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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SCOTT MATTEO, Defendant and Appellant.	B265815 (Los Angeles County Super. Ct. No. NA100060)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Modified and, as modified, affirmed.

George L. Schraer for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Scott Matteo guilty of grand theft. His primary contention on appeal is the judgment must be reversed because the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Although we conclude that any failure to disclose evidence did not rise to the level of a *Brady* violation, we modify the judgment to correct a sentencing error. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The prosecution's case*

Antoinette Matteo[1] lived with her mother, Betty Hernandez, in Wilmington. Antoinette's adult son, Scott (defendant), "more or less" grew up in the house. Although he had lived with Antoinette and Hernandez, he moved out in May 2014. He kept his key and came over about once a week to do laundry or to eat. At some point after Scott moved out, Hernandez changed the locks because a lock broke. Scott was not given a new key, and he was not told the locks had been changed.

On August 25, 2014, Antoinette and Hernandez left for Hawaii. Before leaving, Antoinette met Scott, who had lost his job and apartment and was using drugs again. He asked for money so he could take the train to San Diego, where he was checking into rehab. Antoinette gave Scott $100 and told him she would be gone for three weeks. He didn't mention he intended to go to the house.

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[1] We refer to Antoinette and Scott Matteo by their first names to avoid confusion.

The next morning, August 26, at approximately 5:50 a.m., Antoinette's and Hernandez's neighbor saw someone being boosted up by another person and unscrewing the motion sensor light on Hernandez's garage. He called the police. An officer noticed that a rear window was "pried open" and a ladder was resting against the window. Inside, two bedrooms had been ransacked and a safe in Antoinette's bedroom had been pried open.[2] According to Antoinette, Hernandez kept documents, passports, checkbooks, credit cards, and jewelry in the safe. A drill was nearby, and tools that could have been used to pry open the safe were around the house.[3] Antoinette didn't recognize the drill and didn't know if a flashlight was her mother's. When asked if tools were kept in the detached garage, Antoinette answered, "Yes. My father has a lot of tools," such as power tools, drills, and a crowbar.

Scott knew that the safe combination was kept in an address book in a cupboard. Costume jewelry and gold jewelry worth "thousands" that Antoinette kept in her top dresser drawer were not taken. Petty cash kept in an unlocked cabinet was also not taken.

When he was arrested at the house, Scott had two rings and a necklace on him. Jose Ochoa was also arrested.

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[2] The car in the detached garage "was on the jack," and there was a wrench underneath the car. Antoinette and Hernandez did not leave the car in this condition.

[3] The drill was not checked for prints. Prints were requested, but the investigating officer was unsure whether anyone went out and obtained them. Antoinette, however, testified that she was told the house would be checked for prints, and there was black dust "everywhere."

Antoinette told officers that Scott did not have permission to go into the house.

B. *The defense case*

Hernandez, Scott's grandmother, testified that she asked Scott to move out because she was annoyed by early morning phone calls he got from his girlfriend.

Scott testified. He's had a drug problem for 20 years, and he has had drug-related arrests, as well as ones for burglary. On August 25, the day Scott's mother and grandmother left for Hawaii, he told his mother he was going to go to the house to get his surfboard. When his key didn't work, he went to the back of the house and tried to open an "old-style window" that would sometimes open if pulled. Instead, the window cracked. He got the ladder and put it alongside the window. He "entered into the side." After getting into the house, he cleaned up the broken glass, ate, showered and did three loads of laundry, including towels left by his mother and grandmother.

In the afternoon, he called "Christina," who was going to give him a ride to San Diego. When he told her about the broken window, she said she knew someone who could fix it. She called Jose Ochoa, who came over later that night and measured the window. Ochoa had drugs, and he suggested they have " 'one last party.' " Ochoa, Scott and Christina got high.

To have sex, Scott and Christina went into the bathroom, where they stayed for about an hour.[4] When Scott came out, he saw Ochoa breaking into his mother's safe. Scott "flipped out" and attacked Ochoa. Christina grabbed a bag and "t[oo]k off."

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[4] Antoinette later found a condom and feminine hygiene products in the bathroom.

Scott chased Christina, who had his mother's necklace. He took it from her and put it in his pocket.

Scott told the police that he didn't know about the safe. He said this because he didn't want to "rat" on Ochoa and be labeled a snitch.

II. Procedural background

An information filed on September 29, 2014 alleged one count of first degree residential burglary (Pen. Code, § 459)[5] against Scott.[6] It also alleged that Scott had 10 prior prison terms within the meaning of section 667.5, subdivision (b).

At the close of evidence, the People moved to amend the complaint to conform to proof to add count 2, grand theft (§ 487, subd. (a)) as a "lesser." Defense counsel said he had no objection. The court thereafter instructed the jury on burglary and on grand theft by larceny as a "lesser" to burglary.

On January 15, 2015, the jury found Scott not guilty of burglary but guilty of grand theft.

After denying Scott's motion for a new trial on April 9, 2015, the trial court sentenced him, on May 7, 2015, to the high term of three years, doubled to six years based on a prior strike found true by the court. He was additionally sentenced to 8 one-year terms under section 667.5, subdivision (b). His total sentence therefore was 14 years in prison.

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[5] All further undesignated statutory references are to the Penal Code.

[6] Ochoa was named in the information, but he entered into a plea agreement and is not a party to this appeal.

CONTENTIONS

Scott contends on appeal that **I.** the prosecution violated *Brady* by withholding evidence Ochoa brought tools to the house, **II.** his trial counsel provided ineffective assistance by failing to object to instruction on grand theft, and **III.** three of his prior prison terms must be stricken.

DISCUSSION

I. Brady

While the jury was deliberating, defense counsel discovered evidence that tools, perhaps belonging to Ochoa, were found in the house but that the investigating officer, Detective Alonzo Canada,[7] told Antoinette she could throw them away. The trial court denied Scott's motion for new trial. Scott now contends that the prosecution had a duty under *Brady* to disclose the evidence. We disagree.

A. *Additional background*

Tools were used to pry open the safe in Antoinette's room. Antoinette didn't recognize the drill left in her room and didn't know if the flashlight was her mother's. When asked if tools were kept in the detached garage, Antoinette answered, "Yes. My father has a lot of tools," such as power tools, drills, and a crowbar.

The prosecutor then used this testimony to argue that Scott had the intent to commit a felony: "So [Scott] had to leave that house and come back in with those tools to break into that safe, and Mr. Ochoa is not in the garage. Mr. Ochoa is not as familiar with this house and where all this stuff is. What do they end up with in the room? They end up with power tools, flashlight, all

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[7] Detective Canada was present throughout the trial.

these items that come from the garage where grandpa keeps all his old tools. [¶] [Scott] didn't even know. 'I'm not sure, you know, essentially, 'I don't use that stuff.' You know, 'that was my grandpa's tools,' or, 'my father's tools.' They end up in the house. So at some point, he had to leave the house and then enter with the intent to break into that safe and steal. Never says the first time, just says that he entered the dwelling. He left the house to go to the garage to get these items. [¶] She told you that these two tools were not in the house when she left. Those are tools that came from outside, and at some point he entered with that intent, to use those to break in."

During deliberations, defense counsel alerted the trial court to an issue regarding the tools. The day before, Antoinette told counsel, " 'Those certainly weren't my father's tools.' [¶] . . . [¶] 'Because I found Ochoa's bag in my house, and it had all the tools in it. It had all the jewels that were in the safe in a small little blue Crown Royal bag along with some drugs.' " Antoinette also found Christina's identification and address book. Detective Canada looked at everything and told Antoinette they had enough evidence. Antoinette asked him to take the bag because she didn't want the stuff in her house. He told her to throw it away, because that is what he would do if she gave it to him. She threw them away.

Defense counsel argued that this raised, among others, *Brady* issues, and, after the jury came back with its verdict, counsel filed a new trial motion[8] which argued that the tool evidence was exculpatory and, had defense counsel known about

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[8] The motion for new trial references Antoinette's declaration, but such a declaration is not in the record.

it, he would have presented his case differently. He would not have, for example, said during opening statement that the police had done a "pretty good job." The trial court denied the motion.

B. *Standard of review*

"Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) "If the undisclosed evidence is 'material,' the defendant's conviction must be vacated without a separate harmless error review, because the prejudice determination is subsumed within the definition of the term 'material.' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 903.)

C. *Any failure to disclose evidence did not rise to the level of a* Brady *violation.*

The due process clause of the Fourteenth Amendment requires the prosecution to disclose "to the defendant evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment." (*People v. Jenkins* (2000) 22 Cal.4th 900, 954; accord, *Brady*, *supra*, 373 U.S. at p. 87; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 709; see also § 1054.1.) The duty extends even to evidence known only to police investigators and not to the prosecutor (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1042), and the duty encompasses impeachment as well as exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676.) " 'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.]" (*People v. Superior*

Court (Johnson), at p. 710.) "Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*Salazar*, at p. 1043; see also *People v.* (*Johnson*), at p. 711; *Kyles v. Whitley* (1995) 514 U.S. 419, 435.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." (*Jenkins*, at p. 954.) "[I]n determining whether evidence was material, 'the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.' [Citation.]" (*In re Steele* (2004) 32 Cal.4th 682, 701.)

Scott argues that the tool evidence was favorable because it showed he lacked the intent to commit burglary and grand theft. Burglary requires the defendant to have entered the residence with the intent to commit a felony. (§ 459; *People v. Fenderson* (2010) 188 Cal.App.4th 625, 635; *People v. Holt* (1997) 15 Cal.4th 619, 669.) The People, in closing, argued that Scott's act of going to the detached garage to get tools and entering the house with them evidenced his intent to steal items from the safe. Scott argues on appeal that he could have countered that imputation of intent had he known about Ochoa's bag of tools. That is, evidence Ochoa brought tools with him raised an inference that Scott did not get tools from the detached garage. The omitted evidence therefore was favorable because it impeached the prosecutor's

argument connecting Scott's intent to his act of getting tools from the garage. Even if we assumed that the evidence was material, its omission was not prejudicial because the jury found Scott not guilty of burglary. Therefore, even if the evidence was favorable to Scott on the first prong of *Brady*, he cannot establish the third prong of a *Brady* claim that he was prejudiced by any withholding of the evidence as to the burglary count.

Nor can we agree the evidence was favorable and material to the grand theft count. Grand theft requires a specific intent to permanently deprive the owner of the use or enjoyment of property. (§ 487; see *People v. Nazary* (2010) 191 Cal.App.4th 727, 741-742, disapproved on another ground by *People v. Vidana* (2016) 1 Cal.5th 632, 648 & fn. 16.) Evidence that Ochoa had tools was, at most, marginally relevant to Scott's intent to commit grand theft. First, it is not even clear to whom the tools belonged. Antoinette could testify there was a bag and tools in the house that didn't belong there. But she couldn't say they belonged to Ochoa, as opposed to Christina or even Scott. Indeed, there was evidence that the tools did not belong to the house, because Antoinette testified that she didn't recognize the drill found next to the safe. Even if there's a reasonable inference that the tools belonged to Ochoa, that still says little about *Scott*'s intent and his participation in the crimes. The tools tend to show that someone intended to break into the safe. They do not, however, disprove either that Scott helped or that he didn't intend to keep the jewelry.

For these and additional reasons, Scott has not demonstrated a reasonable probability of a different outcome had the tool evidence been admitted. Scott, a long-term drug addict with a history of burglary and stealing, went to his mother's

house without telling her and broke into it. He then invited two untrustworthy people into his family's home. The next-door neighbor saw two people tampering with outside lighting. Scott was arrested with his mother's jewelry in his pocket. Moreover, there were other explanations for the tools other than exculpatory ones; for example, Ochoa came over to help Scott fix the broken window. A jury could conclude that Ochoa therefore brought tools to fix the window.

Nor can we read too much into the length of jury deliberations or the jury's questions. After an approximate two-day trial that began on January 12, 2015, deliberations began on January 13 at 4:07 p.m. and ended at 4:30 p.m. that day. The jury deliberated all the following day and rendered its verdict on January 15 at 3:53 p.m. We cannot say that approximately two days of deliberation, some of which was devoted to rereading Scott's and an officer's testimony, suggests that the tool evidence would have tipped the balance in Scott's favor. (See, e.g., *People v. Walker* (1995) 31 Cal.App.4th 432, 438, [jury's 6.5 hours of deliberations after a 2.5 hour trial were not an indication of a close case, particularly when some time was spent listening to testimony readbacks]; *People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

We also disagree that the four notes the jury sent out during deliberations suggest this was such a close case that the tool evidence would have led to a different result on the grand theft count. The jury, for example, asked the trial court to "specify if there is a time frame on the 'intent' element of burglary" and whether, when Scott "entered the building did he have to have the 'intent' to steal or could the idea come to him hours later and still apply to burglary? He left the premises to go

to t-mobile and then when he re-entered the building, did he have to have the intent and does it apply to the law of burglary?" If anything, the notes suggest that the jury was focusing on the burglary count and when the intent to steal had to be formed. As we said, Scott was acquitted of that crime.

II. Ineffective assistance of counsel

At the conclusion of evidence, the prosecutor asked for the complaint to be amended to add grand theft as a "lesser." Defense counsel did not object. The jury was then instructed on grand theft as a "lesser crime" of burglary and found Scott guilty of grand theft, "a lesser included offense."[9] Because theft is not a

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[9] The trial court gave these instructions: "If all of you find the defendant is not guilty of a greater charged crime, burglary, 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."

"Grand theft is a lesser crime of first-degree burglary charged in this case. [¶] . . . [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime, grand theft, only if you have found the defendant not guilty of the corresponding greater crime of burglary."

"The defendant is charged as a lesser crime to that in this case – lesser charge of grand theft by larceny. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's consent; [¶] 3. When the defendant took the property, he intended to deprive the owner of it permanently; and [¶] 4. The defendant moved the property even a small distance and kept it for any period of time, however brief."

lesser included offense of burglary, Scott contends his trial counsel provided ineffective assistance of counsel by failing to object to Scott "being convicted of a crime (grand theft) that was not a lesser included offense of the charged offense (burglary)."

To establish ineffective assistance of counsel, a defendant must show counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, a more favorable determination would have resulted. (*People v. Johnson* (2016) 62 Cal.4th 600, 653.) If the defendant makes an insufficient showing on either component, the claim fails. Counsel has wide discretion in choosing the means by which to provide constitutionally adequate representation. (*Ibid.*) If the record on appeal fails to show why counsel acted or failed to act, " ' "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. [Citation.]" ' " (*Ibid.*) "[T]o prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

Defendant here is correct that theft is not a lesser included offense of burglary, because burglary can be committed without stealing. (See *People v. Tatem* (1976) 62 Cal.App.3d 655, 658; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.) It is unclear whether defense counsel here believed, incorrectly, that theft is a lesser included offense of burglary or whether he thought, correctly, that theft is a lesser related offense of burglary. In any event, we cannot conclude that defense counsel provided ineffective assistance by agreeing to instruct the jury on theft.

(See generally *People v. Birks* (1998) 19 Cal.4th 108, 112-113, 136, fn. 19 [instruction on lesser related offense is proper upon the parties' mutual consent]; *People v. Taylor* (2010) 48 Cal.4th 574, 622.) Defense counsel could have believed there was a risk that if the jury did not have a "lesser" as an option, the jury would convict defendant of the greater crime of burglary. Stated otherwise, given a choice between all or nothing, the jury would go with all. To prevent the risk of an "all or nothing" outcome, defense counsel may have decided to give the jury an option.

This was a rational tactical choice, given the evidence. Although the evidence was not conclusive one way or the other, there was certainly enough evidence of guilt to support counsel's decision. Antoinette testified that Scott didn't tell her he was going to the house, even though she saw him that morning. Scott knew his family would be gone for an extended time. Scott, who was broke and back on drugs, also knew that his family kept jewelry in the house. Rather than not enter the house when his key didn't work, he broke a window. He then invited people into the house he knew his family would not want there, and he did drugs with them. He was arrested with some of his mother's jewelry on him. This was more than sufficient evidence of not only grand theft but of burglary.

Moreover, the prosecutor moved to amend the complaint to add theft as count 2. It appears that the trial court did not formally amend the complaint; instead, the court said it would instruct the jury on theft. In any event, under section 1009, a trial court may, at any stage of the proceedings, permit an amendment of an information to add another offense shown by the evidence at the preliminary hearing. (§ 1009; *People v. Tallman* (1945) 27 Cal.2d 209, 213; *People v. Lettice* (2013)

221 Cal.App.4th 139, 147; *People v. Villagren* (1980) 106 Cal.App.3d 720, 724 [amendment may be made as late as the close of trial if no prejudice is shown].) The evidence at the preliminary hearing showed that Scott committed grand theft. Antoinette, for example, testified that she told Scott she would be in Hawaii. While she was gone, the safe was opened and a window was broken. When an officer responded to a call regarding the house, defendant was there. Because the court would not have abused its discretion in allowing the amendment, defense counsel could have reasonably believed it futile to object. (See generally *People v. Price* (1991) 1 Cal.4th 324, 386-387 [counsel does not provide ineffective assistance by failing to make an objection he or she reasonably determines to be futile], superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161.)

III. Prior prison terms

The trial court sentenced defendant to 8 one-year terms for prison priors, under section 667.5, subdivision (b). Defendant contends that three of the prior prison terms must be stricken because they were not based on separate prison terms. We agree.

The amended information alleged that defendant had suffered the following 10 prior felony convictions for which a separate prison term was served under section 667.5, subdivision (b): 1. 95HF1011; 2. 95HF1011; 3. 97NF1992; 4. 00WF0070; 5. 00WF0070; 6. 02NF1300; 7. 02SF0347; 8. 2CF26686; 9. 2HF0859; and 10. MA034395. The People concede that defendant served only one *continuous* prison term for his convictions in case numbers 02NF1300, 02SF0347, 2CF26686 and 02HF0859. Because an enhancement may be imposed only for *separate* prison terms (*People v. Medina* (1988) 206

Cal.App.3d 986, 990), he is subject only to 1 one-year term for those four convictions. Three of the one-year prior prison term enhancements must be stricken. Defendant is therefore subject to 5 one-year enhancements, which reduces his sentence to 11 years in prison.

DISPOSITION

The judgment is modified to strike three of the one-year terms imposed under section 667.5, subdivision (b). The judgment is affirmed as modified. The clerk of the superior court is directed to modify the abstract of judgment and to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

GOSWAMI, J.*

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