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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LLOYD WADE, Defendant and Appellant.	B231593 (Los Angeles County Super. Ct. No. BA371473)

APPEAL from a judgment of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Affirmed.

Syda Kosofsky, 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, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Lloyd Wade appeals from the judgment entered upon his conviction by jury of voluntary manslaughter (Pen. Code, § 192, subd. (a))[1] as a lesser included offense of murder (§ 187, subd. (a)). The jury found to be true the personal use of a firearm allegation within the meaning of section 12022.5. The trial court sentenced appellant to an aggregate state prison term of 10 years. Appellant contends that (1) the trial court erred and violated his Sixth Amendment right to present a defense and Fifth and Fourteenth Amendment rights to due process by excluding relevant evidence of the victim's violent criminal history, character for violence when using narcotics and possession of cocaine and drug paraphernalia in her car, (2) the trial court erred and violated his Fourteenth Amendment due process right to a fair trial by admitting evidence of two dissimilar uncharged incidents, and (3) his Fourteenth Amendment rights to due process and a fair trial were violated by the cumulative effect of the evidentiary errors.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

Background

In May 2010, appellant resided on 11th Avenue, in Los Angeles. His sister-in-law, Florence Wade (Wade), and her son, Ernest Glass (Glass), lived in the house next door. Appellant was 87 years old and in poor health. He owned a collection of antique guns mounted on wall plaques.

William Brown (Brown) met appellant through Brown's friend, Glass. Because appellant was sick, Brown checked on him from time to time to see if he needed anything. Beginning in 2010, Brown began visiting appellant daily, cooking and doing odd jobs for him. In May 2010, Brown, who had been homeless, began sleeping at appellant's residence. He never saw appellant use or threaten to use any of his guns, and he and Wade never saw appellant act violently.

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

Caroline Lovett (Lovett) was Brown's longtime girlfriend. After Brown began caretaking for appellant, Lovett sometimes spent the night at appellant's house. On May 14, 2010, appellant told Brown that Lovett was no longer welcome. Appellant also told Wade that Lovett was not welcome, adding that he might hurt her, which Wade later reported to police. On May 15, 2010, Lovett told Brown she was unhappy that he was continuing to sleep at appellant's house.

The shooting

On May 16, 2010, near 10:00 a.m., Lovett drove to appellant's home to talk to Brown because she was upset with him staying there. She told him that appellant was trying to drive them apart. Brown told her that her concerns were unfounded and that they had to make sacrifices to save money so he could get an apartment with her. Lovett drove away, apparently satisfied.

Near 6:00 p.m. that evening Lovett returned to appellant's home visibly angry. That morning, she had been told by Wade that appellant was gay, leading Lovett to believe that Brown was having an affair with him. Brown and Lovett drove to a nearby restaurant, where they sat in the car, and he attempted to assuage her concerns. Lovett said she did not believe him and reached into her purse where she placed a hammer in her hand, though she did not take it out of the purse. Brown feared she might hit him. Lovett told him, in substance, "I bet you won't stay at [appellant's] residence tonight." When Brown left the car to get a drink at the restaurant, Lovett drove away.

That same evening, Wade and Glass were at home and heard appellant and Lovett arguing in front of appellant's home. Lovett did most of the arguing and cursing. Glass did not hear Lovett make any threats to use physical force, though Wade heard Lovett say in substance, "I am not going to let no man take my man away from me." Appellant and Wade told Lovett to calm down and go home.

Lovett walked toward her car, turned and walked back toward appellant's house. Appellant, who had briefly gone inside, came back outside holding a pistol. According to Glass, who knew that Lovett was jealous of appellant's relationship with Brown and had a bad "temper," she seemed "out of control," "aggressive," "overly excited" and

"enraged." Lovett rushed at appellant as if she was going to "do him." Appellant put her in a headlock. Neither Wade nor Glass saw Lovett hit appellant. Wade and Glass went into their house, fearing the gun would discharge. Glass then heard a gunshot, a pause, and a second gunshot, while he was calling 911. Wade did not believe the shots were in rapid succession. Appellant shot Lovett, who fell to the ground. He then shot her again.

The investigation

Police officers arrived a short time later and arrested appellant, who was calm and cooperative. He did not appear to be injured. The police found a .45-caliber revolver, two expended casings and five live bullets. The revolver was later successfully test fired. In order for the trigger to be pulled, its hammer had to be manually cocked. A second shot required a second cocking.

Wade told detectives that she was afraid of appellant due to his mood swings and described him as crazy and angry though she had never seen him act violently. Glass told detectives that he saw appellant and Lovett wrestling and that Lovett was trying to take the gun from appellant. At trial, he denied making that statement.

Lovett suffered a chest and head wound, both of which were fatal. There was no soot or stippling on the entry wound, indicating that the shots were not fired from close range but from at least one and one-half to two feet away. Lovett's blood tested positive for cocaine and morphine. No weapon was found near her, and her purse was in the car.

Appellant's prior threats of violence

In the weeks before the shooting, appellant threatened to shoot a mechanic, Mr. Sawyer, and Terry Whitaker (Whitaker). The details of these incidents are set forth in detail in part IIA, *post*.

The defense's evidence

Shavawn Jackson (Jackson), appellant's neighbor, heard Lovett and appellant arguing. Appellant repeatedly told Lovett to leave, as she cursed and yelled epithets at him. When Lovett got in her car and started to leave, she had words with a small woman (Wade), who told her, "Oh, you're stupid if you stay. . . . You are a dumb bitch if you stay." Lovett took a silver item from her purse that Jackson thought was a gun and said

to appellant, “Mother fucker, what you going to do now?” Appellant responded, “You just stay your ass right there,” and he went into the house.

At that point, Lovett got out of her car. Appellant came out of the house holding a gun, and again told Lovett to leave. He asked her, “What you going to do now?” Lovett argued with appellant, but made no threats. Appellant came down off his porch towards her and began to pistol whip her, striking her in the head with the gun. Lovett swung her arms at appellant, trying to hit him. The gun discharged and Lovett fell. Appellant looked “surprised that the gun had went off.” Lovett looked up at him and said, “No.” Appellant looked at her, “a couple seconds,” pointed the gun at her as she was on the ground with her hand in a defensive posture, and shot her in the head.

Appellant testified on his own behalf, claiming that in the morning of the shooting, Lovett telephoned him 15 times, threatening him. She later came to his home, yelling profanity and banging on his window and door trying to break in. Appellant opened his door, and she “snatched” him from his front door, dragging him outside. He grabbed a pistol, intending to use it to hit Lovett. She fought with him, hitting him and threatening to “kill” him. She was in a rage and “seemed to be awful strong and on something.” Lovett was holding keys, which appellant thought was a gun. He knocked them from her hand, and hit her with the side of the gun, which discharged. Appellant denied pulling the trigger. Lovett pulled the trigger on the gun as they struggled, shooting herself in the head. Appellant claimed that the gun was very old and that he had been told years earlier that it was irreparable and would not fire. He nevertheless kept it loaded to discourage burglars. Appellant insisted that he suffered numerous wounds during the fight.

Glass testified that he told Detective Shean Hanson that Lovett pulled out what looked like a small gun. He also said that Lovett did not fall to the ground after the first shot, but only after the second.

Patricia Fant, the defense firearms expert, opined that the nature of Lovett’s head wound was consistent with Lovett standing over the gun, not lying down when appellant shot her. She saw gunpowder soot on Lovett’s head, indicating that she was shot from close range.

According to a defense expert, it was very likely that the drugs in Lovett's system could have altered a person's behavior, interacting to cause "agitation," paranoia, "excessive physical strength" and combativeness.

The prosecution's rebuttal evidence

Detectives Silvia Sanchez and Hansen spoke with appellant just after the shooting and the next morning, respectively. One or both of the officers reported that appellant did not tell them that Lovett threatened to kill him and was banging on the window and door of his house. Appellant also failed to tell the officers that Lovett dragged him from his house, wrestled with him, injured him or got her hand on his gun and shot herself.

Appellant also told the detectives that he "guess[ed]" that he cocked the gun, or that he might have cocked it, but was surprised that it fired because it did not work half the time. He also said that he pushed Lovett, and the gun went off. He never said that they struggled for the gun. With regard to the second shot, he said, "You just pull it and it goes off," also stating that, "Maybe I pulled it." He denied that his gun had to be cocked to be fired. He said nothing about Lovett having her hand on the gun or pulling the trigger. He said that she had keys in her hand and that when the gun went off the second time, she could have been on the ground. He had the only gun, which he fired, unloaded and left, along with the bullets, on the porch.

Dr. Ogbonna Chinwah testified that the nature of Lovett's head injury was such that it could not have been inflicted by her and could have been inflicted while she was lying on the ground.

Criminalist, Steven Dowell, found gunshot particles on Lovett's hands. It was possible that a person with particles on her hands could have been handling the gun. But gunshot victims can have gunshot residue even if they did not handle the gun. From the gunshot particles, it is impossible to tell who pulled the trigger.

DISCUSSION

I. Exclusion of evidence

A. Background

1. Evidence of Lovett's drug use

Before trial, the prosecutor made a motion in limine pursuant to Evidence Code section 352 to exclude all evidence of Lovett's drug use, including evidence contained in the toxicology report that narcotics were found in her blood at the time of death, the coroner's observations of "track marks" on her arm, and the finding of cocaine and narcotics paraphernalia in her car. The prosecutor argued that the evidence was irrelevant and could not be admitted under Evidence Code section 1103 because drug use is not a character trait for which such evidence was admissible. The trial court tentatively ruled that evidence of narcotics in her blood was relevant, but how it got there was not and was cumulative.

After introduction of the evidence that narcotics were in Lovett's blood, defense counsel requested that the trial court admit the evidence that cocaine and narcotics paraphernalia were found in her car, claiming that it corroborated that Lovett was under the influence at the time of the incident. The trial court adhered to its tentative ruling and denied appellant's request.

2. Evidence of Lovett's behavior on drugs

During Glass's cross-examination, the trial court sustained the prosecutor's general objection to questions whether Lovett's behavior seemed "irrational" and whether she appeared to be "stimulated." It did allow him to testify that she was "enraged," "overly excited," "aggressive" and "out of control."

At the sidebar, defense counsel explained that he planned to ask Glass whether he had ever seen anyone under the influence of cocaine and whether Lovett appeared to be. The trial court invited Glass to participate in the sidebar discussion and ordered an Evidence Code section 402 hearing, at which Glass testified that he knew Lovett was a drug user, he had seen her ingest narcotics, knew she did heroin and had seen her under the influence of cocaine 10 or more times. Glass opined that Lovett was under the

influence at the time of the shooting, based upon her being so aggressive. He conceded, however, that her behavior on drugs was similar to her behavior when angry.

In light of this concession, the trial court ruled that Glass's testimony would not be helpful to the jury, as required by Evidence Code section 800. Further, the trial court allowed admission of the toxicology report showing that Lovett had drugs in her system and expert testimony that her behavior indicated drug use.

3. Lovett's prior convictions (rap sheet)

In another in limine motion, the prosecutor moved under Evidence Code section 352 to exclude evidence of Lovett's prior convictions, which included, among others, 17 burglaries, three robberies, five batteries, three assaults, brandishing, and resisting arrest. The most recent conviction was suffered in 1996. She argued that the convictions were not relevant to establish self-defense because there was no proof that appellant was aware of the convictions before the shooting or that the circumstances of the priors were factually similar to the charged offense. The prosecutor said that she asked Brown if Lovett was violent when she took drugs and he said, "No. Absolutely not."

Defense counsel argued that Lovett's rap sheet was relevant to appellant's self-defense claim. He claimed that, at a minimum, the robberies and the assaults should be admitted because they were serious or violent felonies. The trial court told appellant's counsel that he would have to make an offer of proof and give his theory of admissibility.

The required showing was never made by appellant's counsel and, there was no final ruling or further discussion of this issue.

B. Contentions

Appellant contends that the trial court violated his Sixth Amendment right to present a defense and his Fifth and Fourteenth Amendment rights to due process by excluding evidence that went to the heart of his self-defense and accident claims, tending to show that Lovett acted violently on the day of the shooting. He argues that the trial court erroneously excluded evidence that Lovett (1) possessed cocaine and drug paraphernalia in her car, (2) acted violently when using drugs, and (3) had a violent

criminal history. This evidence, he asserts, was admissible under Evidence Code section 1103, subdivisions (a) and (a)(1), and its probative valued outweighed any prejudice.

The People contend that appellant has forfeited that portion of his claim that relates to the admission of Lovett's rap sheet of her prior conviction by virtue of appellant's failure to make an offer of proof as requested by the trial court and hence to obtain a ruling on the issue. Appellant responds that if this portion of his claim is forfeited, then counsel's failure to make the requested offer of proof and to provide legal authority for the admission of the rap sheet constituted ineffective assistance of counsel.

C. Forfeiture

The failure to obtain a ruling on an objection forfeits the claim. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1249; *People v. Memory* (2010) 182 Cal.App.4th 835, 857.) As previously stated, the prosecution made a motion in limine under Evidence Code section 352 to exclude all evidence related to Lovett's prior convictions. Before ruling, the trial court required appellant to make an offer of proof of its relevance and of his theory of admissibility. No such offer of proof was made, and defense counsel made no effort to obtain a ruling. As a result, that portion of his claim was not preserved for appeal.

D. Standard of Review

We review the trial court's ruling on the admissibility of evidence under the abuse of discretion standard. (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532 [review of Evid. Code, § 352 ruling]; see also *People v. Chandler* (1997) 56 Cal.App.4th 703, 711 [review of Evid. Code, § 1103 ruling]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [relevance of evidence], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.)

E. Admissibility under Evidence Code section 1103

Evidence Code section 1103 provides in part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Evidence of an aggressive and violent character by specific acts of the victim on third persons is admissible in homicide cases where self-defense is asserted. (*People v. Wright* (1985) 39 Cal.3d 576, 587; *People v. Rowland* (1968) 262 Cal.App.2d 790, 797.)

The three categories of excluded evidence challenged here, Lovett's possession of cocaine and drug paraphernalia in her car, her violent conduct when using drugs, and her violent criminal history (if that claim had not been forfeited), all would, as a general proposition, be admissible under Evidence Code section 1103, as they would tend to show her propensity to act violently, and the drugs would tend to show that her use of them made it more likely that she acted violently.

The key issue here is whether the trial court acted within its discretion in excluding the evidence under Evidence Code section 352. Evidence that is otherwise admissible under Evidence Code section 1103 may still be excluded under Evidence Code section 352 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." (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 444; Evid. Code, § 352.) We conclude that no abuse of discretion occurred here.

F. Exclusion under Evidence Code section 352

1. Lovett's propensity for violence when on narcotics

The trial court did not abuse its discretion in excluding evidence that Lovett had a character for acting violently when using drugs. As appellant argues, lay opinion regarding drug intoxication is admissible so long as a proper foundation is laid. (*People*

v. Navarette (2003) 30 Cal.4th 458, 493.) However, that foundation was not laid here. Evidence of Lovett's violent nature on drugs was sought to be introduced through Glass's testimony. He had seen Lovett under the influence of cocaine more than 10 times. But he did not indicate that he believed that Lovett was intoxicated by virtue of any objective physiological symptoms, such as, for example, dilated pupils, but rather solely on behavioral characteristics such as her racing around faster than normal. However, Glass said that Lovett exhibited the same behaviors when she was angry.[2] Thus, he provided no basis for concluding that her behavior was more likely the result of being under the influence of drugs, rather than that she was just angry. When asked if he thought Lovett was under the influence of drugs at the time of the shooting, he only said that "[i]t's quite *possible*." (Italics added.) Anything is possible. This evidence had little, if any, probative value.

We cannot say that the trial court abused its discretion in concluding that the prejudice substantially outweighed this minimal probative value. Moreover, introduction of this evidence could have led to undue delay. For example, the prosecution might have sought to introduce evidence of others who knew Lovett regarding whether or not they believed she was under the influence at the time of the incident, what her behavior was when she was under the influence, and related issues.

Even if the trial court erred in excluding Glass's opinion on whether Lovett was under the influence of narcotics at the time of the incident, that error was harmless in that it is not reasonably probable that appellant would have received a more favorable verdict had the evidence been admitted. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317; *People v. Watson* (1956) 46 Cal.2d 818, 836.) First, there was evidence that Lovett was violent at the time of the shooting. There were three witnesses, Brown, Wade and Glass, who saw Lovett as the aggressor, who refused to leave the area when appellant told her to

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2 Lovett was angry when she returned to appellant's house in the evening of the shooting as she believed appellant was having an affair with Brown and was trying to drive her and Brown apart.

do so. Glass testified that Lovett had a bad temper and seemed out of control, aggressive, very excited and enraged. Brown, Lovett's long-time boyfriend, earlier the same day feared that Lovett was going to hit him with a hammer she had in her purse. Lovett even argued with Wade at the time of the shooting. Thus, even without evidence that Lovett acted violently on drugs, there was evidence she was acting violently at the time she was killed.

Further, as the trial court pointed out, the evidence that in Glass's opinion Lovett was on drugs at the time of the incident was largely cumulative. It was not particularly compelling evidence, as Glass only testified that it was "possible" that Lovett was on drugs at that time and that it was also possible she was just angry. The trial court allowed more convincing evidence from the toxicology report that cocaine and morphine were found in Lovett's blood, and a defense toxicology expert who testified that the drugs in Lovett's system could have altered a person's behavior and caused excessive agitation, greater physical strength and more combativeness. Appellant testified that Lovett was acting as if she was noticeably strong and was "on something."

2. Drugs and drug paraphernalia found in Lovett's car

The trial court also excluded evidence that there was cocaine and drug paraphernalia found in Lovett's car. Appellant argued that this evidence supported an inference that Lovett was under the influence at the time of the incident. The trial court could properly have concluded that the prejudice of drugs being in her car substantially outweighed any probative value that that evidence might have had. There was no evidence as to why or how long they were in Lovett's car, or when, if ever, she may have used those drugs.

In any event, for the same reasons set forth in part IF1, *ante*, any error in excluding the evidence was harmless.

3. Lovett's violent criminal history (rap sheet)

The prosecution objected to the admission of evidence of Lovett's rap sheet on Evidence Code section 352 grounds. Appellant argues that evidence of Lovett's violent criminal past, as reflected on her rap sheet, was "unquestionably admissible under

Evidence Code sections 1103 and 800." As we concluded above, appellant forfeited this contention. However, even had it not been forfeited, we would nonetheless reject it.

Lovett had prior convictions of 17 burglaries, three robberies, five batteries, three assaults, brandishing, and resisting arrest. Defense counsel intended to present evidence of these convictions by introducing Lovett's rap sheet. There is no suggestion that defense counsel had any evidence of the facts underlying the convictions. From the face of the rap sheet, one cannot discern whether, for example, Lovett had been convicted as an aider and abettor under the natural and probable consequences doctrine, and did not personally engage in the violence, or even know of it. There is no indication of whether the violence was comparable to what occurred during charged incident. Finally, Lovett had been free of any convictions for violent conduct for 15 years. The trial court might have concluded that they were too remote to be relevant to her character on the day of the charged offense. We cannot say that the trial court abused its discretion in concluding that admitting evidence showing a lengthy list of convictions would be very prejudicial.

Finally, the jury had evidence before it of the explosive and deplorable conduct of Lovett on the day of her death. She argued with Brown and displayed a hammer during their discussion, causing him to fear for his safety. She argued loudly with appellant and, according to Glass, she rushed appellant despite his nine or so inches height advantage. She also argued with Wade just before the shooting. Glass testified that he was aware that Lovett had a bad temper and that she seemed out of control, aggressive, overly excited and enraged during her argument with appellant. Lovett threatened that she was not going "to let no man take my man away from me." Given this evidence, evidence that Lovett was convicted of violent offenses 15 years earlier was of little relevance and at most cumulative evidence of her violent nature, which were on full display at the time of the shooting.[3]

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[3] Because we conclude that there was no error in excluding evidence of Lovett's convictions of violent offenses, appellant's ineffective assistance of counsel claim based upon his counsel's failure to obtain a ruling on the admissibility of this evidence must also fail. The standard for establishing ineffective assistance of counsel is well settled.

G. Right to present a defense and due process

Under the Sixth Amendment to the United States Constitution, a defendant has the fundamental constitutional right to confront witnesses against him and cross-examine his accusers. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *People v. Brock* (1985) 38 Cal.3d 180, 188–189.) Nonetheless, "'[a]s a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level . . . .'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.) Analogously, a person's due process right to a meaningful opportunity to be heard and a fair trial does not invalidate the trial court's authority to exclude evidence that is not of significant probative value to the issues before the court. (*In re J.F.* (2011) 196 Cal.App.4th 321, 335; *People v. Espinoza, supra,* 95 Cal.App.4th at p. 1317.) The excluded evidence now challenged did not preclude appellant from presenting other evidence on his self-defense and accident claims.

II. Admission of evidence of uncharged incidents

A. Background

Appellant objected when the prosecutor began questioning Brown about an incident that occurred two to three weeks before the charged incident, involving appellant and a mechanic, named Sawyer. At the sidebar, the prosecutor made an offer of proof that Brown would testify that appellant threatened to shoot the mechanic because appellant "didn't get his money back." Appellant "was looking around [to

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The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) It is not reasonably probable that had defense counsel sought a ruling on the motion to introduce Lovett's prior convictions, appellant would have enjoyed a more favorable result.

purchase] . . . another gun" to do so. The prosecutor argued that the threat was admissible under Evidence Code section 1101, subdivision (b) to show absence of mistake or accident and appellant's intent to use the gun. Defense counsel argued that the incident was not relevant but supported appellant's belief that the gun used in Lovett's shooting did not actually work.

The trial court was dubious of the admissibility of the evidence because appellant "didn't shoot that person." It deferred its final ruling. Later, the trial court ruled that the evidence was admissible under Evidence Code section 1103 because appellant had introduced evidence of Lovett's character for violence, and hence the prosecution could offer evidence of appellant's character for violence.

Brown then testified to two incidents: one involving Sawyer, the mechanic, and the other involving Whitaker, as follows. Near the end of April or beginning of May 2010, appellant became upset with Sawyer, who had taken money from him in exchange for a car, but had failed to deliver the car, and had stopped answering his cell phone and returning appellant's phone calls. Appellant asked Brown to take him to a pawn shop to buy a gun that appellant could use to assist him in settling his dispute with Sawyer. Brown drove appellant to various pawn shops, but no gun was purchased. Later that night, Sawyer returned appellant's money.

A few days later, appellant expressed displeasure that his acquaintance, Whitaker, was repeatedly calling and "nagging" him. Appellant told Brown that he would shoot Whitaker if he came to the house. Brown testified that he did not believe the threat to shoot the man was serious. He had never seen appellant shoot at anyone. As a witness for the defense, Whitaker testified that he had known appellant for almost 30 years and that appellant had never threatened him and had no disagreement with him. Whitaker had never seen appellant upset and knew him to be honest.

B. Contention

Appellant contends that the trial court abused its discretion in admitting evidence of the two prior incidents, thereby violating his Fourteenth Amendment rights to due process and a fair trial. He argues that the two incidents were irrelevant to appellant's

intent during the charged incident and only confused and inflamed the jury. This contention lacks merit.

C. Admissibility of uncharged acts

Admission of evidence of misconduct other than that which is charged produces an "overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1215.) Consequently, other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).)[4]

Evidence Code section 1101, subdivision (b) expressly carves out an exception to this rule.[5] It provides that such evidence is admissible if it is relevant to an issue other than disposition to commit the act. Evidence Code section 1101, subdivision (b) permits prior misconduct evidence on the issue of intent and accident or mistake, which are merely other aspects of intent. If one does an act accidentally, then it was not done with the requisite intent. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance." [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) "The least degree of similarity between the crimes is needed to prove intent. [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.)

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4 Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

5 Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Admissibility of other misconduct evidence depends upon (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crime to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352.[6] (*People v. Carpenter* (1997) 15 Cal.4th 312, 378–379, superseded by statute as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107; *Ewoldt, supra,* 7 Cal.4th at p. 404 ["[T]o be admissible such evidence [of other misconduct] 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]'"].)

1. Materiality

A "plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019; see *People v. Steele, supra,* 27 Cal.4th at p. 1243.) Appellant's not guilty plea therefore put his general intent in issue. Appellant's asserted defenses of accident or mistake and self-defense were also material.

2. Probative tendency

"In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves '"logically, naturally, and by reasonable inference"' to establish that fact. [Citations.] The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense . . . .'" (*People v. Thompson* (1980) 27 Cal.3d 303, 316, fn. omitted, disapproved on other grounds in *People v. Williams* (1988) 44 Cal.3d 883, 907, fn. 7.)

In the matter before us, the People argue that appellant's prior conduct is probative of whether he intended to shoot Lovett or whether he shot her accidentally or by mistake.

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6 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, of confusing the issues, or of misleading the jury."

The trial court found it admissible under Evidence Code section 1103, subdivision (a)(2) because the defense had introduced evidence of Lovett's character for violence. We conclude that while this evidence had only slight probative value, there was little prejudice to outweigh it.

In the prior incidents, appellant became angry at two people and told Brown that he would shoot them. It may be somewhat more likely that a person who threatens to shoot someone is more likely to commit a shooting than a person who has not made such threats. However, people make many threats in the heat of anger that are never acted upon. The record here does not indicate that appellant's prior threats were anything more than the idle threats of an octogenarian in poor health, during a moment of anger and frustration. While appellant asked Brown to take him to a pawn shop to purchase a gun, none was ever purchased.

Furthermore, neither incident involved illegal conduct. Appellant's threats were not criminal threats made directly or indirectly to those who were the objects of the threats, but were made only to Brown, appellant's caretaker. Brown did not take the threats seriously and never saw appellant use any gun or shoot at anyone. Even Whitaker, the object of one threat, testified that appellant never threatened him, had no disagreement with him, never lied to him and was an honest and good neighbor. It is difficult to see how a threat to shoot someone that is not acted upon, and may be nothing more than an idle boast, is probative of whether a later shooting of someone else was accidental or intentional. These prior incidents, however, may have had minor relevance to whether appellant had a violent disposition and possible susceptibility to violence.

Appellant contends that in order to admit evidence under Evidence Code section 1101, subdivision (b) "[t]he court must further conclude that the evidence of uncharged conduct has '"*substantial* probative value,"'" citing *Ewoldt, supra,* 7 Cal.4th at p. 404.) But *Ewoldt* made this statement in connection with "uncharged offenses" or "uncharged *misconduct*," (italics added). The prior incidents here did not involve criminal offenses or misconduct. Appellant was legally entitled to tell his caretaker his feelings of anger and frustration and even that he felt like shooting someone. There is no evidence that

those feelings were ever converted to action, that any criminal threats were made to anyone, or that there was any illegal possession of any weapon, as no weapon was acquired. Because there was no illegal conduct and consequent "'"substantial prejudicial effect [is] inherent in [such] evidence"'" (*Ewoldt, supra,* 7 Cal.4th at p. 404), the justification for requiring *substantial probative value* was not present.

3. Prejudice

In considering whether the probative value of the uncharged misconduct is outweighed by the prejudice under Evidence Code section 352, we must evaluate the inflammatory nature of that evidence, the probability of confusion, consumption of time, remoteness, probative value, as well as other unique factors presented. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Harris* (1998) 60 Cal.App.4th 727, 738–740.) "'The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger, supra,* 58 Cal.App.4th at p. 352.)

While the probative value of the evidence challenged, as discussed in the preceding section, was not overwhelming, the prejudice did not substantially outweigh it. The two prior incidents did not involve criminal conduct or violence. The evidence that appellant made unfulfilled threats to shoot Sawyer and Whitaker to his caretaker was not inflammatory when compared to the charged conduct in which appellant shot an unarmed woman and, after she was on the ground begging him not to shoot her again, he did so. The introduction of this evidence did not consume substantial time, as it was introduced by some comparatively brief testimony by Brown, who was already testifying about other issues. Moreover, the evidence actually provided some benefit to appellant, as it indicated to the jury that despite his having had a house full of guns, he believed he needed to purchase a gun to shoot someone. This would tend to corroborate his contention that he did not know that the weapon involved in the shooting of Lovett was capable of firing. Also, the jury was instructed in connection with CALCRIM No. 375 that it could only consider appellant's prior threats against other persons if it determined

by a preponderance of the evidence that appellant committed the acts and then, only for the purpose of deciding if appellant acted with intent to kill or acted accidentally or mistakenly. We presume that the jury followed the instructions given, not that it ignored them. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

4. Harmless error

Even if it was error to admit the evidence of the prior incidents, the error was harmless in that it is not reasonably probable that had it been excluded a different result would have ensued for the reasons set forth in the preceding section. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

III. Cumulative error

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have concluded that appellant's claims of error are meritless, there are no errors to cumulate.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD