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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. COLLIN WHITE, Defendant and Appellant.	A153162 (San Francisco County Super. Ct. No. SCN2272336)

After a jury trial, appellant Collin White was found guilty of involuntary manslaughter and related offenses arising out of the December 2015 assault on Stuart Jackson that resulted in Jackson's death at a San Francisco bus stop. White raises a single issue on appeal, whether the trial court erred in allowing the prosecution to present evidence of a prior uncharged assault for the purpose of identifying White as the perpetrator of the crimes under review. Seeing no abuse of discretion in this evidentiary ruling, we affirm.

I. BACKGROUND

At approximately 2:00 p.m. on December 5, 2015, Susan Singer approached a bus shelter on Van Ness Avenue near Market Street in San Francisco, hoping to take a bus to Grace Cathedral for an event there. As she walked past the shelter close to the curb, she noticed an individual—whom she later identified in court as White—sitting in the bus shelter. According to Singer, when she walked past White, he spat on the ground behind her. Feeling "a little uneasy," Singer went to the far end of the bus shelter and looked back at the illuminated sign above White's head to see if she had missed the bus. She

took a moment to look at White, noticing he had closely cropped hair, a "sort of five o'clock shadow," a straight brow and nose, thin lips, and a long jaw. He appeared to her to be an attractive, powerfully built man. He was wearing a dark "puffy" jacket or vest and dark pants.

Singer was standing at the end of the shelter scanning the street for a bus or taxi when she noticed an elderly, "tidily dressed" white man walking towards the bus stop exactly as she had, along the edge of the curb. According to Singer, the man—identified at trial as 74-year-old Stuart Jackson—appeared thin and frail. When Jackson got to the edge of the shelter, Singer heard White's foot hit the ground with some force and saw White "rise from his seat and swing a punch with his right fist that hit the old gentleman on the temple and sent him flying." Singer attempted to catch Jackson before the back of his head hit the ground, but she was unsuccessful. She heard his head hit the pavement with a "horrible crunch." According to Singer, Jackson was "completely unconscious," had an abrasion on his left cheekbone, and was bleeding from the back of his head. Singer testified that Jackson and White had had no interaction prior to the assault. Afterwards, White slowly left the bus shelter, walking past Singer, who later described him to both the 911 dispatcher and the responding police officer as an approximately 30-year-old Black male with a beard, who was wearing a dark jacket. Jackson subsequently died from his injuries.

As a result of this incident, the San Francisco County District Attorney filed an amended information on August 30, 2017, charging White with involuntary manslaughter (Pen. Code,[1] § 192, subd. (b) (count one)), assault with force likely to produce great bodily injury (§ 245, subd. (a)(4) (count two)), battery with serious bodily injury (§ 243, subd. (d) (count three)), and inflicting injury on an elder adult likely to cause great bodily harm (§ 368, subd. (b)(1) (count four)). The amended information also included several special allegations. As to count two, the information further alleged infliction of great bodily injury on a person 70 years of age or older in accordance with section 12022.7,

[1] All statutory references are to the Penal Code unless otherwise specified.

subdivision (c). Count three included a special allegation under section 1192.7, subdivision (c)(8), that White personally inflicted great bodily injury for purposes of that statute. And count four was subject to enhancement under section 368, subdivision (b)(3), for proximately causing the death of the victim.

At trial, it was stipulated that surveillance footage in the area of the assault depicted White, shortly after 2:00 p.m. on the date of the attack, wearing dark clothing as he walked west on Market Street to Van Ness Avenue and subsequently ran north on Van Ness Avenue to Fell Street, east on Fell Street to Polk Street, and north on Polk Street. White was arrested inside a residence hotel on Polk Street on January 7, 2016. The next day, police officers executed a search warrant for his room and discovered a black baseball cap with a white emblem, a black jacket, a black pair of pants, a black pair of high tops with white soles, a black and blue backpack, and an identification card bearing White's name. The clothing and backpack were similar to those worn by White in the surveillance videos.

In addition to the evidence of the attack on Jackson described above, the prosecution presented evidence at trial of a previous assault allegedly committed by White in the Civic Center area. Specifically, Jason Honig testified that on the morning of February 4, 2013, he was walking to work when he stopped at a bus shelter near Hyde and McAllister Streets in San Francisco to check the electronic sign for the next arriving bus. As Honig, a white male who was 61 years old at the time, stood there, he was punched or shoved on the rear of his right shoulder. Honig looked to see who had struck him, but nobody was "right there." He therefore continued walking toward the corner, where he saw White yelling and gesticulating at him while walking backwards in the intersection. Although "it didn't make sense," it appeared to Honig that White was acting as if Honig was the one who had caused the problem. Frightened, Honig continued to walk south on Hyde Street toward Market Street. White continued to walk in front of him, saying "aggressive things" and warning Honig not to come near him. Eventually, Honig saw a security guard in Civic Center Plaza and asked the guard to call the police. White was temporarily detained by the police, and at trial in these proceedings, the police

officer who responded to the Honig incident identified White as the individual involved in this prior altercation with Honig.

The defense introduced evidence to support its theory of mistaken identity. About a month after the attack on Jackson, Singer was shown a video of White on Market Street and a photo array which included White's photograph. She was unable to identify the person in the video or any of the individuals in the photo array as Jackson's assailant. However, Singer later identified White as the perpetrator of the crime at the preliminary hearing and at trial. The defense called Dr. Kathy Pezdek, a professor of cognitive science at Claremont Graduate University, to testify as an expert regarding eyewitness identifications. In response to a hypothetical question tracking the facts of this case, Dr. Pezdek opined that the eyewitness identification would not be reliable. In particular, Dr. Pezdek emphasized the brief amount of time the eyewitness was exposed to the perpetrator, the cross-racial nature of the identification under a high level of stress, and the identification of the alleged perpetrator months later at trial, after previously having been unable to make identifications from a video or photo array.

On September 14, 2017, a jury found White guilty as charged and found all of the related special allegations to be true. At sentencing on November 3, 2017, the trial court sentenced White to a total unstayed prison term of nine years. Specifically, White received the low term of two years on count four, with a consecutive term of seven years for the related enhancement. Sentences with respect to counts one through three were imposed but stayed in accordance with section 654. This timely appeal followed.

II. DISCUSSION

The sole issue on appeal turns on the trial court's ruling allowing testimony of a prior uncharged assault to be admitted into evidence over defense counsel's objection. Prior to trial in this matter, the prosecution moved in limine to allow presentation of evidence regarding four prior unprovoked batteries committed by White in San Francisco in order to prove identity, intent, and knowledge in the instant case. White filed a written objection, arguing the proffered prior misconduct was not sufficiently similar and its admission would be significantly more prejudicial than probative. At the trial court's

initial hearing on the motion, the court concluded the evidence the prosecution was seeking to admit was being offered to prove identity—that White was the individual who committed the assault on Jackson. Observing there must be sufficient " 'common characteristics' " to justify the admission of such prior bad acts, the court requested all of the relevant police reports so it could "decide whether or not the marks of similarity, common marks and the distinctive marks are sufficient to allow their admission under [Evidence Code] section 1101[, subdivision] (b)."[2]

At a subsequent hearing, the trial court reviewed all four prior incidents and held only a single event admissible, the 2013 altercation with Honig described above. In finding the Honig confrontation sufficiently similar, the trial court noted that both the instant assault and the attack on Honig occurred during the daytime at bus stops in the Civic Center area of San Francisco and involved single victims, two older white men. Moreover, since the Honing incident occurred only 33 months earlier, it was not too "remote to exclude."

White contends that the prior bad act evidence introduced at trial was unduly prejudicial to him and requires reversal of his judgment of conviction. A trial court's decision to admit evidence of uncharged misconduct is essentially a specialized type of relevance determination reviewed on appeal for abuse of discretion. (*People v. Sanchez* (2016) 63 Cal.4th 411, 453 (*Sanchez*); *People v. Cage* (2015) 62 Cal.4th 256, 274 (*Cage*).) We see no such abuse here.

It is beyond peradventure that evidence a defendant has committed crimes other than those currently charged is not admissible to prove the defendant is a person of bad character or has a criminal disposition. (Evid. Code, § 1101, subd. (a); *Cage*, *supra*,

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[2] Pursuant to Evidence Code section 1101, subdivision (b), "the admission of evidence that a person committed a crime, civil wrong, or other act" is permissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

62 Cal.4th at p. 273.) Equally well established, however, is that such evidence *is* admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes.[3] (Evid. Code. § 1101, subd. (b); *Sanchez*, *supra*, 63 Cal.4th at p. 452; *Cage*, at p. 273; *People v. Kipp* (1998) 18 Cal.4th 349, 369.)

The degree of similarity required to justify admission of uncharged misconduct "ranges along a continuum, depending on the purpose for which the evidence is received. The least degree of similarity is required to prove intent. A higher degree is required to prove common plan, and the highest degree to prove identity." (*People v. Scott* (2011) 52 Cal.4th 452, 470.) Where, as here, the evidence is being offered to establish White's identity as the attacker in the charged offenses, "the offenses must share common features that are so distinctive as to support an inference that the same person committed them." (*Id.* at p. 472.) "The inference of identity need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*Id.* at p. 473.) For example, and of particular relevance here, "the likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics." (*People v. Miller* (1990) 50 Cal.3d 954, 989; see *People v. Lynch* (2010) 50 Cal.4th 693, 736–738, disapproved on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637–638.)

Viewing the evidence in the light most favorable to the trial court's ruling, the uncharged prior assault of Honig and the charged assault on Jackson share common features that reveal a highly distinctive pattern of behavior. In both instances, the perpetrator committed an unprovoked daylight assault on a complete stranger at a bus stop in the same area of San Francisco. Both victims of these assaults were older white men and both assaults occurred within three years of each other. In both cases, the

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[3] "[A] jury may consider properly admissible 'other crimes' evidence so long as it finds 'by a preponderance of the evidence' that the defendant committed those other crimes." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1224, fn. 14.)

perpetrator delivered a single blow to the head or upper body of the victim. But perhaps the most distinctive characteristic is the sheer randomness of the attacks; on both occasions, there had been no interaction whatsoever between the attacker and victim prior to the assault. Viewing these features in their totality, we cannot say that the trial court abused its discretion in finding the prior uncharged behavior relevant for purposes of identification. White himself seems to acknowledge on appeal that the Honig evidence was "arguably admissible" on this basis. He asserts, however, that the trial court erred in failing to exclude the evidence under Evidence Code section 352, because it was more prejudicial than probative. In essence, White make a general argument that uncharged misconduct evidence of this type is simply propensity evidence designed to unfairly appeal to the jury's emotions.

Pursuant to Evidence Code section 352, a "court in its discretion may exclude evidence if its probative value is *substantially* outweighed by the probability that its admission will . . . create *substantial* danger of *undue* prejudice." (Italics added.) Evidence is deemed unduly prejudicial under the statute "if it tends to create an emotional bias against a defendant that could inflame the jury, while also having a negligible bearing on the issues." (*People v. Lucas* (2014) 60 Cal.4th 153, 268, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.) It is true, as White asserts, that "[b]ecause evidence of a defendant's commission of other crimes, wrongs, or bad acts ' "may be highly inflammatory, its admissibility should be scrutinized with great care." ' " (*Cage*, *supra*, 62 Cal.4th at p. 273.) However, some degree of prejudice is inherent whenever other crimes evidence is admitted (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404 (*Ewoldt*), and thus something more than a general argument— unmoored to the facts of the particular case—that admission of such evidence might have a tendency to inflame the emotions of the jury is required in order to successfully challenge a trial court's reasoned decision to allow it.

Here, it does not appear that the risk of undue prejudice was particularly grave. Unlike the charged conduct, where an unprovoked attack resulted in the death of an older victim, the facts of the Honig altercation are relatively muted and occasioned no injury.

On this record, it is difficult to see how such evidence of uncharged conduct could inflame the jury's passions and cause it to convict on improper grounds. Additionally, the evidence offered to establish the prior offense was straightforward and highly probative. (See, e.g., *Ewoldt*, *supra*, 7 Cal.4th at pp. 404–405 [observing that the probative value of evidence of uncharged misconduct is significantly enhanced when provided by an independent witness who is unconnected to the charged offense].)

Moreover, the jury in this case was properly instructed on the limited purposes for which it might consider the evidence of this prior uncharged misconduct.[4] And we presume the jury followed the instruction. (Compare *Cage*, *supra*, 62 Cal.4th at p. 275; see *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 649 ["[w]e assume the jurors are intelligent persons capable of understanding and correlating all jury instructions given them"].) Under such circumstances, we conclude the trial court acted well within its discretion in finding the probative value of the evidence outweighed any *undue* prejudice.[5]

III. DISPOSITION

The judgment is affirmed.

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[4] Specifically, the jury was instructed, in pertinent part: "If you decide that the defendant committed the uncharged offense, you may but are not required to consider that evidence for the limited purpose of deciding whether the defendant was the person who committed the offense alleged in this case. . . . Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

[5] Because we find no state law evidentiary error on this record, we likewise reject White's related assertion that the trial court's decision to admit the challenged evidence also violated his constitutional due process rights. Ordinarily, a decision properly made under the rules of evidence does not implicate constitutional rights. (*People v. Dement* (2011) 53 Cal.4th 1, 52, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Kraft* (2000) 23 Cal.4th 978, 1035–1036; *People v. Thorton* (2007) 41 Cal.4th 391, 443 ["Ordinarily a criminal defendant's attempt 'to inflate garden-variety evidentiary questions into constitutional ones [will prove] unpersuasive.' "].) We see no extraordinary circumstances which persuade us this case constitutes an exception to this general rule.

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Sanchez, J.

WE CONCUR:

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Margulies, Acting P. J.

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Banke, J.