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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. LARRY HOWARD, Defendant and Appellant.	B247955 (Los Angeles County Super. Ct. No. BA397282)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury found Larry Howard not guilty of one count of residential burglary and not guilty of the lesser included offense of unauthorized entry of a dwelling. (Count 2; Pen. Code, §§ 459; 602.5, subd. (a).)[1] Further, the jury found Howard guilty of one count of first degree residential burglary with a finding that a person was present in the residence during the commission of the offense (count 3; §§ 459; 667.5, subd. (c)) and six counts of first degree residential burglary (counts 1, 4, 6, 7, 9, 10; § 459). The trial court sentenced Howard to a total aggregate term of 14 years in state prison. We affirm.

FACTS

Count 1

Andrew Grad returned home to find his residence had been ransacked, and certain personal items, including a camera, an iPod, and identification documents were missing. A police forensic specialist responded to the scene and collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Grad's house matched defendant Howard's prints.

Count 2 — Acquitted

Tony and Priscilla Monte returned home to find their house ransacked. All of the drawers in the kitchen and other rooms were pulled out. An iMac computer and jewelry was missing. Ms. Monte found a plastic bag outside the residence with a flannel shirt in the bag that did not belong to the Montes. Police responded to the scene and "dusted" for fingerprints; fingerprints were found on the plastic bag found outside the residence. At trial, the prosecution presented evidence that some of the fingerprints on the plastic bag matched defendant Howard's fingerprints.

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[1] All section references are to the Penal Code.

Count 3

Carlos Espinoza returned to the residence where he rented a room from Richard Hamilton. When Espinoza arrived, he heard the house alarm sounding, and then noticed a ladder leaning up against the house. Meanwhile, Hamilton was in the house and heard the door to his bedroom open. Hamilton saw the silhouette of a tall person whom Hamilton knew "definitely did not live in the house." Hamilton called out to the person, and the person fled. Espinoza heard Hamilton calling out, and entered the residence. Upon entering his room, Espinoza noticed that items in his room had been moved. Police collected fingerprints in Espinoza's room. At trial, two fingerprint specialist testified that prints collected from the Hamilton house matched defendant Howard's prints.

Count 4

Alison Teitel returned home to find her laptop computer missing from her home office. A window in the office appeared to have been pried open. Police took a report and collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Teitel's house matched defendant Howard's prints.

Count 6

Tony Heim and his wife left their house in the morning. During the afternoon, Tony received a phone call from his wife who reported that their house had been ransacked. When Tony returned home, he saw broken windows, removed screens, a metal bar and mask. All of his wife's jewelry was missing. Police collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Heim's house matched defendant Howard's prints.

Count 7

Simone Simmons returned home to find a broken window, couches flipped over, a closet damaged, and clothes thrown about. Simone noticed several items missing. Police collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Simmon's house matched defendant Howard's prints.

Count 9

Evan Himmel returned to his house to find it "basically ransacked." A back door, which was locked when he left, was open. A bathroom window was open; the screen was ripped out. A television, his wife's jewelry, their social security cards, and the money in their children's piggy banks were missing. Police collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Himmel's house matched defendant Howard's prints.

Count 10

Lee Livingston returned home to find his bedroom was a "mess," with clothes thrown all over. The television was missing; it was later found on the ground in the backyard. A laptop was missing from the kitchen. A back bedroom window was open. Police collected fingerprints. At trial, two fingerprint specialist testified that prints collected from Livingston's house matched defendant Howard's prints.

The Criminal Case

In August 2012, the People filed an information charging Howard with 11 counts of first degree residential burglary which included the eight incidents summarized above (counts 1, 2, 3, 4, 6, 7, 9, 10), and three other incidents (counts 5, 8, and 11). Each and all of the burglary counts involved separate intrusions. Further, the information alleged that Howard suffered a prior juvenile adjudication in 2007 for carjacking which qualified as a strike (§§ 667, subds. (b)-(i); 1170.2, subds. (a)-(d)), and had served a prior prison term (§ 667.5, subd. (b)) for a drug offense.

In February 2013, the charges were tried to a jury. During trial, the prosecution elected not to proceed on counts 5, 8 and 11, and the trial court dismissed those counts in the interest of justice. As to counts 1, 2, 3, 4, 6, 7, 9, and 10, the prosecution presented evidence showing an intruder entered the victims' residences, the collection of fingerprint evidence, and comparisons of the fingerprints collected at the crimes scenes with Howard's fingerprints. Howard did not present any defense evidence. His trial counsel, noting that the case "obviously involves around fingerprint evidence," argued to the jurors that the fingerprint evidence should not be trusted.

The jury convicted and acquitted Howard as noted at the outset of this opinion. The trial court sentenced Howard to a total aggregate term of 14 years in state prison, comprised of the upper term of 6 years on count 1 and consecutive one-third the middle base term of 1 year and 4 months on each of counts 3, 4, 6, 7, 9, and 10.

The record does not reflect a final disposition of the prior strike and prior prison term allegations. At a hearing after the jury's verdicts and before sentencing, the lawyers and the trial court discussed whether Howard's prior juvenile adjudications qualified as a strike. Based on the final sentencing structure, we conclude that there was an agreement or finding that the priors would not be applied for purposes of sentencing.

Howard filed a timely notice of appeal.

DISCUSSION

We appointed counsel to represent Howard on appeal. Appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, requesting that our court review the record on appeal for arguable issues. We thereafter notified Howard by letter that he could submit any claim, argument or issues which he wished us to review. Howard filed a letter brief raising the arguments we discuss below.

Howard contends that the joinder of 11 counts justifies reversal of all the jury's guilty verdicts. He says: "The number by its self brings forth bias and ha[d] me guilty until I prove[d] otherwise. This is unconstitutional." We understand Howard to argue that the joinder of counts violated his constitutional right to a fair trial by an impartial jury because the sheer number of counts involving different victims could have caused the jury to believe he must be guilty of something. We do not agree.

A criminal defendant has a fundamental constitutional right to a fair trial by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *People v. Collins* (1976) 17 Cal.3d 687, 692-693, superseded by statute on other grounds, as stated in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Pursuant to section 954 an accusatory pleading may charge two or more different offenses "so long as at least one of two conditions is met: The offenses are (1) 'connected together in their commission,' or (2) 'of the same class.'" (See *People*

v. Soper (2009) 45 Cal.4th 759, 771 (*Soper*), fn. omitted.) Here, all of the charged offenses against Howard were of the same class; all were residential burglaries. When the prosecution properly joins offenses pursuant to section 954, the burden is on the party seeking severance to "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Soper,* at p. 773.) The law favors the joinder of counts because it promotes efficiency. (*People v. Myles* (2012) 53 Cal.4th 1181, 1200; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) Nonetheless, a trial court has discretion to order that offenses be tried separately. (*Soper*, at p. 769; *People v. Elliott* (2012) 53 Cal.4th 535, 551.)

We are not reviewing a denial of severance, but find similar principles applicable in reviewing a claim of unfairness raised after convictions. This said, Howard's arguments do not persuade that his trial was unfair. We do not have a situation where weak charges were joined with stronger charges, or where one charge was particularly inflammatory so as to poison the jury as to all charges. We disagree with Howard that the joined counts were particularly great in number. The efficiency of a unitary trial provided benefits to the trial court, the prosecution, the jurors, the public and even to Howard, who did not have to defend himself at multiple trials. On balance, we find no error justifying reversal of Howard's convictions.

Howard next contends his trial counsel provided ineffective legal assistance with respect to a number of matters. He alleges his trial lawyer failed to "take serious" a suggestion from Howard that a "co-defendant" be called to testify; he implies that the co-defendant would have confessed on the stand and exonerated Howard. However, the information in the record shows Howard was charged alone. Further, Howard contends his trial counsel failed to investigate his claim that he had an encounter with one of the jurors outside of court, before his arrest. Last, Howard contends his trial counsel failed to "disagree" with the prosecution's fingerprint experts. We assume Howard is arguing that a defense expert should have been consulted and or called to testify. We find that none of Howard's claims can be examined in the context of his current appeal because his claims are based on matters that are not in the record on appeal; his claims must be presented by

a habeas petition which would allow development of a record for their proper examination.

Howard also claims the prosecutor engaged in misconduct by emphasizing the amount of evidence against Howard. He says the prosecutor stepped over the line by making statements such as the following: "Ladies and gentlemen, if you have even the slightest doubt in your mind that you're not comfortable with, look at all of the prints that you have in this case! There are over 30 of them! One, you say, 'Okay,' two, 'Might be coincidence.' Three, four, five. After a certain amount, it's just undeniable."

We have read the entirety of the prosecutor's arguments, and find no misconduct. A prosecutor is given wide latitude during argument to comment on the evidence, which includes reasonable inferences, or deductions to be drawn therefrom. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) Moreover, the jury was instructed that "[s]tatements made by the attorneys during the trial are not evidence." We presume the jury obeyed these instructions. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 684 (*Ledesma*).)

It is not misconduct for the prosecutor to argue that the jury should believe the prosecution's version of events. Indeed, the prosecutor has a wide-ranging right to discuss the case in the closing argument, and to fully state views as to what the evidence shows and the conclusions to be drawn from it. The reviewing court accords trial counsel great latitude at argument to urge whatever conclusions he or she believes may properly be drawn from the evidence. (See *Ledesma*, at p. 693; *People v. Harris* (2005) 37 Cal.4th 310, 345.) We see no argument in the trial record showing that the prosecutor went too far in Howard's current case.

Finally, Howard contends the prosecutor "lied" to the trial court at the sentencing hearing in order to assure that Howard was sentenced to "the max." Specifically, Howard argues the prosecutor lied about the extent and seriousness of Howard's criminal history. In a related vein, Howard contends his trial lawyer "didn't argue the matter" on Howard's behalf. Based on the record on appeal, we are not persuaded that there was sentencing error, either from a judicial or assistance-of-counsel standpoint.

In imposing sentence, the trial court stated the following: "I do recall that there were attempts to try to work something out before trial, but at least at that time the People thought and I believe the defense thought that the prior conviction would be considered a strike which would warrant a much higher sentence. I believe the offer was 20 years. . . . [¶] So, it's understandable why the defendant chose to go to trial. But here's the problem I see with Mr. Howard. His criminal history suggests that he really doesn't care about other people's rights. Maybe because he was facing so much time, he's re-thinking that. He's at the period of his life where, according to sociological studies, he's probably the most dangerous, someone in his 20's. I am concerned about the public safety. I do think that that the burglaries here were somewhat aggravated, not all of them, but some of them were. It is of concern to me that, at least in one case, there was a person present. So I do think the high term is appropriate because of not only Mr. Howard's criminal history, but I believe he could be a danger to others if released sooner rather than later."

Howard's arguments on appeal do not persuade us that the prosecutor lied about Howard's criminal history, or that any alleged lie caused the trial court to impose the maximum sentence. Apart from this, the probation report shows that Howard has an extensive criminal history. This history includes multiple juvenile matters, predominantly consisting of violent crimes, and, as summarized by the probation officer, additional "prior arrests resulting in five felony adult convictions and two misdemeanor convictions." The adult history appears largely drug-offense related. The probation report shows an unbroken criminal history from 2005 to 2012, when Howard was arrested and charged with the 11 residential burglaries involved in his current case. In the end, it appears that Howard's sentence of 14 years in his current case actually could have been much longer had his prior conviction background been alleged and pursued.

We have independently reviewed the record on appeal, and we are satisfied that Howard's appointed counsel fulfilled her duty, and that no arguable issues exist. (*People v. Wende, supra,* 25 Cal.3d 436, *People v. Kelly* (2006) 40 Cal.4th 106.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.