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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY JOSHUA LARA,

Defendant and Appellant.

2d Crim. No. B284423  
(Super. Ct. No. 17F-00263)  
(San Luis Obispo County)

Larry Joshua Lara appeals a judgment following his conviction after trial by jury for carrying a concealed dirk or dagger (Pen. Code, § 21310), a felony.<sup>1</sup> The trial court found Lara had two prior strike convictions for robbery (§ 211, 667, subds. (d) & (e)), and had served four prior prison terms (§ 667.5). The court sentenced him to an aggregate state prison term of seven years.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

We conclude, among other things, that the trial court did not err 1) by excluding evidence from a police officer that Lara was homeless, 2) by admitting evidence about a prior conviction, 3) by denying Lara's request to reduce his felony conviction to a misdemeanor, and 4) by denying Lara's request to strike for sentencing his prior strike convictions. (§ 667.) We affirm.

### FACTS

On January 11, 2017, Police Officer Jeffery Smith was on "patrol" duty. He saw Lara in a park. After conducting a "lawful search" of Lara, Smith found a "fixed blade knife" inside Lara's sock. The knife was in a "small plastic sheath." It was "a paring knife" with a four-inch "normal size handle" and a four-inch blade.

Smith testified "the entire knife was tucked down inside the sock, except for approximately an inch of the handle, which stuck up." The knife was "concealed by a sock, a boot and a pant leg." It was in "a very accessible position." Smith said, "[Y]ou can't see it; and . . . you can access it very quickly"; "the area on the inside of the ankle is a common place where police officers put a back-up weapon because it's concealable and very easy to access."

Smith testified the knife he found on Lara can "cause great bodily injury." The knife had a sharp blade "on one side" and a "sharp point." Smith arrested Lara for carrying a concealed dirk or dagger. Smith showed the jury the knife at trial and it was admitted into evidence.

Smith testified that Lara had previously been arrested for the same type of section 21310 offense six months prior to the current arrest. In that prior case, police found a fixed blade knife in Lara's backpack. The blade was inside the backpack and the

handle was “sticking out.” The knife was “readily accessible” from “the backpack.” The knife in that case had a “serrated blade.” Lara had pled no contest to violating section 21310 in that prior case.

On cross-examination, Smith testified a “paring knife” is a “tool that’s used to cut food.” The knife admitted into evidence has a “dull side and a sharp side.” It was not the same knife police seized in the prior case.

Lara did not testify.

### *Pretrial Motions*

The People filed a motion in limine to exclude defense questions to Smith about Lara being homeless. The trial court granted this motion.

The defense objected to the introduction of Smith’s testimony about Lara’s prior crime. The trial court overruled the objection.

## DISCUSSION

### *Granting the People’s Motion to Exclude Defense Evidence*

Lara contends the trial court erred by granting the People’s motion in limine to prevent the defense from asking Officer Smith to testify about whether Lara was a “transient” or was “homeless.” Lara claims this was an exclusion of relevant defense evidence requiring a reversal. We disagree.

A conviction for Lara’s offense requires proof that 1) he “concealed upon his . . . person any dirk or dagger,” which is “a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death” (*People v. Plumlee* (2008) 166 Cal.App.4th 935, 939); 2) he knew that he carried the dirk or dagger; and 3)

he knew that it “may be used as a stabbing weapon.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332.)

Lara’s trial counsel made an offer of proof that “[i]f Mr. Lara is homeless, by inference, he carries his stuff with him,” which would include his knife. But she did not specify what facts Smith would testify to on this issue based on Smith’s personal knowledge. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1124 [“The offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued”].)

Offers of proof may not be based on speculation. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) “[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion.” (*Ibid.*)

In the People’s motion in limine, they noted that Smith’s proposed testimony about whether Lara was a transient would only be “speculation.” The prosecutor said Lara “never told Officer Smith he was transient.” Smith only assumed he was based in large part on the condition of Lara’s car. The People also claimed Smith’s testimony on this point was of minimal probative value and was substantially outweighed by the prejudicial impact of allowing Smith to describe Lara as a transient to jurors. (Evid. Code, § 352.)

After defense counsel claimed Lara’s alleged homelessness meant Lara “doesn’t have a place to store his stuff,” the court asked, “[D]o you concede that Mr. Lara has an automobile?” His counsel conceded he did. That answer conflicted with this offer of proof and showed the offer was based on speculation and not on facts Smith could testify about. (*People v. Babbitt, supra*, 45 Cal.3d at p. 684.) Moreover, this offer of proof was not related to

the relevant issue of whether Lara knew he was carrying the knife and knew it “may be used as a stabbing weapon.” (*People v. Rubalcava, supra*, 23 Cal.4th at p. 332.)

In Lara’s opening brief, he claims he “[1] knew he was homeless; [2] knew he had to keep items of value on his person; [3] knew that items of value included his kitchen utensils, which helped assist him in preparing meals; [4] knew that he had to use public restrooms to clean his kitchen utensils; and [5] knew his small paring knife was used for cooking and eating - not to kill or seriously injur[e] someone.” But Lara did not make an offer of proof in the trial court showing how *Smith could testify* about *any* of these claims from *his personal* knowledge. Lara did not testify.

Moreover, as the People note, “[e]ven if [Lara], because of his homelessness, knew the knife’s purpose was to prepare food, that did not prove or disprove that he also knew the knife could be used to stab someone.” In addition, Lara has not shown why this speculative evidence of homelessness could not also be excluded on Evidence Code section 352 grounds.

*Admission of Evidence about Lara’s Prior Conviction*

Lara contends the trial court erred by admitting evidence that he had been convicted for another section 21310 offense seven months before he committed the current offense.

The People moved to admit this evidence. They claimed it was admissible because the prior misdemeanor conviction for carrying a knife in his backpack proved the knowledge element of the current offense. They contended that because of his prior recent conviction he was on notice that carrying the knife was a crime and “the knife could readily [be] used as a stabbing weapon” in violation of section 21310. The defense objected claiming this was “propensity” evidence and it was not relevant.

The court said, “I do share the concern that the jury shouldn’t be reviewing this as propensity evidence.” It said it would give jurors a limiting instruction that this evidence is “solely being used for the purpose of establishing knowledge on this occasion that the item could readily be used as a stabbing weapon . . . .”

Lara contends evidence of other crimes may not be admitted to show Lara’s character or disposition to commit crimes. But evidence of such “uncharged misconduct” may be admissible if it is “relevant to establish some fact other than the person’s character or disposition.” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) It may be used to show the defendant’s conduct in the current case was not the product of a mistake or accident. (*Id.* at p. 1374.) It may be used to prove the defendant’s knowledge, dispel a claim of ignorance, or show a common plan or scheme. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400.) The court must consider its probative weight. But “[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.” (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.) Here the prior offense was recent and it involved conduct similar to the conduct in the current case. The court considered the probative value of this evidence.

But the trial court was also properly concerned that jurors might use this evidence to conclude Lara had a propensity to commit crimes. It consequently and properly instructed jurors, “*Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.*” (Italics added.)

The trial court also took reasonable steps to make sure this evidence was only considered for a limited purpose. It instructed jurors, “If you decide that the defendant committed the

uncharged offense, you may, but are not required to, consider the evidence *for the limited purpose of deciding whether:* [¶] *The defendant knew* that it could readily be used as a stabbing weapon when he allegedly acted in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. [¶] *Do not consider this evidence for any other purpose.*” (Italics added.) As to the charged offense, the court reminded jurors that “[t]he People must still prove the charge beyond a reasonable doubt.”

Lara has not shown the trial court abused its discretion by allowing this evidence to be introduced for the limited purpose of showing the knowledge element of the charged offense.

But even had Lara shown the trial court erred by admitting this evidence or by excluding evidence about his alleged homeless status, the result would not change. He has not shown that in the absence of these alleged errors that there is any reasonable probability of a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

The People’s evidence was uncontradicted. Smith was the only witness to testify at trial. His testimony is compelling evidence of Lara’s guilt. Lara’s knife was concealed in his sock. As the People correctly note, even absent evidence about his prior conviction, Lara’s knowledge that “the knife was sharp and could hurt others could be inferred from the fact that he stored it in a sheath.” It was a “fixed blade knife” with a four-inch blade that “comes to a point.” The knife was admitted into evidence and the jury could inspect it to determine how sharp it was. The People note that the prosecutor had actually cut himself while opening the knife exhibit before closing argument. Smith testified the knife could be used “to cause great bodily injury.” The knife was

stored in Lara's sock, a place where one can "access it very quickly" and is "a common place where police officers put a back-up weapon."

*Not Reducing Lara's Felony Conviction to a Misdemeanor*

Lara contends the trial court abused its discretion by not reducing his felony conviction for carrying a concealed dirk or dagger (§ 21310) to a misdemeanor.

Lara filed a request to reduce that conviction to a misdemeanor. He said his "offense is subject to reduction pursuant to Penal Code § 17(b) to a misdemeanor." The trial court denied the request.

For "wobbler" offenses, the trial court has discretion to reduce them to misdemeanors. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary." (*Ibid.*) "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives . . . ." (*Ibid.*) In deciding whether to reduce the offense to a misdemeanor, the court may consider "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial." (*Id.* at p. 978.) It may also consider "the defendant's criminal history." (*Id.* at p. 979.)

The trial court said it had "read and considered the report of the probation department." In that report the probation department recommended that Lara be "sentenced to the Department of Corrections and Rehabilitation." It said Lara's "prior convictions as an adult" are "numerous." It listed 11 prior convictions between 1996 and 2015, including two prior



convictions for robbery. He had served four prior prison terms. The report noted that Lara was on postrelease community supervision “when he committed the instant offense” and his “prior performance on probation or parole was unsatisfactory”; “[t]he defendant has a significant criminal history . . . .” The court said it took into consideration Lara’s “criminal history” as set forth in the probation report. It said it showed “an unremitting criminal history from 1996 forward” and “many of these crimes involve crimes of violence.” Lara has not shown an abuse of discretion.

*Denying Lara’s “Romero Motion”*

Lara contends the trial court abused its discretion by not striking his two prior “strike” convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The trial court has the authority to “strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions.” (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 504.) In considering whether a defendant falls outside the spirit of the Three Strikes law, the court considers the present felony conviction and “prior serious and/or violent felony convictions, and the particulars of his background, character and prospects.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Lara contends the trial court erred by not considering the “*Williams*’ factors” in denying his *Romero* motion. In his motion Lara said he had “severe alcohol, drug, and mental health issues.” But the court considered those factors. It said, “I don’t find that Mr. Lara falls outside the sentencing scheme of the Three Strikes law *pursuant to the Williams factors* that you set forth.” (Italics added.)

Lara notes that the “priors found true by the trial court included the two ‘Strike’ priors” for robbery which occurred in 1996. But the trial court noted that his criminal history extended far beyond those earlier criminal convictions. Lara had 11 prior convictions between 1996 and 2015. The court said Lara had “an unremitting history of violence.” Lara has not shown an abuse of discretion. We have reviewed his remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Jacquelyn H. Duffy, Judge  
Superior Court County of San Luis Obispo

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