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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE HERNANDEZ AGINAGA,

Defendant and Appellant.

F061608

(Super. Ct. No. VCF229705)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J., and Franson, J.

A jury convicted appellant, George Hernandez Aginaga, of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)),<sup>1</sup> and found true allegations that he had suffered a prior conviction that qualified as both a prior serious felony conviction under section 667, subdivision (a) and a “strike,”<sup>2</sup> and that he had served a prison term for a prior felony conviction. The court stayed the imposition of sentence on the prior prison term enhancement and imposed a sentence of 13 years, consisting of the four-year midterm on the substantive offense, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus five years on the prior serious felony enhancement. The court awarded appellant presentence custody credit of 478 days, consisting of 416 days of actual time credit and 62 days of conduct credit.

On appeal, appellant contends the court erred in instructing the jury on motive and in calculating appellant’s conduct credit, and the prosecutor committed misconduct in closing arguments. We modify the judgment to award appellant additional conduct credit, and otherwise affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***Facts***

#### **Prosecution Case**

On September 25, 2009,<sup>3</sup> Luis Espinoza met appellant at a gathering at the home of his (Espinoza’s) next-door neighbor. Luis and his wife, Rene Espinoza, were aware that appellant did tattooing, and the three discussed appellant providing tattoo services for

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<sup>1</sup> Except as otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> We use the term “strike,” in its noun form, as a synonym for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subs. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

<sup>3</sup> Further references to dates of events are to dates in 2009.

Luis and Rene.<sup>4</sup> Luis gave appellant \$20 and it was agreed appellant would come to the Espinozas' house the next day to discuss the matter further. No specific time was set.

After this arrangement was agreed upon, Rene realized she and Luis were going to a party on September 26. She was unable to contact appellant, however, because she had no telephone number or address for him.

On the afternoon of September 26, Rene drove to her sister-in-law's house a short distance away to attend the party. Luis was at work at the time. Rene left a window in front, which was covered by screen, slightly open, but, she indicated, she otherwise "close[d] up the house[.]"

When Rene arrived, her sister-in-law told her that just moments before she (Rene's sister-in-law) had seen that the screen was off the front window at Rene's house. At that point, Rene drove back to her house with her sister-in-law. There, Rene saw a man inside her house open the front door and look out. She also saw that the window was opened wider than she had left it and the screen was off. The two women waited, and after approximately five minutes, the man, who at that point Rene recognized as appellant, came out of the house carrying what Rene described as a "market bag." Neither Luis nor Rene had given appellant permission to enter their house.

As appellant walked away from the house, Rene approached him, called out to him by name, and asked him what he was doing. Appellant turned around, walked back toward Rene, said he was sorry and handed Rene the bag. Rene testified that appellant "was very remorseful." Inside the bag was a DVD player and a DVD that had been on a table in Rene's house before she left. Rene testified appellant stated he "wasn't feeling well and that ... he needed to get something to get something else."

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<sup>4</sup> For the sake of brevity and clarity, and not out of disrespect, we refer to Luis and Rene Espinoza by their first names.

Rene's sister-in-law telephoned Luis and asked him to come home. Luis arrived approximately ten minutes later. Rene indicated that while she waited for her husband to arrive, appellant apologized "the whole time."

Luis testified to the following: When he arrived on the scene, he chastised appellant for "break[ing] in," and asked him "what's going on, why did you do this[?]" Appellant apologized and said that he was "feeling sick." Luis told appellant, "just get out of here." Luis later called the police.

Police arrested appellant on November 15, and interviewed him the next day. An audio recording of the interview was played for the jury. During the interview, appellant stated the following:<sup>5</sup> He "didn't take anything from that house or whatever the hell they're saying." He "owe[d] the man \$20," because he (appellant) had taken that amount "up front" to do a tattoo for the man. The accusation that he committed burglary was a "misunderstanding." Appellant speculated that "maybe he got pissed off because I owe him money." Appellant "had a real bad drug habit"; he had "been clean"; and he was "just trying to stay clean."

#### Defense Case<sup>6</sup>

Appellant did not burglarize the Espinozas' home. He met Luis and Rene approximately two days before "that day [he] went over there," at the home of his ex-mother-in-law, who lives next-door to the Espinozas.<sup>7</sup> Appellant is a tattoo artist, and Luis asked him to do a tattoo on him. Appellant asked for \$20, as a "good faith down

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<sup>5</sup> Our summary of appellant's statements at the interview is taken from a transcript of the interview that was provided to the jury.

<sup>6</sup> The "Defense Case" portion of our factual statement is taken from appellant's testimony.

<sup>7</sup> Rene and Luis referred to their next door neighbor as Ms. Montoya.

payment.” Subsequently, he “drew a design,” and on the appointed day, Saturday, went to Luis’s house.

When appellant arrived at the house, the front door and the screen door were closed but the “screen was off already.” He knocked on the door and when no one answered, he went next door and asked Montoya if she knew the Espinozas’ whereabouts. Montoya said she thought they were at a party and said she would call them. She made a call but was unable to reach them.

Appellant waited approximately 20 minutes at Montoya’s house, and then began walking to the home of a person he knew in order to get a ride home. On direct examination, he testified that as he walked, he saw that the screen door was shut but the front door was open, and “[t]here was a bag by the door.” On cross-examination, he testified the screen door was open 10 to 12 inches and the front door was “wide open.”

Appellant tapped on the screen door and called out to see if anybody was home. As he was calling out, he picked up the bag and entered the house. He “figured [Luis] was there” because Luis and appellant had arranged for appellant to go to the house; he entered because he “was there to do a tattoo” and he “had an appointment to be there.” Nobody answered him as he called out and he “just kept going,” until he realized nobody was in the house, at which point he “walked back to the front door.” As he walked out of the house with the bag still in his hand, “the lady ... just called [him].” Appellant realized “how it looked” and “tr[ie]d to explain to her” that he “kn[ew] the way it looks, but it’s not what you think.” He left the house with the bag in his hand because he “wasn’t thinking.”

Outside the house, he handed the bag to Rene. She told him the police had already been called but that she and her husband were not going to “press charges.” At that point, Luis arrived on the scene. He was angry, and he told appellant to “just ... leave.”

Appellant complied. “Otherwise, [he] would have just stayed there and explained [his] part of the story.”

Appellant admitted that he had suffered two prior felony convictions.

### ***Procedural Background***

Prior to trial, the prosecutor asked the court that he be allowed to introduce evidence that appellant had suffered a prior conviction of being under the influence of a controlled substance (Health & Saf. Code, § 11550). The court denied the request.

During trial, prior to the playing of the recording of the police interview with appellant, the defense objected, outside the jury’s presence, to the introduction into evidence of portions of the interview, including the following statements by appellant: “I’ve been in jail”; “I have a real bad drug habit”; and “I been clean, you know, I final -- I’m just trying to stay clean, you know.” Defense counsel explained: “I’m particularly concerned about that because I’m concerned it will open the door to [appellant’s] character if this is played and raises character -- puts [appellant’s] character in issue.”

The court ruled that it would exclude appellant’s statement that he had been in jail, but not his statements regarding his drug habit. The court agreed with the prosecutor that “that would certainly give someone a motive for committing the crime.”

The court instructed the jury after the parties rested and prior to closing argument. Included in those instructions was the following, in the language of CALCRIM No. 3.70: “The People are not required to prove that the defendant had a motive to commit the crime charged. In reaching your verdict, you may, however, consider whether the defendant has a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.”

In closing argument, the prosecutor argued: “The evidence shows that [appellant] went [to the Espinozas’ house]. He ... had an appointment to go there. The ... victims had no way of getting ahold of him. They left. He got there, saw the window cracked open.... [H]e told Espinoza at the time that he was not feeling well, he needed this to get something. [¶] Now, I think it’s not unreasonable to -- to be fair based on his own statement that he is a user.”

At that point, defense counsel interjected: “Your Honor, I’ve got to object to that. I don’t believe there’s any evidence of that and also believe it’s inappropriate aspersions on [appellant’s] character. I also think it’s [an] inappropriate ... use of any evidence that might be there.”

The court overruled the objection, and the prosecutor continued: “And he told the Espinozas he wasn’t feeling well, ... he needed this to get something. What would that something be? [¶] He had the motive and the opportunity presented itself.”

During deliberations, the foreperson of the jury sent the court a note with the following question: “Does the timing of intent matter? Does the prosecution have to prove the defendant had the intention before entering the building? Or can the defendant have the intention after entering the building?” In response, the court referred the jury to the instruction on intent and told the jury that “A defendant must have the intent to commit theft when he entered the building.” The jury reached its verdict 50 minutes after sending the note.

## **DISCUSSION**

### ***Motive Instruction***

“The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528.) ““Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence

that a reasonable jury could find persuasive.” [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) Appellant argues that the evidence of his drug use did not constitute substantial evidence that his motive in entering the house was to commit a theft to support a drug habit, and therefore the court erred in instructing the jury that having a motive may be a factor tending to show guilt.

Appellant bases this argument chiefly on *People v. Reid* (1982) 133 Cal.App.3d 354 (*Reid*). In that case, the prosecution, in an effort to show the defendant’s motive for committing robbery was to obtain money to support a drug habit, introduced evidence “of the most commonly used drugs and how much they cost,” and evidence the defendant was in possession of “drug paraphernalia” and “had track marks on his arms (thus indicating he injected drugs) ....” (*Id.* at p. 362.) On appeal, the defendant challenged the admission of this evidence.

The appellate court held that evidence of the defendant’s drug use, by itself, was irrelevant on the issue of motive: “[I]n order for the drug evidence to be admissible in this case, the prosecution must have established a reasonable basis for inferring the cost of [*the defendant’s*] habit or use. There was no evidence as to what drugs [*the defendant*] used, or how often. There was no evidence to indicate how fresh [*the defendant’s*] track marks were.” (*Reid, supra*, 133 Cal.App.3d at p. 363.) Without establishing that “link,” the court stated, the drug-use evidence did not satisfy one part of the three-part test announced by the California Supreme Court in *People v. Thompson* (1980) 27 Cal.3d 303 (*Thompson*) for determining the admissibility of character evidence to prove motive, i.e., the relevance of the evidence within the meaning of Evidence Code section 210. (*Reid*, at p. 363; see *Thompson*, at p. 316.) Relevant evidence “means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “The fact that [*the defendant*] used

drugs, *without more*, does not have a tendency to prove a motive for robbery.” (*Reid*, at p. 363, italics added, omitted.)

*Reid*, however, is distinguishable. Here, there was evidence in addition to that of appellant’s drug use bearing on motive. Specifically, Luis testified that when he spoke to appellant shortly after appellant entered his house and came out with the Espinozas’ DVD player and asked him, “why did you do this,” appellant stated he was “feeling sick,” and Rene testified that appellant told her shortly after she confronted him that he “wasn’t feeling well and that ... he needed to get something to get something else.” Considered in conjunction with appellant’s statement that he had had a drug habit, these statements reasonably can be interpreted as admissions that he burglarized the Espinozas’ house to “get something”—property that could be converted to cash—so that he could get “something else,” viz., drugs. Thus, the instant case is not one in which the People attempted to show motive with evidence of drug use “without more.” (*Reid, supra*, 133 Cal.App.3d at p. 363.) Here, unlike in *Reid*, the People introduced relevant evidence that a reasonable jury could have found persuasive on the issue of motive. Therefore, the court did not err in giving the motive instruction.

Moreover, assuming for the sake of argument that the evidence did not support the motive instruction, any error in giving the instruction was harmless. The instruction was a correct statement of the law, and if it was not supported by the evidence, it was simply inapplicable. “[G]iving an irrelevant or inapplicable instruction is generally “only a technical error which does not constitute ground for reversal.” [Citation.]” (*People v. Cross* (2008) 45 Cal.4th 58, 67.) When the court gives a correct instruction that has no application to the facts of the case, if that is the only error, the error “does not appear to be of federal constitutional dimension.... [¶] The error is therefore one of state law subject to the traditional *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836) applicable to such error. [Citation.]” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-

1130.) Under that test, “[r]eversal is required only if ‘the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.’ [Citations.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 571, quoting *People v. Watson, supra*, 46 Cal.2d at p. 836, fn. omitted.) Such review of the entire record to determine whether the error was prejudicial may properly consider such matters as “the overall strength of the evidence.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1144; accord, *People v. Sheldon* (1989) 48 Cal.3d 935, 947 [error not prejudicial under *Watson* standard, in light of totality of instructions given and substantial evidence of defendant’s guilt].) A determination of prejudice under the *Watson* standard “focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration.” (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) It is appellant’s burden of showing prejudice under the *Watson* standard. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 222.)

Appellant argues that based on the jury’s question regarding the requisite intent for burglary, “the jury appears to have been at least temporarily considering acquittal based on lack of intent,” and suggests that “[b]ecause intent to commit theft was such a close question for the jury,” it is reasonably probable the jury would have reached a result more favorable to appellant had the court not given the motive instruction. We disagree.

Appellant’s defense that he entered the house with the intention only of determining if anyone was home was weak, in large part because of his failure to explain why he picked up the bag at all and his implausible testimony that he left the house with the Espinozas’ DVD player because he “wasn’t thinking.” Moreover, appellant’s two felony convictions cast serious doubt on his credibility. (See Evid. Code, § 788 [prior felony convictions may be used to attack credibility of witness].) In addition, Rene’s testimony that she left the house “closed up,” except for a partially open window,

supports the inference that appellant entered the house through the window, contrary to appellant's testimony. And, such entry is suggestive of an intent to steal. (Cf. *People v. Corral* (1964) 224 Cal.App.2d 300, 304 [in burglary prosecution, "intruder's intent to commit theft within the houses was amply shown by [inter alia] the secret and noiseless entry *in an unusual manner* at an odd hour of the night into the homes where he was not an invited guest" (italics added)].) Finally, we note that appellant's show of great remorse upon Rene confronting him, although consistent with the act of inadvertently leaving with the Espinozas' property, provides further support for the prosecution case. On this record, even if the jury had not considered the motive instruction, a result more favorable is not reasonably probable.

### ***Prosecutorial Misconduct***

As indicated above, in closing argument, the prosecutor argued that appellant's reference to his "drug habit" during his interview with police, coupled with the evidence of his statements to the Espinozas that he was sick and "needed this to get something," showed that his motive in entering the house was to commit a theft to support a drug habit. Appellant argues that for two reasons, the prosecutor's argument "was reprehensible and so infected the entire trial with such unfairness," that appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution was violated.

First, appellant argues the argument "violated the spirit" of the court's ruling that the prosecution was not allowed to introduce evidence of appellant's prior conviction of being under the influence of a controlled substance. There is no merit to this contention. The prosecutor made no mention of appellant's drug-crime conviction. Rather, the prosecutor based his argument on evidence, the admission of which appellant does not challenge on appeal, of statements made by appellant and the victims. The prosecutor's argument violated neither the letter nor spirit of the court's ruling.

Second, appellant argues that the prosecutor's argument that appellant had a motive to commit burglary violated appellant's due process rights because it was based on evidence of appellant's drug habit; such evidence was irrelevant on the issue of, and therefore inadmissible to prove, motive; and a closing argument based on irrelevant and therefore inadmissible evidence is "improper." Again, we disagree.

As demonstrated above, the evidence of appellant's drug habit was relevant and properly admitted. Moreover, even if such evidence was not admissible, appellant has not demonstrated that the prosecutor exceeded the bounds of permissible argument.

Conduct by a prosecutor that necessitates the reversal of a conviction is commonly called prosecutorial misconduct. "The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

The prosecutor's argument regarding motive, even if it was based on inadmissible evidence, did not constitute prosecutorial misconduct. Argument based on evidence admitted at trial is not misconduct even if the evidence is irrelevant and therefore inadmissible. As our Supreme Court stated in *People v. Visciotti* (1992) 2 Cal.4th 1, 82, "Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight." We find further support for our conclusion in *People v. Davenport* (1995) 11 Cal.4th 1171, 1212-1213, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5, where the court stated, "remarks made in an

opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.” Here, the prosecutor’s argument regarding motive violated neither appellant’s federal due process rights nor his rights under state law.

### ***Presentence Credits***

As indicated above, the court awarded appellant presentence custody credit of 478 days, consisting of 416 days of actual time credit and 62 days of conduct credit. The court based its award of presentence custody credit on section 2933.1—which limits conduct credit to a maximum of 15 percent of actual time served in presentence custody for persons convicted of certain offenses—rather than on section 4019, which contains more generous custody credit provisions. In basing its credit award on section 2933.1, appellant contends, and the People concede, the court erred. We agree.

A defendant is entitled to have actual presentence custody credited toward his state prison sentence after conviction. (§ 2900.5, subd. (a).) Additionally, under the version of section 4019 applicable here, appellant could accrue conduct credit of two days for every four days of actual presentence custody.<sup>8</sup> (Former § 4019, subs. (b), (c); *People v.*

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<sup>8</sup> Prior to January 25, 2010, under the version of section 4019 to which we refer as former section 4019, a defendant held in county jail prior to sentencing would typically earn two days of conduct credits for every four days served in custody prior to sentencing. (Former § 4019, subs. (b), (c), (f), Stats. 1982, ch. 1234, § 7, p. 4553.) This version of the statute applies to appellant. Section 4019 was amended, effective January 25, 2010, and that version of the statute, to which we refer as amended section 4019, provided that *qualifying* defendants could earn conduct credits at an accelerated rate of four days’ credit for every two days actually served. (Amended § 4019, subd. (f), Stats. 2009–2010, 3d Ex. Sess., ch. 28, § 50, p. 4427.) Although amended section 4019 was in effect when appellant was sentenced in January 2011, it is not applicable here because defendants who, like appellant, had suffered a prior serious felony conviction did not qualify for its enhanced credits scheme. (*Ibid.*) Section 4019 was amended again, effective September 28, 2010 (Stats. 2010, ch. 426, § 2.), but by its terms this version of the statute, to which we refer as current section 4019, applies only to defendants sentenced for offenses committed after its adoption. (Current § 4019, subd. (g).) The

*Caceres* (1997) 52 Cal.App.4th 106, 110 [correct formula is to divide days of actual custody, including date of sentencing, by four, and then multiply result, excluding remainder, by two].) However, when a defendant has been convicted of certain crimes, viz., those listed in section 667.5, subdivision (c) (section 667.5(c)), section 2933.1 limits to “15 percent of the actual period of confinement” the amount of conduct credit that can be awarded. (§ 2933.1, subd. (c).)

Here, as the parties agree, the instant offense is not among those listed in section 667.5(c) and therefore appellant is entitled to conduct credit under former section 4019.<sup>9</sup> When we apply the formula set forth in the preceding paragraph, we conclude, as the parties agree, that appellant is entitled to a total of 724 days of presentence custody credit, consisting of 416 days of actual time credit and 208 days of conduct credit. We will modify the judgment accordingly, and direct the trial court to prepare an amended abstract of judgment reflecting this modification.

### **DISPOSITION**

The judgment is modified to provide that appellant is awarded 724 days of presentence custody credit, consisting of 416 days of actual time credit and 208 days of conduct credit. The trial court is directed to prepare an amended abstract of judgment

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instant offense predates September 28, 2010, and therefore, current section 4019 was not applicable to appellant. We note that on April 4, 2011, section 4019 was amended yet again. (Stats. 2011-2012, ch. 15, § 482.) This version of the statute is also not applicable to appellant. It was adopted after appellant was sentenced and it is conditional on the creation and funding of a community corrections program. (*Id.* at § 636.)

<sup>9</sup> Under certain circumstances, none of which is applicable here, first degree burglary is a 667.5(c) offense. It was alleged in the information that another person, other than an accomplice, was present in the Espinozas’ residence at the time of the instant offense. This allegation, which, if proved, would have qualified the instant burglary as the offense set forth in subdivision (c)(21) of section 667.5, was dismissed at trial on the motion of the prosecutor.

and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.