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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.

LUCKY PETTIS CLARK,

Defendant and Appellant.

B237061

(Los Angeles County  
Super. Ct. No. BA385981)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
William Ryan, Judge. Affirmed.

Melissa J. Kim, 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, Assistant Attorney General, Scott A. Taryle and Kimberley  
J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

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Lucky Pettis Clark appeals the judgment entered following his conviction by jury of first degree burglary. (Pen. Code, § 459.) He contends the trial court erred in permitting the People to introduce evidence of an uncharged burglary to show his intent in the charged burglary. We find no error in the admission of the evidence. Moreover, even if error is assumed, it was harmless. We therefore affirm the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

### *1. The prosecution's evidence.*

#### *a. The charged burglary of Esaw's apartment on April 24, 2011.*

On the morning of April 24, 2011, Curtis Esaw left his third floor apartment in a low income apartment complex known as 39 West, located at 3885 South Western Avenue in Los Angeles. When Esaw returned the following day, he did not notice any damage to the front door or the windows but a DVD player, a surround sound system and some clothes and food were missing. Esaw had never given Clark a key to his apartment, had never lost a key to the apartment and, to Esaw's knowledge, the only other person who had a key to his apartment was the complex manager.

After Esaw called the police, he went to the first floor and reported the burglary to Carlos Lopez, a 39 West manager. Lopez and Esaw looked at digital security video from the evening of April 24, 2011. A three-minute video taken at 10:30 p.m. depicted Clark coming up a flight of stairs with a bag and walking to the area of Esaw's apartment. Later in the video, the bag appears to contain a DVD player. Esaw had known Clark for almost a year, they were neighbors, they talked on occasion and Esaw considered Clark a friend. Esaw recognized Clark's gait and, although the video is dark, Esaw could see the top portion of Clark's head, including his nose and ears.

Lopez testified he recognized Clark at first sight in the video based on the "way he walks." Also, the facial features that are visible in the video are consistent with Clark's appearance.

At a meeting with 39 West case workers regarding the burglary, Lopez showed Clark the video and told him he was going to be evicted. Clark initially denied it was him in the video but eventually signed a statement admitting he broke into Esaw's apartment and promising to make restitution if Esaw agreed not to prosecute.<sup>1</sup> Clark never paid Esaw restitution and did not return any of the stolen property.

b. *The uncharged burglary of Battest's apartment on May 5, 2011.*

On May 5, 2011, John Battest returned to 39 West and found his apartment on the first floor had been ransacked. A money order in the amount of \$2,221 and \$500 in cash were missing. The back window of the apartment had been "torn open."

Karla Acosta, a 39 West manager, viewed surveillance video tape recordings of various areas of the complex with Battest. In one video, Acosta saw Clark leave his apartment through the window and enter the window of the apartment of his neighbor, Battest. After viewing the video, Acosta called the police. Shortly thereafter, Clark walked past the office. Acosta called Clark into the office and showed him the video. Clark initially said he was not the person depicted. Clark then told Acosta he had "locked himself out of his apartment, so he came out and then [went] back in." Clark ultimately acknowledged he was the person entering Battest's window. Acosta told Clark she had called the police and there was a possibility Clark would be evicted. When the police arrived, Clark was not in his apartment and Acosta never saw him again at the complex.

Acosta identified the person in the video as Clark based on his height, clothing and gait. Acosta testified the person in the video walked with a hunched back and Clark "always walks like that." Acosta confronted Clark because she recognized him in the video.

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<sup>1</sup> The agreement stated: "I, Lucky Clark, [admit] to entering Curtis [Esaw]'s unit 305 on 4/24/11 at 10:30 p.m. and taking a DVD player. I, Lucky Clark, promise to pay \$200 in cash by 4/30/11 to Curtis [Esaw] for the DVD player."

2. *The defense.*

The defense rested without presenting evidence.

**CONTENTION**

Clark contends the trial court erroneously admitted evidence of the Battest burglary to prove his intent in the Esaw burglary.

**DISCUSSION**

1. *Relevant principles.*

Evidence Code section 1101, subdivision (a) prohibits the admission of character evidence, including evidence of specific instances of uncharged offenses, to prove conduct on a particular occasion. Notwithstanding this prohibition, Evidence Code section 1101, subdivision (b) permits evidence of uncharged offenses when relevant to prove some fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consent.

The admissibility of evidence of uncharged offenses under Evidence Code section 1101, subdivision (b) depends upon the fact sought to be proved and the degree of similarity between the charged and uncharged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) “The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt, supra*, at p. 402.) To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference the defendant probably harbored the same intent in each instance. (*Ibid.*; *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Kelly* (2007) 42 Cal.4th 763, 783.)

When evidence of uncharged crimes is deemed admissible under Evidence Code section 1101, subdivision (b), the trial court also must determine if the evidence should be excluded as unduly prejudicial under Evidence Code section 352.<sup>2</sup> (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) Because evidence of uncharged crimes is inherently prejudicial, such evidence must have “ ‘substantial probative value’ “ to be admissible. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, italics omitted; *People v. Lindberg, supra*, 45 Cal.4th at p. 23; *People v. Kelly, supra*, 42 Cal.4th at p. 783.) *Ewoldt* identified various factors to be considered when weighing the probative value against the prejudicial effect of uncharged crimes evidence, including the tendency of the uncharged offense to demonstrate the fact in issue, the independence of the source of the uncharged crime, whether the uncharged crime resulted in conviction, whether the facts of the uncharged crime are more inflammatory than the facts of the charged offense, the remoteness in time to the charged offense, and whether there is other evidence to substantiate the fact in issue. (*People v. Ewoldt, supra*, at pp. 404-406.)

We review rulings under Evidence Code sections 1101, subdivision (b) and 352 for abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

## 2. *Litigation of the issue in the trial court.*

Before trial, the prosecutor sought leave to introduce evidence of the Battest burglary to prove Clark’s intent in the Esaw burglary. The prosecutor contended the proximity and similarity of the two events demonstrated intent in the charged incident. When defense counsel objected, the prosecutor indicated that, based on the preliminary hearing transcript, it appeared that Clark and Esaw knew each other. Thus, even if defense counsel did not argue Clark had permission to enter, there

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<sup>2</sup> Evidence Code section 352 provides: “The court in its discretion may 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, or confusing the issues, or of misleading the jury.”

remained an implicit suggestion Clark may have had permission to enter, even though Esaw would deny it had been granted. The prosecutor noted defense counsel had pointed out to the prosecutor that the security footage arguably showed Clark holding keys.

Defense counsel asserted Clark would defend based on misidentification, not lack of intent. Therefore, the uncharged incident was irrelevant. Additionally, the evidence constituted impermissible propensity evidence and was highly prejudicial as the jurors would assume Clark had committed both offenses.

The trial court found the uncharged offense relevant to show Clark's intent and found the probative value of the evidence outweighed its prejudicial effect, noting the jury would be instructed not to consider the evidence to prove propensity.

3. *The trial court properly admitted evidence of the Battest burglary to show Clark's intent in the Esaw burglary.*

By pleading not guilty, Clark placed all elements of the charged offense at issue, including whether he harbored the requisite intent. (*People v. Lindberg, supra*, 45 Cal.4th at p. 23). Thus, the People were required to establish he entered Esaw's apartment "with [the] intent to commit grand or petit larceny or any felony . . . ." (Pen. Code, § 459.) Lacking direct evidence of Clark's mental state, evidence of the Battest burglary was relevant to demonstrate Clark's intent during the Esaw incident. That is, the two incidents were sufficiently similar to support the inference Clark probably harbored the same intent in each instance. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402; *People v. Lindberg, supra*, 45 Cal.4th 1, 23; *People v. Kelly, supra*, 42 Cal.4th at p. 783.)

Clark claims the two incidents had numerous dissimilarities. He notes that in the Esaw offense, the mode of entry was unknown and the unit was not ransacked. In the Battest offense, the burglar entered through a window and ransacked the apartment. Also, the units were on different floors and the residents were away for different periods of time at the time of the burglaries. However, given that the least amount of similarity is required to show intent, a residential burglary of another of

Clark's neighbors committed within ten days of the charged offense while the resident was away, was sufficiently similar to the Esaw burglary to warrant introduction on the issue of intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Also, consideration of the factors identified in *Ewoldt* reveals no abuse of the trial court's discretion in weighing the probative value of the evidence against its prejudicial effect. The uncharged crime had a strong tendency to prove Clark's intent in the charged offense; the uncharged offense was proved by evidence independent of the evidence relied upon to prove the charged offense; the uncharged offense was nearly identical to the charged crime and thus was not more inflammatory; the uncharged offense was not remote in time; and, the evidence was not cumulative as there was little other evidence tending to establish Clark's state of mind when he entered Esaw's apartment. Although the uncharged conduct did not result in a conviction, the danger the jury might punish Clark for that offense, rather than consider the evidence solely for the limited purpose for which it was admitted, was minimal given that the two offenses were nearly identical and Clark was on trial for the charged offense.

Also, evidence of the Battest burglary did not consume an undue amount of time and would not have confused the jury as it clearly involved a separate incident. Clark resists this conclusion by noting the testimony of Battest and Acosta consumed approximately 40 percent of the trial testimony and the evidence related to the uncharged offense was confusing because Acosta, the first witness, testified about the uncharged offense. Notwithstanding these considerations, each incident involved a separate victim and a separate 39 West manager. Thus, there was little danger of confusing the jury. Also, the entire trial was relatively brief. Consequently, the presentation of evidence related to the uncharged offense did not consume an undue amount of time.

Clark also claims the prosecutor emphasized evidence of the uncharged act in closing argument by referring to the evidence four separate times. However, review of the record reveals the prosecutor made no improper use of the evidence. The

prosecutor argued the jury had the videos, the confession, the uncharged burglary that took place two weeks later regarding Clark's intent, and Clark's suspicious activity when he was confronted with these allegations. Later, the prosecutor advised the jury that, when determining what Clark could have intended when he entered Esaw's apartment, it could consider that Clark subsequently entered Battest's apartment with the intent to steal. These arguments did not make unfair use of the evidence.

Clark next asserts the fact the jury reached a verdict after 20 minutes of deliberation indicates the jury reacted emotionally to evidence of the uncharged offense. However, overwhelming evidence of guilt is a more likely explanation for the quick verdict than an emotional reaction to the uncharged burglary. (See discussion, post.)

Finally, Clark disputes whether the item in the hand of the person in the video can be deciphered. Clark further argues that, even if he had keys in his hand, he was in his own apartment complex and there was no evidence he had a key to Esaw's apartment or that Esaw had given Clark permission to enter. Rather, Esaw testified he did not give Clark permission to be in his apartment, he never gave Clark his keys and he has never lost his keys. Because Esaw's testimony showed Clark did not have permission to enter, intent was not in dispute and, when intent is not contested, the prejudicial effect of admitting an uncharged act to prove intent outweighs the probative value of the evidence. "[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." (*People v. Lopez* (2011) 198 Cal.App.4th 698, 715.) Clark asserts the evidence of the uncharged offense portrayed him as a serial burglar and, absent the evidence, a different result is reasonably probable.

Unlike *People v. Lopez*, Clark's intent in the charged offense was not beyond dispute. As the prosecutor argued at the hearing on the admissibility of the evidence, based on the evidence that indicated Clark and Esaw knew each other, the jury might infer Clark had permission to enter even if the defense did not argue it and Esaw



denied it. Also, the security video footage was clear enough to permit the reasonable inference the item in Clark's hand could have been keys. In fact, defense counsel suggested to the prosecutor the object in Clark's hands might be keys. Therefore, in order to rebut the inference Clark entered Esaw's apartment with permission for some purpose other than to commit theft, the trial court did not abuse its discretion in permitting the prosecution to present evidence of the Battest burglary.

4. *Any error in the admission of the evidence was harmless.*

Even assuming the admission of the challenged evidence constituted error, Clark would not have obtained a more favorable result absent the error. Defense counsel argued the identifications of Clark were not reliable as they were based on body language, not facial features; Clark's confession was tainted by the pending threat of eviction; and, the identifications were tainted by the confession. However, Clark's confession could not have tainted the identifications because Esaw and Lopez, witnesses who were familiar with Clark, immediately identified him as the individual depicted in the video. Further, it is unlikely the threat of eviction would cause Clark to admit the commission of a felony. Thus, the defense arguments were not persuasive.

On the other hand, the surveillance video depicted Clark holding an empty bag and reappearing at the end of the video with items in the bag, including an object that appeared to be a DVD player. Clark was identified in the surveillance video by Esaw and Lopez, two individuals who knew him, and Clark thereafter admitted the crime in writing. Given this overwhelming evidence of guilt, there is no reasonable probability Clark would have obtained a more favorable result had evidence of the uncharged burglary been excluded. Thus, regardless of the standard of review, any error in the admission of the evidence must be seen harmless. (*Chapman v. California* (1967) 386 U.S. 18, 22-24 [17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.