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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHRYSTIAN M. BAUTISTA, Defendant and Appellant.	2d Crim. No. B278597 (Super. Ct. No. YA094190) (Los Angeles County)

A jury convicted Chrystian M. Bautista of two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)), one count of possession of methamphetamine (Health & Saf. Code, § 11377), and one count of possession of drug paraphernalia (Health & Saf. Code, § 11364). The trial court suspended execution of concurrent four-year sentences on the burglary convictions, and placed Bautista on five years of formal probation. Bautista contends: (1) the court should have granted his motion for judgment of acquittal on the two burglary charges, (2) there was insufficient evidence that he neither owned nor lacked consent to take the property at issue, (3) the court should

have granted his request to instruct the jury on a mistake-of-fact defense, (4) the court should have barred evidence of prior conduct as irrelevant to his intent to steal, and (5) the court erroneously reduced the prosecution's burden of proof by labeling his prior conduct as an "alleged attempted burglary." We affirm.

BACKGROUND

Bautista moved into his mother and stepfather's house in the fall of 2015. They told him he could stay until he found a job. In mid-March 2016, his mother said he had to leave by the end of the month if he did not find a job. On March 31, his mother told him he could not live at the house any longer and that he was not allowed to be there. He removed his belongings later that day.

Over the next four weeks, Bautista entered his parents' house almost daily, without their permission, to take showers and to eat. His mother did not report the entries to police. She believed he had a key to the house.

On April 27, a television was missing from the house when Bautista's mother arrived home from work. The bathroom window was open. She found two notes in Bautista's handwriting, one addressed to her and one to her husband. The note to Bautista's stepfather read: "After seeing 2 what lengths you guys will go to not help me out . . . with at least showering or eating after most memorably, kicking me out, of the house I grew up in . . . . [I]t is interesting how you, now married, will kick me out and do the most 2 keep me down as I get up. [¶] Good thing you don't have any more kids 2 kick out and kick down. Welcome home . . . the one I grew up in."

Two weeks later, Bautista's mother changed the locks to the house. The next day, she noticed a hole had been drilled

underneath the new lock. Around 1:00 a.m. on May 13, she heard her car alarm. She went outside and saw Bautista trying to get into the trunk of her car. He left, dropping a pillow on the sidewalk, but returned and confronted his mother a few minutes later. He then left again.

The next day, Bautista was inside the house when his mother came home. His belongings were in the front yard. She called the sheriff's department and waited in her car. After Bautista left, she went inside and noticed that money and food were missing. A deputy arrested Bautista later that day, and found two mirrors belonging to his stepfather in his luggage.

Bautista admitted that he took the television from his parents' house on April 27. He said he lent it to a friend and planned to return it. Police recovered the television from Bautista's friend.

DISCUSSION

Motion for judgment of acquittal

Bautista contends the trial court should have granted his motion for judgment of acquittal on the two burglary charges because he had a right to enter his parents' house. We disagree.

A trial court may grant a motion for a judgment of acquittal "if the evidence then before the court is insufficient to sustain a conviction." (Pen. Code, § 1118.1.) When deciding the motion, the court views the evidence in the light most favorable to the prosecution, and determines whether substantial evidence supports each element of the crime charged. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132.) "The question 'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.' [Citation.]" (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) This court applies

the same standard, and we independently determine whether the evidence can sustain a verdict. (*Ibid*.)

A burglary is "an entry [that] invades a possessory right in a building . . . committed by a person who has no right to be [there]." (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) Even if that person enters with consent, a burglary conviction will stand if the person "does not have an unconditional possessory right to enter." (*People v. Pendleton* (1979) 25 Cal.3d 371, 382.) Thus, to sustain the burglary convictions here, the prosecution must show that Bautista did not have the unconditional possessory right to enter his parents' home at the time of his entries. (*People v. Davenport* (1990) 219 Cal.App.3d 885, 892.)

The trial court properly denied Bautista's motion for judgment of acquittal on the two burglary charges because he did not have an unconditional possessory right to enter his parents' home. Bautista's mother told him he was not allowed in her home after March 31. In the notes he left on April 27, Bautista admitted he had been kicked out of the house by his stepfather. He moved his possessions out of the house. These facts support the conclusion that Bautista no longer had a possessory interest in the house when he entered on April 27 to take his mother's television or on May 13 to take his stepfather's money, food, and mirrors. (*People v. Sears* (1965) 62 Cal.2d 737, 746, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509-510; see also *People v. Ulloa* (2009) 180 Cal.App.4th 601, 609-610; *People v. Gill* (2008) 159 Cal.App.4th 149, 161; *In re Richard M.* (1988) 205 Cal.App.3d 7, 17.)

Bautista alternatively contends he had a license to be in his parents' house. But even if true, his license granted him no possessory interest in the house. (*Spinks v. Equity Residential*

Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1040.) And even if a license included a right of entry, that right was conditional and could be revoked at any time. (*Ibid.*) As leaseholders, Bautista's parents had possessory rights to their home, including the right to exclude others from it. (*Danger Panda, LLC v. Launiu* (2017) 10 Cal.App.5th 502, 513.) Here, they revoked Bautista's right of entry when they kicked him out on March 31. Any consent that remained after that revocation was passive at best. That is not a defense to burglary. (*People v. Sigur* (2015) 238 Cal.App.4th 656, 667 [for consent to constitute a defense to burglary, owner must actively invite the defendant to enter, knowing the defendant's larcenous intent; "merely standing by or passively permitting the entry will not do"].) Because Bautista did not have an unconditional possessory right to enter his parents' residence as a licensee, he could be guilty of burglarizing their home. (*People v. Pendleton*, *supra*, 25 Cal.3d at p. 382; see also *People v. Frye* (1998) 18 Cal.4th 894, 953-955, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Bautista relies on out-of-state cases to urge us to hold that "[h]e . . . had greater rights [to his parents' home] by virtue of the familial relationship than a mere licensee." But California law is different. In this state, "[p]arents have a right of possession in their home superior to the right of their children in that home. [Citation.]" (*In re Richard M.*, *supra*, 205 Cal.App.3d at p. 17.) "'The law does not require them to submit to the . . . tyranny of a drug addict son who seeks to enter the home for the purpose of committing a theft.' [Citation.]" (*Ibid.*) The trial court's denial of Bautista's motion for judgment of acquittal was correct.

Ownership of property and consent to take it

Bautista next contends the prosecution presented insufficient evidence that the television was not his, and that his stepfather did not consent to the taking of his money, food, and mirrors. We disagree.

The convictions require proof that Bautista entered his parents' home with the intent to commit theft. (Pen. Code, § 459; *People v. Anderson* (2009) 47 Cal.4th 92, 101.) Theft requires proof the property was taken from his parents without their consent. (*People v. Davis* (1998) 19 Cal.4th 301, 305.) We review Bautista's contentions for substantial evidence. (*People v. Abilez* (2007) 41 Cal.4th 472, 508.) In doing so, we presume all facts and inferences in support of the judgment, and disregard any contrary findings. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) We neither assess witness credibility nor reweigh evidence. (*Ibid.*) Reversal is unwarranted if "a reasonable trier of fact could find [Bautista] guilty beyond a reasonable doubt. [Citation.]" (*Ibid.*)

The prosecution put forth sufficient evidence to support the jury's conclusion that the television did not belong to Bautista. On direct examination, his mother said the television was hers. That is enough. (*People v. Elliott* (2012) 53 Cal.4th 535, 585 [single witness's testimony is sufficient to support a conviction].)

Bautista's contention that the prosecution failed to show that his stepfather did not give him permission to take his money, food, and mirrors is misplaced. Our Supreme Court has long held that the prosecution need not prove the victim's lack of consent to a theft. (See, e.g., *People v. Davis* (1893) 97 Cal. 194, 195.) Rather, consent is an affirmative defense. (*People v. Brock*

(2006) 143 Cal.App.4th 1266, 1275, fn. 4; see generally *People v. Neidinger* (2006) 40 Cal.4th 67, 72-73.) Here, there was no need for the prosecution to show that Bautista's stepfather did not consent to the taking of his property. (*People v. Davis*, at p. 195.) If Bautista believed he had right to his stepfather's money, food, and mirrors, it was his burden to produce evidence to support that belief. (*People v. Romo* (1990) 220 Cal.App.3d 514, 519-520.) He did not do so.

Jury instructions on mistake of fact

Bautista claims the trial court should have instructed the jury regarding whether he mistakenly believed he could enter his parents' home after March 31 and whether he mistakenly believed the television he took on April 27 was his. (See CALCRIM No. 3406.) We disagree.

"[A] defendant, upon proper request therefor, has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of . . . guilt could be engendered. [Citation.]" (*People v. Sears* (1970) 2 Cal.3d 180, 190.) But the defendant "is not entitled to an instruction on a theory for which there is no supporting evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 868.) Rather, the trial court's "duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 73.)

"Substantial evidence is . . . evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) It may come from the defendant's testimony or any other evidence in the record.

(*People v. Thomas* (1968) 267 Cal.App.2d 698, 709, disapproved on another point by *People v. Mayberry* (1975) 15 Cal.3d 143, 158.)

"A mistake of fact occurs when a person understands the facts to be other than what they are. [Citation.]" (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 275.) A mistake of fact defense "'requires, at a minimum, an actual belief "in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act. . . ."' [Citations.]" (*People v. Givan* (2015) 233 Cal.App.4th 335, 343.) It applies to a wrongful entry if the defendant's mistaken belief was "'both actual and reasonable.'" (*Ibid.* [standard for general intent crimes]; *People v. Hill* (1967) 67 Cal.2d 105, 118 [wrongful entry committed with general intent].) It applies to a wrongful taking if the defendant simply held a good faith belief in the ownership of the property. (*People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11.) We independently review whether, in light of the evidence in the record, the trial court properly refused a proposed instruction. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

The trial court did not err when it refused Bautista's requested instruction because there was no evidence to support it. (*People v. Zamani* (2010) 183 Cal.App.4th 854, 885.) Bautista "did not testify at trial, so there is no direct evidence that he honestly and reasonably believed" he could enter his parents' home after March 31. (*People v. Brooks*, *supra*, 3 Cal.5th at p. 75.) And the circumstantial evidence shows that Bautista did not harbor this belief: He left notes recognizing that his parents had kicked him out, and he removed his belongings from the house. (Cf. *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [evidence of

defendant's mental state is "'almost inevitably circumstantial'"].) Testimony from Bautista's mother also shows that Bautista knew he could not enter the house: She told him to leave, that he could not live there any longer, and that he was not allowed to be in her home. She also changed the lock on the door. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 126 [victim's testimony can provide circumstantial evidence of defendant's belief].) That Bautista ignored these wishes and entered the house to bathe and eat does not render his belief reasonable. (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849 [belief unreasonable where defendant aware of contrary facts]; see *People v. Stewart* (1976) 16 Cal.3d 133, 140.)

There is also no evidence that Bautista believed the television he took was his. Bautista "presented neither circumstantial evidence of his state of mind [on April 27] nor evidence that controverted [his mother's] testimony regarding the [ownership of the television]." (*People v. Maury* (2003) 30 Cal.4th 342, 425.) The "only 'evidence' concerning his belief was his counsel's theory in closing argument." (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793, disapproved on another point in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.) But arguments by counsel are not evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1004.) And "[j]ury instructions are not to be given if they are based solely on conjecture and speculation. [Citation.]" (*People v. Gonzalez*, at p. 793.) The trial court properly refused to give CALCRIM No. 3406. (*People v. Zamani*, *supra*, 183 Cal.App.4th at p. 885.)

Evidence of prior conduct to prove intent

Over Bautista's objection, the trial court permitted Bautista's mother to testify about his attempt to open the trunk

of her car during the early morning hours of May 13. Bautista contends the trial court should have barred his mother's testimony as irrelevant. We disagree.

Evidence of a defendant's prior conduct is admissible to prove intent. (Evid. Code, § 1101, subd. (b).) To be admissible, "the uncharged act must be relevant to prove a fact at issue [citation] . . . ." (*People v. Leon* (2015) 61 Cal.4th 569, 597-598.) Relevance depends on whether "'the uncharged misconduct [is] sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'" [Citation.]" (*Id*. at p. 598.) We review for abuse of discretion. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

The trial court did not abuse its discretion when it admitted evidence of Bautista's attempt to open the trunk of his mother's car. The attempt occurred in the driveway just hours before he entered the house and took his stepfather's property. That evidence supports the inference that Bautista had the intent to steal when he entered the house. (*People v. Scott* (2015) 61 Cal.4th 363, 398-399 [proximity in time and location between charged offense and uncharged act renders the latter probative of intent]; *People v. Harris* (2013) 57 Cal.4th 804, 842 [same]; *People v. Petty* (1981) 127 Cal.App.3d 255, 260-262 [same].)

This case is unlike *People v. Kronemyer* (1987) 189 Cal.App.3d 314, disapproved on another ground by *People v. Whitmer* (2014) 59 Cal.4th 733, 739-741, on which Bautista relies. In *Kronemyer*, the prosecution introduced evidence that the defendant had previously cashed the client's tax refund checks as proof he engaged in prior embezzlements. (*Id*. at p. 346.) The Court of Appeal held that the trial court erred in admitting the evidence because its probative value did not

outweigh the danger of undue prejudice. (*Id.* at p. 348.) Additionally, the Court of Appeal faulted the trial court because it did not instruct the jury it had to find that the defendant intended to steal the tax refunds; rather, it told the jury that the defendant's acts were crimes that required that intent. (*Ibid.*)

Here, Bautista does not argue that the admission of his prior conduct was unduly prejudicial but rather that it was irrelevant. Moreover, unlike the *Kronemyer* trial court, the trial court here told the jury it "may consider [the evidence of Bautista's attempt to enter his mother's car] only if the People have proved by a preponderance of the evidence that [Bautista] in fact committed the uncharged offense." It also instructed the jury that burglary requires entry with the intent to commit theft. The jury was thus free to credit or reject the prosecution's theory that Bautista had the intent to steal when he attempted to open the trunk of his mother's car. The evidence was properly admitted. (*People v. Harris*, *supra*, 57 Cal.4th at p. 842.)

Jury instruction on intent

Lastly, Bautista faults the trial court for labeling his conduct during the early morning hours of May 13 as an "attempted auto burglary" when it instructed the jury on considering his prior conduct as evidence of intent. He claims the instruction relieved the prosecution of its burden to prove his intent to steal during the May 13 burglary. We disagree.

The trial court instructed the jury: "The People presented evidence that [Bautista] committed the offense of attempted auto burglary that was not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that [Bautista] in fact committed the uncharged offense. . . . [¶] . . . [¶] If you decide that [Bautista]

committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether . . . [¶] [he] acted with the intent to steal in this case. [¶] . . . [¶] If you conclude that [Bautista] committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that [he] is guilty of burglary. The People must still prove each charge beyond a reasonable doubt." (See CALCRIM No. 375.) Bautista did not object.

Initially, we reject the Attorney General's contention that Bautista forfeited his claim of instructional error because he did not object to the instruction at trial. "[E]ven without a request, a defendant may argue the court erred in instructing the jury 'if the substantial rights of the defendant were affected thereby.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 993; see Pen. Code, § 1259.) If the error Bautista claims occurred, his substantial rights were affected. (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1420-1421.)

But Bautista's claim fails on the merits. "[N]othing in the [trial court's] instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." (*People v. Prieto* (2003) 30 Cal.4th 226, 248.) To the contrary, the "instructions properly instructed the jury on its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof." (*Ibid.*) There was thus "'no possibility' [the court's instruction] reduced the prosecution's burden of proof in this case. [Citation.]" (*Ibid.*; see also *People v. Holt* (1997) 15 Cal.4th 619, 662 [jurors presumed to understand and follow instructions].) There was no error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Hector M. Guzman, Judge

Superior Court County of Los Angeles

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