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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

AUBREY BOONE,

Defendant and Appellant.

B284686

(Los Angeles County  
Super. Ct. No. TA139543)

APPEAL from a judgment of the Superior Court of Los Angeles County. H. Clay Jacke II, Judge. Affirmed.

Phillip A. Trevino, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted Aubrey Boone of first degree burglary and disobeying a court order. Boone appealed the judgment, and his appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Boone then filed a supplemental brief in which he contends there was insufficient evidence supporting his convictions and the trial judge was disqualified. We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

Boone's mother, D.B., lived in a home on 137th Street in Compton. The property was held in a trust, of which D.B. and her brothers were beneficiaries. In 2012, D.B. signed a document purporting to gift to Boone her ownership rights to the property. Boone, however, did not have the right to possess or live at the residence because the transfer had not been approved by a court. D.B. continued living at the residence and was the only person with a key to it.

Boone and D.B. had a tumultuous relationship. On October 31, 2013, a court issued a restraining order preventing Boone from coming within 100 yards of D.B. or the 137th Street residence. The order was valid until October 31, 2016. In a series of voice and text messages, Boone warned D.B. the order would not protect her.

On January 18, 2016, at around 11:30 a.m., D.B. was gardening in her backyard when she heard dogs barking. She went inside the house and saw Boone walking down the hallway. According to D.B., when she confronted Boone he hit her on the head three times with a closed fist. D.B. fell to the ground, and

Boone kicked her before running out of the house. D.B. had some bruising, but did not call paramedics or go to the hospital.

After Boone left the house, D.B. noticed her cell phone and about \$500 in cash were missing from her purse, which was in her bedroom. A few hours later, D.B. called 911 to report the incident. A police officer went to D.B.'s house around 7:00 p.m. that evening. D.B. told the officer she believed Boone entered the residence through her open front door, and the officer did not see any signs of forced entry.<sup>1</sup>

Five days after the incident, D.B. found her cell phone on the front porch. The contents of the phone had been erased and the sim card had been removed. D.B. took the phone to her carrier and received a replacement phone. At some point, D.B. found the missing \$500 in a drawer.

On December 14, 2016, the People filed an information charging Boone with first degree burglary (Pen. Code, § 459),<sup>2</sup> battery (§ 242), and disobeying a court order (§ 166, subd. (a)(4)).

#### *Trial*

The case was tried to a jury in July 2017. When the prosecutor called D.B. to testify, she refused, stating she did not want her son to go to jail. The court informed D.B. she could be held in contempt for refusing to testify and appointed counsel to represent her. After D.B. had an opportunity to confer with her appointed counsel, the court initiated contempt proceedings.

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<sup>1</sup> At the preliminary hearing, D.B. testified that her front door had been locked and she noticed a glass panel on the door was broken. D.B. told a detective she would provide photos of the damage, but she never did.

<sup>2</sup> All further unspecified statutory references are to the Penal Code.

The prosecutor asked D.B. a series of questions, which she refused to answer even after the court ordered her to do so. As a result, the court found D.B. in contempt and imposed a \$500 fine.

After the contempt hearing, the court informed the jury that D.B. had been declared legally unavailable. The parties then read to the jury portions of D.B.'s testimony from the preliminary hearing and a pre-trial Evidence Code section 402 hearing. In addition, the prosecutor presented testimony from several investigating officers and a custodian of records for Verizon Wireless.

Boone's theory of the case was that D.B. fabricated the allegations against him in response to a dispute over the 137th Street property. In support, he presented evidence suggesting D.B. agreed to move out of the residence and received \$30,000 in return, but she later refused to leave.

Boone also presented expert testimony from Dwayne White. Based on data from Verizon Wireless, White mapped the location of the cell sites that facilitated D.B.'s cell phone's activity between January 18 and 24, 2016. White testified that because he did not know the radius of the cell sites, it was not possible to pinpoint where the phone was while the activity was taking place.

On cross-examination, White agreed that, because the network prefers to use cell sites in close proximity to the phone, cell site records give a very good idea of where a phone is at a particular time. According to White's analysis, the morning of January 18, D.B.'s phone had connected to cell sites in the general vicinity of the 137th Street residence. Around noon, there were several data communications using cell sites close to downtown Los Angeles. Around 7:00 p.m., the cell phone made

an outgoing call using a cell site far from the 137th Street residence but close to Boone's home.

The jury found Boone guilty of burglary in the first degree (§ 459; count 1), and found true the allegation that a person was present. The jury also found Boone guilty of disobeying a court order (§ 166, subd. (a)(4); count 3). The jury indicated it had not reached a verdict on the battery charge, after which the court granted the prosecutor's motion to dismiss the count.

On count 1, the court sentenced Boone to probation for five years and ordered he serve 88 days in county jail.<sup>3</sup> On count 3, a misdemeanor, probation was denied and Boone was given credit for time served, 88 days in county jail. The court granted Boone 88 days of custody credit, and ordered he perform 400 hours of community service, complete 52 weeks of a drug and alcohol rehabilitation program, and complete 26 weeks of anger management classes. The court imposed various fines and fees.

Boone timely appealed.

### **DISCUSSION**

We appointed counsel to represent Boone on appeal. Appointed counsel filed an opening brief pursuant to *Wende, supra*, 25 Cal.3d 436, requesting independent review of the record on appeal for arguable issues. We notified Boone by letter that he could submit any claim, argument, or issue that he wished our court to review. Boone filed a supplemental brief in which, as best we can tell, he asserts there was insufficient

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<sup>3</sup> In explaining its sentence, the court noted the case was unusual in that Boone burglarized a house that essentially belonged to him, he does not have a history of this type of criminal conduct, and he returned the phone after five days. Further, the court noted D.B. did not appear traumatized in the typical fashion of a victim of residential burglary.

evidence supporting his convictions and the trial judge was disqualified. We find no merit to these arguments.

## **I. Substantial Evidence Supported the Convictions**

### **A. Standard of Review**

When an appellant challenges the sufficiency of evidence supporting a jury's verdict, the reviewing court examines whether there was substantial evidence, considered as a whole, to permit a reasonable trier of fact to find the defendant guilty of the charged crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; see also *People v. Smith* (2014) 60 Cal.4th 603, 617; *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The court's standard for determining what is "substantial evidence" is whether the evidence is "credible and of solid value." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) One witness's testimony can be sufficient evidence to sustain a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The reviewing court presumes every fact the jury could have reasonably deduced from the evidence in support of the judgment. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212–1213; see also *People v. Lewis* (1990) 50 Cal.3d 262, 277.) " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Staten* (2000) 24 Cal.4th 434, 460.) Therefore, the reviewing court will not reverse a judgment for insufficient evidence unless " 'it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' " (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) This standard of review applies to claims involving

both direct and circumstantial evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

### **B. Burglary**

Boone asserts there was insufficient evidence to support the burglary conviction. We disagree.

To prove a defendant has committed first degree burglary, the prosecution must establish the defendant entered an inhabited dwelling house with the intent to commit theft or any felony. (§§ 459, 460, subd. (a).) Here, D.B. testified that Boone entered her residence on January 18, 2016. After he left the house, D.B. discovered her cell phone was missing from her purse, which was in her bedroom. Cell phone records indicated that later that night, the phone was in the general vicinity of Boone's residence. This was sufficient evidence from which the jury could conclude that Boone committed burglary by entering the 137th Street residence with the intent to commit theft.

Boone insists he cannot be guilty of burglary because he was the owner of the 137th Street residence. An individual, however, may be guilty of burglarizing his own home if he lacked the unconditional possessory right to enter it. (See *People v. Smith* (2006) 142 Cal.App.4th 923, 929–933 [defendant guilty of burglarizing home for which he was a co-owner]; see also *People v. Sears* (1965) 62 Cal.2d 737, 746 overruled on another ground by *People v. Cahill* (1993) 5 Cal.4th 478 [defendant guilty of burglarizing family home]; *People v. Gill* (2008) 159 Cal.App.4th 149, 161 [same].) Here, there was substantial evidence that on the day of the incident, Boone did not have an unconditional possessory right to enter the 137th Street residence. D.B. testified that Boone did not have a key to the residence and did not have the right to live in it. Moreover, it was undisputed that,

at the time of the incident, there was a protective order in place that required Boone remain 100 yards from the residence. Based on such evidence, the jury could have reasonably concluded that Boone did not have the right to enter the residence.

We are also not persuaded by Boone's various arguments related to weaknesses in the prosecutor's case. Among other things, Boone asserts the investigating officer found no evidence of forced entry, D.B.'s testimony was inconsistent with what she told police, the police investigation was not timely or thorough, there was a lack of direct evidence that he used the stolen cell phone, D.B. had a motive to lie, and the investigating detective had a conflict of interest. These arguments are essentially invitations to reevaluate the witnesses' credibility and reweigh the evidence, which we decline to do when considering a challenge to the sufficiency of the evidence. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890; *People v. Brown* (2014) 59 Cal.4th 86, 106.)

### **C. Disobeying a Court Order**

Boone contends there was insufficient evidence to support his conviction for disobeying a court order. We disagree.

Section 166 makes it a misdemeanor to willfully disobey the terms as written of a lawful court order. (§ 166, subd. (a)(4).) Here, it was undisputed there was a lawful restraining order in effect from October 31, 2013 through October 31, 2016, which required that Boone stay at least 100 yards from D.B. and the 137th Street residence. D.B. testified that on January 18, 2016, Boone entered the 137th Street residence and made physical contact with her. She further testified that, prior to the incident, Boone sent her voice and text messages in which he acknowledged the existence of the protective order. This was



sufficient evidence from which the jury could conclude that Boone willfully disobeyed the written terms of the protective order, in violation of section 166.

We reject Boone's suggestion that he cannot be convicted of violating section 166 because he was not formally served the protective order until after the incident. Although section 166 requires the violation of the court order be willful, it does not require formal service of the order. Here, the jury could have inferred Boone's violation was willful based on D.B.'s testimony that, prior to the incident, he acknowledged the existence of the protective order in voice and text messages. Whether Boone was formally served with the protective order is inconsequential.

## **II. The Trial Judge Was Not Disqualified**

Boone asserts the trial judge was biased and should have recused himself because he was the judge in a prior case involving Boone's brother. We disagree.

"Under state and federal law, a defendant has a due process right to an impartial trial judge." (*People v. Peoples* (2016) 62 Cal.4th 718, 787.) "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist 'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" [Citation.] (*People v. Freeman* (2010) 47 Cal.4th 993, 996.) Only the most "extreme facts" justify judicial disqualification based on the due process clause. (*Ibid.*)

Here, Boone fails to explain how the fact that the trial judge proceeded over a prior case involving his brother created the probability of actual bias. In addition, we have reviewed the

entire record on appeal and find no evidence of bias or anything that would raise doubts about the trial judge's impartiality. There is no merit to Boone's claim that the trial judge was disqualified.

**DISPOSITION**

The judgment is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

GOODMAN, J.\*

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\* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.