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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.

D'ANGELO JEROME,

Defendant and Appellant.

A130013

(Contra Costa County
Super. Ct. No. 05070412)

Defendant D'Angelo Jerome was convicted by a jury of grand theft from the person of another, and sentenced to the upper term of three years in prison. (Pen. Code, § 487, subd. (c).) At the time of sentencing, his custody credits exceeded the imposed sentence and he was set free. Because he was incarcerated during a prior appeal, he was released without parole and his credits also covered all fines and fees other than \$2,629.95 of victim restitution. He argues the judgment must be reversed because the court erroneously admitted evidence of his commission of a prior robbery. We conclude the trial court did not abuse its discretion when it admitted the prior acts evidence and affirm the judgment.

I. BACKGROUND

A. Results of the First and Second Trials

Jerome was previously convicted by a jury of kidnapping to commit robbery (Pen. Code, § 209, subd. (b)) and second degree robbery (Pen. Code, § 211), and was sentenced to life with the possibility of parole. We reversed that judgment because defense counsel's voir dire of prospective jurors was improperly restricted. Upon retrial, the jury

acquitted Jerome of kidnapping to commit robbery and the lesser included offenses of kidnapping and false imprisonment. The jury also acquitted him of second degree robbery, but convicted him of the lesser included offense of grand theft.

B. Prosecution Case

(1) The Charged Crimes — 2006 Incident

When the Sony PlayStation3 (PS3) video game console was released on November 17, 2006, people were camping out at stores to buy it. Jeremy Diaz paid a person in line at the Target store in Pleasant Hill \$1,800 for a place in the queue, and that morning bought a PS3 for \$599, plus three games and an extra controller, intending to resell them for a profit. He advertised them for sale on Craigslist for \$4,100.

A man responded to the ad that day and arranged a meeting with Diaz at a Guitar Center store. Diaz drove there with his friend Daniel Santos. Jerome pulled up in a Saturn and backed into a parking space in front of the store. Inside Guitar Center, Diaz met Jerome with the PS3 and Jerome said he had the cash to buy it in his car. Diaz started to worry when he saw that the Saturn had no license plates.

Diaz testified that he got part way into the Saturn's front passenger seat with the door open, and his right foot and his right hand holding the PS3 in a bag were outside of the car. Jerome got into the driver's seat and answered a call on his cell phone. In what Diaz called "all one slick move," Jerome hung up the phone, pressed a gun to Diaz's side, grabbed the bag with the PS3 in it, and put it behind his seat. Diaz said, "give me that back," and Jerome replied, "be quiet or I'll pop you." Diaz said, "let me out," but Jerome told him to close the door, and drove out of the Guitar Center parking lot. Jerome drove quickly, for 20 seconds to a minute, to a nearby restaurant parking lot. He told Diaz to "get the fuck out of the car" and not say anything stupid. Diaz got out and Jerome drove away with the PS3.

Santos testified that he saw Diaz leave Guitar Center with the bag and get into the Saturn, but did not see what transpired there. He was sitting in Diaz's car adjusting the radio, and when he looked up the Saturn was gone. He drove to look for Diaz, and found him without his bag less than a minute later.

Diaz called 911 to report the incident and gave a statement to Concord Police Officer Michael Jaime at Guitar Center. In a photo lineup, Diaz identified Jerome as the robber.

On December 1, 2006, Concord Police Corporal Darryl Holcombe spotted a Saturn that matched the description of the vehicle involved in the robbery. The car was being driven by Jerome's brother, Mark Frisse. The police detained Frisse, and found documents connected with Jerome in the car.

Later that day, Detective Carl Cruz set up a perimeter of officers around a residence in Concord where they believed Jerome was living. When Cruz knocked on the front door, an officer radioed that Jerome was running out of the back of the house. Jerome was taken into custody on the other side of the backyard fence.

Jerome was unarmed when he was arrested. No PS3 or gun was found in the Saturn or at Jerome's residence. When Cruz falsely told Jerome that the police had a videotape of his encounter with Diaz, Jerome said that the tape would show Diaz leaving the Saturn holding the bag with the PS3.

(2) The 1996 Incident

On September 10, 1996, Police Officer William Jeha questioned Jerome about his involvement in a robbery at Walnut Creek Civic Park. Jeha testified that, during the interview, Jerome pulled out a bag of marijuana and said, "This is what it's all about." Jerome told the officer that he and two others drove to the park and he told the driver to stop beside two males. One of them, Joshua Turner, approached the car and asked if they wanted to buy marijuana. Jerome asked to see the marijuana, and Turner got into the car and showed him a bag of it. Jerome grabbed the bag and told Turner to get out of the car. Turner refused and fought with Jerome. The car left the scene, and when it stopped Jerome told Turner, "Get the fuck out of the car." Turner got out of the car and left the marijuana.

On cross-examination Jeha testified that Jerome told him Turner got into the car voluntarily. Jerome did not say that the car was being driven out of the park when he fought with Turner. Rather, Jerome said the car was driven in a "circular manner," which

could have meant going in circles in the parking lot where he met Turner if the lot was empty. Jerome was not charged in connection with the incident.

B. Defense Case

(1) The Charged Crimes

Jerome admitted meeting Diaz at Guitar Center and trying to buy his PS3, but denied that he kidnapped or robbed him. Jerome said that he offered to pay \$1,000 or \$1,500 in cash, plus marijuana he had in the Saturn that was worth almost \$1,500, but Diaz wanted more for the PS3. Jerome drove slowly away from Guitar Center when he was showing Diaz the marijuana in the car. Diaz asked Jerome if he had methamphetamine, and Jerome said he did not. Jerome stopped the car in the Guitar Center parking lot and let Diaz out when it was clear they had no deal. He then drove the car to an auto repair shop.

Jerome's account was supported by testimony from his brother, Mark Frisse, and Frisse's friend, Eddie Evans. Frisse wanted to buy a PS3 and sent Jerome to negotiate the purchase with Diaz. Frisse called Diaz from a restaurant where he, Evans, and Jerome were having lunch to arrange the meeting. Jerome left in Frisse's Saturn, and Frisse and Evans met up with him less than an hour later at an auto repair shop. Jerome did not have a Target shopping bag, PS3, or a gun.

Evans testified that he drove Frisse and Jerome from the auto repair shop to their mother's house, where they continued looking online for a PS3. They gave up the online search because of the outrageous prices, and Frisse never got a PS3. Evans said that Diaz continued to advertise his PS3 for sale on Craigslist for weeks after the alleged robbery.

Jerome testified that he was not trying to evade the police when he was arrested. He was in the backyard smoking a cigarette when Officer Cruz knocked on the door. When he saw a "pack of officers" at the house, he went through an opening in the back fence to walk to a squad car.

(2) 1996 Incident

Jerome testified that Jeha's testimony about his 1996 interview "was pretty much accurate," but that he did not tell Jeha that he had grabbed marijuana from Turner.

Turner handed the marijuana to Tim, another passenger in the car, who gave it to Jerome. When the driver gave Turner less than he was asking for the marijuana, Turner fought with Jerome to get the marijuana back. While they fought the driver was doing “donuts,” driving in circles with the door open, and Tim threw Turner out of the car. The car never drove away from the scene.

Jerome testified that he and his friends were “look[ing] for chicks” when they met Turner. Turner was with a female, and Jerome did not tell Jeha that the car drove up to two males.

II. DISCUSSION

A. Issue Presented

Jerome argues that the court should have excluded evidence of the 1996 incident under Evidence Code sections 1101 or 352.¹ Character evidence is generally inadmissible to prove conduct on a specific occasion (§ 1101, subd. (a)), but criminal conduct is admissible “when relevant to prove some fact (such as . . . intent [or] plan . . .) other than [a] disposition to commit [the] act” at issue (§ 1101, subd. (b)). Under section 352, evidence may be excluded if its probative value is substantially outweighed by its potential to cause undue prejudice or consume undue time. Rulings under these statutes are reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371 (*Kipp*); *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) “A court abuses its discretion when its ruling ‘falls outside the bounds of reason.’ ” (*Kipp, supra*, 18 Cal.4th at p. 371; see also *People v. Jennings, supra*, 81 Cal.App.4th at p. 1314 [§ 352 rulings are reversible only if “palpably arbitrary, capricious and patently absurd”].)

B. Record

In our prior opinion we observed: “If the People again intend to introduce in their case-in-chief only evidence of defendant’s statement to the police concerning the 1996 incident [without also introducing the victim’s description of the incident], the trial court

¹ Further statutory references are to the Evidence Code.

may wish to reconsider the admissibility of that evidence pursuant to . . . section 1101, subdivision (b).”

In a brief prepared for the retrial, the prosecution argued for admission of evidence of the 1996 incident. The brief states that when Jerome was interviewed about the 1996 incident, he said he “grabbed the weed out of the victim’s hand. They struggled over the weed while the vehicle drove away from the scene, and away from the person the victim was with. [Jerome] took the marijuana from the victim and told him to ‘get the fuck out of the car.’ After he ordered the victim out of the car, the victim jumped out of the vehicle.”

This description of Jerome’s statement at the time of the 1996 incident was consistent with our discussion of the facts in our prior opinion concerning possible asportation. We wrote: “[Jerome] grabbed the bag out of the victim’s hands and told him to get out of the car. The victim began to fight with [Jerome]. The driver started the car and began to drive away from the scene during the struggle. As the car was moving, [Jerome] continued to struggle with the victim and again told the victim to get out of the car. The victim opened the car door and jumped out.”

Jerome moved in limine to exclude evidence of the 1996 incident. The motion’s account of his statement to Jeha was also generally consistent with the prosecution’s brief and our previous opinion, but did not mention that the car was being driven away from the scene when he and Turner struggled.

The prosecution’s trial brief stated that, at the first trial, Jerome “admitted making the aforementioned statements to the Walnut Creek police officer, including the struggle for the marijuana and driving away from the scene with the victim in the car.” However, additional facts elicited from Jerome’s testimony were in our prior opinion that states during the struggle over the marijuana, “the driver of the car was spinning around in the parking lot in order to eject the victim from the car. The car door was wide open at that point.”

In arguing the 1996 incident was admissible to prove Jerome’s intent, identity, or common plan or scheme, the prosecution identified the following similarities between it

and the charged offenses: “In both incidents [Jerome] knew neither the victim, nor the victim’s friend who was standing nearby. In both incidents the victim entered the vehicle. In both incidents [Jerome] robbed the victim[s] while they were inside his vehicle. In both incidents the victim was accompanied by a friend or friends who could have aided the victim during the robbery. In both incidents the victim was driven a short distance during the robbery, away from his friend[], increasing [Jerome’s] chances of a successful robbery. . . . In both incidents, once the vehicle was moved away from the initial scene, [Jerome] ordered the victim using identical language, ‘Get the fuck out of the vehicle.’ In both incidents the victim jumped out of the vehicle after being demanded to do so by [Jerome].”

The court determined that evidence of the 1996 robbery was admissible to show planning and intent with respect to the charged crimes. The court was aware that we had asked it to reconsider admission of the 1996 incident if “the People’s plan was to use only the defendant’s statements to the officer, which is exactly what the People intend to do. So I have reconsidered the issue, and I find it admissible, as did the original trial court.”

The court explained: “In the first instance . . . the officer will state that [Jerome] admitted he took the victim’s weed, which arguably shows intent. It involves a party trying to sell something to [Jerome], [Jerome] inviting the person to get into the car with [him] to complete the transaction, the car moving away from a friend and the initial starting point and [Jerome] taking the item to be sold. All of that is very similar to the incident here, and here [Jerome] disputes intent. [¶] Situations that are sufficiently similar may be probative of intent as well as common plan. I find that those two issues . . . given the sufficient similarity, are points that the People can argue.”

The court further found under section 352 that the probative value of the evidence was not substantially outweighed by its potential for undue prejudice or consumption of time. The court observed that introduction of the evidence took only one-half hour in the first trial, and that the facts in the 1996 incident were “much less egregious” than the events surrounding the current charges.

The court ruled during trial that, if Jerome testified, he could be impeached with the 1996 incident, as well as a felony conviction in 2000 for receiving stolen property. Jerome admitted the 2000 conviction during his testimony.

At the close of the evidence, the court instructed the jury pursuant to CALCRIM No. 375 that if the 1996 incident was proven by a preponderance of the evidence, the jury could “consider that evidence for the limited purpose of deciding whether or not a defendant acted with the requisite intent to commit the charged crimes as well as the lesser-included crimes and the defendant had a plan to commit the offense alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. Don’t consider this evidence for any other purpose, except for the limited purpose of determining the defendant’s credibility. Don’t conclude from this evidence that the defendant has a bad character or is disposed to commit the crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider, along with all of the other evidence. It’s not sufficient by itself to prove that the defendant is guilty of committing the charged or lesser-included offense. The People must still prove each charge[] beyond a reasonable doubt.”

C. Analysis

“[A] defendant’s uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 (*Ewoldt*)). “To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts.” (*Id.* at p. 403.)

Jerome argues that the only similarities between the 1996 and 2006 incidents, which he identifies as robbing a stranger in car and using the same expletive to order the victim out of the car, were “[t]oo [g]eneric to be [m]eaningful.” However, this argument ignores the kidnappings involved in both incidents, and the similarities between those. In both cases, the robbery occurred in a car that was driven away from someone who might

have aided the victim. Jeha's testimony about the 1996 incident was probative of planning with respect to the 2006 incident because it showed that the incidents both involved similar kidnappings for robbery.

Jerome asserts, citing Jeha's cross-examination at the second trial, that the driver in the 1996 incident merely "drove in circles in a parking lot . . . putting no significant distance between Turner and his friends." However, while Jeha disclosed at the second trial that Jerome described "circular" driving of the car, the court determined the admissibility of the 1996 incident before hearing Jeha's testimony. When the court made its ruling, the record of Jerome's 1996 statement consisted of the facts set forth in our prior opinion, and in the parties' briefing on the admissibility of the statement, which did not mention "circular driving." Our prior opinion and the prosecution's brief indicated that Jerome told Jeha the car was driving away from the scene while he fought with Turner. When we stated in our prior opinion that "the car was spinning around in the parking lot" as Jerome and Turner struggled, we were referring to Jerome's testimony at the first trial, not his 1996 statement as reported by Jeha, which was the evidence at issue before the court here.

Jerome submits that the two incidents could not be found to reflect a common plan "because the 1996 events were obviously not planned at all. It was chance that [Jerome] and his friends encountered Turner; unexpected that Turner approached the car and handed in his product; and unplanned that Turner decided to get in the car. The fight broke out when [Jerome] would not hand the product back on demand. [The driver], not [Jerome] decided to drive around in circles. Each of these actions was spontaneous" However, the trial court was not required to accept as true everything Jerome claimed about the incident, such as Turner voluntarily getting into the car. Nor did Jerome run into Turner entirely by chance. Jerome said he told the driver to stop next to Turner and another stranger, but never explained why. Given the robbery that admittedly ensued, it could reasonably be inferred that Jerome and his friends approached Turner in order to rob, and if necessary, kidnap him. Viewed in the light most favorable to the court's ruling (*People v. Carter* (2005) 36 Cal.4th 1114, 1148 [discussing admission of

uncharged offenses]; *Kipp, supra*, 18 Cal.4th at p. 369), the evidence did not establish that the 1996 incident was entirely unplanned.

“A greater degree of similarity [between the uncharged act and the charged offense] is required in order to prove the existence of a common design or plan” than “is required in order to prove intent.” (*Ewoldt, supra*, 7 Cal.4th at p. 402.) Thus, because the 1996 incident was sufficiently similar to the 2006 incident to reflect a common plan, it was also sufficiently similar to be probative of Jerome’s intent to rob Diaz of the PS3. Jerome argues that intent was not “genuinely at issue” as to the 2006 incident because his intent was clearly innocent or clearly criminal depending on whether the jury believed his testimony or that of Diaz about what transpired. But “[w]hen a defendant pleads not guilty, he or she places all issues in dispute, and thus the perpetrator’s . . . intent [is a] material fact[.]” (*People v. Walker* (2006) 139 Cal.App.4th 782, 796.) And if intent was not truly contested, then it is not reasonably probable that exclusion of the prior incident would have led to a different result. (See *People v. Welch* (1999) 20 Cal.4th 701, 749-750 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 to an alleged error under § 1101]; *People v. Lopez* (2011) 198 Cal.App.4th 698, 716.)

Jerome maintains that the 1996 incident was “[t]oo [r]emote in [t]ime to [p]rove [a]nything.” However, “ [n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.’ ” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1388.) The ten-year-old incident here was less remote than uncharged offenses that have been admitted in other cases. (See, e.g., *id.* at pp. 1388-1389 [assaults committed between eight and 28 years before a murder; citing cases where the uncharged acts were over 15 years old].)

The trial court did not exceed the bounds of reason when it concluded that the 1996 incident was sufficiently probative to be admissible under section 1101. The 1996 incident was less egregious than 2006 incident because it did not involve a weapon, and the jury was instructed that it could be considered only for limited purposes. Thus, there was little potential for undue prejudice from admission of the prior incident, and no abuse

of discretion in failing to exclude it under section 352. (*People v. Foster* (2010) 50 Cal.4th 1301, 1332 [prior crime less inflammatory; limiting instruction given].)

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Jenkins, J.