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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.

RICKY PAY PERRY,

Defendant and Appellant.

E062378

(Super.Ct.No. FWV1202704)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed with directions.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant and appellant Ricky Ray Perry of first degree burglary while a person was present (count 1; Pen. Code, § 459).¹ After a bifurcated bench trial

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

thereafter, the trial court found true allegations defendant had suffered six prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(i)) and five prior serious felony convictions (§ 667, subd. (a)(1)). The court sentenced defendant to a 25 year determinate term of incarceration followed by an indeterminate term of 25 years to life.

After trial counsel filed the notice of appeal, this court appointed appellate counsel to represent defendant. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case, a summary of the facts, and identifying two potentially arguable issues: 1) whether the court improperly instructed the jury by giving purportedly duplicative language in the standard pattern jury instruction for burglary (CALCRIM No. 1700); and 2) whether the court abused its discretion by denying defendant's *Romero*² motion.

Defendant was offered the opportunity to file a personal supplemental brief, which he has done. In his brief, defendant contends the court erred in permitting pictures of the stolen property, rather than the stolen property itself, to be admitted into evidence. Defendant additionally argues the People's failure to preserve the stolen property and the door through which the victim's daughter first saw defendant infringed upon his constitutional right to due process. Finally, defendant maintains insufficient evidence supports his conviction. We shall direct the superior court to correct the abstract of

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

judgment to reflect it sentenced defendant pursuant to sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(i). In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2012, around 7:40 a.m., the victim left her residence to take her sons to school. She left behind her three daughters, the oldest of whom was 15. Several minutes later, someone rang the doorbell. The victim's eldest daughter looked out through the clear beveled glass of the front door.³ She saw defendant, a man whom she did not recognize, wearing a gray sweatshirt and gray sweatpants. The daughter also saw a white van parked across the street.

She called her mother to inform her someone was at the front door. While on the phone with her mother, the daughter heard the metal gate on the side of the house, which lead into the backyard, close. She informed her mother. The mother told her daughter to call 911.

The daughter then heard someone trying to open the locked sliding glass door. She later heard footsteps inside the house.

An officer dispatched to the home noted a white van parked across the street. As he approached the home, he saw defendant walking away from the house wearing a gray sweatshirt and holding a pillow case which appeared to have heavy items inside rather than a pillow. The officer told defendant to stop. Defendant got into the white van and

³ The victim also testified the beveled glass on the front door was clear such that one could recognize an individual's face through it.

drove away quickly. The officer radioed dispatch with the license plate number of the vehicle and its direction of travel.

The victim returned home soon thereafter. She ran inside the home to the garage where she found her three daughters crying.

The victim went through the house with officers. She found her water jug, which was full of cash and change, in the entryway; it had been located in her master bedroom closet before she left the house. She found her perfume bottles, which she had left on the ledge in front of the open window in her master bathroom, had been knocked to the ground and broken. The screen to the window was found outside on the patio.

The shelves to the victim's jewelry armoire had been thrown on the floor and several drawers were missing. Jewelry shelves which had been in her closet were also missing. Boxes were missing off her bedside table. A maroon pillow case from the boys' room was also missing, as was a satchel containing her son's coins.

Another officer found what appeared to be boxes of jewelry scattered in the street on his way to the victim's residence. A pillow case was also located nearby. An officer later took the victim to the site where she identified the jewelry and pillowcase as belonging to her. Pictures of the jewelry and pillow case were identified by the victim as those stolen from her residence. The court later admitted the pictures into evidence. Defense counsel never objected to either the identification or admission of the photographs as exhibits.

A third officer on his way to the residence heard additional information regarding the location of the suspect's van. He went to that location and saw a white van matching

the radioed description. The officer conducted a traffic stop and commanded the driver to exit the vehicle. Defendant was the driver.

Inside the back of the vehicle, the officer found a black bag with a large hammer and wire cutters. An officer took the victim's daughter to another location in order to identify the suspect. She informed the officer she could not be sure defendant was the perpetrator because he appeared older than the man whom she saw at the house. However, the victim's daughter testified the suspect's clothing matched the person who had rung the door bell. Likewise, defendant's van matched the one she saw parked across the street.

During a search of defendant at the police station, defendant turned over a white bag containing coins. The victim later identified the bag as belonging to her.

An evidence technician lifted prints off the window sill, the window screen, and the water jug. A fingerprint examiner later analyzed six latent fingerprints taken from the scene. None of the prints were suitable for comparison.

The People charged defendant by first amended information with first degree burglary while a person was present (count 1; § 459) and receiving stolen property (count 2; § 496, subd. (a)).⁴ The People additionally alleged defendant had suffered six prior strike convictions for residential burglary (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(i)), two in 1984, two in 1985, one in 1989, and one in 2011. The People also alleged the same convictions as prior serious felony convictions (§ 667, subd. (a)(1)).

⁴ The court dismissed count 2 prior to trial on the People's motion.

In an apparent off-the-record discussion, defense counsel objected to a sentence in the standard pattern instruction on residential burglary. (CALCRIM No. 1700.) On the record, the court observed, “In [CALCRIM No.] 1700 there was a request that the sentence that the People did not have to prove the defendant actually committed theft be stricken, and the Court will deny [] that request. I believe it should stay. And I think we resolved another portion of your concern about that.” The court instructed the jury that, “A burglary was committed if the defendant entered with the intent to commit theft. The 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 the defendant actually committed theft.”

After the jury convicted defendant, the court proceeded to a bifurcated bench trial on the prior conviction allegations.⁵ The People offered into evidence certified copies of records reflecting defendant’s prior convictions. At one point, the court stated that it could “clearly state that I would not be prepared . . . to state beyond a reasonable doubt that the photos from the 1980’s are [defendant] today.” “I’m not sure that it’s [defendant] today.” The court also stated, “I’m not going to make a determination of fingerprints, that I will tell you right now. Because last I realized, I don’t qualify as a fingerprint

⁵ The minute order dated November 19, 2013, reflects discussions were held concerning trial on the prior conviction allegations and an oral waiver was taken by the court. We do not have a reporter’s transcript for this date. We presume, particularly because defense counsel never objected to a bifurcated bench trial on the prior conviction allegations, that this discussion involved defendant’s request for a bifurcated trial on the allegations and a waiver of his right to a jury trial on those allegations.

analyst.” Nevertheless, the court ruled that, “for the time being I’m accepting that the priors that I mentioned were proven beyond a reasonable doubt: ’84, ’85, ’89 and 2011.”⁶

Defense counsel subsequently filed a *Romero* motion requesting the court strike defendant’s prior strike conviction allegations. The People filed opposition. The court denied the motion noting, “This court presided over the trial of [this] case . . . and also presided over the trial on the priors. And I have spent a lot of time considering the situation presented. I’ve looked at [defendant’s] background. I’ve looked at his character. I’ve looked at his prospects for the future. And in the court’s estimation[,] [defendant] clearly falls within the scheme of the three strikes law. . . . [Defendant has] seven misdemeanor convictions, nine felony convictions, including numerous residential burglaries, ten grants of probation, six commitments in state prison, totaling in excess of 25 years, beginning in 1975 to the present, [which] can only paint the picture to the court that [defendant’s] future is likely to mimic his past.”

DISCUSSION

Defendant contends the court erred by allowing photographs of the stolen property to be admitted into evidence. He maintains the failure of the People to preserve the front

⁶ Despite the court’s failure to enumerate exactly how many prior conviction allegations it was finding true and of what type, the probation officer’s report and the People’s opposition to defendant’s *Romero* motion reflect that the court had apparently found all six of defendant’s alleged prior strike convictions true, but only five of his alleged prior serious felony convictions true even though they were all based upon the same convictions. The minute order reflects only that the court found five priors true, without specifying whether they were prior strike convictions, prior serious felony convictions, or both.

door as evidence prejudiced him because it would have revealed the impossibility of any identification of him through the beveled glass. Additionally, defendant argues the stolen property should have been fingerprinted. Finally, defendant asserts there was insufficient evidence to convict him. We disagree.

First, defendant failed to object to the identification or admission of the photographs of the stolen property as exhibits at trial. (*People v. Lucas* (2014) 60 Cal.4th 153, 264-265; *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1075.) Second, the court was required to presume that the photographs accurately reflected the stolen property; thus, the photographs were properly admitted at trial. (Evid. Code, § 1553 [There is a rebuttable presumption that photographs are an accurate representation of the images they purport to represent.]) Third, defendant failed to object at trial regarding the People’s purported failure to preserve evidence. (*Lucas, supra*, 60 Cal.4th at pp. 233-234 [“The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.’ [Citation.]”].)

Fourth, law enforcement agencies are required to preserve “evidence” only if it possessed exculpatory value before it was destroyed. (*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1262) Defendant has not carried his burden in showing the People acted in bad faith or that the evidence would have helped his case. (*Id.* at p. 1262 [“The state’s responsibility is further limited when the defendant challenges the failure to preserve evidence “of which no more can be said than that it could have been subjected to tests” that might have helped the defense. [Citation.] In such a case, unless the

defendant can show “bad faith” by the police, failure to preserve “potentially useful evidence” does not violate his due process rights.’ [Citation.]”.) Indeed, the jury found defendant guilty despite the fact that no fingerprints, even those obtained from three items ostensibly touched by the perpetrator at the crime scene, matched defendant’s.

Finally, sufficient evidence supported defendant’s conviction. The victim’s daughter gave a general description of the suspect who matched the individual one officer saw leaving the residence with a pillow case filled with heavy items. At trial, both the victim’s daughter and the officer identified that person as defendant. The victim’s daughter heard rummaging around and inside her house soon after defendant rang the doorbell. The house had apparently been entered through the master bathroom; items inside the house had been moved around the house and others had been stolen.

The victim’s daughter saw a white van parked outside when defendant stood at the front door. She later identified the van that defendant was driving as the van she saw parked across the street from her house. The officer also saw defendant get into a white van parked across the street from the victim’s home. Defendant fled even after being told to stop by the officer. The officer radioed dispatch with the license plate of the vehicle and its direction of travel. A vehicle matching that description was shortly thereafter stopped. Defendant was the driver. The officer who called in the vehicle’s description later went to the location where it had been stopped. He identified the vehicle as the one he saw leaving the victim’s residence.

The victim testified jewelry and a pillow case had been taken from her home. Items matching those descriptions were soon after found strewn on the street along the

path which defendant had potentially taken from the residence to the location where he was stopped. The victim went to the location and identified the property as hers. Defendant had on his person a satchel of coins which had been taken from the residence. Defendant had burglary tools in his vehicle when he was stopped. Sufficient evidence supports defendant's conviction.

Under *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues. (See *People v. Bolden* (2002) 29 Cal.4th 515, 558 [Trial court did not err in declining to give requested defense pinpoint instruction where the standard instruction adequately and correctly explained requirements for jury finding]; see *People v. Dement* (2011) 53 Cal.4th 1, 52 [Contention that trial court committed prejudicial error by giving purportedly duplicative instruction has been repeatedly rejected.] *People v. Clancey* (2013) 56 Cal.4th 562, 579 [Trial court's broad discretion whether to dismiss true findings on prior strike allegations is narrowly restrained by considerations of the interests of society and furtherance of justice.])

DISPOSITION

The superior court is directed to correct the abstract of judgment to reflect it sentenced defendant pursuant to sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(i). The trial court shall forward a copy of the corrected abstract of

judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.