Filed 10/2/18 P. v. Stewart CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. OLLIE JONATHAN STEWART, Defendant and Appellant.	2d Crim. No. B283158 (Super. Ct. No. 2008016583) (Ventura County)

Ollie Jonathan Stewart appeals a judgment after a jury convicted him of residential burglary (Pen. Code,[1] § 459; count 1), attempted residential robbery (§§ 664/211; count 2), residential robbery (§ 211; count 3), carjacking (§ 215, subd. (a); count 4), assault with a deadly weapon (§ 245, subd. (a)(1); count 5), kidnapping to commit another crime (§ 209, subd. (b)(1); count 6), attempted carjacking (§ 664/215, subd. (a); count 7), and

[1] Further unspecified statutory references are to the Penal Code unless stated otherwise.

criminal threats (§ 422; count 8). The jury found true the allegations that he personally inflicted great bodily injury for counts 5, 6, and 7 (§ 12022.7, subd. (a)), and that he personally used a deadly and dangerous weapon for counts 5, 6, and 7 (§ 12022, subd. (b)(1)). The trial court sentenced him to life with a possibility of parole plus 13 years in state prison. The court imposed restitution and parole revocation fines of $400 each. (§§ 1202.4, 1202.45.)

Stewart contends the trial court erred when it (1) admitted evidence of a prior uncharged offense (Evid. Code, § 1101, subd. (b)) and (2) imposed restitution and parole revocation fines above the minimum amount. We modify the judgment to reflect restitution and parole revocation fines of $200 each, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

April 20, 2007 Offense

Fourteen-year-old E.A. was at home on J Street in Oxnard when he heard a knock at the front door. E.A. opened the door and saw Stewart and his wife, Aileen Fuller, standing there. Stewart asked E.A. if "Jordan" was home. E.A. did not know Stewart, Fuller, or anyone named Jordan.

Stewart forced his way into the house, and asked E.A. for the keys to his mother's Sports Utility Vehicle (SUV), which was parked in the driveway. Stewart shoved E.A., told him to sit on the couch, and used duct tape to tie E.A.'s hands. E.A. punched Stewart in the face and the two started fighting, ending up outside. E.A. ran to a neighbor's house.

E.A.'s mother, L.D., picked up a phone and said she was going to call the police. Stewart "came after" L.D. with his fists raised, grabbed the phone, and demanded she give him the

keys to the SUV. L.D. gave him the keys. Stewart and Fuller got into the SUV and drove off.

When E.A. returned home, he found the bandana Stewart wore during the incident. A forensic scientist ran a DNA analysis on the bandana. Stewart and Fuller were "major contributors."

When the police asked E.A. and L.D. to identify the perpetrator from a photo lineup, neither of them were able to identify Stewart. At trial, E.A. positively identified Stewart from a photo lineup and also identified him in person.

April 24, 2007 Offense

M.B. parked her SUV on H Street in Oxnard. While she was walking towards her home, Stewart and Fuller approached her. M.B. asked "What do you want? Do you want my purse?" M.B. threw her purse at Stewart.

Stewart demanded her car keys. M.B. said they were in her pants pocket. Fuller took the keys out of M.B.'s pocket. M.B. tried to yell, but Stewart hit her on the forehead with a metal pipe. Stewart told her to walk to her SUV. Fuller grabbed M.B. by the arm, pulled her by the hair, and pushed her as they walked to the SUV. Stewart continued to hit M.B. on the head with the metal pipe, causing her to bleed. When M.B. tried to protect her head with her hands, Stewart hit her hands with the metal pipe.

When they arrived at the SUV, Stewart told Fuller to "[g]et inside" and said "[l]et's go kill the bitch." Fuller tried to push M.B. into the SUV. At that moment, another car approached them, and M.B. fell down. Stewart hit her head two more times with the metal pipe before fleeing. M.B. suffered a

blood clot to her head, damaged tendons to her hand, and suffered seven fractures to her arm.

During the investigation, the police recovered two blue gloves: one glove was found inside M.B.'s SUV and M.B.'s daughter handed the other glove to an officer. The police also found a metal pipe inside the SUV. The forensic scientist ran a DNA analysis on the gloves. Fuller and Stewart were "major contributors" on the left glove and "possible major contributors" on the right glove. Blood stains on the glove and the metal pipe matched M.B.'s DNA. When the police showed M.B. a photo lineup, she was not able to identify Stewart or Fuller.

Uncharged January 2007 Act

S.G. was parked in her truck at her house in Oxnard when she saw Stewart on a bicycle. Stewart approached S.G.'s window and asked if she knew Maribel. S.G. replied she did not know Maribel. Stewart then put his fingers through S.G.'s open window and pulled until the window shattered. He punched S.G. and demanded her car keys.

S.G. jumped to the passenger seat and ran out of her truck. Stewart followed her on his bicycle. S.G. ran into her house and called 911. S.G. later identified Stewart in an in-field lineup.

Before trial, the prosecution moved to admit evidence of the uncharged act under Evidence Code section 1101, subdivision (b). The trial court initially denied the motion.

During trial, the court granted the prosecution's motion to reconsider. The court found that the uncharged act was similar to the charged offenses and was relevant to show identity and common scheme or plan. It also found the uncharged act was more probative than prejudicial (Evid. Code, §

352). The court instructed the jury to consider the evidence of the uncharged act for the limited purpose of determining whether Stewart committed the charged offense or whether he had a common scheme or plan. The court instructed the jury not to consider the evidence for any other purpose.

DISCUSSION

Uncharged Act

Stewart contends the trial court erred in admitting evidence of the uncharged act against S.G. because it (1) was not "sufficiently similar" to the charged offenses and (2) was more prejudicial than probative. We disagree.

Evidence of an uncharged act is admissible if it is "relevant" to establish some fact such as a common scheme or plan. (Evid. Code, § 1101, subd. (b).) To prove an uncharged act is relevant to a common scheme or plan, the uncharged act and charged offense must share common features that "indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*).) If evidence of an uncharged act is relevant, the trial court must also weigh its probative value against its prejudicial value. (*Id.* at p. 404; Evid. Code, § 352.) We review the court's rulings pursuant to Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) We will not reverse unless the court acted in an arbitrary or capricious manner. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

The trial court did not abuse its discretion when it admitted evidence of the uncharged act because the uncharged act was relevant to prove a common scheme or plan. (Evid. Code, § 1101, subd. (b).) All three incidents occurred within four

months of each other, took place within the same area of Oxnard, involved women as victims, and involved a carjacking or attempted carjacking of a SUV or truck. In both the uncharged act and the April 20 offense, Stewart used the same ruse of asking the victim if they knew a person before he committed the offense. In both the uncharged act and the April 24 offense, Stewart approached a lone female near or inside their cars, assaulted them, and demanded their car keys. Based on these similarities, the court reasonably found that evidence of the uncharged act was admissible to prove a common scheme or plan.

Evidence of the uncharged act was more probative than prejudicial. (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The evidence was probative given that identity was a contested issue. The evidence was not unduly prejudicial because the uncharged act was less severe than the charged offenses, which involved a forced entry into the victim's home and a violent assault. (See *id.* at p. 408.)

Stewart contends the court had no "proper basis" to reverse its initial decision to exclude evidence of the uncharged act. But he does not provide any argument or cite authority stating that the court could not reconsider its prior ruling. Nor does he demonstrate the court's decision was arbitrary or capricious. Therefore, he does not show error.

Restitution and Parole Revocation Fine

Stewart contends the trial court's imposition of restitution and parole revocation fines of $400 violated the ex post facto clauses of the federal and state constitution (U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, § 9) because the statutory minimum fines at the time he committed his offenses

were $200. We modify the order to reflect restitution and parole revocation fines of $200.

At sentencing, defense counsel requested the trial court order the minimum restitution and parole revocation fines and find Stewart did not have the ability to pay a presentence investigation fee. The trial court found Stewart was "indigent" and did not have the ability to pay a presentence investigation fee. The court asked: "what[] is the minimum restitution fine for a felony? 400?" To which defense counsel replied "I believe so." The court ordered restitution and parole revocation fines of $400 each. (§§ 1202.4, 1202.45.)

A restitution fine qualifies as punishment and is subject to the proscriptions of the ex post facto clause. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) The minimum restitution fine is calculated at the time of the offense. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) A parole revocation fine must be set "in the same amount" as the restitution fine. (§ 1202.45, subd. (a).)

Stewart forfeited the ex post facto claim because he did not object to the fines at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) However, we may exercise our discretion to consider an issue not preserved on appeal. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 404.)

We exercise that discretion to review the fines here because the trial court expressed its intent to impose the "minimum restitution fine for a felony." (See *People v. Guillen* (2014) 227 Cal.App.4th 934, 1032-1033 [restitution fine modified to statutory minimum where a trial court indicated its intent to impose the minimum].) The court imposed fines of $400 rather than $200, which was the minimum fine at the time Stewart

committed his offenses. (Former § 1202.4, subd. (b)(1), as amended by Stats. 2005, ch. 240, § 10.5.) We therefore modify the judgment to reflect the minimum restitution and parole revocation fines of $200 each. (§ 1260.)

DISPOSITION

The judgment is modified to reflect restitution and parole revocation fines of $200 each. The clerk of the superior court is directed to amend the sentencing minute order and the abstract of judgment to reflect the modification. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

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