*Id.* at p. 1236.) The Ninth Circuit agreed that the government had "'ambushed' the defense with a new theory of culpability," noting that "[d]efense counsel would have added an evidentiary dimension to his defense designed to meet the felony-murder theory had he known at the outset what he was up against." (*Id.* at p. 1237.)

That is not the case here. Appellant cannot claim that he was deprived of a defense by way of the prosecutor's amendment. Unlike *Sheppard*, the felony complaint included "inhabited property" in the arson

---

[5] Sheppard's counsel objected as follows:

> I object strenuously to the giving of any instructions based on any theory of first degree murder on the felony-murder theory.
>
> ... It never occurred to me that the People would ever go forward on a theory of felony-murder, ...
>
> I would note that at no time has a robbery ever been charged in this case. It was never charged in the Municipal Court; there was no holding on that issue by the magistrate at the end of the preliminary hearing. There was no robbery charge ever filed in Superior Court in an Information. Mrs. [Prosecutor] has filed several amended Informations that never included a robbery charge. And suddenly, after we've already gone over all the instructions, we've gone home and prepared our arguments, the time comes to argue the case, Mrs. [Prosecutor] is submitting a felony-murder theory.

(*Sheppard, supra*, 909 F.2d at pp. 1235-1236.)

charge, all offers that appellant rejected contemplated arson of an inhabited structure or inhabited property, the magistrate's order requiring appellant to answer was based upon the evidence introduced at that preliminary examination that appellant burned an inhabited structure or inhabited property. (*Sheppard, supra*, 909 F.2d at pp. 1235-1236.) As mentioned, the information was amended before trial but the amendment did not prevent appellant from setting forth any defenses at trial. Specifically, the motorhome-is-property argument *had* to be asserted because of the sentence enhancement that was alleged that focused on the burning of structures and because the defense wanted to place before the jury the lesser offense of recklessly causing a fire to property. (See *People v. Gallego* (1990) 52 Cal.3d 115, 188-189 [court rejects *Sheppard* claim that due process right to adequate defense was violated by trial court's instruction on felony murder where the "defendant himself testified that the murders were committed while he ... w[as] engaged in a robbery[.]"]). It cannot be said that his defense arguments would have been any different had arson of an inhabited structure or inhabited property been charged in the alternative. In other words, an affirmance by this court would not be by ambush because arson of inhabited property does not adds an "evidentiary dimension" that was not contemplated by the defense. (*Sheppard, supra*, 909 F. 2d at p. 1237.)

Appellant cannot reasonably claim otherwise. Respondent recognizes that, during a mid-trial hearing on the prosecutor's proposed special instruction on "structure," which was denied by the trial court, appellant's counsel proclaimed that the only reason appellant proceeded to trial was because of the way the prosecutor had charged the arson count. Counsel said he believed that the elements of the offense could not be met because a motorhome was not a structure under the law of arson. (1 RT 233, 240.) Counsel's rhetoric in opposition to the prosecutor's proposed special

instruction does not support any claim of ambush. The record of counsel's conduct belies any such assertion. Appellant was charged with attempted murder and, prior to the preliminary hearing, the prosecutor amended the felony complaint to charge attempted first degree murder. The defense turned down the prosecution's eight-year offer to settle the case. (1 CT 121.) The attempted first degree murder count was a significant aspect of the defense case and carried the potential greatest penalty. (§ 664, subd. (f).) Appellant could not then and cannot now claim that the prosecution's amendment to the arson count was the catalyst for his decision to go to trial when the record clearly demonstrates his decision to go to trial was based upon his unwillingness to settle the matter *before* any amendments to the arson count were made. (See *People v. Ardoin* (2011) 196 Cal.App.4th 102, 133-134 [noting that to the extent defense counsel "may not have argued against felony-murder liability in as much detail as he, upon subsequent reflection, would have liked, ... defense counsel knew the issue had been presented and took the opportunity to vigorously contest it" and noting the "right to due process guarantees an opportunity for effective presentation of a defense, not the presentation of a defense that is as effective as a defendant might prefer"].)

In sum, the fact that the first amended information did not contain the "or inhabited property" language in no way deprived appellant of an adequate defense and did not prejudice his defense. At trial, appellant admitted that he burned the motorhome, which he conceded was property, and argued his did not have the required mental state for arson. Appellant did not and could not dispute that he lived in the motorhome with his girlfriend. Appellant's trial strategies allowed him to rebut the sentence enhancement allegation and admit some level of culpability, which was reasonable under the circumstances, but argue for the jury to convict him of the least offense of recklessly causing a fire of property. These strategies

and defenses would have been no different had the arson count been charged using the alternative "or inhabited property" language. Accordingly, this court should affirm appellant's conviction under section 451, subdivision (b).

II. PENAL CODE SECTION 654 DOES NOT PREVENT RETRIAL OF AN OFFENSE PROPERLY ADDED IN THE ORIGINAL PROSECUTION, BUT WHERE AN INSTRUCTIONAL ERROR RESULTED IN NO VERDICT BEING RETURNED

Alternatively, when a defendant impliedly consents to being placed in jeopardy of a conviction on a uncharged lesser related offense, urges the jury to so convict as an alternative to the greater offense, and an instructional error occurs that results in no verdict being returned, a retrial of the lesser related offense to resolve the question of guilt is proper because it constitutes a continuation of the original prosecution, rather than a new, successive prosecution barred by section 654.[6] Because the jury here did not make a finding on arson of property as instructed, jeopardy has not terminated as to that offense. Therefore, a retrial on the offense of arson of property does not implicate, and is not prevented by, state or

---

[6] Respondent's alternative argument is premised on arson of property as constituting a lesser related offense of arson of an inhabited structure. The Court of Appeal's ruling on this point, not challenged here, was that arson of property is not necessarily included in the charged offense of arson of an inhabited structure because the charged crime did "not include all of the elements of the lesser" and arson of property requires "proof the property either did not belong to the defendant [...], or in burning or causing one's own property to burn, 'there is an intent to defraud or there is injury to another person or another person's structure, forest land or property.' (§451, subd. (d).)" (Opn. at p. 8.) The limitation of burning one's own property in section 451, subdivision (d), does not exist in section 451, subdivision (b). Therefore, for the same reasons relied upon by the Court of Appeal, arson of property is not necessarily included in arson of inhabited property.

federal principles of double jeopardy. Retrial to resolve the issue of guilt is proper under such circumstances.

A. Additional Relevant Procedural Background

At trial, there were two disputed issues related to the arson count: whether appellant burned a structure and whether he did so with malicious intent. The former issue was argued extensively at several points during trial, specifically in the context of instructions. (1 RT 141-148 [defense motion to exclude prosecution's expert reference to "structure"]; see 2 RT 278-280 [expert testimony]; 1 RT 146-147, 228-242 [prosecutor's special instruction on structure denied]; 1 CT 224.) The trial court determined it would instruct the jury as to structure under the statutory definition, and the parties could argue their positions to the jury. (1 RT 240-241.)

The defense did not call any witnesses. (2 RT 283.) Before closing arguments and outside the presence of the jury, the trial court stated that it had been "working on" verdict forms. The trial court described to the parties a "decision tree" that the jury might utilize to eliminate the greater crime before finding guilt on a lesser crime. The trial court explained there were a series questions that the jury had to determine relating to "whether or not the burning was done with malice which would make it arson as opposed to unlawful setting of a fire," and "whether or not [the motorhome] was inhabited," and lastly, "whether or not it was a structure or just personal property." (2 RT 284.) The trial court indicated to the prosecutor and appellant's attorney that it "did everything as lesser-includeds." (2 RT 285.) The prosecutor explicitly agreed to the lesser offense instructions and verdict options proposed by the trial court, which included arson of property and identified all of the lesser offenses as lesser included offenses. (2 RT 284-287.) Appellant's attorney spoke on the matter also. In response to the trial court's inquiry concerning the proposed instructions

and verdict forms, appellant's attorney stated he "understood where [the trial court was] going." (2 RT 285.)

During closing arguments, appellant's counsel focused the jury's attention on the crimes of arson of property and unlawful burning of property. (2 RT 354-356.) Appellant's counsel argued to the jury that appellant committed a crime by recklessly burning his motorhome, which was property, and urged the jury to "[c]onvict him of what he did[.]" (2 RT 358, 369; see 1 CT 118-119, 120.)

B. Section 654, as Construed by This Court in *Kellett*, Does Not Apply to Prevent Retrial of Charges Properly Before the Jury in the Original Prosecution

In cases where a defendant is charged with and convicted of an offense, and that offense is reversed on appeal, an issue arises as to whether section 654 poses a bar to the defendant being charged with a related offense for the same act. Subdivision (a) of section 654 provides as follows:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

This court explained the application of section 654 to a new prosecution in *Kellett*. Simply put, the rule in *Kellett* is concerned with new and separate prosecutions of offenses that were never before considered by a jury, but are based on the same act or conduct of an earlier prosecution. (*Kellett, supra*, 63 Cal.2d at p. 827.) In that case, Kellett was charged with misdemeanor brandishing of a firearm (§ 417), and in a second case based on the same facts, with possessing a concealable weapon

by a felon (§ 12021). After pleading guilty to the misdemeanor, Kellett sought to dismiss the second case against him. In holding the section 12021 charge should have been dismissed under section 654, this court reasoned that where joinder of offenses is proper, closely related crimes based on the same act or conduct "must be prosecuted in a single proceeding" and if they are not brought in "the initial proceedings" subsequent prosecution is barred. (*Kellett, supra*, 63 Cal.2d at p. 827; see § 954 [requiring joinder of related offenses in a single prosecution].)[7] The provision of section 654 prohibiting multiple prosecutions "is a procedural safeguard against harassment." (*Id.* at p. 825.) Section 654 operates in complete accord with section 954. The court in *Kellett* illustrated the balance between the two sections with the following hypothetical. If a defendant blows up an airplane killing all on board, he is properly subject to greater punishment than if he killed one person. However, it is not true that he is properly subject to successive prosecutions for each airplane passenger's death.

---

[7] The full text of section 954 states as follows:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

This court explained in *Kellett*, "It would constitute wholly unreasonable harassment in such circumstances to permit trials seriatim until the prosecutor is satisfied with the punishment imposed." (*Id.* at pp. 825-826.) Section 954 demonstrates the Legislature's intent to require joinder of related offenses in a single prosecution. Joinder of related offenses prevents harassment but also "avoids needless repetition of evidence and saves the state and the defendant time and money." (*Id.* at p. 826.)

The Court of Appeal's opinion in *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609 (*Sanders II*), is instructive on the interplay between sections 654 and 954 and the application of the rule in *Kellett*. In *Sanders II*, the issue was whether, following the reversal of the defendant's convictions on ten counts of grand theft for insufficient evidence, the prosecution could property file new charges of forgery and presenting false documents that were based upon the same acts as the original prosecution for grand theft. The appellate court determined this was error and granted the defendant's petition for writ of mandate. (*Sanders II, supra*, 76 Cal.App.4th at pp. 612-613, 617.) In its analysis, the court read the provision in section 654 prohibiting multiple prosecutions and section 954 together and concluded *Kellett* error occurred. (*Id.* at p. 614.)

The evidence to support the new charges was presented in the original prosecution against Sanders. However, unlike the present case, the jury was not instructed as to those offenses in the original prosecution. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, 1417-1418 [appeal in original prosecution on sufficiency of evidence claim] (*Sanders I*).) Therefore, because the jury in *Sanders I* was not so instructed, it was legally impossible for it to consider whether the defendant was guilty of any of those related crimes. Thus, the subsequent information filed by the prosecution contained new charges on which it sought to commence a new

and successive prosecution in violation of the *Kellett* rule. (*Sanders II, supra*, 76 Cal.App.4th at p. 617.)

More recently, the Third District addressed a claim that the prosecutor proceeded on charges against the defendant based on the same act or conduct of an earlier prosecution. In *People v. Valli* (2010) 187 Cal.App.4th 786 (*Valli*), the defendant was acquitted of murder, attempted murder and being an ex-felon in possession of a gun. Immediately upon his acquittal, the defendant was arrested and charged with two counts of felony evading based on evidence that had been introduced at the first trial to show defendant's consciousness of guilt. (*Id.* at p. 790.) Prior to the second trial, the defendant brought an unsuccessful motion to dismiss the evading counts on the basis of section 654 as interpreted in *Kellett*. (*Ibid.*) On appeal of that ruling, the *Valli* court acknowledged the charges against the defendant were a matter of the prosecutor's discretion. The court aptly noted that a requirement for prosecutors to proceed on all known charges simultaneously would have the adverse effect of "impelling a prosecutor filing on one charge to throw the book at the defendant in order to prevent him from acquiring immunity against other potential charges and to protect the prosecutor from accusations of neglect of duty. [Citation.]" (*Id.* at p. 801.) By contrast, the rule of *Kellett* more appropriately tempers the prosecutor's charging discretion by requiring joinder of offenses related by the defendant's conduct. The *Valli* court ultimately concluded that the rule of *Kellett* was not violated by the felony evading trial because, "although the People relied in part on proof of the evading in order to prove the murder, the necessary interrelation of murder and evading is missing; the same act or course of conduct did not play a significant role in each." (*Ibid.*) The court explained, "Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*." (*Id.* at p. 799.) On this

point, the *Valli* court distinguished *Sanders II*, where "the same conduct was at issue in both prosecutions." (*Id.* at p. 802; see also *People v. Cuevas* (1996) 51 Cal.App.4th 620, 624, and cases cited therein [*Kellett* does not require that offenses committed at different times and at different places must be prosecuted in a single proceeding].)

In nearly five decades of jurisprudence, *Kellett*'s principles have remained unchanged: new charges that are based on the same conduct of a failed earlier prosecution are not permitted. Here, the majority relied exclusively on *Kellett.* The majority acknowledged that the trial court instructed the jury on the offense of arson of property. (Opn. at p. 9.) But the majority applied *Kellett* in a wholly new context when it concluded that retrial of the unresolved arson of property count was foreclosed on the basis of *Kellett* even though the jury considered the offense in the original prosecution. The settled rule in *Kellett* is concerned with new and separate prosecutions of offenses that were never before considered by a jury, but are based on the same act or conduct of an earlier prosecution. (*Kellett, supra*, 63 Cal.2d at p. 827.) In stark contrast to a situation where wholly new charges are filed, retrial in the present case cannot be deemed a new or successive prosecution under *Kellett* because the lesser related offense was before the jury as a separate count. (Cf. *Sanders II, supra*, 76 Cal.App.4th at p. 617 [prosecution filed subsequent information that contained new charges on which it sought to commence a new and successive prosecution in violation of the *Kellett* rule].) Retrial does not amount to unreasonable harassment when a defendant has agreed to an uncharged lesser offense and, because of an instructional error, the jury does not return a verdict on it, leaving it unresolved. (*Kellett, supra*, 63 Cal.2d at p. 827.) Retrial of the unresolved count here is properly viewed as a continuation of the original prosecution, rather than a new and

successive prosecution within the meaning of section 654 as construed by *Kellett*.

C. Appellant Impliedly Consented to Add the Uncharged Offense; Any Claim the Jury Was Improperly Discharged When it Failed to Declare a Verdict as to This Offense Is Forfeited, Retrial Is Proper to Resolve the Question of Guilt

Although arson of property was not originally charged, appellant impliedly consented to allow the jury to consider this lesser related offense. He did so in two ways: (1) by his tacit agreement to the instructions and (2) by his affirmative conduct during argument urging the jury to convict him on the lesser. As the dissent concluded, any misunderstanding as to the nature of the arson of property offense as a lesser included offense does not alter the conclusion that appellant supplied valid consent. (Dis. Opn. at p. 3.) This is so because it did not matter to the defense how the count was classified; it only mattered that it was put before the jury for its consideration. Nor does the instructional error that allowed the jury to be discharged without declaring a verdict on the lesser related offense prevent retrial. Appellant forfeited any claim of error in the taking of the verdict by failing to bring the error to the trial court's attention.

1. The Rule of *Toro* and Implied Consent Controls

An information can be amended with an uncharged lesser related offense when such offense is put before the jury by way of jury instruction without objection by the defense or when the defense urges the jury to convict of such offense. Under the facts of this case, both rules apply. The information was amended to add the offense of arson of property because

appellant's attorney did not object to the court's instructions and he affirmatively urged the jury to find him guilty of burning property.

Generally, a defendant may be convicted of an uncharged crime only if it is a lesser included offense of a charged crime. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227; see § 1159.) The rule limiting convictions of uncharged crimes to lesser included offenses of charged crimes satisfies the due process requirement that an accused be given adequate notice of the charges so as to have a reasonable opportunity to prepare and present a defense. (*People v. Reed, supra,* 38 Cal.4th at p. 1227.)[8]

When a lesser offense is not necessarily included in the original charge, the parties may nevertheless agree that the defendant may be convicted of such offense. (*People v. Birks* (1998) 19 Cal.4th 108, 136 fn. 19 (*Birks*).) It is only when the parties mutually agree to amend the charge with a lesser related offense that this court's stated concern for "mutual fairness between the defense and the prosecution" in the context of lesser offenses remains intact. (*Id.* at p. 126.)

A defendant's agreement that he may be convicted of an uncharged lesser related offense may be express or he may impliedly consent or acquiesce to have the trier of fact consider an uncharged offense. (*Toro*, supra, 47 Cal.3d at p. 973, disapproved on another ground in *People v. Guiuan*, *supra*, 18 Cal.4th at p. 568, fn. 3; *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

---

[8] Although similar to the previous notice discussion, the notice discussion in this section is based on appellant's notice of the arson of property offense. As discussed in the preceding section, appellant had proper notice of the offense of arson of inhabited property. As to each offense, appellant's defense is no different — i.e., that he did not have the required mental state.

In *Orlina*, *supra*, 73 Cal.App.4th 258, the court addressed whether the state may retry a defendant on an uncharged lesser-related offense following acquittal of the charged offense and a deadlocked jury on the lesser offense. (*Id.* at p. 260.) The Court of Appeal concluded the defendant's request that the jury be instructed on the lesser related offense effectively amended the information to add a count:

> By requesting the jury be instructed on the lesser offense, be it an included or related one, a defendant asks to be tried on a crime not charged in the accusatory pleading. By doing so, the defendant implicitly waives any objection based on lack of notice. Such defendants in effect ask the court to treat them as if the pleading had been amended. [...] [A] defendant who requests the jury be instructed on an uncharged offense consents to be treated as if the offense had been charged.

(*Id.* at pp. 263-264.)

The dissent in this case relied upon *Orlina* for the proposition that the charge was effectively amended by way of jury instruction and could be "'treated as if the offense had been charged.'" (Dis. Opn. at pp. 2-3 quoting *Orlina*, at p. 264.) Although the defendant in *Orlina* requested that the jury be instructed on an uncharged offense, which was not the case here, a defendant need not explicitly request that a jury instruction be given for an amendment to occur. It is well settled that a defendant is considered to have impliedly consented to an amendment of the charge when he fails to object to the jury instructions or verdict form that gives rise to a nonincluded offense. (*Toro, supra,* 47 Cal.3d at pp. 976-977.) In *Toro*, the defendant was charged by information with attempted murder and assault with a deadly weapon. In addition to the charged offenses, the jury was instructed on, and received verdict forms for, the offenses of attempted voluntary manslaughter, battery with serious bodily injury, simple battery, and simple assault. (*Id.* at pp. 970-971.) The defense did not object to the proposed instructions, the verdict forms, or claim unfair surprise with

respect to the verdict options provided to the jury, leading this court to conclude that "the failure to object constituted an implied consent to the jury's consideration of the lesser related offense and a waiver of any objection based on lack of notice." (*Id.* at p. 978.) *Toro* held, "There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id.* at p. 976.) Thus, a failure to promptly object to verdict forms and jury instructions "will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*Ibid.*)

This court reiterated these principles in *Birks,* noting that if the defendant "fails to object when the prosecutor or the court proposes that such instructions [on an uncharged, nonincluded offense] be given, no complaint about the consequences can thereafter be raised on appeal." (*Birks, supra,* 19 Cal.4th at p. 136 fn. 19.) The defendant's failure to object to such instructions is deemed consent and constitutes waiver of any claim of unfair surprise. (*Ibid.*, citing *Toro, supra*, 47 Cal.3d at p. 976.)

Consent to conviction of a lesser related offense has been found not only when a defendant requests an instruction on the lesser offense, or when he impliedly consents to such instruction by failing to object, but also when he urges conviction on the lesser. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 623 (*Ramirez*), disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1137.) In *People v. Taylor* (1969) 273 Cal.App.2d 477 (*Taylor*), for example, the defendant was charged with attempted murder and there was no allegation that the attempt was made with a deadly weapon. However, the defendant's attorney urged the trier of fact to find that the defendant was guilty of assault with a deadly weapon under the charge of attempted murder. The *Taylor* court concluded that the attorney's conduct caused two accusatory pleading-amending events to occur. First, the defendant impliedly consented that the information be

treated as though the separate and related crime of attempted murder by use of a deadly weapon had been pleaded. Second, as a result of his implied consent to the separate offense, the information was effectively amended and "clearly charged the lesser included offense of assault with a deadly weapon." (*Id.* at pp. 485-486.)

a. Appellant's Tacit Agreement to the Lesser Offense Instruction Amended the Charge

The record establishes appellant's tacit agreement to the trial court's proposed instructions on the lesser offenses. When appellant's attorney responded to the trial court's inquiry as to whether he "understood" the trial court's so-called "decision tree," appellant's attorney expressly stated that he "understood where [the trial court was] going." (2 RT 285.) The trial court identified the lesser offenses as lesser included offenses of arson of an inhabited structure. Appellant had ample opportunity to object to the instructions but did not. (*Toro, supra*, 47 Cal.3d at pp. 973, 976-977.)

b. Appellant's Affirmative Conduct Amended the Charge with the Lesser Offense

Imbued with as much, if not greater, significance as appellant's tacit agreement is appellant's affirmative conduct during argument urging the jury to convict him of burning property. (2 RT 354-356, 358, 368-369; *Ramirez, supra*, 189 Cal.App.3d at p. 623; *Taylor, supra,* 273 Cal.App.2d at pp. 485-486.) Indeed, under the facts of this case, "'neither [appellant] nor his attorney could rationally have anticipated anything other than a finding of guilt of some offense.'" (*Toro, supra*, 47 Cal.3d at p. 977 quoting *People v. Francis* (1969) 71 Cal.2d 66, 74.) Appellant's counsel strategically focused the jury's attention on the crimes of arson of property

and unlawful burning of property. (2 RT 354-356.) He conceded that appellant was guilty of unlawfully causing a fire to property and urged the jury to "[c]onvict him of what he did[.]" (2 RT 369.)

2. Appellant's Trial Strategy Depended Upon the Jury's Consideration of the Lesser Offense

Appellant's entire theory of the case was that he did not burn a structure, but that he recklessly burned *something*, and that it was mere property. (2 RT 369.) From a defense perspective, it matter not how the lesser offense was classified; it only mattered that the offense was before the jury so that the defense could argue for the best potential result — a conviction on the least of all the crimes, misdemeanor burning of property. Appellant had obvious tactical reasons for agreeing to the additional instructions and arguing accordingly. As in the *Taylor* case, the instruction on arson of property gave rise to an additional lesser offense that would otherwise not have been available to the defense. Namely, as a result of adding the arson of property count, the jury was also instructed on the lesser included offense of misdemeanor unlawful burning of property. (*People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1325 ["Unlawfully causing a fire is a lesser included offense of arson."]; *Taylor, supra*, 273 Cal.App.2d at pp. 485-486 .) Had the jury been persuaded by appellant's arguments that he burned mere property, and did so recklessly, he would have been convicted of a misdemeanor, and therefore would have been outside the reach of the Three Strikes law under which he was ultimately sentenced. (1 CT 97, 262-265; 2 CT 297-298, 311-314.)

The majority ignored the effect of appellant's consent to the uncharged offense and summarily disposed of the instruction on the lesser offense of arson of property to be a product of the trial court's and parties' mistaken belief. The majority focused instead on the prosecutor's charging

decision. The majority reasoned, "Had the prosecutor charged defendant with the lesser related offense in this case, the jury would have been instructed to render verdicts on both the greater and lesser charges." (Opn. at p. 10.) At the outset, the majority's undue emphasis on the prosecutor's charging decision runs counter to the separation of powers doctrine. It is well settled that "the prosecutor has the discretion to decide which offenses to charge. The courts do not generally supervise these 'purely prosecutorial functions[s].' [Citations.]" (*People v. Ceja* (2010) 49 Cal.4th 1, 7; see *Valli, supra*, 187 Cal.App.4th at p. 801.) But more importantly, that the prosecution could have done things differently does not detract from the fact that appellant consented to amending the information to add the uncharged offense. (*Toro, supra*, 47 Cal.3d at pp. 973, 976-977; *Ramirez, supra*, 189 Cal.App.3d at p. 623; *Taylor, supra,* 273 Cal.App.2d at pp. 485-486.) Nevertheless, the majority concluded that "[*b*]*ecause* the prosecutor did not [charge the offense of arson of property], there is no unresolved or pending charge on which to remand this matter to the trial court." (Opn. at p. 10; italics added.) The majority's reasoning has no support in law or logic.

As Justice Richli noted in dissent, appellant was charged with the lesser related offense because he failed to object to the jury instruction on it and, "because the jury never returned a verdict on the lesser (for whatever reason), the charge is still 'unresolved' and 'pending.'" (Dis. Opn. at p. 3.) In other words, the instructional error that occurred here merely delayed resolution of the charge.

3. Appellant Has Forfeited Any Claim Under Section 1164 that the Trial Court Improperly Discharged the Jury Without a Verdict on the Lesser Offense

At no point in the trial court proceedings did appellant ever claim that the jury should not be discharged without declaring a verdict on the lesser offense. Appellant's failure to object to the jury's discharge without a verdict on the lesser offense forfeited any claim the discharge was improper under section 1164, subdivision (b). That statutory provision provides, in pertinent part, the jury shall not be discharged "until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it." (§ 1164, subd. (b).)

Here, without objection, the trial court instructed the jury as if the lesser related offense was a lesser included offense. (1 CT 118; CALCRIM No. 1515.) The instruction that characterized arson of property as a lesser included offense of arson of an inhabited structure did not compromise the jury's ability to consider the arson of property offense because the elements of that offense were accurately set forth in the instructions. (*Kellett, supra*, 63 Cal.2d at p. 827.) However, as a consequence of it being characterized as a lesser included offense, the jury was instructed that it could not convict appellant of "both a greater and lesser crime for the same conduct." (1 CT 122.)[9] Under the instructions provided, when the jury reached its verdict on

---

[9] The jury was specifically instructed:

> If you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] Arson of

(continued...)

the greatest offense charged, arson of an inhabited structure, it did not return a verdict on the lesser offense of arson of property. (1 CT 126, 131.)

In *People v. Saunders* (1993) 5 Cal.4th 580, this court held the defendant forfeited his claim the trial court erred under section 1164, subdivision (b), when it discharged the jury. In that case, the defendant failed to object to the trial court's discharge of the jury that convicted him of burglary, before the same jury could decide the truth of the prior conviction allegations. (§ 1025.)[10] He claimed that the trial court was barred from impaneling a new jury and conducting further proceedings on the prior conviction allegations. (*Id.* at p. 587.) This court concluded that general waiver and forfeiture principles applied, explaining that it "is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial. [Citation.] " (*Id.* at p. 590, italics in original.)

In reaching this conclusion, the court acknowledged that trial practice is fast-paced and issues are sometimes overlooked but noted, "The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal. [Citation.]" (*Ibid.*) Thus, the defendant's claim that the trial court had improperly

---

(...continued)

property or a structure is a lesser crime of arson of an inhabited structure charged in Count One.

[10] Subdivision (b) of the section states, in pertinent part, "the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose, or by the court if a jury is waived." (§ 1025, subd. (b).)

discharged the jury before it determined the truth of the prior conviction allegations was forfeited. The court concluded, "although sections 1025 and 1164 prohibit a trial court from discharging a jury until it has determined the truth of any alleged prior convictions, a defendant may not complain on appeal of a departure from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection." (*Ibid.*) Because the forfeiture did not apply to the defendant's claim of once in jeopardy, the court further concluded that the defendant's double jeopardy rights had not been violated. (*Id.* at pp. 592-597.)

Likewise, this court recently held in *People v. Anzalone* (2013) 56 Cal.4th 545, that forfeiture rules applied to the defendant's claim that her right to a unanimous verdict was violated by the trial court's failure to ask the jury to affirm its verdict. Section 1149 mandates the procedure for taking the jury's verdict; the section requires the trial court to ask the jury if it has agreed upon their verdict and, if further required, to declare their verdict. (§ 1149.) The *Anzalone* court explained that in the event of such error "a party should not sit on his or her hands, but instead must speak up and provide the court with an opportunity to address the alleged error at a time when it might be fixed." (*Id.* at p. 550.) Notwithstanding the court's forfeiture ruling, it held the error was not in any way unfair. (*Id.* at pp. 556-560.)

The same reasoning applies to the present case: under the principles of forfeiture, appellant cannot claim the jury was improperly discharged because he failed to object. Consistent with the agreed-upon instructions provided by the trial court, that not only identified the arson of property offense as a lesser included offense but told the jury that appellant could "not be convicted of both a greater and lesser crime for the same conduct," the trial court discharged the jury when it returned its verdict of guilt on the

greater crime because the trial court believed it had reached a verdict "on all issues before it." (1 CT 122; Pen. Code, § 1164, subd. (b).) The jury faithfully followed the trial court's instructions and returned its verdict as instructed. Appellant's failure to object to the trial court's instructions and, importantly, to the jury's discharge without rendering a verdict on the arson of property count, amounts to forfeiture of a claim that the discharge was improper. Absent any objection below, appellant cannot now claim that this statutory error prevents retrial; he is not entitled to a "'get out of jail free card'" because the jury was discharged without a verdict on the lesser count of arson of property. (Dis. Opn. at p. 1.)

As discussed above, appellant had obvious strategic reasons for wanting the lesser offense to be before the jury. In the context of consent, it did not necessarily matter to appellant *how* the lesser offense was classified, only that it be before the jury as an alternative offense for which the defense vigorously argued. (2 RT 354-356, 358, 269.) The jury's consideration of the motorhome as property was critical to his defense because it not only defeated the multiple structure enhancement allegation but also brought into the jury's view the misdemeanor offense of reckless burning of property. Appellant's strategy was reasonable, but it is unreasonable for him not to accept the resultant consequence of his consent to the instructions and his failure to object to the jury's discharge. The unresolved count is a function of what occurred in the trial court. Had appellant objected to the jury's discharge, the trial court would have had the opportunity to correct the any alleged error. (See § 1161 [circumstances under which the court may direct the jury to reconsider the verdict].)[11]

---

[11] Section 1161 provides:

In what cases Court may direct a reconsideration of the verdict. When there is a verdict of conviction, in which it appears to the

(continued...)

Under the principles of forfeiture, appellant is precluded from claiming that the error prevents retrial.

In sum, appellant's statement to the trial court that he "understood" the jury instructions and his affirmative conduct before the jury in closing argument reasonably implied his consent to add the lesser related offense to the prosecutor's original charge. From a tactical standpoint, the mistaken classification of the offense as a lesser included offense was immaterial; what mattered greatly to the defense was that the count be before the jury. Because "adding a new offense at trial by amending the information" is the functional equivalent of "adding the same charge by verdict forms and jury instructions[]" (*Toro, supra*, 47 Cal.3d at p. 976, fn. omitted), the charge was properly amended with the lesser offense of arson of property. Any claim that the instructional error that resulted in the jury not returning a verdict on the lesser offense precludes retrial is forfeited. The instructional error that rendered the offense "unresolved" or "pending," simply delayed resolution of the count. (Dis. Opn. at p. 3.) Retrial of the offense is proper.

(...continued)

> Court that the jury have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the Court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the Court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the Court.

D. The Principles of Double Jeopardy Do Not Prevent Retrial of a Lesser Related Offense Mistakenly Identified as a Lesser Included Offense in the Jury Instructions and for Which the Jury Did Not Return a Verdict as Instructed

The Court of Appeal entirely abandoned its earlier reliance on the principles of double jeopardy in concluding that retrial was barred in its now-divided third opinion at issue here. And properly so. Appellant agreed to be placed in jeopardy of the lesser related offense. His consent to the jury instructions extends to the way in which the jury was discharged. As such, federal and state double jeopardy protections are not violated by retrial to resolve the question of guilt.

"The Fifth Amendment to the United States Constitution provides that '[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....' This guarantee is applicable to the states through the Fourteenth Amendment. [Citations.] Similarly, article I, section 15, of the California Constitution provides: 'Persons may not twice be put in jeopardy for the same offense....'" (*People v. Saunders*, *supra*, 5 Cal.4th at pp. 592-593.)

The Double Jeopardy Clause provides a defendant three basic protections: "'[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' [Citations.]" (*Ohio v. Johnson* (1984) 467 U.S. 493, 497-498 [104 S.Ct. 2536, 81 L.Ed.2d 425].) As the high court has further stated, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." (*Richardson v. United States* (1984) 468 U.S. 317, 325 [104 S.Ct. 3081, 82 L.Ed.2d 242].) "However, when a trial produces neither an acquittal nor a conviction, retrial may be permitted if the trial

ended 'without finally resolving the merits of the charges against the accused.'" (*People v. Anderson* (2009) 47 Cal.4th 92, 104, quoting *Arizona v. Washington* (1978) 434 U.S. 497, 505 [98 S.Ct. 824, 54 L.Ed.2d 717].) Federal and California state courts have taken the position that retrial is proper following the discharge of the jury before rendering its verdict based upon legal necessity or a defendant's consent. (*Ibid.*)

California's double jeopardy protection is codified in section 1023 which states: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

This court considered the application of section 1023 in *People v. Fields* (1996) 13 Cal.4th 289. In that case, the jury hopelessly deadlocked on the greater offense but reached a verdict on the lesser included offense. The trial court declared a mistrial on the greater offense and set it for retrial. The trial court received the jury's verdict on the lesser included offense and discharged the jury. Subsequently, the defendant was retried on the greater offense and convicted. (*Id.* at pp. 296-297.) The issue before this court was whether federal or state principles of double jeopardy barred retrial of the greater offense on which the jury deadlocked but in the same proceeding returned a guilty verdict on a separately charged lesser included offense. (*Id.* at p. 295.) This court considered two distinct doctrines of double jeopardy that were potentially at play: the implied acquittal doctrine and the doctrine of legal necessity. (*Ibid.*) Ultimately, the court concluded neither doctrine applied. The court reasoned an express deadlock is inconsistent with the jury's silence underlying an implied acquittal of the greater offense. Additionally, notwithstanding the deadlock, which permits

retrial based upon legal necessity, a verdict of guilt on the lesser included offense prevents retrial on the greater under section 1023. (*Id.* at pp. 300-303, 305.) Relying on an earlier opinion of this court construing section 1023, the *Fields* court confirmed, "The statute implements the protections of the state constitutional prohibition against double jeopardy and, more specifically, the doctrine of included offenses." (*Id.* at pp. 305-306; *People v. Greer* (1947) 30 Cal.2d 589, 596-597 [conviction of lesser included offense bars subsequent prosecution for the greater offense].)

The *Fields* court specifically addressed the importance of the jury acquitting the defendant of the greater offense before reaching the question of guilt of any lesser included offense, i.e., the "acquittal-first" rule, within the context of the doctrine of lesser included offenses. It outlined the procedure for trial courts to follow prior to the discharge of the jury to avoid incomplete verdicts. (*Id.* at pp. 309-311.) The court further concluded that when an incomplete verdict is rendered and the jury has been discharged, the no-retrial consequence is "borne by the People." (*Id.* at p. 311.) The court reasoned it was appropriate to place the burden on the People to bring the incomplete verdict to the trial court's attention because it "preserves the possibility that, after reconsideration pursuant to section 1161, the jury will decline to return the requisite verdict of acquittal of the greater offense" and thereby trigger either a motion for mistrial by the People or a request by the People for dismissal of the greater offense. (*Ibid.*)

This case is distinguishable from *Fields* because the doctrine of included offenses at work in the *Fields* case is not applicable to lesser related offenses. The narrow issue raised by an incomplete verdict under the rubric of the acquittal-first rule is not present under the circumstances of the present case. More specifically, the jury here, unlike the jury in *Fields*, convicted appellant of the greater offense. Unlike the doctrine of included

offenses, the unresolved verdict on the lesser related offense bears no direct relationship to the greater offense so that a conviction of one does not necessarily render conviction of both improper. Because of this, it was possible to convict appellant of both the greater and lesser offenses. (*People v. Labaer* (2001) 88 Cal.App.4th 289, 290 [defendant convicted of both arson of a structure and arson of property].) The specific concerns related to the lesser included offense doctrine do not apply.

Further, the consequences of the instructional error here should not be "borne by the People" rather than the defense because appellant consented to be charged and tried on the lesser offense. When appellant agreed he could be convicted of the lesser related offense of arson of property by placing it before the jury, he entered into a logical concomitant agreement that the jury would resolve the count, either by conviction or acquittal. Appellant "is entitled to a fair trial, not a perfect one." (*People v. Saunders, supra*, 56 Cal.4th at p. 556.) His agreements do not carry any less force or validity because an instructional error occurred requiring retrial of the count in order for final resolution of it. This court should not provide appellant a "get out of jail free card" because, as agreed by appellant, the jury was discharged without a verdict on the lesser count of arson of property. (Dis. Opn. at p. 1.)

This court has stated that "question of the propriety of discharging a jury depends upon the facts of each particular case." (*People v. Ham Tong* (1909) 155 Cal. 579, 584-585 (*Ham Tong*).) In *Ham Tong*, the trial court erroneously determined the information charged robbery, when it actually charged larceny. The trial court proceeded to instruct the jury on robbery and the jury so convicted. In reviewing the error in the context of double jeopardy, this court rhetorically asked, "Why should this form of error entitle a defendant to his discharge any more than should any other misdirection upon a question of law?" (*Ham Tong*, *supra*, at p. 584-585.)

There, "[t]he jury, acting according to the law as given them by the court, returned 'their verdict,' erroneous to be sure, but according to that declaration of the law which they were bound to accept as containing the principles to be followed by them in reaching 'their verdict[].'" (*Ibid.*) The court concluded under those circumstances the defendant was not protected from retrial of larceny under principles of double jeopardy. (*Ibid.*)

Here, the trial court determined that a motorhome could be a structure under the law of arson; it erroneously determined without objection that arson of property was a lesser included offense of arson of an inhabited structure, and instructed the jury accordingly. (1 CT 118-119, 122.) Subsequently, the Court of Appeal ruled that a motorhome was not a structure and reversed appellant's conviction for arson of an inhabited structure. (Opn. at pp. 4-8.) This court's reasoning in *Ham Tong* permitting retrial following an invalid verdict that was based upon instructional error should apply with equal force to the unresolved verdict in the current case. Indeed, *Ham Tong* echoes the concern of the dissenting justice in this case, that appellant should not be entitled to be released based on the instructional error that occurred. (Diss. Opn,. at pp. 1, 3.)

It is well settled that a jury may be discharged before reaching a verdict with the defendant's consent. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 516; *People v. Sullivan* (2013) 217 Cal.App.4th 242, 256.) In this context, the defendant's consent can be implied from defense counsel's conduct. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265, 288.) Appellant's failure to object to the trial court's instructions on the lesser offense that allowed the jury to not return a verdict on the lesser offense of arson of property if it found guilt on the greater offense of arson of an inhabited structure is reasonably construed as implied consent to the process by which the jury was discharged. By logical extension, he agreed to both the jury instructions and the way in which the jury was discharged

via those instructions. (See *In re Colford* (1924) 68 Cal.App. 308, 311 [a defendant who allows an imperfect verdict to be rendered, without objection, waives the right to plead once in jeopardy if the verdict is set aside and a retrial ordered]; *Higgins v. Superior Court In and For Los Angeles County* (1960) 185 Cal.App.2d 37, 42 [petitioner's failure to object to the entry of judgment on the defective verdict and subsequent collateral attack of the judgment results in an implied waiver of any objection to being tried on the charge of which he was improperly convicted].)

No state or federal constitutional principle of double jeopardy is violated when a defendant is subjected to retrial of a lesser related offense after he has agreed to be placed in jeopardy for that offense and, by reason of instructional error for which appellant did not object, the jury does not return a verdict for the offense so that neither acquittal nor conviction and sentence exist. During trial, the true nature of the lesser offense as a lesser related offense was overlooked. Setting aside appellant's failure to object to the error, this case aptly illustrates the principle underlying the well-settled rule that the double jeopardy guaranty does not prohibit retrial following trial error. (*People v. Garcia*, *supra*, 36 Cal.3d at p. 558 fn. 13 [double jeopardy principles do not bar retrial after special circumstance finding is reversed for instructional error even though evidence of one element of special circumstance "may be insufficient"].) Trial error, such as instructional error, does not trigger application of the rule against double jeopardy.

The purpose of the constitutional provision against double jeopardy is to prevent repeated harassment of a defendant upon the same charges. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 714.) The rule against double jeopardy achieves its purpose of protecting the defendant against the harassment and risks of unnecessary repeated trials on the same charge by giving the prosecution a "powerful incentive to make the best case it can at

its first opportunity." (*People v. Shirley* (1982) 31 Cal.3d 18, 71, citing *Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 2147, 57 L.Ed.2d 1].) Such incentive serves no purpose when the prosecution did make such a case-- as evidenced here by the jury's verdict for the "greater" offense—and, "having done so, the prosecution [has] little or no reason to produce other evidence of guilt." (*People v. Shirley, supra,* 31 Cal.3d at p. 71.) This not a case where the prosecutor can be faulted for moving forward without sufficient evidence to convict appellant. (See, e.g., *Downum v. United States* (1963) 372 U.S. 734, 737-738 [83 S.Ct. 1033, 10 L.Ed.2d 100] [retrial improper following first trial where jury discharged at prosecution's request because one of its key witnesses was absent and had not been found and the prosecutor allowed the jury to be sworn and selected under these circumstances, rather than move to dismiss its case before the jury was sworn and jeopardy attached]; *Martinez v. Illinois* (May 27, 2014) ___U.S.___ [134 S.Ct. 2070, ___ L.Ed.2d ___] (per curiam) [Double Jeopardy Clause barred state's appeal of trial court's directed verdicts of not guilty on charges of aggravated battery and mob action, entered after State declined to present evidence against defendant after jury was sworn, since the directed verdicts constituted acquittals].)

As in this case, circumstances may arise during the course of trial that prevent the return of the jury's verdict but that do not implicate the "oppressive practices" that the double jeopardy clause was designed to protect against. (*Wade v. Hunter* (1949) 336 U.S. 684, 689 [69 S.Ct. 834, 93 L.Ed. 974].) It cannot be said that a retrial of the unresolved count may be counted among the "oppressive practices" forbidden by the double jeopardy clause. Continuing prosecution on an unresolved consented-to lesser related offense following reversal of the greater offense for insufficiency does not amount to "governmental overreaching." (*Ohio v. Johnson, supra,* 467 U.S. at p. 501.) Appellant agreed he may be convicted

of the lesser offense of arson of property. Indeed, he urged the jury to convict him of burning property. Thus, he "has no constitutional interest in preventing his retrial" for arson, and "there is an important public interest in finally determining whether he committed that offense." (*Stone v. Superior Court, supra,* 31 Cal.3d at p. 522.)

Simply put, an instructional error occurred that has delayed resolution of the lesser related count. "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." (*Wade v. Hunter, supra*, 336 U.S. at p. 689.) The dissenting justice expressed that point precisely when she stated that appellant was not entitled to a "'get out of jail free'" card." (Dis. Opn. at p. 1.) Because appellant's original jeopardy has not terminated, retrial for resolution of the lesser related offense is proper. This court should reverse the holding of the Court of Appeal and find that when a defendant consents to be placed in jeopardy for an uncharged lesser related offense and a trial error subsequently occurs that renders the issue of guilt on that offense unresolved, the prosecutor may retry the offense.

CONCLUSION

This court should affirm appellant's conviction of section 451, subdivision (b), because a violation of that section is established by the jury's verdict, the opinion of the Court of Appeal, and appellant's concession the motorhome was property. An affirmance does not prejudice appellant's due process right to notice of the charges against him or right to prepare a meaningful defense. This is so because appellant's defense would have been no different had the count been charged in the alternative language of section 451, subdivision (b).

Alternatively, section 654 does not apply to prevent retrial of the lesser related offense of arson of property in this matter because appellant impliedly consented to be tried for that offense in the original prosecution. Consequently, the rule in *Kellett* construing section 654 and prohibiting multiple prosecutions for the same conduct has no application to this case. Appellant's agreement to be placed in jeopardy for the lesser related offense is not vitiated by the instructional error that permitted the jury's discharge without declaring its verdict on that offense, leaving it unresolved. For all of these reasons, a retrial to resolve the issue of appellant's guilt of the lesser related offense of arson of property is proper. Because the Court of Appeal reached the contrary conclusion in its opinion by relying exclusively on *Kellett*, it should be reversed.

Dated: July 18, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
STEVEN T. OETTING
Deputy Solicitor General

FELICITY SENOSKI
Deputy Attorney General
Attorneys for Respondent

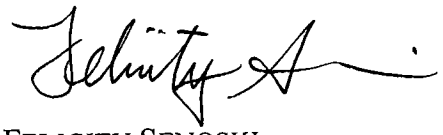
FS:swm
SD2014808005
70911475.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 16,662 words.

Dated: July 18, 2014

KAMALA D. HARRIS
Attorney General of California



FELICITY SENOSKI
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Goolsby*
No.: **S216648**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 18, 2014, I served the attached **OPENING BRIEF ON THE MERITS**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

STEVEN S LUBLINER
ATTORNEY AT LAW
P O BOX 750639
PETALUMA CA 94975-0639

Attorney for Appellant
Richard James Goolsby
(2 Copies)

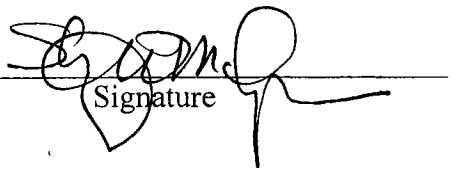
CLERK OF THE COURT
FOR HON BRYAN F FOSTER
SAN BERNARDINO CO SUPER COURT
401 N ARROWHEAD AVE
SAN BERNARDINO CA 92415-0063

APPELLATE SERVICES UNIT
OFFICE OF THE DISTRICT ATTORNEY
412 W HOSPITALITY LN 1ST FLR
SAN BERNARDINO CA 92415-0042

KEVIN J LANE CLERK
DIV TWO FOURTH APP DIST
CALIFORNIA COURT OF APPEAL
3389 TWELFTH ST
RIVERSIDE CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 18, 2014, at San Diego, California.

STEPHEN MCGEE
Declarant


Signature

SD2014808005
70894718.doc