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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**KHATARI COLEMAN,**

**Defendant and Appellant.**

**A137058**

**(Solano County  
Super. Ct. No. FCR294077)**

Khatari Coleman appeals from a judgment of conviction and sentence imposed after a jury trial. His attorney has filed a brief seeking our independent review of the record, pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (see *Anders v. California* (1967) 386 U.S. 738), in order to determine whether there is any arguable issue on appeal. We find no arguable issue and affirm.

**I. FACTS AND PROCEDURAL HISTORY**

In June 2012, Coleman was charged by information with felony commercial burglary in the second degree (Pen. Code, § 459), felony petty theft with a prior based on four alleged prior convictions and imprisonments for theft (§ 666), and contributing to the delinquency of a minor (§ 272, subd. (a)(1)).<sup>1</sup> As to the counts for burglary and theft with a prior, it was further alleged that Coleman suffered a prior conviction and prison term for purposes of section 667.5. Before trial, the prosecution dismissed the charge of contributing to the delinquency of a minor.

<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

Coleman, represented by counsel, proceeded to a jury trial on the burglary and petty theft offenses and a subsequent court trial on the alleged prior convictions.

*A. Evidence at Jury Trial*

Jose Zuniga, an asset protection associate for a Walmart store in Dixon, testified that he observed a male and two young boys – later identified as Coleman and his two sons – in the store on June 12, 2012. Coleman pushed his toddler son in a shopping cart while his eight-year-old son walked next to the cart. The cart contained a “Hello Kitty” pillow and other “Hello Kitty” merchandise. The older son was carrying a diaper bag.

Zuniga followed them to the toy department, where Coleman took two “Lego” playsets off the shelf and handed them to his older son, who had opened the diaper bag. As Coleman’s son tried to fit the boxes into the diaper bag, Coleman looked around nervously. When Coleman’s son could not fit the second box into the diaper bag, Coleman returned the playsets to the shelf. Zuniga testified that he contacted the police on a cell phone, using a headset with a voice-activated speed dial so he was able to observe Coleman without interruption.

Zuniga next observed Coleman’s older son place the “Hello Kitty” merchandise into the diaper bag in Coleman’s presence. Coleman and his sons then approached the store exit, bypassing the registers.

As Coleman was removing his younger son from the shopping cart, his older son exited the store. Zuniga approached the older son. Coleman (with his younger son) continued toward the exit until he looked in Zuniga’s direction. Zuniga identified himself to the older son, who was carrying the diaper bag but denied he had any merchandise. Coleman came out of the store and started to walk past them, until Zuniga confronted Coleman as well.

Zuniga explained to Coleman why he had stopped them and asked them to return to the store with him to resolve the matter. Meanwhile, a second man approached from behind, put his arm around Coleman’s son (with the diaper bag), and started walking him towards the parking lot. Coleman then walked away as well, and Zuniga followed them. At that point, a Dixon police unit approached, and Zuniga indicated to the police

which car the individuals were entering. The second man dropped the diaper bag and kicked it under a car nearby. The diaper bag was later found to contain the “Hello Kitty” merchandise from Walmart.

Officer Alberto Cruz testified that he responded to the Dixon Walmart on June 12, 2012, at around 8:00 p.m., to investigate the report of a possible theft. The Walmart loss prevention officer was in the parking lot, pointing at a vehicle and advising the officers it was driven by a man who was stealing merchandise.

Officer Cruz approached Coleman, who was sitting in the driver’s seat of a white SUV. Cruz noticed a woman in the passenger’s seat and two children sitting in the backseat.

Officer Cruz explained to Coleman that he was suspected of stealing merchandise from Walmart. Coleman claimed that he had been in Walmart but had not purchased anything. Cruz observed the black diaper bag under the vehicle next to them and retrieved it. He showed the bag to Coleman, who denied it was his. After further investigation, Coleman was arrested.

The prosecution also presented evidence of Coleman’s prior theft from a Raley’s supermarket. Loss prevention specialist Will Simmons testified that in December 2007 he observed Coleman and a female companion place items in a baby stroller. Coleman pushed the stroller to the front of the store, then directed a young girl to exit the store with the stroller. Simmons detained Coleman for arrest. (The court in the instant case instructed the jury that these acts could be considered only if proven by a preponderance of the evidence and, even then, only for limited purposes.)

The prosecution also introduced evidence of certified copies of three of Coleman’s prior convictions and a certified copy of Coleman’s “RAP” sheet.

#### *B. Coleman’s Motion for Directed Verdict*

At the close of the prosecution’s case, Coleman sought a directed verdict on the commercial burglary charge under section 1118.1, contending there was insufficient evidence of intent. The court denied the motion.

### C. *Verdict and Sentence*

On August 23, 2012, the jury found Coleman guilty of commercial burglary (§ 459) and petty theft (§ 484, subd. (a)).

On August 27, 2012, the court found true the alleged prior theft convictions (for purposes of count two, rendering the petty theft found by the jury under section 484 to be petty theft with priors under section 666) and the alleged prior prison term (for purposes of a sentence enhancement under section 667.5, subdivision (b)).

At the sentencing hearing on October 26, 2012, the court refused to grant Coleman probation because his previous placements on probation had been unsuccessful and he was on parole when he committed his current offenses. The probation department's presentence report listed 14 prior convictions for Coleman and numerous failures on probation.

The court then sentenced Coleman to a total of four years in county jail pursuant to section 1170, subdivision (h)(1), consisting of the upper term of three years for the burglary conviction (§ 459) plus a consecutive one-year term for the prior prison enhancement (§ 667.5, subd. (b)). In imposing the upper term, the court explained that Coleman had numerous prior convictions and he had used a minor to commit or assist his commission of the crime. The court found there were no mitigating factors, and that even if the factors argued by the defense were indeed mitigating factors, they were "clearly outweighed by the factors in aggravation as I evaluate them." Sentence on the conviction for petty theft with a prior (§ 666) was stayed pursuant to section 654.

The court imposed a restitution fine of \$240 pursuant to section 1202.4, subdivision (b), and credited Coleman with 274 days of custody credit, without objection.

This appeal followed.

## II. DISCUSSION

Coleman's appellate counsel represents in the opening brief in this appeal that she wrote to Coleman and advised him of the filing of a *Wende* brief and his opportunity to personally file his own supplemental brief within 30 days.

On June 13, 2013, we received a letter from Coleman’s appellate counsel enclosing a handwritten letter from Coleman as his supplemental brief. In his letter, Coleman asserts that Zuniga committed perjury by testifying that he was not on a cellphone (or had a headset) and did not have his back to Coleman and his son, while the surveillance video and testimony of Officer Cruz purportedly indicates otherwise. Accordingly, Coleman asserts: “I do not see how Zuniga[’]s testimony was submitted as evidence for the prosecution or against me. To make it more of a legal argument, there was nothing done due to the fact and evidence he committed perjury. There never was and still is no physical evidence nor surveillance video to back up his lies. Due to the two facts of Zuniga committing perjury (breaking the law) and being [in] contempt of the court, his testimony was still used to convict me besides my past criminal history. I feel that there are legal argument[’]s to be made, and for the court to [recognize] the legal error that was made.”

Coleman’s argument is unavailing. Whether Zuniga was testifying truthfully was a matter for the trier of fact, as was the significance of any mistake or falsehood in his testimony. At trial, Coleman’s defense attorney cross-examined Zuniga on these issues and argued at length to the jury that Zuniga’s entire testimony should be disregarded – and Coleman should be acquitted – because Zuniga was not a reliable witness and lied in these respects. The allegedly impeaching videotape was admitted into evidence and available for the jury to review, as defense counsel urged the jury to do. We generally must defer to the credibility determinations of the jury. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Furthermore, whether Zuniga used a headset or a cellphone to call the police, and whether or not Zuniga ever turned his back to Coleman or his son, the testimony was that Zuniga saw Coleman look around nervously as he attempted to have his son put merchandise in the diaper bag, Coleman’s son later put the “Hello Kitty” merchandise in the diaper bag in Coleman’s presence, Coleman and his son left the store without paying for any merchandise, Coleman’s son carried the diaper bag outside the store, and Coleman was walking past his son and Zuniga outside the store until Zuniga asked Coleman to stop. It was also undisputed that the “Hello Kitty”

merchandise was found outside the store in the diaper bag that Coleman's son had carried out. In sum, there was ample substantial evidence to support the jury's verdict, and Coleman's argument does not establish reversible error.

We find no arguable issues on appeal.

There are no legal issues that require further briefing.

### III. DISPOSITION

The judgment is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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SIMONS, J.