Filed 3/23/17 P. v. Condee CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHRISTOPHER CONDEE, Defendant and Appellant.	B270899 (Los Angeles County Super. Ct. No. PA081834)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Condee appeals from the judgment entered following his conviction by jury on one count each of attempted first degree burglary, first degree residential robbery, first degree residential burglary, and false imprisonment by violence. (Pen. Code, §§ 664/459, 211, 459, 236.)[1] Appellant contends that his conviction for attempted burglary was not supported by substantial evidence. Appellant also contends, and respondent concedes, that the trial court should have stayed his false imprisonment sentence pursuant to section 654. Finally, appellant contends that the trial court abused its discretion in denying his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to dismiss his strike. We conclude that the trial court should have stayed the false imprisonment sentence but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

A. *September 1, 2014 Incident*

Leslye Salas lived with her parents, sister, and brother on Stagg Street in Sun Valley. Their house was one of three houses on the lot.

On September 1, 2014, Salas' parents and brother were out of town, and Salas was home with her younger sister, Linda Casillas, who was 14 years old at the time. Around midnight, they went outside to tie their dogs to a tree, then they watched television in the living room until around 2:00 a.m. Salas and Casillas felt uneasy, so they walked

---

[1] Further unspecified statutory references are to the Penal Code.

around the house to be sure everything was locked. Casillas took a baseball bat with her and fell asleep in her parents' room. Salas could not sleep, so she checked on her sister, found the baseball bat and took it with her to her own bedroom. Salas locked her bedroom door.

Around 6:00 a.m., Salas heard the gate into her backyard being opened. She looked out her window and saw a man, later identified as appellant, trying to open the door from her backyard into her house. She thought he left after being unable to open the door, but then she heard the kitchen window open. She heard appellant enter the kitchen and start walking through the house opening doors. Salas called 911.

Appellant tried to pry open Salas' bedroom door but was unable to, so he walked to her parents' room. Salas heard her sister screaming her name, and she heard thumping noises from her parents' room. Salas remained in her room, fearful that her sister was dead. She heard the backyard fence rattle and heard a loud thump.

Casillas testified that she woke up around 6:00 a.m. and had the feeling she was being watched. She saw a man, later identified as appellant, standing in the bedroom, so she started screaming for her sister. He dragged her off the bed, put something in her mouth to stop her from screaming, and tied her hands with a phone cord. He told her he would not hurt her and only wanted money, so she pointed at a drawer where she knew her parents kept money. Casillas found an envelope of money in the drawer and handed it to him. He moved Casillas to the living room couch and left.

Salas untied Casillas' hands, and they ran out the front door, where they saw police officers arriving. After the police officers left,

Casillas found tennis shoes and a lighter in her parents' bedroom that did not belong to her family, so her aunt took them to the police station. Both Salas and Casillas identified appellant in a photographic lineup.

B. *September 2, 2014 Incident*

Marlene Chakaradjian lived on Vinedale Street in Sun Valley, approximately one mile away from Stagg Street. There were two homes on the property. Chakaradjian lived in the house at the rear of the property, and her sister, Christine Barrera, lived in the other house with Barrera's daughter.

On September 2, 2014, around 11:30 p.m., Chakaradjian was in her bedroom, which was in the back of her house. The blinds of her bedroom window were closed, but the window was open. She heard a "shooshing noise" outside the window, so she opened the blinds and saw a man looking at her through the screen window. She screamed, and the person started waving his hand at her. Chakaradjian closed her window, locked it, and ran to look out the window in the front of her house, facing her sister's house.

Around the same time, Barrera and her daughter were asleep in their bedrooms, which were located in the back of their house. Barrera had cracked open the windows in both rooms and placed pieces of wood in the tracks to prevent them from being opened all the way.

Barrera was awakened by a scream around 11:40 p.m. She checked her daughter, who was still asleep, but she saw nothing wrong and she returned to her own room. She heard a shuffling noise, and she went to check on her daughter again but found nothing. As Barrera

was walking back to her own bedroom, she heard the sound of her window "banging against" the piece of wood. Barrera continued to hear noises, and she reached through the blinds to shut her window and saw appellant standing outside her window. She asked who he was, but he did not respond. Barrera felt resistance as she was closing the window. After she closed the window, appellant slowly walked backwards away from the window.

Los Angeles Police Officers Alan Cieto and Garrett Pascolla arrived at Barrera's house in response to a call about a burglary. Barrera told them a man in a plaid shirt and jeans had tried to enter her house.

Officers Cieto and Pascolla found appellant in the backyard crouching behind a small tree and arrested him. The officers did not see any pry marks around Barrera's window, but after they left, Barrera noticed that the screen had been removed. Chakaradjian and Barrera identified appellant as the man in their yard.

II. *Defense Evidence*

Dr. Haig Kojian, a forensic psychologist, testified that methamphetamine is a stimulant that can cause the user to exhibit bizarre, delusional, psychotic, irrational, and hallucinatory behavior. Dr. Kojian reviewed appellant's jail records following his arrest and stated that appellant exhibited symptoms of methamphetamine withdrawal. Deputies at the jail reported that appellant was naked, talking to himself, and rocking back and forth in his cell. The following day appellant was transported from jail to the hospital after being

found in his cell unresponsive and covered in fecal matter and blood. Appellant tested positive for methamphetamine, which Dr. Kojian believed must have been consumed before his arrest because he would not have had ready access to methamphetamine in jail.

Dr. Richard Lubman treated appellant at the hospital on September 7, 2014. Dr. Lubman stated that appellant had been in a locked psychiatric ward at the jail because he was exhibiting behavior injurious to himself. Dr. Lubman believed that appellant was under the influence of methamphetamine when he arrived at the hospital.

III. *Procedural Background*

Appellant was charged with four counts: count 1, first degree burglary of Barrera's home (§ 459); count 2, first degree residential robbery of Casillas and Salas (§ 211); count 3, first degree burglary of Salas' home (§ 459); and count 4, false imprisonment by violence (§ 236). The information further alleged that appellant had suffered two prior first degree burglary convictions for purposes of the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12), section 667, subdivision (a)(1), and section 667.5, subdivision (b).

The jury convicted appellant of the lesser included offense of attempted burglary on count 1 and convicted him of the other counts as charged. The trial court found the prior conviction allegations to be true and denied appellant's *Romero* motion to dismiss a prior strike. The court sentenced appellant to a total of 70 years to life in prison, calculated as follows: count 1, 35 years to life; count 2, 35 years to life to run consecutively; count 3, 35 years to life, stayed pursuant to section

654; and count 4, six years to run concurrently. Appellant timely appealed.

DISCUSSION

I. *Attempted Burglary Conviction*

Appellant contends the evidence is insufficient to support his attempted burglary conviction because there was no evidence that he had the intent to steal when he attempted to enter Barrera's home. We conclude the evidence is sufficient to sustain the conviction.

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

"'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] '[A] jury may not rely upon unreasonable inferences, and . . . "[a]n inference is not reasonable if it is based only on speculation."' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Zaun* (2016) 245 Cal.App.4th 1171, 1174 (*Zaun*).)

"Attempted burglary requires two elements: (1) the specific intent to commit burglary and (2) a direct but ineffectual act toward its

commission. [Citation.] Burglary ordinarily requires (1) unlawful entry into a building with (2) the intent to commit theft or *any* felony. [§ 459.] Entry of an inhabited dwelling house with the requisite intent is burglary of the first degree. (§ 460, subd. (a).)" (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.) Appellant challenges the intent requirement, arguing that the prosecution presented no evidence that he had the intent to steal when he attempted to enter Barrera's home.

"[I]ntent, as a mental fact, must usually be proved by circumstantial evidence. '[S]uch intent must usually be inferred from all the facts and circumstances disclosed by the evidence, rarely being directly provable.' [Citation.] In [*People v. Matson* (1974) 13 Cal.3d 35], the court held that evidence that the defendant entered a female victim's apartment surreptitiously, hid in her bathroom with the lights out, and then denied under oath that he had done so was sufficient to support a finding of entry with intent to rape." (*People v. Smith* (1978) 78 Cal.App.3d 698, 704 (*Smith*).) In *Smith*, the evidence that the defendant "was armed with a knife or other object of substance" when he confronted the victim in her apartment and subsequently fled was sufficient evidence to support the defendant's burglary conviction. (*Id.* at p. 704.) The court stated that "'[w]hen the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal.' [Citation.]" (*Ibid.*)

The evidence here is sufficient to support the conviction for attempted burglary of Barrera's home. Appellant was in Barrera's backyard looking through her bedroom window. Barrera heard the

piece of wood in her window track "banging against" the window, which indicates someone was trying to open the window. The night before this incident, appellant had committed a burglary by climbing through the window of a nearby house. The jury reasonably could infer from these circumstances that appellant had the intent to steal when he attempted to enter Barrera's home.

Appellant relies on *In re Leanna W.* (2004) 120 Cal.App.4th 735 (*Leanna W.*), in which the appellate court found insufficient evidence to support the juvenile court's finding that the minor committed first-degree burglary and vandalism of her grandmother's home. *Leanna W.* is distinguishable. There, the minor held a party with 30-40 guests at her grandmother's home while her grandmother was out of town. When the grandmother returned, she found many items missing from her home, including cash, jewelry, and "six bottles of liquor." (*Id.* at p. 740.) On appeal, the court reasoned that the fact that the minor was present when the liquor was consumed did "not show that she actually consumed it, much less that she had the specific intent to take it when she entered the house. The mere possibility that [the minor] consumed the alcohol raises nothing more than a suspicion, which does not form a sufficient basis for an inference of fact. [Citation.]" (*Id.* at p. 741.) Similarly, the fact that the home's utilities and Direct TV services were used did not mean the minor possessed "the necessary intent to commit theft at the time she entered the house." (*Id.* at p. 743.) "[A]ny one of the numerous people who were at the house for the party could have placed the Direct TV orders" or consumed the alcohol. (*Ibid.*)

Unlike *Leanna W.*, there were not numerous people who could have entered Barrera's backyard or attempted to open her window. As discussed above, appellant's presence in the backyard and attempt to open the window the night after he had committed a similar burglary is sufficient to support the conviction for attempted burglary. (Compare *People v. Rocha* (2013) 221 Cal.App.4th 1385, 1394 [explaining that the rationale for admitting evidence of similar crimes is that "'"if a person acts similarly in similar situations, he probably harbors the same intent in each instance" . . . . The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.'"].)

II. *Section 654*

Section 654 provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

"'[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. . . . If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses

but not for more than one.' [Citation.]" (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215 (*Wynn*).)

The trial court imposed and stayed sentence on count 3, burglary of Salas' home, on the basis that the first degree residential robbery and first degree residential burglary were part of a single course of conduct under section 654. Appellant contends that his sentence on count four also should have been stayed because he harbored the single intent to take money from the house when he committed the false imprisonment offense. We agree.

The false imprisonment of Casillas was part of a single course of conduct to enter the house and steal money. Appellant told Casillas he would not hurt her and only wanted money, and he left after she gave him the money. His false imprisonment conduct thus was "incident to one objective" of taking money from the house. (*Wynn*, *supra*, 184 Cal.App.4th at p. 1214, italics omitted.) Respondent concedes that appellant's sentence on count four should have been stayed. We therefore will order that the abstract of judgment be modified to stay the execution of appellant's sentence on count 4.

III. *Romero Motion*

Appellant contends that the trial court abused its discretion in denying his motion to strike one of his prior convictions. He argues that the court incorrectly based its ruling solely on his criminal record and that the denial of his motion resulted in an unjust punishment. We find no abuse of discretion.

"A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. [Citation.] . . . '[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' [Citations.]" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 904-905 (*Philpot*).)

"'[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.] [¶] Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.)

The trial court did not rely solely on appellant's criminal record in denying appellant's *Romero* motion. The court reasoned that the burglary of Salas' home was "particularly egregious," noting that appellant "tied up and gagged" a minor girl in committing the offense.

The court also noted that appellant was on parole and had been released only two weeks earlier when he committed the offenses. The court therefore found that appellant was not "outside the scheme and spirit of the Three Strikes law."

The court's decision was not "'so irrational or arbitrary that no reasonable person could agree with it.' [Citations.]" (*Philpot*, *supra*, 122 Cal.App.4th at pp. 904-905.) The court did not abuse its discretion in denying the *Romero* motion.

DISPOSITION

We direct the superior court to amend the abstract of judgment to reflect that the sentence on count 4 is stayed pursuant to section 654 and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.