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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MORRIS KENNETH ROWLAND,

Defendant and Appellant.

A129571

(Solano County  
Super. Ct. No. FCR270127)

Defendant Morris Kenneth Rowland appeals from a judgment convicting him of first degree burglary and sentencing him to eight years in prison. His appointed counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and nine potentially arguable issues, and requesting this court to undertake a review of the entire record. Defendant was advised that he could file a supplemental brief, which he has not done. Having conducted an independent review of the record, we find no issue of colorable merit and shall affirm.

**Factual and Procedural History**

Defendant was charged by information with one count of first degree burglary (Pen. Code, § 459) and one count of misdemeanor possession of a smoking device (Health & Saf. Code, § 11364). The information also alleged four sentence enhancements under Penal Code section 667.5, subdivision (b) based on defendant's prior felony convictions and related prison terms.

The following evidence was presented to the jury: On the evening of September 6, 2009, defendant and the victim were drinking beer in the victim's motel room. When they left the room, the victim locked the door. When he returned to his room 15 minutes later, he noticed that the window screen had been cut and his black leather backpack was missing from the room. He found his backpack in a trash can at the motel but his cell phone and a digital camera were missing. He reported the crime to the police, mentioning that defendant might be a suspect. At that time, the daughter of defendant's then girlfriend reported to the police that she had seen defendant carrying a "black leather backpack." When defendant was arrested two days later, he told the arresting officer "[h]e was happy he was caught so that he could clean up" and that he had been on drugs for four or five days. He also told her that he used his finger nail to cut the window screen and that he traded the stolen cell phone for drugs. A search of defendant's pockets revealed two methamphetamine pipes. On cross-examination the arresting officer testified that defendant also said, "I took what was owed to me."

Defendant did not testify at trial, but called his ex-girlfriend and her daughter as witnesses on his behalf. The daughter clarified that she did not tell the officer that she saw defendant with a black leather backpack. Rather, she told the officer she saw defendant with "something leather" that was black. The ex-girlfriend testified that when the victim took his backpack from the trash can he said, "I must have" put it there. She also testified that after looking through the bag, he said that nothing was missing. In closing argument, defendant's attorney claimed there was no evidence that defendant had anything to do with the burglary. The attorney argued that the victim was not credible and that the ex-girlfriend's testimony suggests that the victim put the backpack in the trash can himself.

During trial, the prosecution dismissed the misdemeanor violation of the Health and Safety Code. The jury found defendant guilty of first degree burglary and the court found true the sentence enhancement allegations. Defendant was sentenced to the midterm of four years for the burglary and consecutive one-year enhancements for each

of the prior convictions. Defendant was given 672 days custody credits. Defendant filed a timely notice of appeal.

### **Discussion**

Prior to trial, proceedings were suspended and defendant's competency to stand trial was evaluated under Penal Code section 1368. Counsel agreed to the appointment of Dr. Nakagawa to examine defendant. Dr. Nakagawa concluded that defendant was mentally competent to stand trial and that although he may have some mental health concerns, there was clear evidence of malingering. The doctor's report provides substantial evidence of defendant's competence to stand trial. (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111 ["On appeal a finding of competency to stand trial 'cannot be disturbed if there is any substantial and credible evidence in the record to support the finding' "].)

During jury selection, defense counsel made a *Batson-Wheeler*<sup>1</sup> motion challenging the prosecutor's dismissal of one African-American woman from the jury. The court observed that it was doubtful the defendant had established a systematic pattern of exclusion because this was the first African-American excused by the prosecutor and "the panel ha[d] three or four other people of African-American heritage" remaining. The court nonetheless heard the prosecutor's explanation for excusing the woman and found credible that she was excused because of her "unconventional appearance" and the fact that she was unemployed. We find no error in the denial of the defendant's motion or the selection of the jury.

Prior to trial, the court granted the prosecutor's in limine motion to preclude admission of the victim's 1995 misdemeanor drug conviction. The court found that the prior conviction was too remote in time, not a crime of moral turpitude, and more prejudicial than probative under Evidence Code section 352. The court denied defendant's motion to exclude evidence of his statements to the police following his arrest. The court conducted a hearing under Evidence Code section 402 and based on the

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<sup>1</sup> *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258.

arresting officer's testimony concluded that defendant's statements were spontaneous. We find no abuse of discretion in these or other evidentiary rulings made by the trial court. Contrary to appellate counsel's suggestion, we do not believe that the trial court exhibited "judicial bias by systematically ruling in favor of the prosecution and against appellant by excluding relevant and exculpatory evidence in the evidentiary rulings."

Appellate counsel questions whether the prosecutor committed "misconduct during the closing arguments when the district attorney vouched for the prosecution's witness and misstated the evidence before the jury." We find no impropriety in the prosecutor's recitation of the evidence. Counsel's statements that the victim had no reason to put his own backpack in the trash can or to set defendant up was permissible argument based on evidence in the record.

We find no error with regard to the jury instructions. The trial court properly denied defendant's request to instruct the jury on trespass as a lesser included offense of burglary under CALCRIM No. 2932. (*People v. Taylor* (2010) 48 Cal.4th 574 [trespass is a lesser related, not a lesser included, offense of burglary].) Moreover, the trespass instruction was not supported by either the evidence at trial or defendant's theory of the case. Likewise, contrary to appellate counsel's identification of arguable issues, the court did not err by failing to instruct sua sponte on the defense of a claim of right under CALCRIM No. 1863.<sup>2</sup> Such an instruction would have been inconsistent with

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<sup>2</sup> CALCRIM No. 1863 provides in relevant part: "If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/[or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it. [¶] In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith. [¶] [The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.] [¶] . . . [¶] If you have a reasonable doubt about whether the defendant had the intent required for (theft/[or] robbery), you must find (him/her) not guilty of \_\_\_\_ <insert specific theft crime[s]>."

defendant's argument that he did not take the backpack. Although defendant's spontaneous statement to the arresting officer that he took what was owed him might have supported such a defense, no additional evidence was offered to explain what defendant meant by that statement, and counsel never made such an argument or requested such an instruction.

Substantial evidence supports the trial court's finding that defendant had suffered four prior felony convictions for which he served four prior prison terms. The absence of an abstract of judgment for one of the prior convictions did not require the court to strike the prior because the conviction and prison term were sufficiently established by the minute order contained in the prosecutor's Penal Code section 965, subdivision (b) packet. (See *People v. Henley* (1999) 72 Cal.App.4th 555, 560, citing *People v. Harrell* (1989) 207 Cal.App.3d 1439, 1444 ["[C]ases have held proper for consideration to prove a prior conviction a variety of items, including . . . a minute order".]) Likewise, the trial court properly denied defendant's request to strike his most recent prior on the ground that he did not actually spend time in prison because he was released on parole directly from county jail due to the 591 days of custody and conduct credits he amassed prior to his conviction. (See *People v. White* (1987) 196 Cal.App.3d 967, 972-973 ["[S]ection 667.5 unambiguously encompasses prison terms of at least one continuous year of custody even though the actual time spent in a state penitentiary is less than one year. To exempt recidivists who compile extensive presentence credits because of delays in prior judicial proceedings while enhancing repeat offenders whose early prior pleas to identical crimes with identical prison sentences is irrational."]; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1249-1250.)

Defendant was adequately represented by counsel throughout the proceedings.

### **Disposition**

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.

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