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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.

KENNETH RICHARD BARBER, JR.,

Defendant and Appellant.

2d Crim. No. B243668
(Super. Ct. No. 1346175)
(Santa Barbara County)

Kenneth Richard Barber, Jr., appeals from the judgment following his conviction by jury of the attempted willful, deliberate, and premeditated murder of Jerry Coffee (Pen. Code, §§ 187, subd. (a), 664)¹ and two counts of assault with a deadly weapon upon Coffee and George Durst (§ 245, subd. (a)). The jury found that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and used a deadly weapon (§ 12022, subd. (b)(1)) in committing each offense. It also acquitted him of a charged attempted murder of Durst. In a bifurcated proceeding, the trial court found that appellant had a prior strike conviction (§ 667, subds. (d)(1) & (e)(1)); a prior serious felony conviction (§ 667, subd. (a)(1)); and served a prior

¹ All statutory references are to the Penal Code unless otherwise stated.

prison term (§ 667.5, subd. (b)). The court sentenced him to 14 years to life, plus 26 years in prison. Appellant challenges the sufficiency of the evidence to support the attempted willful, deliberate and premeditated murder. He further contends that the court abused its discretion and violated his Sixth Amendment right to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)) when it revoked his "pro per" status; abused its discretion by admitting gang evidence and evidence of uncharged crimes; and erred by imposing an upper term sentence for assault with a deadly weapon and imposing a prior prison term enhancement. Respondent concedes the latter sentencing error. We accept its concession, strike the prior prison term enhancement, otherwise affirm and remand to the superior court with directions to modify the abstract of judgment to conform to the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

In August 2008, appellant was housed in the Northwest D module (NW D) of the Santa Barbara County Jail. NW D had upper and lower tiers, with cells on each tier. Caucasian, African-American and Hispanic inmates occupied NW D. Jail staff usually assigned inmates of only one race to each cell. Ordinarily, inmates also segregated themselves by race while outside their cells. Appellant and George Durst shared a bottom tier cell. Jerry Coffee and another inmate shared an upper tier cell. Durst and Coffee were friends who had known each other for nearly 20 years. Coffee met appellant in custody in August 2008 and they usually got along.

Appellant is an associate of the Ventura Skinhead Dogs, a neo-Nazi skinhead, and white supremacist. He has tattoos that reflect his affiliations and he uses the moniker, "Trippy." Appellant was the leader ("shotcaller") of Caucasian inmates in NW D.

Jail rules prohibit the possession of weapons. NW D inmates nonetheless use weapons crafted from available supplies, including razors and

toothbrushes. Appellant told Coffee that he kept a razor blade in his mouth, and that he cut Bruce, a former NW D inmate, before Coffee arrived there.

Appellant organized and directed exercise sessions for Caucasian inmates. On August 23, Coffee and two other Caucasian inmates were exercising in an upper tier cell with appellant. Coffee was doing sit-ups. Appellant's hands were inside shower shoes, near Coffee's feet. He directed Coffee to punch the shoes each time he sat up. Coffee refused, and said his hand was injured. Appellant slapped Coffee in the chest with a shoe. Coffee stood, told appellant to "Get fucked," and went to his cell. Minutes later, appellant entered Coffee's cell, smiled at him, and said he loved him. He approached Coffee, as if he were about to hug him, and cut the left side of Coffee's throat. It bled profusely. Unarmed, Coffee covered his throat, lay on his bunk, and elevated his feet to resist any further assault. Appellant stood over him, stared at him, and told him he would work out when appellant told him to work out. Another inmate entered Coffee's cell and told appellant to leave. He complied.

Durst entered Coffee's cell and asked to see his wound. Durst got upset and went to confront appellant in their cell. Appellant attacked Durst as he entered the cell, with a weapon that Durst had constructed weeks earlier.

Coffee and Durst were taken to the hospital for treatment. Coffee's throat wound was two and a half inches long, close to his jugular vein and only about one-quarter inch away from his carotid artery. If it had reached either vessel, Coffee would have quickly suffered a severe blood loss. Because the wound was deep, doctors sutured it with two layers of stitches. Durst received three wounds in his abdomen, one in his left shoulder, and two in his left arm. His combined wounds were potentially fatal, absent medical treatment.

Coffee and Durst were transported to jail after their treatment. Both men declined to discuss the attacks with investigators or deputies. Durst said he injured himself by falling down the stairs. Coffee was shaking and crying. He discussed the attack later, in monitored conversations on the jail telephone. Coffee

told a friend he was scared, and declined to name the attacker. He said the authorities knew "who did it" and "got who did it." Coffee told his mother (Nina Ford) he could not identify his attacker because if he said "the wrong thing . . . it could be bad" if "they" heard it.

At trial, Coffee identified appellant as his attacker. He explained he did not identify him initially because he feared "repercussions" pursuant to the inmate "code." That code prohibits inmates from "snitching or ratting" by providing information regarding inmates to authorities, or cooperating with them. Upon breaking the code, an inmate becomes a "rat" or "snitch," who risks retaliation, including serious injury or death. Inmates publicize snitching by circulating "paperwork," such as police reports.

Durst persistently refused to make any verbal statements against appellant to authorities, but he made some gestures that partially confirmed their suspicions regarding appellant. Durst said he did not want appellant to be prosecuted for the attack. Before and after their release from custody, Durst urged Coffee not to identify appellant as his attacker.

Gangs and Groups in Penal Institutions

Simi Valley Police Department Major Crimes Investigator Dan Swanson, formerly of the Ventura Police Department's gang unit, testified as a gang expert. Bruce Jones, an inmate and white supremacist skinhead, also testified about white supremacist groups.

In penal institutions, an inmate must segregate himself with members of his own race, or risk making his race appear weak as a group. Caucasian inmates are typically outnumbered by members of other races, and generally consider it safer to segregate themselves.

The Aryan Brotherhood ("A.B.") is a Caucasian prison gang that uses symbols associated with Nazis. A.B. adheres to a white supremacist ideology, follows pagan religious beliefs, and admires Odin, a mythological Nordic god. A.B. engages in drug sales and commits violent crimes, including murder. At times

A.B. has controlled all Caucasian inmates in the California prison system. The California Department of Corrections and Rehabilitation ("CDCR") tries to limit A.B.'s influence by isolating its leaders in Segregated Housing Units ("S.H.U.s"). A.B. therefore relies upon members and associates of other gangs (e.g., the Nazi Lowriders and Public Enemy Number 1 ("PENI") who are housed outside S.H.U.s to carry out its orders.

There are Caucasian inmates who self-identify as skinheads, without supporting white supremacists or Nazi tenets. Neo-Nazi skinheads do follow white supremacist and Nazis tenets. Independent skinheads follow the "Odinist" belief of a "pure white race," but do not necessarily join an organized group. Some skinheads join several gangs. For example, appellant is an independent skinhead, and an associate of the Ventura Skinhead Dogs, a Neo-Nazi skinhead gang. Incarcerated members of different white supremacist groups are compatible, but compete with each other to control Caucasian inmates.

White supremacist inmate groups revere respect, loyalty, and power. Respect is the paramount value. Committing an act of violence or having others obey one's order to do so are the most common ways to earn respect among gangs in penal institutions. Inmates boast about committing violent crimes and confirm their boasts by disseminating paperwork.

The Caucasian shotcaller in a penal institution dictates the conduct of Caucasian inmates. Subordinates must follow the shotcaller's orders. The shotcaller is expected to respond immediately to any sign of disrespect from subordinates by disciplining them. Discipline can range from mandatory exercise to violent punishment, including murder. A shotcaller who fails to respond immediately to subordinates' disrespect risks losing standing with more highly ranked prison shotcallers. Reduced standing will "drastically affect that jail leader's ability to continue to establish their own criminal resume or just continue to climb any rank structure within the prison."

A.B. leaders in S.H.U. facilities often use a code based upon an ancient Nordic alphabet to communicate and impose orders. They send messages through an intermediary, such as another inmate or a female outside the penal system. Before trial, appellant corresponded with multiple A.B. associates, including Lee Simpson, who was housed in a S.H.U. Simpson was the "primary conduit of information" for Charles Sherwin, a high-ranking A.B. associate and PENI gang member housed in a S.H.U. at Pelican Bay State Prison. In corresponding with Simpson and others, appellant used a code and phrases commonly used by Neo-Nazi skinheads, as well as references to Odin. While appellant was housed at Calipatria State Prison ("Calipatria"), Simpson corresponded with him regarding a position A.B. offered him to conduct business on its behalf. In his May 13, 2010 letter, appellant asked Simpson about the position, and how many inmates and facilities he would control. Appellant sent Simpson an acceptance letter on May 14, using a coded message. On May 17, Simpson sent appellant a letter regarding some "cowardly" inmates at Calipatria with an offer to place appellant on a team that would get the cowards "back in line." A later letter contained a coded message authorizing appellant to discipline three named inmates by violently assaulting them.

Uncharged Assaults

Bruce Jones testified that he was housed in NW D in the summer of 2008, until August 11. Jones, a skinhead, shared a cell with his friend, Durst. One day, Jones got angry at appellant for making derogatory comments about Jones's girlfriend. Later that day, another inmate told Jones appellant wished to see him. Jones returned to his cell, where appellant rushed him with a tomahawk (a weapon constructed of two razor blades attached to a comb or toothbrush) and inflicted multiple wounds on Jones's upper left torso and one wound on his left arm. Each wound was six to seven inches long. Appellant also threatened to cut off Jones's face and said, "Never disrespect another skinhead." Jones believed appellant

attacked him for disrespecting him in front of other Caucasians. He did not report the incident because appellant was a fellow skinhead.

On November 6, 2009, appellant fought with Robert Dennis while they were incarcerated in Calipatria. Dennis was a white supremacist. There was blood on both men. Officers found a weapon (a razor blade tied to a toothbrush) between the men. It lay near Dennis's feet, within appellant's reach. Dennis had several slash wounds, including one in his neck. Appellant had scrapes, abrasions and one cut on his knee.

Defense Case

Ryan Erskine testified that he and Coffee shared NW D cell 5 on August 23. They were inside cell 5, on the upper tier, working out with appellant and another inmate. Coffee whined, said he would not work out, and other inmates ridiculed him. Coffee told appellant, "Oh, fuck you, Trippy," and left. Appellant, Erskine and the other inmate remained in cell 5. Minutes later, they heard thuds and bangs coming from outside cell 5. They found Coffee holding his throat and staggering outside the upper tier cells.

Dominguez Rodriguez testified that he was housed in NW D in August 2008. Appellant was the well-respected Caucasian leader. To preserve their power, jail leaders "check" inmates of their own race who disrespect them. Rodriguez testified that appellant and Durst were drinking Pruno (jail-made alcohol) on August 23. Santa Barbara County Sheriff Lieutenant Shawn Lammer testified that Coffee told him appellant was under the influence of Pruno on August 23.

Detective Steven Gonzales testified that he or another detective told prosecution witness Jones that he might receive an early parole date if he helped the prosecution but made no promises to him. Jones told Gonzalez appellant had once slashed him with a "tomahawk."

DISCUSSION

I. *Sufficiency of the Evidence*

Appellant contends that the evidence of attempted willful, deliberate and premeditated murder is not sufficient to satisfy federal due process. We disagree.

In reviewing claims of insufficient evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maciel* (2013) 57 Cal.4th 482, 514-515.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) We accept the logical inferences that the jury might have drawn from the evidence even if we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) If the trier of fact's findings are reasonably justified by the circumstances, the opinion of the reviewing court that a contrary finding might also reasonably be reconciled with the circumstances does not warrant reversing the judgment. (*People v. Jones* (2013) 57 Cal.4th 899, 961.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.' [Citation.]" (*People v. Houston, supra*, 54 Cal.4th at p. 1217.)

An attempted murder is premeditated and deliberate if it resulted from the defendant's "careful thought and weighing of considerations," rather than an "unconsidered or rash impulse." (*People v. Banks* (2014) 59 Cal.4th 1113, 1153.) "[T]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly[.]' [Citation.]" (*People v. Watkins*

(2012) 55 Cal.4th 999, 1026.) In reviewing the sufficiency of a finding of premeditation and deliberation, courts often consider evidence of the defendant's planning, motive, and method, although these factors "need not be present in some special combination or afforded special weight, nor are they exhaustive. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

There is sufficient evidence to support the attempted willful, deliberate and premeditated murder. Appellant approached Coffee, as if he were going to hug him, said he loved him, and cut his neck, near the jugular vein, just a quarter inch away from his carotid artery. He inflicted a deep wound that required two layers of stitches. Appellant's feigned friendly approach reflects his planning and deliberation. Coffee was unarmed. "In plunging the knife so deeply into such a vital area of the body of an apparently unsuspecting and defenseless victim, defendant could have had no other intent than to kill." (*People v. Bolden* (2002) 29 Cal.4th 515, 561.)

II. Revocation of Appellant's Self-Representation

Appellant contends the court abused its discretion by revoking his pro per status. (*Faretta, supra*, 422 U.S. 806) We disagree.

We review a trial court's decision to revoke a defendant's self-representation status for an abuse of discretion. (*People v. Williams* (2013) 58 Cal.4th 197, 252.) We "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings." (*People v. Carson* (2005) 35 Cal.4th 1, 12) (*Carson*); accord, *People v. Williams, supra*, at p. 252.)

A defendant has a federal constitutional right to self-representation. (*Faretta, supra*, 422 U.S. 806.) However, there are limits on the right to act as one's own attorney. The right of self-representation is not absolute. (*Ibid.*) "[T]he trial judge may terminate self-representation by a defendant who deliberately

engages in serious and obstructionist misconduct. [Citation.]" (*Id.*, at p. 834, fn. 46; *Carson, supra*, 35 Cal.4th at pp. 8-9.) A trial court may terminate a defendant's self-represented status for misconduct that seriously threatens the core integrity of the trial. (*Carson*, at p. 6.) "One form of serious and obstructionist misconduct is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential 'subversion of the core concept of a trial.' [Citation.]" (*Id.*, at p. 9.)

Background

Appellant represented himself for two separate time periods before trial. When he first represented himself in April 2010, the trial court issued a protective order which prohibited appellant from having any contact with victims Coffee and Durst. On May 21, 2010, the court issued additional protective orders prohibiting appellant's investigator from providing appellant with discovery material that contained witness contact information, and barring appellant and his investigator from providing discovery to third parties. The court issued the May orders after it learned of a letter appellant wrote to victim Durst in April, which said he had sent "one of the Huntington Comrades" to look for him at the home of Durst's mother. The letter also included the following direction for Durst: "Don't explain anything about that day. Nothing. Just wait . . . I'll set something up once I know you got this."

On June 10, 2010, appellant sent a message to victim Dennis in a letter he sent to his mother, Marsha Dennis. The message stated: "I'm fighting 2 cases . . . They are using that bullshit down south against me so I imagine someone will be looking for you soon. I believe my investigator . . . Rose . . . (805) . . . can make sure you don't have to take a road trip. Please give him a call A.S.A.P. He'll explain. He will try to get ahold of you before anyone else. I wanted to send you something first. They're making quite the big deal out of this."

On July 2, 2010, the court granted appellant's request to appoint counsel to represent him.

On May 23, 2011, the trial court granted appellant's second motion to represent himself. Before granting the motion, the court questioned and admonished him as follows: "Do you understand that your right to act as your own lawyer is not a license to abuse the dignity of this [C]ourt? If the Court determines that you're doing that by engaging in deliberate misbehavior that's causing disruption in the trial proceedings, the Court can terminate your right to self-representation. Do you understand that?" Appellant answered in the affirmative. The court appointed an investigator and advisory counsel to assist him.

During proceedings on July 25, 2011, the trial court considered appellant's request for witness and victim information which had been redacted from discovery documents. The prosecution objected that outstanding protective orders prohibited disclosing the redacted data to appellant. In addition, the prosecutor cited a 2010 incident in which appellant had arranged for investigator Ron Rose to use intimidating tactics while interviewing victim Coffee. The court denied appellant's request.

In the same hearing, a deputy county counsel reported that Rose took photographic and video contraband to the jail for appellant. The deputy further reported that Rose had sent subpoenas to a government agency with a statement that a lawsuit would be brought if the agency did not comply with the subpoena, pursuant to appellant's request. The court admonished appellant as follows: "It looks very much to me as though you are using public funds . . . for the purpose of having this investigator intimidate witnesses." The court found that appellant was using discovery procedures to seek irrelevant material. The court asked Rose about the "threatening and intimidating" questions he had asked Coffee. Rose denied any intent to intimidate Coffee, and said he just asked the questions that appellant gave him. The court granted Rose's request to be removed from the case.

On February 22, 2012, the prosecutor advised the trial court of an August 2010 incident in which jail staff had recovered an excerpt of the transcript from a statement by victim Coffee to a prosecution investigator. The excerpt had

been passed among inmates in two modules of the jail to "get the word out that Jerry Coffee is a rat." Appellant had received a transcript of Coffee's statement in discovery while he was "in pro per." On March 5, 2012, the trial court issued orders to prohibit appellant from taking discovery materials into his cell. The orders permitted him to view discovery materials according to the policies, procedures and protocols of the jail. Jail staff permitted appellant to review discovery material in the jail's professional visitation booth ("PV booth"), to take notes regarding the discovery material, and to possess notes (but no discovery material) in his cell.

Throughout pretrial proceedings, appellant repeatedly moved to continue trial, claiming that he had not had sufficient opportunity to prepare. On May 1, 2012, the prosecutor and a deputy county counsel asserted that appellant was engaging in "delay tactics," by repeatedly declining to review discovery material in the jail PV booth while telling the court he needed to review them in his cell in order to timely prepare for trial. The court denied his renewed request to take discovery into his jail cell, but arranged for appellant, his investigator and advisory counsel to use the courtroom to review discovery. On May 3, the prosecutor advised the court that on May 2, appellant had declined to use the courtroom beyond the noon hour. On May 21, 2012, a jail deputy testified about multiple occasions from January 12, through May 3, 2012, on which appellant had declined offers to use the PV booth to review discovery.

On May 25, 2012, the prosecutor filed its response and opposition to appellant's request for additional victim contact information which provided evidence of appellant's repeated violation of protective orders. An attached report prepared by Melissa Adams, a Federal Bureau of Investigation forensic examiner and cryptanalyst, described excerpts from appellant's coded correspondence. Coded sections of appellant's correspondence with A.B. associate Simpson and others concerned the distribution of victim contact information. For example, appellant's May 4, 2010 letter to Simpson contained a coded numerical message which corresponded to the phone numbers of Coffee's girlfriend and mother. Other

correspondence between appellant and Simpson discussed an unidentified task that appellant had asked Ventura Skinhead Dogs associate Justin Mattley to perform. In his August 4, 2010 letter to Mattley, appellant sent a coded message instructing him to dispose of any documentation regarding Coffee's mother.

On May 25, the court found that appellant "continuously abused the court processes and [was] engaging in a pattern of conduct in an endeavor to tamper with and intimidate witnesses, that he [had] engaged in obstructionist misconduct that . . . compromise[d] the fact-finding process and constituted a . . . subversion of the concept of a trial." Among other things, the court noted his ongoing attempts to delay trial in order to obtain information to further intimidate victims and witnesses. The court revoked appellant's "pro per" status and appointed the attorney who had served as advisory counsel to represent him.

Appellant contends the trial court abused its discretion because it did not consider "alternative sanctions" before it terminated his self-representation. We disagree. Appellant violated the court's protective orders repeatedly and used deceptive tactics to delay the proceedings in an effort to engage in victim and witness intimidation. He threatened those individuals, personally, or through cohorts, in blatant violation of protective orders. Moreover, he used a complex code to convey information to his cohorts, which delayed and nearly prevented authorities from discovering the extent of his serious and obstructionist misconduct. Under the circumstances, the court did not abuse its discretion in terminating appellant's self-representation before considering alternative sanctions. (*Carson*, *supra*, 35 Cal.4th at pp. 6, 9.)

III. Gang Expert and Cryptanalysis Testimony

Appellant further claims that the trial court abused its discretion and violated his right to a fair trial by allowing the prosecution to present expert testimony regarding the A.B. and the cryptanalyst's testimony regarding appellant's coded letters. The record belies his claim.

Gang evidence is admissible where it is relevant to establish motive or intent. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Expert testimony concerning the culture, habits, and psychology of gangs as well as motivation for a particular crime and rivalries among gangs is the proper subject of expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657.) Where gang evidence is relevant to motive, it can be admitted even where the prosecution does not attach gang enhancements. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194-1195.) We review the admission of gang evidence for an abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) There was none.

The challenged gang expert testimony was highly probative to explain the motive for appellant's crimes. He had violently attacked unarmed Caucasian inmates with whom he was usually friendly, under circumstances that would seem innocuous to jurors. Absent the gang evidence, there was no apparent motive. Gang mores demand that a shotcaller punish subordinates' lack of respect, as appellant did in attacking Coffee and Durst. Following the charged attacks, appellant acquired more status in the prison gang structure, as demonstrated by his correspondence with Simpson. "[W]here evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial. [Citations.]" (*People v. Martin* (1994) 23 Cal.App.4th 76, 81.) Moreover, much of the challenged gang evidence was cross-admissible, where its content showed consciousness of guilt, including appellant's correspondence with gang associates regarding witness and victim intimidation. Similarly, the challenged cryptanalyst's testimony explaining the contents of appellant's coded messages was probative to show motive and consciousness of guilt. The trial court did not abuse its discretion in admitting the challenged testimony.

Uncharged Crimes

Appellant contends that the trial court violated his due process rights and abused its discretion under Evidence Code section 352 by admitting evidence of uncharged crimes. We disagree.

The trial court allowed the prosecution to present evidence of appellant's August 2008 assault upon county jail inmate Jones and his November 2009 assault upon Dennis at Calipatria. Before trial, the court ruled the uncharged crimes evidence was relevant to show appellant's motive and intent in attacking Coffee and Durst (Evid. Code, § 1101, subd. (b)); and that its probative value outweighed "any concerns related to undue consumption of time, confusion of issues to the jurors or prejudice to the defense." (Evid. Code, § 352.) After trial began, counsel for appellant renewed his objection to evidence of the Dennis assault and argued it was irrelevant because it occurred after the charged offenses. The court ruled it was admissible, despite its timing, because appellant had mentioned it in his letters, and it occurred in the "entire context of what arguably is a plan to engage in violent activities . . . and . . . use letters and coded messages to inveigle people into a plan not to testify against" appellant.

We review a trial court's ruling under Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) Evidence Code section 352 gives the court discretion to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence of a defendant's criminal conduct on another occasion may be admitted to prove motive, intent, or lack of self-defense. (Evid. Code, § 1101, subd. (b).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that

defendant probably harbored the same intent in each instance.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) Where an act is sufficiently similar to prove intent, motive, common plan or identity, its relevance is not diminished by the fact that it occurred after the charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

The trial court did not abuse its discretion in admitting the Jones and Dennis assaults to prove intent. In each instance appellant cut an apparently unarmed Caucasian inmate. In the Jones and Durst assaults, he used a weapon crafted by Durst. The Jones assault further resembled appellant's assaults upon Coffee in that he entered the victim's cell to attack him immediately after the victim displayed conduct he considered disrespectful. In the Coffee, Durst and Dennis assaults, appellant cut the victim's neck. Although the Dennis assault occurred outside a cell, unlike the charged offenses, it was "sufficiently similar to support the inference that defendant probably harbored the same intent in each instance." (*People v. Cole, supra*, 33 Cal.4th at p. 1194.)

We also reject appellant's assertion that the trial court abused its discretion under Evidence Code section 352 by admitting the uncharged crime evidence because its prejudicial impact outweighed its probative value. The uncharged crime evidence was not more inflammatory than the evidence of the charged crimes which caused injuries that required professional medical treatment. Further, the court repeatedly instructed jurors with CALCRIM No. 375 that the uncharged crimes evidence could not be used to conclude that appellant had a bad character or was predisposed to commit the charged crimes, and that jurors must only consider it for the limited purpose of establishing identity, intent, or motive.

IV. Sentencing Issues

Appellant contends the trial court abused its discretion in imposing an upper term sentence for the count 4 assault with a deadly weapon because the court failed to give the requisite statement of reasons and the interests of justice were not served "by such an excessive sentence." The claim is forfeited because it was not

raised below. (*People v. Scott* (1994) 9 Cal.4th 331, 353-357.) In any event, the claim lacks merit.²

We review a trial court's sentencing decision for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846-847.) Appellant was sentenced under section 1170, subdivision (b), which provides in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, . . . and any further evidence introduced at the sentencing hearing. . . ."

During sentencing the prosecutor argued that the aggravating factors listed in the probation report supported the imposition of the upper term. Those factors are (1) appellant had engaged in violent conduct which indicated a serious danger to society, and (2) his prior convictions were numerous or of increasing seriousness. The probation report listed no mitigating factors and appellant cites none. The court announced its selection of the upper term shortly after the prosecutor cited the aggravating factors, which implies the court based its sentencing decision upon them. The court did not abuse its discretion in imposing the upper term. Because it is not reasonably probable that resentencing would result in a sentence more favorable to appellant, we will not remand this matter for a statement of reasons for the selection of the upper term. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 155.)

Appellant further contends, and respondent appropriately concedes, that the trial court improperly imposed a section 667.5, subdivision (b) one-year

² We reject appellant's related claim that counsel's failure to object deprived him of the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 746.) Because he has not shown that his count 4 sentence would have been more favorable but for counsel's claimed failure, appellant has not established the requisite prejudice to support that claim. (*Ibid.*)

prior prison term enhancement because the mayhem conviction on which that enhancement was based was used to impose a five-year section 667, subdivision (a) enhancement. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) We accept respondent's concession and strike the prior prison term enhancement.

DISPOSITION

We modify the judgment to strike the section 667.5, subdivision (b) prior prison term enhancement. The superior court shall amend the abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Frank J. Ochoa, Judge
Superior Court County of Santa Barbara

Susan S. Bauguess, under appointment by the Court of Appeal, for
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