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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELINA DIAZ,

Defendant and Appellant.

G047822

(Super. Ct. No. 11NF3716)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Donna L. Harris, 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, William Wood and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted Marcelina Diaz of residential burglary (Pen. Code, §§ 459 & 460, subd. (a); all statutory references are to the Penal Code unless otherwise stated). Diaz contends there is insufficient evidence to sustain the conviction. For the reasons expressed below, we affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2011, Mariann McCoy left her Anaheim home shortly before noon after locking up the house, leaving her bedroom door open. When she returned about an hour later, she found an earring in her hallway and noticed her bedroom door was now closed. The burglar had apparently entered the home through McCoy's bedroom window by pushing aside a window air conditioning unit and cutting the hard plastic accordion panel. The burglar ransacked two bedrooms, stealing gold bracelets, an amethyst necklace, and two pairs of amethyst earrings.

An Anaheim Police Department forensic specialist, Kimberly Edelbrock, processed the home for evidence. She found no fingerprints on the bedroom window, a window screen, the air conditioning unit, jewelry boxes, or other items within the home the burglar may have handled. A pair of garden shears located on the ground outside McCoy's bedroom window contained DNA belonging to someone other than McCoy.<sup>1</sup>

Forensic scientist Jennifer Jarrett of the Orange County Crime Lab, testified DNA may be transferred onto an item or a person by blood, urine, saliva, and sweat. She further testified the DNA on the shears came from a single donor and eliminated McCoy as a contributor. The DNA was consistent with Diaz's DNA, and alleles from Diaz's

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<sup>1</sup> McCoy testified she did not know whether the garden shears belonged to her. She normally kept her shears in the garage, but sometimes left them outside atop another air conditioner near the patio.

DNA profile matched the alleles from the profile on the garden shears at 11 locations or loci. Jarrett used the Identifiler Plus DNA kit, which tests for DNA at 15 loci, plus a sex-determining locus. The sex-determining locus showed the contributor was a female. A partial profile results when DNA alleles appear at fewer than 15 loci. Partial samples may result when the amount of DNA present is very low or when some of the DNA falls at or below the threshold for comparison. At four locations of the profile from the garden shears, at least one allele was either missing or undetected. For example, at location vWA, Diaz's alleles were 16, 19, and the allele on the garden shears was a 16. At location TPOX, Diaz's alleles were 8, 11 and the allele on the garden shears was 11. Jarrett considered the DNA material recovered at the vWA and TPOX locations to match Diaz's DNA based on a match to one of the alleles. Results at two other locations were below the threshold for comparison. Jarrett opined that given the match at 11 loci, and using an FBI database containing frequency estimates for individual alleles, the frequency of someone matching the partial DNA profile from the shears was "approximately one in 1 trillion unrelated individuals."

Following trial in October 2012, a jury convicted Diaz of residential burglary (§§ 459 & 460, subd. (a)). In December 2012, the trial court found Diaz had suffered two prior convictions that qualified as both strikes under the Three Strikes law (§ 667, subd. (b)-(i)) and serious felony priors (§ 667, subd. (a)). The court struck both strike prior findings and sentenced Diaz to an aggregate 14-year prison term, four years for the burglary, plus five years for each of the serious felony priors.

## II

### DISCUSSION

#### *Substantial Evidence Supports the Burglary Conviction*

Diaz challenges the sufficiency of the evidence to support her conviction for the burglary of McCoy's residence. Specifically she contends "[t]he evidence was insufficient to support [her] conviction for residential burglary both because the DNA expert's opinion was based on 'possibility' the alleles in [her] DNA profile matched those from the DNA found on the garden shears and because the garden shears found outside the house did not establish appellant entered the house or was otherwise involved in burglary of the house." After reviewing the record, however, we conclude substantial evidence supports the jury's verdict.

We review the record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, defined as evidence that is reasonable, credible, and of solid value. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) We presume the existence of every fact the trier could reasonably have deduced from the evidence in support of the judgment (*People v. Rayford* (1994) 9 Cal.4th 1, 23) and draw all reasonable inferences in support of the judgment (*People v. Catlin* (2001) 26 Cal.4th 81, 139). We must affirm the judgment below unless "upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) It is the jury's exclusive province to assess the credibility of the witnesses, resolve conflicts in the testimony, and weigh the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) The fact the circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v.*

*Bean* (1988) 46 Cal.3d 919, 932-933.) We must affirm the convictions if a rational trier of fact could have found guilt based on the evidence and reasonably drawn inferences. (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

The crime of burglary is committed when a person enters any building with the intent to commit larceny or any felony. (§ 459.) Burglary of an inhabited dwelling is burglary of the first degree. (§ 460, subs. (a) & (b).) The essence of burglary is ““an entry which invades a possessory interest in a building.”” (*People v. Valencia* (2002) 28 Cal.4th 1, 7.)

As noted above, Jarrett testified she considered alleles at the vWA and TPOX locations match Diaz’s DNA based on a match to one of the two alleles. She explained there was a possibility there was a second allele that also matched Diaz. Jarrett also testified the alleles at locations CSF1P0 and D18S51 on the garden shears “could possibly” match appellant’s alleles at those locations but were below the threshold for comparison. Jarrett did *not* opine there was a “possibility” of a match between Diaz’s DNA and that found on the garden shears. Rather, she opined there was a one in a trillion chance the DNA on the garden shears belonged to someone other than Diaz. The single allele detected at locations vWA and TPOX on the shears *matched* one of Diaz’s two alleles at those locations. Significantly, none of the DNA material on the shears *excluded* Diaz as a contributor. The jury reasonably could conclude the DNA on the shears came from Diaz.

Alternatively, Diaz argues that even if the DNA found on the garden shears belonged to her, “[t]he shears in no way established that [she] entered the house or participated in a burglary of the house.” She explains, “The bottom line was that [her] DNA may have been on a pair of gardening shears found outside the home. Nothing else

was known about the shears, not who the shears belonged to, how they got to McCoy's yard, how long they had been in the yard, when the genetic material was left on the shears, whether [she] touched the shears or whether [her] DNA was otherwise transferred onto the shears. There also was no evidence establishing that the shears were used to gain access to the home. [¶] The DNA on the garden shears established [she] may have had contact with the garden shears but there was no evidence to establish when that contact may have occurred or where the contact occurred since the shears were an item easily movable from one location to another. There also was no evidence to support an inference that [she] was in McCoy's yard or that she used the garden shears to effect entry into McCoy's home."

McCoy's testimony established her home was burglarized between noon and 1:00 p.m. The garden shears were found lying on rocks in the garden under the window that appeared to be the point of entry. McCoy used similar shears in gardening and normally kept her shears in the garage or on top of an air conditioner outside. The jury reasonably could infer the burglar used McCoy's garden shears to cut the hard plastic accordion panel to enter and burglarize McCoy's home.

Diaz relies on *People v. Briggs* (1967) 255 Cal.App.2d 497 (*Briggs*). There, the burglar or burglars broke into a business sometime after closing. Window panes were broken out of a louvered window that opened out onto the roof on the second floor of the office and broken glass was found on the roof. The broken window could have been reached easily by means of a stairway in an adjoining building. A police officer found a wallet lying on the roof directly under the window where the glass had been broken. Paperwork found inside the wallet included a New York driver's license, Veteran's Administration identification and paperwork, and a traffic ticket in the

defendant's name. (*Id.* at p. 498-499.) There was no fingerprint evidence found on the wallet or inside the business. At the bench trial, the defendant testified he lost his wallet about two weeks before the incident and he reported the loss to a secretary at the Veterans Administration Clinic. The prosecution stated during argument, "I will concede, your Honor, it is a circumstantial evidence case. That is about *all I have is a strong suspicion*. It is unfortunate that that is all the People have is the wallet found at the scene.'" (*Id.* at p. 499, original italics.)

The appellate court concluded the evidence raised a "strong suspicion" of guilt but was insufficient to sustain the judgment. (*Briggs, supra*, at p. 500.) The court noted the defendant's plausible explanation about losing the wallet, and observed, "Nothing from the burglary in the case at bench was found in the possession of defendant, no fingerprint evidence was offered by the prosecution and presumably whatever prints were found, if any, were not of defendant." (*Id.* at p. 500; see also *People v. Draper* (1945) 69 Cal.App.2d 781, 785-786 [court held evidence of burglary insufficient where defendant rode in an automobile with codefendants before the crime occurred, had an opportunity to participate in committing the crime, was found near the scene of the crime shortly after the burglary and ran when approached by police officers].)

Diaz also relies on an Indiana case, *Meehan v. State* (2013) 986 N.E.2d 371. There, the police found a glove with the defendant's DNA near the point of entry at a burglarized business. No other evidence tied the defendant to the crime. A forensic biologist testified there was no way to tell how long the defendant's DNA had been on the glove. (*Id.* at p. 373.) The appellate court reversed the conviction stating "there was no evidence that would support an inference that [defendant]'s DNA was found on the

glove because he handled it during the burglary, as opposed to some other time.” (*Id.* at p. 376.)

True, Diaz’s DNA was not found inside McCoy’s residence, no other evidence placed Diaz in McCoy’s neighborhood around the time of the burglary, and she was not found in possession of property stolen from the McCoy home when she was arrested months after the crime. Nor did the evidence definitively establish Diaz left her genetic material on the shears at the time of the burglary. Nevertheless, the jury reasonably could infer the shears used to gain entry either belonged to Diaz or she seized the tool when she spotted them on top of the air conditioner. The *Briggs* court relied on the absence of fingerprint evidence connecting the defendant to the crime, but here Diaz’s DNA was found on shears near the point of entry, and nothing in the record suggests an innocent explanation for the presence of Diaz’s DNA. In *Meehan*, the DNA was from saliva and the expert opined it could last indefinitely. Here, Jarrett testified the DNA on the shears could degenerate within a day. Moreover, the size of the entry hole in this case, eight to 12 inches, suggested the burglar was “a very small person just like [Diaz],” as the prosecutor argued to the jury at trial.

Reversal of the judgment is not warranted even if circumstances arguably support an acquittal. We cannot say no rational juror could reach the conclusion that Diaz burgled McCoy’s home. Stripped of its gloss, Diaz merely invites us to reweigh the evidence in her favor. This we decline to do.

III

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.