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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS RIVERA GARCIA,

Defendant and Appellant.

H040163

(Santa Clara County

Super. Ct. No. C1241949)

After a five-day trial, a jury convicted defendant Carlos Rivera Garcia of one count of first degree burglary (Pen. Code, §§ 459, 460, subd. (a), a felony; all further statutory references are to the Penal Code) and one count of resisting arrest (§ 148, subd. (a)(1), a misdemeanor). The jury also found that an enhancement allegation that “a person not an accomplice . . . was present in the residence during” the burglary (§ 667.5, subd. (c)(21)) was true. The court sentenced defendant to two years in prison for the burglary and imposed a concurrent 30-day jail sentence for resisting arrest.

On appeal, defendant challenges the sufficiency of the evidence to support the jury’s implied finding that he intended to commit theft when he entered the victim’s apartment. After reviewing the entire record, we conclude that there was substantial evidence to support that finding. We will therefore affirm the judgment.

## FACTS

In September 2012, Karla S. (Karla) lived in an apartment in San José with her husband, 11-year-old daughter, and 18-month-old son. Defendant lived in an apartment in the building next door. At the time of the burglary, defendant was 18 years old. He had graduated from high school and was working part-time as a dishwasher in a restaurant.

### *Prosecution Case*

The prosecution's witnesses were Karla, Ricardo Vasquez (Karla's neighbor), and San José Police Officer Jason Kilmer.

In the early morning hours on September 26, 2012, Karla was asleep in the bedroom of her one-bedroom, ground-floor apartment. Her husband was not home. Her son was asleep in the bedroom, and her daughter was sleeping in the living room. Around 1:00 a.m., Karla was awakened by a noise from her bathroom window. It sounded "like somebody was climbing" and then like someone had jumped into her bathtub.

The bathroom window, which Karla had opened to keep the apartment cool, was over the bathtub. There was no screen on the bathroom window. The window opened out into the space between Karla's apartment building and the apartment building next door, which the parties referred to as an "alley," a term we adopt for ease of reference. The alley was approximately 50 feet long. There was a six-foot-high wooden fence between Karla's apartment building and the building next door. There was also a six-foot-high fence at both ends of the alley, with a six-foot-tall gate at one end. The bottom of Karla's bathroom window was six to seven feet off the ground.

After she heard the noises, Karla got up and looked into her bathroom. She saw the silhouette of a person against her light-colored shower curtain; he was standing in her

bathtub, looking right at her. Karla grabbed her phone, picked up her son, and called 911. While she was on the phone with the 911 operator, she woke up her daughter, and they all fled the apartment. Karla rang her next-door neighbor's doorbell and sent her daughter upstairs to Ricardo Vasquez's apartment. Both neighbors came out to help. Karla remained on the phone with the 911 operator. The jury heard the 911 tape, which corroborated Karla's testimony.

Vasquez testified that he was watching television, heard about the burglary from his girlfriend, and stepped outside to help Karla. He offered to check inside Karla's apartment, but the 911 operator advised against it. Vasquez knew the bathroom window opened into the alley, so he went to the fence at one end of the alley, stepped onto a concrete block, and looked over the fence to see if anyone was there. Vasquez saw defendant two to three feet away from him, crouching next to the fence. Vasquez asked defendant what he was doing there. Defendant stood up and said, "Nothing." Vasquez said, " 'Stick around. The cops are on the way.' " Defendant then took off running, away from Vasquez, and jumped over the gate at the other end of the alley.

San José Police Officers Jason Kilmer and Jason Barton responded to the 911 call. Officer Kilmer testified that as they were about to enter Karla's apartment complex, they heard "the kicking of wood" and saw defendant jump over the fence. Defendant landed about 10 feet from the officers. Defendant looked surprised, then started running away. The officers ran after him, shouting, "Stop! Police!" multiple times. They chased defendant around the block and apprehended him near his home.

Officer Kilmer inspected Karla's apartment and the alley as part of his investigation. When he looked into the alley, he saw two wooden boards leaning up against the exterior wall under Karla's bathroom window. One of the boards was six feet long; it looked like the same type of board that was used to build the fence. The other board was less than half that length.

When Karla went to take a shower the following morning, she saw two muddy footprints inside her bathtub. Karla did not know defendant; she had never seen him before. Defendant did not have her permission to enter her apartment.

### *Defense Case*

The defense witnesses were defendant and his friend, Heriberto Orozco. After defendant got off work at 10:00 p.m. on September 25, 2012, he walked to Orozco's apartment building, which was down the street from Karla's building. Defendant and Orozco were "hanging out" in front of Orozco's apartment building when a "random guy" (one of Orozco's neighbors) offered them some beer. They each drank two beers. Orozco went home around 11:30 p.m. After Orozco left, defendant and Orozco's neighbor smoked some marijuana. Defendant left between 12:30 a.m. and 1:00 a.m.

When defendant got to Karla's apartment building, he hopped the fence into the alley. Defendant told the jury he went back there to look for a racquetball he had lost while walking to work the day before. He also testified that while he was in the alley, he urinated on a bush.

As defendant walked down the alley, he noticed an open window, became "curious," and decided to look inside. There were no lights on in that apartment. Defendant did not know why he looked in the window and said he "wasn't thinking." He denied any intent to steal anything from the apartment.

The windowsill was a foot above his head and he could not reach the window from the ground. He saw a wooden board, which was already leaning up against the wall. He also found a longer board on the ground, leaned it up against the wall, and used it as a ramp to access the window. One end of the board was wedged under the bottom of the fence, which would have prevented it from slipping as defendant stepped onto the board. When he set up the ramp, he was not worried about making noise or waking anyone who lived in the apartment building. Defendant stepped onto the board, grabbed

the windowsill with his arms, pulled himself up, stuck his head inside the open window, and looked inside. He noticed a light under the closed bathroom door, which he assumed came from a television. He denied climbing through the window or stepping into the bathtub.

Defendant stood on the ramp for 20 to 30 seconds, looking inside the window. Then he saw Vasquez's shadow to his right. Defendant "panicked," "got scared," hopped off the board, crouched down, and hid near the fence. He hid for five or 10 seconds before Vasquez looked over the fence and asked what he was doing. He stood up, said "nothing," and ran off toward the other end of the alley. He hopped the fence, saw two police officers 10 feet from him, and kept running. His testimony regarding the police chase and his apprehension was consistent with Officer Kilmer's testimony. Defendant did not comply with the officers' orders to stop because he had never been in trouble with the law before.

On cross examination, defendant testified that he had never been in the alley before and never played racquetball there. He agreed that it did not make sense to look for a racquetball in a dark alley at 1:00 a.m. And when presented with photographs that demonstrated that there were no bushes in the alley, he admitted that he had lied about urinating in the alley.

### ***Sentencing***

The court sentenced defendant to the lower term of two years in prison for the burglary and a concurrent term of 30 days in jail for resisting arrest. The court also imposed fines and fees that are not at issue in this appeal. The court stated that defendant had shown no remorse and lied on the stand, and that the victim was believable, while defendant was not.

## DISCUSSION

Burglary has two elements: (1) unlawful entry; accompanied by (2) the intent to commit theft (either felony or misdemeanor) or any other felony. (§§ 459, 490a; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041 & fn. 8 (*Montoya*)) The intent to commit the underlying theft or felony must exist at the time of entry. (*People v. Holt* (1997) 15 Cal.4th 619, 699.)

Defendant contends his burglary conviction must be reversed because there was insufficient evidence that he had formed the intent to either steal or commit a felony when he entered Karla's bathroom. Defendant had disputed the entry element at trial. But on appeal, he does not challenge the sufficiency of the evidence that he entered the apartment, acknowledging that putting his head inside the bathroom window was sufficient to satisfy the entry element. (*People v. Valencia* (2002) 28 Cal.4th 1, 12-13 [penetration of the outer boundary of a building amounts to an entry, including "penetration into an area behind a window screen . . . even when the window itself is closed and is not penetrated"], overruled on another ground as stated in *People v. Yarbrough* (2012) 54 Cal.4th 889, 894.)

### ***Standard of Review***

"In considering a challenge to the sufficiency of the evidence to support [the jury's verdict], we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also

reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ ” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*) [sufficiency of the evidence to support enhancement]; *People v. Wilson* (2008) 44 Cal.4th 758, 806 [“We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction”].) “ ‘The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.” ’ ” (*People v. Snow* (2003) 30 Cal.4th 43, 66.) “Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.” (*People v. Rehmeier* (1993) 19 Cal.App.4th 1758, 1765.)

### ***Proof of Intent***

“The intention with which an accused enters the [dwelling] of another is a question of fact and where the circumstances of a particular case and the conduct of the accused reasonably indicate his [or her] purpose in doing so is to commit a [theft] or a felony<sub>[,]</sub> a verdict of guilty of the crime of burglary will not be disturbed on appeal.” (*People v. Kittrelle* (1951) 102 Cal.App.2d 149, 156 (*Kittrelle*).) Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence. (*People v. Matson* (1974) 13 Cal.3d 35, 41.) “[I]n showing that a defendant entered the premises with felonious intent, the [prosecution] can rely upon reasonable inferences drawn ‘from all of the facts and circumstances disclosed by the evidence,’ since felonious intent is rarely proven through direct evidence. [Citation.]” (*In re Anthony M.* (1981) 116 Cal.App.3d 491, 501.) “Burglarious intent can reasonably

be inferred from an unlawful entry alone. [Citation.] Even if no crime be committed after the entry, circumstances such as flight after being hailed by an occupant of the building [citation], the fact that the building was entered through a window [citation], or through a doorway which previously had been locked [citations], without reasonable explanation of the entry, will warrant the conclusion by a jury that the entry was made with the intention to commit theft.” (*People v. Jordan* (1962) 204 Cal.App.2d 782, 786-787.) “Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal.” (*People v. Nunley* (1985) 168 Cal.App.3d 225, 232.)

The seminal case on proof of intent in a burglary prosecution is *People v. Soto* (1879) 53 Cal. 415, 416 (*Soto*). In *Soto*, “the defendant, at a late hour of the night, after the family had retired and the lights had been extinguished, entered the building through a window, and was found in a bedroom, in which a woman and three infant children were sleeping in one bed; . . . he seized the woman by the throat and threw himself across the bed, but on her making an outcry left the building without any further act of violence, and without having committed a larceny, so far as the evidence shows. The woman further testified that she had no previous knowledge of the defendant, but stated it as her belief that his purpose in entering the building was to have sexual intercourse with her. On this evidence, the jury found the defendant guilty as charged,” (*id.* at pp. 415-416) namely, that he had “entered a dwelling-house in the night-time, with the intent to commit petit larceny.” (*Id.* at p. 415.) The defendant appealed, arguing that there was insufficient evidence that he entered the building with the intent to commit larceny. The court stated, “the intent with which he entered was a question of fact for the jury; and though there was no direct evidence of the intent, it might be inferred from the surrounding circumstances. The weight to be given to these was a question properly left to the jury; and when a person enters a building through a window at a late hour of the night, after

the lights are extinguished, and no explanation is given of his intent, it may well be inferred that his purpose was to commit larceny, such being the usual intent under these circumstances. The belief of the woman that he entered with the further intent to have sexual intercourse with her is of no consequence. It was for the jury to determine the intent, and whether her belief was entitled to any weight.” (*Id.* at p. 416.)

Numerous California cases have followed *Soto*. (See, e.g., *People v. Jordan*, *supra*, 204 Cal.App.2d at pp. 786-787 [“Even if no crime be committed after the entry, circumstances such as flight . . . , the fact that the building was entered through a window [citation] or a doorway which previously had been locked [citation] without reasonable explanation of the entry, will warrant the conclusion by the jury that the entry was made with the intent to commit theft”]; *People v. Martin* (1969) 275 Cal.App.2d 334, 339 [defendant entered through a broken window, failed to satisfactorily explain why he was at the medical office or why he fled when the police arrived]; *People v. Fitch* (1946) 73 Cal.App.2d 825, 827 [“forcible and unlawful entry alone” was sufficient to raise the inference of intent]; *People v. Frye* (1985) 166 Cal.App.3d 941, 947 [unlawful entry late at night and flight upon discovery sufficient to infer an intent to steal]; and *People v. Moody* (1976) 59 Cal.App.3d 357, 363 [“even if no crime was committed after entry” into a structure, the requisite intent could be inferred from entry into a locked home late at night, flight upon being discovered by the occupant, and flight from the police].)

A number of other jurisdictions have similarly held that an intent to commit a theft or other felony can arise from the unlawful entry of a dwelling. The Supreme Court of Illinois stated, “[w]e are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose. This conclusion is supported by

the decisions of other courts . . . .” (*People v. Johnson* (1963) 28 Ill.2d 441, 443-444 [92 N.E. 2d 864, 866] [citing *Soto* and cases from Massachusetts, Utah, Alabama, Idaho, Michigan, Iowa, Indiana, and Wisconsin]; see also *State v. Zayas* (1985) 195 Conn. 611, 620, citing federal, Washington, and Georgia cases.)

Circumstantial evidence of a specific intent to commit theft or a felony may also include the defendant’s conduct before entry (acts of preparation or equipment found on the defendant), the method of entry, as well as the defendant’s conduct while on the premises and after leaving the premises. (2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) §§ 153-156, pp. 200-205 and cases cited therein.) “Flight, concealment, and false and inconsistent explanations on apprehension are all probative.” (*Id.* at § 156, p. 204, citing *Kittrelle, supra*, 102 Cal.App.2d at pp. 156, 158 and *People v. Sturman* (1942) 56 Cal.App.2d 173.)

In this case, there was substantial circumstantial evidence of the intent to commit theft to support the jury’s finding on the burglary count. Defendant entered the apartment from a dark “alley” late at night (1:00 a.m.) through an open bathroom window. Although everyone referred to the area next to Karla’s building as an “alley,” it was not used as a walkway or thoroughfare. The area was enclosed by a six-foot-high fence on three sides, one of which had a closed gate to permit access to utility meters. Defendant did not open the gate; he hopped over it. The tall fence and the cover of darkness allowed him to conceal his presence in the alley. The lights inside the apartment were not turned on. The bathroom window, which was not the usual point of ingress and egress, was six to seven feet off the ground and beyond defendant’s reach. He therefore constructed a ramp out of scrap wood he found in the alley to boost himself up so he could enter the bathroom window. Defendant was a complete stranger to the victims. He was unknown to Karla, uninvited, and did not have permission to enter her apartment. Defendant himself testified that when he saw Vasquez’s shadow and realized he might be

discovered, he jumped off the ramp and hid by the fence. When Vasquez confronted him, defendant fled. And when defendant saw the police officers, he continued to flee.

The jury may have also concluded that defendant lied about his reasons for being in the alley. He testified that he went into the alley at 1:00 a.m. to look for a racquetball he had lost the day before. Defendant admitted that it did not make sense to look for the ball at 1:00 a.m. since the alley was dark. He also testified that he had never been in the alley before and never played racquetball there. Defendant also admitted that he lied about urinating in the alley. Since defendant lied about these things, the jury may have concluded that he also lied when he testified that he did not intend to steal anything. On this record, we conclude that substantial evidence supports the burglary conviction and that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 579.)

Defendant argues that “[i]n the typical burglary case, the defendant’s intent is established through proof that he actually stole items belonging to the victim.” Defendant relies on *People v. Abilez* (2007) 41 Cal.4th 472, in which the California Supreme Court stated that the “[d]efendant’s possession and subsequent sale of goods stolen from the victim’s home shortly after the crimes is strong circumstantial evidence that [the defendant] harbored the intent to commit larceny when he entered her home. [Citation.] Moreover, ‘[t]here is no better proof that [defendant] entered [the victim’s house] with intent to commit robbery than a showing that he did in fact commit robbery after his entry.’ ” (*Id.* at p. 508.) But *Abilez* does not require proof that the defendant actually stole something or evidence that he possessed the stolen property to sustain a burglary conviction. Indeed, “[o]ne may be liable for burglary upon entry with the requisite intent to commit a felony or a theft . . . , regardless of whether . . . any felony or theft actually is committed.” (*Montoya, supra*, 7 Cal.4th at pp. 1041-1042.) Thus, while theft or possession of stolen property may be strong proof of intent, it is not the only way of proving the requisite intent to support a conviction for first degree burglary.

Citing a number of cases, defendant argues that certain types of circumstantial evidence that supported findings of the intent required to commit burglary in those cases is lacking in this case. In addition to asserting that there was no evidence that he took anything from Karla's home, defendant argues that there was no evidence that he: (1) had committed prior burglaries; (2) wore dark clothing or a disguise to conceal his identity; (3) "possessed burglary tools, a flashlight, or similar implements"; (4) had a bag, backpack, or pockets in his clothing that could have been used to carry away the victim's property; (5) tried to act in a stealthy manner; or (6) had a motive to steal. That these types of facts are lacking or that the facts here are different from facts in other cases does not mean that there was not substantial evidence to support the jury's finding. The appellant in a criminal case does not meet his burden to demonstrate that the evidence was insufficient "by arguing about what evidence is *not* in the record." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573, original italics.)

Defendant also contends that the evidence that he drank two beers and smoked some marijuana and his testimony that he was not concerned about making noise or waking anyone up when he built the ramp to the bathroom window support the inference that he never formed the specific intent to steal when he entered the apartment. But under our standard of review, "[i]f the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar, supra*, 51 Cal.4th at p. 60.)

Defendant argues that "the only evidence on which [the jury] could have based a finding of intent was his flight from the police and the late hour" and that "neither of those circumstances, singly or in combination, constitutes 'substantial evidence' of . . . intent." But, as we have already explained, those were not the only facts that supported the jury's finding. In addition to flight and the late hour, (1) the lights were out in the apartment; (2) defendant entered through the bathroom window; (3) defendant

accessed the window from an enclosed area (the alley) that was dark and was not open to the public; (4) the window was not the usual point of ingress and egress; (5) since the window was six to seven feet off the ground, defendant created a ramp to access the window; (6) defendant was uninvited and unknown to Karla; (7) defendant concealed himself from Vasquez; (8) defendant fled from both Vasquez and the police; (9) defendant did not provide a reasonable, credible explanation for why he was in the “alley” in the first place, and (10) defendant could not explain why he entered the apartment.

*Soto* holds that entry through a window, late at night, after the lights are out, with no explanation of intent is sufficient evidence of the intent to commit theft. (*Soto, supra*, 53 Cal. at p. 416.) This case has all of the facts the court relied on in *Soto* and more. And although defendant provided an explanation of his intent (he was curious and not thinking), the jury may not have believed him.

Defendant relies on *In re Leanna W.* (2004) 120 Cal.App.4th 735 (*Leanna W.*), in which this court reversed the juvenile court’s jurisdictional finding that the minor had committed conduct that, if committed by an adult, would be burglary, because there was insufficient evidence that the minor had the specific intent to commit theft. The minor in *Leanna W.* was charged with burglary for entering her grandmother’s house without permission—and throwing herself a going away party—while her grandmother was out of town. During the party, utilities and alcohol were used, a boxing match and several adult movies were ordered from a cable provider, jewelry and money were stolen, and the premises were damaged. (*Id.* at pp. 738-740.) This court found the evidence insufficient to support a finding of intent to commit burglary because there was no evidence that Leanna—as opposed to one or more of her 30 or 40 guests—actually used the utilities, drank alcohol, placed orders with the cable providers, or stole jewelry and money, or that Leanna entered the house with the intent to do any of those things. (*Id.* at pp. 742-743.) This case is distinguishable from *Leanna W.* because the evidence here showed that only

one person (defendant) entered Karla's bathroom, such that the intent to commit burglary could not be attributed to others, and the circumstances as previously enumerated were such that the jury could reasonably conclude that defendant intended to commit theft when he entered the apartment.

#### **DISPOSITION**

The judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Grover, J.