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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRYANT ANDRUE REAGOR, JR., Defendant and Appellant.	F075751 (Super. Ct. No. BF165660A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Bryant Andrue Reagor, Jr. appeals from the judgment of his convictions for first degree robbery, carjacking, and false imprisonment against a transgender woman

arising from an incident in a Bakersfield motel room. He contends the trial court erred by admitting evidence of uncharged robbery and forcible sodomy that he committed against another transgender woman in a motel room two years prior to the charged incident in violation of Evidence Code sections 1101 and 1108.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Information

Reagor was charged by information with assault with the intent to commit the act of forcible oral copulation during the course of a burglary (Pen. Code, § 220, subd. (b)/288a, subd. (c)(2)(a); count 1); first degree robbery of an inhabited dwelling (Pen. Code, § 212.5; count 2); carjacking (Pen. Code, § 215, subd. (a); count 3); burglary (Pen. Code, § 460, subd. (a); count 4); attempted oral copulation (Pen. Code, § 664/288a, subd. (c)(2)(a);[2] count 5); false imprisonment (Pen. Code, § 236; count 6); and misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1); count 7). It was further alleged as to counts 1 through 6 that Reagor personally inflicted great bodily injury on the victim (Pen. Code, § 12022.7). It was also alleged Reagor had served three prior prison terms (Pen. Code, § 667.5).

Prosecution Evidence – Charged Acts

On September 2, 2016, Eva C., a transgender woman, was a guest at a Bakersfield motel. She spoke to a person named "Drue" or "Andrue" on a dating application called Badoo. The two exchanged phone numbers, and Eva told "Drue" the motel where she was staying. They planned to meet for a date at a restaurant next to the motel, but he cancelled. A couple of hours after he cancelled, Eva was in her motel room watching television when someone knocked on the door, and said "maintenance." Eva opened the door, and Reagor shoved the door in her face, hitting her lip and chipping her front tooth.

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[1] Undesignated statutory references are to the Evidence Code.

[2] Now Penal Code section 287, subd. (c)(2)(A).

He then choked Eva from behind. Eva lost consciousness, and when she regained consciousness, she was tied up "like a pig" with her hands tied to her legs behind her back. She was gagged and lying face down on the carpet, and Reagor was rummaging through her things.

When Reagor noticed she was awake, he asked her where her money and credit cards were. He kicked Eva, lifted her up so that she was on her knees, and said, "I'm going to make you mine. You're going to suck my dick." Reagor took Eva's gag off, and she told him she was transgender. Eva said Reagor shook his head in a way she took to mean "never mind" and continued looking through her things. Throughout the incident, Reagor repeatedly told Eva, "I'll hurt you" and "I'll kill you," and "If you tell me where the money is, I will not kill you."

Eva told Reagor she had money and credit cards in her car. She told him where her car keys were, and he told her "if you wouldn't have given me this, I would have killed you." After Reagor took Eva's keys, he picked up the bed frame and kicked her underneath it. Eva heard him leave the room and then wiggled out from underneath the bed. When she freed herself, Reagor was in the room and said "Oh you're trying to get out?" He put her back under the bed and then stacked the mini refrigerator and nightstand on top of the bed. Eva then heard him leave the room and heard her car start. She figured Reagor had left and was again able to wiggle out from underneath the bed. She used her chin and mouth to open the door. A man smoking a cigarette outside went to her and cut her free. Her car was gone. Reagor had taken her cell phone, keys, $120, and her Louis Vuitton wallet. The man who cut her free looked into her room and testified it was "a mess." The mattress was upside down and the cabinets were strewn about the room, and Eva's belongings were all over the floor as if someone had been going through them.

Officer Steven Ronfeldt testified he recovered Eva's vehicle. The vehicle was abandoned at an address at which Reagor had lived for about six months. When Reagor was arrested, he told police where to locate Eva's iPhone, and it was retrieved.

Prosecution Evidence – Uncharged Acts

Samantha C., a transgender woman, testified she was staying in a Bakersfield motel in May 2014. Samantha arranged to meet a man named "Andrue" through the dating application Badoo. They arranged to meet in her motel room to have sex. She had told him through the application that she was transgender. When Reagor went to Samantha's motel room, she performed oral sex on him, and he performed oral sex on her. Reagor then said he wanted to have anal sex. Samantha consented to the anal sex at first, but it started to hurt her and she told him to be gentle. He was not gentle; he continued and told her that she was going to be "his bitch." Samantha told Reagor to stop, and he did not. When he did stop, Samantha asked him to leave, and he "started acting weird."

When Reagor was about to leave, he hit Samantha, pulled her hair, and threw her on the ground. He got on top of her and tried to choke her, first using his hands and then his belt. While he was choking her he said, "You're going to die today. You won't be the first transsexual I kill." Reagor told Samantha if she did not allow him to tie her hands, he was going to put the television on her face. Samantha told Reagor to take anything he wanted. He then hit her in her left eye with his closed fist. She struggled to get him off of her and was able to break away. Reagor pulled a drawer out from the television stand and tried to throw it at her. Samantha locked herself in the bathroom and stayed there for about three hours. When she came out, the room looked "destroyed," the mattress was standing on end, and she was missing two cellphones, a purse, her Mexican passport, credit cards, her car keys, her house key, $450 cash, a Macbook laptop, a duffel bag, clothing, and makeup.

Defense Evidence

Reagor testified in his own defense. He testified that he had a Badoo profile with the name "Andrue Diggler." He met Eva on Badoo, and she identified herself as a transgender woman on her profile. They agreed to meet to have consensual sex. He did not cancel their date. He testified that when he had arrived at the motel, Eva told him her room number over the telephone. When he arrived at her room, he knocked on the door, and she answered. He said they had a consensual sexual encounter. He did not tell her "You're going to suck my dick" or make any attempt to force her to perform oral sex on him or perform any other sexual act. He testified he did not choke, hit, or bind her. He did not rifle through her things. He testified she gave him her phone and some money. He did not take her vehicle but took the bus home.

Reagor testified the entirety of his sexual encounter with Samantha in 2014 was consensual. He said after the sexual encounter, he looked around her room and decided he wanted her things and took them. He admitted he hit her, giving her two black eyes.

On cross examination, Reagor testified that during the 2016 incident, Samantha was also present, and he had a "threesome" with both Eva and Samantha.[3]

Verdict

Following trial, the jury returned a verdict of not guilty as to counts 1 and 5 and guilty as to counts 2, 3, and 6. The jury found the great bodily injury enhancements not true. The jury could not reach a verdict as to count 4, and a mistrial was declared as to that count. Reagor later pleaded no contest to count 7 in a bifurcated proceeding. Count 4 was dismissed on the condition his plea of no contest to count 7 remain in full force and effect. The allegations of prison priors were found true at a bifurcated court trial.

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[3] Both Eva and Samantha testified they had never met the other.

Sentencing

Reagor was sentenced to the upper term of nine years as to count 3. Punishment for counts 2 and 6 was stayed pursuant to Penal Code section 654. Two consecutive one-year terms were imposed for prior prison term enhancements pursuant to Penal Code section 667.5, subdivision (b). Reagor's total prison sentence was 11 years.

DISCUSSION

Reagor contends the trial court abused its discretion by admitting evidence of the uncharged conduct from 2014 because (1) the evidence of the forcible sodomy was not "probative" to prove the charged sex offenses and thus was inadmissible under section 1108, and (2) the evidence of the incident as a whole was not "probative" for the issues of "intent, knowledge, and modus operandi" and thus was inadmissible under section 1101, subdivision (b). We find no error.

Evidence of prior misconduct is generally inadmissible to prove conduct on another specified occasion or to prove a person's disposition to commit such an act. (§ 1101, subd. (a).) Section 1101, subdivision (b) is an exception to this general rule, providing that evidence of specific prior acts may be admitted, "not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or motive." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) In a sex offense case, section 1108, unlike section 1101, subdivision (b), permits admission of evidence of a defendant's commission of another sexual offense for the purpose of showing propensity to commit such crimes. (§ 1108, subd. (a).) Both charged and uncharged prior sexual offenses may be admitted under this provision. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918; *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160, 1164.) Evidence admitted under section 1101, subdivision (b) and/or section 1108 is also subject to analysis under section 352. (§§ 1101, 1108.) Section 352 provides that the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption

of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352.)

On appeal, we presume the trial court's evidentiary ruling was correct, and defendant bears the burden of demonstrating error. (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Trial courts have broad discretion in determining the admissibility of evidence and we review challenges to the admission of evidence for abuse of discretion. (*People v. Jackson* (2016) 1 Cal.5th 269, 320–321.) Under this standard, the court's ruling " ' "will not be disturbed, and reversal is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Reagor's first contention, that the 2014 uncharged forcible sodomy was not probative as to his propensity to commit the charged sexual offenses, is not well taken because he was acquitted of the charged sexual offenses. It cannot be said he improperly suffered a conviction based on wrongly admitted propensity evidence. Thus, whether the 2014 sexual conduct was admitted for the purpose of proving propensity is irrelevant. Any error in admitting the evidence of the uncharged sexual conduct in violation of section 1108 is clearly harmless. We turn now to the 2014 conduct as a whole and whether the evidence was admissible under section 1101, subdivision (b).

The jury was instructed that it may consider the evidence Reagor had committed the crimes of robbery and forcible sodomy on Samantha in 2014 for the purpose of deciding whether or not he: "was the person who committed the offenses alleged in this case" (identity); "acted with the intent to commit forcible oral copulation and/or robbery in this case"; "had a motive to commit the offenses alleged in this case"; or "had a plan or scheme to commit the offenses alleged in this case."[4] (CALCRIM No. 375.)

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[4] In his briefing, Reagor makes arguments with regard to whether the 2014 evidence was probative as to knowledge and modus operandi. As the jury was not

Admission of evidence of prior uncharged conduct for a nonpropensity purpose under section 1101 should be analyzed using the following factors: "(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315.)

Here, Reagor's not guilty plea put "in issue" all elements of the offense, including intent. (See *People v. Rowland* (1992) 4 Cal.4th 238, 260; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) Further, at trial, Reagor denied assaulting Eva or taking any of her things without her consent. This alternate account made his identity as the perpetrator and whether he committed the alleged criminal acts particularly "material." Whether Reagor had a motive or was acting pursuant to a common scheme or plan tends to prove whether he in fact committed the charged crimes. Reagor's argument that the evidence was inadmissible to show identity because he admitted he was in Eva's motel room is not well taken. The evidence was uncontroverted that *someone* had tied Eva; since Reagor denied criminal activity, identity was an issue in the case. Further, even though Eva identified Reagor as her assailant, the prosecution was entitled to bolster her in-court identification with additional evidence. (See *People v. Jones* (2013) 57 Cal.4th 899, 933 (*Jones*).)

The uncharged conduct tended to prove the facts it was offered to prove because of its similarity to the charged conduct. The greatest degree of similarity between uncharged misconduct and charged crimes is required to prove identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) The test for determining if the similarity is sufficient is whether the trial court abused its discretion "in concluding these crimes bore such common and distinctive marks that the person who committed *one* of them likely

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instructed it could consider the evidence with regard to those facts, we do not address these arguments.

committed *all* of them[.]" (*Jones, supra*, 57 Cal.4th at p. 931.) Distinctions may exist, but " 'the charged and uncharged crimes need not be mirror images of each other.' " (*Ibid*.)

The inference that the person who committed the uncharged offenses also committed the charged offenses cannot be solely supported by similarities so common that such similarities would be shared by other crimes committed by persons other than the defendant. (*People v. Haston* (1968) 69 Cal.2d 233, 244-250.) However, the inference "need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set 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." (*Id*. at p. 246, fn. omitted.)

Here, the unique *combination* of the similarities between these crimes set Reagor's crimes apart from "other crimes of the same general variety." The victim in both incidents was a transgender woman Reagor met using the dating application Badoo to meet for dating or a sexual encounter. Reagor assaulted both victims in a motel room in Bakersfield to effectuate takings of their valuables. He tied Eva up and threatened to tie Samantha up. He used motel room furniture to trap Eva under the bed and attempted to use a drawer from the motel room dresser to assault Samantha. There was a sexual component to each of the incidents, and with regard to forcible sexual conduct, he used similar phrasing with each woman; he told Eva he would make her "his," and he told Samantha he would make her "[his] bitch." He threatened to kill both women if they did not allow him to take their belongings, telling Samantha "you won't be the first

transsexual I kill." This comment supports an inference that Reagor has a specific vendetta against transgender women. Though perhaps many robbers, for example, may meet their victims on dating applications or target transgender victims, the combination of the similarities in this case tends to prove that the person who committed the 2014 crimes also committed the 2016 crimes.

Because we conclude there was sufficient similarity between the conduct to be probative as to identity, we reject Reagor's contention that the acts were too dissimilar to prove motive. As discussed, identity requires the greatest degree of similarity. We do not find the trial court abused its discretion by concluding the acts were sufficiently similar to be probative as to identity, intent, motive, or that Reagor operated pursuant to a common scheme or plan.[5]

Having determined the identity, intent, motive, and common scheme and plan were material issues and that the uncharged conduct was sufficiently similar and thus relevant to the charged offenses, we next must determine whether the probative value of the evidence outweighs any undue prejudice pursuant to section 352. "Prejudicial" in this context is not synonymous with "damaging." (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105.) " '[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the

[5] Reagor does not raise any issues with regard to whether the evidence was probative as to whether he acted pursuant to a common scheme or plan, so we do not address it in detail. Because we conclude the uncharged conduct was similar enough to be probative as to identity, it follows it was also similar enough as to be probative as to whether he committed the offense pursuant to a common scheme or plan.

jury will use it for an illegitimate purpose.' " (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Here, given the verdict, the jury clearly did not harbor any blanket prejudice toward Reagor; their emotions were not so inflamed they convicted him whether they thought the evidence supported the charges or not. The record demonstrates the jury carefully weighed the evidence as to each element of each count and fulfilled its duty in finding whether the People had proven each element of each charged crime beyond a reasonable doubt. This is evident in the jury's acquitting Reagor of some of the most serious charges and being unable to reach a verdict as to the burglary count. Reagor's only pointed argument with regard to prejudice, that the evidence on intent was "cumulative," does not alter our conclusion for the foregoing reasons.

We conclude the court did not abuse its discretion by admitting the evidence of Reagor's 2014 conduct.

DISPOSITION

The judgment is affirmed.

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SNAUFFER, J.

WE CONCUR:

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MEEHAN, Acting P.J.

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DE SANTOS, J.