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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TRAVELL LAMONT BRAGG, Defendant and Appellant.	B277720 (Los Angeles County Super. Ct. No. KA106271)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Jr., Judge. Affirmed.

Maggie M. Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Travell Lamont Bragg was convicted of first degree residential burglary. The court found true a prior strike and other priors allegations and sentenced defendant to state prison for 17 years. Defendant's only claim on appeal is the court violated his due process rights by admitting evidence of a 2010 residential burglary conviction under Evidence Code section 1101, subdivision (b) (hereafter section 1101(b)). Defendant contends the two burglaries were not sufficiently similar, and the probative value of the evidence was outweighed by the prejudicial impact.

We affirm.

BACKGROUND

1. The Burglary and the Fingerprint Evidence

William and Jill Dwyer have lived in their home in San Dimas since about 1992. Mrs. Dwyer testified that on March 2, 2014, she left home to go to lunch with her 44-year-old son, as was their custom every Sunday afternoon, between 1:00 and 2:00. Her husband of 49 years was out of town on business that day. Mrs. Dwyer and her son returned to her home around 4:00 p.m. to find drawers had been emptied in almost every room of the house. "Every single thing had been touched from sheets to mattresses, drawers, closets taken out, everything taken out of the closets."

When she left home to go to lunch, the sliding glass door in the kitchen was closed and locked (although, after the burglary, she learned how easy it was to open the latch). When she and her son returned to her home, she found the sliding door open. The two-story home has four bedrooms, including a master bedroom and bathroom upstairs.

Mrs. Dwyer kept four or five jewelry boxes in the master bathroom. Four were wooden and one was plastic. Mrs. Dwyer found jewelry missing from the plastic jewelry box. Other pieces of jewelry and a watch were missing from the other jewelry boxes. In addition to the jewelry and watch, Mrs. Dwyer's iPad was missing.

Mrs. Dwyer bought the plastic jewelry box from a Bed Bath & Beyond in Glendora four or five years before the burglary. Since then, she has always kept the plastic jewelry box "exactly where it was" in the master bathroom. The only people who were permitted access to the master bathroom were family members. The Dwyers did a major remodel of the family room and kitchen in 2013 (downstairs) but none of the workers was permitted upstairs to the master bathroom.

Mrs. Dwyer did not recognize defendant in court, had never seen him at her house, and she never gave him permission to enter her home. She did not give anyone permission to enter her home on the Sunday afternoon of the burglary. Mr. Dwyer also testified he did not recognize defendant in court, had never seen him before, and he never gave defendant permission to enter their home.

The day after the burglary, on March 3, 2014, a forensic identification specialist with the Los Angeles County Sheriff's Department dusted the Dwyers' home for fingerprints. She found one fingerprint on the plastic jewelry box in the master bathroom. She applied a special fingerprint tape over the fingerprint and lifted the tape so as to collect the dusted area and placed the tape on a fingerprint card that resembled a shiny-surfaced index card. She booked the card into evidence at the crime lab.

A sheriff's deputy who has been assigned to the crime lab for 14 years testified how he determined that the fingerprint was from defendant's right forefinger, and that two other independent forensic identification specialists confirmed the fingerprint was defendant's. The deputy testified the quality of the fingerprint was "very good," and "there's a lot of clarity and quantity here present." He testified there was a "zero" chance that the fingerprint belonged to someone other than defendant, and that he was "100 percent certain" the fingerprint was defendant's, explaining that "fingerprints are unique to every human being," and even identical twins have unique fingerprints. No evidence was offered at trial to dispute that the fingerprint was defendant's.

2. Defendant's Recorded Jailhouse Telephone Conversations

A representative of the sheriff's department testified about the telephone monitoring system that records all conversations with an inmate in a county jail facility. Inmates are made aware their conversations are being recorded. Literature is posted by the telephones, and the system periodically interrupts each conversation with the reminder, "This call is being recorded."

The jury heard three recorded conversations defendant had with a woman who described herself as defendant's girlfriend, on August 12, 13 and 17, 2014, and the jury was given transcripts of the telephone conversations. In the first conversation, the woman told defendant she had spoken with his defense lawyer. The lawyer told her "it [was] looking bad" for defendant, and "they [were] talking about giving you years" because of one fingerprint found on a jewelry box, and because defendant did not have an alibi.

In the second conversation, defendant told the woman his lawyer needed pictures of him showing he was "at this place at this time." The woman said she could download pictures from Instagram and "add dates." Defendant told her to write down "March 2nd, 2014" and "find some pictures from that day." The woman asked, "can I just add the date to the picture?" and defendant replied, "yeah you could, but we can't be talking like that over this phone."

In the third conversation, after asking the woman to help him post bail, defendant expressed his regret that he was in a jail cell and not with her. He asked her to help him get out of jail so he could "waive time" and "keep postponing it" for two years while he "stayed out of trouble" "on the streets," saying, "I know I--I put myself here. You know, I f---ed up, you feel me? I f---ed up. I don't blame nobody for this."

3. The Defense Witnesses' Attempt to Provide an Alibi

Defendant's sister, Timeisheun Bowman, testified that she hosted a gathering to remember her deceased cousin at her home in Watts on March 2, 2014 (the day of the burglary).
Ms. Bowman identified a photograph of defendant and her daughter that was taken that day. Ms. Bowman testified that defendant arrived at her home early in the morning, between 7:30 and 8:00 , and that he was around for a couple hours but she could not account for his whereabouts in the afternoon.

Ms. Bowman testified on cross-examination that she knew her brother was in trouble with the law since the day he was arrested, but she did not tell his defense counsel that defendant had been with her on March 2, 2014, until the first day of trial on March 30, 2015. That was also when she first showed defense

counsel the picture of defendant taken with her daughter on the morning of March 2, 2014.

Finally, Ms. Bowman testified that she had been speaking with defendant's girlfriend, Euricca Horton, on the phone when the police arrived to arrest defendant, and she heard a police officer ask Ms. Horton to turn over defendant's cell phone to the police.

Defendant's girlfriend, Ms. Horton (not the same woman who spoke with defendant in the jailhouse recordings), testified that she had a cell phone account in her name for which she obtained a second phone to give to defendant for his use. She and defendant were living together on the day he was arrested, and she was home with defendant when the police arrived.
Ms. Horton testified that defendant asked the officers why they were arresting him, and "they said something about his parole." She testified that defendant believed he had violated parole and wanted to call his parole officer. As he was being escorted to the patrol car, he asked her to get his phone. He was already in handcuffs when she found the phone, so she gave it to one of the police officers who took it and said they would keep it for defendant.

The defense called a representative of Ms. Horton's cell carrier who testified about the call detail records for the phone number on her account that Ms. Horton had testified was defendant's phone. He testified that the cell phone tower data showed that on March 2, 2014, that cell phone was in South Los Angeles, and not San Dimas.

4. The Impeachment of Defendant's Cell Phone Alibi

When defendant was booked, he gave the police a cell phone number that Ms. Horton recognized as that of his sister.

Ms. Horton was not with defendant on March 2, 2014, and she did not know whether on that day defendant was in possession of the cell phone she had given to him.

The prosecution called sheriff's Detective Anthony Valenzuela, who had interviewed defendant in custody in connection with the 2010 burglary, and who also was among the deputies present at the time of defendant's arrest for the burglary in this case. Detective Valenzuela testified defendant had some property on him that he did not want to have booked with him, including a watch, that he handed to his girlfriend. Detective Valenzuela did not recall that defendant tried to take a cell phone with him or that anyone at the location tried to give him a cell phone. He further testified the deputies would not have allowed anyone to give defendant any property to be booked with him that was not on his person. If, however, someone had broken the protocol and allowed any property to be handed to a person being arrested, that property would be accounted for at the time of booking.

Sheriff's deputy Greg Kaplan was also present when defendant was arrested in 2014 for this burglary. Deputy Kaplan prepared the booking report. He logged in that shoelaces, an MTA card, a business card, and $34 were booked at the time of defendant's arrest. No cell phone was booked.

5. The Section 1101(b) Evidence of Defendant's 2010 Burglary Conviction

Before trial, in an Evidence Code section 402 hearing, the prosecution sought permission from the court to admit evidence pursuant to section 1101(b) that in 2010, defendant burglarized a home in La Mirada, entering through a sliding glass door in the middle of the day when no one was at home. The prosecution

argued the previous burglary was sufficiently similar to this burglary to be admissible to prove identity and motive. Defendant lived in Watts, and in both burglaries, defendant entered homes in neighborhoods other than his own, in the middle of the day when no one was home, through a backyard fence and a sliding glass door and took jewelry.

The prosecution emphasized that defendant told police in 2010 that a few friends drove up to him in South Los Angeles, and told him to get in the car with them because "we're going to go get paid." When police officers asked him what he understood that to mean, defendant responded that he knew they were going to go rob some houses. The prosecution argued that defendant was unemployed when he committed this burglary, and evidence of the prior burglary was relevant to show he harbored the same motive, to get "paid" since he had no job. The prosecution also argued the evidence was relevant to prove identity, because defense counsel had said he planned to impeach the fingerprint evidence and offer cell phone tower evidence to show defendant was not the burglar.

The defense objected that the 2010 burglary was not sufficiently similar to be admissible, and that it was more prejudicial than probative.

After extensive argument, the court ruled that evidence of the 2010 burglary was admissible under section 1101(b).

Accordingly, the prosecution offered the following testimony. Detective Valenzuela investigated the La Mirada burglary and interviewed defendant in custody, after giving him his *Miranda*[1] warning and obtaining defendant's consent to be

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

interviewed. Defendant told the detective he was picked up by two other men in a vehicle who told him "they were going to go get paid" and for defendant to get in the vehicle. The detective asked defendant what he understood that to mean, and defendant "said it was his understanding they were going to go rob homes." Defendant said they drove on the 105 Freeway to its end, into some residential areas where they stopped. Defendant rang a doorbell, and when no one answered, he and the front passenger entered the backyard through a side gate, unlocked the gate, went into the yard and entered the house through an unlocked sliding glass door.

Jose Montoya was living in the home in La Mirada that defendant burglarized in 2010. Jewelry and cash were taken. Mr. Montoya had never seen defendant before the burglary and never gave him permission to enter his home.

Detective Valenzuela's testimony about the 2010 burglary, including cross-examination, is contained in two and one half pages of the reporter's transcript. Mr. Montoya's testimony is contained in one and one half pages of the reporter's transcript.

6. **The Jury Instruction Regarding the Section 1101(b) Evidence**

When the court and counsel met to settle the jury instructions, they discussed what modifications should be made to CALCRIM No. 375, the instruction the court must give on request when evidence of other offenses has been introduced. CALCRIM No. 375 has bracketed sentences that must be selected to specify the grounds of relevance of the other offense evidence.

Although the prosecution had argued before trial that the 2010 burglary was relevant to prove identity and motive, the prosecutor asked the court *not* to instruct on identity "based on

the state of the evidence." Instead, the prosecutor asked the court to select the bracketed sentences for motive, common plan, and lack of accident or mistake. The prosecutor explained he wanted to argue the fingerprint found on the jewelry box in 2014 was not there by accident, and that defendant's unemployment status provided a motive for the burglary.

The defense did not object to the selection of the bracketed sentences to include in the CALCRIM No. 375 instruction. Accordingly, the court instructed the jury they could consider evidence of the other offense to decide whether or not defendant had a motive to commit the offense alleged in this case, or the defendant's alleged actions were the result of mistake or accident, or the defendant had a plan or scheme to commit the offense alleged in this case.

DISCUSSION

We review evidentiary rulings under section 1101(b) for abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

Defendant argues in this appeal that the prior offense evidence was not similar enough to the burglary in this case to prove identity. However, the court did not instruct the jury they could consider the evidence in deciding whether defendant was the person who committed the burglary in this case, that is, in deciding the identity of the burglar. The prosecutor had acknowledged the evidence did not support an instruction that the jury could consider the prior offense in deciding identity. Therefore, we will not address defendant's arguments that the evidence was inadmissible to prove identity or intent because the court did not instruct the jury they could consider the prior

offense evidence to determine identity or intent, and the prosecutor did not argue the evidence proved identity or intent.

We will address the only argument on appeal that is tethered to the instructions and the prosecutor's argument, that is, defendant's contention the evidence was inadmissible to show motive because motive was "not an issue in dispute" and was therefore "irrelevant."

The Supreme Court explained when evidence of a prior crime is admissible under section 1101(b) in *People v. Ewoldt* (1994) 7 Cal.4th 380 and in *People v. Balcom* (1994) 7 Cal.4th 414. *Ewoldt* says when, as here, the defendant enters a plea of not guilty, all elements are in dispute and relevant. (See also *People v. Lindberg* (2008) 45 Cal.4th 1, 23.) Motive can be powerful evidence. (See *People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017 [" '[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence' "].) And, because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence. (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.)

Moreover, section 1101(b) expressly authorizes the admission of other crimes evidence to prove motive. (*Ibid.* ["Nothing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as motive. . . .)]"; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1289 [proof of prior threat was "highly relevant" to establish motive for subsequent shooting]; *People v. Enos* (1973) 34 Cal.App.3d 25, 34 ["It is settled that evidence of other crimes is admissible where it helps or tends to show motive"].)

Not every burglary is committed to steal valuables. Burglaries are committed for the purpose of kidnap, rape, murder, and other crimes. The prosecutor argued to the jury that defendant's fingerprint was not found on Mrs. Dwyer's jewelry box due to some accident or innocent mistake but because he had entered her home for the purpose of stealing valuables since he had no other means of getting "paid," just as he had when he burglarized the home of Mr. Montoya in 2010.

Therefore, we cannot say the evidence of motive was irrelevant. We turn then to defendant's argument that prejudice outweighed the relevance of the prior offense evidence. This was a very strong case. The fingerprint evidence was no doubt the key evidence on which the jury relied. In light of the crime lab specialist's uncontested testimony that he was 100 percent certain that the fingerprint found on the jewelry box was from defendant's right forefinger, and there was "zero" chance it was someone else's fingerprint, there was no rational basis on which the jury might conclude that someone other than defendant committed the burglary. Defendant's recorded jailhouse conversation in which he acknowledged that he had messed up and had only himself to blame was also strong evidence of a consciousness of guilt. The attempt to fabricate an alibi with a photo of defendant taken on the day of the burglary, and the highly implausible cell tower evidence, no doubt worked against defendant in persuading the jury of his guilt and his consciousness of guilt. Finally, defendant failed to appear without any explanation and was not present in court for the last day of testimony and closing arguments. The court gave the standard flight instruction, instructing the jury they could consider flight as evidence of defendant's consciousness of guilt.

With this record, and defendant having absconded just before the jury was to render its verdict, we can see no prejudice in the admission of the prior offense to prove motive.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.