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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS GONZALEZ, Defendant and Appellant.	B248086 (Los Angeles County Super. Ct. No. TA125149)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Douglas Gonzalez appeals his conviction for robbery. He contends: (1) the trial court abused its discretion by admitting evidence of his uncharged misconduct; (2) his counsel provided ineffective assistance; (3) the trial court committed two instructional errors; and (4) the cumulative effect of the errors was prejudicial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

(i) *The robbery*

On July 18, 2012, at approximately 10:00 p.m., 17-year-old Darrien Anthony was waiting for his train on the upper deck of the Metro green line station located near the intersection of Figueroa and 117th Streets in Los Angeles. The Metro station had two levels and was monitored by surveillance cameras. Anthony, who had his Visp bicycle with him, noticed Gonzalez "constantly looking" at him and his bike. Anthony got a "bad vibe" from Gonzalez. Because Gonzalez's conduct was making him uncomfortable, Anthony moved to a bench at the far east end of the platform. Gonzalez followed and sat on a bench behind Anthony. After approximately 10 minutes, Gonzalez approached and asked Anthony to sit down and talk with him. Anthony refused. Gonzalez asked if he could use Anthony's cellular telephone, because Gonzalez's was broken. He showed Anthony a cellular telephone with a missing battery and a cracked screen. Anthony, afraid Gonzalez was going to steal his phone, told Gonzalez he could use the phone but Anthony would dial the number and hold the phone during the call. At Gonzalez's request, Anthony dialed 323-428-2430 several times, but the number was out of service.

Gonzalez walked to a bench and sat down. After approximately five minutes, Gonzalez put his hood up, walked towards the far side of the platform towards another person, spoke to the other person, reached down and grabbed something, walked back to within two feet of Anthony, displayed a black and silver handgun that he pulled from his clothing, and pulled the gun's slide back. Gonzalez put the gun back in his clothing, but told Anthony he wanted him to come sit with him on the bench so they could talk.

Anthony, afraid Gonzalez would shoot him, complied. Gonzalez sat very close to Anthony and began describing his "spiritual beliefs." Gonzalez "went on and on," "trying to boggle [Anthony's] mind with letters and names." Three trains came through the station while Gonzalez was talking. When Anthony told Gonzalez he wanted to board his train, Gonzalez replied, "No." Anthony complied because Gonzalez had a gun. After Anthony missed several calls from his girlfriend, Gonzalez allowed him to call her back and tell her he would see her later. Although other people were on the platform during some portions of the incident, Anthony did not ask them for help because he did not want Gonzalez to shoot him or others.

Eventually, Gonzalez demanded that Anthony purchase a train ticket for him. They took an elevator downstairs and walked to the ticket machine. Anthony kept his bicycle at his side. As Anthony was purchasing the ticket, Gonzalez demanded, "Let me ride your bike." Anthony complied "so [he] wouldn't get shot." Gonzalez tried to ride away on the bike, and Anthony followed him and grabbed the seat post. Gonzalez threatened that if Anthony did not let go, he would shoot him. Anthony let go. Gonzalez rode out of the parking lot, made a left on Figueroa, made another left on 117th, and then rode out of Anthony's view.

(ii) *The investigation and identification of Gonzalez*

Anthony flagged down a Metro security guard and described the robbery to him. Shortly thereafter, Los Angeles County Deputy Sheriff Ralphael Banks arrived at the Metro station and briefly spoke with Anthony. Banks called the number Anthony had dialed for the robber, which was recorded in Anthony's phone. Banks heard a "disconnection" sound.

Anthony described the robber as a thin Black man, 5 feet 9 inches to 6 feet tall, between 20 and 25 years old, with sideburns, wearing a blue hooded sweatshirt, camouflage pants, and a black baseball cap, with short hair. Anthony believed the robber was Black, in part because of his manner of speech and the slang he used. Gonzalez was 23 years old, 5 feet 4 inches tall, weighed 140 pounds, was part Hispanic and part

Caucasian, and had long hair. Anthony, who was part Black and part Hispanic, was six feet tall.

California Highway Patrol officers stopped and detained a suspect shortly after the robbery, but in a field showup Anthony confirmed the man was not the robber.

Michael Morris, a crime analyst for the Los Angeles County Sheriff's Department Transit Services Bureau, watched the entire videotape of the incident, including footage from both the upper and lower levels of the station, in order to extract still photographs of the robber for use on "wanted" flyers. Morris described for the jury what he observed. He extracted a still photograph showing the robber riding away on Anthony's bicycle, with Anthony following him with his hands up. Morris also pulled still photographs of the robber on the platform at approximately 10:12 p.m.

Deputy Banks requested that a portion of the videotape be preserved. However, the time period he specified did not include Anthony's initial interactions with the robber, or the events occurring on the lower floor of the station. The investigating detective, Keith Schumaker, subsequently requested the missing portions of the video, but they had been recorded over and were no longer available. The preserved portion of the videotape, which depicted the majority of the interaction between Anthony and the robber occurring between 10:31 and 10:48 p.m., was shown to the jury. The videotape was grainy.

Using computerized resources, Morris discovered that the out-of-service phone number the robber had Anthony call was linked to Gonzalez.[1] Detective Schumaker thereafter prepared a six-pack photographic lineup that included Gonzalez's photo. On July 25, 2012, Anthony viewed the photographic lineup and identified Gonzalez as the robber. Anthony also positively identified Gonzalez as the robber at the preliminary hearing, and at trial.

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[1] In late February 2012, Gonzalez had informed a government agency that his phone number was 323-428-2430. In April 2012 Gonzalez provided a different number to the agency.

A July 26, 2012 search of Gonzalez's family home revealed a Metro PCS cellular telephone that was missing a battery and back plate, in between the wall and an air mattress where Gonzales slept. However, Anthony told Detective Schumaker that it was not the phone Gonzalez had shown him. Anthony's bike was never recovered.

(iii) *Prior robbery*

On October 7, 2006, 11-year-old Corey Onte Hayes and his grandfather, Dorris Applewhite, were waiting for their bus at a bus stop near the intersection of Crenshaw Boulevard and Florence Avenue. Hayes was playing with his brand new Sidekick III cellular telephone. Gonzalez and a companion rode up on their bicycles. Gonzalez "tussled" with Hayes over the phone. Hayes heard Gonzalez say to the other man, "toss me a gun," or "toss me a burner." Gonzalez took the phone and he and the other man rode off on bicycles.

When testifying at trial in the instant matter, neither Hayes nor Applewhite recalled Gonzalez saying anything else, or making unusual statements. Hayes did not recall whether he had a scooter with him when the robbery occurred. Hayes testified that the entire incident was quick, lasting only approximately 40 seconds.

However, Los Angeles Police Department Officer Melisa Lisenby (formerly Melisa Leon), who took the police report from Applewhite and Hayes in 2006, testified that Hayes told her that before taking his phone, Gonzalez had asked "strange questions." Applewhite told her Gonzalez came up to Hayes and, referring to Hayes's scooter, said "That's my scooter." Applewhite also told the officer that Gonzalez made "absurd and incoherent" statements to Hayes. The parties stipulated that Gonzalez was the person who took Hayes's phone.

b. *Defense evidence*

A defense investigator who viewed and photographed the Metro station was unable to see, from the west side station entrance or the parking lot, the intersection of 117th and Figueroa Streets, nor would he have been able to see a person riding down an adjacent railway from the station entrance.

2. *Procedure*

Gonzalez was charged with kidnapping, second degree robbery, false imprisonment by menace, and kidnapping to commit robbery. A jury convicted him of the second degree robbery of Anthony (Pen. Code, § 211)[2] and deadlocked on the remaining counts and on the allegation that Gonzalez personally used a firearm.[3] Gonzalez admitted suffering a prior conviction for robbery, a serious and violent felony. (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d).) The court denied his *Romero* motion[4] and sentenced him to a term of 15 years in prison. It ordered Gonzalez to pay victim restitution and imposed a restitution fine, a suspended parole restitution fine, a court operations assessment, and a criminal conviction assessment. Gonzalez appeals.

DISCUSSION

1. *Admission of prior crime evidence*

a. *Additional facts*

In a pretrial brief, the People represented that Gonzalez had committed six robberies in 2006, some involving handguns; had admitted his involvement in some of the crimes; and had been sentenced to three years in prison for one of the crimes. Appended to the trial brief was a copy of a police report briefly summarizing the incidents, as well as Lisenby's more detailed report regarding the Hayes robbery. The prosecutor initially sought to introduce evidence of several of the prior crimes. Before trial, however, he elected to seek admission of only the Hayes robbery under Evidence Code section 1101, subdivision (b), to prove identity, intent, and common scheme or plan.

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2 All further undesignated statutory references are to the Penal Code.

3 At the request of the defense, the trial court subsequently dismissed counts 1, 3, and 4, as well as the firearm allegation.

4 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Defense counsel objected to admission of the evidence, and the trial court considered the matter at an Evidence Code section 402 hearing. The prosecutor argued that the Hayes and Anthony robberies were similar because: (1) both crimes occurred within a six-mile radius; (2) both occurred at a mass transit stop (a bus stop and a train station); (3) both victims were juveniles, and five to six years younger than Gonzalez at the time the robberies occurred; (4) Gonzalez initially feigned interest in one of the victim's possessions (Hayes's scooter, Anthony's cell phone), but then robbed the victim of a different item (Hayes's phone, Anthony's bicycle); (5) Gonzalez stole property, rather than money, in both instances; (6) Gonzalez brandished or referenced a concealed gun in both crimes; (7) Gonzalez rode away on a bicycle after both robberies; (8) in both incidents, Gonzalez appeared to have an accomplice nearby; (9) in both crimes, the accomplices were African-American males; and (10) in both instances, Gonzalez engaged the victims in conversation before robbing them, asking strange questions or talking about religion. The prosecutor argued that these similarities were more compelling than those present in *People v. Roldan* (2005) 35 Cal.4th 646, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, in which admission of evidence of a prior robbery was held to be proper.

Defense counsel countered that the purported similarities were not as compelling as the prosecutor believed, and the crimes were too dissimilar to allow for admission under Evidence Code section 1101, subdivision (b). Among other things, defense counsel urged that (1) in Los Angeles, a distance of six miles cannot be characterized as close; (2) the robbers took different types of property in the current and prior crimes, that is, a cell phone and a bicycle; (3) no gun was actually displayed in the Hayes robbery; (4) in the Hayes robbery, the victim was 11 years old and Gonzalez was 16, whereas in the instant crime the victim was 17 and Gonzalez was an adult; (5) mass transit stops are not unique robbery locales; and (6) the prior crime was remote in time. Defense counsel also vigorously disputed that there was any evidence a second person was involved in the Anthony robbery. He noted that the videotape showed only that the robber briefly spoke to another man on the platform and there was no evidence the other man gave Gonzales

the gun. Defense counsel also urged that the other five robberies Gonzalez committed in 2006 were dissimilar to the Anthony robbery, undercutting any argument that Gonzalez was operating pursuant to a common plan or scheme. In his view, it was improper for the People to "cherry-pick[]" the only prior that shared similarities with the Anthony robbery. Defense counsel further argued that intent was not really at issue in the instant case, given the robber's actions; and the prior crime evidence was more prejudicial than probative under Evidence Code section 352.

The trial court ruled that the Hayes robbery was not similar enough to be offered to establish identity, but was admissible as evidence of intent and the existence of a common plan or scheme. The similarities enumerated by the prosecutor were sufficient to support the inference that Gonzalez operated according to a common plan, and had the same intent, in both instances. The court found it especially significant that in both incidents, the assailant did not immediately rob the victims, as in a typical robbery, but instead engaged them in small talk or made unusual statements to throw them off guard first. The court also observed that to prove the kidnapping for robbery charge, the prosecutor had to establish that Gonzalez formed the intent to rob prior to moving the victim, and therefore intent was at issue. Finally, the court concluded the evidence was not more prejudicial than probative.

At various points thereafter, defense counsel continued to argue that admission of the prior crime evidence was improper. In particular, counsel urged that the prosecutor was attempting to use Gonzalez's unusual statements to the victims to establish identity through the "back door." Counsel expressed concern that when the jury heard Gonzalez had involved Hayes in a "strange conversation," it was likely to assume, "maybe that means religion. Maybe that means the same person." Defense counsel objected to a brief portion of the prosecutor's argument on the same grounds. The trial court continued to overrule the defense objections.

Before the prior crime evidence was presented, the court instructed the jury that it could only be considered on the issue of intent.[5] As discussed more fully *post*, the court also instructed with CALCRIM No. 375 before the jury retired for deliberations. CALCRIM No. 375 advised the jury that in addition to intent, the evidence could be considered on the question of whether Gonzalez had a common scheme or plan to commit the charged offenses.

b. *Relevant legal principles*

Evidence that a defendant committed misconduct other than that currently charged is generally inadmissible to prove he or she had a propensity to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Jones* (2013) 57 Cal.4th 899, 929-930; *People v. Rogers* (2009) 46 Cal.4th 1136, 1165; *People v. Kelly* (2007) 42 Cal.4th 763, 782.) However, such evidence is admissible if it is relevant to prove, among other things, intent, knowledge, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *Jones*, at p. 929; *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400.) When reviewing the admission of evidence of other offenses, a court must consider the materiality of the fact to be proved or disproved and the probative value of the other crimes evidence to prove or disprove the fact. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667.)

Even if other crimes evidence is admissible under Evidence Code section 1101, subdivision (b), it should be excluded under Evidence Code section 352 if its probative value is substantially outweighed by undue prejudice. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491; *People v. Thomas* (2011) 52 Cal.4th 336, 354.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful

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[5] The court instructed: "In a few moments, you will hear evidence by way of witness testimony from a 2006 incident. The purpose for you listening to that evidence and hearing that testimony is for you to consider it when you are considering the intent in this incident which is before the court and how the 2006 incident may be inferred or referenced to the intent in this case before the court. [¶] Does everyone understand? [¶] And for that limited purpose only and for no other purpose."

analysis. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404; *People v. Hendrix* (2013) 214 Cal.App.4th 216, 238.) " ' " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent." ' " (*Scott,* at p. 490.) Evidence is prejudicial under Evidence Code section 352 if it uniquely tends to evoke an emotional bias against a party as an individual or would cause the jury to prejudge a person on the basis of extraneous factors, and has little effect on the issues. (*Id.* at p. 491; *People v. Cowan* (2010) 50 Cal.4th 401, 475.)

We review the trial court's rulings under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Jones, supra,* 57 Cal.4th at p. 930; *People v. Fuiava, supra,* 53 Cal.4th at pp. 667-668; *People v. Thomas, supra,* 52 Cal.4th at pp. 354-355.) We view the evidence in the light most favorable to the trial court's ruling. (*Jones,* at p. 931.)

Evidence of uncharged crimes is admissible to prove identity, common plan, and intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference on these issues. (*People v. Edwards* (2013) 57 Cal.4th 658, 711; *People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) The degree of similarity depends on the purpose for which the evidence is presented. (*People v. Jones* (2011) 51 Cal.4th 346, 371.) The least degree of similarity is required to prove intent; the uncharged misconduct must only be sufficiently similar to support the inference the defendant probably harbored the same intent in each instance. (*Id.* at p. 371; *Ewoldt,* at p. 402; *People v. Harris* (2013) 57 Cal.4th 804, 841.) A greater degree of similarity is required to prove the existence of a common design or plan; there must be not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally explained as caused by a general plan. (*Ewoldt,* at p. 402; *Edwards,* at p. 712.) The greatest degree of similarity is required to prove identity; the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive to support the inference the

same person committed both acts; the pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. (*Ewoldt*, at p. 403; *Harris*, at p. 841.)

c. *The trial court did not abuse its discretion by admitting evidence of the Hayes robbery on the issue of intent; admission of the evidence to prove common plan was harmless error.*

Gonzalez contends admission of evidence of the Hayes robbery was prejudicial error because: (1) the prior and current crimes were insufficiently similar; (2) the evidence was cumulative; and (3) the evidence was more prejudicial than probative. We discern no prejudicial error.

(i) *Similarity of the prior and charged crimes*

Contrary to Gonzalez's contention, the Hayes and Anthony robberies shared features in common sufficient to support the inference that in each incident, Gonzalez operated according to a common plan, and with the same intent to rob. Both crimes occurred at mass transit stops. In both, Gonzalez took property that was in plain view rather than asking for money or the contents of the victim's pockets. Gonzalez brandished or referenced a concealed gun in each incident. While the parties disagreed about whether the man Gonzalez spoke to was associated with him or was simply a bystander, this was a question of fact for the jury. Most significant was the fact Gonzalez talked to both victims during the encounters in an apparent effort to throw them off guard. In the Hayes robbery, Gonzalez commented on Hayes's scooter, and then made "absurd and incoherent" statements. In the Anthony robbery, Gonzalez asked to use Anthony's phone. After displaying the gun but before taking the bike, Gonzalez "went on and on" about his spiritual beliefs. Anthony felt Gonzalez was trying to "boggle [Anthony's] mind with letters and names." Jurors could readily infer that Gonzalez's plan was to facilitate the robberies by talking to his victims in an unusual and puzzling fashion, thereby confusing them and obscuring his purpose. While Gonzalez argues that these and other similarities cited by the prosecutor were either "not truly similar" or insignificant, we are unconvinced. The robberies were different in some respects, but precise symmetry is not required. (*People v. Jones, supra,* 57 Cal.4th at p. 931 [" '[t]o be

highly distinctive, the charged and uncharged crimes need not be mirror images of each other' "].)

People v. Roldan, supra, 35 Cal.4th 646, and *People v. Jones, supra,* 51 Cal.4th 346, are instructive. In *Roldan,* the defendant robbed a San Fernando swap meet in 1990. Roldan pulled a gun on the swap meet manager as he was about to take bags of cash from the swap meet office to his vehicle. Roldan's accomplice wrested the money bags from the manager, and the two robbers fled on foot to a getaway car. Roldan shot and killed one of several swap meet employees who attempted to apprehend them. At the time, Roldan was out on bail after being charged with robbing a different swap meet located in Sun Valley. (*Roldan*, at pp. 663-664.) The prosecutor was allowed to present evidence of the prior swap meet robbery under Evidence Code section 1101, subdivision (b), on the issues of identity, intent, and motive. (*Id.* at pp. 704-705.)

The California Supreme Court concluded admission of the evidence was proper, despite defense counsel's attempts to emphasize the differences in the two crimes, including that in the Sun Valley crime, the robbers broke into a secured area, whereas the charged crime was "essentially a 'snatch and run.' " (*People v. Roldan, supra*, 35 Cal.4th at p. 704.) The court explained: "[D]efendant and his cohorts victimized the owners or proprietors of swap meets, an unusual venue for such crimes. We disagree with defendant's characterization of a swap meet as just another generic location where money can be found by those willing to transgress the larceny laws. Swap meets are distinctive in that they are large sprawling affairs with less security over cash receipts than might be found in a permanent brick and mortar establishment. Moreover, the crimes here were committed in a distinctive manner. One robber grabbed the cash, not merchandise, while a second stood behind him with an Uzi or machine gun partially obscured by clothing. The third member of the group waited in a car to facilitate a rapid departure. In light of the distinctiveness and unusual nature of these shared characteristics, we conclude the trial court did not abuse its discretion in ruling evidence of the Sun Valley offense would support the inference the same person committed the San Fernando offense." (*Id.* at p. 706.)

In *People v. Jones, supra,* 51 Cal.4th 346, in 1993 the defendant and an accomplice entered the Mead Valley home of an elderly couple, the Florvilles, in the early hours of the morning, hog-tied them, stabbed them to death, and stole their property. (*Id.* at p. 351.) At trial, the court admitted evidence that one of the defendants had committed a prior robbery in Vernon in 1985. (*Id.* at pp. 369-370.) In that robbery, three furniture store employees were leaving work when the defendant and another man drove up in front of them and exited their car. The defendant pointed a handgun at the employees, demanded their money, and threatened to kill them. The other robber took cash from the victims, hitting one of them. (*Id*. at p. 370.) Our Supreme Court found no abuse of discretion in admission of the prior crime evidence to prove intent. It explained: "The Vernon robbery and the Florville home invasion were not particularly similar, but they contained one crucial point of similarity—the intent to steal from victims whom defendant selected. Evidence that defendant intended to rob the Vernon victims tended to show that he intended to rob when he participated in the Florville crimes. This made the evidence relevant on that specific issue, which is all that the court admitted it for." (*Id.* at p. 371.)

Here, the charged and uncharged crimes had a greater degree of similarity than that present in *Jones*, and approximating that present in *Roldan.* Given that our Supreme Court found the showing in *Roldan* sufficient to meet even the more stringent standard necessary to prove identity, we cannot say the trial court abused its discretion here by concluding the two incidents were sufficiently similar.[6]

(ii) *Was the prior crime evidence cumulative?*

Gonzalez next argues that evidence of the Hayes robbery was cumulative on the issues of intent and common plan because, if Gonzalez engaged in the charged conduct,

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[6] Gonzalez cursorily reiterates an argument made below: that the other five robberies he committed in 2006 were dissimilar to the Anthony robbery, defeating the contention that he was operating pursuant to a common plan or scheme. However, Gonzalez cites no authority holding that a court must compare all of a defendant's prior crimes and admit such evidence only if all are similar.

his intent to rob was beyond dispute. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1149 [to be admissible, the probative value of uncharged offense evidence must be substantial].) "[E]vidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute; the prejudicial effect of the evidence of the uncharged acts outweighs its probative value to prove intent as it is cumulative regarding that issue. [Citations.]" (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715-716.)

We agree that the evidence was cumulative on the issue of common plan or scheme, and should not have been admitted for that purpose. *Ewoldt* explained that "evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan" is not necessarily admissible "in all (or even most) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation.] This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense. [Citation.] [¶] For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. *Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.* Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, *if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value*." (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 405-406, italics added.) Applying these principles here, we conclude the evidence was not properly admitted to establish a common plan or scheme.

However, evidence of the Hayes robbery was not cumulative, and was properly admitted, to prove intent. To prove count 4, kidnapping for the purpose of robbery, the People had to establish that Gonzalez forced Anthony to move a substantial distance beyond that merely incidental to the commission of the robbery, and that "[w]hen that movement began, [Gonzalez] already intended to commit robbery." (See CALCRIM No. 1203; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1365.) During closing, defense counsel argued that the robber might have decided to take the bike only after arriving on the lower level. Thus, the question of *when* Gonzalez formed the intent to rob was a significant, and disputed, question. Jurors could have inferred that Gonzalez intended, in the Hayes robbery, to disarm the victim by making unusual statements before taking the phone. Given that Gonzalez had a similarly odd conversation with Anthony on the upper level of the Metro station, jurors could have inferred that Gonzalez formed the intent to steal the bike before forcing Anthony into the elevator and downstairs. Thus, the prior incident was probative on this contested issue.

Moreover, our Supreme Court has rejected the notion that where identity is the only material issue at trial, prior crimes evidence cannot be admitted to prove intent. "Defendant argues that only identity was actually disputed at trial, and he did not dispute the perpetrator's intent to rob at the Florville residence. Even if this is so, it is not dispositive. '[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.' [Citation.] 'The prosecution, of course, must prove each element of its case. Defendant's assertion that his defense to the two charges was bound to focus upon identity, and not intent, would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt.' [Citation.]" (*People v. Jones, supra,* 51 Cal.4th at p. 372.) Given that evidence of the Hayes robbery was admissible on the issue of intent, we discern no harm to Gonzalez from the fact the jury was also told it could be considered as evidence of a common scheme or plan.

(iii) *Evidence Code section 352*

Gonzalez next argues that admission of the evidence was an abuse of discretion because, even if otherwise admissible, it was unduly prejudicial under Evidence Code section 352. He urges that the jury must have concluded that because he robbed Hayes, he also committed the charged robbery. We disagree. The evidence of the Hayes robbery was not inflammatory. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [the potential for prejudice is decreased when testimony describing the defendant's uncharged acts is no stronger and no more inflammatory than the testimony concerning the charged offenses]; *People v. Jones, supra,* 51 Cal.4th at p. 371.) The trial court gave a limiting instruction advising jurors that they could not infer from the prior crime evidence that Gonzalez had a bad character or was disposed to commit crime. This instruction, which we presume the jury followed, mitigated the possibility of prejudice. (*People v. Lindberg* (2008) 45 Cal.4th 1, 25-26; *People v. Rogers* (2013) 57 Cal.4th 296, 332.)

(iv) *Any error was harmless.*

In any event, any error in admission of the evidence was not prejudicial. "[T]he erroneous admission of other crimes evidence is harmless if it does not appear reasonably probable that without the error a result more favorable to the defendant would have been reached." (*People v. Lopez, supra*, 198 Cal.App.4th at p. 716; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Carter, supra,* 36 Cal.4th at p. 1152; *People v. Hendrix, supra,* 214 Cal.App.4th at p. 248; *People v. Leon* (2008) 161 Cal.App.4th 149, 169-170.) Here, the majority of the incident was captured on videotape and shown to the jury. Although the video of events on the lower level was not available, still photographs showed the robber taking the bicycle. While the video quality was such that it was not possible to definitively identify Gonzalez from it alone, the video and photographs corroborated Anthony's account of the offense. Anthony consistently and repeatedly identified Gonzalez as the robber. It was undisputed that Anthony had ample opportunity to observe the culprit during the crime. Admittedly, Anthony's description of the robber to police did not match Gonzalez's characteristics in key respects. But the video clearly

showed the robber was shorter than Anthony, demonstrating that Anthony's description of the robber was simply inaccurate, and the actual robber was Gonzalez's height. The phone number the robber asked Anthony to call was Gonzalez's old number. Taken together, this evidence overwhelmingly supported the conclusion Gonzalez was the culprit. Furthermore, as we have discussed, any prejudice that might have resulted from admission of the prior crime evidence was neutralized by the limiting instruction, which we presume the jury followed. (*People v. Rogers*, *supra*, 57 Cal.4th at p. 332; *People v. Lindberg*, *supra*, 45 Cal.4th at pp. 25-26.) There was no reasonable probability Gonzalez would have obtained a more favorable result had the challenged evidence been excluded. To the extent Gonzalez intends to raise a due process challenge to the evidence, he has failed to show that admission of the evidence of the Hayes robbery rendered his trial fundamentally unfair. (*People v. Roldan, supra,* 35 Cal.4th at p. 705, fn. 23; *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20.)

2. *Ineffective assistance of counsel*

a. *Additional facts*

During Detective Schumaker's direct examination, outside the presence of the jury, the parties and the trial court discussed how the prosecutor should elicit testimony about Schumaker's compilation of the six-pack photographic lineup. Schumaker explained that Crime Analyst Morris "ran" the phone number the robber had asked Anthony to call, and "it came back to an insurance claim form" made by Gonzalez. Schumaker then conducted a criminal history check on Gonzalez and obtained several booking photographs. He used the most recent photograph, taken in 2011, in the photo six-pack. The court and parties agreed that Schumaker could say he obtained the photograph from a "government database" or using "governmental resources."

During direct examination, Detective Schumaker testified, consistent with the parties' agreement, that Morris ran the phone number through a database and discovered it was linked to Gonzalez. Schumaker then "conducted various checks through one of our governmental agency . . . databases" and "was able to obtain a photo of Mr. Gonzalez," which he placed in the photographic lineup.

Defense counsel subsequently conducted the following cross-examination of Schumaker:

"[Defense counsel]: . . . Now, you put [Gonzalez] in the six-pack based on a few factors; is that correct? Based on the information that you had come up with?

"[Detective Shumaker]: That was provided to me, yes.

"[Defense counsel]: So the first thing was Mr. Morris told you that—gave you the information that the defendant had given the phone number in question in January of 2011 when he was—to a police officer when he had been hit by a car in a traffic accident; is that right?

"[Detective Shumaker]: That's right.

"[Defense counsel]: And based on that information, you also looked and saw that he had the prior robbery; is that correct?

"[Detective Shumaker]: Correct.

"[Defense counsel]: And—so you took the name Douglas Jeremiah Gonzalez from that information and put it into your governmental system; is that correct?

"[Detective Shumaker]: Correct.

"[Defense counsel]: And then you got this photo from . . . July of 2011; correct?

"[Detective Shumaker]: Correct."

b. *Discussion*

Gonzalez contends counsel's cross-examination "must have confused the jurors into thinking that [he] had committed a robbery in July 2011." Because the parties stipulated that he committed the 2006 robbery of Hayes, he argues, the jury must have concluded he committed *two* prior robberies, one in 2006 and one in 2011. From this, jurors would have concluded Gonzalez was "a career robber" and thus was the culprit who robbed Anthony. Moreover, he argues, there was no need and no possible tactical purpose for counsel to elicit that Schumaker discovered he committed the 2006 robbery. Therefore, Gonzalez argues, his counsel rendered ineffective assistance, requiring reversal of his conviction.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, that is, there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Brown* (2014) 59 Cal.4th 86, 109; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) If the defendant makes an insufficient showing on either component, the claim fails. (*People v. Homick* (2012) 55 Cal.4th 816, 893, fn 44; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) We presume counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Mai*, at p. 1009; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Counsel did not perform inadequately by referencing the 2006 robbery. It was no surprise to the jury that Gonzalez committed the 2006 robbery of Hayes. Before Schumaker's cross-examination, the trial court had already ruled the evidence was admissible; the prosecutor, in opening statement, had told the jury it would hear evidence that Gonzalez robbed Hayes in 2006; Applewhite had already testified regarding the incident; and defense counsel had agreed to stipulate that Gonzalez was the robber in the 2006 incident. Thus, defense counsel's reference to the 2006 robbery was not unreasonable, and could not have prejudiced the defense case.

Even assuming arguendo that counsel blundered by stating that the photograph was taken in 2011, Gonzalez has not established prejudice. Counsel did not refer to the 2011 photograph as a "booking photograph." Neither his questions nor Detective Schumaker's answers suggested Gonzalez had committed a second robbery. Gonzalez's argument that the jury would have jumped to this conclusion is entirely speculative. Accordingly, his ineffective assistance claim fails.

3. *Jury instructions*

a. *CALCRIM No. 375*

The trial court instructed the jury with CALCRIM No. 375, evidence of uncharged offenses. In pertinent part, that instruction stated: "The People presented evidence that the defendant committed another offense that was not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense." After describing the preponderance of the evidence standard, the instruction continued: "If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to[,] consider that evidence for the limited purpose of deciding whether or not: [¶] A. Intent [¶] The defendant acted with the intent to permanently deprive Mr. Anthony of his property and/or with the intent to rob Mr. Anthony when he kidnapped him in this case, or [¶] B. Common Plan [¶] The defendant had a plan or scheme to commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charges or allegations beyond a reasonable doubt."

Defense counsel requested that the instruction be modified to include that (1) the prior crime evidence could not be used to prove identity or motive, and (2) the jury could not consider the prior crime evidence unless and until it concluded Gonzalez was the person who robbed Anthony. The court denied the defense request. It observed that the instruction was a correct statement of law, and already told jurors they could use the evidence only for the limited purposes of deciding whether Gonzalez acted with the requisite intent, or pursuant to a common plan or scheme. It noted that counsel was free

to explain to the jury that "they don't even get to [CALCRIM No.] 375 or the 2006 incident until they first determine that your client was the person who did, in fact, rob Mr. Anthony in 2012."

Gonzalez contends the trial court prejudicially erred by refusing his request to modify the instruction, because CALCRIM No. 375, as given, "was not clear enough" to make jurors understand that the prior crime evidence had no bearing on the question of whether Gonzalez was the person who robbed Anthony. We disagree.

Upon request, a trial court must give an instruction that pinpoints the theory of the defense case, if supported by the evidence. (*People v. Moon* (2005) 37 Cal.4th 1, 30; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; *People v. Bolden* (2002) 29 Cal.4th 515, 558.) A pinpoint instruction " 'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi.' " (*People v. Wilkins* (2013) 56 Cal.4th 333, 348-349.) It is well settled that a pinpoint instruction may properly be refused where it is, among other things, argumentative, duplicative or potentially confusing. (*People v. Homick, supra,* 55 Cal.4th at p. 890; *People v. Bacon* (2010) 50 Cal.4th 1082, 1112; *People v. Moon, supra,* 37 Cal.4th at p. 30; *People v. Gurule* (2002) 28 Cal.4th 557, 659.)

We do not agree with the People that the proposed modifications were argumentative. An instruction is argumentative if it invites the jury to draw inferences favorable to one of the parties from specified items of evidence. (*People v. Homick, supra,* 55 Cal.4th at p. 890; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1244.) The proposed modifications did not fall in this category. They did not highlight specific facts or invite the jury to draw inferences favorable to Gonzalez. Contrary to the People's argument, the proposed modifications did not highlight Gonzalez's claim that Anthony had misidentified him, but simply instructed the jury on when and how it could use the prior crimes evidence. (See generally *People v. Trinh* (2014) 59 Cal.4th 216, 233.) Nor do the People persuasively explain why the proposed instructions would necessarily have been confusing.

However, the People are correct that the proposed instructions were duplicative.

Gonzalez's proposed modifications "did not pinpoint a specific defense theory not covered by [the instructions given], but merely provided a lengthier and more detailed expression" of the relevant principles. (*People v. Bacon, supra,* 50 Cal.4th at p. 1112.) As given, CALCRIM No. 375 clearly stated that the prior crime evidence could be considered only "for the limited purpose" of deciding whether Gonzalez acted with the requisite intent, or had a plan or scheme to commit the offenses.[7] Thus, it necessarily informed jurors the evidence could not be considered on the issue of identity. This point was emphasized by the admonitions, "Do not consider this evidence for any other purpose" and "[d]o not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." In short, it would have been readily apparent to jurors that the evidence was not to be considered as proof of identity.

Likewise, it would also have been readily apparent to jurors that the evidence had no probative value unless and until they concluded Gonzalez was the person who accosted Anthony. "[T]he point of the requested instruction was readily apparent from the instructions given, and nothing in the particular circumstances of this case suggested a need for additional clarification. The trial court did not err in refusing to give [the] requested pinpoint instruction." (*People v. Bolden*, *supra*, 29 Cal.4th at p. 559; see also *People v. Clark* (2011) 52 Cal.4th 856, 975 [court properly may refuse a proposed instruction when the point is covered in another instruction]; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1144 [pinpoint instruction properly declined where standard instructions given adequately covered the points made by the proposed instruction].) Because the instructions given were correct and adequate, the trial court did not err by refusing the requested pinpoint instructions. (*People v. Bacon, supra,* 50 Cal.4th at p. 1112.)

Even assuming arguendo that the trial court erred, we discern no prejudice. The

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[7] As we have discussed, the evidence should not have been admitted on the issue of common plan. Even with the "plan or scheme" language contained in the instruction, however, the instruction made clear the jury was not to consider the Hayes robbery as evidence of the robber's identity.

erroneous failure to give a proposed pinpoint instruction is reviewed for prejudice under the *Watson* standard, and reversal is required only if it is reasonably probable that the jury would have come to a different conclusion had the instruction been given. (*People v. Trinh, supra,* 59 Cal.4th at p. 233; *People v. Larsen* (2012) 205 Cal.App.4th 810, 830; *People v. Watson, supra,* 46 Cal.2d at p. 836.) No such probability exists here. As we have explained, the instructions given made clear the jury was not to consider the Hayes robbery evidence to prove identity. Moreover, during argument defense counsel explained that the prior crime evidence could be considered only if the jury determined Gonzalez was the culprit, and then only on the issue of intent.[8] (See *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1144-1145 [if failure to give pinpoint instruction was error, it was harmless because nothing in the instructions given precluded jury from adopting the defense theory, which was fully covered in counsel's argument]; *People v. Franco* (2009) 180 Cal.App.4th 713, 720 [when assessing claim of instructional error, appellate court considers the record as a whole, including arguments of counsel]; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111.) The prosecutor discussed the prior crime evidence in the context of the kidnapping for robbery charge, explaining that it demonstrated intent.[9]

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[8] Defense counsel argued the jury could not assume that because Gonzalez committed the 2006 robbery, he was guilty in the instant case. Counsel continued: "Let me explain to you what you can use it for. First, you have to decide . . . beyond a reasonable doubt, that you think that the person who committed whatever crime happened here is the defendant. Then, and only then, can you . . . look into the prior act and say: 'What light does it shed on what was going on on the train platform?' . . . [¶] . . . Does it explain to me anything about . . . what the suspect's intent was or what the defendant's intent was? I believe it was him. What was his intent when they were up there on the train platform? Was it to rob the whole time? Was it to rob later or to steal at all? What was it? And does that shed any light on it?"

[9] The prosecutor argued: "[Y]ou heard the testimony yesterday about what happened to Corey Onte Hayes on October 7th, 2006. And this is the element of the charge that that evidence goes to, . . . because you can see how similar, what the defendant did in that case to what he did in this case. And from that, you could take that he had the same intent that he had in that last case." After arguing that aspects of the two incidents were similar, the prosecutor argued: "So from that, you can tell that when the

The prosecutor did not argue that the similarities between the two crimes demonstrated the same person was responsible for each. Viewing the record as a whole, any error was harmless.

b. *CALCRIM No. 358*

Gonzalez next urges that the trial court erred by failing to instruct, sua sponte, with CALCRIM No. 358. The standard version of that instruction states: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

Where the evidence warrants, "[i]t is well established that the trial court must instruct the jury on its own motion that evidence of a defendant's unrecorded, out-of-court oral admissions should be viewed with caution." (*People v. McKinnon* (2011) 52 Cal.4th 610, 679; *People v. Wilson* (2008) 43 Cal.4th 1, 19; *People v. Dickey* (2005) 35 Cal.4th 884, 905.) "The rationale behind the cautionary instruction suggests it applies broadly. 'The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' [Citation.] This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th 312, 392-393; *Wilson*, at p. 19.)[10]

Gonzalez contends CALCRIM No. 358 should have been given here because his

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defendant took Mr. Anthony from that second level down to the first level, that he had already formed the intent to rob him of his bike."

[10] The question of whether CALCRIM No. 358 must be given sua sponte when the statements constituted the criminal act, as well as the question of harmless error, is pending before our Supreme Court. (*People v. Diaz* (2012) 208 Cal.App.4th 711, review granted Nov. 20, 2012, S205145.)

out-of-court threat to shoot Anthony when Anthony attempted to stop him from riding off on the bicycle was inculpatory. Because the video showing this portion of the incident was not available, and in any event did not record sound, the statement was not recorded within the meaning of the instruction. Accordingly, omission of the instruction was error.

Nonetheless, the error in omitting the instruction was harmless. Failure to give CALCRIM No. 358 is reversible error only where it is reasonably probable the defendant would have obtained a more favorable result absent the error. (*People v. McKinnon, supra,* 52 Cal.4th at p. 679; *People v. Carpenter, supra,* 15 Cal.4th at p. 393.) No such probability exists here.

" ' "Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]" ' [Citations.] [Our Supreme Court] has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements." (*People v. McKinnon, supra,* 52 Cal.4th at pp. 679-680; *People v. Wilson, supra,* 43 Cal.4th at p. 19; *People v. Dickey, supra,* 35 Cal.4th at p. 906.) Here, although Gonzalez did not testify, his defense was mistaken identity, which effectively operated as a denial he made the statement.

Thus, the pertinent question for the jury was whether Anthony truthfully and accurately testified about Gonzalez's statement. The jury was instructed with CALCRIM No. 226, which listed the factors relevant to assessing a witness's credibility. In light of that instruction, which provided full guidance on the relevant factors, omission of CALCRIM No. 358 was necessarily harmless. "[W]hen the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, [our Supreme Court has] concluded the jury was adequately warned to view their testimony with caution. [Citation.]" (*People v. McKinnon, supra,* 52 Cal.4th at p. 680; *People v. Dickey,*

supra, 35 Cal.4th at pp. 906-907; *People v. Carpenter, supra,* 15 Cal.4th at p. 393.) Accordingly, there is no reasonable probability the error was prejudicial.

4. *Cumulative error*

Gonzalez contends that the cumulative effect of the purported errors demonstrates prejudice. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.