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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CRAIG KAISER GARRETT, Defendant and Appellant.	B239107 (Los Angeles County Super. Ct. No. YA080544)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed in part and reversed in part.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Craig Kaiser Garrett appeals from a judgment entered after a jury found him guilty of first degree residential burglary (Pen. Code, § 459, count 1),[1] resisting a peace officer (§ 148, count 2), and attempted first degree residential burglary (§ 664/459, count 3). In bifurcated proceedings, the jury found true the allegations that appellant had suffered three prior convictions, two of which qualified as serious felonies (§ 667, subd. (a)(1)) and as strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), the "Three Strikes" law), and two alleged prior prison terms (§ 667.5, subdivision (b)).

After denying appellant's *Romero*[2] motion, the trial court sentenced appellant to 35 years to life in state prison, consisting of 25 years to life pursuant to the Three Strikes law on the burglary conviction, plus five years for each of the two section 667, subdivision (a) serious felony convictions, and 180 days in county jail for resisting a peace officer, with 180 days credit for time served. A sentence of 25 years to life for the attempted burglary conviction was stayed pursuant to section 654.

Appellant contends (1) that there was insufficient evidence to sustain the convictions for burglary and attempted burglary, (2) the trial court abused its discretion in refusing to strike one of appellant's prior strikes, and (3) appellant was improperly convicted of both burglary and attempted burglary based on the same act. The People argue the matter should be remanded so the trial court can impose or strike the one-year enhancements under section 667.5, subdivision (b).

We reverse the conviction for attempted burglary (count 3). In all other respects, the judgment is affirmed.

FACTS

Prosecution Case

John Park lived across the street from Joseph Robinson on West 159th Street in the City of Gardena. On March 10, 2011, at approximately 12:30 p.m. Park looked

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

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

through his bedroom window and saw appellant walk up to Robinson's house, open the security screen and knock on the front door. Appellant knocked on the door for a while before moving to the big glass window in the front of the house. Appellant looked through Robinson's front window into the house and then went back and knocked on the screen door. No one answered the door and appellant crouched down and sat by the wall at the front of the house. Park's view of appellant was then obscured by a bush at the front of the house.

After a few minutes appellant got up and looked in the window again. He then walked to the end of the porch, looked around, and started doing pull ups from a beam attached to the house. He suddenly "hiked his leg" over a fence next to the porch and entered Robinson's backyard. Appellant went towards the back door of Robinson's house and disappeared from Park's view. Park called 9-1-1 and went outside to his porch when he saw the police arrive.[3] Park saw appellant walk towards the front of the yard from the garage area at the back. Park yelled and pointed at appellant who ran towards the back of the pool when he saw Park. Appellant was wearing brown plaid shorts. Police set up a perimeter around the area and attempted to locate appellant.

Gardena Police Officer Nick Beerling responded to the burglary call. He received information that appellant was seen running in an alley behind West 159th Street, approximately 300 yards west of the Robinson residence. Appellant ran towards Officer Beerling, made a sharp turn and ran towards an apartment complex. He was wearing a white tank top, gray shirt, and brown plaid checkered shorts. Officer Beerling broadcast his location and remained at the entrance of the apartment complex for a few minutes until he was asked to respond to another location.

At approximately 1:00 p.m. Angelica Hernandez, who lived on West 159th Street, heard police sirens and her dog began barking. She looked outside and saw appellant pulling clothes out of her car parked in the driveway. Hernandez ran outside and asked

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[3] A compact disc containing an audio recording of the 9-1-1 call was played for the jury and admitted into evidence.

appellant what he was doing on her property. Appellant dropped the clothes and ran through the back of the property.

Gardena Police Department Detective Ixtzia Linares saw appellant on the roof of a residence on the corner of Normandie and West 159th Street. He was wearing a white tank top with brown plaid shorts. Appellant ignored verbal commands from police officers to come down from the roof. After further unsuccessful attempts to convince appellant to climb down from the roof, Gardena Police Department Detective Luis Villanueva fired a rubber bullet which struck appellant in the chest. Appellant was arrested and taken into custody. Redondo Beach Police Officer Corey King and his K-9 dog assisted in searching the area. He found a gray T-shirt in the driveway of the adjacent property which was booked into evidence.

On March 11, 2011, Detective Linares and other police officers met Robert Bailey at the Robinson residence. Bailey was Robinson's neighbor and had been taking care of the house for approximately a year while Robinson was in the hospital. Detective Linares noticed a screen missing from the living room window at the back of the house. The screen was not missing when Bailey inspected the house on March 9, the day before the incident. The screen was found at the bottom of Robinson's pool and had been cut. Bailey had installed new screens for the entire house six months earlier. Detective Linares, who had been trained in lifting prints, lifted a palm print from the window where the screen had been removed and booked it into evidence.

Kimberly Swobodzinski, a trained and experienced forensic technician with the Gardena Police Department, compared appellant's booking fingerprint and palm print impression with the prints lifted by Detective Linares at the scene. The prints matched.

Defense Case

Gardena Police Officer Yvette Evans responded to the 9-1-1 call regarding a burglary on West 159th Street on March 10, 2011. She stopped at the Robinson residence and "did a quick visual of the house." She testified that she did not notice anything unusual. She checked the garage and the west and south sides of the house but did not check all of the back of the house.

DISCUSSION

I. There Was Sufficient Evidence to Support Appellant's Conviction for Burglary

Appellant contends that there was insufficient evidence to support his convictions for burglary and attempted burglary because he lacked the specific intent to commit a theft or any felony. Appellant contends he did not have any burglar tools, did not wear gloves, and was at the house for approximately 30 minutes "just looking into the window and exercising." He argues that there was no evidence that permits a rational inference that he had the intent to commit a theft or any felony. We disagree.

In order to prove that a defendant committed residential burglary, it must be shown that he or she entered a dwelling with the specific intent to commit a felony or theft. (§ 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) The intent to commit a felony or theft must exist at the time of the entry. (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

Evidence of intent is usually circumstantial and must support a reasonable inference of the requisite state of mind in order to support a conviction of burglary. (*People v. Holt, supra,* 15 Cal.4th at p. 669.) The intent required for burglary is usually inferred from all the facts and circumstances surrounding the crime. (*People v. Lewis* (2001) 25 Cal.4th 610, 643.)

When reviewing a criminal conviction for sufficiency of the evidence, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The standard of review is unchanged when the prosecution relies upon circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Even if we find that the circumstantial evidence could reasonably be reconciled with a different verdict, we do not reverse so long as the circumstances reasonably justify the outcome reached by the jury. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

In the present case, the circumstantial evidence that appellant entered Robinson's house with the intent to commit a felony or theft consisted of his being observed by a neighbor peering in the front window of the house when no one responded to his knocking on the front door, his crouching down out of view for several minutes by the house, and his jumping over the fence and entering the backyard of the house where he was again unseen for several minutes. Further evidence was a screen which had been affixed to a window at the back of the house on the day before the burglary that was found at the bottom of the swimming pool and had been cut, appellant's palm print on the glass window from which the screen had been removed, and that appellant left the scene when the police arrived rather than remaining to give his explanation for his presence on Robinson's property.

It was reasonable for the jury to infer that appellant was casing the house for a burglary through his actions of knocking on the door, peering in the windows, and waiting for a few minutes to see if anyone responded. Confident that the house was empty, appellant then jumped the fence and entered the property. Appellant proceeded to take further steps towards the commission of a burglary and it was reasonable for the jury to infer that the removal of the screen from the window was done to gain entry into the house and facilitate a theft. (See *People v. Valencia* (2002) 28 Cal.4th 1, 11 [the removal of a window screen from a window is sufficiently invasive to show penetration of the building].)

The absence of burglary tools is not dispositive. (*In re Charles G.* (1979) 95 Cal.App.3d 62, 67.) It was also reasonable for the jury to infer that appellant's flight from police and the lengths he went to avoid arrest show a consciousness of guilt. (See *In re Anthony M.* (1981) 116 Cal.App.3d 491, 500–501 [unexplained flight from burglary scene implies entry with unlawful intent].)

In sum, there was sufficient evidence to support appellant's conviction of residential burglary.

II. The Trial Court Properly Exercised Its Discretion in Denying Appellant's Motion to Dismiss His Prior Strikes

Appellant contends that the trial court abused its discretion by refusing to dismiss one of his prior strikes.

In *Romero*, the California Supreme Court held that a trial court may strike an allegation under the Three Strikes law that a defendant has previously been convicted of a serious or violent felony '"in furtherance of justice'" under section 1385, subdivision (a). (*People v. Williams* (1998) 17 Cal.4th 148, 159 (*Williams*).) The term "'"'in furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People,* in determining whether there should be a dismissal. [Citations.]"'" (*People v. Superior Court* (*Romero*), *supra,* 13 Cal.4th at p. 530.) In deciding whether to strike a prior conviction, "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra,* at p. 161.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in deciding to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Id.* at p. 378.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a

showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at pp. 376–377.)

There is no showing that the trial court was either unaware of its discretion or considered impermissible factors. We cannot say that its ruling was irrational or arbitrary. The record shows that the trial court considered counsels' arguments, as well as appellant's criminal history. Appellant's prior strike convictions arose from an attempted robbery in 1991, and a residential burglary in 1998. Appellant downplays the seriousness of his criminal history and contends that the key fact which the court refused to consider was that the current offense did not involve violence. But that oversimplifies and misstates the analysis conducted by the trial court. Although counsel below characterized appellant's criminal history as "not the worst record that we've ever seen," it appears from the record that appellant's long criminal history influenced the court's reasoning. In 1988 as a juvenile, appellant was convicted of attempted robbery and two counts of burglary. Appellant's adult criminal history consisted of a conviction for attempted robbery in 1991, a conviction for receiving stolen property in 1993, and a conviction for residential burglary in 1998. Appellant received a 13-year prison sentence for the conviction in 1998 and was on probation when he committed the current offenses.

We agree with the trial court's comment at the sentencing hearing that "in the grand scheme of things, this is not a serious residential burglary." But, "the nonviolent or nonthreatening nature of the felony cannot alone take the crime outside the spirit of the [Three Strikes] law." (*People v. Strong* (2001) 87 Cal.App.4th 328, 344.) Where, as here, a defendant commits the same type of offense he previously committed, the repetitive nature of the crime weighs against striking the prior conviction, even if the

offense is not violent. (See *Williams, supra,* 17 Cal.4th at p. 163 [multiple convictions of driving under the influence]; *People v. Strong, supra,* at p. 344 [multiple convictions of false drug sale].) As the trial court appropriately noted, this was appellant's second conviction for residential burglary, and he did not fall outside the spirit of the Three Strikes Law "based on his criminal history and his prospects for the future."

The court's comments leave no doubt that it fairly exercised its discretion. "On this record, where the trial court considered the relevant criteria, including appellant's lengthy criminal history and the timing and nature of his offenses, none of which reflect well upon his prospects, we find no abuse of discretion in the trial court's refusal to strike one or both of appellant's prior felony convictions." (*People v. Barrera* (1999) 70 Cal.App.4th 541, 555; see *People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

III. Appellant's Conviction on the Lesser Included Offense of Attempted Burglary Must Be Vacated

Appellant contends he was improperly convicted of attempted first degree residential burglary in count 3 because it is a lesser included offense of first degree residential burglary which he was convicted of in count 1. The People concede this point and we agree.

Attempted burglary is a necessarily included offense of burglary in violation of section 459. "If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Accordingly, appellant's conviction for attempted burglary must be reversed.

IV. Penal Code Section 667.5, Subdivision (b) Enhancements

The People argue that "remand for resentencing is required so that the trial court may either impose or strike the Penal Code section 667.5, subdivision (b) enhancements." We disagree.

The amended information alleged, inter alia, that appellant had suffered two prior serious felony and strike convictions (§§ 667, subd. (a)(1); 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) in 1991 for attempted robbery in case No. TA013593, and in 1998 for first degree burglary in case No. YA035919. It was also alleged that he had served two prior prison terms (§ 667.5, subd. (b)), one in 1993 for violating his felony probation for the attempted robbery in case No. TA013593[4] and the other in 1998 for his first degree burglary conviction in case No. YA035919. The jury found all the enhancement allegations to be true.

In *People v. Jones* (1993) 5 Cal.4th 1142 at pages 1144 to 1145 (*Jones*), the California Supreme Court determined that when the electorate enacted what is now section 667, subdivision (a)(1), it did not intend for a prison sentence to be enhanced for both a prior conviction and for a prison term imposed on that conviction. The Supreme Court held that "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Jones, supra,* at p. 1150)

It is permissible to impose enhancements under both sections 667, subdivision (a)(1) and 667.5, subdivision (b), if the enhancements are based on multiple prior convictions that are part of one prison term. (See, e.g., *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1666–1671.) That is not the situation here. In this case, each prison term (in 1993 for attempted robbery and in 1998 for first degree burglary) was based on one serious felony (robbery and burglary). At sentencing, the trial court imposed two 5-year prior serious felony conviction enhancements pursuant to section 667, subdivision (a)(1).

The People correctly point out that the trial court did not address appellant's prior prison term enhancements found to be true pursuant to section 667.5, subdivision (b).

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[4] Appellant also suffered a new felony conviction in 1993 for receiving stolen property. The information incorrectly refers to the code section as "496.1." Previously the section was referred to as section 496, subdivision 1. In 1992, it was redesignated section 496, subdivision (a).

But, the two one-year enhancements for the prior prison terms under section 667.5, subdivision (b) cannot be imposed for the same offense. Therefore, had the trial court addressed the enhancements found to be true it would have come to the same conclusion.

The People's request that the case be remanded so that the trial court may either impose or strike the section 667.5, subdivision (b) enhancements is denied.

DISPOSITION

Appellant's conviction for attempted burglary (§ 664/459, count 3) is reversed and the sentence on that count, including any conviction based assessments, is vacated. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ