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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWIN R. RUANO, Defendant and Appellant.	B279177 (Los Angeles County Super. Ct. No. TA136968)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Richard D. Miggins for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Edwin R. Ruano of one count of first degree murder, in violation of Penal Code, section 187.[1] The jury also found true a special circumstance, pursuant to section 190.2, subdivision (a)(17), that Ruano committed the murder while he was engaged in the commission of an attempted robbery. The trial court sentenced Ruano to life in prison without the possibility of parole.

Ruano contends: (1) there was insufficient evidence to support the finding of a special circumstance; (2) the trial court erred by allowing the prosecution to introduce evidence of Ruano's prior thefts in order to establish that he intended to rob the victim; (3) his trial attorney provided ineffective assistance of counsel by failing to request a jury instruction on voluntary intoxication; (4) the trial court erred by allowing witnesses to testify improperly regarding their opinions and conclusions; (5) the trial court erred by advising the jury that the case did not involve a potential death penalty. We reject these contentions and affirm Ruano's conviction.

FACTS AND PROCEEDINGS BELOW

Six witnesses testified that they saw Ruano beat Cesar Zamora Rodriguez to death on the night of April 12, 2015. A surveillance camera also captured part of the altercation between the two.

Ruano spent the afternoon of the murder drinking liquor with friends in an alley in South Los Angeles. At around 10:00 p.m., Rodriguez rode past on a bicycle. Ruano followed behind Rodriguez and pushed him. They struggled until Ruano knocked Rodriguez to the ground and took the bike. Ruano struck Rodriguez with the bike, pushed him to the ground, and kicked him while he was down. Rodriguez got up, and Ruano—who was standing between Rodriguez and the bike—pointed and told him

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

to go away. Ruano walked away, but then turned and came back toward the bike, which Rodriguez had left on the ground. Rodriguez picked up the bike, placing it in front of him to protect himself from Ruano. Ruano and Rodriguez then both tugged at the bike, with Ruano winning it and walking back toward the alley with it.

Rodriguez followed behind Ruano and grabbed the bike. Ruano ran after him, pulled a set of chrome "bars" from his pocket, and hit Rodriguez in the face with them. Rodriguez fell to the ground, and Ruano kept hitting him. Ruano picked up Rodriguez's head and slammed it against the concrete several times. He then threw the bike up in the air and let it fall on Rodriguez's head. Ruano kicked Rodriguez, turned him over, searched through his pockets, and then ran away.

Ruano testified in his own defense. He claimed that he drank at least 3 fifths[2] of hard liquor in the five hours leading up to the killing. Ruano claimed that Rodriguez became upset with him when Ruano threw an empty bottle of vodka and it smashed into a wall near Rodriguez. Rodriguez began walking toward Ruano and cursing at him. Ruano claimed he was afraid Rodriguez was going to attack him, so Ruano pushed Rodriguez off his bike. Rodriguez got up and swung his bike at Ruano, and they fought over the bike. Ruano punched Rodriguez, who fell to the ground. Ruano said he walked away, bringing the bike with him. Ruano then left the bike behind him, but soon realized that Rodriguez had retrieved the bike and was approaching him from behind. Ruano was afraid Rodriguez would attack him with the bike, so Ruano punched him again. Ruano admitted that he continued to punch Rodriguez, but he denied that he meant to kill him.

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[2] The Random House dictionary defines "fifth" as "a fifth part of a gallon of liquor or spirits," or approximately 750 milliliters.

DISCUSSION

I. Sufficiency of the Evidence of Attempted Robbery

The People alleged that Ruano committed the murder, and that a special circumstance enhancement applied, namely that Ruano killed while engaged in the commission of an attempted robbery. (§ 190.2, subd. (a)(17).) In order to prove attempted robbery, the People must show not only that the defendant tried to take another person's personal property by means of force or fear (see § 211), but also that the defendant acted with "the specific intent to deprive the victim of his or her property permanently." (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007; accord, *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.)

Ruano contends that the People failed to introduce sufficient evidence that he intended to deprive Rodriguez of his bicycle permanently. Ruano points out that at several points during his altercation with Rodriguez, he let go of the bike and left it alone. In addition, after killing Rodriguez, Ruano fled without taking the bicycle with him.

When addressing a challenge to the sufficiency of the evidence, " 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, 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. Avila* (2009) 46 Cal.4th 680, 701.) We draw all reasonable inferences in favor of the verdict and presume the existence of every fact the jury could reasonably deduce from the evidence that supports its findings. (*People v. Maciel* (2013) 57 Cal.4th 482, 515.)

Under this standard, there was sufficient evidence to support the jury's finding that Ruano acted with the intent to deprive Rodriguez of the bicycle permanently. Even if a defendant leaves stolen property behind, a jury may reasonably

conclude that he originally intended to keep the property. As the court explained in *People v. DeLeon* (1982) 138 Cal.App.3d 602, a case in which the appellants stole a car and abandoned it after an hour, the "[a]ppellants' intent was to be inferred from circumstances and was a question of fact for the jury to decide. [Citation.] The jury might reasonably conclude, for example, that appellants intended to deprive the owner permanently of the car, but after discovering" that the car contained valuable merchandise, they might have "concluded that they had better abandon the car as quickly as possible because the police would not treat this as a routine car theft." (*Id.* at p. 606; see also *People v. Hall* (1967) 253 Cal.App.2d 1051, 1054 [jury could infer that defendant intended to permanently deprive victim of his wallet even though he gave the wallet back].)

In this case, eyewitness testimony and the surveillance footage showed that Ruano knocked Rodriguez off his bicycle and took it away. Although Ruano more than once left the bicycle somewhere not in his immediate control, every time Rodriguez tried to take it back, Ruano physically attacked him and kept him away from it. The jury could have reasonably inferred that Ruano intended to keep Rodriguez from ever recovering the bicycle, and that he elected to leave it behind only after Rodriguez was dead and Ruano realized his actions had just become a much more serious crime.

II. Evidence of Prior Thefts

Ruano contends that the court abused its discretion by granting the prosecution's motion to introduce evidence of three prior thefts Ruano committed on the ground that the prior acts were probative of Ruano's intent to steal the bicycle from Rodriguez. He argues that the prior acts were not sufficiently similar to his actions with Rodriguez to be admissible for this purpose.

The prosecution called three witnesses who testified that, on prior occasions, Ruano robbed them. All three witnesses were female, including one woman in a wheelchair and a 16-year-old girl. In all three cases, Ruano and an accomplice approached the women and attempted to grab the necklaces they were wearing. In all three cases, Ruano had a getaway car waiting nearby.

Evidence of a defendant's uncharged bad acts is not admissible to show the defendant's propensity to commit crimes. (See Evid. Code, § 1101, subd. (a).) Evidence of prior bad acts may be admissible, however, for purposes other than to show the defendant's disposition to commit crimes, 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." (Evid. Code, § 1101, subd. (b).) As our Supreme Court has explained, "We have long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution." (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on other grounds, as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

The degree of similarity required between the uncharged prior acts and the current charges is lower when evidence is admitted to prove intent than it is to show other relevant factors under Evidence Code section 1101, subdivision (b), such as common design or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds, as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) " '[T]he

recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] 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." ' " (*Ibid.*)

Ruano argues that the prior bad acts in this case were insufficiently similar to the robbery of Rodriguez to be admissible. He points out that, in the prior instances, Ruano targeted women who appeared vulnerable in some way. He searched out victims during the daytime and had a getaway driver nearby to take him away from the scene. In this case, Ruano's victim was a man, and Ruano did not search him out. Instead, Rodriguez simply happened to be passing by the area where Ruano was drinking on the night of the murder. To the extent that the evidence was probative at all, Ruano contends that the potential for prejudice from the inflammatory nature of the evidence outweighed it. (See Evid. Code, § 352.)

We are not persuaded. Although many of the circumstances differed, Ruano's conduct in the prior instances bore several important similarities with his actions here. Importantly, "the points of similarity occur precisely in those areas which are most relevant to the issue on which the evidence was offered." (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1247.) In all cases, Ruano took property by force from a vulnerable victim incapable of resisting him. Although Rodriguez, unlike Ruano's prior victims, was a man, Rodriguez was much older than Ruano, and it is reasonable to infer that Ruano recognized that he could have overpowered him. The similarities among these incidents were not close enough to allow the admission of the prior acts under a theory of common plan. But the prior acts

allowed the jury to infer that when Ruano robbed Rodriguez, he did so with the intent of keeping the stolen property, just as in his prior robberies.

Furthermore, because the earlier actions did not involve nearly the same level of violence as did Ruano's killing of Rodriguez, the potential for prejudice from the uncharged acts was not great. The trial court's limiting instruction to the jury not to consider the evidence as propensity evidence also limited the potential prejudice. The trial court did not abuse its discretion by finding that the probative value of the evidence of uncharged acts was not "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." (Evid. Code, § 352.)

III. Instruction on Voluntary Intoxication

Ruano contends that he received ineffective assistance of counsel from his defense attorney because the attorney failed to request an instruction on voluntary intoxication. The jury instructions in this case included no statements regarding intoxication, whether voluntary or involuntary.

In general, evidence of a defendant's voluntary intoxication is inadmissible to show that the defendant lacked the required mental state for a crime. (§ 29.4, subd. (a).) There is an exception, however, for murder and crimes requiring specific intent. In these cases, evidence of voluntary intoxication is admissible to show that the defendant did not form the mental state necessary for the crime. (§ 29.4, subd. (b).) When there is substantial evidence that a defendant's intoxication affected his ability to form a required specific intent, the defendant is entitled to an instruction on voluntary intoxication. (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial

court does not have a sua sponte duty to instruct the jury as to voluntary intoxication, however. Instead, the defendant must request such an instruction. (*People v. Myles* (2012) 53 Cal.4th 1181, 1217.)

Evidence of voluntary intoxication is relevant with respect to both murder committed with express malice aforethought and to attempted robbery, which is a specific-intent crime. (§ 29.4, subd. (b); *People v. Vizcarra*, *supra*, 110 Cal.App.3d at p. 861.) Furthermore, there was evidence that Ruano was intoxicated at the time of the murder. He testified that he had been drinking all evening, testimony corroborated by one of the prosecution's witnesses and the surveillance footage of Ruano walking into a nearby liquor store a few hours before the killing. In closing argument, Ruano's attorney argued that the jury should convict him of voluntary manslaughter rather than murder because his intoxication made him believe unreasonably that he needed to kill Rodriguez in self-defense. Nevertheless, Ruano's attorney did not request an instruction on voluntary intoxication.

In order to establish ineffective assistance of counsel, a defendant must show first, that his attorney's performance was deficient, and second, that those errors prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose

for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Ruano's claim of ineffective assistance of counsel fails because his attorney may have had a tactical reason for not requesting a voluntary intoxication instruction. As the People point out, both of the relevant CALCRIM pattern jury instructions are limiting instructions. They emphasize how a jury may *not* use evidence of intoxication in as much as they speak of its use. One instruction, which addresses cases of homicide, states in relevant part, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] . . . [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose." (CALCRIM No. 625.) Another pattern instruction, which addresses voluntary intoxication with respect to other specific intent crimes, includes almost identical language regarding the uses and restrictions on evidence of voluntary intoxication. (See CALCRIM No. 3426.)

The trial court instructed the jury accurately regarding the mental state required for all the charges Ruano faced. In particular, the court instructed the jury on murder with malice aforethought, including both express and implied malice (CALCRIM No. 520), first-degree murder because of deliberation and premeditation (CALCRIM No. 521), felony murder (CALCRIM No. 540A), and voluntary manslaughter under both a heat-of-passion (CALCRIM No. 570) and imperfect self-defense theory (CALCRIM No. 571). Ruano's attorney argued that as a result of his intoxication, he unreasonably believed he needed

to kill Rodriguez in self-defense, and neither the court nor the prosecutor told the jurors that they could not use evidence of intoxication as a relevant consideration for that purpose or with respect to any other mental state required for the charges Ruano faced. A reasonable attorney might have worried that the jury, hearing the instructions on voluntary intoxication, would focus on the restrictions on this evidence rather than its use. Thus, a reasonable attorney could have decided that these instructions would be useless at best, and might actually do his client more harm than good.

IV. Lay Opinion Testimony

Ruano contends that the trial court erred by allowing witnesses to invade the province of the jury by testifying as to their opinions and legal conclusions. A witness not testifying as an expert may offer opinion testimony so long as it is "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony." (Evid. Code, § 800.) Opinions as to whether a defendant is guilty or innocent of the charges "are inadmissible because they are of no assistance to the trier of fact." (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.)

During trial testimony, various witnesses described Ruano as "the murderer," "[t]he one that killed," or said "I saw him killing the gentleman." One witness testified, "[H]e was the one that murdered the gentleman," and another witness stated multiple times that she believed Ruano "wanted to steal the bike." Ruano contends that these statements were improper because the questions of whether Ruano committed murder or intended to steal the bicycle were the ultimate questions the jury needed to determine.

We do not agree that the trial court erred by allowing this testimony. As our Supreme Court has explained, statements like these from lay witnesses are more accurately interpreted as

statements of what the witness perceived, not judgments as to the defendant's guilt or innocence. (See *People v. Smith* (2015) 61 Cal.4th 18, 49 (*Smith*).) In *Smith*, when a witness stated that a defendant was " 'torturing' " the victim, the Supreme Court concluded that the statement "did not include an opinion about defendant's commission of a special circumstance. It was simply part of her narrative. A witness who uses the word 'torture' in describing a sequence of events is no more testifying 'in the form of an opinion' (Evid. Code, § 800) than a witness describing a 'robbery.' " (*Ibid.*)

Ruano cites *People v. Miron* (1989) 210 Cal.App.3d 580, 583, in which the court held that the testimony that the defendant was " 'trying to kill us' " was improper opinion testimony, but that case has effectively been overruled by *Smith*. Ruano also cites several cases holding that a prosecutor should not refer to a killing as a murder in the absence of a verdict of murder. (E.g., *People v. Garbutt* (1925) 197 Cal. 200, 208-209; *People v. Price* (1991) 1 Cal.4th 324, 479-480.) But, of course, the standards applicable to a prosecutor are stricter than those applicable to lay witnesses.

V. Advisement on the Death Penalty

Ruano contends that the trial court erred by informing potential jurors that the case did not involve the death penalty. He notes that the function of a jury is to determine the defendant's guilt or innocence, not to determine a sentence. He argues that "it is error for the court to put before the jury any considerations outside the evidence that may influence them, and lead to a verdict not otherwise possible of attainment." (*Miller v. United States* (D.C. Ct. App. 1911) 37 App.D.C. 138, 143.) According to Ruano, the trial court's statement about the death penalty might have prevented the jury from "reach[ing] its verdict without regard to what sentence might be imposed." (*Rogers v. United States* (1975) 422 U.S. 35, 40.)

We are not persuaded. The trial court's statement did not prejudice Ruano and may have served a valuable function with respect to jury selection. As the court explained in response to a similar challenge in *People v. Hyde* (1985) 166 Cal.App.3d 463, 479, "The public commonly understands that in contrast to other criminal cases, the jury in a death penalty murder case must determine penalty as well as guilt. The moral and ethical questions surrounding the use of the death penalty have generated considerable social debate. It is reasonable to anticipate that a significant number of prospective jurors might question their ability to sit on a jury which potentially would have to consider imposition of a sentence of death. Not only did the trial judge's decision to raise and dispose of the issue at the outset save time and unnecessary strain on potential jurors' psyches, but it also avoided any possibility that a prospective juror's concern about serving on a death penalty case might skew his answers to voir dire questioning."

Ruano contends that simply by broaching the subject of the death penalty, the trial court might have prejudiced the jurors against him. He argues, "[b]ecause murders potentially subject to the death penalty are presumptively more egregious than non-death penalty murders, the jurors were no doubt convinced, consciously or subconsciously, that the murder in this case was particularly aggravated and, therefore, whatever the defendants did, must be considered the worst of the worst."

This does not follow logically. If anything, the trial court's statement was more likely to convince the jury that the murder Ruano was accused of was *not* particularly aggravated, because the death penalty was not possible. Only speculation supports Ruano's argument. The trial court did not err by informing the potential jurors that the death penalty was not possible in this case.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.