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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO ALONZO ESPINOZA,

Defendant and Appellant.

A132618

(Contra Costa County
Super. Ct. No. 51103852)

Defendant Hugo Alonzo Espinoza appeals a judgment entered upon a jury verdict finding him guilty of first degree burglary (Pen. Code,¹ §§ 459, 460, subd. (a)), and finding that at the time of the burglary, a person other than an accomplice was present in the residence (§ 667.5, subd. (c)(21)). The trial court sentenced him to the mid-term of four years. (§ 461, subd. (a).) Defendant contends the trial court abused its discretion in excluding evidence and in imposing sentence. We shall affirm the judgment.

I. BACKGROUND

At 2:40 in the morning of January 7, 2011, the Richmond Police Department got a report from a caller who reported that two males, one wearing gray clothing and a backpack and one wearing a dark jacket and dark hat, had cracked the windows of a townhouse near the BART station and gone inside it.

Police officers who responded found the window of the townhouse had been broken and the front door was ajar. After announcing themselves, they entered the

¹ All undesignated statutory references are to the Penal Code.

townhouse and went up the stairs to a living room. They saw two men there. One of them was defendant, who had on a black backpack with gloves and a beanie in it. The officers ordered the two men to the ground and handcuffed them. In defendant's pants pocket, an officer found keys to two cars. Three remote controls were found in the jacket pocket of the other man.

The residents of the townhouse were asleep at the time. They did not know defendant or his companion and had not given them permission to be in their home.

A flat screen television that was normally affixed to the wall had been removed, and was on the floor. The residents normally kept a set of their car keys in a common area of the townhouse so they could move each others' cars in their garage. Those keys were missing from their usual place, and were found in defendant's pocket. On the kitchen counter was a small golden statue, which was normally kept on the same shelf as the keys. A sharp fork and chef's knife, which were normally kept in a knife block, had also been moved. The fork was on the kitchen counter by the golden statue, and the chef's knife was on a shelf on the second floor landing.

Defendant testified in his own defense. According to defendant, he and Marcos Gutierrez were at a party on the night in question. He was wearing a gray jacket, black pants, a beanie, and a backpack, and had carried beer to the party in his backpack. Over the course of the evening he drank approximately 12 beers and snorted about six lines of cocaine. He took a bus back to Richmond, and was dropped off at the BART station at approximately 2:30 in the morning. As he and Gutierrez walked toward his home, a man approached, told them that he was having an argument with his roommates, and asked for help moving out of his house in return for some money and a ride. Defendant noticed that a window of the house was cracked. The man said his roommates did not want to let him in. They went into the residence, and defendant saw the television leaning against the wall. The golden statue was on the kitchen counter. The man asked defendant and Gutierrez to wait while he got his truck and to start loading his belongings when they heard him honk. Before leaving, he gave defendant some keys and asked him to hold them so his roommates would not take them, and asked Gutierrez to hold some remote

controls. He had not returned when the police officers arrived. Defendant was too shocked when the police arrived to tell them what had happened, but testified that he told his story to the police after he had been taken from his cell.²

II. DISCUSSION

A. Evidence of Conversation with Police Officer

Defendant contends he was deprived of his right to present his defense by the trial court's exclusion of evidence about a conversation he had with Detective Hall after his arrest, in which, according to defendant, he explained what had happened at the townhouse.

Defendant sought to introduce evidence that he had spoken with Hall after his arrest and that the conversation had not been recorded. He did not seek to introduce evidence of the substance of the conversation, but simply that it had taken place. The trial court excluded the proffered evidence, ruling it was irrelevant and also concluding its admission would be more prejudicial than probative because it would invite the jury to speculate about the content of the conversation.³

During her closing statement, defense counsel argued that if defendant's testimony had been inconsistent with what he told police on the evening in question, the prosecution would have had the police officer so testify. The prosecutor objected to the argument, and the trial court told the jury, "Disregard the statement about [anyone] talking to the police. That's not before the court."

Defendant contends these rulings deprived him of his right to call witnesses at trial to corroborate his testimony that he had spoken with the police after the incident.

² In this exchange, after defendant had given his version of events, defense counsel asked, "And did you tell all of this to the police?" Defendant replied, "At that moment no because I was shocked. . . ." His attorney asked, "When did you tell the police?" Defendant responded, "When the detective—detective call me from cell No. 5 when they take me from Richmond Police Department."

³ The trial court initially suggested that if defendant testified, the parties might stipulate afterward that the conversation with Hall was not recorded, or that Hall might testify after defendant. The court ultimately did not allow Hall to be called to testify as to whether a conversation had been recorded, concluding it was not relevant.

Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court has broad discretion to decide whether evidence is relevant. (*People v. Lomax* (2010) 49 Cal.4th 530, 581.) It likewise has broad discretion to limit the scope of closing arguments. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387-1389.)

We see no abuse of discretion in the exclusion of evidence that defendant made an unrecorded statement to Hall. Defendant did not—and does not—contend that the *content* of the statement was admissible.⁴ The trial court could reasonably conclude that, divorced from its inadmissible content, the mere fact that defendant had made a statement to a detective did not tend to prove any disputed fact.

Based on this ruling, the court also acted within its discretion in preventing defense counsel from arguing that the jury should conclude defendant had not made any inconsistent statements to police officers after the incident. Defendant argues that the trial court’s rulings left him helpless to counteract the disbelief in defendant’s story the prosecutor expressed both in his cross-examination—when he asked repeatedly whether defendant had told the police when they arrived that he was helping someone move out—and in his closing argument. The argument the trial court excluded, however, was effectively an invitation for the jury to speculate on the content of defendant’s inadmissible statements to the police. There was no abuse of discretion.

⁴ Under Evidence Code section 791, “Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.” Defendant makes no claim that either of the exceptions to the rule of Evidence Code section 791 apply here.

B. Abuse of Sentencing Discretion

Defendant contends the trial court should either have placed him on probation or imposed the low term of two years, and that its choice of the midterm was an abuse of discretion. The punishment for first degree burglary is imprisonment for two, four, or six years. (§ 461, subd. (a).) Probation may not be granted to one convicted of burglary of an inhabited dwelling “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation.” (§ 462, subd. (a).) A trial court’s determination of whether to grant probation in such a case and its choice of the appropriate prison term are reviewed for abuse of discretion. (*People v. Serrato* (1988) 201 Cal.App.3d 761, 763; *People v. Roe* (1983) 148 Cal.App.3d 112, 118-119; *People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).

Defendant argues that this was an unusual case justifying probation for several reasons: he was a high school graduate; he had a good record of employment; he was on track to be promoted to a machinist at his work; he had a large, supportive family; he had lived with the same family members for eight years; he had no criminal or juvenile record aside from a misdemeanor conviction for driving under the influence of alcohol in 2006; he had never served time in jail before; he was under the influence of alcohol and drugs when he committed the crime; he had come to realize he needed help with his substance abuse problem; the probation officer noted that defendant expressed remorse for his actions; and at age 26, he was youthful when he committed the crime. Moreover, defendant argues, neither he nor Gutierrez had brought a weapon into the house and they did not succeed in taking anything of great monetary value.

California Rules of Court,⁵ rule 4.413 sets forth facts that “may indicate the existence” of an “ ‘unusual case[] where the interests of justice would best be served’ ” by a grant of probation. (Rule 4.413 (b) & (c).) Under this rule, a statutory limitation on probation may be overcome if the court determines that “[t]he fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the

⁵ All rule references are to the California Rules of Court.

circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence”; and [¶] “[t]he current offense is less serious than a prior felony conviction that is the cause of the limitation on probation” (Rule 4.413(c).) An unusual case may also exist where there is “[a] fact or circumstance not amounting to a defense, but reducing the defendant’s culpability for the offense”; those facts might exist when the defendant participated in the crime under great provocation, coercion, or duress; the crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood the defendant would respond favorably to mental health care; or the defendant is youthful or aged, and has no significant criminal record. (Rule 4.413(c)(2).) These factors are permissive, not mandatory; the trial court “ ‘may but is not required to find the case unusual if the relevant criterion is met under each of the subdivisions.’ [Citations.]” (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*)).

If the court finds the probation limitation is overcome, it *then* applies the criteria in rule 4.414—which include whether the defendant was armed, the degree of monetary loss, whether the defendant was an active or passive victim, history of substance abuse, family background and ties, employment history, the adverse effects on the defendant’s life, and remorse—to decide whether to grant probation. (Rules 4.413(b), 4.414.) That is, the court does not apply the rule 4.414 factors unless it first makes the threshold determination under rule 4.413 that this is an unusual case in which the probation limitation is overcome. “ ‘[M]ere suitability for probation does not overcome the presumptive bar [I]f the statutory limitations on probation are to have any substantial scope and effect, “unusual cases” and “interests of justice” must be narrowly construed,’ and rule 4.413 ‘limited to those matters in which the crime is either atypical or the offender’s moral blameworthiness is reduced.’ [Citation.]” (*Stuart, supra*, 156 Cal.App.4th at p. 178.)

In denying probation, the trial court found that “the seriousness of this particular crime and the impact upon the victims of this particular crime far outweigh the only

mitigating factor, if it even possibly applies, in rule 4.413, which is age and lack of prior felonies.” We see no abuse of discretion in the court’s conclusion that the statutory limitation on probation had not been overcome. Defendant and his accomplice broke into a home in the middle of the night, while the occupants were sleeping, moved a knife, and tried to steal their belongings. None of the facts of this case persuade us that the trial court was obliged to conclude that its facts were “substantially less serious” than in other cases with a similar limitation on probation. (Rule 4.413(c)(1)(A).) There is no evidence the crime was committed either under provocation, coercion, or duress, or because of a mental condition that was highly likely to respond well to treatment. (Rule 4.413(c)(2)(A) & (B).) The facts that defendant was relatively young and had a limited criminal record do not persuade us that the trial court abused its discretion in concluding the probation limitation of section 462, subdivision (a), had not been overcome.

Nor do we see an abuse of the trial court’s broad discretion in its selection of the midterm. In selecting the term, the trial court cited the dishonesty and lack of remorse shown by defendant “[lying] to the judge, [lying] to the jury, tell[ing] a preposterous story,” as well as the impact of the crime on the victims. On the facts of this case, the trial court could reasonably conclude that the mitigating circumstances of defendant’s relative youth and limited criminal record did not compel the choice of the low term. We see no abuse of the trial court’s broad discretion. (See *Sandoval, supra*, 41 Cal.4th at p. 847.)

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P. J.

SEPULVEDA, J. *

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.