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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. THOMAS WALKER and WANO WAH McSWAIN, Defendants and Appellants.	B272277 (Los Angeles County Super. Ct. No. KA110016)

APPEAL from judgments of the Superior Court for Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Thomas Walker.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Wano Wah McSwain.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Thomas Walker and Wano Wah McSwain were convicted of attempted first degree residential burglary (Pen. Code,[1] §§ 664/459; count 1), conspiracy to commit a crime (§ 182, subd. (a)(1); count 2), and first degree residential burglary (§ 459; count 4); Walker also was convicted of receiving stolen property exceeding $950 in value (§ 496, subd. (a); count 3), and in a bifurcated bench trial, the trial court found that he had suffered two prior strike violations and serious felonies under the Three Strikes law (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)). Walker was sentenced to a prison term of 25 years to life as a third strike offender, plus an addition five-year term for a prior serious felony. McSwain was sentenced to two years in prison. Both defendants appeal.

Walker argues on appeal that the trial court (1) abused its discretion by admitting evidence of Walker's prior burglary arrest under Evidence Code section 1101, subdivision (b); (2) abused its discretion by failing to declare a mistrial after a witness testified about a statement McSwain made that, along with other evidence, appeared to implicate Walker in the crimes; and (3) violated Walker's right to a jury trial and due process by imposing an enhanced sentence based in part upon a prior juvenile adjudication. McSwain does not present any arguments on appeal; his attorney filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting that we conduct an independent review of the record.

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1 Further undesignated statutory references are to the Penal Code.

Having reviewed the record, we conclude that the admission of evidence of Walker's prior burglary arrest was not error, that the trial court did not abuse its discretion by determining that its immediate admonishment to the jury to disregard the testimony regarding McSwain's statement was sufficient to avoid any prejudice to Walker, and the trial court's use of Walker's juvenile adjudication was proper. We also conclude that no arguable issues exist with respect to McSwain. We did, however, discover that the abstract of judgment for Walker states that the trial court stayed the five-year sentence enhancement under section 667, subdivision (a)(1), but the record is clear that the court did not do so. Accordingly, we direct that the abstract of judgment for Walker be amended to indicate that the section 667, subdivision (a)(1) enhancement is not stayed, and otherwise affirm the judgment as to both defendants.

BACKGROUND

On June 24, 2015, Mario Rivera left his home on Cabo Blanco Drive in Hacienda Heights at around 10:45 a.m. When he returned a few hours later, he saw that everything in the master bedroom was on the floor, and all the jewelry he and his wife kept in a jewelry box in the master bathroom was missing, including his class ring. He also noticed that his laptop, which he kept in his home office in the bedroom, was gone. He called the police and reported the burglary.

That same day, Gloria Ochoa heard someone ringing her doorbell and knocking on the door. She saw a Black man look through her window and then walk away. As he was walking away, Ochoa opened

the door and asked if she could help him. He turned around, mentioned a woman's name and asked if she lived there. Ochoa said no, and the man thanked her and apologized for disturbing her. She subsequently saw a silver car with paper license plates drive away, although she could not see the occupants of the car. She called the police and reported the encounter.

Norma Mata was working as a cleaner at a house on Punta del Este Drive in Hacienda Heights from around 9:00 a.m. to around 11:00 a.m. that same day. While she was cleaning the kitchen, she saw a man jump over a fence from another yard into the yard of the house she was in, and run away. He was Black, and was dressed in blue with a baseball cap. Mata asked the owner of the house if the neighbor had a Black man living there; the owner asked the neighbor, who said that she did not, and they called the police.

That morning, Los Angeles County Sheriff's Deputies Lisa Ondatje and Joanne Arcos were on patrol in Hacienda Heights and saw a silver car with paper license plates[2] parked across the street from 16309 Colegio Drive. There was someone, later identified as defendant Walker, in the driver's seat with the seat reclined. It appeared to Deputy Arcos that Walker was trying to hide from view.

Deputy Arcos approached the car and asked Walker what he was doing in the area. Walker said that he was reading his mail. The

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[2] Deputy Arcos noted that, although there were paper license plates on the car, the car did not appear to be new. It was subsequently determined that the car was registered to Walker.

deputy asked him where he lived, and he told her he lived in Inglewood.[3] While she was talking to Walker, Deputy Arcos noticed that the gate at 16309 Colegio Drive was wide open and that the passenger side door of Walker's car was not closed all the way. Deputy Arcos had Walker get out the car, and Deputy Ondatje searched it. Deputy Ondatje found jewelry in the center console and the slot below the car radio, and a yellow metal man's Nixon watch in the back seat. Among the items of jewelry was a class ring with the name "Mario Rivera" engraved inside it, a yellow metal bracelet, and a couple of yellow metal pendants.[4] In addition, Deputy Ondatje found a photo identification card for McSwain in the front passenger seat.

Deputy Arcos asked Walker about the jewelry that was found in his car. He told the deputy that he buys and sells jewelry, but he could not provide any proof of purchase of any of the jewelry or give the name of anyone from whom he bought the jewelry. She asked him if he knew anyone named Mario Rivera; he said he did not. When asked when he bought the jewelry found in his car, he said he bought it earlier that day.

Deputy Ondatje went to the home at 16309 Colegio Drive and knocked on the door. When no one answered, she went through the open gate into the back yard, where she saw that the electrical panel was uncovered and the cover was on the ground. The owner of the

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[3] Inglewood is approximately 30 miles from Hacienda Heights.

[4] Rivera subsequently identified those items as items that were taken from the jewelry box in his home.

home, Joan Wigington, returned to her home at around 11:00 a.m. and saw the police were there. She had been gone for an hour or so; when she left, the gate was closed and locked, and the cover was on the electrical panel.

Deputy Lorenzo Bright was on patrol in Hacienda Heights that morning, and responded to a call regarding burglars in the area. As he drove southbound on Stimson near Halliburton he saw a man, identified as McSwain, walking northbound on the east curb of Stimson.[5] A patrol unit from the Hacienda LaPuente School District was just ahead of Deputy Bright, and it stopped to make contact with McSwain. Deputy Bright pulled over just after that patrol unit stopped; when he approached McSwain, he saw that McSwain was breathing heavily and was sweating, as though he had been running. Sometime later, another deputy transported Norma Mata (the person who had seen someone jump over the fence of the house in which she was working and run off) to the location where Deputy Bright was detaining McSwain. Mata identified McSwain, based upon how he was dressed, as the person she had seen.

Deputy Arcos went to Deputy Bright's location to talk to McSwain. She asked him what he was doing in the area, and he said he was visiting a woman. She asked if he had been to 16309 Colegio Drive; he said he had, and admitted he had opened the gate. When she asked why he was there, he responded that he was "up to no good."

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[5] This location was several streets away from 16309 Colegio Drive.

McSwain later was interviewed by Detective Steven Busch. McSwain told Detective Busch that he lived on Normandie Avenue in Los Angeles. He said he had gone to 16309 Colegio Drive to burglarize it. He walked up the driveway and knocked on the front door. When no one answered, he went around the side of the house, opened the gate, went into the back yard and looked in the windows. He had a change of heart after thinking about it, and left the location by jumping the rear wall and going through the neighborhood.

Detective Busch also interviewed Walker. When asked what he had been doing in that neighborhood, Walker said that he was reading his mail. He said that he bought the jewelry that was found in his car from some man earlier that day, and paid the man $750 for it. He was unable, however, to provide any information about how to contact that man. He told Detective Busch that he bought the jewelry to sell it; he said that he buys and sells gold to make money.

Walker and McSwain were charged by information with attempted first degree residential burglary of Joan Wigington's home (§§ 664/459), conspiracy to commit a crime (§ 182, subd. (a)(1)), and first degree residential burglary of Mario Rivera's home (§ 459); Walker also was charged with receiving stolen property exceeding $950 in value (§ 496, subd. (a)). With regard to the conspiracy count, the information alleged Walker and McSwain conspired to commit first degree residential burglary, and alleged five overt acts: (1) they drove approximately 30 minutes to get to the location; (2) the car in which they drove had paper license plates; (3) one person remained in the car as a lookout while the other went to knock on the door; (4) that other

person opened a side gate and entered the yard; and (5) one of them went to a home, visually inspected it, knocked on the door, and fled when someone was home. The information also alleged that Walker and McSwain each had been convicted of two felonies within the meaning of section 1203, subdivision (e)(4), and that Walker had suffered two serious felony convictions within the meaning of section 667, subdivision (a)(1), and was subject to sentencing under section 667, subdivisions (b) through (j) and section 1170.12.

Both defendants were tried before a single jury. The jury found each defendant guilty of the counts alleged against him. Each defendant waived his right to jury trial on the prior conviction allegations, and the trial court found that Walker had suffered two prior strikes under the Three Strikes law. The court sentenced McSwain to two years in prison on the first degree residential burglary count, with concurrent two-year terms for each of the other counts. It sentenced Walker to a term of 25 years to life on the burglary count, plus one five-year enhancement under section 667, subdivision (a)(1), on count 4, and concurrent 25-years-to-life terms on each of the other counts. Each defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *McSwain's Appeal*

As noted, McSwain's appointed counsel filed an opening brief under *Wende*, *supra*, 25 Cal.3d 436, asking that we review the record to determine whether any arguable issues exist. We notified McSwain of

his right to submit a supplemental brief, but no such brief has been filed. We have independently examined the entire record and conclude that there are no arguable issues on appeal as to McSwain.

B. *Walker's Appeal*

1. *Admission of Evidence of Prior Burglary Arrest*

Before calling its last witness at trial, the prosecutor told the court she intended to present the witness to testify about the circumstances surrounding Walker's 2014 arrest for burglary in Inglewood. She explained that the burglary in that incident followed a similar pattern as the attempted burglary in this case, in that there was more than one person, one person stayed in the car with the seat reclined, the burglary took place at the same time of day, and the focus of the burglary was on jewelry. She noted that in the 2014 incident, Walker was inside of the house rather than in the car, but, as in the present case, the car belonged to Walker or someone in his family. She argued that the evidence was admissible under Evidence Code section 1101, subdivision (b) because it showed intent, plan, knowledge, and/or absence of mistake or accident.

Defendant objected to the admission of the evidence, arguing that the facts of the 2014 burglary and the burglary/attempted burglary in this case were not sufficiently similar to show a common scheme or plan, and that the evidence was more prejudicial than probative. The trial court overruled the objection, finding that the evidence at issue tended to show a common scheme or plan, intent, and/or absence of mistake.

The prosecutor called Paul Devlin, a police officer for the City of Inglewood to testify. He testified that on April 15, 2014, he responded to a call regarding a burglary in progress. A person had reported that one or more people were in the house next door to his or her house, but the owners of that house were not there. When Officer Devlin arrived at the location, he saw a silver car parked in front.[6] There was someone inside the car, reclined back in the seat. He determined there were people inside the house, and ordered them to come out. Two people came out, one of whom was Walker.

Officer Devlin spoke with Walker after he was detained. Walker told him that he went to the front door of the house, knocked, and received no response. He then jumped over the gate and checked the side door. It was open, so he went inside. Once he saw that the police were outside, he did not take anything and came outside, where he was arrested.

On appeal, Walker contends the trial court abused its discretion in allowing Officer Devlin to testify about Walker's 2014 burglary arrest. We are not persuaded.

"Evidence Code section 1101, subdivision (a), generally prohibits 'evidence of a person's character or a trait of his or her character' when it is 'offered to prove his or her conduct on a specified occasion.' Subdivision (b) of section 1101, however, provides: 'Nothing 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

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[6] He subsequently learned that the car was registered to Walker's mother.

as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 782-783 (*Kelly*).)

The Supreme Court has explained "that '[t]he admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.] The main policy that may require exclusion of the evidence is the familiar one stated in Evidence Code section 352: Evidence may be excluded if its prejudicial effect substantially outweighs its probative value. Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value. [Citation.] This determination lies within the discretion of the trial court." (*Kelly*, *supra*, 42 Cal.4th at p. 783.)

Walker argues that the evidence of his 2014 burglary arrest was not admissible because his entire defense was that he had no knowledge that McSwain was committing burglary, and the similarities between the 2014 burglary arrest and the present case were not of the sort that would make it more likely that Walker knew what McSwain was doing. (Citing *People v. Hendrix* (2013) 214 Cal.App.4th 216, 242-243.) We disagree.

"[E]vidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are

manifestations of a common design or plan." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402 (*Ewoldt*).) "[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the result, 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.' . . . [¶] To establish the existence of a common design or plan, the common features must 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 . . . ; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Id.* at pp. 402-403.)

In this case, the common features of the 2014 burglary and the current burglary/attempted burglary were substantial. Walker and another person (or two) drove to a location and parked in front of the target house; one person stayed in the car with his seat reclined while the other (or others) went to the front door, knocked, and when there was no response went through (or over) a gate to gain access to the inside away from view. These similarities are sufficient to "indicate the existence of a plan rather than a series of similar spontaneous acts" (*Ewoldt*, *supra*, 7 Cal.4th at p. 403), even if that plan was not particularly distinctive or unusual. Thus, the evidence was relevant to negate Walker's assertion that he did not know what McSwain was doing.

Walker argues, however, that even if the evidence of the 2014 burglary was relevant, its probative value was outweighed by its

prejudicial effect, and therefore it should have been excluded. As he notes, the Supreme Court has warned that "'substantial prejudicial effect [is] inherent in [uncharged misconduct] evidence,'" and therefore that evidence is admissible only if it has "substantial probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) Here, the evidence had substantial probative value because the similarities between the 2014 burglary and the facts of the present case went directly to the most critical issue in the case against Walker, i.e., whether he had knowledge of what McSwain was doing and intended to aid and abet the commission of a burglary. Therefore, we conclude the trial court did not abuse its discretion by admitting Officer Devlin's testimony under Evidence Code section 1101, subdivision (b).

2. *Failure to Declare a Mistrial*

Before trial, Walker's counsel expressed his concern that the prosecution intended to introduce evidence of statements that McSwain made that implicated Walker. The prosecutor stated that she intended to use McSwain's statements to Deputy Arcos that implicated only himself, but did not intend to use his statement that implicated Walker, i.e., that he drove with Walker to the area to burglarize a house.

During the examination of Deputy Arcos at trial regarding her encounter with McSwain, the prosecutor asked, "Did you ask him why he was in the area?" Deputy Arcos responded, "Well, he made a statement that he was up to no good." Counsel for Walker objected to the testimony as non-responsive, and the trial court sustained, saying, "It is technically non-responsive." The prosecutor asked the question

again, and Deputy Arcos asked if she could refresh her recollection "to get a statement." The court allowed her to do so, and the prosecutor repeated the same series of questions she had previously asked about the deputy's questioning of McSwain, ending with, "Did you ask him why he was in that area?" Deputy Arcos responded, "Well, he made a statement that -- yes. I asked him. He stated that he was driven there to burglarize the home." Walker's counsel immediately objected, and the court held a sidebar with counsel.

At the sidebar, Walker's counsel moved for a mistrial. The prosecutor explained that she had told the deputy she could not introduce any statements by one defendant that would implicate the other, and Deputy Arcos understood that, which is why her initial response was that McSwain said that he was up to no good. But the prosecutor believed that when she re-asked the question after Walker's objection was sustained, Deputy Arcos thought the prosecutor was not getting what she needed, and so answered with McSwain's other statement, with the implicating information omitted. The prosecutor argued that any problem with the testimony could be cured by an admonishment because the statement itself did not implicate Walker; the photo identification found in Walker's car was what connected him to McSwain's statement.

Noting that McSwain's statement, as testified to by Deputy Arcos, was that "he was driven to the location" -- which the court observed could mean by a man or a woman, in Walker's car or in another car -- the court agreed that it could cure any harm by striking the question

and response, and directing the jury to disregard it. The court therefore denied Walker's motion for a mistrial.

Back before the jury, the court instructed: "The last question and last answer are stricken. The jury's directed to disregard the question and the answer, and not let -- totally disregard the question and answer, and not let that enter into your deliberations in any way, shape, or form, since it is not evidence." Resuming her examination of Deputy Arcos, the prosecutor asked, "Deputy, earlier you made a statement that defendant McSwain made a statement: I'm up to no good. Was that in response to you asking him why he was in the area?" Deputy Arcos responded, "Yes."

On appeal, Walker argues the trial court abused its discretion in refusing to order a mistrial because, given the evidence that McSwain's photo identification was found in Walker's car, Deputy Arcos' testimony that McSwain said he was driven to the area to burglarize was incurably prejudicial.

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 565; see also *People v. Valdez* (2004) 32 Cal.4th 73, 128 [motion for a mistrial "should only be granted when a defendant's 'chances of receiving a fair trial have been irreparably damaged'"].)

We find no incurable prejudice here. In this case, the trial court immediately admonished the jury not to consider the testimony for any purpose, and the prosecutor immediately made clear that the only relevant statement McSwain made in response to Deputy Arcos's question about why he was in the area was "I'm up to no good." We presume the jury followed the trial court's admonishment, and that the excluded testimony therefore did not prejudice Walker. (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

3. *Use of Juvenile Adjudication to Enhance Sentence*

As noted, the information alleged that Walker had two prior strikes under the Three Strikes law. One of those strikes was a juvenile adjudication. On appeal, Walker contends the use of a prior juvenile adjudication to enhance an adult criminal sentence violates his constitutional rights to a trial by jury and/or due process under the Sixth and Fourteenth Amendments to the United States Constitution.

Walker concedes that the California Supreme Court rejected this argument in *People v. Nguyen* (2009) 46 Cal.4th 1007, but contends that case was wrongly decided. As an intermediate appellate court, we are bound to follow the Supreme Court's ruling in *Nguyen*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we hold there was no constitutional violation in the use of Walker's juvenile adjudication to enhance his sentence.

4. *Abstract of Judgment Must Be Corrected*

The trial court imposed sentence on Walker as follows: "As to Count 4, the base count, the Court will select 25 years to life pursuant to Section 1170.12 (a) through (d) and 667 (b) through (i). This is a third strike. [¶] As to the 667(a)(1), that will be 5 years. [¶] For a total of 30 to life. [¶] As to Count 1, 25 to life concurrent. [¶] As to Count 2, 25 to life concurrent. [¶] As to Count 3, 25 to life concurrent." The abstract of judgment, however, incorrectly indicates that the five-year enhancement under section 667, subdivision (a)(1), was stayed, with a total term of 25 years to life. Therefore, the abstract of judgment must be amended to show that the section 667, subdivision (a)(1) enhancement was not stayed, and the total term of Walker's sentence is 30 years to life in prison.

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a certified copy of an amended abstract of judgment that indicates the section 667, subdivision (a)(1) sentence enhancement has not been stayed. The judgments are otherwise affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.