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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WALTER MACK, Defendant and Appellant.	B264044 (Los Angeles County Super. Ct. No. BA424175)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed as modified.

Elana Goldstein, 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, Senior Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Walter Mack appeals from a judgment of conviction entered after a jury trial. The jury found him guilty on three counts of second degree robbery (Pen. Code, § 211) and one count of attempted second degree robbery (*id.*, §§ 211, 664). The jury found true the allegations that defendant personally inflicted great bodily injury on one of his victims (*id.*, § 12022.7, subd. (a)), and he personally used a firearm in the commission of the crimes against the other three victims (*id.*, § 12022.53, subd. (b)).

The trial court imposed the middle term of three years as to one of the robberies and one-third the middle term on the other two robberies—one year each—to run consecutively. The court imposed 10 years for the first firearm use enhancement, one-third for the second—three years, four months—and three years for the great bodily injury enhancement. It imposed and stayed a concurrent two-year sentence on the attempted second degree robbery count and stayed the associated firearm use enhancement under Penal Code section 654. The total sentence imposed was 21 years and 4 months.

On appeal, defendant raises a claim of error with respect to the prosecutor's exercise of peremptory challenges. He also contends the trial court abused its discretion in admitting other crimes evidence and erred in imposing the full great bodily injury enhancement rather than one-third the middle term. We agree as to the claim of sentencing error and modify the judgment accordingly. In all other respects, we affirm.

FACTS

A. *Prosecution*

1. *Robbery of Melisande Amos*

At about 10:25 a.m. on December 4, 2013, Melisande Amos was leaning against her parked car near the intersection of Pico Boulevard and Fairfax Avenue, holding her iPhone. A man in a black hooded sweatshirt with white block lettering on the front walked by her. He then returned to where Amos was standing and grabbed her hand. She reacted by pulling her hand back, becoming trapped between the man and her car. He told her, "Give me your phone, bitch," and punched her in the face. She let go of the phone, and the man ran away with it.

As a result of the blow to her face, Amos was bleeding and unable to close her jaw. She lost a tooth and required multiple oral surgeries to repair the damage.

Amos reported the robbery to the police, describing the robber as a young African-American man, about six feet tall, wearing a black hooded sweatshirt and black pants. The police were able to track Amos' phone and found it in the possession of a young man other than the defendant. They brought the young man to Amos for a field show-up, and she told them he was not the man who had taken her phone.

Several weeks later, the police showed Amos a photographic lineup. She identified defendant's photograph as that of the robber and recalled that he had had been wearing a sweatshirt with a "California" logo in red and white lettering. She also identified defendant at the preliminary hearing.

2. *Robbery of Murshida Islam*

At about 1:45 p.m. on December 4, 2013, Murshida Islam was working at I Market in the 7900 block of Melrose Avenue. A man wearing a black or blue hooded sweatshirt with lettering on it walked into the market. After all the other customers left the store, the man put on gloves, pointed a gun at Islam, and told her to give him all the money. Islam opened the cash register and gave the man about $150. He told her not to do anything or call the police, or he would kill her. He then exited the market. The incident was captured on the market's surveillance system, and the recording showed the robber's face.

The police showed Islam a photographic lineup, but she was unable to identify the robber from the photographs. She identified defendant at the preliminary hearing and at trial.

3. *Robbery of Soheil Kermanshahi, Attempted Robbery of Chaim Lopian*

At about 5:45 p.m. on December 5, 2013, Soheil Kermanshahi was in his eyeglass store in the 7100 block of Beverly Boulevard with a patient, Chaim Lopian. A man wearing a red beanie, black hooded sweatshirt, black sweatpants, and sneakers walked into the store. He approached Kermanshahi and Lopian, pulled a gun from his waistband and pointed it at them. The man told them not to make any sudden movements and asked where the cash was in the store. He ordered Kermanshahi to the back of the store and asked again where the cash register was, to which Kermanshahi replied the store did not have a cash register. The man persisted in asking for money, waving his gun and cursing.

The man then ordered Kermanshahi and Lopian to empty their pockets. Kermanshahi had $82 and a check; Lopian had no cash. The man asked for their cell phones, but Kermanshahi did not have one with him and the man did not want Lopian's phone. The man warned Kermanshahi and Lopian not to contact the police, or he would blow their brains out and then left.

Kermanshahi later identified defendant from a photographic lineup and at the preliminary hearing. Lopian identified defendant at the preliminary hearing and at trial based on his distinctive eyes.

A surveillance video from the bank next door showed a person in white tennis shoes and dark pants walking toward the eyeglass shop right before the robbery and walking in the opposite direction about nine minutes later.

4. *Other Crimes*

Defendant admitted to committing two subsequent robberies at Subway restaurants on the same day in February 2014. In the first robbery, defendant was wearing a black "California" logo hooded sweatshirt, blue jeans and tennis shoes. During the robbery, he had the hood up. In the second, he was wearing the same "California" logo sweatshirt and Philadelphia Eagles gloves. In both robberies, he asked the cashiers, "Do you value your life?" In the first, he raised his sweatshirt to reveal the butt of a gun; in the second, he looked down to signal that he had a gun. In neither robbery did he hold a gun, yell, curse or become violent.

During the investigation of the Subway robberies, the police searched defendant's home. They found a black

"California" logo sweatshirt, which he acknowledged he had worn during both of the Subway robberies.

B. *Defense*

Defendant testified in his own defense. He stated that he was five feet eight inches tall and weighed 160 pounds. He denied committing the robberies charged in this case.

Defendant admitted committing the Subway robberies while wearing dark jeans, tennis shoes and the black "California" logo hooded sweatshirt later found by the detective during the search of his home. He explained that he selected the Subway restaurants because he knew they had cash. He asked the cashiers if they valued their lives because he had worked in the retail business and knew that phrase would catch their attention. He denied possessing a gun during the robberies and said he did not yell or become aggressive because he was frightened and is not a loud person. He said he committed the robberies to obtain money to repay his girlfriend, who was upset with him for losing some of her money.

A defense investigator visited a number of stores in tourist destination areas. He testified he found "California" logo sweatshirts, with some variations in the lettering, in most of the stores. The sweatshirts could be found in a variety of colors and styles.

Dr. Kathy Pezdek testified as an expert on eyewitness identification and memory. She testified as to how memory works and is affected by stressful situations. She also testified as to the psychological factors which affect the accuracy of eyewitness identification, including stress, the presence of a weapon, cross-racial identification, and suggestive identification

procedures used by the police. She explained that even well-intentioned witnesses may make erroneous identifications due to these factors.

DISCUSSION

A. *The Prosecutor's Use of Peremptory Challenges To Excuse Two African-American Jurors*

1. *Proceedings Below*

During voir dire, the trial court asked if any of the prospective jurors had ever been the victim of the type of offense with which defendant was charged. Juror No. 5 raised his hand. He explained that he was the victim of three theft-related crimes, in one of which he was robbed at gunpoint. He added, "But your honor, this have nothing to do with this matter. It's just something to tell you. I am highly religious. I am not going to blame anything for what happened, but first thing come to your mind." He said, "So I have forgiven the people, so hopefully. But they still in your mind, you know."

The court asked if the police ever caught any of the perpetrators, and Juror No. 5 said they had not. The court asked if that would affect his ability to be impartial and he said it would not, adding, "I am highly religious, I forgive them. But at the same time you forgive, but you don't forget."

In exercising peremptory challenges, the prosecutor excused Juror Nos. 6, 17, 11, and 19. The prosecutor then excused Juror No. 5. At that point, defense counsel asked to approach the bench and told the court, "He seemed to be a totally fair juror, nodded with both parties, said he could be fair, was interested, informative. And I don't . . . see a reason for kicking

him besides his race." The trial court asked "who else has been kicked, in your opinion, because of race?" Defense counsel responded, "No. 11. She also was fair and informative and nodded with both parties, answered accordingly, seemed like a perfectly fair juror. This is number two."

The trial court stated for the record that defense counsel had excused one African-American juror, and that defendant was African-American, as were Juror Nos. 11 and 5. It did not think that defense counsel had made a prima facie showing of racial discrimination but invited the prosecutor nonetheless to state her reasons for excusing the two African-American jurors.

The prosecutor stated for the record that there were still two additional African-American jurors in the jury box. As to Juror No. 5, she explained, "First of all, his demeanor I found unusual, which was on the first day. And the second day he is the only juror who comes in smiling, which I found a little unusual. And the fact that he volunteered that he was highly religious. I don't particularly like jurors who are highly religious, because they have difficulties to judge individuals, which is why I kicked him, for that reason."

As to Juror No. 11, the prosecutor explained: "when counsel had asked her about whether or not she would be able to deliberate at 4:30 on a Friday, her quote was, 'Someone's life is on the line.' And based upon that, I believe she would be considering punishment versus the actual charge itself." Following this colloquy, the trial court stated it was denying the defense's motion. Subsequently, the defense dismissed one of the remaining African-American jurors. At no time did defense counsel raise an objection to the use of a peremptory challenge for Juror No. 5 on grounds of his religious faith or beliefs.

2. *Applicable Law*

A party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias presumed from the jurors' membership in "an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713; accord, *People v. Bell* (2007) 40 Cal.4th 582, 596, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Doing so violates the right to trial by an impartial jury under article I, section 16 of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) It also violates the 14th Amendment to the United States Constitution's guarantee of equal protection of the laws. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

"The now familiar *Batson/Wheeler* inquiry consists of three distinct steps. First, the opponent of the strike must make out a prima face case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges. Second, if the prima facie case has been made, the burden shifts to the proponent of the strike to explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications. Third, if the party has offered a nondiscriminatory reason, the trial court must decide whether the opponent of the strike has proved the ultimate question of purposeful discrimination." (*People v. Scott* (2015) 61 Cal.4th 363, 383.)

On appeal, defendant does not challenge the trial court's determination that he failed to make a prima facie case of racial discrimination. Rather, the only argument he raises is that the first step of the *Batson/Wheeler* analysis "became irrelevant once

the prosecutor provided her reasoning. In step two, . . . in her attempt to make her explanation race-neutral, she discriminated against another protected class, 'religious people.'"

As the People point out, defendant failed to raise this issue below. A party may not raise a new claim regarding the exercise of peremptory challenges for the first time on appeal. (*People v. Jones* (2011) 51 Cal.4th 346, 368; *People v. Howard* (1992) 1 Cal.4th 1132, 1157-1159; *People v. Hayes* (1990) 52 Cal.3d 577, 605.) The reason for requiring a timely objection to a peremptory challenge is in part to allow the development of an adequate record for review on appeal. (*People v. Morrison* (2004) 34 Cal.4th 698, 710.)

Any argument that "the prosecutor's decision to volunteer reasons for challenging [Juror No. 5] makes the issue cognizable on appeal despite" case law requiring a contemporaneous objection was squarely rejected in *Howard, supra,* 1 Cal.4th at pp. 1158-1159. There, the defendant objected during voir dire to the use of peremptory challenges based on race; after the motion was denied, the prosecution offered an explanation that one of the jurors was "seductive" and might distract male jurors. On appeal, the defendant raised for the first time that this statement was an admission of gender bias in the selection of jurors. The defendant urged the court to carve out an exception to the forfeiture rule. The court rejected the argument, holding that he was barred from raising on appeal the issue of gender bias as it had not first been presented to the trial court. (*Howard, supra,* at pp. 1158-1159.)

The many compelling reasons for this rule were set forth by the Ninth Circuit in *Haney v. Adams* (2011) 641 F.3d 1168: "'Because challenges are often based on such subtle, intangible

impressions, the reasons for exercising the challenges may be quite difficult to remember if an objection is not raised promptly.' [Citation.] . . . '[W]hen determining whether the prosecutor's race-neutral explanations are credible, "the best evidence often will be the demeanor of the attorney who exercises the challenge."' [Citations.] [¶] These determinations not only lie 'peculiarly within a trial judge's province,' [citation], they would also be difficult, if not impossible, to evaluate for the first time in post-conviction proceedings when no record is preserved. [Citations.] . . . [¶] Similarly, the Supreme Court's proposed remedies for *Batson* violations presuppose a contemporaneous objection. The Supreme Court [in *Batson*] declined 'to formulate particular procedures to be followed upon a defendant's *timely objection* to a prosecutor's challenges.' [Citation.] However, the Court theorized that, after a finding of intentional discrimination, trial courts could choose to 'discharge the venire and select a new jury from a panel not previously associated with the case' or 'disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.' [Citation.] Neither option would be viable if struck members of the panel had been dismissed, or the case had already gone to a jury. [Citations.] [¶] Aside from these procedural issues, it would also be unwise to allow defendants 'to manipulate the [trial] system to the extreme prejudice of the prosecution' by allowing post-conviction *Batson* claims. [Citation.] A defendant would have a strong incentive to allow the trial to proceed with the selected jury, then—in the event of a conviction—raise the *Batson* claim on appeal, long after the prosecutor may have forgotten the reasons for his challenges. [Citations.]" (*Haney v. Adams*, *supra*, at pp. 1172-1173; accord,

Galarza v. Keane (2d Cir. 2001) 252 F.3d 630, 638 ["[A] party must raise his or her *Batson* challenges in a manner that would allow a trial court to remedy the problem at trial . . ."); *Carter v. Hopkins* (8th Cir. 1998) 151 F.3d 872, 875-876 [refusing to apply burden-shifting when no contemporaneous objection]; *Sledd v. McKune* (10th Cir. 1995) 71 F.3d 797, 799 [refusing to consider *Batson* claim without an objection because there was no record to review]; *Thomas v. Moore* (5th Cir. 1989) 866 F.2d 803, 804.)

The defendant disputes that he forfeited this claim, asserting that his trial counsel raised a general *Batson* objection to the exclusion of Juror No. 5, which encompassed any impermissible reason given by the prosecutor, even if not articulated below. We disagree. Defendant's attempts to make his race-based challenge encompass his religion based claim is unavailing given the strict requirements with respect to objections to peremptory challenges. His counsel was obligated to state distinctly the matter objected to and the grounds of the objection, and to do so at the time.

Because Mack's counsel failed to raise a challenge to the religion-based reasoning offered by the prosecution, he has forfeited any further challenge based on the juror's religious affiliation or beliefs.

B. *Other Crimes Evidence*

Prior to trial, the prosecution filed a motion in limine to introduce evidence of six robberies occurring on February 11, 2014, in which defendant entered five Subway and one Little Caesar's restaurants, wearing a black hooded sweatshirt with a "California" logo on it, asked the cashiers if they valued their lives, and showed them a gun. The prosecution sought to

introduce the evidence to show intent and common plan or scheme under Evidence Code section 1101, subdivision (b).

The defense objected pursuant to Evidence Code section 352 "that at a certain point it definitely ends up becoming cumulative and prejudicial and propensity evidence at that point. If the court is going to allow the People under 1101(b) to prove up some of these bad acts, I ask that it be limited and not all six." The defense did not raise an objection on the record on the basis of section 1101.

The trial court agreed "that six is too much under Evidence Code [section] 352. I will, however, find that there is relevance that is not outweighed by undue prejudice to introduce two."

Defendant now argues that all evidence of the other robberies should have been excluded under Evidence Code section 352, in that such evidence is generally inadmissible to prove propensity to commit the charged crime under Evidence Code section 1101, subdivision (a). However, defendant failed to make an objection under section 1101, subdivision (a), in the trial court, objecting only to the number of robberies the prosecution sought to admit.

Defendant's ""failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.'" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434; accord, Evid. Code, § 353; *People v. Valdez* (2012) 55 Cal.4th 82, 130.) "'[A] specifically grounded objection to a defined body of evidence serves to prevent error.'" (*Partida*, *supra*, at p. 434.) It allows the trial judge to exclude or limit admission of evidence to avoid prejudice and allows the proponent of the evidence to lay a foundation, modify the offer of proof, or take steps to minimize the chance of reversal. (*Ibid.*) "Because defendant did not object

to this evidence at trial as improper character evidence under Evidence Code section 1101[, subdivision (a)], he has forfeited such a claim. [Citations.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 912; accord, *Valdez*, *supra*, at p. 130.) That defendant now attempts to couch his objection in terms of Evidence Code section 352, which he did raise in the trial court, does not change the fact that the nature of his claim of error on appeal is different from the objection he made in the trial court. (See *People v. Doolin* (2009) 45 Cal.4th 390, 437 ["Because defendant objected only that the evidence was irrelevant and unduly prejudicial under Evidence Code section 352, he has forfeited his claim that the court admitted the evidence in violation of Evidence Code sections 1101 and 1102"]; see also *People v. Benavides* (2005) 35 Cal.4th 69, 93 [where counsel agrees to the admission of other conduct evidence, the trial court cannot be expected to *sua sponte* raise an objection under 1101].)

Even if we were to consider defendant's claim on the merits, we would find no abuse of discretion in admission of the evidence under section 1101 or 352. (*People v. Leon* (2015) 61 Cal.4th 569, 597.) "With exceptions not relevant here, 'evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.' (Evid. Code, § 1101, subd. (a) . . . .) Subdivision (b) of the same section, referred to as the 'other crimes' provision, provides that '[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .

other than his or her disposition to commit such an act.' (Evid. Code, § 1101, subd. (b).) An example of the application of subdivision (b) would be a case in which the charged crime has distinct features similar to a prior crime that the defendant committed, and the prosecution seeks to present evidence of the prior crime to prove that the defendant committed both crimes. [Citation.]" (*People v. Alexander*, *supra*, 49 Cal.4th at p. 912, italics omitted.)

The relevance of other crimes evidence "depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. [Citation.] 'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . [Citation.]' Greater similarity is required to prove the existence of a common design or plan. In such a case, evidence of uncharged misconduct must demonstrate "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.]' [Citation.] To show a common design, 'evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts.' [Citation.] Finally, the greatest similarity is required to prove identity. When offered on this point, '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.] These common features need not be unique or nearly unique; 'features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.' [Citation.]" (*People v. Leon*, *supra*, 61 Cal.4th at p. 598.)

The investigating officer testified that the Subway robberies came to his attention because of the similarities: "it was gender, race, age, clothing, and they were usually smaller businesses." Both sets of robberies occurred within a small geographic area and a short period of time (as to the first two charged robberies and the Subway robberies). In both sets of robberies, the perpetrator wore a dark hooded sweatshirt with a "California" logo and the hood pulled up. In one of the Subway robberies and one of the charged robberies the perpetrator wore gloves. In the Subway robberies and the charged robberies, the robber either displayed or pretended to display a gun. There was enough similarity to prove common design or plan, and the trial court could have ruled the evidence admissible on that basis. (See *People v. Leon*, *supra*, 61 Cal.4th at pp. 598-599.) For the same reason, the court did not err in finding admission of two of the uncharged robberies more probative than prejudicial.

Moreover, any error in admitting the evidence was harmless. (*People v. Thomas* (2011) 52 Cal.4th 336, 356) [any error in admitting evidence of other crimes is subject to harmless error review]; *People v. Malone* (1988) 47 Cal.3d 1, 22 [same].) The victims of the charged robberies each identified defendant in court; two were able to select his photograph from a photographic lineup ; and a surveillance video of the robbery of Islam showed defendant wearing a beanie and gloves taking money from the person behind the counter.

C. *Sentencing Error*

Defendant contends, and the People agree, that the trial court erred in imposing the full great bodily injury enhancement as to count 1, the Amos robbery. The court selected count 2, the Islam robbery as the base term.

A determinate sentence consists of the base term and a "subordinate term for each consecutive offense [which] shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (Pen. Code, § 1170.1, subd. (a).)

The term for a great bodily injury enhancement under Penal Code section 12022.7, subdivision (a), is three years. Because count 1 was a subordinate term, the trial court should have imposed one-third of that term, or one year. We will modify the judgment accordingly.

Although neither party raises the issue, we note that the trial court erroneously imposed and stayed a two-year sentence for defendant's attempted second degree robbery conviction. The middle term sentence for second degree robbery is three years (Pen. Code, § 213, subd. (a)(2)), so the middle term sentence for attempted second degree robbery would be one year and six months (*id.*, § 664, subd. (a)). We will correct the judgment to reflect the appropriate sentence, as we may correct an unauthorized sentence at any time, even in the absence of an objection. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173.)

DISPOSITION

The judgment is modified to provide a one-year term for the enhancement under Penal Code section 12022.7, subdivision (a), on count 1, and a one year and six-month term, imposed and stayed, on count 4. In all other respects, the judgment is affirmed. The trial court is directed to prepare a modified abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

KEENY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, 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.