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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM CHUMLEY,

Defendant and Appellant.

B254669

(Los Angeles County
Super. Ct. No. BA403886)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Herriford, Judge. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria Wilson, Garrett A. Gorlitsky and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

William Chumley was convicted by a jury of second degree burglary (entering a locked vehicle). On appeal he contends the trial court erred in admitting evidence of two prior uncharged offenses. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

An information charged Chumley with burglary of an automobile (Pen. Code, § 459) and specially alleged he had previously served a separate prison term for a felony (Pen. Code, § 667.5, subd. (b)). Chumley pleaded not guilty and denied the special allegation.

2. The Trial

a. The charged burglary of an automobile

Freddy Pineda testified he had parked and locked his car on the evening of August 27, 2012 near the intersection of Wilshire Boulevard and Burlington Avenue in Los Angeles. At 5:00 a.m. the following day Pineda was walking to his car and saw a Black man sitting in the driver's seat with the door open. As Pineda approached, he could see the man's face. The man jumped out of Pineda's car and put something in his pocket. The man, who was wearing black clothing, entered a blue SUV with large custom chrome wheel rims and drove away. The SUV had been parked in front of Pineda's car in a no-parking zone.

Pineda testified he intended to follow the suspect, but his car would not start; the battery had been removed. Also missing were Pineda's work tools, which had been in the trunk. Pineda discovered all the doors on his car and four other cars parked behind his car were unlocked, leading him to believe the suspect had used a master key or a shaved key to open the doors.

Pineda testified he did not immediately notify the police of the burglary because the suspect had seen him and Pineda feared retaliation. However, on August 31, 2012 Pineda went to a police station and told Los Angeles Police Officer Hugo Villagrana what had happened to his car. He did not report having seen the perpetrator.

On September 19, 2012 Pineda returned the police station and learned his work tools had not yet been recovered and no suspect had been detained. Pineda then told the officers he had seen the individual in his car, whom he described as a Black man, five feet eight inches to five feet 11 inches tall, weighing 195 to 210 pounds and dressed in a black shirt and black pants. Pineda described the suspect's vehicle as a dark blue 1999 to 2003 Ford Expedition with large aftermarket chrome wheel rims.¹ Pineda said that since the burglary he had seen the suspect looking through the windows of cars parked on Burlington Avenue and Sixth Street in the early morning hours (between 4:00 a.m. and 5:30 a.m.). He had also seen the suspect use a shaved key to open the doors of four cars parked on Burlington Avenue, near where Pineda's car had been burglarized. Pineda identified Chumley at trial as the man who had burglarized his car.

According to the testimony of Los Angeles Police Officer Jessie Swartz, on the evening of October 17, 2012 Pineda identified Chumley as the burglary suspect in a photographic line up. The next day Swartz and other officers conducted surveillance of Chumley's residence and saw a blue Chevrolet Tahoe parked in the driveway. When Chumley drove away in the vehicle, he was stopped and arrested.

b. *The uncharged burglary and attempted burglary of an automobile*

The prosecutor sought to introduce evidence of five uncharged automobile burglaries and attempted automobile burglaries committed by Chumley to prove identity, intent and common plan or scheme pursuant to Evidence Code section 1101, subdivision (b). At a pretrial hearing, following argument of counsel, the trial court found none of the uncharged offenses was probative of a common plan or scheme and there was no issue as to criminal intent. However, in view of the disputed issue of identity, which was the basis of Chumley's defense, the court ruled two of the uncharged

¹ Pineda identified the suspect's vehicle after being shown a series of photographs of SUVs by the police. Based on the information provided by Pineda, the police created a crime alert bulletin, which included a photograph of a Ford Expedition. At trial Pineda testified the Ford Expedition shown in the bulletin was similar to the SUV in which Chumley had fled after burglarizing Pineda's car.

offenses, an October 12, 2012 automobile burglary and a March 26, 2013 attempted automobile burglary, were admissible on the issue of identity. The court also concluded the probative value of the two uncharged offenses was not outweighed by any prejudicial effect under Evidence Code section 352. The court explained Chumley had been identified in the uncharged offenses as being associated with a distinctive SUV that was the same as, or similar to, the SUV used in the charged offense. The court also noted the time of day and location of two of the offenses were sufficiently similar to be probative on the issue of identity.

At trial the prosecutor introduced evidence of these two uncharged offenses. The court provided a limiting instruction to the jury on its use of this evidence.²

i. The October 12, 2012 Guerrero automobile burglary

Jose Guerrero testified that at approximately 5:00 a.m. on October 12, 2012 he parked his SUV across the street from his office at Temple and Vendome Streets in Los Angeles. Guerrero set the alarm and locked the SUV. About 45 minutes later Guerrero heard the alarm and discovered a Black man, wearing black clothing, standing beside a blue Chevrolet Tahoe with 23-inch chrome wheel rims. The vehicle was parked, with the engine running, in front of Guerrero's SUV. Guerrero noticed the front passenger window and door lock of his SUV had been broken. Guerrero yelled, and the man immediately fled on foot. Guerrero discovered the center console and glove box of his SUV had been opened and the stereo face plate was missing.

² The court instructed pursuant to CALCRIM No. 375 that, if it found by a preponderance of the evidence that Chumley had committed the uncharged offenses, the jury could consider the evidence solely for the purpose of deciding whether Chumley "was the person who committed the offense alleged in this case. [¶] In evaluating this evidence consider the similarity or lack of similarity between the uncharged offenses and the charged offense. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from the evidence, that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of burglary of a motor vehicle. The People must still prove that charge beyond a reasonable doubt."

Guerrero's son, Sergio, testified he telephoned the police emergency number and gave the operator a description of the suspect and the license plate number of the blue Chevrolet Tahoe. When the police arrived 10 minutes later, the engine of the Chevrolet Tahoe was still running, and a woman appeared to be asleep in one of the backseats. She suddenly jumped into the front seat and attempted to drive away, but was detained by the officers.

Los Angeles Police Officer Byron Hernandez testified that, after speaking with Guerrero, he and his partner officer searched the immediate area and detained Chumley because he matched Guerrero's description of the suspect. Chumley provided his name, date of birth and current address, which were recorded on a field identification card.

Los Angeles Police Officer Louis Duenas testified Chumley was released at the scene about 30 minutes later after Guerrero told the officers nothing had been stolen from his SUV and refused to make a police report or to participate in a field show up. Chumley returned to the blue Chevrolet Tahoe, and the woman drove him away.

ii. The March 26, 2013 Vasquez attempted automobile burglary

In September 2013 Chumley was convicted of the attempted burglary of Francisco Vasquez's pickup truck.³ Vasquez testified that at 2:30 p.m. on March 26, 2013 he drove Anna Lopez in his pickup truck to a big box retail store on Slauson Avenue in Los Angeles. After spending five to 10 minutes inside the store, Vasquez and Lopez returned to the parking lot and saw that a blue Chevrolet Tahoe had been backed in and parked next to Vasquez's pickup truck. The front and rear doors of the Chevrolet Tahoe were open, partially blocking Vasquez's view of his pickup truck. However, Vasquez could see Chumley standing between the vehicles and facing the driver's door of Vasquez's pickup truck. It appeared Chumley was holding some tools in his hands. When Vasquez and Lopez were about a car length away, Chumley looked up at Vasquez, immediately closed the rear door of the Chevrolet Tahoe and drove away in the vehicle.

³ The parties stipulated at trial that Chumley had pleaded guilty to committing the March 26, 2013 attempted automobile burglary.

Vasquez testified, when he reached his pickup truck, he found a hole had been punched in the driver's door handle. Vasquez attempted to pursue Chumley in his pickup truck, but soon lost track of him. Vasquez identified Chumley as the attempted burglary suspect at trial. Anna Lopez identified Chumley in a photographic lineup as the man she saw standing next to Vasquez's pickup truck in the store parking lot and also identified Chumley at trial.

3. The Defense Evidence of Mistaken Identity

Chumley did not testify in his defense. Faced with Pineda's two identifications of Chumley as the perpetrator, his counsel argued Chumley had been misidentified and presented Dr. Robert Shomer as an expert witness on eyewitness identification. According to Dr. Shomer, eyewitness identification of strangers has a very low level of reliability and is highly influenced by a number of factors, including the suddenness of the encounter, the existence of stress, the tendency to focus on a weapon, the passage of time and the suggestiveness of the procedure used to make the identification. Additionally, the confidence shown by a witness in making an identification does not correlate with its accuracy. Dr. Shomer specifically described problems with delayed identifications, photographic line-up identifications and in-court identifications.

Los Angeles Police Officer Villagrana was the desk officer on duty on August 31, 2012 when Pineda went to the station to report the burglary of his car. The defense called Villagrana as a witness to impeach Pineda's credibility concerning his account of the burglary and his failure first to report the burglary and then to inform the police he had seen the suspect and the suspect's vehicle.

4. The Requested Read-back of Testimony, Verdict and Sentencing

On the morning of the first full day of deliberations, the jury requested the testimony of Pineda be read back in its entirety. In the afternoon the jury returned with its verdict, finding Chumley guilty of second degree burglary. In a bifurcated proceeding Chumley admitted the one-year prior prison term allegation.

The trial court sentenced Chumley to an aggregate state prison term of four years, the upper term of three years for second burglary (Pen. Code, § 461, subd. (b)) plus one

year for the prior prison term enhancement, and imposed statutory fines, fees and assessments.

DISCUSSION

1. *Legal Principles and Standard of Review*

Evidence Code section 1101, subdivision (a),⁴ “prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; see *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) Pursuant to Evidence Code section 1101, subdivision (b),⁵ however, this general rule does not prohibit admission of evidence of uncharged misconduct “when such evidence is relevant to establish some fact other than the person’s character or disposition.” (*Ewoldt*, at p. 393; accord, *People v. Leon* (2015) 61 Cal.4th 569, 597-598; see *Falsetta*, at p. 914 [“the rule against admitting evidence of the defendant’s other bad acts to prove his present conduct [is] subject to far-ranging exceptions,” citing Evid. Code, § 1101, subd. (b)].) “[E]vidence of uncharged crimes 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 . . . only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or

⁴ Evidence Code section 1101, subdivision (a), provides, “Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.”

⁵ Evidence Code section 1101, subdivision (b), provides, “Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, 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.”

intent” (*People v. Carter* (2005) 36 Cal.4th 1114, 1147; accord *People v. Edwards* (2013) 57 Cal.4th 658, 711.)

A high degree of similarity between the charged and uncharged offenses is required when the aim is to prove identity. “When offered on this point, ‘the uncharged misconduct and charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.’” (*People v. Leon, supra*, 61 Cal.4th at p. 598.)

Even if evidence of uncharged crimes is relevant under Evidence Code section 1101, subdivision (b), before admitting the evidence a trial court must also find it has substantial probative value that is not largely outweighed by its potential for undue prejudice under Evidence Code section 352. (*People v. Kipp* (1998) 18 Cal.4th 349, 371; accord, *People v. Leon, supra*, 61 Cal.4th at p. 599.) A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great. (*People v. Walker* (2006) 139 Cal.App.4th 782, 806; *People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.)

The trial court’s determination of the admissibility of evidence of uncharged offenses is reviewed for abuse of discretion. (*People v. Kipp, supra*, 18 Cal.4th at p. 369 [“[o]n appeal, the trial court’s determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion”].) Similarly, whether the probative value is outweighed by the prejudicial effect of the evidence is subject to abuse-of-discretion review. (*People v. Davis* (2009) 46 Cal.4th 539, 601; *People v. Leon, supra*, 61 Cal.4th at p. 599.)

2. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Chumley’s Prior Uncharged Offenses To Prove Identity*

Relying on *People v. Rivera* (1985) 41 Cal.3d 388 (*Rivera*), overruled on another ground in *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, footnote 10, Chumley contends the Guerrero automobile burglary and Vasquez attempted automobile burglary were too dissimilar to the Pineda automobile burglary to be relevant to the disputed issue of identity. In particular, Chumley points to specific differences between the uncharged and

charged offenses and between the uncharged offenses themselves with respect to the time of day the crimes occurred, the method of entry into the victims' vehicles, the number of perpetrators involved and whether a pretrial identification of the burglary suspect had been made. Chumley also urges the only feature common to all three crimes was the blue Chevrolet Tahoe, which he characterizes as a generic vehicle with no unique characteristics and thus not sufficiently distinctive to support an inference he committed the Pineda automobile burglary.

In *Rivera* the defendant was charged with murder and burglary in the stabbing death of a convenience store customer who had chased four youths after they stole beer from the store. (*Rivera, supra*, 41 Cal.3d. at p. 391.) The trial court admitted into evidence the defendant's prior armed robbery to establish his identity as one of the four youths who had committed the charged offenses. (*Id.* at p. 392.) The prosecutor had urged there were a number of similarities between the charged and uncharged offenses, "(1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) both markets were in Rialto, California; (5) both markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; (9) defendant used an alibi defense in both cases: when accused of the prior offense, he claimed to have been with his brother all night; in the current case he claims to have spent the evening with his sister." (*Id.* at pp. 392-393.)

Reversing, the Supreme Court held "taken alone or together . . . these characteristics are not sufficiently unique or distinctive so as to demonstrate a 'signature' or other indication that defendant perpetrated both crimes." (*Rivera, supra*, 41 Cal.3d at p. 393.) The Court noted that "[c]onvenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more than one perpetrator; finally, alibi is a common defense." (*Id.* at p. 393.) Moreover, the Court described significant differences between the two crimes: The prior offense was armed robbery, a crime against the

person, whereas the charged offense was burglary, a crime against property; the prior involved money, while the charged crime involved beer; the co-perpetrators in each case differed; the prior offense involved a gun. (*Ibid.*)

Although the analysis in *Rivera* is certainly applicable to the case at bar, the quality of the similarities and distinctions between the uncharged and charged offenses here is vastly different from that in *Rivera*. In particular, as the trial court found, the use by the perpetrator of a distinctive vehicle to arrive at, and leave, the scene of the automobile burglaries strongly suggest a common criminal signature that sets these crimes apart: “A modus operandi or criminal signature, creating an inference of identity, is demonstrated ““when the marks common to the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.””” (*People v. Felix* (1993) 14 Cal.App.4th 997, 1005.)

Chumley, a Black man, drove a large blue American-made SUV in the Guerrero automobile burglary and Vasquez attempted automobile burglary, and a Black man, whom Pineda later identified as Chumley, drove the same or very similar SUV in the Pineda automobile burglary. The SUV in all three crimes was equipped with large, aftermarket chrome wheel rims. According to the evidence, all three crimes occurred in the open, a public street or a commercial parking lot, rather than a private driveway or garage, during which the SUV was parked adjacent to the vehicle that was being burglarized. Like the Guerrero automobile burglary, the Pineda automobile burglary happened at approximately 5:00 a.m. when the victims’ vehicles were parked on the street.

To be sure, the three offenses were not identical; but for the charged and uncharged offenses to be highly distinctive, and thus admissible to prove identity, they need not be mirror images of each other. (*People v. Carter* (2005) 36 Cal.4th 1114, 1148.) On this record the trial court’s determination the uncharged acts evidence was admissible was well within its discretion.

Finally, we reject Chumley's contention the trial court abused its discretion in determining the evidence of the uncharged offenses was more probative than prejudicial. Chumley asserts, because he presented expert evidence Pineda's pretrial identification of him may have been unreliable and the jury asked for Pineda's testimony to be read back in its entirety, without the admission of the uncharged offenses he would not have been found guilty. That the evidence of uncharged misconduct may have contributed to the jury's conclusion Chumley was guilty of the burglary of Pineda's car, of course, is simply another way of saying it had probative value, a necessary element under Evidence Code section 1101, subdivision (b). The question under Evidence Code section 352 is not whether the evidence proves guilt but whether it prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638; see *People v. Walker, supra*, 139 Cal.App.4th at p. 806; see generally Simons, Cal. Evidence Manual (2015 ed.) § 1:28, pp. 35, 37 ["The term 'undue prejudice' connotes a sense of unfairness."].)

Here, the nature of the prior acts was not more inflammatory than the charged offense; and, although the crimes were committed relatively close in time, there was little possibility the jury would confuse the prior acts with the Pineda burglary. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211) Any "prejudice" to Chumley resulted not from any danger the evidence would be misconstrued or might evoke an emotional bias against Chumley unrelated to the issue of identity but from the evidence's persuasiveness.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

BECKLOFF, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.