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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EMANUAL PEAVY,

Defendant and Appellant.

D068389

(Super. Ct. No. SCD256031)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie Garland, Assistant Attorney General, Charles C. Ragland, Allison V. Hawley and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Emanuel Peavy of (among other crimes) the attempted murder of a perceived gang rival. To establish defendant's identity, intent, motive, and use of a common plan, the prosecutor introduced evidence showing defendant was involved in a similar (though fatal) gang shooting three days earlier. (See Evid. Code,¹ § 1101, subd. (b).) Defendant contends the trial court abused its discretion and violated his due process rights by admitting this evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charged Offenses*

On April 15, 2014, at about 2:00 a.m., Bobeke Traylor was "hanging out" with a friend in the area of 17th and K Streets in downtown San Diego. Traylor described the location as a "high transient" and "high narcotic" area, and a police detective described it as being just outside territory claimed by the Crips criminal street gang, but a "high Crip hangout" nonetheless.

Traylor noticed a silver Ford Taurus drive past him and return about 15 minutes later. Defendant—an active member of the 59 Brim criminal street gang, which is affiliated with the Bloods criminal street gang—parked the car, got out, and walked toward Traylor and his friend. As defendant approached, he pulled out a gun and repeatedly said, "This is Crip." Traylor interpreted this statement as defendant asking whether Traylor is a member of the Crips, a rival street gang.² Traylor responded

¹ Undesignated statutory references are to the Evidence Code.

² A detective corroborated Traylor's understanding.

repeatedly, "Nobody on that shit," meaning he was not a gang member.³ Traylor's friend fled. Defendant began shooting at Traylor, who turned and ran. Defendant fired six or seven shots, one of which struck Traylor in the foot. Defendant drove off in the Taurus.

Police and paramedics responded to the incident and transported Traylor to the hospital. One of the bullets fractured one of Traylor's toes at the joint and it had to be surgically fused back together. Another toe suffered damage that caused tingling.

Traylor's recovery was painful.

Traylor was unable to identify defendant as the assailant. Police recovered five spent shell casings from the crime scene. The casings bore different "headstamps" (labels): four were stamped "PMC 9mm LUGER," and one was stamped "WIN NT 9mm LUGER." Police also obtained surveillance camera footage from a nearby business that captured the incident. The footage showed a silver Ford Taurus approach the crime scene. It also showed the shooter was wearing a jacket and a dark hooded sweatshirt with a yellow design. The shooter's left hand was not visible. Detectives briefed patrol officers to be on the lookout for the Taurus.

On May 10, 2014, police were monitoring the Oceanview Park area of San Diego—59 Brim territory—because the gang was continuing to celebrate its "gang holiday" from the day before (May 9, or 5/9). Officers observed a silver Ford Taurus being driven away from the party, followed it, and initiated a traffic stop when the driver failed to signal. Defendant was sitting in the driver's seat and was wearing red clothing

³ A detective corroborated that Traylor was an "associate," but not an active member, of the West Coast Crips.

associated with 59 Brim. He identified himself as "Lamar Wilson," but one of the officers told defendant he knew his real name. The officer had previously encountered defendant in the presence of another known 59 Brim member who was one of the leaders of a violent subset of 59 Brim called the "Tiny Hit Squad." The officer particularly remembered defendant from that encounter because he recalled defendant did not have a left hand. Defendant admitted he gave a false name because he had a warrant for a probation violation. Police arrested defendant and obtained DNA samples from him.

Police also searched defendant's cell phone and found several pictures that were taken during the 59 Brim holiday celebration. One showed defendant wearing a red bandanna over his face, holding a gun, and displaying the letters THS (the abbreviation for Tiny Hit Squad).

Based on other photographs, police were able to identify the house in which defendant's girlfriend rented a room. Defendant lived in the room with her, but told her not to tell police that fact. Police searched the rented room and found a digital scale, a baggie containing 18.3 grams of cocaine base (about 180 doses), razor blades (commonly used for cutting cocaine base), a sweatshirt that looked like the one depicted in the surveillance footage, a bandanna, batting gloves (commonly used by gang members when they fight), a military-style bulletproof vest, and a loaded 9-millimeter handgun.

The handgun was loaded with 11 cartridges bearing a "hodgepodge" of headstamps: six were stamped with "WIN 9mm LUGER"; two were stamped with "PNT 9mm LUGER"; one was stamped with "BLAZER 9mm LUGER"; one was stamped with "RT 9mm LUGER +P"; and one was stamped with "WIN NT 9mm LUGER." Defendant

told police after his arrest that he possessed the gun for his protection because members of the West Coast Crips had recently shot up his car and he had heard they were after him. A gang detective testified regarding the importance of respect in gang culture and opined that someone who had been shot at by a rival gang would be expected to retaliate "as hard or harder" to avoid losing respect and appearing weak.

Forensic analysis revealed gunshot residue on the sweatshirt found in defendant's room, and DNA matching defendant's on the sweatshirt, gun, and baggie.

Police confirmed defendant's girlfriend had rented the Taurus in February 2014 and possessed it until defendant's arrest on May 10.

The district attorney charged defendant with (1) premediated attempted murder (Pen. Code, §§ 187, subd. (a), 189, 664); (2) assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)); (3) possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)); (4) possession/purchase of cocaine base for sale (Health & Saf. Code, § 11351.5); and (5) giving false information to a peace officer (Pen. Code, § 148.9, subd. (a)). The district attorney also alleged gang, firearm, and prison prior enhancements.

B. *The Uncharged Murder*

Three days before defendant's attempted murder of Traylor, West Coast Crip member Gregory Benton was shot and killed in a "known West Coast Crip hangout." A detective opined a rival gang member would know to search this area if "hunting" for potential targets.

The parties stipulated that Benton's cousin, who was present during the murder, would have testified that at about 10:00 p.m. on April 12, 2014, she and Benton drove

back to a gathering at her family's house after leaving to buy cigarettes. As they walked toward the house, a car pulled up next to them and two unidentified black males got out. One of them asked, "How's that Brim life?" The man who asked the question then started shooting at Benton and the cousin. The cousin ran for cover, and Benton was killed.

A crime scene specialist recovered 19 shell casings at the murder scene and determined they were fired from two guns. Eleven of the casings came from one gun and bore the same headstamp ("MFS 9x19"). The remaining casings came from the other gun and bore a variety of headstamps: five were stamped "WIN 9mm LUGER"; two were stamped "WIN NT 9mm LUGER"; and one was stamped "R.P. 9mm LUGER." A firearms examiner determined that the gun that fired the cartridges bearing a mixture of headstamps during the April 12 murder was the same gun that fired the cartridges bearing a mixture of headstamps during the April 15 attempted murder. He also determined the casings with a variety of headstamps were likely "reloads"—remanufactured cartridges that use recycled shell casings and are sold in mixtures. He noted the "WIN NT 9mm LUGER" headstamp is "not real common." The firearms examiner also noted that in the majority of cases, shell casings recovered from crime scenes all bear the same headstamp.

DNA obtained from two of the shell casings recovered from the April 12 murder scene matched defendant's DNA. DNA from another shell casing matched that of another 59 Brim member, Lamont Holman. Defendant and Holman both told the police they did not know each other. However, when police later placed the men in the same holding cell, their recorded conversations revealed otherwise. Defendant told Holman, "Hey, homie, that shit on April 12th, my DNA just came back on two of those shell

casings." Holman responded, "No doubt we fucked up, homie." Both men made numerous references to Bloods, 59 Brim, and Tiny Hit Squad. Defendant also admitted to Holman, "I sell dope."

Cell phone data also linked defendant and Holman. Police learned that defendant had two cell phones, but they recovered only one. Call logs for the unrecovered phone showed that defendant called Holman on the afternoon of April 12. The recovered phone was activated on May 4, 2014. Call logs for that phone showed that one of the first calls defendant made was to Holman. And on May 9, defendant sent photographs to Holman via text message, including the one described above in which defendant is wearing attire associated with 59 Brim. In one photograph defendant is making a gang hand gesture signifying "Crip Killer."

C. Motion to Admit Evidence of the Uncharged Murder

Before trial, the prosecutor moved in limine for permission to introduce evidence of defendant's participation in the April 12 murder. The prosecutor argued the uncharged murder was relevant to prove defendant's motive, intent, and identity in the charged offense, as well as to show a common plan or scheme in killing rival gang members.

Defense counsel acknowledged the evidence was probative, but argued its probative value was outweighed by the risk that "the jury would have an emotionally . . . profound reaction to [the] news" that someone had died in the April 12 shooting, whereas Traylor suffered only a gunshot wound to his foot.

The prosecutor countered that there was no concern "with regards to the inflammatory nature of a murder" because he was not "attempting to put forward a bunch

of bloody graphic murder photos as part of this evidence" The court acknowledged this was "an important," "significant point."

The court granted the prosecutor's motion with the following explanation:

"[I]t is within my discretion So I think on several counts the evidence has *significant probative value*. I don't think it's substantially outweighed by the probability of undue consumption of time. It's not going to take very much time to put on the evidence, particularly since the focus is going to be primarily on the forensic nexus and the automobile, not on the graphic details of the death of Mr. Benton. So I don't think there is a danger of undue consumption or misleading or confusing the jury. I think the jury instructions will be understandable to the jurors and they will understand the limited purpose for which they can consider that evidence. I don't think there is a probability of undue prejudice under [section] 352 in the legion of cases which has defined the undue prejudice within the meaning of [section] 352." (Italics added.)

The evidence discussed above regarding the April 12 murder was admitted at trial. After the close of evidence, the trial court instructed the jury that it could consider the evidence only for the limited purposes of determining defendant's identity, intent, motive, and use of a common plan or scheme in connection with the April 15 crimes. (See CALCRIM No. 375.) The court reiterated, "you may not consider this evidence for any other purpose." The court added, "And even if you conclude that he committed an uncharged offense, that's only one factor for you to consider along with all the rest of the evidence."

The prosecutor "reiterate[d]" during closing argument that the jury had been instructed to make only limited use of the evidence regarding the April 12 murder. However, he began and ended his closing by calling defendant "a killer" and argued that, but for Traylor running, there would have been "two dead bodies in the streets of San

Diego and not just Mr. Benton." Defense counsel did not object to any of these statements.

D. *Jury Verdict and Sentencing*

The jury convicted defendant on all counts and found true all the enhancement allegations (except for the prison prior, for which defendant waived jury trial and ultimately admitted). The trial court sentenced defendant to 50 years to life.

DISCUSSION

Defendant contends the trial court abused its discretion and violated his due process rights by admitting evidence regarding the April 12 murder. He argues "[t]here was nothing unusual and distinctive" about that crime to indicate the same person also committed the April 15 attempted murder. He further argues the evidence was unduly prejudicial in that the victim was *killed* during the April 12 offense. Finally, defendant argues the evidence was impermissibly cumulative of other evidence regarding intent and motive. We find no error.

Under section 1101, subdivision (a), "[e]vidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition" (*People v. Thomas* (2011) 52 Cal.4th 336, 354 (*Thomas*); see § 1101.)⁴ "Subdivision (b) of section

⁴ Section 1101 states: "(a) 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. [¶] (b) Nothing in this section prohibits the admission of

1101 clarifies, however, that this 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." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, footnote omitted (*Ewoldt*)). Thus, for example, "evidence 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." (*Thomas*, at p. 354.)

"To be admissible, there must be some degree of similarity between the charged crime and the other crime, but the degree of similarity depends on the purpose for which the evidence was presented." (*People v. Jones* (2011) 51 Cal.4th 346, 371.) "The least degree of similarity is required to prove intent or mental state. A higher degree is required to prove common plan" (*Thomas, supra*, 52 Cal.4th at p. 355; see *Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ewoldt*, at p. 403.) That said, "[t]he

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. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

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." (*People v. Scott* (2011) 52 Cal.4th 452, 473.)

" "There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." " (*Thomas, supra*, 52 Cal.4th at p. 354; see § 352.) " "We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under . . . sections 1101 and 352." [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668, fn. omitted.)

The parties agree this case was primarily "a 'who done it?' " and that "[t]he ultimate issue at trial was not whether the shooter intended to kill Traylor, but whether [defendant] was the shooter." Therefore, we focus primarily on admission of evidence regarding the April 12 murder to establish the identity of the perpetrator of the April 15 attempted murder, which requires the highest degree of similarity between the uncharged conduct and the charged offense. (*Thomas, supra*, 52 Cal.4th at p. 355; *Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) We find no abuse of discretion in the trial court's admission of the April 12 murder evidence for this purpose because it shows there was sufficient similarity between the crimes to support the inference that both were perpetrated by the same person.

First, analysis of ballistic evidence established the highly probative fact that one of the two guns used on April 12 was also used on April 15. (See, e.g., *People v. Leon* (2015) 61 Cal.4th 569, 599 ["The probative value of these crimes was high because they showed defendant committed the charged crimes according to the same plan and *using the same weapon.*"], italics added.) Further, shell casings recovered from both scenes revealed a similar mixture of reloaded ammunition, which the firearms examiner explained occurs less frequently than recovery of single-composition ammunition. The firearms examiner also explained that casings recovered at each of the crime scenes bore the "not real common" headstamp of "WIN NT 9mm LUGER." The fact that the handgun recovered from defendant's room, although not used in either the April 12 or April 15 crimes, was similarly loaded with a mixture of ammunition—including one cartridge with the same "WIN NT 9mm LUGER" headstamp—linked defendant (to a degree) to the gun used in the April 12 and April 15 crimes.

Second, DNA evidence compellingly linked defendant to the handgun common to both crimes. DNA matching his was discovered on two of the shell casings recovered at the April 12 crime scene. This evidence was critical—without it, jurors would only have learned that the same weapon was used in both crimes; they would have learned little about the identity of the perpetrator. Indeed, the DNA evidence showed that the odds of the DNA found on one of the casings belonging to a random contributor other than defendant were at least one in 14 quintillion.

Third, the April 12 and April 15 crimes were perpetrated similarly. On both occasions, the assailant(s): (1) drove a car; (2) entered territory known to be frequented

by rival gang members; (3) exited the car; (4) approached a small group of victims; (5) referred to 59 Brim or its rival, the Crips; (6) fired multiple shots from a handgun; and (7) fled by car. Coupled with the forensic evidence just discussed, this evidence would allow a jury reasonably to infer that the same person who committed the April 12 murder also committed the April 15 attempted murder. Thus, as the trial court concluded, "the evidence has significant probative value."

We are not persuaded by defendant's argument that the evidence was unduly prejudicial. First, although someone was *killed* during the uncharged April 12 crime, there was nothing about the way it was perpetrated vis-à-vis the April 15 attempted murder that would inflame jurors' passions. Indeed, the two crimes were committed in substantially the same way and it is only the *outcomes* that differed. Moreover, as the prosecutor argued—and the trial court found persuasive—the jury was not shown "a bunch of bloody graphic murder photos." Instead, the emphasis was on the "forensic nexus" and the actions leading up to the shooting. There was nothing particularly inflammatory about that evidence.⁵

Second, we are unpersuaded by defendant's argument that he was prejudiced because the evidence of the April 12 murder "invited the prosecutor to characterize

⁵ Defendant advances a new, related prejudice argument on appeal: that the trial court could have sanitized admission of the April 12 evidence by omitting the fact "that the gun was used to actually *kill* someone." Of course, an appellant generally forfeits an argument raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) And, in any event, for the reasons just explained, there was nothing particularly prejudicial about the evidence of the April 12 murder as compared to the April 15 attempted murder.

[defendant] as a killer to the jury." Preliminarily, although the prosecutor called defendant a killer during closing argument, defense counsel did not object or seek a limiting instruction. Moreover, the trial court properly instructed the jury regarding the limited use to which it could put the April 12 evidence. Further, even the prosecutor—despite his questionable references to defendant as a killer—reminded jurors to follow the instruction regarding their limited use of the April 12 evidence. Finally, as a matter of context, the jury saw photographs that had been stored on defendant's phone in which he purports to be a "Crip Killer" and a member of the Tiny Hit Squad. We therefore conclude defendant was not unduly prejudiced by admission of the April 12 evidence to establish his identity as the perpetrator of the April 15 attempted murder.

Defendant also argues evidence regarding the April 12 murder was unduly cumulative of other evidence showing defendant's intent and gang-related motive in committing the April 15 attempted murder. However, because the evidence was properly admitted to establish identity—which the parties agree was the primary issue at trial—we are not persuaded the evidence was unduly cumulative.

Finally, we reject defendant's due process challenge. Defendant acknowledges that a trial court's discretion to exclude propensity evidence under section 352 saves statutes akin to section 1101 from facial due process violations (see, e.g., *People v. Falsetta* (1999) 21 Cal.4th 903, 917), but he contends "the trial court did not properly apply the . . . section 352 safeguard." As already explained, the trial court properly applied section 352 and did not abuse its discretion in admitting evidence regarding the April 12 murder.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.