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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN MATTHEWS TUCKER,

Defendant and Appellant.

E053643

(Super.Ct.No. FVA1001836)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Eric Cioffi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant John Matthews Tucker argues that the evidence at trial was insufficient to support his convictions for commercial burglary and forgery. (Pen. Code, §§ 459 & 470.)<sup>1</sup> He also claims that the trial court erred by not dismissing his prior strike. We will affirm.

## FACTS AND PROCEDURAL HISTORY

On November 29, 2010, defendant entered a bank and tried to cash a check for \$942.<sup>2</sup> The teller to whom he presented the check had earlier cashed a similar-looking check made out to someone with a similar name and drawn on the same account. The teller, who had been in her job for 15 years, became suspicious and consulted her supervisor. Unable to confirm the authenticity of the check, the supervisor called police. When it seemed to be taking a long time to get the check approved, defendant told the teller he was in a hurry and asked her to return his identification, but did not ask for the check. Officer Delacruz responded to the bank's call.

After talking to the teller, Officer Delacruz interviewed defendant. The officer observed that defendant "appeared nervous and kinda fidgety." Defendant said he had gotten the check from a lady for whom he had done some work and that he didn't know it

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

<sup>2</sup> An amount, incidentally, which is just \$8.00 below the threshold for grand theft. (§ 487, subd. (a).)

was fraudulent. He was unable to recall the lady's name, address, telephone number, or directions to her house; and he had no receipts or paperwork to document his story.

In a felony complaint filed December 1, 2010, defendant was charged with commercial burglary (§ 459, count 1) and forgery (§ 470, subd. (d), count 2). The complaint further alleged that, in relationship to both counts, defendant had suffered a prior conviction for a serious and violent felony, robbery (§§ 211, 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)); and two prison priors (§§ 667.5, subds. (b)-(i) & 1170.12, subds. (a)-(d)).

At trial, the owner of the business account on which the check was drawn testified that he had not written it; nor had he written the similar-appearing one cashed earlier that day for someone also named "Tucker." Blank checks bearing the numbers of both were still in the owner's checkbook. The fraudulent check defendant tried to cash had a different style, color, and pattern from the owner's checks.

The two checks written to someone with the last name "Tucker" on the date of the incident were admitted into evidence, as was a check written by the owner to another payee about ten days earlier. The earlier check had never been cashed and apparently had never been received by the payee. The business owner had had to write the payee a new check on a different account after his original account was closed by the bank following this incident.

On April 13, 2011, a jury convicted defendant of both charges. In a separate proceeding, on April 20, 2011, the court found true the allegations that defendant had

suffered a prior serious and violent conviction for robbery and that he had two prison priors. Sentencing was set for May 18, 2011.

Defense counsel filed a section 1385 motion on April 25, 2011, asking the court to dismiss defendant's prior strike in the interests of justice. Counsel argued that his client fell outside the spirit of the three strikes law because his current offense was not a serious or violent felony; his one serious and violent felony was over 10 years old; and his participation in the old crime had been minimal. The People filed an opposition to defendant's motion, arguing that he was a recidivist whose crimes were continuing despite his having been given many chances to reform.

On May 18, 2011, after listening to argument from counsel, the court denied the motion to dismiss defendant's "strike" prior, explaining that his criminal history showed a long pattern of continuing criminal behavior, including numerous parole and probation violations. Defendant had been on parole when he committed the current crime, a fact that the court considered "an aggravating circumstance in terms of my position in the Romero decision." In addition, despite the overwhelming evidence against him and the jury's verdict, defendant continued to deny responsibility for the crime and had expressed no remorse for it.<sup>3</sup> The court hoped that when defendant was released from prison for his current offense, out of consideration of the strong love he had for his daughter, he would not break the law again.

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<sup>3</sup> The court indicated that it had read the probation report as well as defendant's motion and the People's opposition. The probation report documented defendant's continuing denial of the current charges. He felt that he had done nothing wrong and stated, "I got screwed."

The court sentenced defendant to a total of six years in state prison: the midterm of two years for count 1, doubled because of the strike prior; plus 2 years for count 2, also doubled because of the strike prior, but stayed pursuant to section 654; plus one consecutive year for each prison prior. This appeal followed.

## **DISCUSSION**

Defendant argues that (1) the evidence was insufficient to support a conclusion that he had the requisite intent to defraud or to commit theft, and (2) that the court abused its discretion by denying his section 1385 motion. The People disagree with both points.

### *Sufficiency of the Evidence*

#### Standard of Review

When a defendant challenges the sufficiency of the evidence to support the verdict, we review the record in the light most favorable to the result below to determine whether it discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 558.) “That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial.” (*People v. Holt* (1997) 15 Cal.4th 619, 669 (*Holt*).

#### Burglary

To establish a burglary, the People must prove that defendant entered the premises with the intent to commit a felony or theft. (§ 459; *Holt, supra*, 15 Cal.4th at p. 669.) Intent is rarely susceptible of direct proof and therefore may be inferred from all the facts

and circumstances disclosed by the evidence. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.)

Here, defendant's intent to commit a felony when he entered the bank could readily be inferred from the facts and circumstances disclosed by the evidence at trial. Firstly, he went into a bank where he was not a customer, and presented a check almost identical in appearance and amount to one cashed earlier the same day by someone with the same last name, making an experienced teller suspicious about the check's authenticity.<sup>4</sup> When there was a delay in cashing the check, defendant told the teller he was in a hurry and asked for his ID back—but not his check for \$942, which, if valid, would have been valuable property. From these facts, the jury might well have inferred that defendant knew the check was forged when he entered the bank and presented it to the teller. Once bank employees began to question it, the check became worthless and defendant had no further interest in it. He was simply anxious to leave the bank as quickly as possible.

Secondly, during an investigation by the responding police officer, defendant appeared nervous and fidgety and was unable to answer simple questions about the check and how he had come by it. He was unable to provide any paper documentation of work allegedly done for the person who had written him the check. He did not know her name, address, or phone number and he could not give directions to the location where the work was done. Again, both from his nervousness and apparent ignorance about the check's

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<sup>4</sup> The earlier check appeared to have been made out to, and cashed by, a person who was probably defendant's brother.

origins, the jury might reasonably have inferred that the check was fraudulent and that defendant knew it.

Finally, there was extensive evidence from the owner of the account on which the check was drawn that neither he nor his wife had written the check, or any check to a person with the last name “Tucker.” The owner did not know defendant and did not recognize the check as one of his, although he admitted that the signature looked like his wife’s. The color and pattern on the check was not the same as that on the owner’s checks. Most significantly, the genuine check with the same number as the fraudulent check was still in the owner’s checkbook, unused.

Together these facts and circumstances supported the jury’s conclusion that defendant knew when he entered the bank that the check he was attempting to negotiate was forged and that he intended to defraud the bank and/or the account owner.

*Denial of a Section 1385 Motion to Dismiss a Prior Strike*

A trial court has discretion to dismiss a prior strike conviction under section 1385 in the interests of justice, but only if it finds, “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.”

*(People v. Williams (1998) 17 Cal.4th 148, 161 (Williams); People v. Superior Court*

*(Romero) (1996) 13 Cal.4th 497, 530.)* We review the court’s decision for abuse of

discretion. The disposition issue is whether the decision is so irrational or arbitrary as to

fall outside the bounds of reason. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377 (*Carmony*); *Williams, supra*, 17 Cal.4th at p. 162.) The party objecting to the sentence has the burden of proof. (*Carmony*, at p. 377.) In this case, defendant failed to carry that burden.

One of defendant's primary arguments here, as it was below, is that his prior strike was ten years old. Despite that fact, however, it was clear that defendant had not given up his life of crime. According to the record in the probation officer's presentence investigation report, which the court indicated it had reviewed and considered, defendant had been in and out of prison since 1991 (20 years) for a variety of offenses. These included battery, robbery, drug dealing (marijuana, cocaine), and driving without a license (three convictions). In the years since his prior strike, he had committed more crimes and had repeatedly failed to successfully complete probation or parole, and at the time of his current offense, he was again on parole. As the court explained, this last factor played a large part in its decision regarding a *Romero* motion. On appeal, defendant characterizes his past crimes as "low level de minimus drug possession charges." But as the trial court emphasized, they were possession for sales of cocaine and marijuana, not simple possession, and he had received significant prison sentences for them.

A second point defendant made below and repeats here is that his most recent crime was not a serious or violent felony. The trial court rejected this argument in part because, after listening to the evidence, it concluded that the current crime demonstrated a significant degree of planning and sophistication. We agree. Defendant had in his

possession a high-grade forged check with a signature so like a genuine signature that even the owner of the account admitted that it looked like his wife's. It is not unreasonable to conclude that such a forgery was likely obtained by sophisticated means—either with the aid of an expert forger, if defendant was not one himself—or via sophisticated use of a computer or internet copying device.

Defendant attempts to rely, as he did in his motion and in argument to the trial court, on *People v. Bishop* (1997) 56 Cal.App.4th 1245. The trial court distinguished defendant's case by pointing out that defendant will be much younger when he is released than the *Bishop* defendant would have been had his strikes not been dismissed, and that defendant's sentence will not amount to a life sentence as would have been the case in *Bishop*. We cannot see that the court abused its discretion in so reasoning.

**DISPOSITION**

The judgment is affirmed.

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CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.