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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SILVIANO CONTRERAS,

Defendant and Appellant.

2d Crim. No. B186551
(Super. Ct. No. 1175432)
(Santa Barbara County)

Appellant Silviano Contreras was tried before a jury and convicted of first degree residential burglary. (Pen. Code, § 459, 460.) He was sentenced to prison for seven years: the six-year upper term plus one year for a prior prison term enhancement found true by the court. (Pen. Code, § 667.5, subd. (b).) Appellant contends: (1) his conviction must be reversed because the court admitted prejudicial evidence that he had committed prior burglaries and erroneously denied a motion for new trial made on this ground; (2) he was entitled to additional days of presentence credits; and (3) the court erred when it imposed an upper term sentence based on aggravating facts that were neither admitted by him nor found true by the jury. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Jay Kuhlman's home on Blue Heron Lane in the City of Guadalupe was burglarized sometime after he left for work at 6:30 a.m. on December 2, 2004. Various valuables were taken. A screen on one window had been removed and a sliding glass door had been forced open. A muddy shoeprint was found on the screen.

At about 10:45 a.m., Guadalupe Police Chief William Tucker was driving down Blue Heron Lane and saw co-defendant Katrina Baldivia standing near the front door of Kuhlman's house.[1] She walked away from the house, approached Tucker, and spoke to him briefly before walking to her nearby home. At about noon that same day, Guadalupe Police Officer Frank Medina saw appellant walking with two other people in Guadalupe. He handed a windbreaker to another man, who tucked it under his arm and ran away. Medina asked Contreras why he had given his jacket to the other man and Contreras denied doing so.

When Kuhlman returned home at 3:45 p.m., he discovered that his house had been burglarized and called the police. Officers went to Baldivia's home at about 5:30 p.m. Appellant was there with Baldivia. Appellant was not wearing shoes, but at the officers' direction, he retrieved a pair of Nike sneakers, the pattern of which were consistent with the muddy footprint found on Kuhlman's screen. Evidence technicians lifted a print from the outside glass of a side window at Kuhlman's house which matched appellant's left palm.

Appellant and Baldivia were each charged with first degree residential burglary and were jointly tried. In addition to testimony concerning the current charge, the prosecution presented evidence that appellant had been involved in the

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[1] Baldivia was convicted of first degree burglary under an aiding and abetting theory and was sentenced to prison for the two-year lower term. We have affirmed her conviction and sentence in a separate unpublished opinion.

burglary of three other homes in Guadalupe. In the fall of 2002, his fingerprints were found on a broken window of a burglarized home on 12th Street that was occupied by his relatives. The defense stipulated that appellant stole property from that home to buy food. In March 2003, a home on Snowy Plover Lane was burglarized and electronic equipment was taken. Appellant's fingerprints were found on a window. Also in March 2003, appellant was discovered at Baldivia's house with stolen property from a home on Surfbird Lane that had been burglarized. Baldivia admitted that she had participated in that burglary by knocking on the door of the home and peering through the window to see if anyone was home.

DISCUSSION

Evidence of Prior Burglaries

The evidence of the three prior burglaries was introduced to prove intent and the existence of a common plan under Evidence Code section 1101, subd. (b).[2] Appellant contends the trial court abused its discretion in admitting the evidence because intent was not at issue, the existence of a common plan was probative only to the extent it showed intent, and the evidence was relevant only to criminal disposition or propensity. (§ 1101, subd. (a).) Appellant also argues that the evidence was more prejudicial than probative under section 352.

Evidence of prior similar criminal acts is generally inadmissible to prove character or criminal disposition, but it may be offered to establish some other relevant fact such as intent, identity or the existence of a common plan or scheme. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) The jury was given a modified version of CALJIC No. 2.50, which provided that evidence of the prior burglaries "may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by

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[2] Further statutory references are to the Evidence Code unless otherwise stated.

you only for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged."

A defendant's not guilty plea puts all the elements of a crime in issue, including intent as evidenced by a common scheme or plan. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4.) However, "in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the charged crime occurred, such evidence would be merely cumulative and the prejudicial effect . . . would outweigh its probative value." (*Id*. at p. 406.)

Assuming without deciding that the court should have excluded evidence of the prior burglaries as more prejudicial than probative, the erroneous admission of prior criminal acts does not compel reversal unless it is reasonably probable the defendant would have obtained a more favorable result if the evidence had been excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) Appellant's palm print was discovered on the window of Kuhlman's home during the investigation of the burglary and he was contacted at the home of co-defendant Baldivia, who earlier had been seen on the porch of the burglarized home. It is not

reasonably probable the jurors would have returned a more favorable verdict had they not heard the evidence of prior crimes.

Appellant also complains that his Sixth Amendment confrontation clause rights were violated because the primary evidence linking him to one of the prior burglaries was an out-of-court statement to police by co-defendant Baldivia in which she admitted knocking on the door and looking in the window during the commission of that prior offense. The statement was sanitized to omit any reference to appellant as required by *Bruton v. United States* (1968) 391 U.S. 123, but even if we assume, as he contends, that it was testimonial and was thus barred by *Crawford v. Washington* (2004) 541 U.S. 36, the error was harmless. Other evidence established that appellant was caught with stolen property from the prior burglary, and Baldivia's statement was limited to a description of her own involvement in that offense.

Because any error in admitting evidence of the prior burglaries was harmless, we reject appellant's related claim that the court abused its discretion by denying his motion for a new trial on the same ground.

Custody Credits

Appellant argues that the court improperly disallowed presentence credits for days he spent in custody on a parole revocation. He argues that the parole revocation term lasted longer than was authorized under prison regulations and that the excess time was attributable solely to the current charges. We disagree.

Appellant was on parole when he was contacted by police on the day of the burglary on December 2, 2004. Officers discovered less than an ounce of marijuana in his possession and placed him in custody on a parole hold. He ultimately waived his right to a parole hearing and accepted a 12-month return to prison for a parole violation, which he served while the charges in this case were still pending. The parole revocation term expired on August 2, 2005, 44 days before the sentencing hearing in this case. At the sentencing hearing, the trial court

awarded 44 days of actual custody credits for the days appellant spent in custody after the parole revocation term expired, plus 22 days of good time/work time credits.

A defendant who is sentenced to prison is entitled to receive credit for days spent in presentence custody. (§ 2900.5, subd. (a).) Such presentence credits shall be awarded "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) There is no entitlement to presentence credits when the defendant was in custody for reasons unrelated to the conduct for which sentence is imposed. "Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*In re Rojas* (1979) 23 Cal.3d 152, 156.)

In cases where the defendant is in custody for multiple reasons, the Supreme Court has formulated a rule of strict causation that precludes an award of credits "unless it is demonstrated that the claimant would have been at liberty . . . were it not for a restraint relating to the proceedings resulting in the later sentence." (*In re Joyner* (1989) 48 Cal.3d 487, 489; see also *People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.) The defendant bears the burden of establishing an entitlement to credits in a situation where he or she is in custody under multiple restraints. (*People v. Purvis* (1992) 11 Cal.App.4th 1193, 1196-1197.)

Appellant acknowledges that he is not entitled to credit for time that was also attributable to his parole revocation. But he argues that his custody on the parole revocation should have been limited to six months from his arrest date on December 2, 2004. He relies on title 15, section 2646.1 of the California Code of Regulations, which provides that the length of confinement for possessing less than an ounce of marijuana is zero to four months. But appellant agreed to a parole revocation term of 12 months, and section 2646.1 allows the parole authorities to "impose a period of confinement that is outside the assessment range if justified by

the particular facts of an individual case and if the facts supporting the term are stated on the record." Appellant was serving an authorized parole revocation term until August 2, 2005 and was not entitled to credits on the current case until that term expired.

Blakely v. Washington

Appellant complains that the upper term sentence on the burglary counts runs afoul of *Blakely v. Washington* (2004) 542 U.S. 296, because it was based on aggravating factors that were neither admitted by him nor found true by the jury. This argument fails for the reasons stated in *People v. Black* (2005) 35 Cal.4th 1238, by which we are bound. Moreover, defense counsel agreed on the record that the court rather than the jury could determine which aggravating factors applied. Under *Blakely*, a defendant may consent to judicial factfinding circumstances used to enhance the sentence.

The judgment is affirmed.

<u>NOT TO BE PUBLISHED.</u>

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

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Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

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