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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LOUIE MUNOZ, Defendant and Appellant.	B227941 (Los Angeles County Super. Ct. No. KA090526)

APPEAL from the judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed as modified.

Eric Cioffi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Blythe J. Leszkay and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Louie Munoz appeals his conviction on two counts of burglary and one count of receiving stolen property. Defendant contends the court committed evidentiary and instructional error and miscalculated the total amount of custody credits to which he was entitled. Respondent concedes an error was made in calculating defendant's custody credits. We agree and conclude defendant is entitled to an additional day of credit. Otherwise, we find no error and affirm the judgment of conviction.

FACTS

In February 2010, the Apollo 11 Auto Center, owned and operated by G.K., was burglarized. The auto center was located on Garey Avenue in the City of Pomona and G.K. had operated his business at that location for over two decades. G.K. estimated that $15,000 to $20,000 worth of tools, a van and other items were taken from his store. His business was burglarized again a couple of months later in April.

G.K. was familiar with defendant, had seen him in the neighborhood or walking by his business, and sometimes exchanged "hellos" with defendant. On the night before the February 2010 burglary, defendant came to the auto center with another individual to put air in the tires of their car. G.K. noticed that defendant got out of the car and appeared to be looking around the grounds of his business in a suspicious way.

In the early morning hours of April 18, 2010, J.S.'s home in Pomona, not far from the auto center, was burglarized. J.S. was at home, recovering from surgery and trying to sleep. Her eight-year-old granddaughter was in bed with her. J.S. heard footsteps in her home and got up to investigate. She saw a figure in her living room and assumed it was her daughter, because her daughter had the house keys and was expected that day for the granddaughter's baptism. J.S. was on pain medication, felt confused and returned to bed, hoping to sleep a little more. When she awoke later in the morning, she saw that the bathroom window pane had been removed and her front door was ajar. She walked through her home and discovered numerous items had been taken, including her purse with money and credit cards inside, her jewelry box, a ceramic figurine and her car. J.S. found her jewelry box in the garage. She also found some DVD's in the garage,

including “Double Jeopardy,” which her daughter had recently purchased on the internet and, the night before, had been in the living room under the television.

Officer Tomas Ramirez of the Pomona Police Department responded to J.S.’s home to investigate the burglary. He dusted for fingerprints inside the home and in the garage. Officer Ramirez lifted one print from the jewelry box and one print from the DVD case for the movie “Double Jeopardy.” J.S. told the police both of those items had been inside the house previously. Officer Ramirez prepared latent print cards for the prints and turned them into the crime scene division for analysis.

Detective Robert Anderson, a 21-year veteran with the Pomona Police Department, was assigned to investigate the three burglaries (the two auto center burglaries and the one at J.S.’s home), all of which had taken place within a short distance and within a couple of months of one another. Adam MacDonald, a crime scene investigator with the Pomona Police Department, reviewed and analyzed the latent print cards prepared by Officer Ramirez. MacDonald determined that the print lifted from the DVD case was defendant’s left thumbprint. The identification of defendant as a suspect in the burglaries was provided to Detective Anderson.

Responding to a dispatch call and a BOLO (Be On the Lookout) flyer regarding defendant put out by Detective Anderson, Officer Rick Aguiar reported to the E-Z Storage facility located on Garey Avenue in the City of Pomona on May 7, 2010. Officer Aguiar found defendant sitting in his storage unit (Unit A-90), which he had rented in March 2010. Defendant was arrested without incident.

During a search of defendant’s storage unit, four screwdrivers and a shaved key, commonly used as a tool to steal cars, were recovered. Detective Anderson showed the recovered screwdrivers to G.K., who identified them as his tools, noting that the paint on two of the screwdrivers was paint he used in his shop. G.K. also explained that he had located several of the items stolen from him in the alley near his shop, which was also right next to Unit A-90 of the E-Z Storage facility.

Defendant was thereafter charged by information with three counts: first degree residential burglary in violation of Penal Code section 459[1], second degree commercial burglary (*ibid*.), and receiving stolen property (§ 496, subd. (a)). It was also specially alleged as to all counts that defendant had suffered a prior strike conviction within the meaning of sections 1170.12 and 667, subdivision (b), and had served three prior prison terms (§ 667.5, subd. (b)). As to count 1, it was further alleged defendant had suffered a prior serious felony (§ 667, subd. (a)(1)). Defendant pled not guilty to all charges.

On the first day of trial and before the court had an opportunity to rule on the prosecution's motion to admit prior crimes evidence pursuant to section 1101, subdivision (b), defendant offered to admit to two prior convictions, one for residential burglary and one for receiving stolen property. Defense counsel advised the court: "We're prepared to admit the convictions to avoid the fact pattern coming in." The court granted the motion on that basis. A stipulation was read to the jury stating, in pertinent part, that defendant was convicted of first degree residential burglary in 1991 and for receiving stolen property in 1995.

The prosecution then put on the testimony of J.S., G.K., Detective Anderson, Officer Ramirez, and Adam MacDonald, as well as several additional witnesses. During the prosecution's case-in-chief, the prosecutor sought to introduce testimony that a defense expert had gone to the Pomona Police Department to review the latent print cards. Defense counsel objected that such testimony, if proper at all, should only be allowed during the prosecution's rebuttal. The court ultimately indicated its intent to allow such evidence over the defense objection. The parties eventually agreed to a stipulation, after scheduling issues arose with the prosecution witness. Defense counsel repeatedly reiterated his objections to the admission of such evidence, but agreed to stipulate only to the fact that a defense fingerprint expert had gone to view the latent print card. The stipulation provided: "Pomona crime scene investigator Sheri Orellana, was called, duly sworn, and testified that a fingerprint expert came to the Pomona Police

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1 All undesignated statutory references are to the Penal Code.

Department on behalf of the defendant and that the defense fingerprint expert examined the latent print card that Officer Tomas Ramirez lifted from the . . . burglary of [J.S.'s] home."[2] The stipulation was read to the jury at the close of evidence.

Defendant testified in his own defense. He denied generally the charges against him and specifically testified that he had never been inside J.S.'s home or G.K.'s business office and had not burglarized either of them. He said his prints should not have been found in J.S.'s home because he was never there. He conceded he was familiar with the general neighborhood where J.S.'s home and G.K.'s business were located and that he did rent Unit A-90 at the E-Z Storage facility located in that same area. Defendant also said that back in the days when he was making mistakes and bad decisions, he knew enough to wear gloves during a burglary in order to not leave fingerprints behind, and also that he did not know anything about "shaved keys" because he knew how to start a car ignition with a screwdriver.

Defendant further admitted he was having financial difficulties despite working two part-time jobs and that he did sometimes stay overnight in his storage unit. He said he found two of the screwdrivers the police claimed were stolen. Defendant said he simply found them lying in the alley outside his storage unit one evening. He testified he purchased the other tools at Walmart with his sister. Defendant's sister testified and corroborated defendant's testimony that she went to Walmart with her brother and they purchased screwdrivers and other items, like a cot which defendant had in his storage unit.

During cross-examination, the prosecutor impeached defendant with his prior convictions, including the two convictions which were the subject of the stipulation read to the jury at the beginning of trial.

Over defense objection, the court agreed to give CALCRIM No. 361 (defendant's failure to explain or deny evidence). Following deliberations, the jury returned a verdict

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[2] The street address of the victim's home has been deleted from the language of the stipulation for privacy reasons.

finding defendant guilty on all three counts and finding all special allegations true. A bifurcated court trial on the priors was held, with the court finding true all allegations regarding defendant's prior strikes and prison terms.

The court sentenced defendant to a total state prison term of 21 years 4 months, calculated as follows: the upper term of six years on count 1 (first degree residential burglary), doubled pursuant to sections 1170.12 and 667, subdivision (b); a consecutive term on count 2 (second degree commercial burglary) of one-third the midterm, or eight months, also doubled because of the prior strike conviction; and an additional consecutive five-year term on the prior serious felony allegation, plus one year each for the three prior prison terms. The court stayed sentence on count 3 pursuant to section 654, awarded defendant 166 days of custody credits and imposed various fines. This appeal followed.

DISCUSSION

1. The Stipulation Regarding Prior Crimes

Defendant contends the trial court erred in allowing the admission of prior crimes evidence by the prosecution. We need not decide the issue, because even if it were error to admit the evidence, defendant invited such error. (*People v. Harrison* (2005) 35 Cal.4th 208, 237; *People v. Riel* (2000) 22 Cal.4th 1153, 1214.) "'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 [defense counsel's affirmative joinder in request to challenge prospective juror deemed invited error]; accord, *People v. Williams* (2008) 43 Cal.4th 584, 629.)

The prosecution filed a pretrial motion seeking the admission of prior convictions suffered by defendant in order to establish intent. On the first day of trial, the court entertained argument on the motion. Defense counsel stated, "Yes. May I be heard briefly?" The prosecutor interrupted and clarified that while the motion referenced three burglaries, he sought to introduce only two convictions. Defense counsel then said:

"We're prepared to admit the convictions to avoid the fact pattern coming in." The prosecutor responded by stating he would be willing to draft an appropriate stipulation and then clarified that the two convictions to be admitted were for residential burglary and receiving stolen property.

Defense counsel repeated his position: "We're good with the convictions, I just -- I would like to avoid the jury hearing specific facts having the People actually prove up those cases." Without any further argument or discussion of the merits of the motion, the court then ordered the prosecution motion would be granted as to the convictions only and the prosecutor was to draft an appropriate stipulation agreeable with the defense. The record reflects that defense counsel preempted any argument or ruling by the court on the merits of the prosecution motion, affirmatively offering to stipulate to the admission of defendant's two prior convictions. Under the doctrine of invited error, defendant cannot now complain the court erred in admitting the two convictions that defendant specifically consented to admit by way of stipulation.

2. The Stipulation Regarding Defense Fingerprint Expert

Defendant next contends the court erred in admitting evidence that a defense expert examined the latent print card lifted from the DVD case. The defense did not call this expert as a defense witness. Defendant contends it was error to admit evidence that his retained expert examined the latent print card because it allowed the prosecution to argue the inference that the defense expert did not testify because the expert concluded the print was defendant's, which defendant argues was prejudicial and improper. We disagree.

As a preliminary matter, defendant's objection to the admission of this evidence was duly preserved, despite the fact that the evidence was received by way of a stipulation. The court indicated its decision to allow the testimony during the prosecution's rebuttal over any defense objection, and then, due to scheduling issues with the rebuttal witness, the parties were encouraged to present a stipulation. Defense counsel repeated his objections on the record (Fifth Amendment and confidentiality/work product), consistent with his prior argument against the evidence, and also raised them

when the evidence was mentioned several times by the prosecutor during his closing argument. Thus, the objection was preserved.

The contested evidence is this stipulation read to the jury: "Pomona crime scene investigator Sheri Orellana, was called, duly sworn, and testified that a fingerprint expert came to the Pomona Police Department on behalf of the defendant and that the defense fingerprint expert examined the latent print card that Officer Tomas Ramirez lifted from the . . . burglary of [J.S.'s] home." The stipulation does not encompass any information that could reasonably be deemed work product. It consists merely of a factual statement attested to by a prosecution witness as to her personal observations in providing the latent print cards to the defense expert for review. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 354-355 [rejecting work-product objection to admission of evidence that prosecution witness had turned over evidence to defense lab for testing].)[3]

As for the prosecutor's arguments regarding the import of the stipulation during closing, the law is well-settled that a prosecutor may fairly comment "on the state of the evidence *or on the failure of the defense to introduce material evidence or to call logical witnesses*." (*People v. Brady* (2010) 50 Cal.4th 547, 566, italics added; accord, *People v. Lewis* (2009) 46 Cal.4th 1255, 1304.) The prosecutor here started to make the argument that the jury could draw a reasonable inference from defendant's failure to present his expert who had viewed the latent print cards. When defense counsel raised his objections, the prosecutor explained to the jury that the defendant did not have any burden of proof on the fingerprint evidence, only that they could consider whatever inference they deemed reasonable from the defense's failure to call the expert as a witness. Defendant has failed to show this was improper or resulted in undue prejudice.

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3 To the extent defendant argues before this court that the evidence was also improper hearsay, we reject that argument as well on the grounds that that objection was not preserved below, and in any event, no hearsay is contained within the scope of the stipulation.

3. CALCRIM No. 361

a. The instruction was properly given.

Defendant further argues it was error for the trial court to instruct the jury with CALCRIM No. 361. We review a claim of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217; *People v. Burch* (2007) 148 Cal.App.4th 862, 870 [validity and impact of jury instructions reviewed independently because "question is one of law and the application of legal principles"]; see also *People v. Smith* (2008) 168 Cal.App.4th 7, 13 [propriety of jury instructions determined from the entire charge from the court and not from consideration of specific instructions in isolation].)

The version of CALCRIM No. 361 given by the court provided: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."[4] We find no error in the giving of this instruction, because the prosecutor was entitled to argue that defendant failed to deny or credibly explain why his thumbprint was found on a DVD case in J.S.'s garage.

Defendant testified in his own defense and denied entering or burglarizing J.S.'s home. Defendant testified he would have worn gloves if he had entered J.S.'s house to burglarize it. In response to a question on direct examination asking if he had any explanation for how his thumbprint "might have arrived in the garage" on the DVD case, defendant responded: "Honestly, I don't know, sir." On cross-examination, defendant

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[4] This was the language of CALCRIM No. 361 before the April 2010 revision. The current version of the instruction provides that the People must prove *the defendant* guilty beyond a reasonable doubt, instead of the former language of prove *each element of the crime* beyond a reasonable doubt. Defendant does not raise any issue specific to this revised language, and the difference in language does not affect our resolution of the issue.

was asked the following question: "Is there any reason why your prints would be inside [J.S.'s] garage?" Defendant responded: "They shouldn't be. Because I was never there."

It is error to instruct with CALCRIM No. 361 if a defendant does not fail to explain or disclose any facts within his knowledge that would have shed light on the crime (*People v. Saddler* (1979) 24 Cal.3d 671, 682-683 (*Saddler*)); or testifies to a version of events that contradicts the prosecution case (*People v. Marks* (1988) 45 Cal.3d 1335, 1346); or fails to recall events (*People v. De Larco* (1983) 142 Cal.App.3d 294, 309). Therefore, trial courts must proceed with caution in deciding whether to give this instruction. This case, however, is the paradigm for instructing with CALCRIM No. 361.

Defendant never denied the thumbprint was his, or offered evidence that it was not his thumbprint, or testified to a version of the events that contradicted the prosecution's case in any respect, other than to generally deny he entered and burglarized J.S.'s home. Defendant could reasonably be expected to know how his thumbprint got on the DVD case, because his thumb goes wherever he goes and does not wander off on its own. If defendant had denied his print was on the DVD case, explaining, for example, that he had cut his left hand and was wearing a bandage that covered his thumb at the time of the burglary, or if he had offered an alternative explanation why his print was on the DVD case, for example, that he worked at a DVD distribution center from which many copies of "Double Jeopardy" were delivered to internet sales sites, then it would have been improper to give CALCRIM No. 361 because defendant would have testified to a version of events which contradicted the prosecution case. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.) The prosecutor no doubt agreed with defendant's testimony that his prints should not have been inside the garage; indeed, the overall purpose of the trial was to convict defendant for being in the victim's house and garage when he should not have been there. The court properly instructed the jury they could consider defendant's failure to explain why his print was on the DVD case, since it should not, and would not, have been there if he had not been there himself.

b. Even if there were any error, it was harmless.

Even if we were to find it was error to give the instruction, any error was harmless because it was not reasonably probable defendant would have obtained a more favorable result in the absence of the instruction. (*Saddler*, *supra*, 24 Cal.3d at pp. 683-684 [applying *Watson*[5] harmless error analysis to alleged error in giving CALJIC No. 2.62, predecessor instruction to CALCRIM No. 361]; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471-1472.) The text of CALCRIM No. 361 provides language beneficial to defendant. It specifically warns the jury that any failure to deny or explain "is not enough by itself to prove guilt" and then reiterates that the burden remains with the prosecution to prove all elements beyond a reasonable doubt. The instruction contains discretionary language stating that the jury "may" consider any purported failure to deny or explain. Jurors are presumed to have followed the law. (*People v. Williams* (1995) 40 Cal.App.4th 446, 456.)

Moreover, while the prosecutor began to argue (before defense objections) the jury could infer the print was defendant's because the defense did not call as a witness the defense expert who examined the print, the prosecutor did *not* argue that defendant failed to explain or deny the existence of his thumbprint on the DVD case. The prosecutor did not raise or highlight CALCRIM No. 361 in this regard at all. Further, there was solid circumstantial evidence of defendant's guilt. Defendant's argument that simply giving the instruction would make the jury disregard defendant's testimony in its entirety and "blindly accept" the prosecution's fingerprint evidence as infallible is a conclusion without any logical support, and we reject it.

4. Calculation of Custody Credits

Finally, defendant contends the court miscalculated the amount of custody credits to which he was entitled by one day. Respondent concedes the error. We agree defendant is entitled to one additional day of credit, for a total of 167 days. The judgment and abstract of judgment shall be modified accordingly.

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5 *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

DISPOSITION

The judgment is modified to reflect total presentence custody credits of 167 days, instead of 166 days. The trial court is directed to prepare a modified abstract of judgment reflecting the modification and to transmit a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.; Concurring and Dissenting

I concur in the opinion except the Discussion part 3.a. in which the majority concludes that it was proper to instruct the jury with CALCRIM No. 361. The instruction as given provided in pertinent part: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating the evidence."

CALCRIM No. 361 applies only when there is evidence within a defendant's knowledge, which he fails to explain or deny. (*People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*).)[1] A "contradiction is not a failure to explain or deny." (*Ibid*.) "'No inference can be drawn if defendant does not have the knowledge necessary to explain or deny the evidence against him. [Citations]'" (*Id*. at p. 680.) Applying these principles, in *People v. De Larco* (1983) 142 Cal.App.3d 294 (*De Larco*), the court held it was error to instruct jurors with an instruction similar to CALCRIM No. 361 in the defendant's burglary trial even though there was evidence that the defendant's fingerprint was found on a flashlight in a burglarized store. (*De Larco*, at p. 309.) The defendant had told officers he had never seen the flashlight and had not committed the burglary. (*Id*. at p. 300.) The court reasoned in part that if the defendant "denied having been in the shop that evening, he could not disclose any further facts that would shed light on his innocence." (*Id*. at p. 309.)

As in *De Larco*, here it was error to instruct the jury with CALCRIM No. 361. Defendant testified that he did not burglarize J.S.'s home and that he did not know why his fingerprint was on a DVD case found in her garage. He could not disclose any "further facts that would shed light on his innocence." (*De Larco, supra*, 142 Cal.App.3d

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[1] In *Saddler*, the court considered CALJIC No. 2.62. But the reasoning applied to CALJIC No. 2.62 equally applies to CALCRIM No. 361. (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067.)

at p. 309.) Stated otherwise, if defendant's testimony that he was not in J.S.'s home were believed, it would not be reasonable to expect him to know how his fingerprint was found on a DVD in J.S.'s garage. As our high court cautioned "[n]o inference can be drawn if defendant does not have the knowledge necessary to explain or deny the evidence against him." (*Saddler, supra,* 24 Cal.3d at p. 680.)

A DVD case is not the type of item defendant could have touched only in J.S.'s home such as a doorknob or fixture. To find that defendant's failure to explain why his fingerprint was on the DVD was within defendant's knowledge, one must assume that defendant was inside J.S.'s home and touched the DVD. Otherwise, it would be unreasonable to expect a person to remember every DVD he or she ever touched.

The assumption that defendant was in J.S.'s home is improper because the test for whether CALCRIM No. 361 should be given is not whether a defendant's testimony is believable. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) Instead, the instruction may be given only when a defendant fails to explain or deny matters within his or her knowledge. (*Ibid*.) Here, absent the improper assumption, there was nothing within defendant's knowledge, which he failed to explain or deny. The instruction therefore should not have been given. (*Saddler, supra,* 24 Cal.3d at p. 680; *People v. Kondor* (1988) 200 Cal.App.3d 52, 57; *People v. Peters* (1982) 128 Cal.App.3d 75, 85.)

FLIER, J.