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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. CHRISTOPHER JAMES PEREZ, Defendant and Appellant.	B226369 (Los Angeles County Super. Ct. No. BA355414)

APPEAL from a judgment of the Superior Court of Los Angeles County, Beverly O'Connell, Judge. Affirmed.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher James Perez appeals from the judgment entered following his conviction by jury of second degree robbery (Pen. Code, § 211) with an admission he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and three prior felony convictions for which he served a separate prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 15 years. We affirm the judgment.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established appellant robbed 15-year-old William L. (William) as follows. On April 8, 2009, William and his friend David Morales rode their BMX specialty bicycles to a Little Cesar's restaurant. William ordered food which the two ate while sitting outside near a parking lot. They were a couple of feet from their bicycles, which were lying on the ground.

Appellant, who was about 30 years old, approached William. Appellant stood so close to William a portion of appellant's body touched William. Appellant asked William where he was from. William replied he did not "gang bang." Appellant said, "Bullshit. I seen [*sic*] you with the Easy Riders." Appellant then said, "this is Big Harpies." According to William, appellant was claiming the Harpies as appellant's gang, and appellant was indicating he had seen William with the Easy Riders gang. William replied, "it was not me."

Appellant acted like he was going to hit William with appellant's left fist, and William flinched. Appellant looked at the bicycles, looked back at William, then said, "let's fight for the bike." William replied he did not want to fight. Appellant continued repeating, "let's fight. I want to fight him." At that time, appellant acted like he was going to hit William with appellant's right fist, and William flinched. Appellant grabbed and held onto the left side of his waist as if he had a gun. William panicked because he thought appellant had a gun.

Appellant grabbed Morales's bicycle, then threw it down. Appellant grabbed William's bicycle. William did not try to prevent appellant from taking William's bicycle because William was afraid. Appellant rode away in the parking lot on William's bicycle. Once appellant was halfway to the street, William chased appellant to get the bicycle and told Morales to call the police. William was afraid to confront appellant without police. Appellant continued riding away. On April 15, 2009, appellant was arrested and admitted he was a member of the Harpies gang. We will refer to this April 8, 2009, incident as the William incident.

Louie Laureano testified that on April 22, 1999, he was near 20th Street in Los Angeles County when he saw his nine-year-old brother on the latter's sports bicycle at a corner. Laureano knew appellant and saw him approach Laureano's brother. Appellant pushed Laureano's brother so he fell off the bicycle, then appellant took it and rode away on it. Laureano's brother never got his bicycle back. Laureano testified without objection concerning this incident that appellant "jacked my little brother a bike." (*Sic*.) We refer to this April 22, 1999, incident as the Laureano incident.

2. *Defense Evidence.*

In defense, appellant indicated as follows. Appellant suffered a 1995 adjudication for robbery. He pled guilty to grand theft from a person based on the Laureano incident. He also pled guilty in 1999 to escape. In 2002, appellant pled guilty to robbery and was also convicted of driving a vehicle without the owner's consent, a felony.

According to appellant, after about 6:30 p.m. on April 8, 2009, he was drinking. About 8:00 p.m., he went to take a bus to get crack cocaine. While waiting for the bus, he smoked marijuana. After taking the bus, he walked to the Little Cesar's parking lot. Appellant saw William and another male. Appellant said to them, "what's up, where's the bud at, where's the weed at?" William replied he did not know. The other male ignored appellant. William and the other male entered the restaurant.

Appellant saw bicycles on the sidewalk outside the restaurant. Appellant picked up William's bicycle and rode away on it. William did not give appellant permission to take

the bicycle, and when appellant took it and rode away, he did not intend to bring it back. Appellant rode the bicycle to 20th and Hoover where he bought and consumed drugs. He denied he asked William and Morales where they were from, denied telling William that appellant had seen him with Easy Riders, and denied threatening to hit William. Appellant also denied grabbing his waist and denied he had a gun that day.

ISSUES

Appellant presents related claims the trial court erroneously failed to exclude, under Evidence Code section 352, evidence of the Laureano incident, and said failure violated appellant's rights to due process and a fair trial. He argues there was no dispute he took William's bicycle with intent to steal; therefore, evidence of the Laureano incident was cumulative.

DISCUSSION

The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Rights to Due Process and a Fair Trial by Admitting Evidence of the Laureano Incident.

1. *Pertinent Facts.*

Prior to trial in the present case, the prosecutor proffered evidence of the Laureano incident. The prosecutor argued the evidence was admissible on, inter alia, the issue of appellant's intent. Appellant objected, inter alia, the incident was remote and the evidence was unduly prejudicial. The court ruled the evidence was relevant to prove intent and was not unduly prejudicial. Laureano's brother testified as indicated in the Factual Summary.

During jury argument, the People argued the Laureano incident was evidence of appellant's intent and of his motive to rob William of his bicycle. Appellant argued to the jury the Laureano incident was a theft, appellant stole William's bicycle, but appellant did not rob William.

During its final charge, the court instructed the jury to the effect the People presented uncharged offense evidence which the jury could consider for the limited purposes of deciding whether appellant acted with intent to deprive the owner of property in this case or whether appellant had a motive to commit the charged offense. The court instructed the jury

not to conclude from said evidence appellant had a bad character or was disposed to commit crime. We will present additional facts below where appropriate.

2. *Analysis.*

Appellant presents related claims as previously indicated. We reject them. Prior to trial appellant pled not guilty to the current robbery charge. Appellant, by that plea, placed the elements of that crime at issue and did not then take any action to narrow the prosecution's burden of proof concerning them. (Cf. *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 (*Ewoldt*); *People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) For example, the court, using CALCRIM No. 1600, properly instructed the jury that robbery required, inter alia, that a defendant use force or fear with intent to steal. Appellant never stipulated he used force or fear with intent to steal William's bicycle. Whether appellant used such force or fear with intent to steal was an issue in this case, apart from whether appellant later took William's bicycle with intent to steal.

There is no dispute that during the Laureano incident, appellant stole the bicycle of Laureano's brother. However, there was substantial evidence more occurred. Appellant pushed Laureano's brother off the bicycle before stealing it. Laureano testified appellant "*jacked* my little brother a bike." (*Sic*.; italics added.) We note the definition of "jack" is "To take illegally, steal (esp. a car or something from a car); *to rob*, burgle." (Oxford English Dict. Online (Dec. 2011) <http://www.oed.com/view/Entry/268047> [as of Feb. 15, 2012]; italics added.) There was thus substantial evidence appellant robbed Laureano's brother of his bicycle.

Appellant concedes evidence of the Laureano incident was relevant to the issue of appellant's intent in connection with the William incident. (See *Ewoldt, supra,* 7 Cal.4th at p. 402.) However, even if evidence of uncharged misconduct is sufficiently similar to charged conduct to be relevant to prove the latter, said evidence must not be excludable under Evidence Code section 352. (*Id.* at p. 404.) Appellant argues his conduct during the William incident was so probative of appellant's intent that it was not reasonably subject to dispute; therefore, evidence of the Laureano incident was cumulative on the issue of intent

with the result the trial court erred by failing to exclude said evidence pursuant to Evidence Code section 352.

An appellate court applies an abuse of discretion standard of review to any ruling by a trial court on an Evidence Code section 352 issue. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) We reject appellant's argument because, as discussed below, whether appellant intended to steal when he used fear in connection with the William incident was reasonably subject to dispute apart from whether appellant's intent when he later took William's bicycle was reasonably subject to dispute.

There was substantial evidence appellant, twice William's age, initiated a threatening, gang-related conversation with William, and appellant acted like he was going to hit William, causing William to be afraid. Appellant never referred to a bicycle during these events. Based on this evidence, the issue of whether during these events appellant intended to cause fear without intending to steal a bicycle from William, or intended to cause fear and to steal, was reasonably subject to dispute.[1]

Only later did appellant look at the bicycles, look at William, and say, "let's fight for the bike." William indicated he did not want to fight.

There was substantial evidence that, subsequently, appellant continued repeating, "let's fight. I want to fight him." Appellant acted like he was going to hit William. Appellant reached for his waist as if he was going to produce a gun. These subsequent events caused William to be afraid. Appellant never referred to a bicycle during these subsequent events. Based on this evidence, the issue of whether during these subsequent events appellant intended to cause fear without intending to steal a bicycle from William, or intended to cause fear and to steal, was reasonably subject to dispute. Only later did appellant actually steal William's bicycle.

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[1] This is true whether or not appellant intended to commit the present offense for the benefit of, at the direction of, or in association with a criminal street gang for purposes of former Penal Code section 186.22, subdivision (b).

In light of the People's evidence, the issue of whether appellant intended to steal when he used fear in connection with the William incident was reasonably subject to dispute. Evidence of the Laureano incident, i.e., appellant's robbery of Laureano's brother, was admissible to prove that, just as appellant had intended to steal when he used force during the Laureano incident, appellant intended to steal when he used fear during the William incident. Moreover, the defense evidence in this case was that appellant committed theft, not robbery; therefore, whether appellant intended to steal when he used fear during the William incident remained an issue even given appellant's defense.

Further, to the extent appellant complains the jury might have used evidence of the Laureano incident as evidence of appellant's bad character or as propensity evidence, the court gave a limiting instruction which told the jury not to do so. We presume the jury followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Appellant also argues the trial court abused its discretion by failing to exclude pursuant to Evidence Code section 352 the evidence of the Laureano incident on the ground the incident was remote. However, the mere fact the court admitted evidence of an incident which occurred 11 years prior to appellant's 2010 trial did not constitute an abuse of discretion. (Cf. *Ewoldt, supra*, 7 Cal.4th at p. 405.)

The trial court did not abuse its discretion by failing to exclude under Evidence Code section 352, evidence of the Laureano incident. Moreover, the application of the ordinary rules of evidence, as here, did not impermissibly infringe upon appellant's rights to due process and to present a defense. (Cf. *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Finally, even if the trial court erred as urged by appellant, it does not follow we must reverse the judgment. There is no dispute appellant stole William's bicycle. There was strong evidence appellant not only stole William's bicycle but robbed him of it. The jury reasonably could have rejected as fabricated the defense evidence appellant committed only theft. It is not reasonably probable that, absent the alleged error, appellant would not have been convicted of robbery. No prejudicial error occurred. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.