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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

AVAK SAHAGIAN,

Defendant and Appellant.

2d Crim. No. B281269
(Super. Ct. No. 2015021372)
(Ventura County)

Avak Sahagian appeals his conviction, by jury, of assault with a deadly weapon, an automobile (Pen. Code, § 245, subd. (a)(1)), and misdemeanor hit-and-run driving. (Veh. Code, § 20002, subd. (a), (c).) The trial court sentenced appellant to a total term in state prison of 4 years, 8 months. He contends the trial court prejudicially erred when it admitted evidence of his prior conviction of felony hit-and-run driving causing injury to another person. We affirm.

Case in Chief Facts

On the evening of July 4, 2015, Derek Dawson went to a motel on Thompson Boulevard, near downtown Ventura, to get a room for the night. There, Dawson ran into an acquaintance, Kathleen Iwan, who had already gotten a room with appellant and another man, Melvin Ferguson. As they were chatting in the doorway of her room, appellant showed up and demanded to know how Iwan knew Dawson. Appellant was upset, called Iwan names and raised his voice at her. Dawson left.

Later that evening, Dawson returned to Iwan's room and asked to use the bathroom. Appellant objected, but Ferguson and Iwan gave permission. While Dawson was using the bathroom, another argument broke out between appellant and Iwan. Dawson heard appellant use racial slurs in reference to him. The two men began a physical fight in the motel room. Dawson hit appellant several times, causing him to lose consciousness.

Dawson's friends urged him to leave, afraid he might kill appellant if the fight continued. Dawson left the room as appellant regained consciousness. Appellant caught up with Dawson in the parking lot and the fight resumed. Dawson again knocked appellant to the ground. He gathered his bicycle and quickly walked with it out of the motel parking lot, toward the parking lot of the lumber yard next door. By the time Dawson reached the street, appellant had grabbed the keys to Iwan's vehicle, a small SUV. Appellant drove out of the parking lot, made a U-turn and then drove up onto the sidewalk toward Dawson. Dawson dropped his bike and jumped behind a tree to avoid being hit. Appellant ran over Dawson's bike, crushing it.

Just then, bystander Michael Stine drove by and asked Dawson if he was OK. Dawson asked for a ride down the road. Meanwhile, appellant was turning his SUV around in the parking lot, so he could take another run at Dawson. When he saw Stine's car, appellant yelled that Stine should get out of his way. Stine used his car to block appellant from getting at Dawson. Dawson tried to throw the remains of his bike at appellant's SUV, and appellant drove away.

Appellant made another U-turn and drove back toward Stine and Dawson. Stine again shielded Dawson with his car. Dawson again lifted his bike to throw it at appellant's SUV. Appellant attempted to drive away. This time, however, appellant ran into another car that was driving down Thompson. After pausing briefly, appellant started driving toward Dawson again. Dawson ran back into the lumber yard parking lot. As he was running away, Iwan appeared and demanded that appellant let her into the SUV. He complied and the two drove off.

Police arrived. Dawson was explaining what had happened when appellant and Iwan returned to the area. Appellant jumped out of the SUV and immediately started yelling at Dawson, using racial slurs and calling him a cockroach. He was so agitated that one of the officers handcuffed him. Appellant still could not regain his composure. He was arrested.

Prior Incident. In January 2013, appellant got into an argument with Albert Virs while the two men were standing outside of a liquor store located on California Street in downtown Ventura. Appellant eventually got into Iwan's SUV – the same vehicle involved in the current offenses – and drove off. Within a few minutes, appellant reappeared across the street. A friend of Virs exited the liquor store and watched as Virs walked across

the street toward appellant. Appellant hit Virs with the SUV, causing him to do "a couple of cartwheels in the air." Appellant drove away, running a red light to leave the area. As a result of this incident, appellant was convicted of felony hit-and-run driving causing injury to another person. (Veh. Code, § 20001, subd. (b)(2).)

Defense. The defense theory at trial was that Dawson was exaggerating or lying about appellant's driving and his speed. Iwan testified that she never saw appellant try to run down Dawson. An accident reconstruction expert offered the opinion that the SUV's turning radius and dimensions made it almost impossible for appellant to make the U-turns and drive on the sidewalk as Dawson described, especially at high speed. The expert's written report conceded, however, that Dawson's account was not entirely impossible.

Discussion

Appellant contends the trial court prejudicially erred when it admitted evidence of the January 2013 hit-and-run and his resulting felony conviction. He contends the prior conviction should have been excluded under Evidence Code section 1101, subdivision (a) because it is not relevant to prove any fact other than his propensity to commit hit-and-runs. We are not persuaded.

We review the trial court's decision to admit evidence of appellant's prior conviction for abuse of discretion. (*People v. Heard* (2003) 31 Cal.4th 946, 973.) Evidence that a person committed "a crime, civil wrong, or other act" prior to the current offense is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his

or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) In addition, evidence of the prior offense must not be inadmissible under Evidence Code section 352. Section 352 permits the trial court 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." (Evid. Code, § 352.)

The similarity of the prior and current offenses is central to the trial court's evaluation of whether the prior offense tends to prove a relevant fact such as motive, intent, common design or identity. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1285.) In determining whether evidence is unduly prejudicial, the trial court must balance, "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Appellant contends evidence of his prior hit-and-run had little probative value to prove any disputed element of the prosecution's case: identity was not at issue; knowledge is not at issue because it is common knowledge that a car can cause death or great bodily injury; and motive is not an element of hit-and-run driving. Appellant further contends his prior conviction is not relevant to prove that he acted pursuant to any plan or scheme or to his intent. He further contends evidence of his intent was not relevant because the prosecution was not required to prove he acted with the intent to cause a particular result. Appellant's intent could be inferred from the nature of his

conduct, rather than his subjective mindset. We are not persuaded.

First, the similarities between appellant's prior and current offenses are strong. In each case, appellant got into a verbal argument with a stranger. Appellant then hit, or attempted to hit that person with Iwan's SUV before driving away from the scene.

Second, the evidence was highly probative of appellant's intent. Intent was placed in issue when appellant pled not guilty to the charged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) Moreover, the defense theory of the case was that Dawson lied when he testified that appellant drove the SUV directly at him, in an attempt to hit him with it. Evidence of appellant's prior hit-and-run was relevant to prove that he intended to use the SUV to injure Dawson, and did not chase Dawson as the result of an accident or mistake. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1096-1097.)

Finally, the evidence was not unduly prejudicial. "Evidence is substantially more prejudicial than probative (see Evid.Code, § 352) if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) In this context, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that "'uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Among the factors a trial court may consider when determining whether uncharged evidence is more prejudicial than probative are whether the uncharged acts resulted in criminal convictions, and whether the evidence of the

uncharged acts is stronger or more inflammatory than the evidence of the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Here, there is no reason to believe that evidence of appellant's prior hit-and-run conviction was unduly prejudicial. The prior offense is not substantially more inflammatory or gruesome than the current offense. In both cases, appellant used the SUV as a weapon. In the prior case, appellant succeeded in hitting his victim; in the present case, he missed. Appellant was convicted of a felony after the first incident. Consequently, there is no danger that jurors would convict appellant in this case to punish him for his conduct in the prior case. The trial court did not abuse its discretion when it admitted evidence of the prior conviction.

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

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