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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.

CHARLES THOMAS STERRY,

Defendant and Appellant.

B244956

(Los Angeles County
Super. Ct. No. LA070388)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Martin L. Herscovitz, Judge. Affirmed.

Libby Anne Ryan, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Charles Thomas Sterry, appeals from the judgment entered following a jury trial which resulted in his conviction of first degree burglary (Pen. Code, § 459)¹ and the jury's findings he previously had been convicted of the serious or violent felony of robbery (§ 211) within the meaning of section 667, subdivision (a)(1) and the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served prison terms for robbery (§ 211) and petty theft with a prior (§ 666) pursuant to section 667.5, subdivision (b). The trial court sentenced Sterry to 10 years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

At approximately 7:55 p.m. on March 1, 2012, Los Angeles County Deputy Sheriff Joshua Castle received a call directing him to a home located at 31364 Broad Beach Road in Malibu. The call indicated an audible burglar alarm in the house had been activated. Castle, who was working alone that evening, was met at the house by an "assisting unit" which had also received the call.

The front of the house faces a driveway which stems off of Broad Beach Road while the back of the house is on the "beach and ocean." The house is somewhat secluded; very little of the house can be seen from the street. Once one passes a garage, access to the home is through two wooden doors which lead to a courtyard. Inside the courtyard is the door to the house. The doors to the courtyard were partially open and Castle entered the area. Although the light was dim, Castle could see two glass panels on the front door to the house, one of which had been shattered. Castle, who could still hear the alarm, believed a burglary might still be in progress and requested additional units and a helicopter.

Within approximately 10 minutes, two additional deputies arrived at the house. Immediately before their arrival, Castle heard a "loud bang" which sounded like a door

¹ All further statutory references are to the Penal Code unless otherwise indicated.

being slammed. After that, Castle could no longer hear the alarm. Between 15 and 20 minutes later, Castle received word from some of the assisting officers that a man had been detained outside the house.

Castle and two other deputies entered the house and performed a “safety sweep” to determine whether any victims or possible suspects were still inside. After confirming no one was in the house, the deputies looked around. Immediately inside the front door were shards of glass on the floor. The house appeared to have been “ransacked.” There were “orange footprints . . . on the wooden floor” and wires which appeared to have been pulled from an entertainment center. On the entertainment center, or “TV stand,” was a television, a digital receiver and a “CD case.” However, some things appeared to be missing.

In one of the bedrooms, Castle saw “a large white bed [with] a package of bread and cheese on top of it [and] orange sauce spilled everywhere.” There was a bottle of Frank’s red, or hot sauce, “on the floor [which] appeared to have been spilled over.” Also on the bed was a “PS-3 game system” and a “DVD system.” The doors to the closets had been opened as had the drawers in the furniture.

In the bathroom next to the bedroom, Castle observed “a white bath mat . . . bunched up by [a door which led to the exterior of the house] and it had a large orange footprint” on it. The footprint faced the door. Castle then noted the door appeared to be unlocked.

In the second bedroom, the drawers and closets had also been left open. “There were articles of clothing thrown all over the place [and] there was the sauce on the floor and on bed sheets.” “There was red sauce all over.” This room, too, had been ransacked.

After the deputies determined there was no one inside the house they went outside, through the bathroom door. Outside the door was a table with bottles of alcoholic beverages on it. Castle noted it appeared one or two bottles were missing from the center of the table. Castle and the assisting deputies then walked around the perimeter of the residence, but did not find anyone.

Castle went to the patrol car where the individual who had been detained was being held. At trial, the deputy recognized Sterry and indicated he was the suspect Castle had seen in the car. Castle indicated on the night of the burglary, Sterry had red sauce “all over his mouth area, and chin, and also on his clothing.” According to Castle, he had red sauce “on his hands, as well” and there was sand on the bottom of his shoes. Sterry appeared “disheveled,” “angry,” and “intoxicated.” He did not wish to speak with Castle, but appeared to be “generally alert.”

Inside a red bag which belonged to Sterry and which was sitting on top of the trunk of the patrol car, Castle found two large bottles of alcohol, a digital home phone and a blue T-shirt. The bottles appeared “to be the same size as the . . . other bottles . . . on the table [at the] residence.” In addition, the phone “matched the base which was inside of the house.” Castle had seen a blue T-shirt like the one in Sterry’s bag “balled up” on the living room floor inside the house. The only difference was one shirt was a size large and the other was a size extra large.

On March 1, 2012, Los Angeles County Deputy Sheriff Michael Treinen responded to Deputy Castle’s request for back-up at the residence on Broad Beach Road in Malibu. Treinen arrived at the house at the same time another deputy, Deputy Cameron, pulled up and Castle asked the two men if they could go “down towards the beach to contain the area.” Approximately five minutes later, as Treinen and Cameron were walking down a ramp toward the ocean, Treinen heard “some rustling [or] . . . noise” on his right side.

Treinen used his flashlight to illuminate the area just below the ramp and observed a “White male . . . from the chest up, [who] appeared to be trying to climb onto the . . . ramp.” Treinen, who had already pulled out his gun, had the individual, whom he later identified as Sterry, continue to climb up onto the ramp, then “put his hands behind his back.” Treinen handcuffed Sterry, who had a “slimy [reddish] liquid on his hands.” Sterry also had some of the liquid “on his lips and mouth area.” The liquid smelled like “barbeque sauce.” However, when Treinen asked Sterry what the liquid was, Sterry refused to answer. Treinen then noted Sterry had with him a “red nap sack or carry bag.”

Treinen and Cameron escorted Sterry back to the street. There, Deputy Castle took over the investigation.

Margaret Bright was familiar with the house at 31364 Broad Beach Road in Malibu and had stayed there several times. The property was owned by her brother-in-law, Kevin Bright, and her husband, Arthur Bright, managed the property. Kevin Bright frequently rented out the house and, on March 1, 2012, it was being rented to Seth Rogen. At that time, Rogen had been renting it for approximately two years. He was, however, not staying there on March 1, 2012.

Margaret Bright, an interior designer, had keys to the house and on that day had been doing some work there. She had arrived at the house at approximately 11:30 a.m. for a meeting with some “window people” scheduled for 12:30 p.m. The “window people” were, however, late and Bright did not actually leave the house until approximately 5:00 p.m. When the individuals who were to do work on the windows finally arrived, Bright went into each of the rooms as they took measurements. At that time, the house appeared “orderly” and “clean.” Before leaving the house, Bright turned on an alarm system then locked all the doors, which included an “outer door, a set of doors” in the front of the house which lead into a courtyard and a “door into the kitchen.”

When Bright was shown photographs of the house taken by deputy sheriffs on the evening of March 1st, she indicated when she had left the house it had looked nothing like the pictures. When she had been at the house earlier that day, there had been no glass on the floor, “[t]he bedrooms [had been] all made up and perfectly hotel-room kind of looking, . . . nothing [had been] . . . on the floor,” the drawers had all been closed and the floor had been clean.

Bright did not know or recognize Sterry. She had never given him permission to enter the Broad Beach Road house.

Seth Rogen had been leasing the house at 31364 Broad Beach Road in Malibu for approximately four years. Although he had not been staying there that night, Rogen had been leasing the home on March 1, 2012, and has continued to lease it since that time.

The house is not his primary residence, but he keeps things such as electronics and clothing there.

Rogen had last been at the Broad Beach Road house at the end of February, approximately one week before March 1, 2012. When he left the house, it had been clean and orderly. Rogen had set an alarm inside the house, locked the front door and locked the courtyard gate. When he was shown some photographs of the house which showed how it looked when the deputy sheriffs had entered it on March 1st, Rogen indicated the pictures did not reflect how it had looked when he had left the residence at the end of February. There had not been “stuff all over the bed” and it had not been “messy.” There had not been hot sauce “all over the place,” the drawers had been closed and “tidy” and the bar had been fully stocked. There had been “no missing gap in the bottle lineup.”

Rogen did not know anyone by the name of Charles Sterry and, when Sterry was pointed out to Rogen at trial, he did not recognize Sterry as anyone he knew. Moreover, Rogen had never given Sterry permission to enter the Broad Beach Road house.

b. *Defense evidence.*

Sterry testified in his defense. He stated he had been arrested at approximately 8:00 p.m. on March 1, 2012, as he was “walking away from [a house he had] just [been] inside.” The house was on Broad Beach Road and Sterry had entered the residence because he “needed shelter.” It had been dark when Sterry went into the house and no lights had been on either inside or outside the house. Sterry had hoped to stay in the house that night, then head for Ventura County the following morning.

Sterry broke a window in the front door with a rock. When he then reached in through the window and opened the door, an alarm went off. He went inside anyway and “just kept moving around in the house and throwing stuff around. [He] threw the electronics on the bed and was listening to the radio” He was hungry so he “ate some food out of the refrigerator” Sterry indicated he was angry because he could

not seem to get to Ventura in time to report to his probation officer.² One of the things he did was take “hot sauce and [throw] it all over the floor.” Sterry had not entered the house with the intent to steal anything. He had “no idea” he had taken a phone from the house. As far as he knew, he had not taken the phone. In addition, Sterry did not remember taking a T-shirt. With regard to the two bottles of alcoholic beverages, Sterry had his own bottle of whiskey, which he had drunk approximately seven shots from before he had entered the house. He had noticed there was alcohol in the house and he had thrown two bottles into his duffel bag. However, he did not have the bag with him when he was arrested. Sterry emphasized he “didn’t go in the house just to go steal something.”

Sterry did not run when he heard the alarm go off because he “just didn’t care. . . .” He had given up and “just sat there in the house for awhile.” When Sterry finally got up, he “saw flashlights on the left side of the house, so [he] started to leave.” Sterry believed the individuals with the flashlights might have been police officers and, at that point, he was trying to avoid the police because he knew there was a warrant for his arrest as he had violated the terms of his probation. However, before he could walk very far from the house, Sterry was “arrested at gunpoint by two sheriff[’s] deputies.”

2. Procedural history.

On September 13, 2012, a second amended complaint³ was filed in which it was alleged Sterry had committed the serious felony (§ 1192.7, subd. (c)) of first degree residential burglary in violation of section 459. It was further alleged Sterry previously had been convicted of the serious or violent felony of robbery (§ 211) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a) and had served terms in prison for robbery (§ 211) and petty theft with a prior (§ 666) pursuant to section 667.5, subdivision (b). In addition, it was alleged that

² Sterry had suffered convictions for petty theft with a prior in 2012 and robbery in 2007. In March 2012, he was on probation for the conviction of petty theft with a prior.

³ Following a preliminary hearing, the first information was filed on July 5, 2012.

because he previously had been convicted of four felonies, he was ineligible for probation (§ 1203, subd. (e)(4)) and, were he to be convicted of the burglary alleged in count 1, any sentence imposed would be required to be served in state prison (§1170, subd. (h)(3)).

On August 29, 2012, Sterry rejected the People's offer of eight years in prison and the case was calendared for a jury trial set to begin on September 5, 2012. At proceedings held on September 5, jury trial was set to begin the following day, on September 6, 2012. The case was actually called for jury trial on September 11, 2012. At the same September 11th proceedings, Sterry's counsel's motion to bifurcate the priors was granted.

Sterry decided to testify in his defense. However, before he testified, the trial court considered which of his prior convictions the People could use as evidence against him. It was determined Sterry had four prior theft-related convictions: a 2012 conviction of petty theft with a prior, a 2007 conviction for robbery, a 2000 conviction of petty theft with a prior and a 1996 conviction for burglary. The prosecutor argued all four prior felony convictions should be available to both impeach Sterry's credibility and to show his intent to steal when he entered the house on Broad Beach Road. The trial court decided it would allow the prosecutor to simply ask Sterry if he had been convicted of the 2012 petty theft and the 2007 robbery. The court indicated the prosecutor could use those two convictions "only for purposes of impeachment." The remaining two convictions were simply too remote in time and would amount to "overkill."

During a discussion regarding jury instructions, defense counsel indicated she believed the trial court should instruct the jury on the lesser included offense of trespass in violation of section 602.5, subdivision (a). The trial court refused, indicating pursuant to a California Supreme Court case, trespass is not considered to be a lesser included offense of burglary.

Following the giving of evidence, instruction of the jury and counsel's arguments, the jury retired to deliberate at 11:01 on the morning of September 13, 2012. While the jury was deliberating, defense counsel asked Sterry if, were he to be found guilty of burglary, whether he wished the jury to then determine whether he had suffered the

alleged prior convictions and prison terms. Sterry indicated he wished the jury to decide whether the allegations of his priors were true.

At approximately noon, the jury reached a verdict with regard to the charge of burglary. The court clerk read the verdict which stated in relevant part: “We, the jury . . . find the defendant, Charles Sterry, guilty of burglary, in violation of . . . section 459, as charged in count one of the information. We further find the burglary to be in the first degree.” A polling of the jury indicated each juror had reached this verdict.

On the afternoon of September 13, 2012, the jury heard evidence regarding whether Sterry previously had been convicted of the alleged robbery and petty theft with a prior. Christopher Larson, a paralegal with the Los Angeles County District Attorney’s Office, testified he had received an eight-page section 969, subdivision (b) packet, or set of documents compiled by the Department of Corrections, which contained, among other items, conviction dates, “booking cards” indicating when Sterry had been received at the Department of Corrections, fingerprint cards and booking photographs. The packet also contained an abstract of judgment which indicated Sterry had been convicted of robbery on April 6, 2007. In addition to the packet indicating Sterry had been convicted of robbery, Larson received an 11-page section 969, subdivision (b) packet pertaining to Sterry’s conviction of petty theft with a prior. Along with other relevant documents, the packet contained an abstract of judgment indicating Sterry had been found guilty of petty theft with a prior in violation of section 666 on September 27, 2000. Finally, Larson testified, since the year 2000, Sterry had not “been free from prison custody for five or more years.”

On September 13, 2012, after being instructed by the trial court and listening to the district attorney’s argument, the jury began deliberating regarding the truth of the prior convictions and prison terms at 2:26 p.m. At 2:53 p.m., the jury indicated it had reached verdicts. After the verdict forms were reviewed by the trial court, the court clerk read them into the record. The clerk indicated the jury had found true the allegations Sterry had suffered a conviction for robbery in violation of section 211 on April 6, 2007, and had been convicted of petty theft with a prior in violation of section 666 on

September 27, 2000. The jury further found Sterry has served a term in prison and “did not remain free from prison custody for and did . . . commit an offense resulting in a felony conviction during a period of five years subsequent to the completion of said term”

The following day, on September 14, 2012, Roger McNichols, a deputy sheriff with the Los Angeles County Sheriff’s Department and an expert in the area of fingerprints, testified that earlier that morning he had “rolled [a] fingerprint exemplar” of Charles Sterry, the defendant in this action. McNichols then compared the exemplar he had taken to exemplars previously taken from Sterry and determined they had been made by the same person. Based on the fingerprint exemplars, the defendant’s name and his photographs, the trial court found Sterry was the same person the jury had found suffered the alleged prior convictions and prison terms.

After Sterry waived time, sentencing in this matter was set for October 24, 2012 or within 15 days of that date.

At proceedings held on October 30, 2012, Sterry personally addressed the trial court and said, “I’d like to enter a plea of not guilty, Your Honor.” After the trial court informed Sterry he had already had a trial, Sterry indicated he would enter a plea of “no contest.” The trial court then addressed Sterry, stating, “You already had a trial Mr. Sterry. [¶] . . . [¶] You don’t remember all the witnesses coming to court and testifying?” After Sterry’s counsel spoke with him, Sterry indicated he remembered the jury trial at which he had been found guilty. When his counsel then asked Sterry if he was “okay,” Sterry responded, “Yes, I’m all right.”

The trial court indicated it had read and considered Sterry’s “motion to strike his strike under *Romero*,^[4] [¶] . . . along with the probation report and the report written by Dr. Lydia Bangston regarding [Sterry’s] mental condition and history.” Defense counsel then indicated Sterry was on medication and was “clearly mentally ill.” Counsel continued: “He suffers from schizophrenia. He comes by it honestly. He didn’t pick it

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

up by doing something bad to himself. He was . . . basically born with it. A hard life.” Counsel asked the trial court to take Sterry’s mental illness “into account” when determining whether to strike his prior Three Strikes conviction and imposing sentence.

The prosecutor “request[ed] that the court not strike the defendant’s strike.” The prosecutor asserted Sterry had “a significant criminal history, much of which [was] theft related.”

The trial court commented, with regard to the *Romero* motion the prior strike was relatively recent and a violent crime, a robbery. Since being released from custody as to that conviction, Sterry committed one misdemeanor in violation of his parole. The trial court continued, “[B]ut, before the strike, he had some twelve misdemeanor convictions and, notwithstanding the strike, . . . two . . . felony convictions, [one] in 1996 and [one in] 2000. Almost all of his crimes involved the same thing: theft.” The court indicated, “although [it] was sympathetic to [Sterry’s] psychological and family history, in this case it [did] not [warrant] striking a strike.” Accordingly, the trial court denied Sterry’s *Romero* motion.

After hearing further argument from the parties, the trial court imposed the low term of two years in prison for Sterry’s conviction of burglary, then doubled the term to four years pursuant to the Three Strikes law. For the finding he previously had suffered a conviction for a serious felony, the court imposed an additional five years and for his prior prison term, the trial court sentenced Sterry to an additional one year, for a total of ten years in prison. After striking any remaining allegations, the trial court ordered Sterry to pay a \$240 restitution fine (§ 1202.4, subd. (b)), a stayed \$240 parole revocation restitution fine (§ 1202.45), a \$30 criminal conviction assessment (Gov. Code, § 70373) and a \$40 court security fee (§ 1465.8, subd. (a)(1)). The trial court then awarded Sterry presentence custody credit for 244 days actually served and 244 days of good time/work time, for a total of 488 days.

Sterry filed a timely notice of appeal on October 30, 2012.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.⁵

By notice filed June 6, 2013, the clerk of this court advised Sterry to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.

⁵ In a letter dated April 20, 2013, appellate counsel requested the trial court to correct the abstract of judgment to show Sterry had been convicted by jury, not by a plea. In a minute order dated April 23, 2013, the trial court ordered the abstract of judgment corrected and forwarded to the Department of Corrections, the clerk of this court, defense counsel and the Office of the Attorney General.