

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO DEPINA,

Defendant and Appellant.

F062008

(Super. Ct. No. BF132790A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

On May 14, 2010, a house on San Emidio Street in Bakersfield was burglarized. On May 17, 2010, a house a quarter of a mile away on Sunset Avenue in Bakersfield was burglarized. On May 29, 2010, an officer arrested Alfredo Depina and told him that his

fingerprints were found on items inside the Sunset house. Depina admitted that he went into the house but insisted that he was mostly a lookout for Damon Phillips, the major player. On June 30, 2010, a detective falsely told Depina that Phillips gave him up as a participant in the San Emidio burglary. Depina admitted that he went inside the house but insisted that he just rode the getaway bicycle and that Phillips was the only one who took anything out of the house.¹ An information charged Depina with the San Emidio burglary. A jury found him guilty as charged. He raises six challenges to the judgment. We affirm.

BACKGROUND

On August 13, 2010, an information charged Depina with residential burglary. (Pen. Code, §§ 459, 460, subd. (a).)² On January 27, 2011, a jury found him guilty as charged. On February 28, 2011, the court imposed the four-year midterm concurrent to his sentence in another case.

DISCUSSION

1. Multiple Prosecutions

Depina argues that the court erred by denying his motion to dismiss on the ground of multiple prosecutions. The Attorney General argues the contrary. We agree with the Attorney General.

The crux of Depina's argument, both at trial and on appeal, is that he was in custody for two other burglaries (BF 132420A and BF 132376A) and a suspect in all three on the date of his arrest for the San Emidio burglary (July 1, 2010), that he was sentenced on both other burglaries before the date of the filing of the information for the San Emidio burglary (August 13, 2010), and that all three burglaries occurred within days of each other, displayed a similar pattern, and arose from the same course of conduct.

¹ Additional facts, as relevant, are in the discussion (*post*).

² Later statutory references are to the Penal Code except where otherwise noted.

At the hearing on the motion, the prosecutor noted that a preliminary hearing must occur before the filing of an information and that defense motions for continuances were responsible for additional delay. Elaborating, the prosecutor pointed out that “even if [Depina] had pled to other crimes that were similar in the – in the same neighborhood, the same type of crime,” the police “can’t just arrest somebody because you suspect him of committing the other crime. You have to have probable cause. [¶] When the officer developed that, he made the arrest, he requested the complaint, the People filed the complaint, and the case ran its course.” His attorney replied, “He was not given the chance to run them all currently [sic]” and, arguing “fundamental unfairness,” asked for a dismissal. The court observed, “It appears he did a number of burglaries. The cops liked him for the burglaries. They’re all very similar to each other.” Commenting that “the law allows the D.A. to do what he’s doing,” the court opined, “Separate cases, separate times, separate dates,” and denied the motion.

By statute, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.” (§ 654, subd. (a).) The statute “addresses both multiple punishment and multiple prosecution. The separate concerns have different purposes and different rules of prohibition.” (*People v. Valli* (2010) 187 Cal.App.4th 786, 794 (*Valli*).

“The purpose of the protection against multiple punishment is to insure that the defendant’s punishment will be commensurate with his criminal liability.’ (*Neal v. State of California* (1960) 55 Cal.2d 11, 20 (*Neal*)). Thus, ‘[a] defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.’ (*Ibid.*) [¶] ‘Section 654’s preclusion of multiple prosecution is separate and distinct from

its preclusion of multiple punishment. The rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double prosecution may be precluded even when double punishment is permissible.’ (*Neal, supra*, 55 Cal.2d at p. 21.)” (*Valli, supra*, 187 Cal.App.4th at pp. 794-795.)

Our Supreme Court “considered the multiple-prosecution prong of section 654” and “noted that, by expanding the scope of permissible joinder under section 954,[³] ‘the Legislature has demonstrated its purpose to require joinder of related offenses in a single prosecution.’ Such joinder not only prevented harassment, but also avoided ‘needless repetition of evidence and saves the state and the defendant time and money.’” (*Valli, supra*, 187 Cal.App.4th at p. 795, quoting *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 826 (*Kellett*), fn. omitted, cit. omitted.)

“Construing sections 654 and 954 in the context of the constitutional requirement of fundamental fairness,” our Supreme Court cautions, “‘If needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively.’” (*Valli, supra*, 187 Cal.App.4th at p. 795, quoting *Kellett, supra*, 63

³ Section 954 provides, “An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.”

Cal.2d at p. 827.) On the other hand, “the offenses must be transactionally related, and not just joinable, before the *Kellett* rule applies.” (*Valli, supra*, at p. 796.)

Whether the *Kellett* rule applies “must be determined on a case-by-case basis.” (*Valli, supra*, 187 Cal.App.4th at p. 797, citing *People v. Britt* (2004) 32 Cal.4th 944, 955.) “Appellate courts have adopted two different tests to determine a course of conduct for purposes of multiple prosecution.” (*Valli, supra*, at p. 797.) “One line of cases finds *Kellett* not applicable where the offenses are committed at separate times and locations.” (*Ibid.*, citing, e.g., *People v. Cuevas* (1996) 51 Cal.App.4th 620, 624.) The other line of cases views *Kellett* not as imposing “a simple ‘different time/different place’ limitation” but as imposing an “evidentiary test” requiring consideration of “the totality of the facts and whether separate proofs were required for the different offenses.” (*Valli, supra*, at pp. 798-799, citing, e.g., *People v. Hurtado* (1977) 67 Cal.App.3d 633, 636.) We review de novo the legal question of whether section 654 applies. (*Valli, supra*, at p. 794.)

Since Depina’s multiple-prosecution claim fails both tests, we need not decide which to apply. The San Emidio burglary occurred at a different time and at a different place than the Sunset burglary, so his claim fails the different time/different place test. With reference to the evidentiary test, “[s]imply using facts from the first prosecution in the subsequent prosecution” is not enough to pass the evidentiary test. (*Valli, supra*, 187 Cal.App.4th at p. 799.) Instead, “[d]ifferent evidentiary pictures are required.” (*Ibid.*) The evidentiary picture in *Valli* was “one of a shooting at night and the other of police pursuits in the following days.” (*Ibid.*) The evidentiary picture in the case before us is one of one burglary of one residence at one time and at one place with one victim and the other of a different burglary of a different residence at a different time and at a different place with a different victim. “Different witnesses would testify to the events” in *Valli* and here alike. (*Ibid.*) In *Valli*, “the evidence needed to prove murder – that defendant was the shooter – did not supply proof of evading.” (*Id.* at p. 800.) Here, the evidence needed to prove the San Emidio burglary did not supply proof of the Sunset burglary.

The decision as to appropriate charges is a matter of prosecutorial discretion, which is “basic to the framework of the California criminal justice system” and which, “though recognized by statute in California, is founded upon constitutional principles of separation of powers and due process of law.” (*Valli, supra*, 187 Cal.App.4th at p. 800, quoting *People v. Jerez* (1989) 208 Cal.App.3d 132, 137.) Here, together with the failure of Depina’s multiple-prosecution claim to pass either the different time/different place test or the evidentiary test, the record shows that delays intrinsic to the legal requirement of holding a preliminary hearing before filing an information, in the defense requests for continuances, and in the development of probable cause for an arrest contributed to the separate prosecutions of the two burglaries.

On that record, we decline to impose a rule requiring the prosecutor “to proceed against a defendant simultaneously for all known offenses, whether related to one another or not, in order to guard against the possibility of harassment.” (*People v. Douglas* (1966) 246 Cal.App.2d 594, 599.) To do so would “aggravate the very harassment it was designed to alleviate by impelling a prosecutor filing on one charge to throw the book at the defendant in order to prevent him from acquiring immunity against other potential charges and to protect the prosecutor from accusations of neglect of duty.” (*Ibid.*)

2. Admission of Statements

Depina argues that the court erred by denying his motion to suppress his statements to the police. The Attorney General argues the contrary. We agree with the Attorney General.

At the hearing on Depina’s motion to suppress, a detective testified that he told Depina at the jail he was investigating “a burglary he was involved in” near a school, a 19-inch television had been taken out in a cardboard box, and “he had been identified by a coconspirator.” Depina said that he knew nothing about that. The detective testified that at the time he thought the statement about the coconspirator was true, that later he

learned the coconspirator had not identified him, and that he “tricked” Depina into talking to him in the belief the coconspirator had identified him. After the detective then read, and Depina then waived, his *Miranda* rights, Depina said that “the other person kicked the front door open and entered,” that he followed the other person inside, but that he personally did not take anything because he was “pumping the other person” (giving him a ride on a bicycle).

After argument by counsel, the court found that the detective thought Depina’s coconspirator had identified him, that he got “an express waiver” after advising Depina of his *Miranda* rights, and that on the “little bit of a sticky issue” of whether his questions were “designed to elicit a response” Depina “waived [his] rights and agreed to speak with him.” On the basis of those findings, the court ruled Depina’s post-waiver statements admissible.

The crux of Depina’s argument is that his admission of involvement in the San Emidio burglary was involuntary because the detective softened him up before he waived his *Miranda*⁴ rights. “After [he] denied involvement,” he argues, “the detective tricked him by falsely telling him that his accomplice had given a statement, naming him as a participant.” Only then, he notes, did the detective read him his *Miranda* rights, after which he admitted his involvement in the crime.

The rule is well-settled, of course, “that a defendant in a criminal case is deprived of due process of law if his [or her] conviction is founded, in whole or in part, upon an involuntary confession.” (*Lego v. Twomey* (1972) 404 U.S. 477, 483.) The prosecution has the burden of establishing the voluntariness of a confession by a preponderance of the evidence. (*People v. Scott* (2011) 52 Cal.4th 452, 480.) Our duty on appeal is to accept the court’s findings of fact, if supported by substantial evidence, but to independently

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

review the ultimate legal question of whether, by the totality of the circumstances, the confession was voluntary. (*Ibid.*)

Deception by the police does not undermine the voluntariness of a defendant's statement to the police unless the deception is of a type reasonably likely to procure an untrue statement. (*People v. Williams* (2010) 49 Cal.4th 405, 443.) With commendable candor, Depina notes that he does not disagree with the Attorney General's observation that the courts approve the police practice of obtaining a confession by falsely informing a defendant of a coconspirator's identification of him or her. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739; *People v. Smith* (2007) 40 Cal.4th 483, 505-506.) Instead, he argues "that the ploys and deception used by the detective on [him] as he sat in a jail cell rendered the *Miranda* waiver involuntary" by the totality of the circumstances. Only 19 years old, and in jail for two burglaries, he emphasizes that the detective, who knew he faced charges and had counsel on both burglaries and was a suspect in a third, "started a conversation with [him] about the current burglary in an effort to soften him up" without notifying counsel in "the related burglaries" or informing him of his *Miranda* rights. The ploy was successful, he argues, as he "denied knowledge of the event," but the detective only "pushed harder" and falsely told him that his accomplice had identified him.

Depina relies primarily on *People v. Honeycutt* (1977) 20 Cal.3d 150, which acknowledged that *Miranda* "nowhere expressly disapproved the conversation-warning-interrogation sequence" but noted that "self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive and then offer the accused an opportunity to rescind that decision after a *Miranda* warning, than if they afford an opportunity to make the decision in the first instance with full knowledge of the *Miranda* rights." (*Id.* at p. 160.) *Honeycutt* does not stand for a general proposition that every prewarning conversation vitiates the voluntariness of a subsequent waiver. (*People v. Patterson* (1979) 88 Cal.App.3d 742, 751-752.) *Honeycutt* involved "a unique factual situation" as absent here as in *Patterson*. (*Id.* at p. 751.) Nothing in the record before us

suggests that the way in which the detective engaged Depina in prewarning conversation overbore his free will. (See *People v. Gurule* (2002) 28 Cal.4th 557, 602.)

3. *Comments During Voir Dire*

Depina argues that the court's comments during voir dire impermissibly diluted the prosecution's burden of proof beyond a reasonable doubt. The Attorney General argues the contrary. We agree with the Attorney General.

Depina challenges two sets of comments. The first was a brief soliloquy on reasonable doubt. "Now, you probably all heard the phrase beyond a reasonable doubt. Do you all understand that that does not mean proof beyond all possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. [¶] If the prosecution had to remove all possible doubt from your mind, there would never be a verdict of guilty because you could always come up with some possible or imaginary doubt. So the standard is beyond a reasonable doubt. [¶] Does everybody understand that? [¶] Does anybody have a problem with that? [¶] No hands. All right."

The second set of comments Depina challenges was a later dialogue with a prospective juror. "It may appear that one or more of the parties, attorneys, or witnesses come from a particular national, racial, or religious group or may have a lifestyle different from your own," the court began. "Would this in any way affect your judgment or the weight and credibility you would give that testimony? Anybody? [¶] Let me ask it this way. It's not very politically correct, but I'll ask it anyway. [¶] Does anybody have a problem with young Hispanic males? No? All right. [¶] Let's see. [Prospective juror "C"], how you doing? [¶] A. Good. [¶] Q. Good. [¶] ["C"], do you agree with me that it would be unfair to prejudge someone's testimony based on what they do for a living, their occupation, or what color their skin is or what their religion would be?"

After "C" replied, "No," the court immediately inquired, "Do you think that's okay? [¶] You do? [¶] ["C"], what's the matter with you? [¶] A. Nothing. [¶] Q. You

think it's okay to judge somebody based on the color of their skin? [¶] A. Yeah. My – I have a couple of family members that are – ” [¶] [“C”], listen to me. Do you think it would be okay to judge somebody based on what they do for a living or the color of their skin or what religion they are? Do you think you can judge somebody based on that? [¶] A. No, you can't. [¶] Q. Of course, you can't, [“C”]. [¶] Are you okay, buddy? [¶] A. Yeah. [¶] Q. All right. Anybody agree with [“C”] that you should judge somebody based on their skin color? [¶] I don't think we were communicating there. [“C”] understands what I'm saying now. [¶] Right, [“C”]? Okay, buddy. [¶] Everybody good on that? [¶] We just had Martin Luther King's birthday. You remember what he said: Judge somebody by the content of their character, not the color of their skin.”

Out of the presence of the jury, Depina's attorney requested a new venire and a new trial on the ground that the court's comments focused on the content of his character and if he were to be convicted “it's going to be because of the content of his character as the People present his other felonious activity.” The prosecutor opposed the motion on the ground that the court's comments were “to correct a misunderstanding that seemed to have occurred” without “in any way” indicating that the burden of proof was less than reasonable doubt. Noting the use of “a famous quote” as the origin of the court's use of the word “character” rather than “in the eyes of the law and codified as such,” the court denied the motion.

Shortly after voir dire resumed, Depina's attorney engaged in a brief dialogue about character. “And Martin Luther King, great American. There was a reference to Martin Luther King. [¶] Do you agree, [prospective juror “B”], this isn't a character contest? You agree? [¶] A. Right. [¶] Q. Good people, bad people, all kinds of people sit next to me all day long, all year long, don't they? [¶] A. Yeah. [¶] Q. And sometimes those people who might not be, for example, [“B”], your cup of tea, those people are entitled to a fair shake on what is it that my colleague and friend, [the prosecutor], is accusing them of, right? [¶] A. Right. [¶] Now, you heard Judge Brownlee read you the

charges, residential burglary case. He's not charged – this fellow right here, Mr. Depina, he's not charged with being a bad person. [¶] A. Right. [¶] Q. He's also not charged with being a great person. [¶] Do you agree, ["B"] that his character in terms of what he's accused of has nothing to do with what he's accused of? [¶] Do you agree? [¶] A. Yes. [¶] Okay. [¶] ["C"], do you agree? [¶] A. Yes."

Noting that the court did not instruct with CALCRIM No. 103 ("Reasonable Doubt") before the presentation of evidence, though acknowledging that the court did instruct with CALCRIM No. 220 ("Reasonable Doubt") before deliberations, Depina argues that, with character evidence and evidence of uncharged crimes playing a central role in his trial, the court's comments during voir dire amounted to instruction "only that reasonable doubt was not the same as imaginary doubt" and that jurors should "judge a man by the conduct of his character."

At issue in *People v. Avila* (2009) 46 Cal.4th 680 was an analogous defense argument "that during voir dire the trial court improperly defined mitigating evidence as 'good things' about defendant, forcing defendant to prove "'good things' in order to save his life,' and making it 'impossible for the jury to apply the law and the facts' because it 'was completely misinformed regarding what constituted mitigation.'" (*Id.* at p. 715.) Our Supreme Court rejected that argument with the observations that the trial court was "'conducting voir dire, not instructing the jury,'" that "'its comments 'were not intended to be, and were not, a substitute for full instructions at the end of trial,'" and that its instructions before deliberations made the jury "fully aware" of the law. (*Ibid.*) The brief dialogue about character between Depina's attorney and prospective jurors after the court's comments during voir dire surely clarified the misunderstanding, if any, in the minds of the jurors about the meaning of character. He raises no challenge to the adequacy of the reasonable doubt instruction the court gave before deliberations. (CALCRIM No. 220.) "We presume that jurors understand and follow the court's

instructions.” (*People v. Gray* (2005) 37 Cal.4th 168, 231.) His argument is without merit.

4. *Witness’s Courtroom Observation*

Depina argues that the court erred by improper denial of his motion to strike a witness’s testimony about observing him in court and by improper admonishment of the jury afterward. The Attorney General argues the contrary. We agree with the Attorney General.

The issue here arose after a neighbor near the San Emidio burglary testified that she saw a young African-American male and a young Hispanic male in the side yard of the house that was burglarized and that later she saw both youths go by on their bicycles, one with a box on top of the handlebars. Asked if she had seen either youth again, she testified, “Just once when we were briefed in the courtroom and asked to come back, but other than that was the only time I’d ever seen him.” Depina’s attorney objected. Out of the presence of the jury, the neighbor testified that when she came to court on a previous date under subpoena she recognized Depina from having seen him at the house that was burglarized and from having talked with him after he and the other youth came up to her that day.

Depina’s attorney moved to strike, and to admonish the jury not to consider, the neighbor’s entire testimony and, in the alternative, for a mistrial on the grounds of late discovery and suggestive identification. The prosecutor opposed the motion, noting that the neighbor did not disclose the information to law enforcement or his office and that he asked the question simply so he could argue to the jury why he did not ask her to identify Depina in court. Asked by the court if in the police reports the neighbor “never made a physical ID of the defendant,” both the prosecutor and Depina’s attorney replied in the affirmative.

Without assigning fault, the court characterized the problem as “late discovery, to put it mildly,” allowed the neighbor’s testimony about her observations at the scene to stand, and ordered her testimony about her in-court identification stricken. Immediately afterward, the court admonished the jury, “Earlier in [the neighbor]’s testimony she had made reference to the fact that she had been to court on a previous occasion and had saw or seen, in any event, Depina was in court with [his attorney]. All right? [¶] Any time there is a court hearing, there’s going to be a plethora of different court hearings. A defendant is required in a felony case to show up with his attorney. [¶] So the fact she saw him in court on a previous occasion means nothing other than the fact that he was in court with [his attorney]. [¶] Don’t read anything into the fact that the defendant was in court with his lawyer. Meaning that he had committed this crime. [¶] Do you understand? [¶] THE JURY: Yes.”

Quoting *Manson v. Brathwaite* (1977) 432 U.S. 98 (*Brathwaite*), Depina argues that “a defendant is denied due process when his conviction stems from an identification procedure that was so impermissibly suggestive as to give rise to ‘a very substantial likelihood of irreparable misidentification’ under the totality of the circumstances.” (*Id.* at p. 116.) He contends that the court’s denial of his motion to strike and the wording of the court’s admonishment of the jury afterward constitute federal constitutional error under *Brathwaite*. The record refutes his claim.

Shortly before the burglary, Depina and the other youth approached the neighbor and asked “if a boy named Bradley lived there.” Since she “barely knew the neighbors,” she “said no.” She saw Depina and the other youth rode their bicycles a short distance. Then they “just kind of stayed there for a few minutes.” She went inside her house, from where she saw Depina and the other youth “back in front” of the San Emidio house. She went outside again and saw Depina and the other youth “fiddling” around in the “side yard” of the San Emidio where “a bunch of boxes” were kept. She “thought that it was

really odd.” Later, she saw Depina and the other youth ride by on their bicycles, one of which had a box on top of the handlebars.

Brathwaite concluded that “reliability is the linchpin in determining the admissibility of identification testimony.” Among the factors the United States Supreme Court enumerates for consideration by the reviewing court are “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.” (*Brathwaite, supra*, 432 U.S. at p. 114.)

The neighbor not only talked with Depina outside her house but also saw him several times, at and near the scene of the burglary. So she had an ample independent foundation to identify him. On that record, his claim of ““a very substantial likelihood of irreparable misidentification”” from her courtroom observation of him and the court’s ensuing admonition to the jury is without merit. (*Brathwaite, supra*, 432 U.S. at p. 116; cf. *People v. Arias* (1996) 13 Cal.4th 92, 168.)

5. Prior Crimes

Depina argues that the court erred by improperly admitting and instructing on evidence of his prior crimes. The Attorney General argues the contrary. We agree with the Attorney General.

Before trial, the prosecutor filed a motion in limine seeking to admit two burglary priors on the issues of common scheme or plan, identity, and intent. One was the Sunset burglary, which occurred on May 17, 2010, a quarter of a mile away from the San Emidio burglary. The other was the burglary of a house on Oleander Avenue, which occurred on May 19, 2010. Depina, who pled no contest to both, filed an opposition. After hearing

argument, the court granted the motion. At trial, the prosecutor put on evidence about the Sunset burglary but none at all about the Oleander burglary.

Depina argues that his no contest pleas to the priors were adequate not only to show his intent to commit those crimes but also to serve as a basis for inferring his intent to commit the charged crime, so “nothing else was necessary.” On the premise that “the fact of the offense was not in dispute,” he argues that the admission of his priors on the issue of common scheme or plan was an abuse of discretion. Additionally, he argues that the court “never considered whether or not the pattern and characteristics of the crimes were so unusual and distinctive as to be like a signature” so the admission of his priors on the issue of identity was error.

In *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), our Supreme Court summarized the guidelines for the admissibility of the evidence Depina challenges. “In determining whether evidence of uncharged misconduct is relevant to demonstrate a common design or plan, it is useful to distinguish the nature and degree of similarity (between uncharged misconduct and the charged offense) required in order to establish a common design or plan, from the degree of similarity necessary to prove intent or identity.” (*Id.* at p. 402, fn. omitted.) “The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*Ibid.*) “A greater degree of similarity is required in order to prove the existence of a common design or plan.” (*Ibid.*) “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity.” (*Id.* at p. 403.)

Here, in ruling the priors admissible, the court carefully noted a number of similarities between the charged burglary and the priors. Among those were temporal proximity to one another (with the May 14th charged burglary preceding the two priors by three and five days, respectively). All three were geographically close to one another (within half a mile). The same accomplice, Damon Phillips, participated in all three. All three were of single-family residences from which similar property was taken. Depina’s

no contest pleas show his intent to burglarize both the Sunset house on May 17th and the Oleander house on May 19th, the court noted, so a logical inference is that “he had the same intent to burglarize” the San Emidio house on May 14th. In sum, the court found that the probative value of the evidence at issue substantially outweighed any prejudice.

Depina’s argument to the contrary entirely overlooks the key fact that his accomplice in the priors was his accomplice in the charged crime as well. The deferential abuse of discretion standard applies to appellate review of the court’s order admitting his priors. (*People v. Hoyos* (2007) 41 Cal.4th 872, 898; *Ewoldt, supra*, 7 Cal.4th at p. 405.) The same two young males, within just a few days, took similar property in burglaries of similar residences in a similar manner in the same neighborhood. That evidence, as the court ruled, was relevant and more probative than prejudicial on the issues of common scheme or plan, identity, and intent. (Evid. Code, §§ 352, 1101; see *Ewoldt, supra*, at pp. 393-407.) As the premise implicit in his due process argument is that the court’s ruling was an abuse of discretion, his constitutional argument is equally without merit. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

Finally, Depina argues that CALCRIM No. 375 (“Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.”) denied him due process by permitting the jury to infer his guilt of the charged crime from his commission of another. CALCRIM No. 375 cautioned the jury, “If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of first degree burglary. The People must still prove the charge beyond a reasonable doubt.” Jurors are presumed to be intelligent people capable of understanding instructions and applying them to the facts of the case. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) Nothing in the record before us persuades us to set aside that presumption.

6. Motion for a New Trial

Depina argues that the court erred by denying his motion for a new trial. The Attorney General argues the contrary. Depina acknowledges that his motion raised the same issues – multiple prosecutions, the court’s comments to the jury during voir dire, the neighbor’s testimony about observing him in court and the court’s admonishment of the jury on that topic, and the court’s admission of evidence of his burglary prior and the court’s instruction of the jury on that topic – that he raises in separate arguments here. (See *ante*, parts 1, 3-5.) Since we have rejected each of those arguments, his argument that the court erred in denying his motion for a new trial is likewise without merit.

DISPOSITION

The judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.