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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BURNELL NELSON,

Defendant and Appellant.

B242989

(Los Angeles County  
Super. Ct. No. MA053090)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Burnell Nelson appeals from the judgment entered following his plea of no contest to residential burglary with a person present (Pen. Code, §§ 459, 667.5, subd. (c)(21))<sup>1</sup> and his admissions that he previously had been convicted of burglary within the meaning of the Three Strikes law (§ § 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and served two prison terms (§ 667.5, subd. (b)). The trial court sentenced Nelson to 14 years in state prison. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. Facts.*<sup>2</sup>

On May 23, 2011, Luke Messmer lived at 510 West Huyer Street in Lancaster. One of his neighbors, Sarah Trama, lived in a house across the street.

On that date, Messmer saw “a vehicle driving through the neighborhood [area] slow[ly], checking out garages . . . and [other] property.” The vehicle pulled up in front of Messmer’s home and, although his garage was closed, Messmer had “property out front and was protecting it.” The vehicle, a “white Ford F-150” truck, then made a loop at the end of the cul-de-sac and stopped in front of Trama’s house. The passenger in the truck, Nelson, got out and walked up to Trama’s partially opened garage door, then entered the garage.

Messmer, who had been in his front room, ran outside and across the street. As he was heading for Trama’s garage, the driver of the truck “beeped the horn one time.” As soon as the horn honked, Nelson left the garage and headed back toward the truck. However, at this point, Messmer had “got[ten] in between [Nelson] and the vehicle.” Nelson got in Messmer’s face and told Messmer that “he was there to find an individual with the nickname of ‘T’.” When Messmer told Nelson that there was no one there who used that nickname, Nelson “brushed up against [Messmer]” as he attempted to get around him and back into the truck. After the two men exchanged words, they pushed each other. Nelson got back into the truck and Messmer, who was standing in front of

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The facts have been taken from the transcript of the preliminary hearing.

the truck at that time, reached for his cell phone, took it out of his pocket and, although he was unable to get a picture of Nelson, took a photograph of the license plate of the truck.

Messmer did “[not] want to be in front of the truck [when it was] running, so [he] started to move toward the side . . . .” The driver of the truck accelerated and, as he pulled away from the curb, struck Messmer with the side of the vehicle, then drove off. Messmer was “[a]bsolutely certain” that Nelson was the man who entered Trama’s garage.

Julia Vezina is a deputy sheriff for the Los Angeles County Sheriff’s Department. She is assigned to the “burglary suppression team” at the Lancaster Station. She spoke to a Deputy Waylon about the incident which took place at Trama’s house on West Huyer Street. Waylon had investigated the matter, spoken with Trama and determined that, when Nelson entered the garage, Trama had been at home, inside the house.

## *2. Procedural history.*

In an information filed June 29, 2011, Nelson was charged in count 1 with first degree burglary with a person present (§ 459), a felony. It was further alleged as to that count that, absent unusual circumstances, Nelson was not eligible for probation (§ 462, subd. (a)) as the offense was both a serious (§ 1192.7, subd. (c)) and violent felony (§ 667.5, subd. (c)) “in that another person, other than an accomplice, was present in the residence during the commission of the . . . offense.” In count 2, Nelson was charged with misdemeanor battery (§ 242).

It was alleged as to both counts that Nelson previously had suffered five convictions for burglary, a “serious or violent felony or juvenile adjudication,” between 1984 and 1991 within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). In addition, it was alleged that Nelson had suffered five convictions for the serious felony of burglary, brought and tried separately, pursuant to section 667, subdivision (a)(1) and that, as to count 1, Nelson had suffered seven convictions for which he served prison terms or terms in county jail within the meaning

of section 667.5, subdivision (b). At proceedings held on July 11, 2011, Nelson entered pleas of not guilty to both counts and denied the special allegations.

At a hearing held on November 16, 2011, counsel from the bar panel was appointed to represent Nelson at trial. Trial, however, did not begin until June 12, 2012 when a group of prospective jurors was summoned from the jury room. Even then, before the jurors entered the courtroom, the trial court indicated that the People had made an offer to resolve the case. Although Nelson faced a sentence of 25 years to life plus approximately 32 years in enhancements, the People indicated they were willing to settle for a term of 25 years to life. Nelson, however, rejected the offer, indicating that he wanted a determinate term.

After the prospective jurors entered the courtroom, the trial court seated a group of 18 in the box, had the remainder sit in the courtroom, read them the information charging Nelson, then gave them a series of instructions.

Voir dire of the jury continued on June 13, 2012. During a break in the proceedings and out of the presence of the jury, the prosecutor indicated that, during trial, he wished to introduce evidence of one or more of Nelson's prior burglaries to show Nelson's intent. The trial court indicated that "[e]vidence of uncharged misconduct is admissible to prove that the defendant committed the charged offense with the requisite intent only if intent is in dispute." Then, "sufficiently similar prior act[s] [are] admissible." The trial court continued: "The defendant's plea of not guilty is not sufficient to place the elements of the crime charged against the defendant in issue. [¶] So, intent is not an issue and [that form of evidence of it] can't come in on the People's case-in-chief." In response, the prosecutor asserted that: "In this particular case, though, there is one distinction. And that is the fact that during . . . the initial encounter of the primary crime charged in this case, the defendant put his intent in issue in the statement to the witness by indicating that he was there [for] some innocent purpose. He said something to the effect of he was looking for his friend. And to the extent that he made that statement and that statement is introduced, his intent is in issue."

After the court made its ruling regarding prior burglaries but before the jurors had returned to the courtroom, defense counsel indicated that the prosecutor had spoken to his supervisors and returned with an offer of “27 years determinative state prison.” The trial court responded, “Well, . . . the jurors are on the way. Why don’t we put this on the record a little later.” The jurors then entered the courtroom and both the prosecutor and defense counsel were given the opportunity to question them.

After the potential jurors left the courtroom for the day, defense counsel indicated to the court that he had “had an opportunity to discuss [the People’s] offer with Mr. Nelson. . . . [Counsel had] told Mr. Nelson [his] opinion and [given] him [his] analysis of the strengths and the weaknesses of his case” and advised Nelson with regard to what he thought Nelson should do. After considering the 27-year offer, Nelson rejected it. He then counter-offered with 10 to 12 years. The People immediately rejected Nelson’s counteroffer.

The following day, out of the presence of the prospective jurors, the parties informed the trial court that they had reached a disposition. In view of the fact that his prior convictions occurred in the 1990’s and Nelson was 54 years old, “[i]n the interest of justice, the People [were] willing to strike all but one of the priors. [¶] So, . . . the offer [would be] a plea to count 1 for the high term of six years, with the admission of one strike prior, which would double it to 12 years, and the admission of two prison priors,” for each of which he would be sentenced to an additional year. That would be a total sentence of 14 years in prison.

After he was advised of and waived his right to a jury or court trial, his right to confront and cross-examine the witnesses against him, his right to present a defense, which included the right to use the subpoena power of the court to procure witnesses on his behalf, and his right against self-incrimination, or to remain silent, Nelson pled no contest to count 1, first degree burglary in violation of section 459, and admitted that a person was present at the time. Then, with regard to case No. TA012803, which alleged that Nelson committed burglary in violation of section 459 on May 15, 1991, Nelson admitted having suffered that conviction within the meaning of the Three Strikes law.

Nelson further admitted having served two prison terms, one for burglary beginning on May 15, 1991 and one for burglary beginning on September 22, 1987. Defense counsel concurred with the plea and stipulated to a factual basis for it based upon the police reports, preliminary hearing transcript and pre-plea report.

The trial court accepted the waivers, found that they were “knowingly, intelligently, understandingly, expressly [and] explicitly” made and found Nelson guilty based upon his plea and admissions. The court sentenced Nelson to six years in prison for his plea to burglary as alleged in count 1, then doubled the term to 12 years due to his prior conviction committed pursuant to the Three Strikes law. In addition, the court imposed two 1-year terms for Nelson’s “prison priors.” In total, the trial court sentenced Nelson to 14 years in prison. The court then dismissed all of the remaining counts and allegations and awarded Nelson presentence custody credit for 388 days actually served and 15 percent, or 58 days, of conduct credit, for a total of 446 days.

Nelson was ordered to pay a restitution fine in the amount of \$500 (§ 1202.4, subd. (b)), a stayed \$500 parole restitution fine (§ 1202.45), a \$40 court operations fee (§ 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$10 crime prevention fee (§ 1202.5), and a \$28 penalty assessment.

Nelson filed a timely notice of appeal on July 31, 2012.

### **CONTENTIONS**

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed October 30, 2012, the clerk of this court advised Nelson to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

### **REVIEW ON APPEAL**

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.