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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. ARTIN SIMONIAN, Defendant and Appellant.	B280907 (Los Angeles County Super. Ct. No.PA085410)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Remanded with instructions.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Artin Simonian of burglary and felony vandalism, based on his forced entry into a residence by breaking two glass doors. Appellant claims the jury lacked sufficient evidence to find that he entered the residence with the intent to commit theft, and therefore that his conviction for burglary must be reversed. He also contends the trial court erred by applying an incorrect standard when it denied his motion for a new trial. Finally, he requests correction of several errors in the abstract of judgment.

We hold that sufficient evidence of intent supports the jury's verdict. However, we conclude that the trial court employed the incorrect standard when ruling on appellant's new trial motion. We therefore reverse the court's order denying that motion and remand to allow the trial court to properly consider it. Additionally, we direct the trial court to correct the errors in the abstract of judgment, to the extent they are relevant following remand.

PROCEDURAL HISTORY

The Los Angeles County District Attorney charged appellant in an amended information with one count of first degree residential burglary (Pen. Code, § 459; count one)[1] and one count of felony vandalism causing over $400 in damages (§ 594, subd. (a); count two). The amended information further alleged that appellant had a prior serious felony conviction for first degree burglary (§ 667, subd. (a)(1)) that was also a strike under the Three Strikes law (§§ 667, subd. (d), 1170.12, subd. (b)). It was also alleged that appellant served two prior prison terms

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

(§ 667.5, subd. (b)); that allegation was later dismissed at the prosecutor's request.

In November 2016, appellant pled not guilty by reason of insanity and the court ordered a psychiatric evaluation. The court received evaluation reports from experts selected by both parties. In January 2017, appellant withdrew his insanity plea. The court indicated on the record, and appellant agreed, that he was withdrawing the insanity plea based on the results of both expert reports and the investigation conducted by appellant's attorney. Appellant pled not guilty to both counts of the amended information and the case proceeded to trial.

The jury found appellant guilty on both counts. In a bifurcated court trial, the court found the prior conviction allegation to be true. The court sentenced appellant to an aggregate term of 13 years in state prison. Appellant timely appealed.

FACTUAL BACKGROUND

The following evidence was adduced at trial.

A. *Prosecution evidence*

Victim A.T. (victim) testified that he lived in one of four houses on a cul-de-sac in Sun Valley. His property is encircled by a fence. When he left for work on December 31, 2015, he locked his doors and set his home alarm system. A.T. did not give the appellant permission to enter his home.

Sabatino Arbucci[2] lived in another house in the cul-de-sac. across the street from the victim. On the afternoon of December 31, 2015, about eight members of the Arbucci family were gathered at the residence for a New Year's Eve celebration.

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[2] For clarity, we refer to members of the Arbucci and Thomassian families by first name.

Around 4:00 p.m., the doorbell rang and Sabatino's brother, John, answered it. John testified that he saw a man standing at the door whom he did not recognize; he identified that man as appellant at trial. John asked, "Can I help you?" Appellant said he was looking for his sister and that "she lives in a white house on top of a hill."[3] John replied, "I'm sorry. Your sister doesn't live here. Have a nice day." John then closed the door.

John told his family what had happened and that the man seemed "very suspicious." While the door was open, he noticed a white BMW parked in the street in the middle of the cul-de-sac. In addition to the white BMW, there were several cars parked around the cul-de-sac, including about six parked in front of the Arbucci home.

Sabatino testified that when John came back into the kitchen, he said there had been a man at the door looking for someone, and he seemed a "little strange." After that, several members of the Arbucci family began looking out the front windows of the home to watch appellant. Someone remarked that appellant was going to all the other neighbors' houses and knocking on the doors. When Sabatino looked out, he saw appellant walk up the sidewalk and enter the gate of the victim's house. He saw appellant approach the front door and try to open it, then walk around the side of the victim's house. As he went, appellant was looking around and trying doors. He went around one side, then the other. About five minutes later, Sabatino heard the alarm from the victim's house go off.

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[3] The police officer who interviewed John later that evening testified that John told him appellant stated he owned a residence in the area, but did not know where it was (not that he was looking for his sister).

John's son, Theo, also looked out the window and saw appellant, dressed in a black hooded sweatshirt and jeans, just "pacing around." He then saw appellant walk to the back of the victim's house, come back out to the front, and continue to walk back and forth for several minutes. Appellant went around back again, and after about three to five minutes, Theo heard the alarm. He then saw appellant coming back out of the property.

Courtney, Theo's wife, testified that the white BMW was parked "haphazardly" in the street. She saw appellant standing near his car; then he walked over to some of the Arbucci family's cars and looked inside. Appellant went back to his car and then returned to the victim's house. Courtney "kept seeing him go duck behind this corner, go around like he was going to the side of the house or back, and he would be back there for a couple of long periods of time, and then come back out." After the house alarm went off, she saw appellant walking back toward his car.

Several members of the Arbucci family called the police to report the incident with appellant. John testified that he first called four or five minutes after his interaction with appellant at the front door. About ten minutes later, when they heard the alarm go off, John's wife called 911.

After the alarm went off, Sabatino and Theo went out to the front of the Arbucci home. They saw appellant coming out of the victim's perimeter gate. Another neighbor, Viken Thomassian, was also outside; Sabatino and Theo walked over to Viken. Sabatino testified that appellant approached the group and, while pointing at the victim's house, told them he was looking for his sister's residence and that "someone had told him his sister lived in a big white house up on the hill." Sabatino responded, "No one lives there. There is a doctor from Indonesia

that lives there. This is not your sister's home." Appellant stated that his sister was a doctor too. Sabatino then told appellant that he was in the wrong neighborhood and that the police had been called and he should leave. Appellant did not respond to the statement about the police, he just continued to say that he was looking for his sister's house. According to Theo, they kept telling appellant to leave and he "kept pleading that, 'no, this is my sister's home.'"

Appellant also spoke to Viken in Armenian. The entire interaction lasted about three or four minutes. Courtney recorded the interaction on her phone. She testified that after Sabatino and Theo went outside, she started recording because she was worried "something bad was going to happen." The cell phone video, which did not capture any audio, was played at trial.

After several minutes, Sabatino and Theo decided the conversation with appellant was "going nowhere" and they went back inside. They looked out the window and saw appellant standing in the middle of the cul-de-sac; appellant then engaged Viken in further conversation. Most members of the Arbucci family then resumed their own activities. At some point, someone mentioned that appellant was leaving in his car.

Officer Mike Foster of the Los Angeles Police Department (LAPD) testified that he responded to a call and arrived at the cul-de-sac about 7:30 p.m. on December 31, 2015. He walked around to the back of the victim's house and saw that the glass door leading into a sunroom was shattered. In addition, he saw that an interior sliding glass door leading from the sunroom into the kitchen was also shattered. Foster called for additional backup units and a helicopter to search the area. There was a

brick inside the sunroom, which he believed was used to shatter the outer door.

The victim returned home around 8:00 p.m. and saw a helicopter shining a searchlight on his home. He discovered the two glass doors completely shattered. He did not find anything missing from his home. At the time, he had security cameras that were visible from the street, but they were not working.

LAPD Officer Aaron Green also responded to the scene that evening and helped search the residence. He was on the scene for 30 to 45 minutes At some point the helicopter left, and 20 to 30 minutes later, he saw appellant walking down the street back toward the victim's residence. Appellant was about 20 houses away from the victim's residence, which was not visible from appellant's location. There was a white BMW parked 75 to 100 feet away. When Green and his partner approached, appellant said he was knocking on doors looking for a female. Green could not remember if appellant specified who he was looking for. The officers detained appellant, and several members of the Arbucci family identified him as the man they had encountered earlier that day.

Appellant was transported to the police station, where he waived his *Miranda* rights and agreed to speak with Foster. Appellant stated he had used a brick from a stack in the victim's front yard to break the exterior door, then entered the sunroom and used a stool to break the sliding glass door and enter the residence. He walked around inside the residence, looking for his fiancée, but did not find her. Appellant denied removing any property from the residence, and said he exited the way he had come in. When asked if the residence belonged to him or his fiancée, appellant stated that it did not and he did not know to

whom it belonged. He told Foster that he returned to the location because "he was going to continue to look for his fiancée." Appellant also said that he had seen the helicopter when it shined its light on his car while he was driving, "so he drove in a different direction."

B. *Defense evidence*

The defense called as witnesses Viken and his wife, Shakeh, who also lived in the cul-de-sac. Shakeh was not at home at the time of the incident. She testified that the word for "some type of flower" in Armenian "can be used as a name of a woman."[4] Viken testified that he spoke to appellant in Armenian for three to four minutes after appellant came out of the victim's property. He did not provide any details of that conversation. He also saw appellant a few hours prior to the incident, standing behind the BMW. Viken looked at appellant and appellant said hello.

DISCUSSION

I. Substantial Evidence of Intent to Commit Theft

Appellant asserts that his burglary conviction was not supported by substantial evidence of his entry into the victim's home with the intent to commit theft. We disagree.

Burglary involves the act of unlawful entry accompanied by the specific intent to commit larceny or any felony. (§ 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) A defendant may be convicted of burglary upon entry with the requisite intent,

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[4] The defense also introduced evidence that a window in the front of the victim's house had etched flowers on the glass. In closing, defense counsel suggested that the flowers on the glass acted like a "beacon" and drew appellant to the victim's house to look for his sister.

regardless of whether any felony or theft actually is committed. (*People v. Montoya, supra,* 7 Cal.4th at pp. 1041–1042.) Here, the prosecution proceeded on a theory that appellant entered the victim's residence with the intent to commit a theft. Thus, the issue on appeal is whether there was sufficient evidence from which the jury could have inferred such intent.

"Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.) Whether the entry was accompanied by the requisite intent is generally a question of fact determined by the jury. (*Ibid.*) "Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal." (*People v. Nunley* (1985) 168 Cal.App.3d 225, 232.)

The appellate court's function is not to reweigh the evidence presented at trial or determine the credibility of the evidence or witnesses. (See *People v. Sanchez* (2003) 113 Cal.App.4th 325, 329–330.) Instead, "[a]n appellate court reviews the record in the light most favorable to the jury's determination," (*People v. Marks* (2003) 31 Cal.4th 197, 215), and determines if there is substantial evidence to support the finding. (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) """Evidence is substantial if it is reasonable, credible and of solid value."" (*People v. Tuner* (2004) 34 Cal.4th 406, 425.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce" from both direct and circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Here, appellant argues the evidence introduced at trial did not support a reasonable inference that he entered the victim's house with the intent to commit theft. In particular, he contends that he did not steal or move any property inside the house, he did not approach the house by stealth or otherwise conceal his actions, he did not have any burglary tools, and he did not flee the neighborhood when the victim's alarm sounded. He acknowledges numerous cases stating the proposition that "[b]urglarious intent can reasonably be inferred from an unlawful entry alone." (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786, citing *People v. Stewart* (1952) 113 Cal.App.2d 687, 691.) He argues, however, that in each of these cases, the court actually relied on other evidence supporting the intent to commit theft, in addition to an unlawful entry. (See, e.g., *Jordan, supra,* 204 Cal.App.2d at pp. 786-787 [items, including television, removed from home and placed on front porch]; *People v. Wolfe* (1967) 257 Cal.App.2d 420, 422 [a rifle and credit card were stolen from the house defendant entered]; *People v. Fitch* (1946) 73 Cal.App.2d 825, 827 [intent inferred from forcible entry and movement of item]; *People v. Martone* (1940) 38 Cal.App.2d 392, 393 [defendant used a wrench to break a hole in the glass on a store door and was apprehended with his arm inside the hole, attempting to unlock the door].)

We need not resolve whether unlawful entry, alone, could constitute sufficient evidence to support a finding of the requisite intent. Here, in addition to the unlawful entry itself, other evidence supports the jury's conclusion that appellant entered the residence with the intent to commit a theft. There was evidence that appellant was going to each house in the neighborhood, knocking on the doors and looking into parked cars. When John

answered the door, appellant stated he was looking for his sister. Appellant next approached the front door of the victim's home, which was unoccupied. After repeatedly walking back and forth between the front and back of the victim's home, appellant broke into the home through the back, out of view of the neighbors. He fled the home when the alarm sounded, then engaged the neighbors who had come out onto the street. He gave inconsistent explanations regarding his presence in the neighborhood to the neighbors and the police. He also admitted neither he nor his sister/fiancée owned the home. Additionally, he admitted attempting to avoid the light from the police helicopter. Finally, he was apprehended walking back toward the victim's house after dark and on foot, after the helicopter had left the area. Based on these circumstances, the jury was entitled to infer, as argued by the prosecution, that appellant engaged in a scheme to find an unoccupied home to burglarize, and to disguise this scheme by claiming he was looking for someone.

Appellant focuses heavily on the absence of certain facts, such as any evidence that he took or moved anything from the home, or used any burglary tools. While these factors can be relevant in assessing intent, they are not the only circumstances from which a jury might properly make such an inference. Further, appellant's entry of the victim's house from the rear and his flight from the house when the alarm sounded contradict his suggestion that he made no efforts at stealth or flight. (See *People v. Frye* (1985) 166 Cal.App.3d 941, 947 [considering unlawful entry and flight upon discovery]; *People v. Moody* (1976) 59 Cal.App.3d 357, 363 ["[E]ven if no crime was committed after entry into the structure, an intent to commit theft at the time of entry may be inferred from flight from the premises. [Citation.]"];

People v. Martin (1969) 275 Cal.App.2d 334, 339 [defendant entered through a broken window, failed to satisfactorily explain why he was at the premises or why he fled when the police arrived].)

Appellant also argues that his inconsistent statements and other conduct established that he was acting unreasonably, in a "confused, deluded, or otherwise mentally disturbed" manner, thus rebutting the prosecution's theory of a ruse. In other words, whereas an "apparently reasonable person who gave unreasonable explanations" might support an inference of larcenous intent, appellant was an unreasonable person giving unreasonable explanations, which could not support the same inference. We are not persuaded. None of the witnesses testified that appellant was acting disturbed, nor was there any evidence as to appellant's mental state. The jury was entitled to infer that appellant was confused and believed he was searching for someone, based on his statements to that effect and his unusual conduct, as defense counsel argued. But they were not required to reach this conclusion. They were also entitled to conclude, based on all of the evidence, that appellant engaged in this behavior in an attempt to conceal his true purpose for being in that neighborhood—to locate and burglarize an empty home. Appellant cites no authority suggesting otherwise. Accordingly, we find the jury's verdict was supported by substantial evidence.

II. Motion for New Trial

Appellant also contends the trial court abused its discretion in denying his motion for new trial based on an erroneous legal standard. We agree and conclude that remand is warranted.

A. *Factual background*

Following the close of the prosecution's case, defense counsel moved to dismiss pursuant to section 1118.1.[5] He argued that the evidence presented was insufficient to support a finding of an intent to commit a burglary. The court denied the motion, noting, "Is this the strongest 459 that ever was? No. But I do think there is enough for the jury to infer. They will determine what his actions and intentions were."

After trial and prior to sentencing, appellant filed a motion for new trial pursuant to section 1181, subdivision (6).[6] He argued that there was "no competent evidence to support a finding that Mr. Simonian entered the premises with the intent to commit a theft," citing *People v. Robarge* (1953) 41 Cal.2d 628 (*Robarge*). At the hearing, the court stated that the motion was "basically asking the court to revisit the 1118 motion, although this [motion] says 1181," and then queried, "Is that a typo?" Defense counsel responded, "I believe so, yes." The court then stated, "Okay, I wanted to make sure there wasn't some Penal Code section I was unaware of." After both sides briefly argued, the court stated, "[f]or the reasons I articulated during the trial, I do believe that there was sufficient evidence to go to the jury, that they could find beyond a reasonable doubt. They didn't have

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[5] Under section 1118.1, "the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

[6] Section 1181, subdivision (6) allows the court to grant a new trial when the verdict "is contrary to law or evidence."

to. They could. I felt there was enough to go. So the 1118 has been denied for those reasons, and for the same reasons I am going to deny the motion for a new trial. . . ."

B. *Analysis*

As an initial matter, we reject the Attorney General's assertion that appellant forfeited his right to appeal this issue when his counsel failed to object to the court's statements during the hearing. Appellant specifically argued in his moving papers that the court was required to independently examine the evidence under section 1181, which the court indicated it had read. Indeed, the Attorney General later relied on these facts to suggest that the trial court was aware of, and properly applied, the correct standard. As such, a finding of forfeiture is unwarranted here. (See *People v. Watts* (2018) 22 Cal.App.5th 102, 113 (*Watts*) [no forfeiture where "Watts repeatedly argued that the court had the ability to independently reweigh the evidence"].)

Next, we turn to appellant's substantive claim, that the trial court erroneously applied the standard for a motion pursuant to section 1118.1, rather than section 1181.

As our Supreme Court explained in *Porter v. Superior Court* (2009) 47 Cal.4th 125, 132 (*Porter*), in the trial court, "a defendant may attack the evidence against him in two ways. A motion under section 1118.1 seeks a judgment of acquittal for insufficient evidence. It may be made at the close of the prosecution's case or at the close of the defense evidence, before the case is presented to a jury. (§ 1118.1.) A motion under section 1181(6) seeks a new trial because the verdict is 'contrary to law or evidence.' The court performs significantly different tasks under these two provisions."

In ruling on an 1118.1 motion for judgment of acquittal, "the court evaluates the evidence in the light most favorable to the prosecution. If there is any substantial evidence, including all inferences reasonably drawn from the evidence, to support the elements of the offense, the court must deny the motion. [Citations.]" (*Porter, supra*, 47 Cal.4th at p. 132.) In considering this legal question, "'a court does not "'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]'" (*Ibid.*)

By contrast, in deciding a motion for new trial pursuant to section 1181, subdivision (6), "the trial court's function is to 'see that the jury intelligently and justly perform[ed] its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.' . . . The trial court's duty is to review the evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251, quoting *Robarge, supra*, 41 Cal.2d at pp. 633-634.) "Although the trial court is to be 'guided' by a presumption in favor of the correctness of the jury's verdict [citation], this means only that the court may not arbitrarily reject a verdict which is supported by substantial evidence." (*Ibid.*) "The trial court is not bound by the jury's determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence. [Citations.] Thus, the presumption that the verdict is correct does not affect the trial court's duty to give the defendant

the benefit of its independent determination as to the probative value of the evidence. [Citation.] . . . If the court finds that the evidence is not sufficiently probative to sustain the verdict, it must order a new trial." (*Id*. at pp. 1251–1252; see also *Porter, supra*, 47 Cal.4th at p. 133 ["the court extends no evidentiary deference in ruling on an 1181(6) motion," but rather "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt t*o the judge*"].)

Here, the court's comments during the hearing indicate that it applied the standard under section 1118.1 rather than the proper independent judgment standard pursuant to section 1181. The court appeared unclear as to the distinction between the two code sections. The court asked defense counsel whether the reference to section 1181 was a "typo" and was told that it was. Additionally, in ruling on the section 1181 motion, the court framed the issue as whether the evidence of intent was sufficient "to go to the jury," echoing the reasoning the court had applied during the prior section 1118.1 motion. There is no indication from the record that the court perceived or engaged in its duty to independently examine the evidence. On this record, we conclude that the trial court failed to apply the correct standard of review. (See *Watts, supra*, 22 Cal.App.5th at p. 111 [finding error where trial court denied new trial motion, stating that "'there was evidence to let the jury decide yes it was a gang case or no it wasn't. . . . Now whether it was or it wasn't, it's not for me to second guess the jury.'"].) This was an abuse of discretion by the trial court. (*People v. Knoller* (2007) 41 Cal.4th 139, 156, [trial court abused its discretion by denying motion for new trial based on "an incorrect legal standard"].)

The Attorney General asserts that any error was harmless because the trial court would have denied the motion even if it had employed the correct legal standard. We note that the trial court remarked when ruling on the section 1118.1 motion that the evidence supporting the burglary charge was not the "strongest." On this record, we find it prudent to remand to allow appellant the benefit of the trial court's independent evaluation of the evidence. Recently, in *Watts, supra*, 22 Cal.App.5th 102, Division One of this court reached the same conclusion, where the trial court had refused to reweigh the evidence or "second-guess the jury." The *Watts* court concluded that remand was appropriate "to allow the trial court to exercise its discretion in the first instance." (*Id*. at p.114; see also *Robarge, supra*, 41 Cal.2d at p. 628 [reversing and remanding to lower court].) We agree.

III. Corrections to the Abstract of Judgment

Appellant contends that the trial court should have awarded him 800 days of presentence custody credit instead of 797. The Attorney General agrees. In addition, appellant notes that the abstract of judgment reflects imposition of a $300 probation revocation fine, whereas the court orally imposed and stayed a $300 parole revocation fine. The Attorney General agrees that the abstract of judgment requires correction.

To the extent these orders remain applicable following remand and the trial court's reconsideration of the motion for new trial, we direct the trial court to issue an amended abstract of judgment reflecting the award of 800 days of presentence custody credit and a $300 parole revocation fine imposed under section 1202.45 and stayed, rather than a probation revocation fine under section 1202.44.

DISPOSITION

The judgment and order denying the motion for new trial are vacated and the matter is remanded for a new hearing consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.