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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.

ROBERT CAREAGA,

Defendant and Appellant.

B281273

(Los Angeles County
Super. Ct. No. LA082760)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Robinson, Judge. Affirmed.

G. Martin Velez, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Careaga appeals his conviction for first degree burglary. He contends the evidence was insufficient to support the verdict, and the trial court erred by failing to instruct on the lesser included offense of attempted burglary. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

As relevant to the issues presented on appeal, the following evidence was adduced at trial.

a. *People's evidence*

Mindy Nadell lived at a residence on Lull Street in Reseda. Her adult grandson, Sean Collins, lived with her. The backyard, which featured a swimming pool, could be accessed through a padlocked front gate, or through an unlocked back gate that opened onto an alley. A sliding glass door that led from the house to the pool was covered by a security gate.

On January 21, 2016, Nadell left the house in the morning. Collins was asleep in his bedroom in the house, with the door closed, suffering from flu-like symptoms. Collins's Toyota Prius was parked on the street in front of the house. The previous evening, Collins had left his keys, with an attached key fob bearing the Toyota logo, on the kitchen counter. He had placed a bag containing his Macbook Pro laptop computer and an external hard drive on a chair near the counter.

Early that afternoon, Collins heard loud knocking on the front door and a noise in the backyard by the pool. However, he did not think much of this and remained in bed.

At approximately 12:45 p.m., Fernando Gomez, Nadell's "pool man," entered the backyard of the residence to check the pool equipment. He discovered Careaga standing in the

backyard, wearing gloves and holding a clipboard. Careaga told Gomez that he was the electrician, and asked if Gomez owned the property. Gomez noticed that a bolt on the sliding glass door security gate was missing, which he found unusual. Careaga appeared “hyper.” Suspecting something was amiss, Gomez quickly completed his work and, after leaving the property, called 911.

Alerted to Careaga’s presence by the pool company, Nadell returned home. The bars on her bedroom window, which were normally bolted into the stucco, were halfway open. The bedroom window was also open, and the screen was missing. A bolt was missing from the sliding glass door security gate, and it appeared someone had attempted to pry the gate open.

Nadell encountered Careaga in the backyard. When she asked what he was doing, Careaga showed her a document routinely left in the window bars by the exterminator, and said he was there to investigate. Careaga asked Nadell to take him inside the house, so he could show her she had nothing to worry about. Nadell refused. Careaga retrieved three black bags from behind Nadell’s garbage cans, next to the alley, and showed her the contents of two of them. Nadell did not venture close enough to fully inspect the bags, but they appeared to contain clothing.

Before Careaga opened the third bag, Collins came into the yard, having been awakened by his grandmother’s arrival. En route to the yard Collins passed through the kitchen and noticed that his keys were missing. When Collins walked outside, Careaga was holding his keys. Careaga stated he had found the keys on a table outside the house. Collins retrieved his keys, told Careaga to leave, and Careaga complied, taking all three bags with him.

Back inside, Nadell realized that Collins's laptop bag was missing. Collins went after Careaga in order to recover the items, but Careaga was gone. Collins called 911.¹

Nadell subsequently noticed that certain items used to clean her cats' litter box were missing. A week later, she found the items in a tool shed located in the backyard, where they did not belong. Nothing else in the house appeared to have been disturbed.

Los Angeles Police Department officer Brittney Gutierrez responded to Collins's 911 call at approximately 2:00 p.m. Based on her examination of the scene, she believed that a forced entry had been made into the house through Nadell's bedroom window.

Gomez and Collins identified Careaga in separate six-pack photographic lineups prior to trial. Gomez, Collins, and Nadell identified Careaga at trial.

b. *Defense evidence*

Careaga's former girlfriend, Janine Arias, testified that in January 2016, she and Careaga were living at her brother's house, which was located near Lull Street. The night before the incident, Arias's brother told Careaga he could no longer live there, due to Careaga's methamphetamine addiction. On January 21, 2016, at approximately 1:40 p.m., Arias and Careaga were on a walk with their young son in the alley behind Nadell's house. Arias was carrying Careaga's gym bag, which could be separated into three parts. They argued about Careaga's reluctance to enter a drug rehabilitation program. Arias, upset, threw the gym bag over the fence into Nadell's backyard. Realizing that the keys to a car she was using were in the gym

¹ Recordings of Gomez's and Collins's 911 calls were played for the jury.

bag, Arias insisted that Careaga retrieve it. They knocked on Nadell's front door but no one answered. Arias waited nearby while Careaga went into the yard. Careaga returned without the bag, saying he had been unable to find it, and someone had been in the yard. Arias insisted he try again. While Careaga was attempting to retrieve the bag, Arias saw an older woman, presumably Nadell, drive up to the house. When Careaga returned, this time carrying the gym bag, he said "somebody came" while he was in the yard.

Careaga also presented evidence that when officers responded to the first 911 call placed by Gomez, no one answered the door at the Lull Street residence; officers did not see anyone in the yard when they looked over the fence from the front of the house; and they did not observe signs of a break-in.

2. *Procedure*

A jury convicted Careaga of first degree burglary (Pen. Code, § 459),² and found another person was present in the residence during commission of the crime. Careaga admitted suffering two prior "strike" convictions for robbery, a serious felony (§§ 667, subds. (a)(1), (d), 1170.12, subd. (b)), and serving six prior prison terms within the meaning of section 667.5, subdivision (b). He also admitted the truth of an "on-bail" allegation. (§ 12022.1). The trial court granted Careaga's *Romero* motion³ as to one of the two strike priors, and sentenced him to a term of 15 years in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations

² All further undesignated statutory references are to the Penal Code.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

assessment, and a criminal conviction assessment. Careaga timely appealed.

DISCUSSION

1. *The evidence was sufficient to support the verdict*

Careaga argues the evidence was insufficient to prove he entered the house, and therefore was insufficient to prove burglary. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, we “ ‘ “review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.]” ’ ” (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears “ ‘ “that upon no hypothesis whatever is there sufficient substantial evidence to support” ’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies when the prosecution relies primarily on circumstantial evidence. (*People v. Salazar*, at p. 242.)

A person is guilty of burglary if he or she enters any house with the intent to commit a theft or a felony within. (§ 459; *People v. Anderson* (2009) 47 Cal.4th 92, 101; *People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The “slightest entry by any part of the body or an instrument is sufficient.” (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273.) If the house was inhabited at

the time of entry, the crime is elevated to first degree burglary. (*People v. Anderson*, at p. 101.)

There was ample evidence in the instant matter to prove Careaga entered Nadell's house with the intent to commit theft inside. The bars on Nadell's bedroom window had been halfway opened, her bedroom window was open, and the screen was missing. The jury could reasonably infer that Careaga entered the house through the window, as Officer Gutierrez testified. Several items which had been inside the house had been moved or taken, providing compelling evidence Careaga had been in the house. When Nadell found Careaga in the yard, Careaga had Collins's keys, which had been in the kitchen. Shortly thereafter, Nadell and Collins realized that Collins's laptop – which had been near the keys – was missing. And, the cat care items had been moved from the house to the shed. The most reasonable inference was that Careaga, having forced his way into the house, took or moved these items. Careaga's gym bags were large enough to hold the laptop. Although Careaga showed Nadell the contents of two of the three bags, Nadell did not get close enough to see all the contents. The jury could also infer that Careaga took the Toyota keys because he intended to steal Collins's Prius, which was parked in front of the house. Careaga's false explanations for his presence in the backyard – that he was an electrician or an exterminator – demonstrated consciousness of guilt. The fact he wore gloves also indicated a preplanned scheme to break into the house. Careaga was a methamphetamine addict, and the jury could infer he had a motive to steal to obtain money to support his drug habit. From this evidence, the jury could readily and reasonably have inferred Careaga entered the house with the intent to commit theft.

Careaga argues the evidence was insufficient because no one saw him enter, exit, or inside the house; the officers who responded to the first 911 call did not see him; Nadell testified she might have left the window open that morning; the residence was not ransacked and valuable items were left behind; no fingerprints were lifted from the residence; no one saw Careaga with the laptop; Careaga voluntarily showed Nadell the contents of the gym bags; Collins's girlfriend had access to the keys, and she could have placed them outside; and the time lapse between the incident and Nadell's discovery of the cat box items in the shed rendered that evidence insignificant. Accordingly, he urges, the evidence was insubstantial and merely speculative.

Careaga's arguments amount to a request that this court reweigh the evidence and substitute our judgment for the jury's. This we cannot do. The fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. (*People v. Harris* (2013) 57 Cal.4th 804, 849–850.) “ ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.’ ” (*People v. Harris*, at p. 849; *People v. Cortes* (1999) 71 Cal.App.4th 62, 81 [where an appellant “merely reargues the evidence in a way more appropriate for trial than for appeal,” we are bound by the trier of fact's determination].) For the reasons we have discussed, there was no evidentiary deficit.

2. *The trial court did not commit instructional error*

At trial, the prosecutor suggested that the court consider instructing on the lesser included offense of attempted burglary. The court declined to do so because it concluded there was insufficient evidence supporting such an instruction. Defense counsel did not request an attempted burglary instruction and did not object to the court's ruling on the prosecutor's suggestion. Careaga now argues the trial court prejudicially erred by failing to instruct on attempted burglary.

a. *Applicable legal principles*

Attempted burglary "requires two elements: (1) the specific intent to commit burglary and (2) a direct but ineffectual act toward its commission." (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605; see *People v. Medina* (2007) 41 Cal.4th 685, 694.) Attempted burglary is a lesser included offense of burglary. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 156; *People v. Michaels* (1961) 193 Cal.App.2d 194, 198; cf. *Magness v. Superior Court, supra*, 54 Cal.4th at p. 278.)

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, even absent a request. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The existence of *any* evidence, no matter how weak, will not justify instructions on a lesser included offense. (*People v. Whalen*, at p. 68.) In determining whether substantial evidence existed, we do not evaluate the credibility of

the witnesses, a task for the jury. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Simon* (2016) 1 Cal.5th 98, 133.)

b. *Application here*

Careaga argues that an instruction on attempted burglary was required because there was evidence from which the jury could have concluded he never entered the house. The People urge the opposite was true, and the jury could not reasonably have concluded Careaga failed to make entry into the home.

We need not determine whether the trial court erred by failing to instruct on attempted burglary, because even assuming *arguendo* omission of the instruction was error, it was manifestly harmless. The failure to instruct on a lesser included offense requires reversal only if an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Wyatt, supra*, 55 Cal.4th at p. 698; *People v. Cady* (2016) 7 Cal.App.5th 134, 149.) No such reasonable probability exists here.

If the jury credited the prosecution's evidence, Careaga entered Nadell's home after making a forced entry through her bedroom window. Once inside, he picked up Collins's keys and laptop and took them outside the house, likely placing the laptop in one of his gym bags. The evidence also showed he moved the cat care items to the shed. Caught in the yard, Careaga attempted to convince Gomez and Nadell that he had legitimate business on the property. When that failed, he attempted to convince Nadell and Collins that he had not taken anything from

the house. Based on this evidence, he was clearly guilty of burglary.

If the jury credited the defense theory, Careaga was simply in Nadell's yard to retrieve the gym bag that Arias had thrown over the fence. He was not there to burglarize the house, was not responsible for opening the bars on Nadell's window, and never entered the house. Had the jury credited this theory, Careaga was not guilty of attempted or of completed burglary; he was simply in the wrong place at the wrong time.

To find Careaga guilty of only attempted burglary, jurors would have had to believe he came to the property and began to break in, but then stopped before he could enter the house. Jurors would have had to ignore the evidence that Collins's laptop was missing and his keys were outside, in Careaga's possession. The most reasonable explanation for this state of affairs, of course, was that Careaga managed to enter the house and took the items. There was no evidence providing a plausible alternative explanation for the laptop's disappearance and Careaga's possession of the keys. There is, therefore, simply no reasonable probability jurors would have concluded Careaga was present for a considerable period, intended to burgle the house, and managed to open Nadell's bedroom window, but coincidentally someone else stole the laptop and put the keys in the backyard. Indeed, the defense never argued that Careaga committed only an attempted burglary on this theory. Accordingly, even if omission of the instruction was error, it was harmless. (*People v. Wyatt, supra*, 55 Cal.4th at p. 698; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.