Filed 7/12/17 P. v. Perets CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID PERETS, Defendant and Appellant.	B275781 (Los Angeles County Super. Ct. No. YA092262)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed, as modified.

Cyn Yamashiro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Perets appeals from the judgment after his convictions for carjacking and second degree robbery. We modify the judgment to strike one of two prior serious felony enhancements and to stay the sentence for robbery under Penal Code section 654.[1] As modified, we affirm the judgment.

FACTUAL BACKGROUND

1. Prosecution Case

a. The victim's testimony

The victim, Jonathan Samson, testified that he first encountered appellant outside a donut shop where Samson was buying lunch. Samson, who is gay, thought appellant was "cute," and approached him. After some conversation, the two exchanged phone numbers, and appellant invited Samson to call him if he wanted to "hang out."

When Samson left work later that day, he texted appellant, and they met in the parking lot of a McDonald's restaurant in San Pedro. Appellant got into the front passenger seat of Samson's car. Appellant had a backpack with him, which he placed in front of him on the car floor.

Samson asked appellant to show him around the area. With Samson driving and appellant navigating, appellant showed Samson the high school appellant had gone to, the local naval base, and other points of interest. As they talked, Samson told appellant he was gay, and appellant said he was bisexual. At appellant's suggestion, they parked at Abalone Cove, a location overlooking the ocean.

After further conversation, Samson offered to perform oral sex on appellant. Appellant said, "[M]aybe later." Appellant

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

began to ask Samson questions about his car, including how to start it and how to operate the radio. When appellant asked Samson to hand him the car key, Samson grew uncomfortable. Samson put the car in reverse and suggested they head back.

Appellant reached into his backpack and pulled out a handgun. He pointed it at Samson's face and asked where Samson's wallet was. He searched Samson's pockets and, finding nothing of value, again asked for Samson's wallet. Samson told him he didn't have one—in fact, his wallet was in a compartment in the driver's side door. Appellant then ripped Samson's cell phone and charger off the vent where they were hanging. He took Samson's keys and told Samson to get out of the car.

Samson got out, grabbing his wallet from the car door as he did so. He started running, and in his peripheral vision saw appellant drive the car away. Samson sought help at a nearby fire station, and the firefighters called the police for him.

b. Other testimony

The fire captain who contacted the police the night of the incident testified that Samson was upset when he arrived at the fire station, and he told the captain that he had been carjacked at gunpoint.

Detective Jason Smith testified that he observed appellant driving Samson's car a few days after the incident and detained him. The police found methamphetamine in appellant's pocket and a pipe for smoking the drug in the car. They searched the car and appellant's home, but did not find a gun, Samson's cell phone, or Samson's keys other than the key fob used to start the car.

2. Defense case

Appellant testified that Samson approached him outside a donut shop and asked about purchasing drugs. Appellant told him to call him later and he could "probably help him out." They exchanged phone numbers.

That night the two men met at a McDonald's in San Pedro, and appellant got into Samson's car, placing his backpack in the back seat. They drove to the house of appellant's friend, where appellant obtained some drugs. They then went to Abalone Cove to "get high." At some point before arriving at Abalone Cove, Samson offered to perform oral sex on appellant, and appellant declined.

At Abalone Cove, appellant packed a pipe with crystal methamphetamine, then got out of the car to smoke a cigarette. Samson got out with him. Appellant asked if he could turn on the car radio, and Samson said yes. Appellant got into the car, turned on the ignition, and drove off, leaving Samson behind. Appellant explained he did so because he "felt weird" about Samson's offer to perform oral sex.

Appellant denied having a gun that night, or asking Samson for his wallet or cell phone. He admitted that he gave a false statement to the police after being arrested because he "was under the influence of drugs, and . . . was afraid of going to jail."

On cross-examination, appellant admitted to telling numerous falsehoods to the police when being questioned and that his story about the incident had changed many times. He also admitted lying to his mother about the incident in recorded phone conversations from jail. He acknowledged that he had asked his mother both to corroborate his false story and to

contact Samson to convince him to recant by "giv[ing] him a guilt trip."

Appellant admitted that he had suffered a sustained juvenile petition for assault with a deadly weapon in 2009, and been convicted of two counts of battery of a police officer in 2011 and one count of carjacking in 2012. He admitted that he had been out of prison for one month when he was arrested for the current offenses.

3. Rebuttal

Detective Smith testified that in his opinion appellant was not under the influence of drugs at the time Smith interviewed him.

PROCEDURE

Appellant was convicted by a jury of carjacking (§ 215, subd. (a)) and second degree robbery (§ 211). The jury found the allegation that appellant had personally used a firearm in the commission of these crimes to be true. (§ 12022.53, subd. (b).) Appellant admitted to a prior conviction for carjacking.

The court sentenced appellant to 25 years for the carjacking conviction, based on the middle term of five years, doubled to 10 years because of the prior conviction (§ 667.5, subd. (b)), with an added 10 years for the firearm allegation, and another five years because the prior conviction was a serious felony (§ 667, subd. (a)(1)).

The court sentenced appellant to 21 years for the robbery conviction, based on a middle term of three years, doubled to six years for the prior strike, and adding 10 years for the firearm allegation and five years for the prior serious felony. The court ordered that this sentence be served concurrently with the carjacking sentence.

The court also awarded credits and imposed fines and fees.

DISCUSSION

1. Use of prior carjacking conviction for impeachment

Appellant claims that the court abused its discretion by allowing the prosecution to introduce evidence of the prior carjacking conviction to impeach appellant. Appellant asserts that this unduly increased the risk that the jury would believe he had a propensity for carjacking and would convict on that improper basis. Appellant argues that the court should have excluded the evidence or, in the alternative, sanitized the conviction by prohibiting the prosecution from referring to the specific crime committed. We disagree and find no abuse of discretion.

a. Proceedings below

Prior to jury selection, the court and the parties discussed the use of appellant's prior convictions as impeachment. The court stated that it was not inclined to allow the prosecution to introduce evidence of the prior carjacking conviction, although the court would permit the prosecution to introduce evidence that appellant had suffered an unspecified prior felony conviction. The court said it was concerned that to inform the jury that appellant had been convicted of the same crime he was now charged with "will cause [the jury] to convict simply because the defendant has previously been convicted of the same offense . . . on the theory that the defendant has propensity to commit these kinds of crimes, and that definitely, clearly, is not an appropriate use of priors." The prosecution stated that it would provide case law indicating that the court had "no obligation to sanitize prior crimes even if they're the same crime that the defendant is currently facing trial on."

Later in the trial, after the court had reviewed cases provided by the prosecution, the court ruled (over defense counsel's repeated protest) that appellant could be impeached with the prior carjacking conviction. The court explained that to do otherwise "would deprive the jurors from taking into consideration the factor or factors that would assist them in determining the credibility of a witness." The court declined to sanitize the conviction out of concern that this would allow the jury to "assume the worst" and speculate that the unspecified felony was a more serious crime than it actually was.

As noted above, appellant admitted to the prior carjacking conviction during his trial testimony.

b. Relevant law

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352."[2] (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Ibid.*) "Because the court's discretion to admit or

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[2] 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."

exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citation]." (*Id.* at p. 932.)

As appellant concedes, there is no automatic bar to prior convictions similar or identical to the charged offense being used for impeachment. (See *Clark, supra*, 52 Cal.4th at p. 932 ["Although the similarity between the prior convictions and the charged offenses is a factor for the court to consider when balancing probative value against prejudice, it is not dispositive."].) Indeed, such impeachment evidence has been approved in many cases. (See, e.g., *ibid.*; *People v. Hinton* (2006) 37 Cal.4th 839, 888 (*Hinton*); *People v. Green* (1995) 34 Cal.App.4th 165, 183 (*Green*); *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647 (*Muldrow*); *People v. Castro* (1986) 186 Cal.App.3d 1211, 1216-1217; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695-696; *People v. Stewart* (1985) 171 Cal.App.3d 59, 66.) A concern reflected in these cases is that the exclusion of evidence relevant to a defendant's credibility may unfairly "clothe[] [him] in a ' " 'false aura of veracity.' " ' " (*Clark, supra*, 52 Cal.4th at p. 932.)

c. Analysis

Here, the court reviewed the relevant case law (including many of the cases listed above) and concluded that to exclude evidence of appellant's prior carjacking conviction would deprive the jury of information relevant to determining appellant's credibility—thus, in effect, clothing him in the "false aura of veracity" warned of in *Clark* and other cases. This considered determination, supported by case law, was not an abuse of discretion.

Appellant argues that in making this determination, the court "ignored" its earlier concern that the prior conviction constituted improper propensity evidence. We reject this characterization. The concern that prior convictions could serve as propensity evidence exists in any case in which evidence of similar or identical prior convictions are used for impeachment, and many courts (including our Supreme Court) have allowed such evidence nonetheless. The court in this case expressed its concern about propensity evidence before it had reviewed the relevant case law; once the court had that additional guidance, it was neither contradictory nor an abuse of discretion to change its position.

Appellant further argues that there was no need to introduce the conviction because appellant's two convictions for battery of a police officer could have been used for impeachment instead. This argument fails for two reasons. First, the carjacking conviction was the most recent, and therefore was most probative of appellant's current trustworthiness.[3] (See *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 [remoteness of prior convictions "generally lessen[s] their probative value"].) Second, "a series of crimes may be more probative of credibility than a single crime." (*Clark, supra*, 52 Cal.4th at p. 932.) On this basis, courts have rejected arguments that only some of a

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[3] Appellant argues that the recentness of the carjacking conviction increases its potential for prejudice: "the more recent the prior, the more the prior appears to demonstrate a pattern of behavior which can be interpreted as propensity." Even if this is true, the court could reasonably conclude that the greater probative value of appellant's recent criminal act in evaluating credibility outweighed any added prejudice.

defendant's prior convictions should be admitted. (See, e.g., *Muldrow, supra*, 202 Cal.App.3d at p. 647 ["On the facts of this case, an admission of any less than six prior convictions would allow the defendant a ' "false aura of veracity." ' "].) Here, the court did not abuse its discretion in concluding the jury was entitled to know more than just a select portion of appellant's criminal history. (See *Green, supra*, 34 Cal.App.4th at p. 183 ["Since the admission of multiple identical prior convictions for impeachment is not precluded as a matter of law [citation], and a series of crimes may be more probative than a single crime, there was no abuse of discretion."].)

We find no error in the court's decision not to sanitize the prior conviction. There is no requirement that courts do so. The court was reasonable to be concerned that referring to the prior conviction as an unspecified felony would invite speculation from the jury that might be detrimental to the defense. (See *Hinton, supra*, 37 Cal.4th at p. 877 [approving defense counsel's decision not to request that prior convictions, including for murder, be sanitized, given "justifiabl[e] concern[]" that "the jury would nonetheless speculate as to the nature of the impeaching priors and conclude they were for similar or other heinous offenses"].)

We also reject appellant's suggestion that the court had an absolute rule never to sanitize prior convictions and thus was improperly declining to exercise its discretion on a case-by-case basis. Appellant cites the court's statement that it had "always felt that allowing jurors to speculate about anything is an invitation to arriving at the wrong verdict." We do not read this as a statement of an absolute rule, but as a general concern explaining the decision in this case. Moreover, given that before trial the court specifically considered sanitizing the prior

conviction, the court clearly did not have an unwavering rule never to sanitize.

2. Use of prior juvenile adjudication for impeachment

Appellant argues that the court erred in allowing the prosecution to impeach him with the sustained petition for assault with a deadly weapon, which occurred when appellant was a juvenile. We agree this was error, but hold that it was harmless.

As respondent concedes, juvenile adjudications may not be admitted for impeachment purposes. (Welf. & Inst. Code, §§ 203, 1772, subd. (a); *People v. Jackson* (1986) 177 Cal.App.3d 708, 711-712.) Appellant's counsel at trial failed to object to the introduction of the evidence, however, thus forfeiting the issue on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*).)

But even had the issue been properly preserved, on the merits we would reject appellant's argument because he has failed to show prejudice. The evidence undercutting appellant's credibility was overwhelming, even without the juvenile adjudication. Appellant admitted in cross-examination to having lied repeatedly to the police and to his mother regarding the circumstances of the robbery and carjacking, and to changing his story to fit whatever new information the police presented to him. Appellant also admitted to encouraging his mother to lie on his behalf and to engage in witness tampering by convincing Samson to recant his story. And appellant admitted to convictions for three prior felonies, including one for which he had only recently been released from prison.

In contrast, the defense presented no impeachment evidence against Samson, the prosecution's chief witness, nor did

the defense point to any material inconsistencies between Samson's testimony and any of his prior statements. Samson's story was also partially corroborated by the fire captain's testimony. In short, the jury had many reasons to doubt appellant's version of events, and virtually no reason to doubt Samson's. Under these circumstances, it is not reasonably likely that the exclusion of the juvenile adjudication would have affected the outcome. Any error in admitting that evidence was harmless.[4]

3. Concurrent sentence for robbery

Appellant argues that under section 654, the court should have stayed the sentence for robbery because it arose from the same act that constituted the carjacking. We agree.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Thus, to the extent the robbery and carjacking were a single act, section 654 would require that the sentence for robbery be stayed. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420 (*Dominguez*).)

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[4] For this reason, we reject appellant's claim that trial counsel was ineffective for failing to object to the introduction of the evidence. (See *Cunningham, supra*, 25 Cal.4th at p. 1003 [appellant claiming ineffective assistance must show "that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's [purported] shortcomings"].)

Here, the prosecution conceded that section 654 applied, and the robbery could not be separately punished. The trial court, however, did not stay the robbery sentence but imposed it concurrently with the longer carjacking sentence. The court's reason for doing so is not clear from the record; the court stated that it was "in agreement with the People," but did not specify with which particular points it agreed.[5]

Regardless, on these facts we find that as a matter of law the robbery and carjacking were a single act, and therefore section 654 applies. *Dominguez*, cited by appellant, is instructive. In that case, the defendant entered a van and pressed "a cold and metallic object" against the driver's neck. (*Dominguez, supra*, 38 Cal.App.4th at p. 414.) The defendant "grabbed" the driver and ordered him to hand over " ' "everything you have." ' " (*Ibid.*) The driver removed some rings from his fingers, which took "about five minutes." (*Ibid.*) Once the driver handed over the rings and a chain to the defendant, the driver ran away. (*Id.* at p. 415.) The police later recovered the van less than a mile away. (*Ibid.*) The appellate court concluded that the robbery and carjacking were " 'the same act' " because "the same

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[5] The trial court was clearly aware of a section 654 concern. It referenced a prior discussion with the parties (not in the record on appeal) about "the 654 issue," and noted that "the People responded, and I think appropriately in my view" by "conced[ing] the issue." The court presumably was referring to the prosecution's second sentencing memorandum, which, unlike the first sentencing memorandum, conceded that section 654 applied. It is possible the trial court agreed with the prosecution that section 654 applied, but incorrectly concluded that a concurrent sentence, as opposed to a stay, could satisfy the statute.

act was essential to both offenses and thus is not separately punishable under Penal Code section 654." (*Id.* at p. 420.)

This holding was cited approvingly by our Supreme Court in *People v. Corpening* (2016) 2 Cal.5th 307, 315 (*Corpening*), in concluding that carjacking and robbery could be a single act for purposes of section 654: "The forceful taking in *Dominguez* . . . required the defendant to enter the victim's van, press a gun against the victim's neck, grab him, demand his belongings, wait five minutes while the victim removed his rings, collect the jewelry from him, and drive away. But these were nothing more than components of a single physical act because none of these acts on their own completed the actus reus required for the relevant crimes."

The facts of the case here are not materially distinguishable from those of *Dominguez*: in both cases, the victims were held at gunpoint and deprived of their valuables, after which they fled their vehicles and the perpetrators drove away. As explained in *Corpening*, appellant's "forceful taking" was a single act, even if it involved numerous steps. (See *Corpening, supra*, 2 Cal.5th at p. 315.)

Respondent argues that *Dominguez* is distinguishable because appellant specifically asked for Samson's wallet, and was "an admitted drug abuser." Respondent asserts this "supports a reasonable inference that appellant, a drug addict, wanted the money presumably inside the wallet to pay for drugs." We fail to see how these facts are significant. To the extent respondent is trying to argue that appellant had different objectives for the robbery and the carjacking, this is irrelevant to our inquiry—for purposes of section 654 we only consider the intent behind multiple crimes "if we conclude that the case involves more than

a single act." (*Corpening, supra*, 2 Cal.5th at 311.) Here, under *Dominguez* and *Corpening*, the robbery and carjacking were a single act, and therefore it is immaterial that appellant may have had different objectives for each crime.

4. Enhancement for prior serious felony

Appellant argues, and respondent concedes, that the court should have imposed only one five-year enhancement for appellant's prior serious felony under section 667, subdivision (a)(1) rather than enhancing both the carjacking and robbery sentences by five years each. This is correct. (See *People v. Sasser* (2015) 61 Cal.4th 1, 7 ["[T]he prior serious felony enhancement may be added only once to multiple determinate terms imposed as part of a second strike sentence."]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164 (*Gutierrez*) ["only one section 667, subdivision (a) enhancement should have been imposed in connection with the aggregate sentence"].)

Appellant argues that this error requires remand for resentencing, so the court can decide to which sentence to add the enhancement. This is incorrect. In *Gutierrez*, the trial court imposed four enhancements under section 667, subdivision (a), staying one and ordering the other three to be served concurrently. (*Gutierrez, supra*, 28 Cal.4th at p. 1163.) To remedy the error, the Supreme Court struck the stayed enhancement and two of the concurrent enhancements, thus leaving only one enhancement in place. (*Id.* at p. 1164.) This solution is appropriate in this case as well.

DISPOSITION

The judgment is modified as follows: (1) the section 667, subdivision (a) enhancement to count 2 (second degree robbery) is stricken, and (2) the sentence for count 2 is stayed. The trial

court is directed to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.