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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OGBEMUDIA UWARE OGBEIWI, Defendant and Appellant.	B280497 (Los Angeles County Super. Ct. No. BA433640)

APPEAL from judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Ogbemudia Uware Ogbeiwi appeals the judgment entered following a jury trial in which he was convicted in count 1 of first degree residential burglary (Pen. Code, § 459),[1] and in count 2 of second degree robbery. (§ 212.5, subd. (c).) Appellant admitted the prior conviction allegations (§§ 667, subds. (a)–(i), 1170.12, subd. (c)(1)) as well as the allegation that he was out on bail at the time of his arrest (§ 12022.1). The trial court imposed an aggregate sentence of 15 years in state prison.[2] Appellant contends the trial court abused its discretion in denying the motion to sever the robbery from the burglary charge. We disagree and affirm.

FACTUAL BACKGROUND

The February 10, 2015 burglary

Shane Lee and his family lived in a two-story house near 7th Avenue and Adams Boulevard in Los Angeles. On February 10, 2015 around 5:00 a.m. Shane was awakened by rumbling noises coming from his brother's bedroom. Someone—whom Shane thought was his brother, Patrick—opened Shane's

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[1] Undesignated statutory references are to the Penal Code.

[2] Appellant's sentence consisted of the low term of two years on count 1 doubled to four years for the prior strike enhancement (§§ 667, subd. (b)–(i), 1170.12, subd. (c)(1)), plus two years pursuant to section 12022.1, and five years for the serious felony enhancement. (§ 667, subd. (a).) On count 2, the trial court imposed a consecutive sentence of one-third the three-year middle term, doubled to two years for the strike prior. In the same proceeding, the trial court sentenced appellant to a consecutive prison sentence of two years for his conviction in Los Angeles County Superior Court (LASC) case No. BA429867.

bedroom door and closed it. About five minutes later, the door opened again, and appellant entered the room and turned on the light. Appellant took a few steps into the room and asked, " 'Where's my brother?' " Appellant then left the room, closing the door behind him.

Shane dressed quickly and grabbed his phone. As Shane was walking out of the house, appellant followed him and asked, " 'Are you leaving?' " Shane said, " 'Yes, I'm leaving.' " Appellant followed Shane outside, but as Shane walked up the street appellant turned around and walked in the other direction. Shane called Patrick, who was at his girlfriend's house, and then called 911.

When police arrived they found appellant on a balcony ledge on the roof outside of Shane's bedroom. Although appellant complied with orders to go inside, he was stumbling, shouting profanities, and "not really going along with the program." Shane identified appellant as the man who had entered his room. Police found Shane's second cell phone and Patrick's social security card and iPod in appellant's pockets. When Patrick returned home, he found a duffel bag on the roof of the patio. He retrieved it, and found property from his bedroom, including some of his clothes, DVDs, an old wallet, and video games. Patrick had not packed the bag or put it on the roof.

Police found no signs of forced entry, and were informed that the front door had likely been left unlocked. In a written statement, appellant explained that the last thing he remembered was being with his brother and some friends listening to music, drinking and smoking marijuana. He drank something out of a cup, and then woke up in an unfamiliar place.

According to appellant's brother, Iyayi, he and appellant had been to a party earlier in the evening. After about two hours, appellant was asked to leave the party because he was "acting out." Appellant "didn't seem like he knew where he was" and did not appear able to control himself. Iyayi had to help his brother stand up and escort him out of the party. While waiting for a bus, appellant was talking to passing cars and stumbling. He did not seem to understand what Iyayi was saying to him. After appellant said something that hurt Iyayi's feelings, Iyayi allowed appellant to "take off."

The February 10, 2016 robbery

Approximately 5:00 p.m. on February 10, 2016, appellant and his niece, Ariel, walked into a grocery store in Compton where Christopher Farrow was working as a uniformed security guard. As Ariel and her uncle walked toward the liquor display, Ariel looked over at Farrow twice, who was standing at the exit door next to the customer service window. Farrow felt they were "up to no good."

Appellant grabbed two bottles of liquor from the shelf, and proceeded past the cashier toward the exit with Ariel. Farrow confronted appellant near the front door and asked him if he had a receipt for the bottles of liquor in his hands. Appellant responded, " 'Fuck you, cuz. No, I don't got no receipt. You know where I'm from?' " Appellant hit Farrow with a bottle. Both bottles broke as Farrow and appellant began to wrestle. At some point, appellant managed to break away and go back inside the store to retrieve another bottle of liquor. Farrow confronted appellant again and they resumed their struggle. Farrow got on top of appellant and held him down until police arrived about 10 minutes later. The entire incident was captured by the store's

surveillance camera. Appellant explained to the officers that he was going to pay for the items, but he forgot.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Denying the Severance Motion

A. *Relevant background*

Appellant was charged in connection with the February 10, 2015 residential burglary (LASC case No. BA433640) on April 1, 2015.[3] He posted bond and was out of custody when he committed the robbery in Compton a year later. The robbery was originally charged in LASC case number TA139326. The trial court denied a defense motion to transfer all pending cases against appellant to Compton, and subsequently granted the People's motion to consolidate the burglary and robbery counts in LASC case number BA433640.

Shortly before the start of trial, the trial court denied the defense motion to sever the burglary charge (count 1) from the robbery charge (count 2). The court explained its ruling, stating: "So the cases having previously been joined, the court will deny the motion to sever them again. They are the same class of crimes and I mean clearly they are two separate incidents but they are the same class of crimes and that is exactly the kind of things that are oftentimes joined. They are both theft cases and certainly the court appreciates that it may be somewhat more

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[3] On December 18, 2014, appellant had pleaded guilty to robbery (§ 211) and grand theft person (§ 487, subd. (c)) in LASC case No. BA429867. Sentencing in that case was delayed, and appellant remained out of custody.

prejudicial to the defendant in the sense that it's multiple crimes but on the other hand, certainly it is not so prejudicial as to prohibit joinder."

B. *Standard of review*

The joinder of "two or more different offenses of the same class of crimes or offenses" (§ 954) is generally favored over separate trials because it avoids the increased costs and expenditure of judicial resources associated with separate trials. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 [because "joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law"].) "Nonetheless, a trial court has discretion to sever properly joined charges in the interest of justice and for good cause." (*People v. Simon* (2016) 1 Cal.5th 98, 122 (*Simon*).) We review the trial court's decision to deny severance for abuse of discretion. (*People v. Armstrong* (2016) 1 Cal.5th 432, 455–456 (*Armstrong*).) A trial court abuses its discretion only when its ruling " ' "falls outside the bounds of reason." ' " (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Where the statutory requirements for joinder are met—that is, where the offenses are of the same class of crimes—"a defendant must make a 'clear showing of prejudice' to establish that the trial court abused its discretion in denying the motion." (*Simon*, *supra*, 1 Cal.5th at pp. 122–123; *Armstrong*, *supra*, 1 Cal.5th at p. 456.) Moreover, because joinder is preferred, "a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial." (*People v. Arias* (1996) 13 Cal.4th 92, 127 (*Arias*).)

C. *Relevant factors*

Our Supreme Court instructs that in our review of the trial court's order denying severance, " 'we consider the record before the trial court when it made its ruling.' [Citation.] We first consider whether evidence of each of the offenses would be cross-admissible in 'hypothetical separate trials.' [Citation.] If the evidence is not cross-admissible, we then consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citation.] In making this assessment, 'we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.' " (*Armstrong*, *supra*, 1 Cal.5th at p. 456.) Finally, "even if the trial court's ruling was proper as a matter of state law, we will reverse the judgment if the defendant shows that joinder of the charges actually resulted in ' " 'gross unfairness' " ' amounting to a denial of due process during the guilt phase." (*Simon*, *supra*, 1 Cal.5th at p. 123.)

As the trial court found, because burglary and robbery are in the "same class of crimes" within the meaning of section 954,

the two offenses were properly joined in this case. (*People v. Biehler* (1961) 198 Cal.App.2d 290, 293; *People v. Johnston* (1931) 114 Cal.App. 241, 244.) Appellant contends, however, that the trial court abused its discretion in denying severance because it failed to consider adequately the lack of cross-admissibility of the evidence to prove each of the offenses. Appellant is correct that the evidence was not cross-admissible on the charges, but as our high court has observed, "cross-admissibility is not the sine qua non of joint trials." (*People v. Marquez* (1992) 1 Cal.4th 553, 572; *Arias*, *supra*, 13 Cal.4th at p. 127.) In the absence of cross-admissibility of evidence, we look to other factors to determine if the trial court abused its discretion. (*Armstrong*, *supra*, 1 Cal.5th at p. 456.) None of those factors supports severance, much less an argument that the trial court abused its discretion here.

There was nothing particularly inflammatory about either the robbery or the burglary in this case that might have unfairly prejudiced the jury against appellant, thereby bolstering a weak prosecution case on one of the charges. (See *People v. Capistrano* (2014) 59 Cal.4th 830, 850 [no abuse of discretion in joinder of brutal rape incident with separate robbery where there was little risk that details of the rape would bolster prosecution of the robbery charge].) Here, the store surveillance video showed nothing more than a garden variety theft-turned-robbery when appellant used force to get out of the store with the two bottles of liquor. It plainly did not constitute the type of inflammatory evidence likely to overwhelm the jury and persuade it to find

appellant guilty of the burglary based on an improper inference that he had a propensity to commit theft.[4]

In the same vein, there is no indication the consolidation of these charges resulted in the joinder of a weak case to a strong case. "The core prejudice concern arising in connection with this issue is that jurors may aggregate evidence and convict on weak charges that might not merit conviction in separate trials." (*Simon*, *supra*, 1 Cal.5th at p. 127.) No such concern arose here. Contrary to appellant's assertion, the evidence of appellant's guilt on the burglary charge was just as compelling as the evidence of his guilt in the robbery case. True, there was no video of appellant's entry into the Lee residence and his conduct inside. But there was abundant evidence from which the jury could deduce that appellant entered the home intending to commit theft rather than out of confusion about where he was. Shane was first awakened by noises coming from his brother's bedroom, indicating that appellant went there first, not looking for his brother, but rummaging through Patrick's room, filling his pockets, and packing a duffel bag of Patrick's belongings, which at some point he tossed onto the roof. Seeing that Shane had left the house, appellant returned to finish the job, and was located by a police helicopter hiding on the roof. Appellant overstates any ambiguity created by evidence that he turned on the light as he entered Shane's room and asked for his own brother. At that point, appellant had already been in Patrick's room which he had

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[4] To the contrary, the jury's question during deliberations indicates it considered the issue of intent on the burglary charge separately from the evidence of the robbery.

found vacant. Upon unexpectedly encountering Shane in the other bedroom, his behavior was entirely consistent with feigning confusion and innocence to avoid being caught in the middle of a burglary.

In sum, appellant has failed to establish any abuse of discretion in the consolidation of the robbery and burglary charges or in the trial court's denial of his severance motion.

We also reject appellant's contention that the joinder of these counts " 'actually resulted in "gross unfairness" amounting to a denial of due process,' " requiring reversal of his burglary conviction. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 162, quoting *Arias*, *supra*, 13 Cal.4th at p. 127; *People v. Soper* (2009) 45 Cal.4th 759, 783.) Appellant's claim in this regard rests entirely on the lack of cross-admissibility of the evidence on the two charges. But as discussed above, absence of cross-admissibility of the evidence is not the sole factor for courts to consider in determining prejudice from the consolidation of charges. Indeed, "[a]ppellate courts have found ' "no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials." ' " (*Soper*, at p. 784.) So it is here. The evidence of these two crimes was straightforward and discrete, and the prosecution of each offense was independent of the other with no spill-over effect. Accordingly, on this record, we find no likelihood of a different outcome had the charges been tried separately.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.