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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME VIDAL AGUIRRE,

Defendant and Appellant.

F062369

(Super. Ct. No. BF131156B)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Patricia L. Brisbois, 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, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, appellant Jaime Vidal Aguirre was convicted of two counts of attempted premeditated murder of a peace officer, two counts of assault upon a peace officer with a semiautomatic firearm, and one count each of unlawful possession of a firearm by a felon, unlawful possession of a firearm by a criminal street gang member, and possession of a stolen vehicle. The jury also found gang and firearm enhancement

allegations to be true. After appellant admitted prior conviction and prison term allegations, the trial court imposed an aggregate sentence of 125 years to life. On appeal, appellant contends: (1) the trial court erred in admitting evidence of a prior robbery/shooting on the issue of identity; and (2) the abstract of judgment must be amended because it incorrectly reflects the total amount of fees and assessments the court imposed pursuant to Penal Code section 1465.8 and Government Code section 70373. We agree with appellant's second contention, which respondent concedes, and order the abstract of judgment to be amended accordingly. In all other respects, the judgment is affirmed.

### **FACTS**

On February 20, 2010, appellant was one of three occupants in a stolen Honda, which led two Bakersfield police officers, Paul Yoon and Rudy Berumen, on a high speed car chase, after the officers attempted to conduct a traffic stop. During the car chase, a person or persons in the Honda fired multiple shots in the direction of the officers. Officer Yoon testified he was unable to see who fired the first shot, but he could see the rear passenger fired the second shot. Officer Berumen testified that the rear passenger appeared to be the one who was shooting at them throughout the car chase. Appellant later admitted to police that he was the rear seat passenger but denied shooting at the officers.

When the Honda eventually came to a stop, its three occupants—the driver, front seat passenger, and rear seat passenger (appellant)—got out of the car and ran in different directions. Officer Berumen fired three or four shots at the rear seat passenger, explaining “[t]his was the person that was shooting at us.” Appellant later admitted sustaining a bullet wound to his shoulder and dropping a black bag when Officer Berumen shot at him. Appellant claimed that the black bag, and the gun it contained, were given to him by the front seat passenger.

The black bag dropped by appellant contained three masks, a nine-millimeter semiautomatic Norinco handgun, a nine-millimeter cartridge casing, binoculars, and glass fragments.

A police scanner was found inside the Honda. Three nine-millimeter cartridge casings were also found inside the Honda: two were found on the rear passenger seat and one was found under the front passenger seat. Forensics testing of two of these casings established that they were fired from the Norinco handgun found in the black bag. The Norinco handgun also fired the casing found inside the black bag with the gun.

Appellant was later arrested and interviewed several times by police detectives. Bakersfield Police Detective James Moore, one of appellant's interviewers, testified that appellant gave varying accounts of the events that transpired on February 20, 2010, including claiming that there was a fourth person in the Honda. Detective Moore explained:

“There was a point in time in one of the interviews, the first interview where he said there were only three of them in the car. Then he assigned this new person in the back seat as this Wito person. At times he would describe this Wito person as a youngster, as a little kid who was crying and upset and very unsophisticated. [¶] As we continued on, he began to assign this Wito ... more involvement. He said he was one of the guys. Called him a little homie. He said he was a dope user, a little dooper. So it progressed from nobody to a crying youngster to this more sophisticated person.”

Appellant presented detectives with “two different scenarios” in describing the shooting. Detective Moore explained: “At one point he described another person in the back seat with him that shot. Then it changed to the front seat, the front passenger was the shooter. And he tended to gravitate toward the second scenario later on in the interview.”

Appellant also gave varying descriptions of how the front seat passenger allegedly shot at the officers. Detective Moore explained:

“His first description ... he confirmed that the shooter used his left hand and then showed us by making an action with his left hand extended turned around behind him and acted like he was shooting a gun. [¶] Later on he described that same front seat passenger turning around in the seat and kneeling and shooting so it changed.”

Ballistics expert Diana Matthias opined that the results of the forensics testing she performed on the Honda were inconsistent with the theory that the front seat passenger was the shooter. Matthias explained that she sprayed a chemical reagent in the interior of the Honda, and that it reacted in two areas, showing the presence of lead deposits or gunshot residue. Matthias explained that these reactions indicated “the firearm had to be in the vicinity of the back headrest of the car at the time that these shots were deposited in the car.” Matthias confirmed that she also sat in the front passenger seat and moved around to see if someone sitting there could have “manipulated a firearm in such a way as to fire those two rounds and still be consistent with the scientific analysis that [she] performed.” Matthias was unable to position herself in the front seat in a manner that would result in the bullet trajectory revealed by her analysis.

The prosecution’s gang expert, Bakersfield Police Officer Brent Stratton, opined that appellant and the other two suspects linked to the subject Honda—Anthony Perez and Juan Carlos Oregon—were active members of the Varrio Bakers criminal street gang. Officer Stratton further opined that the offenses in this case “would be done at the very least in association with, more likely for the benefit of the Varrio Bakers criminal street gang.” The expert explained:

“In your hypothetical ... there are three Varrio Bakers gang members together. They’re occupying a stolen vehicle, which in my opinion, is one of the primary activities of the Varrio Bakers criminal street gang. [¶] The presence of the masks would indicate to me the robbery to be involved, which is again one of the primary activities of the Varrio Bakers criminal street gang. The presence of the firearms, which are also significant in a gang context as being tools of the trade, if you will. The scanner, the binoculars also, in my opinion, being things to assist in facilitating when committing these crimes that would benefit themselves and the Varrio Bakers criminal street gang. [¶] And the shooting in an effort to get away

and extend, in my opinion, notoriety, lawlessness to help facilitate a getaway to continue a criminal lifestyle.”

### ***Evidence of Prior Robbery/Shooting***

The prosecution presented evidence that appellant was involved in a robbery/shooting on January 24, 2010, which was the subject of a trailing case. The victim of the prior incident, Christian Ramirez, identified appellant as one of three people who robbed Ramirez during what was supposed to have been a narcotics deal. One of the robbers put a gun to Ramirez’s head, while appellant pointed a gun at Ramirez’s friend, Jason. Ramirez testified that the robbers took “everything” including money and a cell phone. After taking these items, the robbers left Ramirez inside a closet.

Ramirez got out of the closet and started yelling and chasing the robbers because he thought their guns were fake. However, appellant and the other robber who had a gun turned around and started shooting at him. Ramirez testified that appellant’s gun was black and resembled the Norinco semiautomatic handgun found in the black bag in the current case. The other robber’s gun was chrome.

Matthias tested cartridge casings collected from the prior robbery/shooting and determined they were fired from the same Norinco firearm found in the current case.

Officer Stratton also relied on appellant’s involvement in the prior robbery/shooting as one of the factors supporting his opinion that appellant was an active gang member and that robbery and firearm possession were primary activities of the Varrio Bakers criminal street gang.

## **DISCUSSION**

### ***I. Admission of evidence of prior robbery/shooting***

Appellant contends that the admission of evidence of the prior robbery/shooting to prove his identity as the perpetrator of the current offenses was prejudicial error. We disagree.

At a hearing before trial, the court found that evidence of the prior robbery/shooting was admissible under Evidence Code section 1101 to prove appellant's identity as the person "that possessed this particular gun in this case." The court also found the evidence was admissible to support the gang expert's opinion that appellant was a gang member and to demonstrate a pattern of gang activity.<sup>1</sup> The court further "determined ... that the probative value is not substantially outweighed by the prejudicial [e]ffect in this particular case." The court later gave the jury a limiting instruction on the proper use of evidence of uncharged offenses.<sup>2</sup>

"Evidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or a poor character." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*)). But evidence of uncharged crimes is admissible to prove, among other things, "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (Evid. Code, § 1101, subd. (b).) "To be relevant to prove identity, the uncharged crime must be highly similar to the charged offenses, while a lesser degree of similarity is required to establish relevance to prove common design or plan, and the least similarity is required to establish relevance to prove intent. [Citations.]" (*Lenart, supra*, at p. 1123.) "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

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<sup>1</sup> Appellant does not specifically challenge or discuss the admission of the evidence for these purposes.

<sup>2</sup> The trial court instructed the jury pursuant to CALCRIM No. 375, in part, as follows: "The People presented evidence that the defendant committed other offenses that are not charged in this case. [¶] ... [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant was the person who committed the offenses alleged in this case. [¶] The defendant had a motive to commit the offenses alleged in this case. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

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.’ [Citations.]” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) “‘The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks.’ [Citations.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 370.)

“Finally, for uncharged crime evidence to be admissible, it must have substantial probative value that is not greatly outweighed by the potential that undue prejudice will result from admitting the evidence. [Citations.]” (*Lenart, supra*, 32 Cal.4th at p. 1123; Evid. Code, § 352.) We review the trial court’s admission of evidence under Evidence Code sections 1101 and 352 for an abuse of discretion. (*Lenart, supra*, at p. 1123; *Kipp, supra*, 18 Cal.4th at pp. 369, 371.)

While the circumstances of the instant offenses and the prior robbery/shooting differed in a number of ways, they shared a highly distinctive feature: they both involved the identical firearm. The evidence of the prior robbery/shooting was thus highly probative on the issues of identity in this case. Although appellant admitted to being the rear seat passenger of the Honda, he denied shooting at the police officers during the car chase or having direct possession of the Norinco nine-millimeter semiautomatic handgun found in the black diaper bag he admittedly discarded. It is undisputed that the same Norinco handgun was involved in both the current and prior uncharged offenses. Expert evidence conclusively established the Norinco handgun was the source of expended cartridge casings collected from both the current and prior shootings, and the victim of the prior offenses confirmed that the gun appellant wielded in the January 2010 incident resembled the Norinco handgun found in this case.

An additional common feature raising an inference of identity was that, in both the prior and current offenses, which occurred just under a month apart, appellant fired the gun once he started to be pursued. There was also evidence in both cases that appellant’s

possession of the Norinco handgun was connected to the planning or perpetration of a robbery. Thus, in the present case there was evidence that appellant possessed and had access to tools useful to committing a robbery; i.e., the police scanner and the three masks and binoculars in the bag where the Norinco handgun was found. While arguably “none of the foregoing ‘common marks,’ standing alone, is particularly distinctive[,] ...we think that, in the aggregate, the similarities become more meaningful, leading to the reasonable inference that defendant was the person who committed all [the] crimes. *Indeed, the ballistic evidence alone probably would have been sufficient to justify admission of the ‘other crimes’ evidence.*” (*People v. Medina* (1995) 11 Cal.4th 694, 748-749; italics added.) On this record, we cannot agree with appellant’s claim that the court’s ruling to admit the evidence of the prior robbery/shooting to prove identity “fell outside the bounds of reason.”

We similarly conclude the trial court did not err in admitting the evidence under Evidence Code section 352. As discussed, the probative value of the prior robbery/shooting was substantial because it tied appellant directly to possession of the Norinco handgun involved in the instant shooting, despite his denials that he either directly possessed the weapon or fired the weapon at the police officers. The evidence of the uncharged prior offenses was neither stronger nor more inflammatory than the evidence of the charged offenses. On this record, we cannot say the court abused its discretion in determining that the substantial probative value of the evidence was not outweighed by the risk of undue prejudice.

We also reject appellant’s related claim that the court’s ruling lessened the prosecutor’s burden to prove the shooter’s identity beyond a reasonable doubt. The jury was specifically instructed under CALCRIM No. 375,

“If you conclude that the defendant committed the uncharged offenses, 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 the

charged crimes in this case. The People must still prove each charge and allegation beyond a reasonable doubt.”

We see no grounds in the record for setting aside the usual presumption that the jury understood and followed the trial court’s instructions.

However, even assuming *arguendo* the evidence was erroneously admitted, the error was harmless. Regarding the issue of identity, there was overwhelming evidence appellant was the shooter. Appellant admitted that he was the rear seat passenger and both police officers testified that the rear seat passenger shot at them. Appellant asserts that “the fact the officers believed the shots were being fired by the rear seat passenger was not inconsistent with appellant’s description [in his police interview] of how the front seat passenger pushed the seat back to shoot out of the rear of the car during the pursuit while appellant ducked down out of the way.” Appellant’s assertion, which suggests that his identity as the shooter was simply a credibility dispute between appellant’s and the officers’ descriptions of the shooting, overlooks the fact that the prosecution also presented expert ballistics evidence refuting appellant’s claim and tending to show that a gun was fired by someone sitting in the rear seat of the Honda. Appellant’s argument also downplays the telling circumstance that he presented police with varying and conflicting accounts of the shooting, including initially claiming the shooter was a nonexistent fourth passenger who occupied the rear seat with appellant. The presence of the Norinco handgun, an expended casing from that gun, and glass fragments in the bag appellant admittedly discarded as he ran from the officers was further evidence of appellant’s identity as the person who shot at the police officers through the back window of the Honda, causing the glass to shatter. Therefore, assuming the court erred in admitting the evidence of the prior robbery/shooting on the identity issue, we find the error was harmless under either the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) or *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) tests.

***II. Amending the abstract of judgment***

Appellant contends the abstract of judgment inaccurately reflects the total amount of fees and assessments imposed pursuant to Penal Code section 1465.8 and Government Code section 70373. Respondent concedes the issue. We accept respondent's concession and direct the trial court to amend the abstract of judgment to reflect the total amount of court security fees imposed under Penal Code section 1465.8 was \$280, and the total Government Code section 70373 assessment was \$210.

**DISPOSITION**

The trial court shall amend the abstract of judgment to reflect the correct amount for the fees and assessments imposed pursuant to Penal Code section 1465.8 and Government Code section 70373, and provide an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Hill, P.J.

WE CONCUR:

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Wiseman, J.

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Poochigian, J.