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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA RHEA BEGLEY, Defendant and Appellant.	A130178 (Sonoma County Super. Ct. No. SCR578339)

Defendant Joshua Rhea Begley entered a guitar shop, stabbed the owner to death, and took some of his property. The jury convicted him of first degree murder, with the special circumstances that the murder was committed in the commission of robbery and burglary (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)), as well as related offenses.[1] The trial court sentenced him to life in prison without possibility of parole. He contends the trial court erred by admitting a prior bad act under Evidence Code section 1101, subdivision (b), and that his trial attorney was ineffective for failing to object to the admission of four other prior bad acts. We reject the first contention and rule the second could not properly be raised by appeal. Accordingly, we affirm.

I. FACTS

Under applicable standards of appellate review, we must view the facts in the light most favorable to the judgment of conviction, and presume in support of the judgment the

[1] Subsequent statutory citations are to the Penal Code unless and until otherwise indicated.

existence of every fact which the jury could reasonably find from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

A. The Facts of the Offense

The victim, Taku Sakashta, made guitars at his shop on Martin Avenue in Rohnert Park. His wife, Kazuko Sakashta, and his friend, Kimihiko Ito, assisted him. The guitar shop had an entrance door and a roll-up door, side-by-side. The entrance door led to a break room with a table and chairs. An interior door, which was always open, led to the woodshop. In a corner of the woodshop was a restroom and a flight of stairs leading to the upstairs office, storage space, and a room used for designing guitars. The roll-up door could only be opened from inside the shop. It was controlled by a chain which could be blocked with an object to keep the door in any up position.

Taku Sakashta kept his wallet, checkbook, cell phone, and keys in a dark brown fanny pack hung over a blue chair by the restroom.

On February 11, 2010, Taku Sakashta started his work day at the guitar shop at approximately 9:00 or 9:30 a.m.[2] Kazuko Sakashta arrived at the shop about 3:00 p.m. Kimihiko Ito, who had worked all day, left a little after 6:00 p.m. after Taku Sakashta paid him, taking his checkbook from his fanny pack. Kazuko Sakashta left the shop after 7:00 p.m., and expected Taku Sakashta to be home by 10:00 p.m.

At approximately 8:00 p.m., Taku Sakashta received a call on Skype from a friend in Tokyo, Nobuyuki Hayashi. They spoke for about a half-hour. Just before 8:30 p.m., Taku Sakashta said, "Mr. Hayashi, wait a minute." There were several seconds of silence, then Mr. Hayashi heard someone moving around. Mr. Hayashi said he would call back later. Taku Sakashta did not respond. Mr. Hayashi then heard Taku Sakashta loudly say, "Ah" in a voice that sounded strained and forced. The call was disconnected. Mr. Hayashi called back, but could not get through. He never spoke to Taku Sakashta again.

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[2] Subsequent dates are in 2010 unless otherwise indicated.

When Taku Sakashta did not come home by 11:30 p.m., Kazuko Sakashta went to the guitar shop to look for him. The front door was locked, which could only have been done from the outside with a key. The lights were on in the break room. The door from the break room to the shop was closed and locked, which it never was before. There was blood on the floor and the fanny pack was missing. Kazuko Sakashta looked for her husband at hospitals, and when she could not find him she called the police and reported him missing.

In the early morning of February 12, officers went to the guitar shop. Taku Sakashta's car was parked in the lot. Inside the shop the officers found a blood smear, about 12 feet long and 13 inches to 2 feet wide, that ended near the roll-up door, consistent with a body being dragged. Boot prints formed in the blood and sawdust on the woodshop floor. There was no one in the guitar shop. The roll-up door was closed and secured from the inside with the link chain.

The officers found blood drops outside the roll-up door which led in the direction of Taku Sakashta's car, where the officers found two pools of blood by the passenger door. They found Taku Sakashta's body between a shipping container and a bush. He was lying on his right side with his hands behind his back and his shirts pulled down over his head to cover his hands. His pants and underwear were pulled down almost to his knees. His upper body was covered by a green jacket. In the right pocket was a bloody black and silver folded pocket knife. In the left pocket was a black and yellow CLC right-handed work glove.

The autopsy showed Taku Sakashta died of multiple stab wounds to the neck and chest, including three deep stab wounds to the chest—one of which penetrated the heart—and a stab wound to the neck that severed the artery that supplied blood to the brain. The deepest stab wounds showed the knife used had a ring through the blade and a pattern that was consistent with the bloody knife found in the jacket.

Taku Sakashta's wallet, fanny pack, keys, check book, and cell phone were never recovered.

B. The Four Unobjected-to Prior Bad Acts

We now discuss the four unobjected-to prior bad acts because they occurred just before and just after the murder of Taku Sakashta, and led to defendant's arrest and essentially create a timeline.

We note at the outset that a surveillance camera showed a dark green Jeep Cherokee SUV with a distinctive rocker panel turning into the driveway of the guitar shop's building at 7:57 p.m. on February 11. The Jeep Cherokee drove out of the driveway at 8:28 p.m. This supports the conclusion the killer drove a dark green Jeep Cherokee.

The Nicole S. incident. On February 8—three days before the murder—Nicole S. called 911 to report that a man driving a Jeep Cherokee followed her home from work a little after midnight. The man parked his Jeep, followed her to her apartment, and tried to open the door. He then looked into her bedroom window, got back into the Jeep, and drove off. She identified the man as defendant.

About 1:00 a.m., Officers Savas and Fernandez stopped defendant's Jeep Cherokee. Defendant had a knife in his back pocket. The knife was of an unusual, if not unique, design, featuring a cutout to open the blade and a small ring on the blade. It was "very similar" to the knife that was found in the jacket covering Taku Sakashta's body.

The officers released defendant after 10 or 15 minutes. A green Jeep followed Nicole S. to work the next day, but turned away when she called 911 on her cell phone.

The Petaluma Towing incident. On February 10, at approximately 7:50 a.m., defendant went to the office of Petaluma Towing to claim a 1993 green Jeep Cherokee that had been towed by the Petaluma Police Department on the night of February 8. Defendant was very upset at the $522 bill to recover his Jeep, and offered $500 in cash. The manager said he could not reduce the amount of the bill. Defendant became very angry and raised his voice. He said he would pay $500 now and $22 later. The manager declined. Defendant left and came back later that day with the $522 and retrieved his Jeep.

The Costco incident. At 3:50 a.m., the morning of the murder, February 11, defendant drove his Jeep through the employee parking lot of the Santa Rosa Costco as employees were coming to work. Defendant was looking at a four-wheel all-terrain vehicle (ATV) that was in the back of an employee's pickup. As defendant drove slowly around the employee lot, employees backed the pickup to the loading dock and removed the ATV to the inside of the building. Defendant parked and walked over, asking the employees what they were doing with the ATV. They said they were putting the ATV into the building so no one would steal it. Defendant replied that if anyone were to take his ATV he would shoot and kill them. He walked back to his Jeep and drove off.

Evidence Not Designated Prior Bad Acts, But Which Fills Out the Timeline.

Two episodes occurred on February 11 between the Costco incident and the fourth incident, discussed below.

At 5:15 p.m. defendant received a ticket for not making a complete stop at a stop sign. He told the officer he was going to a friend's house.

At approximately 8:00 p.m.—about a half-hour before the murder—Traci W. could not park in her parking space by her home because it was blocked by a green Jeep Cherokee. The Jeep drove toward her. The driver, defendant, was looking at her and seemed to be about to say something to her. She parked in her space and called her boyfriend to tell him she was afraid to get out of her car. Referring to defendant, she said she had never seen anybody's face look so horrible and she was afraid to get out of her car. She thought defendant was going to do something awful. Defendant looked back at her and drove off, squealing his tires.

The Grant J. incident. Between 10:30 and 11:00 p.m. on February 13—two days after the murder—Grant J., an off-duty police officer, was driving to his house. His wife was behind him in her car. A man, driving defendant's Jeep Cherokee erratically, began to follow them. The Jeep stopped in front of their house. Grant J. got out to see what the man wanted. The man said nothing and drove off. Grant J. reported that someone had followed him home.

C. Additional Prosecution Evidence

The day after the Grant J. incident, February 14, at approximately 4:30 p.m., officers saw defendant's Jeep parked near 905 Civic Center Drive, the residence of Sheryl Bishop, a friend of defendant's. Defendant came out of Bishop's residence at approximately 11:10 p.m., and drove off in his Jeep. The officers followed and activated their emergency lights. The Jeep pulled to the curb and stopped. After an officer approached the Jeep, defendant drove off, led the officers in a high-speed chase, crashed the Jeep, and ran off. An officer chased defendant, but he got away. But soon thereafter he was found in Bishop's residence and arrested.

On February 15, officers searched Bishop's residence and found bloody dark blue pants, white socks with small blood stains, and a pair of bloody boots. Bishop testified defendant kept clothes and shoes and other possessions in her garage. A single left-hand yellow and black CLC glove was found in defendant's Jeep.

Defendant's knife bore the DNA of Taku Sakashta. Samples from the right boot bore the DNA of both Taku Sakashta and defendant. The injury to Taku Sakashta's face was consistent with his being stepped on by defendant's right boot.

Stephanie G., a former girlfriend of defendant, testified defendant kept jackets in his Jeep similar to the jacket found on the victim's body. He kept yellow and black gloves in his Jeep similar to the one found in the pocket of the jacket draped over the victim's body. He kept knives in the Jeep, including the knife with the ring through the blade that was found on the victim's body.

D. The Objected-to Prior Bad Act

The Alvarez incident. Over defendant's objection, the People introduced the testimony of Ranulfo Alvarez regarding an encounter he had with defendant. Alvarez testified as follows.

Alvarez was the general sales manager of Pacific Auto Sport in Santa Rosa. On December 5, 2005, defendant came to the car dealership and asked about buying a vehicle. They started the sales process, but defendant had insufficient identification for a loan application. He left the sales lot and came back two or three hours later.

Defendant told Alvarez he was going to take the vehicle and walked around the back of the sales table in a tent on the sales lot, toward the place where the car keys were kept. Alvarez told defendant to step back. Defendant shoved Alvarez in the chest twice, then swung at him with his right fist. Alvarez grabbed defendant and shoved him back. They fought, with defendant punching, kneeing, and kicking Alvarez.

Alvarez got defendant outside the tent, where a salesman tried to intervene on Alvarez' behalf. But defendant scratched the salesman from his forehead to his neck and upper chest. Alvarez wrestled defendant to the ground and held him. Defendant pulled a folding knife out of his pants pocket and tried to open it. Another salesman kicked the knife out of defendant's hand. Alvarez hit defendant in the jaw. Alvarez shoved defendant away and got up. Defendant ran across the street, jumped a fence, and ran off.

E. The Defense Case

Defendant testified. We summarize his testimony as follows.[3]

Defendant had been arrested about 30 times. He had felony convictions for receiving stolen property, resisting an officer, and auto theft. He admitted two prison terms. He described various occasions when he had run from the police. He claimed the police treated him unfairly. He was once attacked by a vicious police dog.

He admitted storing property at Bishop's house and garage. He owned a green Jeep Cherokee. He admitted getting the traffic ticket, referred to above, on the afternoon of the day of the murder.

Defendant testified regarding three of the prior bad acts. Defendant followed Nicole S. home to talk to her because she smiled at him. He did not try to open her door. The knife the officer found on him was not the one found on the victim, but was a knife

[3] We generally relate defendant's testimony without repeated qualifiers such as "Defendant testified that" or "According to defendant." It must be understood what may appear to be unqualified statements of fact are defendant's version of events that must be viewed in light of the jury's verdicts of guilt.

found on Bishop's bedroom dresser.[4] He followed Grant J. because he thought he knew him and wanted his phone number. He drove off when he realized he was mistaken. He drove through the Costco parking lot in the early morning hours of the day of the murder because he was excited about starting a new job later that day.

Defendant presented a detailed version of events of the day of the murder and the day after. We have carefully reviewed the testimony and, in light of the substantial evidence rule, need not set it forth in detail. Defendant described his activities on February 11, which involved spending time with friends and "dumpster diving." At the time of the murder, he was with his friend Steven Van Leuven. He went to Bishop's house around 10:15 or 10:20 p.m. and spent the night there. He denied the Jeep on the February 11 surveillance tape was his.

He found the boots next to a dumpster on February 12. There was a yellow and black glove inside one of the boots—the glove later recovered from his Jeep. He never saw the jacket draped over Taku Sakashta's body or the knife found in the jacket pocket.

We have not been cited to a passage in defendant's testimony where he actually denied committing the murder.

Defendant presented the testimony of several witnesses. His brother Douglas testified he had never seen the jacket found on the victim, the knife, or the gloves. Bishop testified she had not seen the jacket, or the knife. Other witnesses testified consistent with defendant's version of the date of the murder, but Van Leuven wasn't sure what day defendant was at his house. Defendant also presented testimony of various incidents where he fled from police.

F. The Verdict and Sentence

The jury convicted defendant as follows: of the first degree murder of Taku Sakashta (§ 187, subd. (a)) with a true finding of the special circumstances that the murder was committed during the commission of robbery and burglary (§ 190.2, subd.

[4] An officer testified on rebuttal the knife found on Bishop's dresser was definitely not the knife he saw during the February 8 traffic stop.

(a)(17)) and that defendant personally used a deadly weapon (§ 12022, subd. (b)(1)); of second degree robbery of Taku Sakashta (§ 211) with a true finding that defendant personally used a deadly weapon and personally inflicted great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)); of burglary of the guitar shop (§ 459) with a true finding that defendant personally used a deadly weapon and personally inflicted great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)); evading a police pursuit with wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a)); and misdemeanor resisting an officer (§ 148, subd. (a)(1)).

The trial court sentenced defendant to life in prison without possibility of parole.

II. DISCUSSION

Defendant contends the trial court erred by admitting the Alvarez incident as a prior bad act under Evidence Code section 1101, subdivision (b).[5] He also contends his trial attorney was ineffective for failing to object to the admission of the Nicole S., Petaluma Towing, Costco, and Grant J. incidents on the ground they were inadmissible as prior bad acts. We reject the first contention on the merits, and rule the second contention must be raised by a petition for writ of habeas corpus. Accordingly, we affirm the judgment.

A. Admission of the Alvarez Incident

Prior to trial, the prosecution filed a motion in limine to introduce the Alvarez incident and another prior bad act. Defendant filed pretrial motions in limine objecting to the admission of the acts. The prosecution then indicated it was only going to introduce the Alvarez incident.[6]

Alvarez testified out of the presence of the jury pursuant to section 402. He testified consistently with his trial testimony, set forth above. After the testimony, the

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[5] From this point forward, statutory citations are to the Evidence Code. Section 1101, subdivision (a) will be referred to as "section 1101(a)." Section 1101, subdivision (b) will be referred to as "section 1101(b)."

[6] Apparently, the prosecution later decided to introduce evidence of the other four prior bad acts.

trial court found the Alvarez incident was "relevant and material as it applies to the issues of intent or common plan or scheme." The court further found "that the events are substantially similar to support the inference that the defendant probably harbored this same intent in each instance."

Having made these findings, the court proceeded to exercise its discretion under section 352 to determine whether or not the probative value of the evidence outweighed its prejudicial effect. The court found the five-year-old incident was not remote in time, and was "not as inflammatory" as the charged murder. The court found the probative value outweighed any prejudicial effect and admitted the evidence. As defendant concedes, the trial court admitted the evidence with the appropriate limiting instruction, CALCRIM No. 375, that the jury could only consider the evidence with regard to intent or common scheme or plan.

Section 1101(a) provides, inter alia, that prior bad acts are inadmissible to prove the defendant's conduct on a particular occasion. But evidence of a prior bad act is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such an act." (§ 1101, subd. (b); see *People v. Daniels* (1991) 52 Cal.3d 815, 856 (*Daniels*).)

The trial court has discretion to admit such evidence if its probative value outweighs its prejudicial effect, and after considering "(1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant." (*Daniels, supra,* 52 Cal.3d at p. 856, citing *People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*).)[7] The court should exclude the evidence "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear . . . ." (*Thompson, supra,* at p. 316.) But a trial court's ruling

[7] *Thompson* was disapproved in part on an unrelated ground by *People v. Scott* (2011) 52 Cal.4th 452, 470–471.

admitting evidence of other crimes under section 1101(b) may not be overturned absent an abuse of discretion. (*People v. Hayes* (1990) 52 Cal.3d 577, 617.)

Here, the trial court admitted the evidence on the issues of common scheme or plan and intent. Admission based on common scheme or plan requires a greater degree of similarity between the charged and the uncharged offenses than admission based on intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403 (*Ewoldt*).) "The least degree of similarity . . . is required in order to prove intent. [Citation.]" (*Id.* at p. 402.)

In our view, we need not discuss common scheme or plan because the trial court did not abuse its discretion by admitting the Alvarez incident on the issue of intent. "To be relevant, an uncharged offense must tend logically, naturally and by reasonable inference to prove the issue(s) on which it is offered. [Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) Our Supreme Court has "long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent." (*Ibid.*, quoting *Thompson, supra,* 27 Cal.3d at p. 319.)

In both the Alvarez incident and the Sakashta murder defendant barged into retail premises and used violence in an attempt, in one case unsuccessful and the other successful, to take property. In both cases he used a knife. He tried to stab Alvarez and he stabbed Taku Sakashta to death. The two incidents are sufficiently similar to justify the admission of the Alvarez incident under section 1101(b) on the issue of acting with an intent to take property.

Our conclusion that the Alvarez incident was admissible does not end the inquiry. A trial court admitting evidence of uncharged crimes must also conclude that the probative value of the evidence substantially outweighs its prejudicial impact, within the meaning of section 352. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) We review section 352 determinations for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

The trial court found the Alvarez incident was not remote in time—which defendant does not dispute—and found it was not as inflammatory as the charged murder. Moreover, the jury was given the proper limiting instruction. Defendant argues, in

essence, that the jury would disregard the instruction ("unavoidab[y]") and consider the Alvarez incident on the issue of identity—which requires a greater degree of similarity than intent or common scheme or plan. (*Ewoldt, supra,* 7 Cal.4th at pp. 402–403.) But jurors are presumed to follow the court's instructions. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 171.)

In any case, any error would be harmless. The prosecutor only once mentioned the Alvarez incident in closing argument to the jury. The defense spent more time discussing the incident in its argument, and the prosecutor did not specifically mention it in rebuttal argument. And the evidence against defendant is overwhelming. The error is harmless under any standard.

B. Alleged Ineffectiveness of Counsel

Defendant's trial counsel did not object to the admission of the Nicole S., Petaluma Towing, Costco, and Grant J. incidents on the ground they were inadmissible as prior bad acts. Defendant argues this constituted ineffective assistance of counsel.

Claims of ineffective trial counsel are more appropriately litigated in a habeas corpus proceeding. Where, as here, the record does not show why counsel failed to act in the way defendant claims he should have, we must reject an ineffective counsel claim based only on the record on appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) There may have been tactical or other reasons not to object. A verified petition for habeas corpus would allow defendant to allege facts outside the appellate record to show that counsel's failure to object was not justified by a tactical choice or other legitimate reason, and thus might constitute ineffectiveness. (See *People v. Michaels* (2002) 28 Cal.4th 486, 526.)

On a cold record, an appellate court generally cannot rule out tactical motivations for trial counsel behavior. In this case, the Attorney General points out trial counsel may have wanted the evidence in to show the prosecution wanted to make defendant look bad to undermine his testimony that he was not involved in the murder, or to show why he fled from the pursuing officer, or for other plausible tactical reasons. Without a habeas

petition, and an explanatory declaration of trial counsel, we cannot entertain this contention on the merits.

III. DISPOSITION

The judgment of conviction is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Banke, J.