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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO DE JESUS RENOJ,

Defendant and Appellant.

D058577

(Super. Ct. No. SCE300449)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

A jury convicted Antonio De Jesus Renoj of burglary (Pen. Code,¹ § 459). It found true enhancement allegations that the burglary was of an inhabited dwelling (§ 460) and someone other than an accomplice was within the residence at that time (§ 667.5, subd. (c) (21).) The court stayed a jail term of 365 days pending Renoj's successful completion of three years of probation.

¹ All statutory references are to the Penal Code unless otherwise stated.

Renoj contends: (1) there was insufficient evidence he possessed the required intent for burglary; (2) the trial court erroneously responded to the jury's request for clarification of the intent requirement; and (3) the court's minute order and probation order improperly imposed fines that the court did not orally pronounce at sentencing. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution's Case

The night of April 24, 2010, Renoj attended a party in San Diego, and drank excessively. He left the party at approximately 1:40 a.m.

Approximately 15 minutes later, James McNairnie (James),² who was sleeping at his house, was awakened by a noise. Renoj, a complete stranger with no permission to be there, was in his master bedroom and carried a metal paint pole that James had kept downstairs. James was scared and slowly approached him. Renoj, whose speech was slurred, responded slowly to James's request that he put down the pole and did not respond to James's questions about who Renoj was. Renoj also said something like, "I don't know what I'm doing here."

Responding to Kathleen McNairnie's (Kathleen) telephone call, police arrived at the residence and asked Renoj what he was doing there. He replied, "I don't really know." Police asked him his name and he responded, "Whatever." Kathleen's iPod and reading light were found on Renoj's person. The McNairnies noticed that a ceramic jar

² We refer to the victims by their first names to avoid confusion and not out of disrespect.

they had wrapped for postage was shattered and the packing material placed in the fireplace.

Defense Case

Renoj testified he was a third class petty officer in the Navy. He had played beer pong at the party and got intoxicated. He did not remember much, except that someone gave him what he assumed was an energy drink. He next remembered being on the ground and a police officer pointing a gun at him.

Renoj's friend from the Navy, Ryan Murphy, testified Renoj had a reputation for trustworthiness and integrity.

DISCUSSION

I.

In challenging the sufficiency of the evidence to support his burglary conviction, Renoj concedes evidence of his intent may be drawn from the fact he picked up the iPod and the book light, placed them in his pocket, and transported them. Nonetheless, he argues, "these actions do not constitute theft for the same reason that his actions overall do not constitute burglary: there was no proof, nor any circumstances sufficient to give rise to an inference, that he did so with the required intent . . . at the time of entry." He points out he made no forced entry, lacked tools to commit burglary or theft, and made no attempt to flee; further, he had committed no such crimes previously. He concludes that "the circumstances are suggestive not of an intent to steal, but of drunken confusion."

Standard of Review

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' " (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We will not reverse unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict. (*People v. Redmond* (1969) 71 Cal.2d

745, 755; see also *People v. Stewart*, at p. 790; *People v. Olea* (1971) 15 Cal.App.3d 508, 513.)

Analysis

Burglary is committed when a "person . . . enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony[.]" (§ 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041; see *People v. Lawrence* (2000) 24 Cal.4th 219, 232-233.) It is settled that the essence of the offense is entry with the proscribed intent; such entry constitutes the completed crime of burglary regardless of whether any felony or theft actually is committed. (*People v. Allen* (1999) 21 Cal.4th 846, 863, fn. 18; see also *Montoya*, at pp. 1041-1042.) It does not matter whether a person who enters a house with larcenous or felonious intent does so through a closed door, an open door, or a window; the entry with the requisite intent constitutes the burglary. (*People v. Nunley* (1985) 168 Cal.App.3d 225, 231.)

"[I]n reviewing the sufficiency of evidence to support a burglary finding, the requisite intent is rarely demonstrated by direct proof, and as a result, may be inferred from facts and circumstances. [Citation.] As a result, evidence such as theft of property from a dwelling may create a reasonable inference that there was intent to commit theft at the time of entry." (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 741; see *People v. Lewis* (2001) 25 Cal.4th 610, 643.)

However, an intent to steal may also be inferred from an unlawful entry without reasonable explanation of the entry. (See *People v. Jordan* (1962) 204 Cal.App.2d 782, 786.) Such intent may be inferred when the defendant is a stranger and enters a home at

a late hour, without permission, and without announcing his intent. (*People v. Swenson* (1938) 28 Cal.App.2d 636, 639-640 (*Swenson*) [evidence was sufficient to prove a defendant entered a room with the intent to commit larceny because he entered the hotel room at 3:00 a.m. without authorization, knocking or giving a prior warning].) The intent to steal may be inferred from the totality of the facts and circumstances. (*People v. Frye* (1985) 166 Cal.App.3d 941, 947.) If the circumstances of a particular case and the conduct of the defendant reasonably indicate that his or her purpose in unlawfully entering a home is to commit larceny, a reviewing court will not disturb a guilty verdict on a burglary charge. (*Swenson, supra*, at pp. 639-640.) It is, of course, settled that a conviction cannot be based on mere speculation and conjecture. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"].)

On the totality of the evidence here, a reasonable trier of fact could draw inferences that Renoj had the requisite felonious intent when he entered James and Kathleen's house. The incident did not occur in broad daylight, but after midnight. Neither James nor Kathleen knew Renoj. A reasonable jury could infer by Renoj's entry with the paint pole at 1:55 a.m. into a stranger's master bedroom, that he held the requisite intent to steal the iPod, reading light or something else of value. (*Swenson, supra*, 28 Cal.App.2d at p. 639 ["[T]he intention with which an accused person enters the room of another individual without permission at an unusual hour of the night must be determined by the jury"].)

The fact Renoj appeared confused when James confronted him and did not resist arrest does not convince us that the evidence is insufficient to find the requisite intent for burglary. As we have stated, a reviewing court's opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*Swenson, supra*, 28 Cal.App.2d at pp. 643-644; *People v. Kraft, supra*, 23 Cal.4th at pp. 1053-1054.) We will not substitute our judgment for that of the jury, which found Renoj had felonious intent; our role on appeal is simply to determine whether its findings in support of the burglary convictions are based on sufficient evidence. On this record, there is substantial circumstantial evidence supporting an inference that Renoj acted with intent to commit theft.

II.

Renoj contends the trial court erroneously failed to clarify the jury's questions in a note it sent during deliberations, stating: "We need a clear definition of [b]urglary [and] intent. If intent was not apparent before [b]urglary is it still [first] degree [b]urglary."

Defense counsel proposed that the court respond to the jury's note by instructing that intent to steal must be formed at the time of entry and if intent was not formed at the time of entry, it is not a first degree burglary. The court rejected the request and instead instructed the jury: "Response to Question # 1: The Court has already provided you with all of the relevant instructions. Response to Question # 2: The Court cannot respond to this question. You are the finders of fact. Please refer to CALCRIM Sections 1700 [and] 1701."

When a jury asks a question after retiring for deliberation, "[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 985.) But "[t]his does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) We review for an abuse of discretion any error under section 1138. (*People v. Waidla* (2000) 22 Cal.4th 690, 746–747.)

There was no possible prejudice to Renoj from the court's refusal to answer the jury's specific questions because the court here had instructed the jury with CALCRIM No. 1700 regarding the elements of burglary that, "The defendants [*sic*] are charged in Count one with burglary. To prove that a defendant is guilty of this crime, the People must prove that: 1. The defendant entered a building; AND 2. *When he entered a building he intended to commit theft. To decide whether a defendant intended to commit theft, please refer to the separate instructions I will give you on that crime. A burglary was committed if a defendant entered with the intent to commit theft. A defendant does not need to have actually committed theft as long as he entered with the intent to do so. The People do not have to prove that a defendant actually committed theft.*" (Emphasis added.)

The court instructed the jury with CALCRIM No. 1701 regarding the degree of burglary: "Burglary is divided into two degrees. If you conclude that a defendant

committed a burglary, you must then decide the degree. First degree burglary is the burglary of an inhabited house. A house is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged entry. All other burglaries are second degree. The People have the burden of proving beyond a reasonable doubt that the burglary was first degree burglary. If the People have not met this burden, you must find the defendant not guilty of first degree burglary."

The court also instructed with CALCRIM No. 251 regarding the union of act and wrongful intent: "The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent. For you to find a person guilty of the crime of Burglary as charged in count 1, that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state. The act and the specific intent or mental state required are explained in the instruction for that crime. The specific intent or mental state required for the crime of Burglary as charged in count 1 is the intent to commit theft."

Finally, the court instructed with CALCRIM No. 3426 regarding the effects of voluntary intoxication on the defendant's ability to form a specific intent: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent to commit theft. A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. In connection with the charge of residential burglary the People have the burden of

proving beyond a reasonable doubt that the defendant acted with the intent to commit theft. If the People have not met this burden, you must find defendant not guilty of residential burglary. You may not consider evidence of voluntary intoxication for any other purpose."

In light of the various instructions set forth above, the court did not err in responding to the jury's note by declining to elaborate on the instructions given, reminding the jury it was the trier of fact, and referring the jury to the instructions given.

III.

Renoj contends some of the fines and costs listed in the minute order and the probation order are improper because the court did not orally pronounce them at sentencing. Specifically, he contends, "At sentencing, the trial court did not orally impose any fine pursuant to [] section 672, providing for the imposition of a fine for the conviction of a crime for which no fine is prescribed, such as burglary, any restitution fine pursuant to [] 1202.4, subdivision (b), or any probation supervision costs or fees pursuant to [] section 1203.1, subdivision (b). The minute order, however, includes a fine of \$800, including penalty assessments and a restitution fine of \$200. The written probation order additionally includes probation fees of \$1127 for the pre-sentence investigation and up to \$99 per month for probation supervision." Renoj requests that the penalty assessments associated with the section 672 fine and the probation supervision costs be stricken. The People counter that Renoj forfeited the claim by waiving his right to formal arraignment for judgment and sentencing and, alternatively, the proper remedy

is to remand the matter to the trial court to pronounce oral judgment. We conclude there was no error.

At the start of the sentencing hearing, the court noted it had read and considered the probation report, and twice afterwards confirmed that defense counsel had reviewed the probation terms with Renoj. The probation report listed the following fees: \$800 for a base fine and penalty assessment and section 1465.7, subdivision (a) surcharge; \$30 for court security; \$154 for criminal justice administration under Government Code section 29550.1; a \$200 restitution fine under section 1202.4, subdivision (b); \$38 for a theft fine under section 1202.5; a \$100 restitution fine; and \$30 for the immediate critical needs account.

The court proceeded to orally pronounce at sentencing: "I'm going to grant you probation even though you're ineligible for it, and I'm going to cite the following rules in support of a grant of probation: [California Rules of Court, rule 4.414, subdivision (b)(1)], which shows you have no record: [California Rules of Court, rule 4.414, subdivision (b)(3)], which indicates you're willing to abide by the terms of probation. And also the lack of — your youthfulness and your lack of criminal sophistication, which is [California Rules of Court, rule 4.414 subdivision (a)(8)]." The court orally pronounced, "I'm going to stay that one year in custody provided you remain law-abiding in all respects, *pay fees and fines \$50 per month 60 days from today's date . . . I'm not going over all the terms because [defense counsel] indicated she has told you about them.*" (Emphasis added.)

The oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) The court in *People v. Sharret* (2011) 191 Cal.App.4th 859, 864, noted the trial court had not specified all penalties, but rather it had listed two and added, " 'plus penalty assessment.' " The appellate court approved of that oral pronouncement, noting, "In Los Angeles County, trial courts frequently orally impose the penalties and surcharge discussed above by a short-handed reference to 'penalty assessments.' The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. This is an acceptable practice."

Here, any discrepancy between the court's oral pronouncement of judgment and the abstract of judgment and the final probation order may be resolved in the same way as it was in *Sharret, supra*, 191 Cal.App.4th 859. The trial court here orally pronounced the fines and fees in an abbreviated fashion, and the clerk filled out the details in the minute order and abstract of judgment, in accordance with the probation report, of which Renoj was apprised. That was an acceptable action by the court.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.