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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.

DARRYL A. BALDWIN,

Defendant and Appellant.

A103831

(Contra Costa County  
Super. Ct. No. 5-020455-2)

After a jury found him guilty of first degree burglary, Darryl A. Baldwin was sentenced to prison for a term of 40 years to life under the Three Strikes law. On appeal, Baldwin argues his conviction must be reversed because the trial court erred in admitting evidence of his prior burglary convictions and because his attorney rendered ineffective assistance of counsel. He also claims his presentence conduct credits were erroneously calculated, a point the Attorney General concedes. We order the abstract of judgment amended to reflect the appropriate credits, and in all other respects we affirm the judgment.

**BACKGROUND**

On the afternoon of January 28, 2002, Baldwin was found inside an apartment that did not belong to him, and several individuals restrained him there until the police arrived. Baldwin was arrested and charged with first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a).) The information alleged he had suffered five prior strike convictions for serious felonies (false imprisonment with a firearm, robbery with a firearm and three first degree burglaries) and had served four prior prison terms. (Pen.

Code, §§ 667, subd. (a)(1), 667.5, subd. (b) & 1170.12.) The case proceeded to a jury trial, at which the following evidence was presented.<sup>1</sup>

## **I. Prosecution Case**

On the afternoon of January 28, 2002, Linda Billington, a resident of the President's Park apartments, was in her apartment on the telephone when she heard glass breaking in the apartment above her. Before this sound, she had not heard anyone yelling, or running up the stairs, or pounding on doors. She walked outside and saw a man upstairs breaking the window of the apartment above her. Billington saw no strange vehicles and no group of men in the parking lot. She watched the man breaking glass for about a minute, then ducked back inside her apartment and called the leasing office. Housekeeper Denise McMullen and maintenance supervisor Mario Villasenor went with a technician to investigate. Villasenor and the technician drove in a golf cart, while McMullen walked, and they arrived no more than two minutes after they received a radio call from the office about the glass. McMullen and Villasenor testified that as they approached the apartment they did not see any groups of people or vehicles leaving the area, nor had anyone contacted Villasenor about a fight or disturbance in the area.

When he arrived at the apartment above Billington's, Villasenor noticed the kitchen window was shattered. He then proceeded upstairs and, looking through the window, saw a shadow moving inside the apartment toward the bedrooms. After knocking and getting no answer, Villasenor opened the apartment door with his master key and saw Baldwin standing inside. Villasenor knew Baldwin was not the resident of the apartment, so he asked what Baldwin was doing there. Baldwin said, " 'The motherfucker owes me money.' " He gave the same response when Villasenor asked why he had broken the apartment window. Villasenor then said the police had been called and told him to stay where he was. Baldwin responded by punching Villasenor in the face. Villasenor repeated that the police were on the way and Baldwin had to stay

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<sup>1</sup> Baldwin's first jury trial on this charge ended in a mistrial. Our review is, of course, limited to evidence presented in the second trial, which resulted in Baldwin's conviction.

where he was. Baldwin then unzipped his parka, put his hand down his shirt, and ordered Villasenor to “back up.” Believing Baldwin was reaching for a weapon, Villasenor “tackled him.” The two fell to the floor wrestling and exchanging blows. Villasenor called to his technician for help, and the technician also became involved in the fight. About 10 to 15 minutes after the altercation began, the police arrived. Baldwin was bleeding from his face and hands, but Villasenor had not noticed any indication of injuries to Baldwin when he first saw him in the apartment. Later that day, Villasenor went into the apartment’s back bedroom, and he noticed drawers, jewelry and clothes spread around, “like somebody was going through the personal items.”

Timothy Shewl, the resident of the apartment in question, testified he left for work early on the morning of January 28, 2002, after making sure the front door and windows were locked. Shewl lived in the apartment alone, and no one else had a key. When he returned home later that evening, Shewl noticed that the contents of his dresser drawers had been scattered on the bed and the floor, and some items in the apartment had been moved around. Shewl did not know Baldwin and had not given him permission to enter the apartment. He denied that a woman named Fatima lived there or that he had promised to take care of or protect Fatima.

## **II. Defense Case**

Donna Gordon, Baldwin’s fiancé, lived in the President’s Park apartment complex. Gordon was out of town in January 2002, and she had told the leasing office that Baldwin would probably be coming in and out of her apartment during this time. Gordon testified she had seen Fatima around the apartment complex several times. She sometimes saw Fatima drive away with a gentleman in a brown Bronco. After the incident, Gordon talked with Shewl, and she testified that Shewl told her, “Well, if Fatima gave them permission to be in the house, so be it.” Two other residents of the apartment complex testified that Fatima lived with Shewl.

Baldwin testified in his own defense. On the day in question, Baldwin finished work around 5:00 a.m. and had breakfast at an Oakland restaurant where Travis Foster, the son of his former girlfriend, worked. After Foster’s shift ended, the two spent some

time together and then came to Gordon's house, where Baldwin turned on a movie and Foster napped. Later, the two men walked to a nearby convenience store. On their way out, they saw Fatima standing by the apartment complex's gate, apparently waiting for someone. Baldwin had met Fatima about six months earlier, and he believed she lived in the apartment he later learned was rented by Shewl. Baldwin did not know Shewl. He had seen Fatima four or five times with a man called "Third," who drove a Bronco. As Baldwin and Foster were talking to Fatima, Third pulled up in the Bronco, jumped out, and approached Baldwin in a very agitated manner, asking " 'What you trying to talk to my girl for?' " When Baldwin tried to leave, Third hit him on the back of the head, and the two started fighting. After Baldwin knocked him to the ground, Third threatened to come back with others and " 'shoot the shit up.' "

Baldwin and Foster walked on to the store. On their way back, though, Baldwin decided to try to smooth things out with Third because he was afraid something might happen to Gordon. Baldwin saw Third on the sidewalk talking with Fatima, and he approached and asked to talk with him. In response, Third pulled a knife and sliced Baldwin's hand. Baldwin grabbed Third reflexively and then was hit several times by someone else wielding a bat. Feeling his life was in danger, Baldwin ran up a set of stairs and banged on the door of the first apartment, asking for help. When no one answered, he went next door, to the apartment he believed was Fatima's, and tried to open the door. Finding the door locked, Baldwin hit the window with his fist, broke it, and dove inside. He sat down inside, dizzy and bleeding. When Baldwin heard people on the stairs, he believed his assailants were coming, and so he punched Villasenor immediately as he entered the apartment. Baldwin denied that they had an extended fight, though, saying Villasenor and the other man wrestled him to the floor quickly and held him there facedown until the police arrived.

An expert in traumatic injuries and emergency medicine testified about Baldwin's injuries. He had facial contusions, which could have been caused by blows from a bat. He also had a laceration on the thumb, which could have been caused by "a sharp object like a knife or a sharp piece of glass." Photographs taken almost a month after the

incident showed a swollen area over the elbow, and the expert explained that swelling caused by trauma “can persist for a very long period of time.” This injury, with swelling persisting a month later, would have resulted from a direct blow. The expert could not tell whether Baldwin’s contusions were caused by the impact of a fist or a solid object like a baseball bat.

Foster testified that he saw Baldwin as a “father figure,” and he described the same sequence of events Baldwin related in his testimony. When one of the men who had been beating Baldwin turned to Foster with a bat, Foster ran away and called his mother. Foster did not recall which day of the week these events happened, but he believed it was probably a Sunday because he worked graveyard shift on weekends. Foster’s mother testified her son called her and said “some men had jumped his dad,” which was how he referred to Baldwin. On March 18, 2002, Foster had told an investigator from the Public Defender’s Office that “he was definite” the fight occurred on a Friday or a Saturday.

### **III. Verdict and Sentencing**

On May 13, 2003, the jury returned a verdict finding Baldwin guilty of first degree burglary, and the case proceeded immediately to a court trial on Baldwin’s prior convictions. The court found that one alleged conviction—for first degree burglary—had not been proven, but all other prior convictions allegedly suffered by Baldwin—for first degree burglary, attempted burglary, false imprisonment with use of a firearm and robbery with use of a firearm—had been proven beyond a reasonable doubt. The court also found true a prior prison term enhancement alleged in the information. After denying Baldwin’s motion for new trial, the court sentenced him to a term of 25 years to life imprisonment on the burglary charge, plus three consecutive sentences of five years for his prior serious felony convictions, for a total of 40 years to life imprisonment. (Pen. Code, § 667, subd. (a)(1).)

## **DISCUSSION**

### **I. Admission of Prior Burglary Convictions Not Reversible Error**

In a motion in limine before trial, Baldwin sought to preclude use of all of his prior convictions for impeachment. At issue were: (1) a 1987 conviction for first degree burglary, (2) a 1988 conviction for first degree burglary, (3) a 1988 conviction for attempted burglary, (4) a 1992 conviction for possession for sale of a controlled substance, and (5) a 1993 conviction for robbery and false imprisonment with the use of a firearm. The prosecution sought to introduce these convictions for impeachment and, depending on the defense Baldwin presented, as substantive evidence of his intent to burglarize. The court permitted the prosecution to use only the three most recent convictions for impeachment; however, if the defense placed in issue Baldwin's intent or motive in entering the dwelling, the court ruled that the two previous burglary convictions could be admitted as well pursuant to Evidence Code section 1101, subdivision (b).

During a break in his direct examination of Baldwin, Baldwin's attorney asked the court in chambers whether it still intended to permit the prosecution to introduce evidence of Baldwin's prior burglary convictions. After the court reiterated its pretrial ruling, counsel repeated his objections. Counsel argued that admission of the convictions alone, without evidence of the underlying acts, would be akin to "something like res judicata" on the issue of intent and would encourage the impermissible inference that Baldwin had a propensity to burgle. Nevertheless, in light of the court's ruling, defense counsel expressed a desire to mention the prior convictions in Baldwin's direct examination to proactively "rehabilitate" his client. In response to the attorney's concern about doing so, the court observed: "I'll put on the record now, that if [defense counsel] wants to put these matters in on evidence by himself, rather than waiting for the district attorney to do it, then that does not constitute a waiver, in my mind. . . ."

When trial resumed, defense counsel elicited testimony about the prior convictions from Baldwin. After Baldwin testified that he had served prison time for prior offenses, he admitted he had been convicted of first degree burglary once in 1987 and twice in

1988 and was also convicted in the early 1990s of possessing cocaine for sale and of robbery, false imprisonment and firearm charges arising from a “violent incident.” Baldwin explained he was addicted to crack at the time, “so [he] was doing a lot of stealing, and crime and stuff” to support his drug habit. He went on to testify at length about how he stopped using drugs in prison and rehabilitated himself by attending church, getting a G.E.D. and learning trades. Baldwin now argues the judgment must be reversed because the trial court erroneously admitted evidence of his three prior burglary convictions.

Although Evidence Code section 1101, subdivision (a) “establishes a general rule that character evidence is inadmissible to prove a defendant’s conduct on a specific occasion,” this rule is limited by subdivision (b) of the statute, which provides “evidence that a defendant has committed a crime, civil wrong or some other act may be admissible to prove certain facts, such as ‘motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . .’ ” (*People v. Branch* (2001) 91 Cal.App.4th 274, 280; see also Evid. Code, § 1101, subd. (b) [“Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . .) other than his or her disposition to commit such an act”].)

In general, “[t]he admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379.) Because this type of evidence can be particularly inflammatory, the trial court must also determine that the probative value of the evidence is substantial and outweighs the danger of undue prejudice. (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1020-1021; see also *People v. Kipp* (1998) 18 Cal.4th 349, 371.) On appeal, the trial court’s determination of these issues is reviewed for abuse of discretion. (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under this standard, “[w]e will reverse only if the court’s ruling was ‘arbitrary,

whimsical, or capricious as a matter of law. [Citation.]’ [Citation.]” (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.)

Here, the uncharged crime evidence was offered as proof of Baldwin’s intent to commit burglary. “Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)” (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) As compared with the level of similarity between charged and uncharged crimes required to prove identity or common plan, “[t]he least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra*, 7 Cal.4th 380, 402.) For this purpose, the uncharged crimes need only be ‘sufficiently similar [to the charged offenses] to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]” ’ (*Ibid.*)” (*People v. Kipp, supra*, 18 Cal.4th at p. 371; see also *People v. Robbins* (1988) 45 Cal.3d 867, 879-880 [explaining why, under the “doctrine of chances,” prior conduct may be relevant circumstantial evidence of an actor’s recent intent].)

Baldwin asserts the trial court abused its discretion in admitting evidence of his prior burglary convictions because the prosecution presented no evidence regarding the underlying facts of these offenses, and therefore there was no way for the court to tell whether these prior crimes were “sufficiently similar” to the current charge to support an inference that he probably harbored the same intent on both occasions. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 402; *People v. Robbins, supra*, 45 Cal.3d at p. 879.) In support of this argument, Baldwin correctly points out that not all burglaries involve an intent to steal. (See, e.g., *People v. Griffin* (2001) 90 Cal.App.4th 741 [entry with intent to commit assault]; *People v. Fond* (1999) 71 Cal.App.4th 127 [entry with intent to commit rape].) The Attorney General responds that the burden was on Baldwin to elicit the facts surrounding the prior convictions since Baldwin was the party who put this evidence before the jury. Given the trial court’s ruling that the prior burglary convictions were admissible, and its express reassurance that testimony presented by the defense

would not be a waiver of objections to this ruling, we do not find the Attorney General's "invited error" argument persuasive.

However, even assuming the court erred in admitting the prior convictions without evidence of their underlying facts or a determination of how similar such facts were to the current offense (cf. *People v. Felix* (1993) 14 Cal.App.4th 997, 1002, 1005-1006 [error to admit prior robbery conviction on the issue of identity where "[n]o details of the prior crime were put before the court, and the court relied on no distinctive features in ruling it admissible"]), any such error was harmless since it is not reasonably probable Baldwin would have obtained a more favorable result absent this evidence. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1025; *People v. Felix, supra*, 14 Cal.App.4th at pp. 1007-1008; *People v. Watson* (1956) 46 Cal.2d 818, 836.) "The prejudicial effect inherent in evidence of prior offenses varies with the circumstances of each case. Factors that affect the potential for prejudice include the degree to which the prior offense is similar to the charged offense, how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense. [Citation.]" (*People v. Wade* (1996) 48 Cal.App.4th 460, 469.) " "Improper evidence of [a] prior offense results in reversal *only* where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.]" ' [Citation.]" (*In re James B.* (2003) 109 Cal.App.4th 862, 875.)

The evidence of Baldwin's guilt was strong.<sup>2</sup> He was caught "red-handed" inside someone else's apartment, and he admitted breaking a window in order to enter. Although Baldwin claimed he entered the apartment to escape pursuers who had been assaulting him, no other witness corroborated the details of this somewhat fantastical story. Neither the maintenance staff nor Shewl's downstairs neighbor noticed a Bronco or heard indications of a brawl on the afternoon in question, and medical testimony

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<sup>2</sup> Despite Baldwin's invitation that we do so, we attach no significance to the fact that the first trial of his case ended in a mistrial because jurors were unable to reach a verdict. The record of the first trial is not before us in this appeal; therefore, it is impossible to tell whether comparable evidence was presented.

indicated Baldwin's injuries could have come from breaking into the apartment and fighting with Villasenor, or could have persisted from a previous encounter. Baldwin's story that he dove through the window in a frantic effort to find shelter was belied by evidence that most of the windowpane remained intact inside its frame, with only a ten-by-four inch hole in the glass, and by the disarray inside Shewl's bedroom, which was consistent with a burglar's search for valuables. Finally, if he were truly hiding in the apartment with the innocent intent of evading pursuers, Baldwin would likely have announced this reason for his presence to Villasenor and the police; instead, he said nothing to the police and told Villasenor he was there because Shewl owed him money.

In contrast, Baldwin's prior burglary convictions were barely mentioned in the trial. Defense counsel brought up the fact of these convictions very briefly in examining Baldwin, and his questioning presented them in a broader context about how Baldwin had purportedly turned his life around and rehabilitated himself. The prosecutor never once mentioned these prior burglaries during his lengthy cross-examination of Baldwin or during his closing arguments. Finally, any potentially inflammatory or inappropriate consideration of the prior burglary convictions was alleviated by the instruction that directed jurors to consider this evidence not for proof of a disposition to commit crimes, but only for the limited purpose of determining the existence of intent. (CALJIC No. 2.50.) "The jury is presumed to have adhered to the court's instructions. [Citations.]" (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023.)

## **II. Trial Counsel's Assistance Not Constitutionally Ineffective**

Baldwin next raises three arguments in support of a claim that his trial attorney rendered constitutionally ineffective assistance of counsel. We conclude none of these arguments has merit.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also

*Strickland v. Washington* (1984) 466 U.S. 668, 687.) “ “Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” [Citations.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

#### **A. Jury Instruction Regarding Prior Offenses**

As noted, the jury heard evidence that Baldwin had previously been convicted of five prior crimes—three first degree burglaries, one drug offense and one robbery—and it was instructed pursuant to CALJIC No. 2.50 that this evidence of prior crimes was not to be considered as proof of a disposition to commit crimes, but rather as evidence bearing on the disputed issue of intent. Baldwin faults his trial counsel for failing to propose a modification of CALJIC No. 2.50 to clarify that only the prior burglaries, and not the other crimes, could be used as substantive evidence of intent.

In support of his argument, Baldwin cites a passage from *People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6, disapproved on another ground in *People v. Castro* (1985) 38 Cal.3d 301, suggesting the *trial court* should modify this cautionary instruction to identify the “other crimes” evidence to which it relates when evidence of a prior conviction has also been admitted for the purpose of impeachment. While it is true the trial court generally has no duty to instruct sua sponte on the limited admissibility of such evidence (see *People v. Collie* (1981) 30 Cal.3d 43, 63-64), Baldwin identifies no case suggesting defense counsel has a duty to even request the CALJIC instruction, let alone tailor it to fit the past crimes presented at trial. On the contrary, the Supreme Court has explained the reason trial courts have no sua sponte duty to instruct is that, “for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes . . . .” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 592; see also *People v. Johnson* (1993) 6 Cal.4th 1, 49 [“because defense counsel might not want the jury to place undue emphasis on the defendant’s prior offenses, the court is not required to give such instructions sua sponte”].) Thus, the Supreme Court has repeatedly rejected ineffective assistance of counsel claims based on a failure to request a cautionary

instruction. (E.g., *People v. Johnson, supra*, 6 Cal.4th at p. 50 [noting “counsel may have deemed it tactically unwise to call further attention to defendant’s prior offenses by requesting special instructions”]; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 592 [plausible tactical reasons for failing to request additional instruction regarding other crimes].)

Likewise, it was a reasonable tactical decision for Baldwin’s trial counsel to refrain from proposing a modification of CALJIC No. 2.50 that would have repeated to the jury that Baldwin had previously been convicted of three residential burglaries. “Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]” (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437; see also *People v. Holt* (1997) 15 Cal.4th 619, 703.)

#### **B. Declarations Supporting Motion for New Trial**

Next, Baldwin complains his trial counsel was ineffective in litigating a motion for new trial. Shortly after the jury returned a guilty verdict, Baldwin’s attorney filed a motion seeking a new trial based, inter alia, on newly discovered evidence. (Pen. Code, § 1181, subd. (8).) This motion was supported by declarations from Baldwin and from a defense investigator.

Baldwin declared that an inmate from his prison module approached him after the trial saying “he didn’t ‘want any trouble with’ ” Baldwin. As the inmate “explained himself,” Baldwin declared, “I realized I must be talking to one of the people I fought on the day of my arrest.” Baldwin declared he then asked the inmate to speak with a defense investigator, and the inmate, Reginald Weaver, agreed.

The defense investigator declared he made arrangements to interview inmate Weaver at defense counsel’s request. Weaver told the investigator he had been involved in a fight with Baldwin at the President’s Park complex. While he was unsure of the time or date of this fight, Weaver “did confirm it was in the ‘middle of the day.’ ” He said three or four males were involved in the fight, and Baldwin was hit in the chest and hit on the head with a short bar. According to the investigator: “Weaver said that when the

fight was over, it was ‘over,’ meaning that they didn’t continue on against Baldwin and Baldwin didn’t run away. When it was over, they took off. [¶] Weaver said he didn’t see what direction Baldwin took off in, or how fast he was leaving the area. Weaver said he doesn’t know anything about any burglary.” Weaver also told the investigator that a Mexican female witnessed the incident.

Finally, the motion was supported by a third declaration from Reginald Weaver listing comments and clarifications of statements related in the investigator’s declaration. Weaver’s declaration stated the time of the fight “was around 2 in the afternoon” but did not mention the date or day of the week. Weaver clarified that Baldwin was not hit with a metal bar, and, with regard to Baldwin’s actions after the fight, Weaver stated, “I did see him get up and run in the direction of the apartments.”

The trial court denied the new trial motion, reasoning “the jury had the evidence both ways. Both sides of the story, and they made a decision and . . . rather rapidly, and I can’t see where the quality of the new evidence, if it came in, would in any way change a jury’s verdict.”

It is well settled that “ ‘ “[t]he determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. [Citation.]’ ” ’ [Citation.]” (*People v. Staten* (2000) 24 Cal.4th 434, 466.) Although he argues the newly discovered evidence from Weaver met the criteria for granting a new trial, Baldwin does not claim the trial court abused its considerable discretion in denying the motion. Rather, he contends his trial attorney rendered ineffective assistance of counsel by supporting the motion primarily with a declaration from a defense investigator, instead of obtaining a declaration from Weaver himself recounting his story about the fight. (See, e.g., *People v. Merrill* (1951) 104 Cal.App.2d 257, 268-269 [trial court may properly disregard hearsay affidavits in ruling upon motion for new trial].)

Even assuming it would have been possible for counsel to obtain such a detailed declaration from the witness, this shortcoming does not rise to the level of constitutionally ineffective assistance of counsel because Baldwin was not prejudiced by

the error. A reviewing court need not determine whether counsel's performance was deficient before examining any prejudice the defendant may have suffered as a result of the alleged deficiencies. (*Strickland v. Washington, supra*, 466 U.S. at p. 697; *People v. Holt, supra*, 15 Cal.4th at p. 703.) The trial court did not exclude the declarations offered in support of Baldwin's motion or disregard them as inadmissible hearsay; rather, the court considered the substantive merit of the new evidence presented and concluded it would not have changed the jury's verdict. Thus, there is no reasonable probability that Baldwin would have obtained a more favorable result if his trial counsel had presented the new evidence differently.

### **C. Investigation of Prior Convictions**

During the court trial on the five prior convictions alleged in the information, Baldwin's attorney contested the proof that his client had suffered one of the 1988 burglary convictions because the name on the "rap sheet" was Derrick, not Darryl, Baldwin, and the sheet listed a different birth date than Baldwin's. Although Baldwin admitted suffering this conviction when he testified, counsel explained he must have been confused because he was asked about all the prior convictions "in gross." Counsel also presented testimony from Baldwin that he had never used the alias Derrick Baldwin, had never used a false birth date on a form, and had not signed the waiver form that was offered to prove the 1988 conviction. After comparing the handwriting on the forms, the court found the allegation of this prior conviction true beyond a reasonable doubt.

Among other arguments presented in the motion for new trial, Baldwin's counsel asserted that new evidence regarding the identity of Derrick Baldwin required that the court hold a new trial on the validity of this prior conviction. Noting that before the sentencing hearing he "did not have access to the materials the prosecutor would use" to prove Baldwin's prior convictions, counsel explained that he directed an investigation into the identity of Derrick Baldwin after the trial. Counsel stated that Baldwin informed him Derrick was his brother and, though they previously lived at the same address, his current whereabouts were unknown. Counsel also submitted police reports from the 1988 case and pointed out that Derrick Baldwin weighed 15 pounds more than his client,

was assigned a different “NCIC” number by the Oakland police, and (unlike his client) had “new” fingerprints entered in police records. After considering this new evidence, however, the court denied the motion. Recalling how the markings on the waiver form for this conviction “were exactly the same type of markings that Mr. Darryl Baldwin uses on marking other . . . waiver forms,” the court noted its belief that the differences on this form signified “an attempt to be convicted under another name and it didn’t work as far as this Court was concerned.” The court then stated, with regard to the new evidence presented, “I’m not changing my mind on that prior conviction.”

Once again, Baldwin eschews arguing that the court abused its discretion in favor of a claim that his trial counsel rendered ineffective assistance by failing to make an adequate pretrial investigation of all documents pertaining to the prior convictions. But again, even assuming counsel should have gathered the evidence to impeach Baldwin’s 1988 conviction before trial, Baldwin was not prejudiced by this failing because the trial court considered the new evidence on the merits when it was presented and found it wanting. It is not reasonably probable the court would have reached a different conclusion, more favorable to Baldwin, if the evidence had been presented at the time of trial.

### **III. Presentence Conduct Credits Improperly Calculated**

At the time he was sentenced, Baldwin had served 580 days in custody. In addition to credit for this time served, the court awarded 87 days of local conduct credits pursuant to Penal Code section 2933.1. This was error. Local conduct credits are limited to 15 percent of time served under Penal Code section 2933.1 only for defendants convicted of a “violent felony,” as defined by Penal Code section 667.5, subdivision (c). (Pen. Code, § 2933.1; *People v. Thomas* (1999) 21 Cal.4th 1122, 1127.) Burglary is not a violent felony listed in Penal Code section 667.5, subdivision (c). Moreover, Baldwin’s status as a Three Strikes defendant did not render his crime a “violent felony” for purposes of calculating his credits, because the Supreme Court has held Penal Code “sections 2933.1 and 667.5[, subdivision] (c)(7) limit a defendant’s presentence conduct credit to a maximum of 15 percent *only* when the defendant’s current conviction is itself

punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist.” (*People v. Thomas, supra*, 21 Cal.4th at p. 1130, italics added.)

As the Attorney General concedes, Baldwin’s local conduct credits should have been calculated at 50 percent of time served pursuant to Penal Code section 4019. Thus, for 580 days of time served, Baldwin should have received 290 days of conduct credits.

**DISPOSITION**

The clerk of the superior court is ordered to amend the abstract of judgment to reflect 290 days of local conduct credits. In all other respects, the judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.