APPENDIX "A"

ORDER BY THE CALIFORNIA SUPREME COURT DENYING PETITION FOR WRIT OF HABEAS CORPUS, FILED MAY 27, 2020, CASE NO. 259807.

CV-127 (09/09) PLEADING PAGE FOR A SUBSEQUENT DOCUMENT

SUPREME COURT
FILED

MAY 27 2020

Jorge Navarrete Clerk

Deputy

S259807

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re STEPHEN F. SNOW on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 11/21/2019 by R. Cervantes, Deputy Clerk

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

In re STEPHEN SNOW on Habeas Corpus

C090804
Amador County
No. 19HC02066

BY THE COURT:

The court examined the notice of appeal and determined that the order appealed from is nonappealable. Therefore, the appeal filed on September 16, 2019, is dismissed. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7 ["no appeal lies from the denial of a petition for writ of habeas corpus"].)

HULL, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: In re STEPHEN SNOW on Habeas Corpus
C090804
Amador County Super. Ct. No. 19HC02066

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

✓ Stephen Snow
CDC #: K20414 DOB: 08/03/1952
Mule Creek State Prison
P.O. Box 409099
Ione, CA 95640

Central California Appellate Program
2150 River Plaza Drive, Suite 300
Sacramento, CA 95833

✓ Amador Superior Court
500 Argonaut Lane
Jackson, CA 95642

Lastly, requests for habeas corpus relief must be timely filed. *In re Robbins* (1988) 18 Cal.4th 770. Unjustified delay in presenting a petition for writ of habeas corpus bars consideration of the merits of the petition. *In re Clark* (1993) 5 Cal.4th 750.

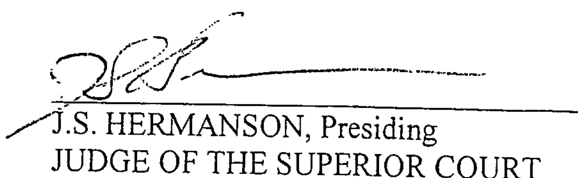
As to the first ground for relief (related to the Board of Parole Hearing psychologist's access to and review of records), the petition is DENIED WITH PREJUDICE on two bases. Petitioner fails to satisfy the initial burden of pleading adequate grounds for relief. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing. *People v. Karis* (1988) 46 Cal.3d 612, 656. If no prima facie case for relief is stated, the court may summarily deny the petition. *Id.* Further, the petition is denied on the basis of delay. Petitioner alleges he knew the legal basis for the claim on July 31, 2017. This habeas petition was filed April 3, 2019, approximately 20 months later.

As to the second ground for relief (as to parole consideration under Proposition 57), the petition is DENIED WITHOUT PREJUDICE on three bases. Petitioner fails to satisfy the initial burden of pleading adequate grounds for relief. *People v. Karis* (1988) 46 Cal.3d 612, 656. Further, the petition is denied on the basis of delay. *In re Robbins, supra,* at p. 780. Relief at the third level was denied March 29, 2018 and this habeas petition was filed April 3, 2019, one year later. Lastly, CDCR has adopted new regulations implementing Proposition 57. See *In re Edwards* (2018) 26 Cal.App.5th 1181. Petitioner must exhaust administrative remedies under the new regulations prior to seeking writ relief in the court. Unless the Petitioner establishes the administrative remedies have been exhausted or it would be futile to exhaust the remedies provided, the petition is not proper. *In re Muszalski* (1975) 52 Cal.App.3d 500.

As to the third ground for relief (as to the June 15, 2018 Rules Violation Report or "RVR"), the petition is DENIED WITH PREJUDICE. The court applies the "some evidence" standard to review disciplinary hearing officers' decisions. *See In re Powell* (1988) 45 Cal.3d 894, 904. Under this standard, the hearing officer's decision will be upheld so long as there is "some basis in fact" for the decision. *Powell, supra,* at p. 904. The hearing officer's findings and disciplinary actions are supported by some evidence in the record.

IT IS SO ORDERED.

DATED: 5-27-19



J.S. HERMANSON, Presiding
JUDGE OF THE SUPERIOR COURT

AMADOR COUNTY SUPERIOR COURT
500 ARGONAUT LANE
JACKSON, CA 95642
(209) 257-2603

FOR COURT USE ONLY

FILED
AMADOR SUPERIOR COURT
AUG - 2 2019
Clerk of the Superior Court
By: [signature]

IN RE: STEPHEN F. SNOW,

PETITIONER,

ON HABEAS CORPUS.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

CASE NUMBER: 19 HC 2066

The Court has read and considered the habeas corpus petition of petitioner STEPHEN F. SNOW filed April 3, 2019. Due to the breadth of relief sought, the court on its own motion extended the time to respond to the petition. (Cal. Rules of Court, Rule 4.550, et seq.). Petitioner sets forth three separate grounds for relief, and also submits a supplemental petition styled as an application for an emergency temporary restraining order, filed July 5, 2019. As to the July 5, 2019 filed application for emergency temporary restraining order, the application is denied without prejudice due to failure to show serious, irreparable harm.

A petition for writ a habeas corpus is the proper method for a prisoner, lawfully in custody, to seek to vindicate rights to which the prisoner is entitled while in confinement. *In re Jordan* (1972) 7 Cal.3d 930, 932; *In re Alacala* (1990) 222 Cal.App.3d 345, 352 fn. 4. A prisoner has constitutional rights related to the conditions of confinement or the lawful execution of his sentence. *Wolff v. McDonnell* (1974) 418 U.S. 539.

To satisfy the initial burden of pleading adequate grounds for relief, the petition should state fully and with particularity the facts on which relief is sought, as well as include copies of reasonably available documentary evidence supporting the claim. *People v. Karis* (1988) 46 Cal.3d 612, 656; *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464. Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing. *People v. Karis*, supra. If no prima facie case for relief is stated, the court may summarily deny the petition. *Id.* at 475.

NOTICE: Any party desiring a rehearing must file a petition within 15 days after the date of this opinion [Rule]

Any party desiring a review by the Supreme Court must file a petition between 30 and 40 days after the date of this opinion [Rule 28b].

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN FRANCES SNOW, Defendant and Appellant.	B105615 (Super. Ct. No. GA022891)

COURT OF APPEAL - SECOND DIST.
FILED
JUN 15 1998
JOSEPH A. LANE Clerk
Deputy Clerk

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APPEAL from a judgment of the Superior Court of Los Angeles County. Victor Person, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** NEF

Date:	AUGUST 9, 1996			
HONORABLE:	VICTOR PERSON	JUDGE	C. PEARCE	Deputy Clerk
	F. JORDAN	Deputy Sheriff	J. SOTO	Reporter

GA022891-03 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA — Counsel for People: L. TRAPP (X)

VS — DEPUTY DISTRICT ATTY: D. VAUGHN (X)

03 SNOW, STEPHEN (X) — Counsel for Defendant: T. BENNETT ICDA. (X)

459 01CT

NATURE OF PROCEEDINGS MOT FOR NEW TRIAL/ P&S REM 2-23-96

Defense Motion for New Trial on Priors is called for hearing. The following witnesses are sworn and testify at defense request: David Jones, Stephen Snow and David Vaughn. The motion is argued and denied by the Court.

Defense Motion to Strike Alleged Judicial Confession, Motion to Strike Priors, Motion to Find Priors Invalid and Motion for New Trial are all heard, argued and denied.

Sentence is imposed as follows:

Probation is denied and the defendant is to be imprisoned in State Prison for the term prescribed by law of 25 years to life pursuant to Penal Code Sections 667(b)-(i) and 1170.12(a)-(d).

Defendant given total custody credits of 847 days in custody, 565 days actual custody and 282 days good time work time.

Defendant is further ordered to pay a $1,000.00 restitution fine to the State Victim Restitution Fund.

The defendant is advised of his Appeal and Parole rights.

The defendant is to be held with no bail and transported forthwith.

REM

NEF

MINUTES ENTERED
8-9-96

76M 413L C-120 9/92

MINUTE ORDER

Stephen Frances Snow, defendant and appellant, appeals from the judgment entered following his conviction, by jury trial, for second degree burglary with prior conviction findings (Pen. Code, §§ 459, 667, subds. (b)-(i)). Sentenced to a state prison term of 25 years-to-life, he contends the trial court erred by: refusing to give an alibi instruction; refusing to instruct on trespass as a lesser related offense; instructing on consciousness of guilt; giving an improper definition of reasonable doubt; admitting evidence of his drug use.

We will affirm the judgment.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On January 27, 1995, real estate agent James Hobson showed a client a building located at 4327 Temple City Boulevard in Temple City. Hobson did not notice any damage to the building at that time. Brent Enright was the exclusive listing agent for this building, which was owned by Bill Sabin. Enright noticed substantial damage to the building on January 30, 1995.

Nicholas Tomchuk owned a building next door to the Sabin building. On January 29, at about 5:30 p.m., Tomchuk and his wife, Lisa Kim, were driving to their building when they saw a man carrying a television set. Tomchuk tried to speak to the man, who kept on walking and did not respond. Tomchuk and Kim then noticed a blue truck parked in the loading dock area of the Sabin building. When Tomchuk pulled up next to the truck, Kim heard a banging noise going on inside the Sabin building. "It was like . . . [a] metal wall was being hit with heavy instruments." Tomchuk went to call 911. When he returned, Tomchuk blocked the driveway with his own vehicle until the police arrived.

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Los Angeles County Deputy Sheriff James Kaylor responded to the call of a possible burglary at the Sabin building. After speaking with Kim, he directed other officers to watch all the exits. Kaylor saw the blue truck parked in the loading dock area. Kaylor heard a loud crashing noise coming from inside the Sabin building. "It sounded like something falling, like somebody dropping something." A few moments later, Kaylor heard someone yelling from the front of the building. Kim had spotted several people, including Snow, walking away from the Sabin building and she had yelled at them. When Kaylor rounded the corner of the building, he saw Kim gesturing and yelling, "They're coming out the door." Kaylor ran up and saw Snow and two other people walking away from the door to the Sabin building. Snow was carrying a green and white athletic bag which had the handles of a bolt cutter sticking out the top. Snow and the two other people were taken into custody. The two others, Susan Duran and David Jones, ultimately pled guilty to burglary charges.

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Inside Snow's green and white bag were the bolt cutters and a pair of vice grips. Inside the building, near the open north door, police found piles of wiring and electrical components on the floor, conduit[1] pulled out of the ceiling and the wall, conduit lying on the floor, gutted electrical boxes and two more tool bags (one burgundy and one blue). The front office door of the Sabin building (the door between the warehouse and the lobby) appeared to have been kicked in. The blue truck had been parked near a door which was ajar and just inside that door were piles of wiring components. Kaylor was able to start the blue truck without any trouble. At his booking, Snow said he had been removing conduit and wiring from the ceiling of the Sabin building when he fell off a ladder and injured his leg.

In a subsequent police statement, Snow said Jones had driven into an alley where several businesses were located. Jones, Snow and Duran went into one of the buildings.

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1 "Conduit" is metal tubing through which wiring is run.

Snow saw scrap wiring stacked up inside and outside the building. He and Jones had brought along their own tools "for the purposes of stripping wire, tubing or any type of scrap metal that they [could] find." Snow said he removed some copper tubing from the ceiling, rolled it up and put it by the door to take on their way out. They had been inside the building for about 20 minutes when Snow spotted a police officer. They panicked and ran outside.

Brian Taylor, an electrical contractor who regularly worked on the Sabin building, testified the electrical system had been working when he was in the building on January 5. But when he returned on January 30, he found wiring had been pulled from the conduits, some metal conduits had been pulled off the wall, several transformers were missing, miscellaneous parts of wiring panels were missing, and the building itself had suffered damage. At least 2,000 feet of wiring had been removed from the building. The wiring, which was made of copper and aluminum, had recycling value. Three transformers, the brass connectors of fire hoses, and the interior parts of electrical subpanels were missing. He estimated the total damage to be $58,000. The damage could have been done in 48 hours. Taylor, working by himself, could have removed just the wiring in six to eight hours.

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Tools found in the burgundy and blue bags could have been used to remove the wiring from the building. A piece of fire hose with brass fittings found in the burgundy bag was identical to a piece missing from the Sabin building. The particular type of vice grip found in Snow's green and white bag is typically used to extract conduit. Other tools recovered from the bag, such as channel locks, snippers, bolt cutters, crescent wrenches and a utility knife, could have been used to extract the wiring.

2. *Defense evidence.*

Snow, who was representing himself, testified that on January 27, 1995, he spent the day panhandling at an exit off Highway 10. In the evening, he went to Caesar's Motel to spend the night. The next day, Snow again panhandled at the freeway exit from noon

until 8 p.m., and again spent the night at the motel. On January 29, he awoke at noon and went back to the freeway exit for several hours before he was chased away. He returned to the motel and around 3 p.m. he left to go looking for aluminum cans to cash in so he could purchase beer for the Super Bowl telecast. However, Jones's truck wouldn't start. After getting a jump-start from Tony, a friend of Snow's, Jones, Duran and Snow went to Pep Boys to buy transmission fluid and then searched several dumpsters for aluminum cans. Jones's truck stalled as it was going down an alley, so they pushed it next to a building which had its doors open. Snow heard noise coming from inside the building, so they went inside to ask for help in getting the truck started.

Inside the darkened building, Snow fell over some material lying on the floor and then hit his head on something hanging from the ceiling. Upset about this, Snow "ripped it off the wall and . . . threw it down on the ground." He heard someone running across the roof and decided to check it out. He found a ladder and put it against a wall, but while climbing up he fell and injured his leg. Snow (and his two friends) then left the building, walked to a gas station and called Tony "to come and give me a jump to take me to the hospital." As they were walking back to the Sabin building, Lisa Kim was standing there. She yelled at them and they were soon surrounded by police.

Snow denied he had been carrying a green and white bag, or any other bag, and he denied having gone into the building to steal anything. He denied saying he was going to sue Mr. Sabin for the injury he had sustained inside the building, and he denied saying he fell off the ladder while taking conduit out of the ceiling. He admitted having used heroin, cocaine and alcohol between January 27 and January 29, and that he had used a mixture of heroin and cocaine, a "speedball," sometime within the 24 hours before his arrest. He conceded an affidavit he had prepared for Barbara Flores's signature contained information that was not within her personal knowledge.

Daniel ("Tony") Laboda testified Snow usually lived in a tent by Highway 10, and that in January 1995, Snow earned money by standing at the freeway offramp begging

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and by collecting aluminum cans. Laboda's mother-in-law, Barbara Flores, was letting Snow stay in her motel room at this time. On January 29, at about 4 p.m., Snow asked Laboda to help jump-start a truck. But even after Laboda gave it a jump, the truck still didn't run. Laboda watched Snow and his friends push the truck out of the parking lot. At 5:30 p.m., after getting a phone call from Snow, Laboda left the motel to go pick him up. When Laboda spotted Snow on Temple City Boulevard, he tried to stop but a police officer waved him on.

Barbara Flores testified she was living at Caesar's Motel in January 1995 with Snow and several members of her family. Snow would usually come home between 8 and 10 p.m. He had been in the motel room all night on both January 27 and January 28. On January 29, he left the motel at about 4 p.m. Between 4:30 and 5 p.m., Flores got a phone call from Snow and she handed the phone to Laboda. After talking to Snow, Laboda left. On cross-examination, Flores acknowledged her testimony was partially based on a three-page document Snow had given her which helped her recall what had happened that day. The document, which had been signed by Flores at Snow's request, contained some information that was not within her personal knowledge, such as Snow's whereabouts after he left the motel room.

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Dorsey Wire testified he owned a business located at 4335 Temple City Boulevard which had been burglarized on January 29, 1995. The burglar had entered through a side door, pried open an inner office door, taken a television set and walked out the front door. At 3 p.m. that day, Wire had seen a truck parked near his business. When Wire returned later that evening, he noticed the same truck in the area.

3. *Rebuttal.*

Snow told a probation officer he made $3,400 a month working as a salvager, had fallen off a ladder and broken his leg while burglarizing the Sabin building, and that he was planning to sue the owner of the Sabin building for his injury.

DISCUSSION

1. *Alibi instruction properly refused.*

Snow contends the trial court's refusal to give an alibi instruction constituted reversible error. He argues the instruction was warranted because, while Brian Taylor testified the damage to the Sabin building could have occurred over a 48-hour period, defense evidence showed Snow had not been present at the Sabin building on either January 27 or January 28. This claim is meritless.

The information charged Snow with burglarizing the Sabin building on January 29, not on January 27 or January 28. "[T]he conduct described and proscribed by section 459 is a single act: entry." (*People* v. *Washington* (1996) 50 Cal.App.4th 568, 577.) Therefore, evidence Snow was not present at the Sabin building on either January 27 or January 28 did not prove he was "not present at the time and place of the commission of the alleged crime for which he is here on trial." (CALJIC No. 4.50 [alibi instruction].)

Testimony from Daniel Laboda and Barbara Flores might have convinced the jury Snow had not been at the Sabin building on January 27 or 28, and theoretically this could have bolstered his testimony he had entered the building on January 29 for entirely innocent purposes. But Snow was not precluded from arguing the testimony of Flores and Laboda had exculpatory implications. As the trial court correctly told Snow: "You can raise a reasonable doubt by arguing that the damage that was done, according to the People's own witness, could not have happened in the short time that you were not seen by these other witnesses [i.e., Laboda and Flores], and [the jurors] can draw an inference that it happened over the course of the two days where you were seen on large parts of the day by other people. You can argue that, because that is in evidence. [¶] I'm saying, I don't think at this point that it warrants an alibi instruction."

The requested alibi instruction was unsupported by the evidence and inconsistent with Snow's own testimony. Accordingly, the trial court properly refused to give it.

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2. *Trespass instruction properly refused.*

Snow contends the trial court erred by failing to instruct on trespass as a lesser related offense. This claim is meritless.

Snow asserts he "requested the court to read an instruction defining trespassing as [a] lesser related offense of burglary." Not true. Snow asked for "a lesser-included offense of attempted burglary and trespassing." After the prosecutor argued trespass was not a lesser included offense of burglary, the trial court denied this portion of Snow's request. The trial court does not have a sua sponte duty to instruct on lesser-related offenses (*People* v. *Carrera* (1989) 49 Cal.3d 291, 310), and a failure to request a particular instruction where there is no sua sponte duty to instruct waives any claim on appeal (*People* v. *Dennis* (1998) 17 Cal.4th 468, 538.)

In any event, the jury could only have acquitted Snow of burglary by inexplicably rejecting the People's case. (See *People* v. *Geiger* (1984) 35 Cal.3d 510, 530 ["[T]he first prerequisite to receiving instructions on lesser related offenses must be the existence of some basis, other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged."].) Immediately prior to Snow's arrest, a witness heard the sound of metal pounding on metal coming from the Sabin building. Snow soon exited the Sabin building carrying tools capable of removing wiring and other electrical components of the building. Electrical wiring and components were piled close to the truck Snow had arrived in. Snow was overheard saying he had been extracting conduit from the building's ceiling when he fell off a ladder and injured his leg. He told a police interviewer he and Jones had gone into the Sabin building with tools for the specific purpose of taking salvageable metals. He admitted to the interviewer he had cut copper tubing from the ceiling and that he intended to take this tubing when he left. Snow later told a probation officer he had injured himself while burglarizing the Sabin building. Snow's explanation of his presence in the Sabin building -- that Jones's truck wouldn't start -- was not credible. An officer had been able to start

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the truck without any trouble. Other than an unexplainable rejection of the evidence, there was no way the jury could have found Snow went into the building for an innocent purpose.

3. *CALJIC 2.04 properly given.*

Snow contends the trial court erred by instructing the jury, pursuant to CALJIC No. 2.04, it could consider evidence he had fabricated evidence or persuaded a witness to testify falsely as a circumstance tending to show consciousness of guilt. This claim is meritless.

Pursuant to CALJIC No. 2.04, the trial court instructed the jury: "If you find that the defendant did persuade a witness to testify falsely or did fabricate evidence to be produced at the trial, such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination." Snow argues there was no evidence supporting this instruction. We disagree.

The prosecutor argued there had been evidence indicating Snow had tried to persuade witnesses to testify falsely: "The reason for this instruction would be that there has been evidence in this case that Barbara Flores testified that the defendant was with her until 4:00. There is evidence that her memory of that is refreshed by the three-page document that the defendant gave her, the affidavit. [¶] In addition, there has been evidence that Daniel Laboda testified that he was with the defendant until 4:00. Then the defendant's own witness, . . . Dorsey Wire, came and testified that he certainly saw the truck at the place of the burglary at 3:00. Therefore, there is enough there to support an inference that Mr. Snow has attempted to persuade witnesses to testify falsely in this case."

Dorsey Wire testified he had seen a truck parked near the Sabin building at 3 p.m., and that he had seen a truck parked in the same area later that evening. While he was on the witness stand, Wire looked at some photographs of vehicles, and his testimony

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apparently gave rise to conflicting implications as to whether or not the truck he had seen in the evening was the same truck he had seen in the afternoon. The trial court determined it would give CALJIC No. 2.04: "Mr. Wire testified in addition -- I agree with you, he did pick out a photo that you showed to him that showed a red truck with a dark colored driver's side door, looking at the photo from this vantage point. However, he pointed to the position that, it appears all the evidence has suggested, that the blue truck was parked in during the relevant period. [¶] So there is an issue for the trier of fact to determine whether or not Mr. Wire saw a red truck or blue truck; nevertheless, he testified that he did see a truck at 3:00 in the position that the blue truck was observed by a number of witnesses. [¶] So your objection is noted, it is overruled. The court will give Instruction 2.04."

Snow does not challenge the trial court's conclusion there was evidence from which the jury could have found Wire had seen Jones's truck as early as 3 p.m. Thus, the instruction was properly given.

4. *Evidence of drug use properly admitted.*

Snow contends he was denied a fair trial by the admission of evidence concerning his use of drugs. He argues this evidence had no tendency to prove or disprove any material fact. The claim is meritless.

On cross-examination, the prosecutor asked Snow if he had omitted, from the recitation of his activities between January 27 and January 29, the fact he had used cocaine, heroin and alcohol. Snow objected and his objection was overruled. Snow admitted he had used those substances during the 72-hour period, and admitted he had used a "Speedball," a combination of heroin and cocaine, within one day of his arrest. After this testimony, Snow renewed his objection to this evidence. The trial court explained the evidence was relevant with respect to Snow's ability to recollect and perceive events that had allegedly taken place. "First of all, Mr. Snow, the fact of the matter is, you opened up the area of what you did on days two days previous for the

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purpose you expressed, to let the jury . . . draw an inference as to whether or not you were involved in what you argued at side bar was a burglary that must have taken a significant period of time to accomplish. [¶] The inference being that, if you were with Ms. Flores and doing [other] things not related to that burglary, that you then would not have been in a position to be responsible for [the burglary]. [¶] With respect to your ability to [be] able to recollect, perceive, so forth things that took place on those days, if you had taken narcotics, medication, alcohol, or any of -- things of that nature, the jury is entitled to know that as to whether or not you have the ability to recall, perceive, recollect . . . those things that you testified to on those days."

A witness's drug use or intoxication is a proper basis for impeachment because it bears upon the capacity to perceive accurately and to recollect what has been perceived. (*People* v. *Melton* (1988) 44 Cal.3d 713, 737.) Snow testified in detail about his activities between January 27 and January 29. Thus, it was appropriate for the prosecutor to ask about Snow's drug use during that time because it had a direct bearing on his ability to accurately perceive and recall those events. Certainly, Snow's use of heroin and cocaine within a day of his arrest on, January 29, was directly relevant to his credibility and could have cast doubt on his specific recollections concerning his actions on the day of the offense.

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5. *Reasonable doubt instruction.*

Snow contends the trial court erred by instructing the jury on reasonable doubt with CALJIC No. 2.90 (1994 rev.). This claim is meritless. CALJIC No. 2.90 (1994 rev.) omits the phrases "and depending on moral evidence" and "to a moral certainty" found in the previous version of CALJIC No. 2.90. The instruction correctly stated the law and the trial court did not err by giving it. (*People* v. *Freeman* (1994) 8 Cal.4th 450, 501-505.)

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