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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMION LAMARR WHITNEY,

Defendant and Appellant.

G045762

(Super. Ct. No. 09SF1121)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, H. Warren Siegel, Judge. (Retired judge of the Orange County Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jamion Lamarr Whitney was tried and convicted of five counts arising out of two separate jewelry store heists. As to a November 20, 2009 incident at a Kevin Jewelers store, a jury convicted defendant of (1) grand theft (Pen. Code, § 487, subd. (a))<sup>1</sup> and (2) second degree commercial burglary (§§ 459, 460, subd. (b)). As to a November 30, 2009 incident at a Neiman Marcus store, defendant was convicted of (3) second degree commercial burglary, (4) grand theft, and (5) carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)). In a bifurcated proceeding, defendant admitted a prior prison term pursuant to section 667.5, subdivision (b). The court sentenced defendant to four years and four months in prison.

On appeal, defendant asserts prejudicial error occurred with regard to (1) the court's refusal to sever the counts relating to the two separate incidents, (2) admonitions by the court during defendant's opening statement pertaining to defendant's potential testimony, and (3) alleged prosecutorial misconduct during closing argument. Finding no error or prosecutorial misconduct, we affirm the judgment.

## FACTS

### *Kevin Jeweler Theft*

At approximately 5:30 p.m., on November 20, 2009, Ali Tofighi was working at Kevin Jewelers in the Shops at Mission Viejo. A "customer came in, she was asking for the biggest diamond I had, over 2 carat diamond. So I showed her the diamond. [¶] And I had [another] diamond in my hand. She was on the phone. And after like 30 seconds she grabbed the other diamond and she ran away." The combined retail value of the two rings taken by the woman was approximately \$100,000. Tofighi chased the woman and tackled her near the mall exit. Tofighi bumped his head on the

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<sup>1</sup>

All statutory references are to the Penal Code, unless cited otherwise.

wall, resulting in bleeding from his head and ear. The rings fell to the ground and were retrieved by a passerby who handed them to Tofighi. After mall security arrived, the woman ran out the front door of the mall. Tofighi identified Danna Campster as the perpetrator in a photographic lineup presented to him by police.

Although Tofighi asked the mall security guard to arrest Campster, the guard did not try to stop her because it was against his firm's policy to touch mall visitors. Instead, the guard followed Campster outside into the parking lot. Campster entered a "maroon Toyota Camry" with tinted windows. The driver was a black male, but the security guard could not see his face. On cross-examination, the guard conceded the driver "could have been a dark Latino." The car pulled away quickly. At trial, the guard remembered seeing the letters "NDR" on the license plate. Although the guard told a police officer after the incident that the car had white paper license plates (and did not mention the letters "NDR"), the guard did not recall his statements to police.

### *Neiman Marcus Theft*

At approximately 1:30 p.m., on November 30, 2009, Debbie Jereczek was working as a sales associate in the precious jewelry department at Neiman Marcus in the Fashion Island mall. A young woman, who appeared to be talking on a cell phone, asked to see a Cartier watch priced at \$53,000. The young woman was by herself in the store. After being presented with the watch, the young woman "turned around and ran out the door" in "a flash." Video evidence confirmed Jereczek's description of the event.

A Newport Beach police officer, after meeting with Neiman Marcus's loss prevention agent and reviewing video footage, "broadcasted a description of the vehicle depicted in the video to patrol units so they could begin looking for the vehicle and the suspects." A patrol officer pulled over a red Toyota Camry 15 minutes later. A black male was driving the vehicle. The vehicle had tinted windows and paper license plates,

both of which provided reason to pull over the vehicle.<sup>2</sup> After the patrol officer stopped the vehicle, his partner detained the driver (i.e., defendant), who confirmed there was a female in the vehicle. When ordered out of the vehicle, Campster sat up in the backseat. A pat down search revealed a seven-and-one-half inch folding knife with a three-inch blade in the possession of defendant. The knife could be opened and locked into place with a “flick of the wrist.” Photographs were admitted into evidence showing the vehicle in which defendant was arrested and the opened vehicle trunk, which contained a screwdriver and the vehicle’s license plates.

Meeting with the police after they had apprehended the suspects, Neiman Marcus employee Jereczek identified Danna Campster as the woman who had taken the Cartier watch. The police recovered a watch from Campster. Campster was given a plastic bag and a private holding cell so she could “retrieve” the property while a female employee stood nearby; the record does not state specifically from where Campster retrieved the watch. The watch recovered from Campster was the Cartier watch taken from the Neiman Marcus store.

### *Defense Case*

The defense did not call any witnesses to testify. Defendant exercised his constitutional right not to testify. Prior to trial, and against the advice of counsel, defendant sought to have Campster subpoenaed to testify in defendant’s case. The court

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<sup>2</sup> The police officer’s testimony was vague as to whether the red Camry was the vehicle described in the police broadcast and whether the red Camry was pulled over by the officer for this reason or merely because the car had paper license plates and tinted windows. The Neiman Marcus loss prevention agent testified that it was unclear what happened with Campster once she left the Neiman Marcus store. Defense counsel established that there was a white car on the video at the same time that Campster was leaving the store. Apparently, there was no footage of Campster actually getting into a particular vehicle.

denied defendant's motion for a continuance to subpoena Campster, who was incarcerated in state prison.

## DISCUSSION

### *Court's Refusal to Sever Counts*

Originally, two complaints were filed against defendant based on the two separate thefts at Kevin Jewelers and Neiman Marcus. The two cases were consolidated in May 2010. In June 2011, defendant moved to sever the Kevin Jewelers counts from the Neiman Marcus counts. The court denied defendant's motion to sever. Defendant contends on appeal that the court abused its discretion by denying his motion to sever because the evidence against him was much stronger with regard to the Neiman Marcus incident, in which he was arrested in the car with Campster immediately after the theft.

“[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law.” (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*)). Here, it is uncontested that the crimes alleged are of the same class and the statutory requirements for consolidation were satisfied. (See *People v. Vines* (2011) 51 Cal.4th 830, 855.)<sup>3</sup> A trial court abuses its

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<sup>3</sup> “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.” (§ 954.)

discretion by refusing to sever properly consolidated counts only when a strong showing of undue prejudice has been made by a defendant. (*People v. Soper* (2009) 45 Cal.4th 759, 773.)

Appellate courts consider several factors in deciding whether a trial court has exceeded the bounds of reason and thereby abused its discretion in denying a severance motion: “(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.” (*Alcala, supra*, 43 Cal.4th at pp. 1220-1221.)

“[I]f evidence underlying the offenses in question would be ‘cross-admissible’ in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court’s refusal to sever the charged offenses.” (*Alcala, supra*, 43 Cal.4th at p. 1221.) But one-way admissibility (rather than two-way cross-admissibility) may be sufficient to show the lack of prejudice. (*Ibid.*) “[E]ven the complete absence of cross-admissibility does not, by itself, demonstrate prejudice from a failure to order a requested severance.” (*Ibid.*)<sup>4</sup>

The question of cross-admissibility is addressed under the familiar rubric of Evidence Code section 1101. Despite its relevance, “evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion,” is inadmissible. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393,

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<sup>4</sup> “In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.” (§ 954.1.)

superseded on other grounds by Evid. Code, § 1108; see also Evid. Code, § 1101, subd. (a).) But “[n]othing . . . prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).)

Here, evidence of the Neiman Marcus incident would be admissible in a hypothetical separate trial for the Kevin Jewelers incident. The Neiman Marcus incident tends to show the identity of the getaway driver in the Kevin Jewelers incident and to show the driver in the Kevin Jewelers incident intended to abet a crime that was part of a common scheme with Campster to rob mall jewelry stores. In the Kevin Jewelers theft, a black man drove Campster away in a maroon (i.e., dark red) Toyota Camry with paper license plates and tinted windows. Following the Neiman Marcus theft, Campster and defendant were arrested in a red Camry with paper license plates and tinted windows. The thefts both occurred at shopping malls in Orange County within the course of two weeks. Both thefts featured Campster, apparently distracted by a cell phone conversation, requesting to see very expensive jewelry and running away with it once she was able to get her hands on it. (See *People v. Robinson* (1995) 31 Cal.App.4th 494, 503 [presence of same accomplice at prior uncharged arson and charged arson was distinctive mark tending to show defendant was present at charged arson].) This is a textbook case in which evidence of another very similar crime would be admissible to prove identity, intent, or common scheme. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 401-403.)

It is perhaps less clear that evidence pertaining to the Kevin Jewelers incident would be admissible in a hypothetical trial relating solely to the defendant’s part in the Neiman Marcus incident. But we need not resolve this dispute. Our consideration of the other relevant factors suggests this is not a case in which the court abused its discretion by denying defendant’s motion to sever. The two incidents at issue are very

similar and neither incident is particularly likely to inflame the jury more than the other. Although the Neiman Marcus case is stronger because defendant was caught red handed, the Kevin Jewelers case was also very strong with the sole exception of the identification of defendant as the getaway driver. As stated above, in an independent trial of the Kevin Jewelers case, evidence pertaining to the Neiman Marcus incident would be admissible to prove identity. And finally, capital punishment considerations are entirely irrelevant to the situation at hand. In sum, the substantial benefits of consolidation significantly outweighed any danger of undue prejudice to defendant. (See *People v. Soper, supra*, 45 Cal.4th at pp. 775, 780-783.)

#### *Alleged Griffin Error*

In his opening statement, defense counsel conceded Campster had committed “several snatch and grabs” and defendant “was the driver” on November 30, 2009. Defense counsel then provided an explanation for why defendant was in the vehicle with Campster following the Neiman Marcus theft — basically, he was romantically interested in Campster and agreed to her request to drive her to the mall in a borrowed car to do some shopping. The prosecutor objected and called for an offer of proof after defense counsel indicated Campster told defendant, “I am going to go in and do some Christmas shopping.” In front of the jury, the court stated, “Well, this is what counsel proposes to prove, ladies and gentleman. You are going to have to determine whether or not it is true. And if there is no testimony that supports the statements, then you can treat it accordingly. Go ahead, counsel.” Defense counsel continued to provide an explanation as to defendant’s alleged knowledge and state of mind when he was at the Fashion Island mall on November 30, 2009. The prosecutor again objected. The court asked whether Campster was going to be a witness. Defense counsel volunteered that defendant’s “beliefs are something I can get into if he is going to be a witness in this case.” The court asked if defendant was going to testify, and counsel responded, “At this

point that is the intent.” The court instructed counsel to proceed, and further admonished the jury: “And again, ladies and gentlemen, opening statements [are] only what counsel thinks the evidence is going to show. If it doesn’t turn out that way, that is something you can consider.” Defendant did not object to the court’s comments at the time of this exchange or ask that the issue be discussed out of hearing of the jury.

As previously noted, defendant did not testify. Defendant moved for a mistrial at the close of the evidence based on an argument that error had occurred during opening statement under *Griffin v. State of California* (1965) 380 U.S. 609 (*Griffin*). *Griffin* held the Fifth Amendment “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” (*Griffin*, at p. 615.) According to defendant, the prosecutor’s demand for an offer of proof and the court’s questioning forced defense counsel to highlight in front of the jury that defendant planned to testify. Once defendant opted not to testify, the court’s comments retroactively amounted to a *Griffin* error because they suggested defendant had the burden to testify and prove his mental state.<sup>5</sup>

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<sup>5</sup> The prosecutor bristled at the defense motion, referencing her commitment prior to trial to not put “anything on the record in terms of *Miranda* [*v. Arizona* (1966) 384 U.S. 436] statements of either defendant. [Defense counsel] was aware of that. He made the decision to talk about the statements that only come from his client. [¶] Now I have made the decision not to even approach that line in closing because it is such a difficult area. I am not going to speak about any of the errors that [defense counsel] committed.” The prosecutor’s statements implied that defense counsel was not honest about defendant’s intention to testify and that defense counsel should not have referenced in his opening statement alleged facts that he did not expect to have in evidence. “The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning.” (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) Counsel should not act as a proxy witness for a criminal defendant who has no intention of testifying by introducing facts that will not be in the record. But we assume for purposes of this appeal that defense counsel acted in good faith.

The court denied the motion, noting that nothing said during the opening statement exchange was inconsistent with standard principles of criminal law jurisprudence (e.g., statements of attorneys are not evidence, defendant has a right to testify or not testify). The court subsequently instructed the jury with CALCRIM No. 222<sup>6</sup> and CALCRIM No. 355,<sup>7</sup> standard jury instructions on the relevant points of law.

Even assuming defendant did not forfeit his contention of *Griffin* error by failing to object to the court's commentary at the time it was made, we find no error occurred. Neither the court nor the prosecutor made any comment with regard to defendant's right to remain silent at trial. It was legitimate for the prosecutor and the court to ascertain whether defense counsel had a good faith basis for stating the evidence would show Campster made specific statements to defendant that misled him into thinking it was an ordinary shopping trip to the mall. (Cf. *People v. Romero* (2007) 149 Cal.App.4th 29, 44 [approving of court's conditioning references to self-defense by defense counsel in opening statement to expectation that defendant would testify].) In response to questioning about Campster, defense counsel volunteered that defendant intended to testify. The court's admonitions to the jury accurately stated the law with regard to opening statements of counsel, and did not differentiate between the potential testimony of defendant, Campster, or any other witness. The *Griffin* "prohibition "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses."" ( *People v. Hughes* (2002) 27

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<sup>6</sup> "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence."

<sup>7</sup> "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations of let it influence your decision in any way."

Cal.4th 287, 393.) Because no *Griffin* error occurred, the court obviously did not abuse its discretion when it denied defendant's motion for mistrial. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094 [denial of mistrial motion reviewed for abuse of discretion].)

### *Alleged Prosecutorial Misconduct*

“A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.” [Citations.] Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial.” (*People v. Lopez* (2008) 42 Cal.4th 960, 965.)

“As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. McDowell* (2012) 54 Cal.4th 395, 436.)

Defendant points to a series of comments by the prosecutor during closing argument as instances of prosecutorial misconduct. First, defendant objected to the prosecutor describing the Kevin Jewelers getaway car as “red or maroon.” The security guard testified the car was maroon. The court overruled the objection. The prosecutor then downplayed the difference between red and maroon.

Second, summarizing the Neiman Marcus incident in closing argument, the prosecutor stated that Campster hid the watch “in a very personal spot.” Defendant objected that the prosecutor was stating facts not in evidence. The inference apparently drawn by the prosecutor was that Campster hid the watch in her undergarments or a body cavity (because she was provided a plastic bag and a private room in which to “retrieve” the watch). But the precise location of the watch was not in evidence.

Third, the prosecutor allegedly made improper comments on the burden of proof by stating, “On [the Kevin Jewelers] case, . . . defense is going to have to argue two things to you . . . . [¶] They have to argue that the driver didn’t know what Miss Campster was doing; and, even though that driver didn’t know, it still wasn’t me. Two arguments on that first date of violation. [¶] The argument on the second date of violation [at Neiman Marcus] has to be . . . ‘I didn’t know.’” According to defendant, by stating that the defense team “ha[s] to” make certain arguments, the prosecutor wrongly suggested defendant had a burden to prove his innocence. Defendant did not object to this statement.

Fourth, the prosecutor referred to a robbery count pertaining to the Kevin Jewelers incident that was dismissed prior to opening statement. The jury, which had heard about the robbery count during initial proceedings, was told before trial that the prosecutor had dismissed the count. The jury was also instructed by the court (along with other posttrial jury instructions) not to consider the robbery count. The prosecutor mentioned during her closing argument that the jury was not deciding whether a robbery occurred in this case, but simultaneously suggested the reason defendant had a knife was to protect property obtained during the crimes at issue. Defendant did not object to any of the allegedly wrongful mentions of robbery.

Fifth, in the prosecutor’s rebuttal and in reference to arguments by defense counsel that it was not proven that defendant’s knife was concealed or that defendant knew about Campster’s planned theft, the prosecutor stated, “[Defense counsel] is a good attorney, he has tried a lot of felonies, he makes good arguments. So, I have to respond . . . . [¶] Confusion by design. Talked about a lot of things — some relevant . . . to latch on to one thing and get sidetracked from what the real issues in this case are. That is carefully orchestrated, it is intentional. Good lawyers know what they are doing. He knows what he is doing. [¶] When you have the facts, you argue the facts; when you have the law, you argue the law; and when that fails, you talk about everything

else to see if one person gets distracted. That is just classic lawyering.” The prosecutor also contrasted defense counsel’s concession during opening argument (“Mr. Whitney had a knife in his pocket that date”) with defense counsel’s denial in closing argument that defendant had a concealed knife. The prosecutor then stated it was “unreasonable” to argue that defendant did not know he was the getaway driver for a property crime. Defendant did not object to any of these statements.

Sixth and finally, the prosecutor referenced the victims in this case: “Crimes like this do have impact on people. There are victims in this case. [¶] And they are not life-long traumatized. They didn’t come in here crying or anything like that, but they are real victims. It has an impact on people when something like that happens. It shakes you up. It shakes your confidence in sales. [¶] It is important now that he be held responsible for what he did. And I would ask you to find him guilty on all of the remaining counts . . . .” Defendant did not object to these statements.

As to allegedly misstating the evidence by referencing a red (rather than maroon) car and indicating Campster retrieved the watch from a very personal spot, no misconduct occurred. Maroon is fairly understood to be a shade of red. Moreover, based on the circumstances described, one could infer the watch was hidden inside Campster’s undergarments or body. These statements by the prosecutor were fair descriptions of the evidence and inferences taken therefrom, not misstatements of the evidence.

Defendant forfeited the latter four categories of alleged misconduct by failing to object and to request curative admonitions at trial. (*People v. Lopez, supra*, 42 Cal.4th at p. 966.) But even assuming these issues have not been forfeited, we find no misconduct occurred. The prosecutor’s statements about defense counsel’s arguments were likely understood by the jury to mean the evidence proved defendant’s guilt of each charged offense beyond a reasonable doubt. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1203 [“we must view the statements in the context of the argument as a whole”].) The jury likely did not conclude the prosecutor was impugning the integrity of defense

counsel or trying to shift the burden of proof to defendant. And by mentioning the employee victims of defendant's offenses, the prosecutor did not invite the jury to view the crime through the eyes of the victim; instead, she merely described the offenses and illustrated the seriousness of the offenses. (See *People v. Martinez* (2010) 47 Cal.4th 911, 956-957 [although appeals to sympathy for victims are improper, prosecutor may describe effect of criminal conduct inflicted on victims].)

*Cumulative Error*

Finally, defendant asserts the cumulative effect of the court's errors and the prosecutor's misconduct resulted in an unfair trial. But no error or misconduct occurred, and therefore no prejudice could accumulate. (*People v. Phillips* (2000) 22 Cal.4th 226, 244.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.