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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO GRIJALVA VILLEGAS, Defendant and Appellant.	2d Crim. No. B268559 (Super. Ct. No. 1449791) (Santa Barbara County)

Armando Grijalva Villegas appeals after a jury convicted him of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)) and first degree burglary (§§ 459, 460). The jury also found true allegations that in committing the assault appellant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)), and that a person other than an accomplice was present in the residence during commission of the burglary (§ 667.5, subd.

[1] All statutory references are to the Penal Code unless otherwise stated.

(c)(21)).[2] The trial court sentenced him to seven years in state prison, consisting of the midterm of three years for the assault plus four years for the great bodily injury enhancement. The court also imposed a concurrent four-year term on the burglary count. Appellant contends his burglary conviction must be reversed for instructional error and insufficient evidence. He alternatively contends that the judgment should be corrected and amended to reflect a stayed term of four years on the burglary count. He also claims he is entitled to an additional day of presentence custody credit. The People concede the latter two claims, and we shall order the judgment modified accordingly. Otherwise, we affirm.

STATEMENT OF FACTS

Uncharged Acts of Domestic Violence Against Claudia R.

Appellant and Claudia R. began dating in July 2012. Throughout the relationship, Claudia lived with her three teenage children, R., Ro., and Y. R.'s girlfriend, Yv., and their infant child also occasionally lived there.

In the spring or summer of 2013, appellant picked Claudia up from an appointment and drove her to a park. He was agitated and smelled of alcohol. He parked and began calling her names. Claudia told him that she did not want or have to put up with his behavior. Appellant began driving around the park. Claudia became scared, took off her seat belt, and opened the door to get out. Appellant grabbed her by the hair and twisted her head. He kept driving and told her to close

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[2] Appellant was also charged with attempted murder (§§ 187, subd. (a), 664), but the jury was unable to reach a verdict and a mistrial was declared. The charge was retried before a different jury and appellant was found not guilty.

the door. She eventually complied and appellant drove her home. Claudia broke up with appellant but resumed seeing him shortly thereafter.

About a month later, appellant was driving Claudia in his car when she said she wanted to go home. Appellant refused to take her home and they began arguing. Appellant hit Claudia in the chest with his arm. Claudia cried and appellant told her to shut up. He drove her to his aunt's house, where he lived, and parked in the driveway. When Claudia tried to get out of the car, appellant grabbed her by the hair and drove away with the front passenger door open. Appellant eventually took Claudia home and followed her into her house. Appellant said he was sorry and tried to hug her but she refused. Appellant picked up a pair of kitchen scissors and approached Claudia. He threw the scissors in the sink and left.

About three weeks later, appellant was drinking and became angry. He called Claudia names and she began walking away from him. Appellant blocked the door and would not allow her to leave. Claudia sat on the floor and appellant moved his foot as he was going to kick her in the face. Claudia pleaded with him to stop and he made fun of her.

One night in October 2013, appellant stayed over at Claudia's house. The next morning, he got up and saw Yv.'s phone in the living room. He accused Claudia of using Yv.'s phone to communicate with another man. They began arguing and appellant said he was sorry. Appellant tried to hug Claudia but she removed his hands and told him to leave her alone. He then pushed her so hard that she fell backwards into her closet door and broke it. Claudia stopped seeing appellant after the

incident and blocked his phone calls and texts. She contacted him a few weeks later and their relationship resumed.

The Charged Incident

On December 24, 2013, appellant picked Claudia up from work at about 5:00 p.m. Claudia could tell he had been drinking. She told him she was tired and that she wanted to go home and spend time with her children. Appellant continued to drive around, picked up one of his cousins, and stopped at his house to pick up Christmas gifts.

Appellant and Claudia arrived at her house just as Claudia's children, grandson, and Yv. were about to go to Yv.'s parents' house in Guadalupe. They asked Claudia to go with them and she agreed. Appellant went to a family gathering at his aunt's house.

As Claudia was returning home from Guadalupe, she texted appellant and asked what he was doing. Appellant texted in reply, "oh, now you want to be with me?" During a subsequent phone call, appellant repeatedly asked Claudia where she had been and said he was upset that she had gone without him. He told her he was going to pick her up and take her to visit his family. Claudia said she would not go with him and hung up.

Claudia got home at about 9:30 p.m. Appellant showed up about five minutes later. He came into the living room where Y. and Yv. were wrapping presents and asked Claudia if she was ready to go. She reiterated that she was not going and appellant replied, "I'm not f'ing asking you, I'm f'ing telling you that you're going." Appellant went into Claudia's bedroom and opened several drawers. He then left the house and said, "bye, you stupid whore." Y. and Yv. attempted to follow appellant and told Claudia she should never allow a man to talk

to her like that. Claudia told Y. and Yv. to leave appellant alone because he was drunk and "it's not worth it." Yv. opened the window and yelled at appellant.

Appellant repeatedly called Claudia after he left. She answered some of the calls and appellant said he was sorry. Claudia told him the relationship was over and that her children should not hear him disrespecting her. Appellant replied, "I'm sorry, but then you don't respect me. If you respected me, if you showed some respect, things wouldn't happen." He added, "no, this is not over. This is not done." Claudia reiterated otherwise and appellant said, "okay. Have a Merry Christmas, ho-ho-ho." They both hung up and Claudia turned off her phone.

Appellant returned to the party at his aunt's house. At about 11:30 p.m., R. told Claudia he had seen appellant drive by their house while R. was in the front yard.[3] Claudia went outside to look for appellant. After she was unable to find him, she went back in the house and locked the doors. Claudia and her children went to sleep in their bedrooms.

At about 1:00 a.m. on Christmas morning, appellant awakened Claudia by knocking on her bedroom window. Claudia opened the window slightly and asked appellant what he wanted. He told her that he wanted her to come outside. She said no and he replied, "well, maybe there's somebody inside your home. That's why you don't want to come out." Appellant made derogatory remarks toward Claudia and approached her. He reached into his pocket and removed a metal item, which Claudia

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[3] R. testified that he did not remember if he saw appellant drive by that night. He also told an investigator from the District Attorney's office that he did not recall seeing appellant that night or telling Claudia that he had.

assumed was the folding pocket knife he always carried. He hit the screen with the object and Claudia closed the window. Appellant said he was sorry and pleaded with Claudia to talk to him. She opened the window very slightly and told appellant to go home. She told him he was drunk and said they would talk after he slept it off. Appellant eventually left in his car.

Claudia was worried because she had never seen appellant act so desperate. She turned her phone back on and saw the text messages appellant was sending her. At that very moment appellant texted, "Claudia, if you care, call me. If not, I don't give a fuck what happens next." Claudia called appellant and tried to calm him down. She reiterated that they could talk after he sobered up. Appellant told Claudia, "Babe, I just want to see you. I just want to hug you." He also said that he wanted to bring presents for Claudia's children. Appellant was "talking normal" and "didn't sound desperate anymore," so Claudia agreed to meet with him. She did not want him inside the house, so she told him to come to her back yard.

Claudia put on a jacket and went to the back door. Appellant was already there when she opened the door. He had parked in the alley, which was unusual. He pushed the door further open and went into the house. Claudia asked what he was doing, and appellant responded, "I need to use the restroom. That's never been a problem before." Claudia replied, "okay. Well, just keep it down because the kids are asleep."

Appellant appeared to be upset and nervous. He walked to the restroom, which was in the hallway in the middle of the house. He turned on the light, stood in the doorway and looked around the house. From his vantage point he was able to see that all of the bedroom doors were closed and that no one else

was in the living room and kitchen. Appellant appeared to be scanning the area, as if he was looking for someone or something. Claudia said, "I thought you had to use the restroom." Appellant replied, "I don't have to go anymore." Claudia said, "okay, let's go outside."

Appellant turned off the restroom light and they both started walking toward the back door. Claudia waited for appellant to go out first, but he wanted her to exit first. They both went outside and Claudia closed the door. Appellant began arguing with Claudia and said "as almost your husband I deserve more respect. You don't respect me. You're always diss'ing me." He pulled out a cigarette and started smoking it. He then suddenly grabbed Claudia in a head lock, removed something from his pocket, and moved his hand toward her neck. Claudia tried to free herself from appellant and asked him what he was doing. Appellant made three slicing motions across her neck and let her go. He ran towards the backyard gate, turned around, and looked at Claudia. He had a look of fear and panic on his face.

Claudia ran inside the house and locked the door. She put her hands to her neck and felt wetness. She saw that her neck was bleeding and called 911. The police arrived and an ambulance transported her to the hospital. As she was opening the door for the police, appellant sent her a text stating, "Babe, answer me, please." Claudia texted back, "the police are here." Appellant was arrested a few hours later.

Claudia was treated for a five-centimeter laceration to her neck. The wound required stitches and left a scar. Her jacket, which was also cut, "took most of the blade" and protected her from more serious injuries.

Uncharged Acts of Domestic Violence Against Francine M.

Appellant and Francine M. began dating in 2006 or 2007. They dated for about a year, with frequent breakups and reconciliations. Appellant first became violent a few months into the relationship. The common theme of the violent incidents was appellant's belief that Francine was cheating on him. The first time he was violent, he punched her in the face while she was driving. She stopped the car and tried to get out as blood gushed from her nose. Appellant gave her his shirt to stop the bleeding and said he was sorry. Francine did not call the police. She hid for about two weeks to prevent anyone from seeing her injuries.

On another occasion, appellant choked and hit Francine. Another time, he pulled her hair and choked her until she blacked out. On yet another occasion, he threatened her with a kitchen knife and said he would hurt her and her children. During the final incident, appellant slapped, beat, and choked Francine as she was holding her infant daughter. When she awoke from blacking out, appellant was holding the child. Francine wrested her daughter from appellant and handed the child to her roommate. She then left through a bedroom window, went to a neighbor's house, and called the police. She finally decided to call the police because her daughter had been involved.

DISCUSSION

First Degree Burglary–Facilitation

Appellant was charged with first degree burglary on the theory that he entered Claudia's residence with the intent to commit an assault with a deadly weapon or an attempted murder. Although the target offense was committed in Claudia's back yard, the prosecution contended that appellant "entered the house in order to make sure that the witnesses were asleep.

There's no one who could intervene or interrupt his plan, and so when he entered the home, that facilitated his safely executing the [assault on Claudia] outside." Over appellant's objection, the trial court instructed the jury on this theory with a modified version of CALCRIM No. 1700.[4]

Appellant contends the evidence is insufficient to support his conviction on the theory that he entered Claudia's residence to facilitate the assault. He also claims the modified instruction erroneously "[e]xpand[ed] the [e]lements of [b]urglary" and "[l]ightened the prosecutor's burden of proof." We

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[4] The court further modified the instruction to provide that appellant could be found guilty of burglary even if he entered Claudia's residence with her consent. The instruction stated: "A burglary was committed if the defendant entered with the intent to commit attempted murder or assault with a deadly weapon. The defendant does not need to have actually committed attempted murder or assault with a deadly weapon as long as he entered with the intent to do so. The People do not have to prove that the defendant actually committed attempted murder or assault with a deadly weapon. [¶] The People allege that the defendant attempted to commit attempted murder or assault with a deadly weapon. You may not find the defendant guilty of burglary unless you all agree that he intended to commit one of those crimes at the time of the entry. You do not all have to agree on which one of those crimes he intended. [¶] The defendant need not intend to commit the attempted murder or assault with a deadly weapon inside the building if you find that the defendant entered the building in order to facilitate the commission of the attempted murder or assault with a deadly weapon. [¶] A person who enters for a felonious purpose may be found guilty of burglary even if he or she enters with the occupant's consent."

conclude the instruction was proper and that the evidence is sufficient to support the conviction.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine "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. [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

A defendant is guilty of first degree burglary if he or she entered an inhabited dwelling "with intent to commit grand or petit larceny or any felony[.]" (§§ 459, 460.) The defendant need not intend to commit the target felony on the premises he or she entered, however, if the entry "facilitate[d] commission of" the target offense. (*People v. Kwok*(1998) 63 Cal.App.4th 1236, 1248 (*Kwok*).) "Facilitate" means "to make the commission of a crime easier." (Black's Law Dict. (9th ed. 2009) p. 668.)

Contrary to appellant's claim, the modified version of CALCRIM No. 1700 correctly stated the law. (See, e.g., *People v. Wright* (1962) 206 Cal.App.2d 184, 191 (*Wright*); *Kwok*, *supra*, 63 Cal.App.4th at p. 1248; *People v. Ortega* (1992) 11 Cal.App.4th 691, 697 (*Ortega*); *People v. Griffin* (2001) 90 Cal.App.4th 741,

749 (*Griffin*).) It necessary follows that the instruction did not impermissibly lighten the prosecution's burden of proof.

Moreover, the evidence is sufficient to support the jury's finding that appellant's entry into Claudia's residence facilitated his commission of the assault because it gave him the opportunity to ensure there were no potential witnesses or intervenors. In arguing otherwise, appellant discusses cases in which the court found the evidence was sufficient to prove the defendant entered a building to facilitate a target offense committed elsewhere. (*Wright*, *supra*, 206 Cal.App.2d at p. 186 [defendant facilitated larceny by entering a tire shop to obtain access to an attached shed from which he stole tires]; *People v. Nance* (1972) 25 Cal.App.3d 925, 927 [defendant facilitated theft by entering a building and flipping a switch that enabled him to steal gasoline from pumps outside]; *Ortega*, *supra*, 11 Cal.App.4th at p. 697 [defendant facilitated extortion by entering residence, removing a radio, and leaving a note informing the victim that he would sell the radio if the defendant did not repair his car by a specified date]; *Kwok*, *supra*, 63 Cal.App.4th at p. 1248; [defendant facilitated assault when he entered the victim's garage to obtain a copy of a key that allowed him to enter the residence and assault the victim nine days later]; *Griffin*, *supra*, 90 Cal.App.4th at pp. 745-746 [the defendants entered the apartment of an acquaintance of the intended victim seeking to discover the whereabouts of the victim, whom they intended to assault at another location].)

Although these cases are instructive, none purports to establish a benchmark for proving facilitation in a given case. The evidence in this case, when viewed in the light most favorable to the judgment, supports a finding that appellant

entered Claudia's residence for the purpose of ensuring there was no one who might interfere with his criminal plan. The jury could logically infer that appellant sought this assurance in order to facilitate the assault, such that he was guilty of first degree burglary. Appellant's claim of insufficient evidence thus fails.

CALRCRIM No. 375

Appellant contends the jury was erroneously instructed with CALCRIM No. 375.[5] It is unclear from the record

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[5] The instruction stated: "The People presented evidence that the defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] • The defendant was the person who committed the offenses alleged in this case; or [¶] • The defendant acted with the requisite intent for the charged crimes in this case; or [¶] • The defendant had a motive to commit the offenses alleged in this case; or [¶] • The defendant had a plan or scheme to commit the offenses alleged in this case; [¶] • The defendant's alleged actions were not the result of mistake or accident. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses. [¶] Do not consider this evidence for any other purpose except for the limited purpose of the defendant's propensity to commit domestic violence offenses. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the

whether the instruction was actually given, but we assume that it was and conclude it was harmless.

Prior to trial, the prosecution requested that the evidence of appellant's prior uncharged acts of domestic violence against Claudia and Francine be admitted under Evidence Code section 1109 (section 1109) to prove his disposition to commit acts of domestic violence. The prosecution also requested that the evidence be admitted under Evidence Code section 1101, subdivision (b) (section 1101(b)) to prove intent, motive, and common plan or scheme. After holding Evidence Code section 402 hearings, the court ruled that the evidence was admissible and allowed Claudia and Francine to testify to the prior acts.

At the conclusion of the trial, the prosecution requested that the jury be instructed with CALCRIM No. 852,[6]

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other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crimes in this case. The People must still prove every charge and allegation beyond a reasonable doubt."

[6] The instruction provided in pertinent part: "The People presented evidence the defendant committed domestic violence that was not charged in this case. [¶] . . . [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence the defendant in fact committed the uncharged domestic violence. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. If you decide the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence the defendant was

which addressed the admissibility of the subject evidence under section 1109, and CALCRIM No. 375, which instructed on the admissibility of the evidence under section 1101(b). Defense counsel pointed out that the bench note to CALCRIM No. 375 states the instruction should not be given if the evidence is admitted only under section 1109. The court stated it had not ruled on the admissibility of the evidence under section 1101(b) and said it was "pulling" the instruction subject to further discussion.

The court ultimately declined to give the instruction and verified it had "pull[ed] it out" of the packet of instructions to be given to the jury. The court's oral instructions did not include CALCRIM No. 375. In the clerk's transcript on appeal, however, the instruction is included in both the set marked "Jury Instructions Given" and the set marked "Jury Instructions Not Given."

The People assert that "any conflict in the record should be resolved in favor of the reporter's transcript statements reflecting that CALCRIM No. 375 was not given to the jury in the written packet." Appellant claims that we must presume the instruction was given. It ultimately does not matter, however, whether the instruction was given. The subject evidence was

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disposed or inclined to commit domestic violence and based on that decision, also conclude the defendant was likely to commit and did commit counts 1 and 2 as charged here. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of counts 1 and 2. The People must still prove each charge and allegation of every charge beyond a reasonable doubt."

admitted under section 1109, and appellant does not challenge that ruling. Accordingly, any error in instructing the jury on section 1101(b) was harmless. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 992 [where evidence was properly admitted under Evidence Code sections 1108 and 352, the court "need not reach" contention that evidence was inadmissible under Evidence Code section 1101].) Although the instruction on section 1109 referred to the assault count but not the charge of first degree burglary, the evidence of appellant's uncharged acts of domestic violence was admissible to prove he committed both crimes. (*People v. James* (2010) 191 Cal.App.4th 478, 482-484.) Because the evidence was admissible to prove that appellant actually committed both charged crimes, any possibility that the jury also considered the evidence for one of the more limited purposes set forth in section 1101(b) is harmless under any standard of review.

Section 654

In sentencing appellant for burglary on count 3, the court initially imposed a five-year term. The court then corrected itself and imposed the midterm of four years and ordered the sentence to run concurrent to the principal term. The abstract of judgment, however, reflects a concurrent sentence of five years for the burglary.

In the event we affirm his burglary conviction, appellant contends that his sentence for that crime should be stayed under section 654. He also requests that we order the judgment corrected to reflect a four-year term. The People concede these errors. The burglary sentence must be stayed because Claudia was the named victim in both the assault and the burglary and the crimes were committed during an

indivisible course of conduct pursuant to the same intent and objective. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Moreover, the abstract of judgment's reference to a five-year term for the burglary is a clerical error that can be corrected at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.) We shall order the judgment amended and corrected accordingly.

Presentence Custody Credits

Appellant was awarded 794 days of presentence custody credits, consisting of 692 days of actual custody credit and 102 days of conduct credit. Appellant contends that he is entitled to an additional day of conduct credit. The People correctly concede the point.

Because appellant was convicted of a violent felony, his conduct credits are limited to 15 percent of his actual custody credit. (§§ 2933.1, subd. (a), 667.5, subd. (c)(8).) Fifteen percent of 692 is 103.8. Appellant is thus entitled to 103 days of conduct credit. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 816 [defendant entitled to "greatest whole number of days" not exceeding 15 percent of actual custody credit].) We shall order the judgment modified accordingly.

DISPOSITION

The judgment is corrected to reflect that appellant was sentenced to the midterm of four years on count 3 (first degree burglary). The judgment is also amended to reflect that (1) the four-year term on count 3 is stayed under section 654; and (2) appellant is entitled to an additional day of conduct credit, i.e., 103 days of conduct credit and 692 days of actual custody credit, for a total of 795 days of presentence custody credit. The trial court shall prepare an amended abstract of judgment and

forward a copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Rogelio R. Flores, Judge
Superior Court County of Santa Barbara

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

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