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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. GERARDO JOSE COLON, Defendant and Appellant.	B230962 (Los Angeles County Super. Ct. No. PA066879)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald V. Skyers, Judge. Modified and affirmed.

J. Scott Cramer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gerardo Colon appeals from the judgment entered upon his jury conviction of second degree robbery and assault by means likely to produce great bodily injury. Defendant contends the court committed reversible error in admitting evidence of a prior assault. We conclude the evidence was not admissible, but the error was harmless and did not render defendant's trial fundamentally unfair. Defendant argues that the sentence violates Penal Code section 654. We agree and order the sentence on count 2 (assault) stayed. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

The victim, Larry Kephart, is a disabled Vietnam veteran, who can walk only short distances. In March 2010, defendant pulled into a handicapped spot at a Wal-Mart store ahead of Kephart. Kephart noticed that defendant's car did not display a handicapped placard. He parked in a handicapped spot across from defendant, went to the back of his minivan, and started taking pictures of defendant's car with his iPhone. His plan was to turn the pictures over to Wal-Mart's security.

Defendant jumped out of his car and rushed Kephart, grabbing at his phone. Kephart tried to put the phone in his left shirt pocket where he usually kept it. The pocket ripped as defendant grabbed at the phone. Kephart did not let go of the phone, and defendant struck him several times on the left side of the head with a closed fist. Kephart's ear bled onto his shirt. Kephart swung at defendant but was not sure he made contact. Defendant knocked Kephart to the ground and kept hitting him until Kephart let go of the phone. Several witnesses, including a passenger in defendant's car, called for defendant to stop hitting Kephart. Defendant wrested the phone away, ran back to his car and drove off so fast that he almost hit another car. He was arrested later the same day. Kephart's phone was not found.

Defendant was charged with second degree robbery in count 1 (Pen. Code, § 211) and assault by means of force likely to produce great bodily injury in count 2 (*id.*, § 245, subd. (a)(1)).

At the jury trial, the prosecution called Kephart and two eye witnesses. One of them, Debbie Macias, saw a portion of the incident. She had an unobstructed view, and it appeared to her that Kephart was being "bullied." She saw defendant push Kephart, who lost his balance and tried to move away. She also saw defendant hit Kephart on the side of the head with a closed fist more than once. She saw Kephart raise his arms to protect his face. Then he went down. Defendant crouched over Kephart, then got up and kicked Kephart before running back to his car. At that point, Macias glimpsed a black object in defendant's hand.

Macias was impeached with her testimony at the preliminary hearing, during which she did not mention defendant kicking Kephart when the latter was on the ground. She was unsure whether she told the responding officer that defendant kicked Kephart.

The other eyewitness, Pamela Meyer, also claimed to have had an unobstructed view of what she thought was a mugging. She first noticed Kephart holding a dark object in his hand high above his head. Kephart appeared to be leaning back, shaking his head "no," and trying to keep the object out of defendant's reach. Meyer thought the object was a wallet. Defendant was pushing and hitting Kephart, trying to reach the object. Meyer saw defendant hit Kephart with his fist around the face and neck. She then looked away to see if anyone was coming to help, and when she looked back, Kephart was on the ground. He was holding an object over his head, and defendant was pulling on it. She saw defendant kick at Kephart and eventually pull the object away. Defendant then ran to his car and drove off. Macias and Meyer confirmed that Kephart's left ear was bleeding.

The 911 calls made by Kephart and Meyer were played to the jury. In her call, Meyer reported that a man's wallet was taken and the man was knocked down. Kephart reported that he was taking photos of a car that parked in a handicapped spot when the driver attacked him and took his iPhone. The responding officer did not testify, but portions of the police report recounting his interviews with Macias, Meyer, and another eye witness were introduced into evidence on the parties' stipulation. According to the

report, both Macias and Meyer claimed to have seen defendant continue to punch Kephart after knocking him to the ground.

Defendant's mother testified for the defense that she, her husband, and defendant's girlfriend rode in defendant's car that day. Her husband had a handicapped placard, but it was not displayed. According to her, when defendant got out of the car to see what Kephart was doing, Kephart insulted him and tried to hit him. She then saw defendant hit Kephart, but claimed not to have witnessed the rest of the encounter. She testified that defendant had nothing in his hand when he returned to the car.

The prosecution argued that, since defendant's mother testified that Kephart was the initial aggressor, it was entitled to present rebuttal evidence under Evidence Code section 1103. The court agreed with the prosecution over defendant's objection. The rebuttal evidence concerned a 2007 incident, during which defendant struck, knocked down, and kicked a woman in a parking lot for tapping his car with her car door. The woman's son intervened and was also hit and kicked by defendant. Defendant then hit and kicked the woman some more. In backing up his car to leave the scene of the incident, defendant struck and injured his own passenger. In surrebuttal, defendant's passenger testified that the 2007 incident was a mutual argument that resulted in a fight, during which the woman kicked and tried to key defendant's car, spit in the face of defendant's passenger and slapped him when he tried to stop the fight, and her son wielded a bumper at defendant. When she was recalled, the woman denied hitting or kicking defendant, his passenger, or his car.

The jury found defendant guilty as charged. He was sentenced to two years in prison on count 2 and to a concurrent two-year term on count 1. This timely appeal followed.

DISCUSSION

I

The trial court allowed evidence of the 2007 incident as rebuttal evidence under Evidence Code section 1103, subdivision (b).[1] Defendant objected this was improper propensity evidence under section 1101 that had the potential of confusing the jury and should have been excluded under section 352 as more prejudicial than probative. Defendant argues the erroneous admission of this evidence was so prejudicial that it rendered his trial fundamentally unfair.

A trial court's rulings on relevance and admission or exclusion of evidence are reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

Character evidence is generally inadmissible to prove a person acted in conformity with it on a given occasion. (§ 1101, subd. (a).) An exception to this rule allows a criminal defendant to offer evidence of a victim's character trait to show the victim acted in conformity with that trait. (§ 1103, subd. (a)(1).) If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the defendant's violent character to show the defendant acted in conformity with it. (§ 1103, subd. (b).)

The victim's conduct during the incident on which the charge is based does not fall under section 1103. (*People v. Myers* (2007) 148 Cal.App.4th 546, 552.) "Wigmore, on whose treatise Evidence Code section 1103 is based (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173–1174), notes the relevance of character evidence is premised on a continuity of character over time: '"Character at an earlier or later time than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, i.e. the offer is really of character at one period to prove character at another. . . ."' (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448, quoting Wigmore [italics omitted].) If evidence of a victim's conduct at the time of the charged offense constitutes character evidence under Evidence Code section 1103, then

[1] All statutory references in part I of this opinion are to the Evidence Code.

every criminal defendant claiming self-defense would open the door for evidence of his own violent character. Evidence Code section 1103 cannot be read so broadly." (*Id*. at pp. 552-553.)

The testimony that Kephart swung at defendant during the 2010 assault for which defendant was on trial was not evidence of Kephart's violent character under section 1103, subdivision (a). Subdivision (b) was, thus, not triggered, and the 2007 incident was not admissible to show defendant's violent character under section 1103.

The People argue that the evidence was nevertheless admissible under section 1101, subdivision (b) to prove intent. They rely on *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), superseded by statute on other grounds, as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505. The *Ewoldt* court reasoned: "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.]." (*Id*. at p. 402.)

At trial, the prosecutor did not seek to introduce that 2007 incident under section 1101, subdivision (b), and no limiting instruction was requested or given to the jury under section 355. (See *People v. Grant* (2003) 113 Cal.App.4th 579, 591 [when evidence of uncharged offense is admitted under section 1101, trial court must give limiting instruction upon request].) The two incidents were not sufficiently similar because the 2007 incident did not include elements of robbery, which were present in this case. Nor did defendant seek to establish that he acted in self-defense or ask that the jury be instructed on this defense.

The evidence also was subject to exclusion under section 352, which gives "the court discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the

jury.' [Citation.]" (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.) The trial court ruled that the 2007 incident was proper rebuttal evidence showing defendant's "propensity for the [*sic*] aggression" under section 1103, and did not expressly address whether it should be excluded under section 352. The court allowed extensive testimony about the 2007 incident that exceeded the question of who was the aggressor in that case. After the surrebuttal, the court acknowledged that "we have left completely the original case," and "all of it is really not that relevant because the jury has to decide the present case. . . . I hope they haven't lost track of it or haven't forgotten, but that's what it is." The evidence about the 2007 incident was not proper rebuttal evidence under section 1103, and most of it should have been excluded under section 352 as irrelevant, time consuming, and potentially confusing.

A defendant may argue on appeal that overruling his section 352 objection resulted in a violation of due process. (*People v. Partida* (2005) 37 Cal.4th 428, 438–439.) Absent such a violation, defendant must prove that it is reasonably probable the verdict would have been more favorable to him. (*Id*. at p. 439, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) On the other hand, a due process violation requires the State to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*), citing *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

"'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.]' [Citation.]" (*Albarran, supra,* 149 Cal.App.4th at p. 229 [gang evidence uniquely inflammatory].) The potential for undue prejudice is lower when evidence of the uncharged acts is "no stronger and no more inflammatory" than evidence of the charged crimes. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144, quoting *Ewoldt, supra,* 7 Cal.4th at p. 405.)

The parties disagree whether the 2007 incident, which involved defendant's fighting a woman and her underage son and inadvertently injuring his own passenger, was more inflammatory than defendant's 2010 assault on a disabled Vietnam veteran. In

closing argument, the prosecutor used the 2007 incident to argue that Kephart could not have been the initial aggressor, and she emphasized the testimony of the victim in that incident that defendant knocked her down with a single punch. Defense counsel used the 2007 incident to argue that in both cases there was a confrontation and a fight. The inference the jury was invited to draw from the evidence was that defendant tends to resort to violence in public places on the slightest provocation. While this was impermissible character evidence, the 2007 incident was not stronger or more inflammatory than the incident for which defendant was on trial.

The prosecutor's case against defendant was so strong that admission of the 2007 incident was harmless under either the *Watson* or *Chapman* standard of review. The evidence was that defendant hit Kephart repeatedly despite bystanders honking their car horns and calling for him to stop; the only inconsistency in the eye witnesses' testimony had to do with whether defendant kicked or punched Kephart after the latter fell to the ground. Whether or not Kephart insulted defendant or swung at him initially was irrelevant because it was undisputed that defendant struck Kephart with such force as to knock him to the ground and make his ear bleed at a time when Kephart was not actively fighting back. Defense counsel did not argue that this response was justified as self-defense. Instead, he tried to characterize it as a simple battery as opposed to an assault by means likely to cause bodily injury. But a blow to the head with a closed fist that knocks a person to the ground and makes his ear bleed is sufficient to convict defendant of assault by means likely to cause bodily injury. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 ["the use of hands or fists alone may support a conviction of assault 'by means of force likely to produce great bodily injury'"]; *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1162 [single blow to the face sufficient to knock the victim to the ground was force likely to produce great bodily injury].)

As to the robbery, defense counsel's theory was that the iPhone flew off during the scuffle and was lost. Kephart's 911 call and trial testimony were credible evidence that defendant took the iPhone. Meyer's 911 call and trial testimony were additional evidence that defendant took an object away from Kephart. Macias corroborated their versions of

the incident when she testified that she saw something in defendant's hand when defendant ran back to his car. In contrast, defendant's mother testified only that defendant had nothing in his hand when he got back into the car. Even were this testimony credited, it did not contradict the evidence that defendant took away Kephart's iPhone. What may have happened to the phone before defendant entered his car was beside the point since he had already taken it from Kephart's person by force. Defense counsel's theory that the iPhone was lost rather than feloniously taken was entirely speculative.

We are satisfied that the trial court's error in admitting testimony about the 2007 incident did not violate defendant's right to due process and was harmless under any standard in light of the prosecution's otherwise solid case against defendant.

II

Defendant argues that the sentence on the assault conviction should be stayed under Penal Code section 654.[2] We agree.

Section 654 requires that, when an act "is punishable in different ways by different provision of law," a defendant "shall be punished under the provision that provides for the longest potential term of imprisonment." It prohibits separate punishment for crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If the crimes were incidental to a single objective, a defendant may be punished only once. (*Ibid*.) The trial court's determination of defendant's objectives may be reversed on appeal only if it is unsupported by the evidence. (*People v. Evers* (1992) 10 Cal.App.4th 588, 604.)

Here, the trial court selected the assault count as the base term and the robbery count as the subordinate term. It imposed a two-year sentence on each count, making the sentence for robbery (count 1) concurrent with the sentence for assault (count 2).[3]

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[2] All statutory references in part II of this opinion are to the Penal Code.

[3] The abstract of judgment differs from the court's oral pronouncement as it lists count 1 (robbery) as the base count. The oral pronouncement of judgment controls over

Defense counsel argued that, if the court found the two counts arose from an indivisible course of conduct, it could not sentence defendant on the second count. Counsel misquoted *People v. Deloza* (1998) 18 Cal.4th 585, where the court explained that where two convictions arise from an indivisible course of conduct, section 654 "requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*Id.* at p. 592.)

In this context, the court reasoned as follows: "I'm holding that [section] 654 does apply, so that it's—it might not be one indivisible course of conduct, but they're so related and so close in time that the court is going to sentence the count 1 concurrent with count 2 but not—not that I'm not going to sentence on count 1. . . . And this is not only because of [section] 654 but because of the closeness in relationship there. Two crimes that could be distinct, because it is claimed that the cell phone was taken from the victim and that he was beaten also. So it's—it's somewhat two separate courses of conduct, but they were so very related that the court uses its discretion to sentence concurrently, and so it's two years. Because that two years will be stayed because of the concurrent sentence."

While the court correctly stated that it had to impose sentences on both counts, it is unclear whether it found that defendant harbored more than one objective to preclude the application of section 654. The evidence does not support such a finding.

A robber cannot be punished for both robbery and assault if the assault is simply a means of carrying out the robbery. (*People v. Flowers* (1982) 132 Cal.App.3d 584, 589.) Gratuitous violence evidences an independent objective as when a robber assaults a neutralized and unresisting victim "to facilitate a safe escape, evade prosecution, or for no reason at all . . . ." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.)

The People contend that defendant initially intended only to frighten Kephart from taking pictures and make him retreat. Once Kephart retreated to his car, defendant

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the minute order and the abstract of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

formed a separate intent to take the iPhone. After taking the phone, defendant gratuitously beat Kephart. This is not a correct statement of the evidence.

Kephart testified he took pictures "standing at the rear right passenger side" of his minivan, and defendant "jumped out of his car and came at me rather quickly, and started grabbing at my phone." Kephart did not remember specifically what defendant said but thought it was something like, "Give me that phone." Kephart's testimony does not support a finding that defendant's intent initially was simply to discourage him from taking pictures. Rather, it supports a finding that from the very beginning defendant intended to deprive Kephart of his iPhone.

Kephart consistently testified that defendant did not let up until he got the phone. Defendant seized and pulled away on the phone while Kephart tried to hold on to it. Kephart tried to put the phone in his shirt pocket, and the pocket ripped when defendant pulled on it. When Kephart "wouldn't let go of the phone," defendant started hitting him. Kephart also said that defendant "kept punching me until I let go of the phone." "He finally wrestled the phone away from me, and then he ran to his car and got in."

Meyer similarly testified that she first noticed Kephart holding a dark object in his hand high above his head. Kephart appeared to be trying to keep the object out of defendant's reach. Defendant was pushing and hitting Kephart, trying to reach the object. She then saw Kephart on the ground, still holding the object over his head, and defendant pulling on it. She saw defendant kick at Kephart, pull the object away, and run to his car.

Macias testified that she saw defendant kick Kephart before running back to his car. She also saw an object in defendant's hand, but her testimony does not make clear whether she saw the object before or after defendant kicked Kephart.

The evidence does not support a finding that defendant engaged in gratuitous violence unrelated to his objective of taking the iPhone. While Kephart may not have actively fought back, he resisted defendant's actions by holding on to the phone. Thus, it cannot be said that defendant gratuitously beat a neutralized and unresisting victim.

Second degree robbery is punishable by a term of two, three or five years. (§ 213, subd. (a)(2).) Assault with force likely to produce great bodily injury is punishable by a

term of two, three, or four years. (§ 245, subd. (a)(1).) Since the robbery provision contains a longer potential term of imprisonment, section 654 requires that the two-year term imposed on count 1 (robbery) be the base term, and that the two-year term imposed on count 2 (assault) be stayed.

DISPOSITION

We modify the judgment to make the two-year term imposed on the robbery conviction the base term and to stay execution of the two-year term imposed on the assault conviction. We direct the trial court to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.