Filed 3/23/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMMAL HANEEF YARBROUGH, Defendant and Appellant.	B222399 (Los Angeles County Super. Ct. No. PA065170)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Reversed.

Linda Charman Hayes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Blythe J. Leszkay and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jammal Yarbrough appeals from a judgment entered following a jury trial in which he was convicted of first degree burglary for having entered a second-floor unenclosed balcony of an apartment with intent to commit a theft. He contends the court erroneously instructed the jury that an unenclosed balcony is part of a building for purposes of the burglary statute and that the facts disclosed only an attempted burglary. We agree because the Supreme Court in *People v. Valencia* (2002) 28 Cal.4th 1 (*Valencia*) stated "the outer boundary of a building for purposes of burglary . . . does not encompass . . . [an] unenclosed balcony . . . ." (*Valencia*, at p. 12, fn. 5.)

BACKGROUND

On the night of August 5, 2007, defendant climbed to the second-floor balcony of the residence of Salvador Deanda. The balcony was bordered by a waist-high wrought iron railing, with a space between the railing and the floor. It was separated from Deanda's living quarters by a sliding glass door that was open. Awakened by the barking of his dog, Deanda saw defendant standing on the balcony outside the railing, holding onto the railing. When Deanda tried to push defendant off the balcony, defendant held onto the railing. He then fell or jumped down, and fled. Though Deanda's bicycles were on the balcony, nothing was stolen.

Defendant was convicted of first degree burglary.

DISCUSSION

The trial court instructed the jury on the elements of burglary using CALCRIM No. 1700, which states that burglary is committed when a person enters a "building" with the intent to commit a felony. The instruction informs the jury that a person "enters" a building if some part of his or her body "penetrates the area inside the building's outer boundary." But the trial court modified an optional paragraph of the instruction to read, "A building's outer boundary includes the area inside a *balcony*." (Italics added.)

The trial court also instructed the jury using CALCRIM No. 1701, which explains that first degree burglary is the burglary of an inhabited house, which "includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it." When it read the instruction to the jury the trial court inserted the word

"balcony" into the blank, so that the instruction read: "A house includes any balcony that is attached to the house and functionally connected with it." During closing argument, the prosecutor told the jury, "The entry is complete as soon as some part of his body crosses into that area inside the outer boundary, which we know is the area inside of the balcony. As soon as a piece of his body crosses into that area, the entry is complete."

Defendant contends the trial court effectively compelled the jury to find him guilty by erroneously instructing that a balcony constitutes the outer boundary of a house. He argues that a balcony is not necessarily part of an inhabited residence as a matter of law, and that the facts disclosed, at most, an attempted burglary. We agree because an unenclosed balcony is not part of a building for the purposes of the burglary statute.

Preliminarily, the People contend defendant has waived this issue by failing to object to the instruction in the trial court. We disagree. Failure to object to an instruction does not waive a claim on appeal that the instruction was an incorrect statement of the law. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.)

"'[A] jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof . . . .'" (*People v. Figueroa* (1986) 41 Cal.3d 714, 726.)

"The crime of burglary is committed when a person '*enters* any . . . *building*,' including a 'house,' 'with intent to commit . . . larceny or any felony.' (§ 459 . . . .) Burglary may be of the first or second degree, but in either event involves an entry into a building or other specified structure." (*Valencia*, *supra*, 28 Cal.4th at p. 6, fns. omitted.)

In *Valencia*, the Supreme Court was called upon to decide whether "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the window itself is closed and is not penetrated." (*Valencia*, *supra*, 28 Cal.4th at pp. 3–4.) In concluding it does, the high court adopted a "reasonable belief test" in defining the outer boundary of a building for purposes of burglary. "Under such a test, . . . a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization." (*Valencia*, at p. 11.)

"Furthermore, in defining the outer boundary of a building for purposes of burglary, the reasonable belief test necessarily refers only to an element of a building that reasonably can be viewed as part of *the building's* outer boundary. The test does not encompass any feature that is not such an element, such as a lawn, courtyard, unenclosed patio, or **unenclosed balcony** that may be located in front of or behind a building; nor does the test purport to define any such feature as part of a building's outer boundary." (*Valencia*, *supra*, 28 Cal.4th at p. 12, fn. 5, boldface added.)

Here, defendant entered an unenclosed balcony. According to *Valencia*, the reasonable belief test does not encompass an unenclosed balcony, and the trial court erred in instructing otherwise.

We are mindful that our colleagues in Division Four of this district have reached a contrary conclusion in *People v. Jackson* (2010) 190 Cal.App.4th 918 (*Jackson*). There, the defendant was seen halfway inside the victim's apartment and halfway on the balcony adjacent to a living/dining room which was separated by a sliding glass door and screen. The balcony was "private" to the victim's apartment and contained a wooden lattice piece against one side of the balcony. The balcony contained a few plants, a coffee table, and a larger table. The jury was instructed that the defendant could be guilty of burglary if the prosecution proved that he entered a building or attached balcony with the intent to commit theft. The *Jackson* court held that the instruction was proper and that "the balcony satisfies the reasonable person test discussed by the California Supreme Court in *Valencia*. Under this test, the question is 'whether a reasonable person would believe that the element of the building in question enclosed an area into which a member of the general public could not pass without authorization.' (*Valencia*, *supra*, 28 Cal.4th at p. 12.)" (*Jackson*, *supra*, 190 Cal.App.4th at p. 925.) The *Jackson* court did not mention the language in *Valencia* excluding an unenclosed balcony from the reasonable belief test. Finally, the *Jackson* court went on to state that "even had the trial court erred by including the term 'balcony' in the definition of burglary, the undisputed evidence is that [the defendant] was halfway inside [the victim's] apartment and halfway on the balcony when [the witness] saw him. . . . Because the evidence established that [the defendant]

entered [the victim's] apartment, any instructional error would not have been prejudicial." (*Jackson*, at p. 926.) Here, defendant did not enter the victim's apartment.

We disagree with *Jackson* and follow the dictum in *Valencia*. In doing so, we acknowledge the seriousness of a residential burglary. "'[T]he interest sought to be protected by the common law crime of burglary was clear. At common law, burglary was the breaking and entering of a dwelling in the nighttime. The law was intended to protect the sanctity of a person's home during the night hours when the resident was most vulnerable. As one commentator observed: "The predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation, for it could only be committed against the dwelling of another. . . . The dwelling was sacred, but a duty was imposed on the owner to protect himself as well as looking to the law for protection. . . ."' [Citation.]" (*Valencia*, *supra*, 28 Cal.4th at p. 7.)

In keeping with the gravity of the offense of burglary, we observe that anyone who climbs onto another's balcony with the intent to enter the adjoining residence to commit theft is guilty of an attempted burglary punishable by a sentence to state prison for one, two, or three years (Pen. Code, §§ 461, 664), which is a serious felony under California's "Three Strikes" law (*id.*, § 1192.7, subd. (c)(18), (39)).

Defendant's final argument here is that the facts disclose only an attempted burglary. First, defendant argues that the evidence established that he gained access to only the outside of the balcony, clinging to the rail, but that he did not "get into" the balcony itself. To commit an entry of the balcony, he did not have to "get into" the balcony; he had to enter the balcony and he did so by clinging to the rail; his fingers were inside the balcony and that was a sufficient entry of the balcony. (See discussion of *Valencia, ante*.) Nevertheless, inasmuch as we have determined that the unenclosed balcony was not part of the building's outer boundary, defendant is correct in further contending that given his failure to enter the apartment, the evidence would establish only

an attempted burglary (were the jury to find, at retrial, that defendant intended to enter the apartment to commit a theft when he climbed onto the balcony).

DISPOSITION

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.