Filed 3/6/17 P. v. Jolley CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY DEAN JOLLEY, Defendant and Appellant.	B261137 (Los Angeles County Super. Ct. No. GA085611)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Candace J. Beason, Judge (Ret.). Vacated with directions.

Law Offices of Michael D. Grahn for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gregory Dean Jolley raises contentions of trial error following his conviction of burglary and attempted burglary (Pen. Code, §§ 459, 664, 459).[1]

For the reasons discussed below, the judgment is vacated and the matter is returned to the trial court, with directions, for further proceedings.

STATEMENT OF FACTS

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

The prosecution's theory of this case was that on February 22, 2012,[2] defendant Jolley and two accomplices drove in a white pickup truck to San Marino where they first burglarized a residence located on Shenandoah Road, and then attempted to burglarize a nearby residence on Circle Drive. The People's case rested on strong circumstantial evidence, but no witness was ever able to identify Jolley as one of the perpetrators.

a. *The Shenandoah Road burglary.*

Victoria P. lived with her family on Shenandoah Road in San Marino. On February 22, around 9:30 a.m., Victoria left home with her sister to go to school; after they left there was nobody at home. She returned home sometime between 3:00 and 4:00 p.m. that day. The police were there investigating a burglary that had occurred at her home. The glass pane of a

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] All further date references are to the year 2012 unless otherwise specified.

French door in the master bathroom had been smashed and the house had been ransacked. Victoria's birthday present from a few days earlier—a Kindle electronic reading device—was missing from her bedroom.

San Marino Police Officer Jeremy Bestpitch testified he responded to a 1:40 p.m. radio call that a burglary had occurred at Victoria's house. Bestpitch searched the house with Officers Kenric Wu and Robert Matthews. Christine Fish, a forensic specialist with the Pasadena Police Department, was called to the scene. She identified the point of entry into Victoria's house as a smashed window pane in a French door. In addition, the glass pane of a second French door "was shattered but not broken through." Fish described a "window punch" as "a tool that's typically used for breaking a window without causing too much noise. It causes the glass to break into small pieces and then just shatter." Fish testified a window punch is commonly used as a burglary tool, although she did not know if tests had been done to determine that a window punch had been used in this burglary.

While the officers were still searching Victoria's house, they received a report that there were prowlers at Elizabeth L.'s house nearby on Circle Drive. Bestpitch stayed at Victoria's house, while Wu and Matthews responded to Elizabeth's house.

b. *The Circle Drive attempted burglary.*

Elizabeth L. lived on Circle Drive in San Marino. On February 22, at about 1:45 p.m., she was home alone and her car was parked in the garage behind her house. She heard the doorbell, but decided not to answer it because she was not expecting anyone. Instead, she went to the second floor balcony directly above her front door to see who was outside. From there, she saw a white pickup truck in the driveway in front of her

house. At trial, Elizabeth described the vehicle as a "white, two-door truck." Elizabeth did not recognize the truck, nor could she see inside of it; no one was near her front door and she did not see anyone coming in or out of the truck. She did not see the driver. Nor did she "see any other white trucks parked in [her] driveway, on the street, [or] in the general area of [her] house."

After a few moments, the truck "pulled out of [Elizabeth's] driveway . . . and parked in front of the house across the street." Two African-American men got out of the truck, walked toward Elizabeth's house, and then walked through an unlocked gate at the side of her house. Elizabeth armed her home's security system and called the San Marino Police Department. The telephone conversation between Elizabeth and two police dispatchers was played for the jury at trial.

Elizabeth moved to another room and watched from a different second-floor window overlooking her side yard. She saw the two men walking back and forth. Then, as one of them walked across the yard, she heard a loud banging noise that seemed to be coming from inside her house. As Elizabeth was about to leave the room, she saw the shadow of a man outside a second floor hallway window. Elizabeth testified there was a backyard fireplace that could be used as a stepping-stone to easily access the rooftop of her house. Broken roof tiles were later discovered right outside "the hallway window where [she] could see the shadow." Elizabeth locked herself into a bedroom closet. On the 9-1-1 call, Elizabeth can be heard saying to the operator: "They are trying to break in please hurry . . . they climbed up the second floor, please hurry . . . please send somebody out now! [Background voices]. I am so scared please hurry!" The operator told her to stay in the closet.

At the preliminary hearing, Elizabeth could not identify Jolley as one of the men she had seen that day.

c. *The investigation*.

Madhu Deevanapalli lived on Circle Drive, three or four houses from Elizabeth. On February 22, at about 2:00 p.m., Deevanapalli was inside his home when he saw a man push through a hedgerow at the back of his property, walk quickly through his backyard, and then run away toward Circle Drive. Deevanapalli ran outside and saw the man run toward the Circle Drive Bridge (which was on the other side of Elizabeth's house).[3] Deevanapalli also saw a white pickup truck driving very fast from the direction of the bridge and past his own house. He only saw one truck go past his house; he did not see a second truck either pass by or park on Circle Drive. Deevanapalli was later taken to Virginia Road to view Jolley in a field show-up. Deevanapalli testified that the detained suspect (i.e., Jolley) was not the man he had seen walking through his yard.

At about 2:00 p.m. that day, Luis Perez was working at a house in the area of Circle Drive and Virginia Road when he saw a man wearing clothing with a Lakers logo run and jump over a fence at the front of the house and then move toward the back of the house. Perez testified that, at a subsequent in-field showup, the detained suspect (i.e., Jolley) was not the man he had seen running earlier.

At about the same time, San Marino Detective/Sergeant Aaron Blonde was responding in an unmarked police car to the

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[3] Circle Drive crosses Virginia Road at this point by means of an elevated bridge (called the Circle Drive Bridge); Elizabeth testified that this street bridge was close to the side yard of her house.

attempted burglary at Elizabeth's house. He was driving on Virginia Road and came to the Circle Drive Bridge. Off to his left he spotted an African-American man coming down the sidewalk toward him. The man was looking from side to side. Blonde then saw another man on the other side of Virginia Road. This second man slid down an embankment just past the bridge. The two men were now almost directly across the street from each other. The second man shook his head from side to side toward the first man. Blonde exited his vehicle, identified himself as a police officer, drew his firearm and told the two men to get on the ground. The second man immediately ran north on Virginia Road and out of sight. The first man ran and jumped over a wrought-iron fence into a property on Virginia Road, which connected to properties on Circle Drive. At the in-field showup of Jolley, Detective Blonde testified that Jolley was not either of the two men he had seen run away.

After Pasadena Police Department crime scene technicians arrived at Victoria's house, Officer Bestpitch was directed to establish a roadblock at the intersection of Circle Drive and Virginia Road.[4] Bestpitch testified: "When I arrived on scene, I basically blocked any traffic from traveling south on Virginia, as well as onto Circle Drive, basically directing all the traffic east on Rosalind."[5] Bestpitch testified he did not see a white truck driving down Rosalind or Virginia Road.

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[4] Unlike the Circle Drive Bridge location, where Circle Drive passes over Virginia Road, at this second location Circle Drive and Virginia Road actually intersect.

[5] Circle Drive deadends into Virginia Road just short of where Virginia Road intersects with Rosalind. This general location is one corner of a half-circle. The opposite corner of the

Jaime Castaneda, a United Parcel Service driver, testified that at about 2:00 p.m. he approached Circle Drive Bridge but found it blocked by police cars. However, the police suddenly departed, so Castaneda traveled over the bridge toward Elizabeth's house. There, he saw "a white four-door pickup . . . truck" parked on Circle Drive across the street from Elizabeth's house. There was nobody inside the truck and Castaneda did not see any other white trucks on Circle Drive.

After passing the truck, Castaneda saw an African-American man emerge from some bushes on Elizabeth's property. The man, who was wearing a white long-sleeved shirt and gray pants, stopped and stared at Castaneda. Castaneda kept driving, but from the "backup camera" in his delivery truck, he saw the man walk "towards the white truck." Although Castaneda did not see the man enter the truck, he saw the truck's lights activate. Castaneda continued making deliveries and, about five minutes later, he noticed the same truck driving behind him as he approached Virginia Road, and the truck "pulled into a driveway." Castaneda did not get a good look at the truck's driver, but he believed it was the same person who had emerged from the bushes. At a field show-up, Castaneda viewed Jolley and stated that Jolley was *not* the man who had emerged from the bushes of Elizabeth's property and gotten into the white truck.

Castaneda also testified that, earlier the same day, he had seen a similar truck with two occupants in the area of

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half-circle is where Circle Drive passes over Virginia Road on the Circle Drive Bridge. Virginia Road is the straight line dividing the circle, while Circle Drive is the curved edge of the half-circle.

Shenandoah Road; that is, not on Circle Drive, but "somewhere up . . in the hills up there." Asked how he could identify this particular white truck, Castaneda testified: "It's something about the truck that caught my attention. It said – I think it was 'Canyon.' It had a logo of like 'Canyon' or something like—" Castaneda was shown photographs of the front and rear of a truck identified as the truck Jolley had driven the day of the burglary and attempted burglary; Castaneda identified the truck in the photographs (People's Exh. 17 & 38) as "very similar" to the truck he had seen. Castaneda confirmed that he had told Officer Wu the vehicle he saw was a "Chevrolet Canyon, four-door pickup." Castaneda also told Wu that the person in the passenger seat looked like he was changing his clothes.

Officer Matthews testified that after spending 20 minutes at Victoria's house, he responded to the attempted burglary at Elizabeth's house. He parked on Circle Drive Bridge and, other than Officer Dany Gutierrez's motorcycle and Officer Henry Todd's car, "[t]he only other vehicle [he] saw was a white Chevy pickup truck which was parked directly on the other side of the street of 1470 [Circle Drive, Elizabeth's house]." Matthews did not see any other white trucks at that time. Todd and Gutierrez were already parked on the other side of Elizabeth's house on Circle Drive. But as the officers approached Elizabeth's house, Detective Blonde radioed that he had two suspects at gunpoint a short distance away, so they immediately went to assist him. Upon arriving at Blonde's location, they learned that both suspects had already fled.

Matthews then drove to the intersection of Circle Drive and Virginia Road as part of establishing a crime scene perimeter. There he was approached by Castaneda, who said he had seen "a

male African-American run from the rear yard of 1470 Circle and into a white pickup truck which was parked across the street." As they were talking, the same white truck that Matthews had seen parked at Elizabeth's house drove toward them. Castaneda identified the truck as the one he was talking about.

Matthews told Castaneda to leave the area and then called for backup. The white truck drove slowly toward Matthews, then stopped momentarily in the middle of the street. The driver looked directly at Matthews and then turned into the driveway at 1325 Circle Drive. Matthews testified that Jolley was driving this truck.

By the time Officer Gutierrez came riding up on his motorcycle, the white truck had pulled into the driveway at 1325 Circle Drive and turned around, so that it was facing the street. The truck was the same one Gutierrez had earlier seen across the street from Elizabeth's house. The driver's door was open and Jolley was standing two or three feet away. Gutierrez got off his motorcycle, drew his gun and ordered Jolley to approach him and get on the ground. At this point, Gutierrez was some 50 or 60 feet away from Jolley and the truck. Instead of complying, Jolley got back into the truck and drove it toward Gutierrez. Gutierrez moved out of the truck's path to protect himself, however, Jolley stopped the truck, got out, and was taken into custody.

Jolley's appearance was disheveled. Gutierrez described him as: "Sweaty. Sweaty. Somewhat dirty, like dirt. Like . . . leaves-type dirt. Not—definitely not clean." Matthews, who had arrived at the scene just as Jolley was stepping out of the truck, testified: "Physically, his clothes were all disheveled and his shirt was untucked . . . . He had what . . . seemed like foliage,

like bush leaves on his shirt. His pants had mud on them that appeared to be still wet. His . . . shirt was not buttoned correctly. . . . His jeans . . . were button fly and most of those buttons weren't buttoned up. It appeared he . . . was taking his clothes off or trying to put clothes on quickly." Matthews also noticed that Jolley was "sweating profusely and had labored breathing as [if] he was just running or something."

Ralph Chapman was a forensic specialist and latent print examiner for the Pasadena Police Department. On February 22, he responded to 1325 Circle Drive where he checked and photographed the contents of Jolley's truck. On the front passenger seat, Chapman found a "window punch," which he described as a tool "that's used to damage auto glass by mechanics when they need to remove glass." In the truck's center console, he found a wallet containing Jolley's driver's license and a Leatherman folding tool with "the knife blade extended." The truck also contained a small box of jewelry and, on the floor in front of the rear passenger seat, Victoria's Kindle. White clothing and a white hat were found on the rear passenger seat. Officer Todd testified there was no other work-related equipment of any kind in the truck cab or in the truck bed.

Chapman testified he fingerprinted the truck and handed the latent prints over to San Marino officers. It appears from Officer Todd's testimony that the only usable prints, which were recovered from outside of the driver's door, belonged to Jolley.[6]

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[6] Although Jolley asserts that "none of the prints lifted at the Shenandoah Road residence [i.e., Victoria's house] were found to be Mr. Jolley's prints," that may have simply been because, as the testimony showed, the fingerprint samples taken from Shenandoah Road "were not suitable for analysis."

Officer Kenric Wu transported Jolley to the Alhambra jail. During a booking search, Wu found a gold bracelet with pink-colored gems in Jolley's pocket.

The evidence established that the vehicle Jolley had been driving when he was taken into custody by Officer Gutierrez was a white Chevrolet Colorado truck that Jolley had rented from Enterprise Rent-A-Car.

2. *Defense evidence*.

Jolley testified in his own defense. He began his testimony by stating that he was 46 years old and acknowledging that he had suffered felony convictions earlier in his life. Jolley testified that between 1990 and 2003, he had been convicted of possessing drug paraphernalia, grand theft, and two attempted robberies. Because he wanted to "change his life," he subsequently obtained training and state certification as a wastewater operator. Jolley testified that this occupation required the use of specialized tools, including the Leatherman tool and the "center punch" (referred to at trial as a "window punch")[7] recovered from the rented white Chevrolet Colorado truck he had been driving when he was arrested. Jolley also testified: "My D.P.D. kit was in there, but I didn't hear them mention it. I had a D.P.D. kit which is for treating water and taking chlorine residuals." Jolley testified that although he "didn't see that in any of the pictures, I did have my D.P.D. kit, which was manufactured by Hatch. It's a little

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[7] Jolley testified, "They referred to it as a window punch, but in my field it's called a center punch. It's a multipurpose tool." He explained that he used the punch for marking metal and plastic and, because it was a newer spring-loaded model, it eliminated the need for a hammer.

blue box that was sitting on my front seat, and that's what had the colorimeter in it."

Jolley testified he had to rent the Chevy Colorado sometime near the beginning of February because his own Toyota Tundra truck was being repaired at a body shop and he needed transportation in connection with his work for Collins Maintenance Service in Monrovia and Waterworks Technology in Perris. Jolley testified that when he got the rental truck, he took some of the property from his Toyota Tundra and "threw it into the back of the Colorado." Regarding jewelry found in the truck, Jolley testified: "A very close family friend's mother passed away and she had jewelry boxes—in fact, she's here today—had some jewelry boxes and stuff and . . . I took some of the stuff out and just put it in my truck. . . . I just kept it and I was actually going to use it for gifts." Jolley identified a photograph (Defense Exh. E) as showing the back seat of his rental truck; this picture shows that the truck was a four-door model.

Jolley testified that on the morning of February 22, he first worked rearranging a storage facility for Collins Maintenance in Monrovia, and then he went to Alhambra to check on some plumbing work at a residence owned by Mr. Gillenwater, the owner of his other employer, Waterworks Technology. The Alhambra job involved going into a crawl space in the basement to make sure the plumber had covered up some puddles. During both jobs, Jolley's clothing (gray Levi's pants, a gray, black, and white checkered shirt, a long-sleeved T-shirt, and gray tennis shoes) got dirty, but he later cleaned his shirt off and put it back on. Jolley testified he arrived at Gillenwater's house "probably about 11:30" or "11:30 going on 12:00." He spent only 10 or 15 minutes checking the basement before leaving.

After finishing at Gillenwater's house, Jolley was on his way to a restaurant for lunch when he stopped at a gas station in Alhambra. There he was approached by three young men who were in a white truck similar to Jolley's rental truck. Two of the men were African-American and one, whose name was Dave, seemed "to be Asian, mixed Asian and black." Dave was in the driver's seat. The men told Jolley they had some stuff for sale and showed him a box of electronics. Jolley agreed to purchase a Kindle, thinking he would give it to his niece. Without paying for it, Jolley threw the Kindle into his truck. He did not pay for it immediately because the men invited him to their house in San Marino to check out some other items they had for sale; they showed him pictures of an iPhone, big screen televisions, tools and guns. Jolley did not think there was anything suspicious about this because he had purchased things out of trucks before, and also because Dave was Asian and it was believable to Jolley that Dave would live in San Marino. Jolley testified he intended to pay for the Kindle out of the $9,600 in cash he had with him: "I had quite a bit of money on me. I shared that with my counsel, but for some reason when my truck was searched, the money issue was never brought up. I had quite a bit of money in my truck."

Jolley testified that he followed the three men to Circle Drive in San Marino. The men initially parked in the driveway of 1470 Circle Drive (Elizabeth's house), but then they backed out and parked across the street. Jolley parked his truck ten or fifteen feet behind them. Two of the men got out and walked back across the street toward Elizabeth's house. The third man stayed in the truck, told Jolley to wait there, and then drove onto Virginia Road, out of Jolley's sight. Jolley moved his

truck into the spot where their truck had been. He made a couple of phone calls while waiting to be invited into the house to view the merchandise. One of the calls he made was to the body shop that was repairing his own truck.

Three or four minutes later, a police officer on a motorcycle with flashing lights drove by. Jolley did not suspect anything was amiss at that point. Another car drove by.[8] Jolley became suspicious when he saw one of the three men dash across the street and out of sight: "[S]o I seen one of the guys, one of the passengers that had gotten out of the truck, dash across and out of sight. And at that point I realized that something wasn't right." Jolley then tried to drive away from Elizabeth's house by going back the way he had come on Circle Drive, but there was now a police roadblock set up. Given his criminal record, Jolley panicked and pulled into one of the driveways on Circle Drive. Jolley testified he "just sat there. My car was still running, and people were coming out of their houses at that point because there was commotion. And probably not even 30 seconds the officer pulled up and . . . pulled his service revolver, pointed it at me, and ordered me to get out of the truck."

Jolley immediately got out of the truck and was handcuffed. He denied having already gotten out of the truck before Gutierrez drew his gun. He denied that he was sweating at this point. However, he did begin perspiring after being kept in a patrol car "for maybe five hours" with the heater turned on. Jolley denied that his clothing was dirty or unkempt. He also denied telling Officer Matthews that he was looking for work.

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[8] This was apparently Detective Blonde driving past in an unmarked police car.

Jolley testified he did not go to Victoria's house on Shenandoah Road. He denied that anyone else had been in his rental truck that day or that he had gotten out of the truck at any time after leaving the gas station, until he was arrested by Officer Gutierrez.

3. *Rebuttal evidence.*

Officer Matthews testified that immediately after being handcuffed in the driveway at 1325 Circle Drive, Jolley said, " 'What's going on? I'm only looking for work.' "

Officer Wu testified that at booking, Jolley had $1.85 in his possession. Wu acknowledged that he did not check to see if there was any money in the rental truck.

4. *Trial outcome.*

The jury convicted Jolley of burglary and attempted burglary, with prior prison term and prior serious felony conviction findings (§§ 459, 664, 459, 667.5, 667, subds. (a) – (i)). He was sentenced to a prison term of 33 years 4 months.

5. *Jolley's new trial motion.*

Following his conviction, Jolley—now represented by a new attorney—filed a new trial motion claiming, among other things, that he had been denied the effective assistance of his trial counsel, privately-retained attorney Philip Deitch, on three grounds: (1) Deitch had a record of State Bar discipline; (2) Deitch failed to call witnesses who would have rehabilitated Jolley's character and corroborated his version of events; and (3) Deitch failed to prevent the jury from learning that Jolley had suffered a very recent theft conviction.[9] Attached to Jolley's new

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[9] The facts relevant to the recent theft conviction are discussed fully below.

trial motion were declarations from three people (Lula Jones, Robin Allen and Cornell Gillenwater), attesting to Jolley's good character and providing some factual information regarding the events of February 22.[10] Each declarant stated that he or she would have given testimony at trial, but had never been contacted by Deitch.

In a written response, the People argued Jolley's new trial motion was meritless because he was complaining "simply that (1) trial counsel was ineffective because [he] did not call two witnesses who would only testify to immaterial and collateral information, and (2) that trial counsel did not stop the defendant from lying under oath about a prior misdemeanor conviction."

The trial court held a hearing on Jolley's new trial motion on October 31, 2014. During that hearing, there was discussion and argument regarding the value of the declarants' proposed testimony and the nature of Deitch's problems with the State Bar.[11] The prosecutor argued that the proposed alibi evidence

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[10] Robin Allen declared she would have testified to the truth of Jolley's explanation for the jewelry found in his truck. Cornell Gillenwater declared he would have testified Jolley worked for his wastewater treatment company, that the tools recovered from Jolley's truck were used in this work, and that on February 22 he asked Jolley to check on his Alhambra house. Lula Jones declared she had worked as a caregiver for the late Mr. Collins of Collins Maintenance, and that she would have testified she was present when Jolley worked at Collins's house on February 22. All three declarants stated they were good friends of Jolley and would have testified to "his good character."

[11] While discussing whether the declarants might have been contacted by Jolley's original trial counsel (who might then have discussed the witnesses' proposed testimony with Deitch), Jolley's

would have been inadequate because, although the precise time of the burglary at Victoria's house was murky, there had been "no evidence that it happened early in the morning." Jolley's new trial counsel acknowledged there had been "substantial circumstantial evidence" of guilt at trial, but argued this was "all the more reason Mr. Deitch's failure to bring these witnesses was prejudicial, [to] cast doubt on this." Defense counsel argued the People's assertion that Jolley's testimony lacked credibility was crucial to the People's case.

The trial court concluded it could not say that Deitch's alleged failure to call available witnesses constituted ineffective assistance because Deitch's reasons for failing to do so were not evident in the record. The court stated: "I don't know [Deitch's] rationale or reasons. I don't think on its face it is an example of incompetency. [¶] Mr. Jolley has not been shy at all about expressing his own concerns or needs to the court. . . . I would sort have expected if there was an issue on that that he would have said something. And I don't recall anything like that." Jolley's attorney said he had been unable to get Deitch to return his phone calls or emails, and argued: "[I]f the court thinks there is a plausible explanation that Mr. Deitch can offer, then I would ask for . . . some assistance in getting Mr. Deitch to talk to me." The trial court declined to explore that area or hear from Jolley

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counsel for the new trial motion told the trial court: "No, I don't believe [the original attorney] contacted them. Their testimony is they weren't contacted by any representative of Mr. Deitch." This assertion was technically inaccurate because the new trial declarants asserted only that Attorney Deitch himself had never contacted them, not that they had not been contacted by any representative of Deitch.

himself, and ruled that – "[h]aving viewed the performance of Mr. Deitch, the presentation of evidence"—it was "going to deny the motion for a new trial."

CONTENTIONS

Jolley contends that he was denied the effective assistance of trial counsel, and that the prosecutor committed misconduct during closing argument.

DISCUSSION

1. *Ineffective assistance of counsel*.

Jolley contends the trial court erred by not granting his new trial motion on the ground of ineffective assistance of counsel. We conclude the proper answer to this claim will require a remand to the trial court for further proceedings.

a. *Legal principles*.

" 'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] ' "A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." ' [Citations.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) Although ineffective assistance of counsel is not an enumerated statutory ground for granting a new trial under section 1181, in *People v. Fosselman* (1983) 33 Cal.3d 572, our Supreme Court held that such a claim may be asserted as a basis for a new trial. (*Id.* at pp. 582–583.)

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390–391 [120 S.Ct. 1495].)

b. *Discussion*.

As Jolley's attorney acknowledged while arguing the merits of the new trial motion, there was a substantial amount of inculpatory circumstantial evidence in this case. Nevertheless, that circumstantial evidence was not overwhelming. Apart from some minor discrepancies (e.g., that Elizabeth described the white pickup as a two-door model, while Castaneda and a defense exhibit indicated it was a four-door model; and that Castaneda thought he saw a Canyon model truck, whereas Jolley's rental was a Colorado model), the major flaws in the People's case were that no witness had been able to identify Jolley as one of the perpetrators, and that Castaneda had testified that Jolley was not the man who emerged from Elizabeth's property and drove off in the white truck. This state of the evidence apparently caused the prosecutor to spend time during closing argument urging the jury to disregard Jolley's testimony as unreasonable.

As Jolley points out, the prosecutor told the jury during closing argument: "The evidence presented is what happened.

The defendant doesn't just get to come up here and give a version of facts – a version of the incident and say, okay, there's a tie, it comes to the defense. That's not how it works. Both theories have to be reasonable for that to be the outcome. And as we all heard the defendant testify, which we'll go through that, his theory is not reasonable." The prosecutor characterized Jolley's credibility as "everything because that's all you heard from the defense." (Italics added.)

The prosecutor offered a lengthy analysis attacking Jolley's credibility: "[O]nce the defense puts on a case, you have to look at what witnesses they could have called that they didn't call. And you may recall the defendant, when he was testifying about the jewelry in his truck that he was supposedly going to give away as gifts that he got from somebody he said, 'Hey, she's even right here in the audience.' [¶] Did that person come and testify? She was here in the courtroom. Did she testify that, yes, she gave that . . . little jewelry box of jewels to the defendant so he can give them away as gifts? No. And she was here and she could have done that. [¶] The defendant made a big point about how his car was in the shop, and that's why he had this rental car . . . . Did those people come in and testify as to why the defendant may have been driving this rental truck? . . . No, they didn't come in and testify. [¶] He made . . . a big long explanation about what he does for his job and why that window punch is actually a tool that he uses in his profession and that he still works for these people. [¶] Did anyone come and talk about what he does, and how this is . . . an important part of what he does for his profession? No. [¶] So all you have . . . . [is] the defendant's testimony only and his theory of what went down that day. His theories of events and how he described it."

Jolley argues he was denied the effective assistance of counsel on three separate grounds. The first of those grounds we reject but, as to the remaining two grounds, we believe that they are possibly meritorious and require further consideration by the trial court.

(1) *Defense counsel's state bar disciplinary problems did not constitute ineffective assistance of counsel.*

We find no error in the trial court's conclusion that Jolley was not denied the effective assistance of counsel because Deitch had a disciplinary history.

The mere fact that a trial attorney has faced past discipline at the hands of the California State Bar does not establish deficient performance in a particular case. "The simple fact that a particular trial attorney has been accused of or has a reputation for rendering inadequate services, or has been found incompetent may have little relevancy in proving the attorney rendered ineffective assistance of counsel in another case. [Citation.] Ordinarily, accusations of incompetency cannot be used to subject counsel to open-ended inquiries about counsel's entire career. [Citation.] To find that an attorney has rendered services below the standard of care, each case must be examined according to its own facts. [Citation.] Any evidence of prior neglect must have a bearing on the new accusations. [Citation.]" (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1134; see, e.g., *People v. Barillas* (1996) 45 Cal.App.4th 1233, 1239–1240 [attorney's suspension for commingling client funds with his own money did "not demonstrate incompetence to provide an adequate defense in a criminal proceeding" because "[i]n general, breach of a professional ethical obligation does not necessarily indicate a lack of knowledge of the law"].)

According to the trial court, none of Deitch's disciplinary problems involved his competence as a trial attorney, an assertion Jolley does not dispute on appeal. Jolley has failed to demonstrate that Deitch's past problems with the State Bar proved he rendered ineffective assistance of counsel in this case.

(2) *Allowing evidence of Jolley's 2011 theft conviction might constitute ineffective assistance of counsel.*

Jolley points out in his reply brief that, on appeal, the Attorney General has failed to address a central element of the ineffective assistance of counsel claim: Jolley's contention that he was prejudiced by Deitch's failure to object to the testimony about Jolley's 2011 theft conviction. This issue also was not addressed when the parties orally argued the merits of Jolley's new trial motion in the trial court. For the reasons that follow, we are concerned that the trial court did not give adequate consideration to this claim.

(a) *Procedural background*.

Just before Jolley took the stand at trial, there was a sidebar discussion about how to present the evidence of Jolley's prior convictions. The trial court ruled that the prosecution could introduce evidence of Jolley's prior felony convictions; but as to prior misdemeanor convictions, the court concluded: "At this point, under [Evidence Code section] 352, I'm going to preclude those unless Mr. Jolley seeks to indicate that he's been crime-free or has not had any other convictions, then the People may be in a position to use that as further impeachment." Deitch then made a short opening statement, during which he acknowledged that Jolley had suffered "a series of felony convictions earlier in his life," but asserted that Jolley "has attempted to restructure his

life in a meaningful way" since then by getting trained as a wastewater technician.

On direct examination, Jolley began by recounting his felony convictions, and then the following colloquy occurred:

"Q. After sustaining those convictions, did you attempt to change your life in some way?

"A. I did.

"Q. And what did you do in order to accomplish that?

"A. I came up with an idea to try a new field, which was the water and wastewater industry."

When it came time for cross-examination, the prosecutor asked for a sidebar and said that, given Jolley's assertion he had turned his life around, "I believe the 2011 conviction for petty theft . . . is relevant now." The trial court said, "I think that rather than having it be theft-related, you can say . . . did you suffer any other misdemeanor convictions, and we'll leave it at that."[12] The prosecutor then began her cross-examination,

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[12] "[T]rial courts have broad discretion to admit or exclude prior convictions for impeachment purposes, and must exercise that discretion on motion of the defendant. The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.) The well-recognized danger in this situation is that the jury might misuse the prior conviction by reasoning that, if the witness did something like this before, the witness was likely to have done it again. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 178 ["Because of the similarity of the prior to one of the charged crimes, the court offered to sanitize [defendant's] prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so."].)

reviewing Jolley's felony convictions again, after which the following colloquy occurred:

"Q. And isn't it true that in 2011 you suffered another misdemeanor conviction?

"Mr. Deitch: Objection. Well, all right.

"The court: Overruled. [¶] You may answer.

"The witness: What was it for? I don't even remember it. I do not remember what it was for.

"The court: All right. You may –

"By [the prosecutor]:

"Q. For petty theft, sir?

"A. I really do not remember what that was for. Oh, yes, I do. I do remember.

"Q. Okay.

"A. Yes, that is true.

"Q. Okay. So you were trying to turn your life around but weren't completely successful; is that correct?

"A. That is incorrect."

(b) *Discussion*.

On appeal, Jolley complains that "when the People . . . asked [him] about his misdemeanor convictions, they—contrary to the trial ruling on admissibility—asked if the conviction was for petty theft. Then, to compound the folly of initially asking the question that admitted the misdemeanor convictions in the first place, Mr. Deitch failed to object regarding the nature of the offense."

We do not conclude that Deitch was incompetent for asking Jolley if he had tried to turn his life around, failing to intervene when Jolley started mulling over the nature of his 2011 misdemeanor, and failing to object when the prosecutor—in

direct violation of the trial court's ruling—asked Jolley if his 2011 conviction had been for petty theft. However, we believe these issues were sufficiently weighty that the court should have addressed these issues at the hearing on Jolley's new trial motion.[13]

Furthermore, we cannot say with confidence that Jolley was not prejudiced by this testimony. As previously noted, although the circumstantial evidence showing that Jolley was one of the burglars was strong, it was certainly not ironclad. On the day of the crimes, witness after witness failed to identify Jolley as one of the men who was seen running through the bushes or driving the white truck: the victim Elizabeth L., her neighbor Madhu Deevanapalli, Detective Blonde, the UPS driver Jaime Castaneda, the gardener Luis Perez. The only fingerprints found on Jolley's rented truck belonged to Jolley. While numerous witnesses remembered seeing only one white truck that day, this does not mean there could not have been a second white truck in the immediate vicinity that witnesses did not notice. And even though Castaneda testified the truck he saw was similar to the photographs of Jolley's rented Colorado, Castaneda also testified that the truck he saw was a Canyon.

Jolley's defense depended on the jury believing his testimony that there were two similar white trucks on Circle Drive on February 22 and that Jolley was merely an innocent bystander. Jolley's credibility was obviously key to his defense,

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[13] Jolley raised the point in his written motion and the People wrote in response that Deitch had merely "stop[ped] defendant from lying under oath about a prior misdemeanor conviction." However, the issue was not addressed by the trial court at the hearing.

yet his attorney failed even to try to prevent the jury from learning that just the previous year Jolley had been convicted of a theft offense.

Our Supreme Court has explained that ineffective assistance of counsel claims are properly considered in the context of new trial motions " 'when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion. . . . "It is undeniable that trial judges are particularly well suited to *observe courtroom performance* and to rule on the adequacy of counsel in criminal cases tried before them. [Citation.]" ' " (*People v. Carrasco* (2014) 59 Cal.4th 924, 981; see also *People v. Wallin* (1981) 124 Cal.App.3d 479, 483 ["The trial judge is the one best situated to determine the competency of defendant's trial counsel. Where, as here, defendant is represented by different counsel at the motion for a new trial and the issue is called to the trial court's attention, the trial judge's decision is especially entitled to great weight and we defer to his fact finding power."].)

In the present case, the trial court seems to have given little, if any, consideration to one portion of Jolley's ineffective assistance of counsel claim. We therefore find it necessary to remand the matter for further consideration. (See *People v. Robarge* (1953) 41 Cal.2d 628, 635 [remand to trial court for reconsideration of its denial of defendant's new trial motion].)

(3) *Failing to call and/or interview witnesses might constitute ineffective assistance of counsel.*

In addition to the trial court's failure to adequately consider Jolley's claim that he was denied effective assistance when Deitch failed to object to the testimony about Jolley's 2011 theft conviction, we are also concerned that the trial court failed

to adequately consider Deitch's alleged failure to interview and/or call available witnesses.

A defense counsel's mere failure to interview or call available witnesses is generally insufficient to demonstrate ineffective assistance of counsel. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [deference is shown to counsel's tactical choices].) A "defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. . . . [H]e can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "While an attorney is not obligated to interview every prospective witness [citation], it is patently incompetent for him to interview none regarding the crux of the anticipated defense . . . ." (*In re Cordero* (1988) 46 Cal.3d 161, 184.)

The declarations submitted in support of Jolley's new trial motion appear to establish that Deitch failed to contact Lula Jones, who stated that, "as a caregiver to the late Mr. Collins," she was present at Collins's house when Jolley worked there on February 22, and "to the best of my recollection, this work lasted a couple of hours and terminated around 11:00 a.m." Although the trial evidence did not conclusively show that Victoria's house had already been broken into by 11:00 a.m., Jones's testimony would have corroborated Jolley's testimony regarding his whereabouts that morning. Cornell Gillenwater's declaration established that Jolley's work for his company, Waterworks

Technology, required the use of "center punches and Leatherman tools," and evidence that Jolley used the punch to mark metal and plastic in his job as a wastewater technician tended to corroborate his alibi testimony.

Furthermore, Robin Allen's declaration stated she "would have testified to the fact that I had given Jolley a jewelry box with jewelry that I possessed and which belonged to my mother before she passed away." This evidence could have helped Jolley because the prosecution suggested to the jury that the jewelry found in his truck constituted unclaimed burglarized property, and that Jolley's failure to call Allen as a witness was ground to question his credibility.

Hence, because we are remanding for the trial court to consider the effect of Jolley's 2011 theft conviction on the jury, we direct the trial court also to reconsider the effect of Deitch's failure to interview Jones, Gillenwater, and Allen, and/or his decision not to call them as witnesses in Jolley's defense.

c. *Disposition*.

We face an unexpected problem in this case, because the judge who presided over Jolley's trial, Judge Beason, has since retired. Nevertheless, we still deem it appropriate to remand this matter to the superior court because a fair reconsideration of Jolley's new trial motion may require the holding of an evidentiary hearing, including perhaps hearing from trial counsel, something this court is ill-equipped to handle. (See *In re Hochberg* (1970) 2 Cal.3d 870, 873, disapproved on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070 ["a reviewing court [is] not designed to conduct evidentiary hearings"].) We will remand this matter to the trial court for reconsideration.

2. *There was no prosecutorial misconduct.*

Jolley contends the prosecutor committed misconduct during closing argument. There is no merit to this claim.

a. *Legal principles.*

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " ' [Citations.] In addition, ' "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." [Citation.]' [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm." (*People v. Dykes* (2009) 46 Cal.4th 731, 760.)

"When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

b. *Discussion*.

Jolley complains that, without objection from his trial counsel, the prosecutor made the following italicized statements during closing argument:

"But once the defense puts on a case, *you have to look at what witnesses they could have called that they didn't call*. . . . [¶] . . . [¶] *Did that person come and testify?* She was here in the courtroom. Did she testify that, yes, she gave that pouch—that jewelry—the little jewelry box of jewels to the defendant so he can give them away as gifts? No. And she was here and she could have done that. [¶] The defendant made a big point about how his car was in the shop, and that's why he had this rental car and how he knew these guys personally. *Did those people come in and testify as to why the defendant may have been driving this rental truck?* He knew them personally. *No, they didn't come in and testify*. [¶] He made—there was a big long explanation about what he does for his job and why that window punch is actually a tool that he uses in his profession and that he still works for these people. [¶] *Did anyone come and talk about what he does, and how this is part—this is an important part of what he does for his profession?* No." (Italics added.)

But these comments were entirely proper. A "prosecutor may comment on the state of the evidence, including the failure of the defense to introduce material evidence or to call witnesses." (*People v. Mincey* (1992) 2 Cal.4th 408, 446.) "The Fifth Amendment does not prohibit the prosecution from commenting on the state of the evidence presented at trial, or on the defense's failure to introduce material evidence or to call witnesses other than the defendant." (*People v. Taylor* (2010) 48 Cal.4th 574, 633.) "A prosecutor is permitted . . . to comment on a defendant's

failure to introduce material evidence or call logical witnesses. [Citation.] By directing the jury's attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant's failure to present material evidence. He did not capitalize on the fact defendant failed to testify." (*People v. Brown* (2003) 31 Cal.4th 518, 554.)

The prosecutor did not commit misconduct during closing argument.

DISPOSITION

The judgment and the order denying the motion for a new trial are vacated, the case is remanded, and the trial court is directed to consider the portion of Jolley's new trial motion asserting that he was denied the effective assistance of counsel. Specifically, the trial court shall consider whether trial counsel was ineffective for (1) failing to intervene to prevent the jury from learning that Jolley's 2011 conviction was for theft, and (2) failing to interview and/or call potential defense witnesses. The trial court is directed to conduct any ancillary proceedings (such as evidentiary hearings) necessary to make these determinations. The trial court shall then issue a detailed written ruling explaining its reasoning.

If the court determines that the new trial motion should be granted, the People shall have 60 days to reinstate charges against Jolley. If the court determines that the new trial motion should be denied, it shall reinstate the judgment of conviction. If Jolley elects to appeal from that judgment, he may raise only the issue of his 2011 theft conviction, the failure to interview and/or call potential defense witnesses, or any issue arising out of the

rehearing of the new trial motion; he may not raise any other issue that was or could have been raised in the present appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.