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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW ALAN MORA,

Defendant and Appellant.

H036371

(Monterey County
Super. Ct. No. SS092752A)

Defendant Andrew Alan Mora was convicted after jury trial of grand theft (Pen. Code, § 487, subd. (c))¹ and vehicle theft (Veh. Code, § 10851, subd. (a)). The trial court found true an allegation that defendant had served a prior prison term. (§ 667.5, subd. (b)). The court sentenced him to prison for five years in this case, with a consecutive term of eight months for a Santa Cruz County conviction for vehicle theft.

On appeal, defendant contends that (1) he was deprived of his due process rights when the court denied his request to empanel a new jury, (2) the court erred in admitting evidence of the Santa Cruz County vehicle theft, (3) the court incorrectly instructed the jury on the elements of grand theft, (4) the errors require reversal under the cumulative error doctrine, and (5) a clerical error in the abstract of judgment should be corrected.

¹ All further unspecified statutory references are to the Penal Code.

We will affirm the judgment but order the clerical error in the abstract of judgment corrected.

BACKGROUND

Defendant was charged by first amended information with carjacking (§ 215, subd. (a); count 1), second degree robbery (§ 211; count 2), vehicle theft (Veh. Code, § 10851, subd. (a); count 3), and assault with a deadly weapon (§ 245, subd. (a)(1); count 4). The information further alleged that defendant had a prior conviction for vehicle theft (§ 666.5, subd. (a)), and that he had served a prior prison term (§ 667.5, subd. (b)). He waived jury trial on the prior allegations.

Defendant moved in limine to preclude the prosecution from “alluding to or introducing any evidence” regarding the facts underlying his December 2009 Santa Cruz County vehicle theft conviction. The prosecutor opposed the motion. After undertaking an Evidence Code sections 1101 and 352 analysis, the trial court found the evidence “probative” and “not unduly prejudicial,” and ruled that evidence of the theft would be admitted but evidence of the subsequent attempt to evade officers and the crash of the vehicle would not be. Because “[t]his is not a gang case” but defendant “has some tattoos which could be misconstrued as gang tattoos,” defendant also moved in limine to “insure that all witnesses are admonished to not get into any area that has anything to do with gangs.” As the prosecutor agreed that “[t]here’s no evidence of any gang allegations,” the court granted the motion.

The Trial Evidence

The Charged Offenses

Around 6:30 a.m. on November 5, 2009, Patrick Lee Moana’s 1997 Toyota Land Cruiser was parked in his driveway on Drew Street in Marina. He started the car with his spare key and then got out, closed the driver’s side door, and walked towards his front porch. Moana testified that when he was just outside his front door, he heard his son yell, “[W]ho’s getting in the car?” He turned around and saw his car backing out of the

driveway at high speed. He caught up to the car when it turned into the street facing south and stopped. He stood in front of the car, looked inside it, and made “eye-to-eye contact” with defendant. He also saw a white car take off from behind it at a high rate of speed in the same direction the Land Cruiser was headed.

Moana further testified that he told defendant to get out of his car. Defendant hit the car’s gas pedal. Moana slammed his hands on the car’s hood. Defendant hit the gas pedal again. Moana slammed his hands on the hood again and then jumped on the front end of it. The car started to take off so Moana slid to the driver’s side in an attempt to get to the door. He fell off the car and hit the ground and the car took off. Moana injured his knee and hyper-extended his pinky finger when he hit the ground. Moana ran into his house to get the keys to his other car. He tried to follow his Land Cruiser in his other car, but he was unable to find it. After driving around for around 10 to 15 minutes, he returned home and spoke to Officer Deborah Kobayashi. He told Officer Kobayashi that the man who took his Land Cruiser was “a Caucasian-colored gentleman,” with reddish brown hair, a goatee, and a hooded sweatshirt.

Officer Kobayashi testified that Moana told her that he had gone back inside his house after starting his car and that he ran towards the car as it was driving southbound on Drew. He told her that he made eye-to-eye contact with the driver and that he fell down in the road while chasing after the car. He said that the man driving the car was a white male adult in his mid-twenties, with light brown hair and a goatee, and wearing a black hooded sweatshirt. Moana did not say anything about the driver having tatoos on his face.

On the 10:00 p.m. television news on November 5, 2009, Moana saw a story about a car theft in Watsonville. He recognized the photograph of the person involved in that car theft as the same man who had stolen his Land Cruiser, so he contacted the police. He was later shown a photographic lineup by Sergeant Jeffery Carr, but he was unable to

positively identify defendant's photo in that lineup. However, Moana identified defendant at trial as "the person that was inside the car."

On November 13, 2009, Watsonville Police Officer Edmundo David Rodriguez found Moana's 1997 Toyota Land Cruiser on Yarro Court in Watsonville. It was "[p]retty much untouched"; there was no noticeable damage to its hood. Before Moana was taken to get the car, he was asked to and did identify a picture of the spare key he had used to start the car on November 5, 2009.

Highway 1 runs parallel to Drew Street behind Moana's house, and it can be accessed about one-half mile from the house by driving south on Drew Street.

The Uncharged Offense

Around 7:15 a.m. on November 5, 2009, the same day Moana's car was taken, Eva Ramirez's 2006 Ford Fusion was parked in her driveway on Las Flores Street in Watsonville, with its engine running, when it was stolen. When Ramirez noticed the car was gone, she called the police. An officer responded within a few minutes.

Some time after 7:15 a.m. on November 5, 2009, Watsonville Police Officer Edmundo David Rodriguez responded to a "be on the lookout" dispatch for a stolen 2006 Ford Fusion. Shortly thereafter, he arrested defendant for possession of the 2006 Ford Fusion. At the time, defendant was wearing a black hat, a black hooded sweatshirt, and baseball batting gloves. He also had a key clipped to a belt loop on his pants. The key was later determined to be the spare key to Moana's Land Cruiser. After defendant waived his *Miranda* rights,² he told Officer Rodriguez that the Ford Fusion did not belong to him.

Yarro Court in Watsonville, where Moana's Land Cruiser was found, is slightly less than a mile from that part of Las Flores Street where Ramirez's Ford Fusion had

² *Miranda v. Arizona* (1966) 384 U.S. 436.

been stolen. The two locations are easily accessible to each other by either walking or driving. Las Flores is about three to five minutes from Highway 1 and Yarro Court is about five to seven minutes from Highway 1.

Verdicts and Sentencing

On October 22, 2010, the jury found defendant guilty of grand theft (§ 487, subd. (c)), the lesser included offense of the second degree robbery charged in count 2, and vehicle theft (Veh. Code, § 10851, subd. (a); count 3). The jury found defendant not guilty of carjacking (§ 215, subd. (a); count 1), and assault with a deadly weapon (§ 245, subd. (a)(1); count 4). The court found true the allegations that defendant had a prior vehicle theft conviction (§ 666.5, subd. (a)), and that he had served a prior prison term (§ 667.5, subd. (b)).

On November 23, 2010, the court sentenced defendant to prison for five years eight months. The sentence consists of the upper term of four years on count 3 (Veh. Code, § 10851, subd. (a); § 666.5, subd. (a)), with consecutive terms of one year for the prison prior (§ 667.5, subd. (b)) and eight months (one-third the midterm) for the Santa Cruz County vehicle theft conviction. The court stayed a three-year term for count 2 (§ 487, subd. (c)) pursuant to section 654.

DISCUSSION

Jury Bias

Background

Defendant has several facial tattoos. He has a tattoo over his left eyebrow that says “salad bowl.” He has a tattoo over his right eyebrow that says “evil” “wayez.” He has a tattoo under his left eye that says “XIV,” and he has a teardrop tattoo to the side of his left eye. He also has two circles tattooed under his right eye. The trial judge stated that he could see tattoos on defendant’s face from where he was sitting, but he had “no idea what they say.”

While questioning the first 18 prospective jurors in the case, the court stated the charges against defendant and then stated that “[t]he fact that the defendant has been charged here in court is not evidence of his guilt. The jury must make its determination in this case based only on the evidence that is presented during the course of the trial. And the jury should not make its decision based on speculation or conjecture. [¶] Having heard the charges which have been filed against the defendant, is there anything about the nature of the charges that would make it difficult for you to be fair and impartial in this case?” Apparently, nobody answered yes, as the court continued: “Now, in a criminal case, the defendant is presumed to be innocent. This presumption requires the People to prove each element of the crime beyond a reasonable doubt. Until and unless that is done, the presumption of innocence prevails.” The court then recessed for the lunch break. After the break, and after generally questioning the jurors, but before the court moved on to the jury questionnaire, the court stated: “It’s important that the Court have your assurance that you will without reservation follow the instructions the Court gives you with regard to the law in this case. You’re going to be the exclusive judges of the facts of this case, but the Court will give you the law that applies to this case and you would be required to follow the law that the Court gives you in terms of the legal part of the case.” The court then asked the prospective jurors, with a show of hands, if there was “anyone that would not be able to follow the Court’s instructions.” No one raised a hand.

The last question on the questionnaire asked the prospective jurors if there was any reason they could not be fair and impartial. Prospective juror Mr. Naranjo stated that his answer to the last question was, “I don’t know at this point.” “I just feel that if you committed more than one crime, 10 to one you did it.” The court told him that “just because of the fact that there are multiple charges that are alleged, the charges are not evidence and so . . . the only evidence that you’re to consider, if selected as a juror, would be the evidence that’s presented in court[.]” Mr. Naranjo responded: “Yes, sir.

But at the same time, from looking at him, I would say he's been in jail before." The court stated: "[O]nce again, how a person looks as they're sitting here in court, one way or another, is not evidence." "So you understand that . . . in terms of deciding this case, you're only to consider the evidence that's presented from the witness stand here, and then any exhibits that are introduced into evidence?" Mr. Naranjo responded: "Correct. But it still would be in my head." The court then asked him if he would be able to follow the court's instructions and decide the case "based on just what you are supposed to?" Mr. Naranjo responded yes.

Defense counsel asked Mr. Naranjo whether he understood "the concept of presumption of innocence," and he responded yes. Counsel then asked the entire panel: "[I]s there anyone who does not feel that they can see Mr. Mora as an innocent man as he sits here today?" No one raised a hand. Counsel then addressed Mr. Naranjo again. Mr. Naranjo explained: "I have two nephews that I don't associate with or nothing that are in gangs, and stuff. I'm not trying to say – but it's just with the tattoos and stuff, it – I have nephews and, you know, I have been explained just here and there what the – certain tattoos mean certain things and . . . [¶] . . . [¶] – normally when you get them on your face, you probably got them in prison or in jail."

Defense counsel then immediately asked prospective juror Mr. Velasquez (who had earlier stated he worked for the California Department of Corrections): "Does some of what Mr. Naranjo say ring true to you?" Mr. Velasquez responded: "You wouldn't put anything on your face that says XIV, 14, if it does not mean anything. It's either active or a dropout." Defense counsel asked to approach the bench, and a sidebar conference was held.

At the sidebar, defense counsel stated that he thought his question was "innocuous enough" and that he was "talking about presumption of innocence not about gang affiliation." "So I think the jury has been irrevocably tainted at this point, and I would request this jury panel be excused as opposed to a request for a mistrial, because the

C.D.C. officer here made it pretty clear” The prosecutor stated that defense counsel had “opened that door,” and “I’m thinking that maybe that was done on purpose.”

Defense counsel said that it was not done on purpose. “[T]he issue again that I was addressing was the presumption of innocence. My client’s appearance affects how they judge a case, how they look at the case.” The court stated: “You asked an open-ended question. The – the response was logical from the question that you asked, and the Court does feel that you actually brought the issue on yourself. But the Court is going to give an admonishment to the jury in terms of that. The Court is going to specifically advise them that this is not a gang case and there are no gang allegations. The fact that a person has any type of tattoo is irrelevant for the purposes of this case. [¶] Is there any other admonishment that you would like the Court to give?” Defense counsel did not offer any.

The court stated: “The fact of the matter, you have done a good job of bringing the issue out; apparently your client does have these tatoos out on his face, and . . . there has been no effort to disguise that in front of the jury. The Court knows that this is an identification issue, and the Court believes . . . that the complaining witness in this case did not identify the tattoos. So if anything, it proves to your client’s benefit. And so the Court is going to give them a strong admonition. And the Court just was asking you for anything that you would like the Court to include in that admonition with regard to . . . anything that was said, or anything that you would like the Court to include in the admonition that it will give to the jury at this point.”

Defense counsel stated: “It’s a tough one I mean, I made my objection. I understand the Court’s ruling. . . . First my objection was that again it was an inadvertent response based upon my follow-up to the . . . statement made by Mr. Naranjo, which I certainly didn’t pre-suppose but certainly opened up an area that . . . I could not address, you know, ‘it looks like he’s been in jail because of the way it looks.’ I mean, I couldn’t go with that. So for that reason then I believe there was an inadvertent response to the

line of questioning I was asking about and would request this jury panel be excused and that another panel be brought in in an abundance of caution.”

The court ruled: “The Court would respectfully deny that request. The Court does feel that the . . . question by Mr. Naranjo was fine – the follow-up question. And your question to Mr. Vasquez, the correctional officer, was an open-ended question that almost invariably called for that result. The Court is going to give a strong follow-up admonition, and the Court . . . is willing to do any additional admonition that you’re requesting. . . . But the Court does not feel that . . . this is actually prejudicial.

“Once again, if this were a gang case, it would be a little different situation than the situation at hand, you know, where really this almost in an unusually strange way works to your benefit, your client’s benefit, since one of the issues in this case is identification, and there’s no identifying regarding any tattoos, which clearly the jurors already noticed, at least by your questioning and by Mr. Naranjo on his own.”

“I mean, here first of all, the only person that suggested that [defendant is a gang member] at all was Mr. Velasquez, and no one else suggested that. And . . . as part of Mr. Velasquez’s response, he said he could be – he thought he could be a gang dropout too. So, you know, which would not be damaging, I suppose. . . . But I just can’t believe that that question would be asked and not believe that you would get the response that you got. I just really feel that you really elicited this yourself, and . . . once again in a strange way, it can be strategically relevant to your identification defense. . . [T]he Court does not know for sure, but it . . . feels your question really called for the answer that you got.”

After the sidebar ended, the court instructed the jury as follows: “You can see from the charges, this is not a gang case; there are no gang allegations in this case. The fact whether or not a person had a tattoo, whatever type of tattoo the person had on them in this particular case is not evidence of anything, as it relates to this case and you should not infer from that that the – that if a person had a tattoo that they were any[]more likely

than anyone else to – to be guilty of the offenses charged. So I just wanted to make it very clear and with a strong possible admonition I could give you, in terms of this particular case, this is not a gang case, and you are not to consider the fact of whether or not a person had tattoos or not, and whether or not they would be more or less inclined to commit a criminal offense. So I guess Mr. Naranjo, we started with you in terms of your comment, which – and, you know, the Court once again will encourage everyone to provide comments with regard to thoughts and feelings, because it's important sometimes by virtue of doing that, the Court has an opportunity to address the issue that may have gone unaddressed. So in a strange sort of way, it's a very positive thing that this – this came out.”

The court then asked Mr. Naranjo whether he would be able to follow the admonition it just gave, and he responded, “Probably not.” The court asked the same question of Mr. Velasquez, and he responded, “I will be able to follow the facts, whatever the facts are. But knowing what it actually means, as far as the tattoos and all that, they do weigh a factor into it.” The court then asked all members of the panel whether there was anyone else who would not be able to follow the court's admonition.

Prospective juror Mr. Boose stated: “Well, it's not that I don't agree with you. It's just that I do know that like some gangs will have certain symbol tattoos that mean certain things.” Prospective juror Mr. Diaz told the court that, if he had “a strong belief that Mr. Mora was a gang member,” he would also believe that “he is more likely guilty of this offense that we are here for trial on.” Prospective juror Mr. Garcia told the court, “So I do not feel comfortable because when I saw him, I saw the tattoos. So for me represent, I mean, the whole Salinas – I was living in Salinas for 20 years, and I saw – you know, I saw the people kill people in streets, so to be honest I don't feel good to be here.” “For me – I mean, I'm just – I mean he's guilty.” Prospective juror Mr. Guantes stated, “For me he not look like gang member.” Mr. Guantes also stated that “[s]ometimes I don't” understand what is being said.

Outside the presence of the prospective jurors, and after consultation with the parties, the court stated that it was going to excuse Mr. Naranjo, Mr. Boose, Mr. Garcia, Mr. Guantes, and Mr. Velasquez and one other prospective juror for cause. After six more prospective jurors were added to the remaining panel members, defense counsel asked the panel: “How do you feel about what you could do in practice if Mr. Mora or any defendant chose not to testify? Would it make you lean more towards one direction or the other?” Mr. Diaz responded: “Yes, sir.” “More likely guilty.” After some additional questioning of the panel, at a sidebar conference the court stated that it was going to excuse Mr. Diaz for cause. The prosecutor and defense counsel each excused three other prospective jurors, leaving 11 seated potential jurors at the end of the day.

The next morning, with no prospective jurors present, defense counsel “restate[d]” his request that “the Court dismiss that panel and bring in a new panel.” “[T]hat was our request, following a response – nonresponsive answer to a question that I did pose to a juror regarding the appearance of the tattoos on the face, because I was following up with what another juror had indicated, which was that he would find it prejudicial against my client, because he believed that if someone has tattoos on their face, they probably would have been in jail or in prison.” The court restated its ruling: “The Court’s feeling, in terms of the question, once again, though, is the Court doesn’t feel that the response by the potential juror was nonresponsive. . . . [Y]ou brought up the issue with the – with one of the jurors, with regard to the tattoos that your client had. Then, you specifically picked – the person that you picked for – to answer the question was a person that had already described himself as a correctional officer, that had been a transport correctional officer for state prison prisoners, and you picked that person, and you asked the question that, ‘based on your experience,’ and you – you used that. And so the Court . . . would have been flabbergasted if . . . there had been any other answer other than what he – he gave, and so the answer was totally consistent with the question that was asked. The Court is sorry that it . . . wasn’t quick enough to intervene between your question and the answer,

because the question, based on the way it was asked, in retrospect, now, . . . asking the correctional officer, based on his experience, was probably an inappropriate phraseology on that question, and it probably tends to bring out information that would be prejudicial. The Court, after that all occurred, the Court did give a strong admonition, with regard to the entire panel, with regard to the tattoos. The Court asked whether or not that you had any additional admonition you wanted the Court to give. The Court repeated the admonition several times.”

Defense counsel noted that the court also reopened voir dire after giving the admonition and allowed counsel to follow up on the same issue, and that counsel was satisfied with that. The prosecutor noted that she “agree[d] with the Judge’s assessment, that the answer given by the correctional officer was entirely responsive to [defense counsel’s] question posed to him.” Defense counsel stated again that his position was that, though it was “potentially, a predictable answer,” “it was not responsive to the question that I asked.”

Voir dire resumed the following day and seven more prospective jurors were added to the panel being questioned. In response to the court’s question of prospective juror Mr. Le Dung whether there was anything that would make it difficult for him to be fair and impartial, he stated: “Yeah.” “ ‘Cause I don’t like police officers. They always – I don’t know. Um – they – around my corner, there’s a lot of gangs, and – and the police doesn’t (sic) go by, and, you know – ‘cause I saw a lot of gang initiation in my town, and I think he look like a gang too.” “Well, by looking at him, I think, by looking at the case and hearing the case, so far, I think he probably be guilty” In response to defense counsel’s question of prospective juror Ms. McVay whether the appearance of someone “is not something that’s important,” Ms. McVay stated “Possibly. Possibly.” “My husband works at the prison. He is not a guard, but he is in contact daily. I am aware of what certain things mean. I’m not saying I would judge your client any differently, but I – it might be in the back of my mind.” She stated that, having “some

kind of personal knowledge about that,” “that might affect [her] judgment in this case.” The court later excused Mr. Le Dung, and Ms. McVay.

The parties agree that, other than the prospective jurors mentioned here, no other prospective juror stated that defendant’s appearance could affect his or her judgment or ability to be impartial. At the close of the case, the court instructed the jury in part: “You must decide the facts from the evidence received in this trial and not from any other source. You must determine the effect and the value of the evidence. [¶] You must not be influenced in your decision by mere sentiment, conjecture, sympathy, passion, or prejudice toward any party, witness, or attorney in the case, or public opinion or public feeling.” “[T]he evidence will be coming from the witness stand from the witnesses that are being called and any exhibits that are admitted. There are exceptions to this rule, and sometimes . . . during the course of the trial, the attorneys may say that they stipulate to something, which means that they both agree. If during the course of this trial, both attorneys agree as to any fact, then, you should consider that fact as having been proved.”

The Parties’ Contentions

Defendant contends that the court abused its discretion and violated his right to due process when it denied his request to empanel a new jury. He contends that the jury panel was exposed to extraneous information from individual prospective jurors which was inherently and substantially likely to have influenced other prospective jurors, and that dismissal of the first jurors and the curative instruction was insufficient to cure the prejudice caused by those jurors. “After the court admonished the prospective jurors that they must not consider [defendant’s] tattoos when determining guilt, the court and defense counsel further inquired of the panel whether they would be able to follow the court’s instructions. Not only did the comments that followed establish that the gang allegation had tainted the jury pool, questions to evaluate possible prejudice gave rise to several additional prejudicial comments.” “The inflammatory nature of the comments that were made during voir dire; the authority with which many jurors spoke (some of

them having experience in law enforcement and some having personally witnessed gang activity); and the repeated suggestion that [defendant's] tattoos meant that he was in a gang were 'inherently and substantially likely to have influenced a juror' to be biased when entering into deliberations."

The People contend the jury was fair and impartial. "Here, no seated juror expressed the view that tattoos on [defendant's] face predisposed him or her to view [defendant] negatively. In fact, one juror revealed that she herself had tattoos that she regretted, another said that considering the tattoos would constitute prejudice, and another said the tattoos were irrelevant to the case." "When reviewed under the totality of the circumstances, on this record, [defendant] is unable to show that the trial court abused its discretion in denying his motion to dismiss the entire panel."

Analysis

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; [citations].)" (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*)). " ' "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.] [Citations.]" (*Ibid.*)

" 'The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' [Citation.] As the United States Supreme Court has explained: 'Due process means a jury *capable and willing to decide the case solely on the evidence before it . . .*' [Citations.]" (*Nesler, supra*, 16 Cal.4th at p. 578.)

“In assessing whether a juror is ‘impartial’ for federal constitutional purposes, the United States Supreme Court has stated: ‘Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.’ [Citation.] ‘“The theory of the law is that a juror who has formed an opinion cannot be impartial.” [Citation.] [¶] It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion *and render a verdict based on the evidence presented in court.*’ [Citations.] ‘ “[L]ight impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but . . . those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him [or her].” ’ [Citations.] An impartial juror is someone ‘capable and willing to decide the case solely on the evidence’ presented at trial. [Citations.]” (*Nesler, supra*, 16 Cal.4th at pp. 580-581.)

“[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required.” (*People v. Medina* (1990) 51 Cal.3d 870, 889.) When “a few prospective jurors have made inflammatory remarks[, u]nquestionably, further investigation and more probing voir dire examination may be called for . . . , but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant.” (*Ibid.*)

“It is within the trial court’s discretion to determine that a prospective juror’s statement was not prejudicial and thereby deny a defendant’s motion to dismiss the jury panel. [Citations.]” (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 41.) “The conclusion

of a trial judge on the question . . . is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion.” (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466 (*Martinez*.) “Just as a finder of fact is in a better position than the reviewing court to judge the credibility of a witness, the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments.” (*Ibid.*)

In this case, we find no basis for reversing the trial court’s exercise of discretion. Following Mr. Naranjo’s and Mr. Velasquez’s statements, the court admonished the entire jury panel that it was not a gang case, that tattoos are not evidence of anything, and that it was to consider only the evidence presented during the trial when deciding the charges against defendant. It then reopened voir dire to allow the court and the parties to determine whether any other potential jurors held similar views as to Mr. Naranjo’s and Mr. Velasquez’s. Several potential jurors stated that they did, and they along with Mr. Naranjo and Mr. Velasquez were excused from the jury panel. No juror who was selected to consider defendant’s case stated that he or she would not be able to be impartial or would not be able to follow the trial court’s instructions. That the sitting jury was not tainted by the comments of the excused jurors, and was able to impartially consider the evidence presented at trial, is evidenced by the fact that the jury found defendant guilty of only one of the charges against him and of a lesser offense of another charge, while finding him not guilty of the remaining charges. As the appellate court stated in *Martinez*: “Several jurors expressed biased opinions with which the remaining jurors did not agree. To the extent the remaining jurors may have found some merit in the comments, it does not appear they were unable to set aside their [views] in order to judge the case against [defendant] fairly and impartially.” (*Martinez, supra*, 228 Cal.App.3d at p. 1466.)

Defendant’s reliance on *Nesler* and *Mach v. Stewart* (9th Cir., 1998) 137 F.3d 630 (*Mach*), in arguing that a new jury should have been empanelled, is misplaced as both cases are factually distinguishable from the case before us. In *Nesler*, a sitting juror

engaged in misconduct by receiving damaging information about the defendant without disclosing the outside information or its source to the court, while repeatedly referring to the information during deliberations, which established a substantial likelihood that the juror's verdict was not based solely upon the evidence presented in court. (*Nesler, supra*, 16 Cal.4th at p. 583.) In *Mach*, the defendant was charged with sexual abuse of a child and a potential juror vouched for the credibility of child sexual abuse victims, but the court did not conduct further voir dire to determine whether the remainder of the panel had in fact been infected by the potential juror's statements. (*Mach, supra*, at p. 633.) In this case, the statements disclosing bias by the potential jurors were heard by the court, counsel, and other potential jurors; the court repeatedly admonished the jury panel that it was not to consider this outside information in reaching its verdict; the court and counsel conducted further voir dire to determine whether the remainder of the panel had in fact been infected by the potential jurors' statements; and all the potential jurors who stated they may not be able to be impartial were excused from the jury panel. No due process violation has been shown.

Evidence of the Uncharged Offense

Defendant moved in limine to preclude the prosecution from "alluding to or introducing any evidence" regarding the facts underlying his Santa Cruz County vehicle theft conviction. The prosecutor opposed the motion. The court found that the evidence was relevant and admissible on the issues of identity, intent, and opportunity. The court also found that the evidence was not unduly prejudicial because the complaining witness in the case before it would not have known about the Watsonville theft when he first reported the incident; the Watsonville theft resulted in a felony conviction; the Watsonville case was "much less inflammatory than the case that is before the Court"; and the court was precluding the prosecution from presenting any evidence of defendant's attempt to evade officers and his crash of the vehicle following the Watsonville theft.

On appeal, defendant contends that the court abused its discretion when it admitted the evidence of the Watsonville case. He argues that the Watsonville vehicle theft was not sufficiently similar to the charged offenses to justify admission of the evidence to prove identity under Evidence Code section 1101, subdivision (b). He argues that the evidence was not admissible to show intent under Evidence Code section 1101, subdivision (b) and that, even if it was, it was inadmissible under Evidence Code section 352. He argues that the evidence was not admissible under Evidence Code section 1101, subdivision (b) to prove opportunity. And, lastly, he argues that admission of the evidence so infused the trial with unfairness as to deny him due process of law.

The People contend that the court properly admitted the evidence of the Watsonville offense to prove intent, identity, and opportunity. The People further contend that any error in admitting the evidence was harmless.

“ ‘Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person’s character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of [Evidence Code] section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person’s character or disposition.’ [Citation.] ‘Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so

damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.” [Citation.]’ [Citation.] ‘ “We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.” [Citation.]’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668 (*Fuiava*)).

In evaluating the relevance or probative value of uncharged offense evidence under Evidence Code section 1101, subdivision (b), it is important to identify the purpose for which the evidence is offered. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*)). “The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ‘ “probably harbor[ed] the same intent in each instance.” [Citations.]’ [Citation.]” (*Ibid.*) “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.]” (*Id.* at p. 403.)

In this case, the connection between the uncharged offense and the charges being tried was clear and central to establishing defendant’s guilt. The prosecution’s theory of the case was that defendant stole Moana’s car in Marina and then quickly drove up Highway 1 to Watsonville, where he abandoned Moana’s car and stole Ramirez’s car under the same circumstances that he had stolen Moana’s car. Both cars were taken from the driveway of a residence within close proximity of Highway 1, and within close proximity in time, after the owners of the cars had left them parked with their engines running. Moana’s car was found a short distance away from where Ramirez’s car was stolen, defendant was arrested driving Ramirez’s car shortly after it was stolen, and defendant had the key to Moana’s car on his person when he was arrested. The court

properly found that the evidence of the uncharged offense was highly relevant to the facts at issue and that there was sufficient similarity between the conduct underlying the uncharged offense and the charged offense for the evidence of the uncharged offense to be admissible on the issues of intent, identity, and opportunity.

The trial court also took actions to limit the possible unduly prejudicial effect of the evidence of the uncharged offense. The court told the jury that defendant had been arrested and convicted of the felony offense of vehicle theft as a result of the conduct underlying the Watsonville offense, so there was little danger that the jury might decide to punish defendant for the uncharged offense regardless of whether it found him guilty of the charged offenses. (See *Ewoldt, supra*, 7 Cal.4th at p. 405.) The court found that the facts underlying the uncharged offense were less inflammatory than the facts underlying the charged offense. There was no evidence that the victim of the Watsonville theft was injured during the theft, and the court precluded the prosecutor from introducing any evidence regarding defendant's attempt to evade officers after the Watsonville theft which ultimately ended in a crash of the vehicle. In light of the significant probative value of the uncharged offense evidence and the trial court's effort to limit the possible undue prejudice, we cannot find that the trial court's ruling was an abuse of discretion. (*Fuiava, supra*, 53 Cal.4th at p. 670.)

Because we find that the trial court did not abuse its discretion under state law in admitting the evidence of the uncharged offense over defendant's objection, his contention that the admission of the evidence violated his constitutional right to due process is also without merit. (See *Fuiava, supra*, 53 Cal.4th at p. 670; *People v. Riggs* (2008) 44 Cal.4th 248, 292.)

Instruction on Theft

The written instruction in the record on theft, the lesser-included offense to the robbery charge in count 2, states: "The defendant is charged as a lesser included offense in Count 2 with grand/petty theft by larceny in violation of Penal Code section 484. [¶]"

To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took possession of property owned by someone else; [¶] 2. The defendant took the property without the owner's or owner's agent's consent; [¶] 3. When the defendant took the property he intended to deprive the owner of it permanently or to remove it from the owner's or owner's agent's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property; [¶] AND [¶] 4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief. [¶] An agent is someone to whom the owner has given complete or partial authority and control over the owner's property. [¶] For petty theft, the property taken can be of any value, no matter how slight." (See CALCRIM No. 1800.)

The reporter's transcript indicates that when the court orally instructed the jury with this instruction, he stated: "The defendant is charged, as a lesser-included offense, once again, in Count 2 with grand and petty theft by larceny, in violation of Penal Code Section 484. To prove the defendant is guilty of this crime, the People must prove that, one, the defendant took possession of property owned by someone else; two, the defendant took the property without the owner or owner's agent's consent; three, when the defendant took the property, he intended to deprive the owner of it permanently or to remove it from the owner or owner's agent's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property; *or*, four, the defendant moved the property, even for a small distance, and kept it for any period of time, however brief. [¶] An agent is someone to whom the owner has given complete or partial authority and control over the owner's property. [¶] For petty theft, the property taken can be of any value, no matter how slight." (Italics added.)

The reporter's transcript also indicates that the court instructed the jury that "there will be four copies of the jury instructions in the jury room for you when you go back. . . . [S]o in terms of listening to the Court's instructions, the Court would ask that you listen

carefully, but you're not going to have to memorize every word the Court gives you right now. There will be the instructions available to you when you go back into the jury room. ¶ The instructions that you receive may be printed, typed, or written by hand. Certain sections may have been crossed out or added. Disregard any deleted sections and please do not try to guess what they would have been. Only consider the final version of the instructions to your deliberations.” (See CALCRIM No. 200.)

Defendant contends that “[t]he trial court’s incorrect oral instruction deprived [him] of his federal constitutional rights to due process and to be convicted only by proof beyond a reasonable doubt of every element of the offense.” “[W]hile the record establishes that the jury heard the incorrect oral instructions, there is no evidence that the jury read and relied on the correct written instructions. Therefore, this court can only speculate as to whether the jury read the correct written instruction and relied on it in returning a conviction for grand theft.” (Italics omitted.) “Because the error was not harmless beyond a reasonable doubt, the grand theft conviction should be reversed.”

The People contend that, “because the trial court provided accurate written instructions to the jury for its use during deliberations, there was no prejudicial error occurring from any deviation in the court’s oral instructions.”

As the California Supreme Court recently stated in *People v. Mills* (2010) 48 Cal.4th 158 (*Mills*), a case where the trial court “misspoke on three occasions” while reading the instructions to the jury: “The trial court committed no reversible error, structural or otherwise. The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke. ‘We of course presume “that jurors understand and follow the court’s instructions.” [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.’ [Citation.] Because the jury was given the correctly worded instructions in written form and

instructed with [CALCRIM No. 200] . . . [‘ to only consider the final version of the instructions in your deliberations,’] and because on appeal we give precedence to the written instructions, we find no reversible error. [Citations.]” (*Mills, supra*, at pp. 200-201.)

Defendant argues that *Mills* was wrongly decided because it “is contrary to settled United States Supreme Court case law holding that where there are conflicting instructions on the essential elements of an offense, the reviewing court must reverse unless it can be determined that the jury followed the correct instructions and not the erroneous instructions.” However, the case cited by defendant in support of this claim, *Francis v. Franklin* (1985) 471 U.S. 307 (*Francis*), dealt with oral instructions that had conflicting language which could have been understood as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent. (*Id.* at pp. 315-318.) There was no discussion by the United States Supreme Court in *Francis* about how an appellate court should review discrepancies between oral and written instructions when the written instructions are correct. And, as an intermediate appellate court, we are bound by the California Supreme Court’s decision in *Mills*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, as did the *Mills* court, we find no reversible error here.

Cumulative Error

Defendant contends that, even if this court finds the individual errors he has raised to be harmless, “the prejudice to [him] caused by the introduction of the Watsonville theft, combined with the erroneous grand theft instruction and the prejudicial comments made by prospective jurors throughout voir dire, warrant[s] reversal under the cumulative error doctrine.” “Under the ‘cumulative error’ doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.] For example, the doctrine required reversal of a judgment when numerous minor instances of attorney misconduct during trial had a cumulatively prejudicial effect. [Citation.]” (*In re*

Avena (1996) 12 Cal.4th 694, 772, fn. 32; see also *People v. Hill* (1998) 17 Cal.4th 800, 845-847 [serious and continuous prosecutorial misconduct together with other errors had cumulative prejudicial effect].) In this case, we have not found any misconduct by counsel. Nor can we say that the evidence of defendant's uncharged offense was highly inflammatory or that the jury panel was tainted by the comments of prospective jurors that were later excused. Therefore, we find that reversal is not required under the cumulative error doctrine in this case.

Correction to the Abstract of Judgment

At sentencing, the court stayed a three-year term on count 2 (§ 487, subd. (c)) pursuant to section 654. However, the abstract of judgment indicates that the three-year term was imposed as a concurrent term. Defendant asks this court to order the abstract corrected to reflect the trial court's judgment, and the Attorney General agrees. Accordingly, we will order the abstract corrected.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is ordered to correct the abstract of judgment to reflect that the three-year term on count 2 (§ 487, subd. (c))

was ordered stayed pursuant to Penal Code section 654, and to transmit a copy of the corrected abstract to the Department of Corrections and Rehabilitation.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.