Filed 3/28/17 P. v. Gilmore CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDWARD DAJUAN GILMORE, Defendant and Appellant.	B270304 (Los Angeles County Super. Ct. No. SA089358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Edward Dajuan Gilmore was charged with robbing a hotel and stealing a charitable donation box from a gas station convenience store. Defendant pled no contest to petty theft of the donation box but proceeded to jury trial on the robbery count. The trial court denied defendant's motion to exclude reference to the donation box. The gas station manager, called as a witness to establish defendant's identity as the hotel robber, mentioned the donation box three times during his testimony. Defendant contends his conviction for the hotel robbery must be reversed because the admission of evidence pertaining to his theft of the donation box violated Evidence Code sections 352 and 1101, subdivision (a). We affirm.

PROCEDURAL HISTORY

Defendant was charged by information with robbery (Pen. Code, § 211) and misdemeanor petty theft (Pen. Code, § 490.2). The information further alleged that defendant personally used a knife during the robbery (Pen. Code, § 12022, subd. (b)(1)), suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)), suffered one prior prison term within the meaning of Penal Code section 667, subdivision (a)(1), and suffered four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

Defendant pled no contest to the petty theft count. He proceeded to jury trial on the robbery count and special allegation, and a bench trial on the priors. The court granted defendant's Penal Code section 1118.1 motion as to the knife allegation. The jury found him guilty of the robbery, and the court found true all of the priors allegations.

The court sentenced defendant to a total of 15 years in state prison: the high term of five years for the robbery, doubled

to 10 years due to his strike, plus an additional five years pursuant to Penal Code section 667, subdivision (a)(1). The court imposed and stayed sentences for the other priors. The court sentenced defendant to 10 days, time served, for the petty theft. Defendant timely appealed.

FACTUAL BACKGROUND

A. *Hotel Robbery*

John Keefer worked as a night auditor at a Travelodge hotel in El Segundo. Keefer testified that three men entered the hotel just after 4:00 a.m. on September 11, 2014. The first man to enter, who was wearing a hooded sweatshirt with a lightning bolt on it, grabbed Keefer, threatened him with a knife, and demanded money. Keefer pointed the man toward the cash register. The man also asked Keefer to open the safe. Keefer did not have keys to the safe, so one of the man's cohorts picked up the safe and ran off with it. The man threatening Keefer took Keefer's wallet before fleeing with his cohorts. Keefer was unable to identify any of the men.

In the early morning hours of September 11, 2014, Maheshkumar Ahir, the general manager of the hotel, received a call from the El Segundo police informing him that there had been a robbery at the hotel. Ahir went to the hotel, where he noticed that the cash register was empty and the safe was missing. The cash register typically contained around $300, and the safe contained around $4,500.

Ahir reviewed hotel surveillance videos that captured the robbery and a few hours preceding it. He provided the videos to police, and they were admitted into evidence and played for the jury at trial. Ahir testified that the video of the robbery showed men entering the hotel through the back door around 4:00 a.m.

The man "in the middle," the "second person of the three," had his head wrapped in a striped cloth or towel; only his eyes and nose were exposed. Ahir could not identify that man by looking at his mostly covered face. However, the man was wearing brightly colored or neon shoes and a brightly colored wristwatch, and Ahir previously had interacted with someone who wore those same items. Ahir identified that man in court as defendant.

Ahir testified that he recognized defendant because he had booked defendant as a guest at the hotel two or three times, including the period spanning September 6 to 9, 2014. A "folio" documenting the bookings and containing defendant's photo identification card was admitted into evidence. On those occasions, defendant was wearing the same brightly colored shoes and watch. Ahir further testified that he also had seen defendant in the lobby of the hotel when he was not booked as a guest. Ahir had some previous negative experiences with defendant, including an incident involving a "chargeback" to defendant's credit card and an incident in which he had to stop defendant from selling gift cards in the hotel lobby. Ahir also identified defendant in one of the videos from the hours preceding the robbery; his face was visible in that video, and he was wearing the same shoes, wristwatch, and clothes as the robber wearing the cloth or towel on his head. In that video, defendant was behind the hotel counter, attempting to make hotel room keys.

In the video of the robbery, Ahir identified defendant as the man who stole the safe. He also identified defendant as the man who was handling an item that "looks like a towel." Ahir testified that the hotel kept clean, bleached, white towels in a cabinet above the safe. The towels were "Wyndry" brand, a proprietary brand used only at hotels owned by Wyndham Properties. All of

the towels had "Wyndry" tags.

The videos showed a black SUV in the hotel parking lot. Michael Cascadden, who was in the neighborhood around 4:10 a.m. on September 11, 2014, saw three or four people get out of a dark SUV, come back 10 to 20 minutes later, and move the SUV backwards in the direction from which they had come. Cascadden also noticed "some kind of commotion or activity" in the area where the people moved the SUV. There was a Travelodge hotel on that end of the block.

B. *Investigation*

El Segundo police officer Paul Saldana responded to a robbery call from a Travelodge hotel in the early morning hours of September 11, 2014. While traveling to the hotel, Saldana noticed a white hand towel and black vehicle armrest lying in the street near the hotel. Saldana collected both items and booked them into evidence. When he returned to the police station, he swabbed the towel for DNA evidence.

Mariann Shea, a senior criminalist with the Los Angeles County Sheriff's Department, tested the samples from the towel, which she described as a white hand towel "with the brand name Wyndry." The sample from one side of the towel contained DNA from at least three contributors. Shea determined that defendant was the "major contributor" of DNA on that side of the towel.

Detective Luke Muir of the El Segundo Police Department investigated the hotel robbery. He reviewed the hotel surveillance videos with Ahir and noticed that the man with the towel around his head had dark lines on his right forearm. Muir testified that the lines matched a tattoo defendant had on his right forearm.

Muir further testified that he went to a gas station across the street from the Travelodge hotel during his investigation and obtained surveillance videos from September 9, 2014. Those videos showed a man wearing a brightly colored wristwatch and shoes that Muir testified was "the same" as that worn by one of the men who robbed the hotel on September 11, 2014.

C. *Caprile's Testimony*

Miguel Caprile testified that he was the manager of a gas station convenience store. The gas station was within sight of a Travelodge hotel. Caprile knew defendant was staying at the hotel and frequented the gas station convenience store; Caprile had interacted with him more than five times. On several of those occasions, Caprile testified, defendant wore a shirt, shoes, and a wristwatch that were brightly colored and recognizable. Caprile was in the store office on September 9, 2014 and observed defendant wearing the shoes and wristwatch.

One of Caprile's managerial duties was to review surveillance videos from the gas station and store. Caprile reviewed videos from September 9, 2014, which were admitted into evidence and played for the jury. Caprile testified that the videos showed defendant walk from the hotel to the gas station, enter the convenience store, unsuccessfully attempt to return an item, take a Red Cross donation box from the store counter, and leave in a black SUV. Caprile specifically mentioned that he recalled reviewing the videos because "[t]hat's when, you know, our Red Cross donation box was missing," and identified the "donation box for the Red Cross" in the videos. Caprile also noted that defendant was wearing the recognizable shoes, shirt, and wristwatch in the videos.

Caprile provided copies of the surveillance videos to Detective Muir. Muir showed Caprile a six-pack photo array, and Caprile "circled the person that took the donation box," whom he identified in court as defendant.

DISCUSSION

Defendant contends the court erred by admitting evidence of his theft of the Red Cross donation box. He argues that the evidence was irrelevant and unduly prejudicial, and that the limiting instruction the court gave at the conclusion of trial did not cure the prejudice. We disagree.

I. Relevant Proceedings

Prior to trial, defense counsel informed the court that defendant intended to plead to the petty theft count. The prosecutor told the court he still planned to introduce evidence relating to that crime for the purpose of identifying defendant as one of the perpetrators in the hotel robbery. The court indicated it was inclined to allow the evidence for that purpose. The court recognized, "it's not nice to steal a donation box," and "a jury might look negatively at him for that," but concluded "it's a few coins. It's petty theft. It's not a big deal. It's not like a murder or something or a sex crime or something that would prejudice the jury against him." "[T]hough there is a certain meanness in stealing a charity box, it's not so offensive compared to a robbery. Robbery is much worse than something like that." The court further noted, "[i]f that's the reason why they remember him or why they paid attention, that's what you need."

After defendant pled no contest to the petty theft, defense counsel filed a written motion to exclude evidence pertinent to that crime. Counsel acknowledged that "items of clothing worn by the defendant on September 9, 2014 and his general

appearance on that date may be relevant for a legitimate purpose," but contended the "bad act of taking a charity donation box would be extremely prejudicial and a gross example of the type of evidence precluded by Evidence Code Section 1101." Counsel argued that the court should restrict the prosecution to "presenting evidence that Defendant had a dispute with the cashier over the return of an item of merchandise and that he was wearing certain items of clothing and appeared as portrayed in the videotape, without showing the actual theft of the box."

At the hearing on the motion, the court commented that allowing the prosecution to present the full video "has a way of strengthening the identification," as the prosecution's theory was that Caprile saw defendant in person and then again when reviewing the video after the theft. Defense counsel argued that would cause "substantial prejudice," but told the court, "They can play the entire video. They just don't have to comment on anything" relating to the donation box. The prosecutor responded that playing the entire video "undermines his argument," because "[c]learly in the video you can see that it's a box with some amount of money in it next to the register," and then defendant "puts it in a white bag." The prosecutor also argued that the probative value of the identification outweighed any prejudice caused by the donation box.

Defense counsel further contended that the nature of the theft should be precluded by Evidence Code section 1101. The court disagreed. It explained, "This is not 1101. I would not instruct the jury from this they could draw any inference about intent. This is evidence of his identification in this very case. That's the point."

The court denied the motion to exclude but offered to provide an instruction as to the limited purpose for which the jury could use the evidence. The court also stated, "the People should not emphasize that aspect [theft of the donation box] or there would be - - I'd consider a contemporaneous objection."

During trial, defense counsel objected when Caprile explained that the September 9, 2014 video looked familiar to him because "[t]hat's when, you know, our Red Cross donation box was missing." The court overruled the objection. Defense counsel did not object to Caprile's other references to the donation box.

At the close of evidence, the court instructed the jury with the following limiting instruction modeled on CALCRIM No. 303: "During the trial, certain evidence was admitted for a limited purpose. Evidence that the defendant committed a petty theft at a convenience store was only admitted for the purpose of identifying him on a video recording at that store. You may not consider this as evidence of character, motive, propensity to commit a crime, or any other purpose besides identifying him. You may consider this evidence only for the purpose of his identification and for no other."

During closing argument, the prosecutor identified the gas station video as one of the "three key pieces of evidence" supporting his theory that defendant acted out of greed. The court sustained defense counsel's objection. The court later clarified at side bar, "you talked about greed, and then the next statement you made was about the petty theft. And I couldn't tell, but I thought the jurors might have taken that to be evidence to support a motive of greed rather than a circumstance of identification."

II. Governing Principles

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," or bears on the credibility of a witness or hearsay declarant. (Evid. Code, § 210.)[1] All relevant evidence is admissible unless otherwise provided by a statutory or constitutional provision. (§ 351; *People v. Bryant* (2014) 60 Cal.4th 335, 405.)

Section 1101, subdivision (a) limits the admissibility of relevant evidence of a person's past conduct "when offered to prove his or her conduct on a specified occasion." It "generally prohibits the admission of a prior criminal act against a criminal defendant" for the purpose of showing that he or she acted similarly on the occasion in question. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) Subdivision (b) of the statute, however, provides that such evidence is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . ." (§ 1101, subd. (b).) Section 1101, subdivision (c) further provides that evidence of past conduct is admissible to "support or attack the credibility of a witness." Thus, under section 1101, "[i]f an uncharged act is relevant to prove some fact other than propensity, the evidence is admissible, subject to a limiting instruction upon request." (*People v. Bryant*, *supra*, 60 Cal.4th at p. 406.)

Even if evidence of a prior offense is relevant to prove a non-propensity fact under section 1101, "to be admissible such evidence 'must not contravene other policies limiting admission,

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[1] All further statutory references are to the Evidence Code unless otherwise indicated.

such as those contained in Evidence Code section 352. [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) Section 352 gives the court discretion to exclude otherwise relevant 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."

We review the trial court's rulings on the admissibility of evidence under sections 1101 and 352 for abuse of discretion. (*People v. Bryant*, *supra*, 60 Cal.4th at p. 405.) "[T]he erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. Analysis

As defendant recognized below, the gas station videos depicting him wearing the same distinctive shoes and wristwatch as one of the hotel robbers days before the robbery were "relevant for a legitimate purpose": identifying him as one of the hotel robbers. Defendant's identity as one of the robbers was a consequential fact in dispute, as Keefer was unable to identify the masked perpetrators and defense counsel argued that defendant was not among them.

Relevant evidence is admissible unless it is barred by some other provision or is unduly prejudicial. (§ 351.) The trial court here concluded that section 1101 did not bar the admission of the videos or Caprile's testimony, and we agree. Identity is listed in section 1101, subdivision (b) as a fact that may be proven by

evidence of prior conduct. Even if it were not, the trial court reasonably relied on the prosecutor's representation that the evidence relating to defendant's presence and conduct at the gas station was for purposes of proving identity and nothing more. Indeed, the trial court sustained defendant's objection when the prosecutor's argument suggested that the gas station evidence demonstrated defendant's greed in addition to his identity. Moreover, the additional identification from Caprile bolstered the credibility of Ahir's identification; both witnesses testified they had interacted with defendant and seen him wearing the shoes and wristwatch depicted in the videos. Supporting a witness's credibility was also a valid reason to admit the evidence under section 1101, subdivision (c).

The trial court also appropriately exercised its discretion under section 352. It "engage[d] in a careful weighing process" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917) in which it considered the prejudicial nature of the donation box theft and the probative value the evidence from the gas station had in establishing defendant's identity and bolstering both Ahir's and Caprile's credibility. The court acknowledged that the jury "might look negatively" at defendant for stealing a donation box, as such conduct "reflected a certain meanness" and was "not nice." It weighed these concerns against the petty nature of the theft, the comparative seriousness of the robbery charge defendant faced, and the importance of the evidence to identifying defendant and explaining why Caprile remembered defendant in the first place. The court's conclusion that the probative value and nature of the crime outweighed the potential prejudice associated with theft of a donation box was not an abuse of its discretion. This is particularly true where the jury

heard evidence of numerous other unsavory acts performed by defendant, including grifting hotel visitors by selling gift cards in the lobby, attempting to make hotel room keys, and attempting to improperly return items to the gas station.

Even were we to conclude the trial court abused its discretion in admitting the evidence of the theft—evidence that defense counsel conceded the prosecution could introduce via the gas station videos—we would conclude any error was harmless, for two reasons.

First, the court provided curative instructions at the close of the case. The court told the jury the evidence "was only admitted for the purpose of identifying him on a video recording at that store," and further instructed that the jury could consider the evidence "only for the purpose of his identification and for no other." These instructions mitigated any prejudicial aspects of the gas station evidence. We presume the jury understood and followed these instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Defendant contends the instructions were inadequate because they were not given until the end of trial, and, furthermore, "[i]t is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) The timing of giving jury instructions is a matter within the discretion of the court, however. (*People v. Chung* (1997) 57 Cal.App.4th 755, 758.) Defendant has not demonstrated how giving the curative instructions at the end of the case, contemporaneously with the bulk of the other jury instructions, was an abuse of that discretion.

Second, the evidence of defendant's guilt was overwhelming even without the gas station evidence. Hotel manager Ahir testified that he was familiar with defendant and his brightly colored shoes and wristwatch because he had interacted with him on several occasions. Ahir identified defendant in the surveillance videos as the robber who was handling a clean, bleached hotel towel. Officer Saldana found a hotel towel in the street near the hotel, and forensic testing revealed defendant's DNA on the towel. Detective Muir testified that tattoos on defendant's arm matched the tattoos on one of the robbers in the video. Cascadden testified that he saw three or four people enter and exit the area near the Travelodge in a dark-colored SUV around the time of the robbery, and a black vehicle armrest was found in the street with the hotel towel. In light of all of this evidence, there is no reasonable probability that the jury would have reached a different verdict had it been unaware that defendant stole a charitable donation box.

DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J. MANELLA, J.