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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.

DARRELL NATHAN MACCLAIN,

Defendant and Appellant.

E054611

(Super.Ct.No. RIF153932)

OPINION

APPEAL from the Superior Court of Riverside County. J. Richard Couzens (retired judge of the Placer Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) and Becky Dugan, Judges.¹ Affirmed with directions.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

¹ Judge Couzens presided over the trial. Judge Dugan denied defendant's motion for additional conduct credits.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant appeals from his conviction of attempted burglary (Pen. Code,² §§ 664, 459.) Defendant contends: (1) the evidence was insufficient to support his conviction; (2) the trial court erred in denying his motion to strike prior convictions; and (3) he is entitled to additional conduct credits. We find no prejudicial error, and we affirm defendant's conviction. However, we remand with directions to the trial court to correct an error in the abstract of judgment.

II. FACTS AND PROCEDURAL BACKGROUND

Around 7:00 or 7:10 a.m. on November 9, 2009, Norma Hernandez heard someone knocking loudly on her front door and attempting to turn the locked doorknob. She looked outside and saw two young Black males wearing all black clothing; one of the men carried a backpack, and both had hoods on; one of the men wore long pants, and the other wore shorts. One of the men was on the top step, and the other was below the step. She did not open the door, and the two men eventually walked away. About two minutes later, Hernandez heard someone trying to lift the screen from the kitchen window in the back of the house. She yelled that she had already called the police, and she then heard

² All further statutory references are to the Penal Code unless otherwise indicated.

footsteps of people running from her house. She later discovered the screen on her kitchen window was bent, although it had not been bent before.

Hernandez reported the attempted burglary and described the men she had seen. Deputy Timothy Provost of the Riverside County Sheriff's Department received the report around 7:46 a.m., and shortly thereafter, he saw defendant and another man, Antoine Stewart, both Black men dressed in all black clothing, and one carrying a backpack, one wearing long pants and the other wearing shorts, walking a few blocks from Hernandez's house. Stewart gave permission for the deputy to search the backpack, and the deputy found that it was completely empty. Defendant had a pair of work gloves in his sweatshirt pocket. The deputy brought Hernandez to see the men, and she recognized them as the men who had come to her front door.

Hernandez told Deputy Provost that she had seen two persons in her backyard. Deputy Provost found a shoeprint on the east side of Hernandez's house near the gate and photographed it. At trial, the prosecutor presented pictures of the shoeprint and of the shoes defendant and Stewart had been wearing when arrested. The deputy testified the shoeprint and the sole of defendant's shoe were adult sized and featured a small circular design at the front, whereas, Stewart's shoes had circular designs on both the front part and the heel. Deputy Provost also noticed that a sliding screen door was partly opened. Hernandez told him the door had been closed before that morning.

Defendant presented the testimony of Claudette Simpson, who stated that defendant had telephoned her that morning at her mother's house saying he needed a ride to take his friend to school. Simpson's mother lived near Hernandez; the area was tract

housing, and the houses looked the same and were the same colors. Simpson told defendant to walk down the street and she would meet him. She was driving to meet him when she saw him detained by the police.

The jury found defendant guilty of attempted burglary (§§ 664, 459). Before the trial, defendant admitted prior conviction allegations. (§ 667, subds. (c), (e)(1)).

The trial court sentenced defendant to the low term of one year for the attempted burglary and doubled the term under the two strikes law. (§ 667, subd. (e)(1).) In addition, the court imposed a consecutive term of five years for the prior serious felony. (§ 667, subd. (a).)

Additional facts are set forth in the discussion of the issues to which they are relevant.

III. DISCUSSION

A. Sufficiency of Evidence

Defendant contends the evidence was insufficient to support his conviction.

1. Standard of Review

We review a defendant's challenge to the sufficiency of the evidence to support his conviction under the substantial evidence test. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In applying that test, we view the entire record “in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence,” by considering whether there was substantial evidence to support the conclusion of the trier of fact. (*Ibid.*) If the circumstances reasonably justify the judgment, we may not reverse simply because the

circumstances might also be reasonably reconciled with a contrary finding. (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

2. Analysis

Defendant first argues the evidence was insufficient to prove he ever entered Hernandez's backyard. However, Hernandez testified that after she yelled she had already called the police, she "heard *their* footsteps. *They* were running." (Italics added.) Moreover, Deputy Provost testified that Hernandez told him she had seen two people in her backyard. That evidence reasonably supported an inference that both defendant and his companion had entered Hernandez's backyard.

Defendant next argues that even if he was present, his presence alone was insufficient to support a conviction for aiding and abetting an attempted burglary. A defendant is liable for aiding and abetting a crime "when he or she aids the perpetrator of an offense, knowing of the perpetrator's unlawful purpose and intending, by his or her act of aid, to commit, encourage, or facilitate commission of the offense" (*People v. Morante* (1999) 20 Cal.4th 403, 433.) In determining whether a defendant "directly or indirectly, aided the perpetrator, with knowledge of the latter's wrongful purpose," a jury may consider whether the defendant was present at the scene of the crime; whether the defendant and the perpetrator were companions; and the defendant's conduct before and after the offense. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094 (*Lynette G.*))

In *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1222, the court held that the jury could reasonably infer the defendant had been present at the scene of a home invasion burglary, robbery, and murder because shoeprints found at the scene matched

the size, pattern, and type of shoes the defendant was wearing immediately after the crime was committed.

In *People v. Perryman* (1967) 250 Cal.App.2d 813, the defendant was seen driving in a car with the perpetrators about 20 minutes before a burglary, and he was later seen driving around the building where the burglary occurred, indicating an attempt to remain in the vicinity. Although he did not enter the building, the court concluded that substantial evidence supported an inference that he had aided and abetted the burglary. (*Id.* at p. 820.)

In *Lynette G.*, the court held the evidence was sufficient to support the defendant's conviction for aiding and abetting a robbery because she "was present at the scene of the crime and had fled with the perpetrator and two others after the crime had been committed and was still in their company shortly thereafter." (*Lynette G.*, *supra*, 54 Cal.App.3d at p. 1095.)

Here, defendant was present with Stewart before and after the attempted burglary. (See *People v. Prettyman*, *supra*, 112 Cal.App.4th at p. 820; *Lynette G.*, *supra*, 54 Cal.App.3d at p. 1095.) Defendant was carrying work gloves, and the jury could reasonably infer he intended to avoid leaving fingerprints. As discussed above, the evidence was sufficient for the jury to conclude that both defendant and Stewart had entered Hernandez's backyard. Defendant's shoe soles matched the shoeprint left in the dirt at Hernandez's house. (See *People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1222.) We conclude the evidence was sufficient to support defendant's conviction of attempted burglary.

B. Denial of *Romero* Motion

Defendant contends the trial court abused its discretion in denying his motion to strike a prior conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

1. Additional Background

Before sentencing, defendant moved to strike his prior strike. He argued he was only 18 years old when he committed the prior strike, a robbery. He stated that his prior felony convictions included juvenile convictions for grand theft (§ 487, subd. (c)) in July 2002, and obstructing an officer (§ 69) in December 2002; and adult convictions for second degree robbery (§ 211) and participation in a criminal street gang (§ 186.22, subd. (a)) in March 2005. However, the probation report described a far more extensive criminal history: Defendant was declared a ward of the court at age 13 in June 2000, based on misdemeanor battery (§ 242), grand theft (§ 487, subd. (c)), and theft (§§ 484, 490.5). In August 2000, he was continued as a ward based on misdemeanor violations of sections 484 and 488. He was continued as a ward in various placements in 2001 and was found to have received stolen property (§ 496) and to have possessed a weapon on school grounds (§ 626.10), both felonies. In March 2002, he was sent to juvenile hall, based on a finding of failure to adjust (Welf. & Inst. Code, §§ 602, 777). In December 2002, he was sent to California Youth Authority (CYA) for a maximum term of eight years two months for felony grand theft (§ 487, subd. (c)); misdemeanor battery (§ 242); felony resisting an officer (§ 69); four counts of misdemeanor vandalism (§ 594, subds.

(b)(1)(A), (b)(2)(A)), misdemeanor escape from custody (Welf. & Inst. Code, § 871),³ and attempted escape from custody (Pen. Code, § 664; Welf. & Inst. Code, § 871). In April 2005, he was dishonorably discharged from CYA. In March 2005, he was convicted as an adult of felony second degree robbery (§ 211) and felony criminal gang participation (§ 186.22, subd. (a)) and was sentenced to prison for five years eight months. He was paroled in August 2009, but his parole was revoked in December 2009, and he was returned to custody for another 12 months. Three months after his release, he committed the current offense. While in custody on the current offense, he was found in possession of a weapon, a “shank” in a correctional facility, and he entered a plea to a felony violation of section 4502, subdivision (b) in exchange for a sentence of 16 months consecutive to that in the current case. Defendant was 23 years old when he committed the current offense.

At the hearing on the *Romero* motion, the trial court stated it had read the motion, the opposition to the motion, and the probation report. The court stated it would deny the motion, because “[t]he defendant’s record is increasing. The violations are fairly recent, and I just don’t feel that he has demonstrated what the law requires as . . . sufficiently mitigating circumstances to justify the granting of *Romero* relief. By the same token, I don’t find the crime particularly heinous or violent.”

³ Page 5 of the probation report indicates the violation was of Penal Code section 871, which does not define a crime. Page 6 indicates the correct citation should be to the Welfare and Institutions Code.

2. *Standard of Review*

We review a trial court's failure to dismiss or strike a prior conviction allegation under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)).

3. *Analysis*

A trial court has discretion to strike a defendant's strike prior only if the court ““conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.”” [Citation.]” (*Carmony, supra*, 33 Cal.4th at p. 374.) In exercising its discretion, the trial court must consider the particulars of the defendant's background, character, and prospects; the nature and circumstances of his current and prior offenses; and the interests of society to decide whether the he may be deemed to be outside the spirit of the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In *Carmony*, the court held that the three strikes law “creates a strong presumption that any sentence that conforms” to the stringent standards of the law “is both rational and proper,” and “[i]n light of this presumption a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances,” such as when the trial court was unaware of its discretion. (*Carmony, supra*, at p. 378.) The court concluded that the failure to strike a prior conviction would be an abuse of discretion in extraordinary circumstances “where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme. . . .” (*Ibid.*) This is not such an extraordinary case. The trial court was

aware of its discretion and did not abuse that discretion in concluding that defendant's extensive criminal background, interrupted only by his periods of custody, disqualified him from leniency under *Romero*.

C. Custody Credits

Defendant contends he is entitled to additional conduct credits.

1. Additional Background

Defendant committed his crime in November 2009, and he was sentenced on August 12, 2011. The trial court awarded him 642 days of actual custody credit and 320 days of conduct credit. He has a prior conviction for robbery, a serious and violent felony, and therefore did not qualify for day-for-day credit under former section 2933, subdivision (e).

Operative October 1, 2011, the Legislature amended section 4019 to allow all defendants serving presentence time in county jail to be eligible for day-for-day credits. (Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, Stats 2011, ch. 39, § 53, and Stats. 2011, 1st Ex. Sess., ch. 12, § 35.) Section 4019 now provides that “a term of four days will be deemed to have been served for every two days spent in actual custody.” (§ 4019, subd. (f).) The only defendants who are excluded from section 4019's current day-for-day credit provisions are those who have a current violent felony or murder conviction. (See § 2933.1, subd. (c), § 2933.2, subd. (c).) By its express terms, the amendment to section 4019 applies only to defendants whose crimes were committed on or after October 1, 2011. (§ 4019, subd. (h).)

In January 2012, defendant filed a motion to correct presentence custody credits on the ground that the equal protection clause required that the recently amended section 4019 be applied to him retroactively, and he was entitled to an additional 322 days of conduct credit. The trial court denied the motion.

2. *Retroactive Application of Amendment to Section 4019*

After briefing was completed in this case, the California Supreme Court issued its opinion in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), holding that a prior amendment to section 4019 that increased presentence custody credits did not increase credits for custody before its effective date of January 25, 2010 (*Brown, supra*, at pp. 319-328), and defendants who received different amounts of custody credit were not similarly situated for purposes of the equal protection clause (*id.* at pp. 328-330).

Although noting that *Brown* was not directly on point because it dealt with a prior version of section 4019, the court in *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551, held that the *Brown* court's reasoning and conclusion applied equally to the October 1, 2011, amendment to section 4019, and that amendment did not apply retroactively. We agree with the reasoning and conclusions of *Brown* and *Ellis*, and we therefore reject defendant's argument that he was entitled to additional conduct credits.

3. *Equal Protection*

Defendant further contends equal protection principles require that the more generous provisions of the current version of section 4019 be applied to him. In *Brown*, the court explained that, because "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners

who served time before the incentives took effect and thus could not have modified their behavior in response” (*Brown, supra*, 54 Cal.4th at pp. 328-329), it necessarily follows that prisoners who served time before the January 25, 2010, version of section 4019 took effect are not similarly situated to those who served time after that (*Brown, supra*, at p. 329). Based on *Brown*, the *Ellis* court rejected the defendant’s equal protection challenge to the October 1, 2011, amendment to section 4019. Again, we agree with the reasoning and conclusions of the *Brown* and *Ellis* courts, and we therefore reject defendant’s equal protection challenge.

D. Correction to Abstract of Judgment

The trial court imposed the low term of one year for attempted burglary and doubled the sentence under the two strikes law. The abstract of judgment indicates defendant was sentenced to a low term of two years for the attempted burglary. However, the box indicating he was sentenced under the two strikes law is not checked. Accordingly, we will direct that an amended abstract of judgment be prepared.

IV. DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting that defendant was sentenced under the two strikes law and to forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.