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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JASON EARL GRAYSON, Defendant and Appellant.	B236379 (Los Angeles County Super. Ct. No. SA071865)

APPEAL from a judgment of the Superior Court of Los Angeles, Elden S. Fox, Judge. Affirmed.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jason Earl Grayson challenges his conviction for one count of burglary and two counts of attempted burglary. He demonstrates no error, and we affirm.

FACTS AND PROCEDURE

On May 27, 2009, someone entered Pascale Rothman's condominium building in Beverly Hills and drove away in Rothman's car. Rothman was home when the person entered and took her car, as Rothman accidentally had left her keys in the condominium-building door allowing easy entry. Appellant's fingerprints were found both inside and outside Rothman's car. A surveillance camera showed a nonresident enter the building wearing a baseball cap with a "B." In count 3 of an amended information, appellant was charged with the first degree burglary of Rothman (Pen. Code, § 459).[1] It was further alleged that another person, not an accomplice was present (§ 667.5, subd. (c)).

On August 11, 2009, Clara B. and Natalie M. lived in separate condominiums in the same condominium building in Burbank. Both condominiums had balconies which were several feet above ground level. At about 2:00 a.m. that day, Clara heard footsteps under her balcony. Neither Clara nor Natalie gave anyone permission to climb over her balcony. Trevor Rapp, who lived across from Clara and Natalie, saw appellant stand in front of one balcony (which appellant describes as Clara's) and then appellant went into the alley when a police car approached. After the police car drove away, appellant looked around and then approached another balcony. Appellant put on his gloves. Rapp saw appellant climb over two balconies, one of which appellant describes as Natalie's. To climb over the balconies, appellant, "put one hand up, the other hand up, another foot up and was able to get over the balcon[ies]." Appellant put his hands on a railing to help lift himself over the balconies.

Rapp called 911. Burbank Police Officer Ashley Sydbrook responded to Rapp's call and observed appellant on one of the balconies. Appellant was crouched down behind the balcony wall. In counts 4 and 5 of the amended information, appellant was charged with attempted first degree burglary (§§ 664, 459).

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[1] Undesignated statutory citations are to the Penal Code.

The hat worn by the person who entered Rothman's building was retrieved from Clara's and Natalie's residence on August 11, 2009, following appellant's arrest.

With respect to all counts, it was alleged that appellant suffered two prior serious or violent felony convictions or juvenile adjudications for robbery (§ 211) and making criminal threats (§ 422). It was further alleged that appellant did not remain free of prison custody for five years following his conviction for making criminal threats (§ 667.5, subd. (b)) and that a five-year enhancement should be imposed pursuant to section 667, subdivision (a). A jury convicted appellant of the substantive charges and found the priors true.

The court sentenced appellant to 25 years to life for the robbery of Rothman and ordered the other terms to run concurrently. The court dismissed the section 667, subdivision (a) and section 667.5, subdivision (b) allegations. The court dismissed both strikes as to counts 4 and 5 (attempted robberies) and ordered sentence on those counts to run concurrently to the 25-year-to-life sentence.

DISCUSSION

Appellant argues (1) the trial court erred in denying his motion for severance of count 3 (burglary of Rothman) from the remaining counts, (2) the convictions were not supported by substantial evidence, and (3) the court committed instructional error. As we explain, no argument has merit.

1. The Counts Were Properly Joined

Appellant's challenge to the trial court's rejection of his motion to sever count 3 from the remaining counts lacks merit. "[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) "[W]e consider the record before the trial court when it made its ruling. [Citation.] 'The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital

case.' [Citations.]" (*Id.* at pp. 1220-1221.) To establish error in the trial court's denial of a severance motion, a defendant must make a "'*clear showing of prejudice to* establish that the trial court *abused its discretion* . . . .' [Citations.]" (*Id*. at p. 1220.) A trial court abused its discretion only if its ruling falls outside the bounds of reason. (*Ibid*.)

Appellant cannot show severance was required. Evidence that the hat appellant wore during the May 27 burglary was retrieved from the August 11 attempted burglaries was cross-admissible. The charges were similar, and no charge was likely to inflame the jury against appellant. Contrary to appellant's argument, a weak case was not joined with a strong one. The evidence on all three counts was strong. Although appellant was not apprehended at the scene of Rothman's condominium on May 27, his fingerprints were found both outside and inside Rothman's car. Appellant was apprehended at the second location on August 11, confirming his identity. The trial court's denial of appellant's severance motion did not fall outside the bounds of reason. To the contrary, appellant fails to show any element supported his severance request.

2. Sufficiency of the Evidence

"In determining the sufficiency of the evidence to support a conviction, 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.] '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Luna* (2009) 170 Cal.App.4th 535, 539 (*Luna*).)

A. Count 3 -- Burglary

A burglary requires the unlawful entry into a building with the intent to commit any felony. (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273.)

The following evidence supported the burglary conviction. A man wearing a baseball hat entered Rothman's Beverly Hills condominium on May 27, 2009. Rothman's car was missing and when found, it contained appellant's fingerprints inside and outside the vehicle. Jurors could reasonably infer that appellant's fingerprints were

inside the car because he took the car. Rothman never gave appellant permission to drive her car, which was kept in an underground garage, requiring an opener for entry. Jurors could also infer that appellant entered the condominium building with the intent to commit the felony as he left with Rothman's car. Appellant wore a hat when he entered, obscuring his face, and he drove off in a vehicle that did not belong to him. In addition to relying on the fingerprint evidence, jurors could infer appellant's identity from the fact that the hat worn on May 27, was retrieved at the scene of the later attempted burglaries on August 11. Sufficient evidence supported appellant's burglary conviction. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1588 [evidence defendant's palm prints were found on glass pane used to gain entry to residence supported burglary conviction].)

B. Counts 4 and 5 -- Attempted Burglary

Attempted burglary requires (1) the specific intent to commit burglary, and (2) a direct but ineffectual act toward its commission. (*People v. Toledo* (2001) 26 Cal.4th 221, 229.) "'"Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]" [Citation.]' [Citation.]" (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1322.)

The following evidence supported the conviction. Appellant hid in the alley when a police car drove by Clara and Natalie's building, supporting an inference that he intended to commit a crime and evade police detection. After appellant emerged from the alley, he put on a pair of gloves, and hopped over one of the balconies. Appellant then climbed onto another balcony before he was arrested. A reasonable jury could infer that appellant intended to commit a felony, especially since he put on gloves, suggesting an effort to avoid leaving fingerprints. Evidence that appellant hid from a police car and crouched down on the balcony further supports that inference. A reasonable jury could infer appellant would have accomplished the crime but for the officers finding and arresting him. (See, e.g., *People v. Garcia* (1969) 274 Cal.App.2d 100, 104 ["[d]efendant's acts in approaching the window wearing gloves and looking though the window of the apartment were overt acts proceeding toward the consummation of the

substantive crime"]; *People v. Davis* (1938) 24 Cal.App.2d 408, 409 [approaching bedroom window "and raising hands either to open it or reaching through it" was overt act supporting attempted burglary conviction].)

Contrary to appellant's argument, *Luna*, *supra*, 170 Cal.App.4th 535 does not compel a different result. In that case, the appellate court reversed a conviction for attempting to manufacture a controlled substance. (*Id*. at p. 537.) The court found no evidence that appellant commenced the intended crime – i.e., the manufacture of hashish. (*Id*. at p. 544.) "At the time appellant was arrested, he had no ability to begin manufacturing hashish, which expert opinion established is an instantaneous as opposed to an incremental process. In order to begin manufacturing hashish, appellant still had numerous steps to accomplish, including assembling the components of the manufacturing device, which were found unassembled and in pieces in appellant's truck. He also had to obtain the key ingredient, 'grocery bags full of marijuana.'" (*Id*. at p. 543.)

Here, burglary requires the unlawful entry into a building with the intent to commit a felony. Climbing over a raised balcony is sufficient to support a burglary conviction. (*People v. Yarbrough* (2012) 54 Cal.4th 889, 894 (*Yarbrough*).) Thus, the evidence that appellant raised himself over the balcony overwhelmingly supported the attempted burglary conviction and, as respondent argues, suggests appellant completed the burglary when he entered Natalie's balcony. With respect to the other attempted burglary, although there was no evidence appellant entered the balcony, a reasonable jury could infer he intended to enter but was thwarted when a police car drove by the building. That was when appellant hid in the alley, supporting the inference that he was attempting to evade detection.

3. Alleged Instructional Error

With respect to the attempted burglaries, jurors were instructed: "A person attempts to enter a building if some part of his body or some object under his control attempts to penetrate the area inside the building's outer limits." Appellant argues that this instruction constituted error under the recently decided Supreme Court case *Yarbrough, supra,* 54 Cal.4th 889.

In *Yarbrough*, the trial court instructed the jury: "'A person enters a building if some part of his or her body or some object under his or her control penetrates the area inside the building's outer boundary.'" (*Yarbrough, supra*, 54 Cal.4th at p. 891.) The high court concluded that this language was overbroad because it did not include the holding that "a second floor apartment's balcony is part of the apartment when the balcony is designed to be entered from and offers an extension of the apartment's living space . . . ." (*Id*. at pp. 894-895.) The balcony at issue in *Yarbrough* was accessible by a sliding glass door, was surrounded by a metal railing, and stood about eight or nine feet above the ground. (*Id*. at p. 891.) The court held that "[w]henever a private, residential apartment and its balcony are on the second or a higher floor of a building, and the balcony is designed to be entered only from inside the apartment (thus extending the apartment's living space), the balcony is part of the apartment." (*Id*. at p. 894.)

Although Clara and Natalie lived on the first floor, the holding of *Yarbrough* is applicable here because the balconies were not at ground level, but instead were almost as high as the second floor balcony described in *Yarbrough*. Clara testified she heard footsteps on the grass underneath the balcony. She testified that the balcony is above the garage and that it was not at street level. The balcony was higher than five feet seven inches, Clara's height. Clara testified the sliding glass door on the balcony leads inside the home. Natalie testified her balcony was about six or eight feet above the ground. Rapp made it clear appellant had to lift himself over a railing to climb onto the balconies. Thus, assuming the court erred in instructing the jury, just as in *Yarbrough*, a properly instructed jury would not have reached a different verdict. (See *Yarbrough, supra,* 54 Cal.4th at p. 894.) Stated otherwise, there was no evidence from which jurors could have concluded the balcony was not part of Clara's and Natalie's condominiums.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J. GRIMES, J.