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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN RASCON,

Defendant and Appellant.

2d Crim. No. B277789
(Super. Ct. No. 2015012772)
(Ventura County)

Christian Rascon appeals from the judgment entered after his conviction by a jury of threatening to commit a crime that would result in great bodily injury or death. (Pen. Code, § 422.)[1]

[1] All statutory references are to the Penal Code unless otherwise stated. Section 422, subdivision (a) sets forth the elements of the charged offense: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal,

The jury found true an allegation that he had used a deadly weapon ("a stabbing instrument"). (§ 12022, subd. (b)(1).) Appellant admitted two prior prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior serious or violent felony conviction ("strike") within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court dismissed one of the prior prison terms. It denied appellant's motions to dismiss the strike and reduce the felony offense to a misdemeanor. It sentenced him to prison for nine years, eight months.

Appellant contends that the trial court abused its discretion in admitting evidence of a prior offense and in denying his motions to dismiss the strike and reduce the felony offense to a misdemeanor. We affirm.

Facts Underlying Charged 2015 Offense

Juan Rascon (brother) is appellant's older brother. In April 2015 brother was living in an apartment with his mother, Silvia Rascon (mother), and other relatives. Appellant was not allowed to live there. Brother was 24 years old. Appellant was 21 years old.

Brother worked at night. After leaving work on April 20, 2015, he returned to the apartment at about midnight and left the front door unlocked. He was in the kitchen when he saw appellant. Brother was "mad" and said, "'[W]hat are you doing

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unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

here? You can't be here.'" Appellant ignored him and sat down on a couch.

Brother was cooking food in a microwave. When he slammed the microwave door shut, appellant "snapped." Brother told the police: "He said I'm gonna fuckin' kill you. I'm gonna fuckin' scratch your car. I'm gonna ruin your fuckin life." While holding a screwdriver, appellant cocked his arm back so that the tip of the screwdriver was pointing toward brother. Appellant said, "I don't give a shit. I'm gonna stab you." Mother intervened and "stopped" appellant. He left the apartment and said to brother, "'I'll be waiting for you outside. I'm gonna get you.'"

Mother made statements to the police that supported brother's version of events. However, mother said that appellant was holding a knife. She mentioned nothing about a screwdriver. Mother said that appellant "carries . . . a switchblade."

Mother's trial testimony was contrary to what she had told the police. Mother testified that appellant had not threatened brother and had nothing in his hands.

After appellant left the apartment, brother called the police and asked them to "immediately" send "two squad cars." He feared "that if the cops didn't get there quickly, [appellant] would actually come back and attack [him]." In the past appellant had "beat[en] [him] up pretty badly."

Facts Underlying Prior 2011 Offense

In March 2011 Officer Ramiro Albarran was dispatched to the same apartment where the present offense occurred. Mother said that she had argued with appellant about his failure to attend school. She "was on the phone trying to communicate with the school staff" when appellant threatened to kill her and "hurt her male companion" if "she didn't stop talking to the school

about his absenteeism." Appellant went into the kitchen and grabbed a knife with a 10-to-12-inch blade.

Brother was inside his bedroom. He opened the bedroom door and saw appellant "threatening" his mother. When appellant saw brother, he "came charging towards [the] bedroom door." Brother "closed the door as fast as [he] could." He said through the closed door, "I'm going to call the cops. Knock it off." Brother was scared for himself and for his "mom's life."

Admission of Evidence of Prior 2011 Offense

Based on Evidence Code section 1101, appellant made a pretrial motion to exclude evidence of the prior 2011 offense. The trial court ruled that the evidence was admissible to show appellant's intent and a "common design or plan." The jury instructions stated that the 2011 offense could also be considered "for the limited purpose of the reasonableness of [brother's] fear of [appellant], and for evaluating [mother's] credibility." Appellant claims that, in admitting evidence of the prior offense, the trial court abused its discretion.

Pursuant to Evidence Code section 1101, "'[e]vidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove . . . the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. . . . [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Such evidence, however, is admissible "'only if the charged and uncharged crimes are sufficiently similar to support a rational inference of . . . common design or plan, or intent. [Citation.]' [Citation.]" (*Ibid.*) Evidence of uncharged crimes is

also admissible to prove additional relevant facts "other than [the defendant's] disposition to commit [the charged crime]." (Evid. Code, § 1101, subd. (b).)

"'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' [Citation.] 'A greater degree of similarity is required in order to prove the existence of a common design or plan. . . . [E]vidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations."' [Citation.]" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328.)

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent [or] common plan, . . . the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid.Code, § 352.)' [Citation.]"[2] (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328.)

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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."

"'Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]' [Citation.] 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*People v. Foster*, *supra*, 50 Cal.4th at pp. 1328-1329.)

Here, the charged offense - making a criminal threat in violation of section 422 - requires that the defendant have "the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out." (*Id*., subd. (a).) The 2015 charged offense and the 2011 prior offense are "'sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance."'" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328, citations omitted.) They are also sufficiently similar to show "'"such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations."'" (*Ibid*.) In the commission of both offenses, appellant reacted in a similar manner to a family member's nonthreatening, verbal conduct that angered him. In the 2011 incident he threatened to kill mother because she was talking over the telephone to school staff about his absenteeism. He armed himself with a knife. In the 2015 incident he threatened to kill brother after brother had said, "'[W]hat are you doing here? You can't be here.'" Appellant armed himself with a screwdriver (according to brother) or a knife (according to mother).

Even if the two offenses did not have the degree of similarity required to show the existence of a common design or plan, they clearly had the lesser degree of similarity required to prove appellant's "specific intent" that his threat to kill brother "be taken as a threat." (§ 422, subd. (a).) Thus, if the trial court had erred in instructing the jury that the prior offense could be considered for the purpose of showing common design or plan, the error would have been harmless. In similar circumstances our Supreme Court concluded: "Because [the prior offense] evidence was relevant on . . . intent, . . . [t]he court's instruction that the jury could also consider the evidence for whether it showed a common design or plan could not, under the circumstances, have been prejudicial. . . . That the jury, which was properly permitted to consider the [prior offense] evidence on the central questions of self-defense and intent to rob, would have reached a different result had it not been told it could also consider the evidence on whether defendant had a common design or plan in the two incidents - a peripheral question at most - is not reasonably probable. [Citation.]" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 18.) Here, common design or plan was also a "peripheral question at most." (*Ibid*.)

Moreover, evidence of the 2011 prior offense was admissible to prove the following element of the 2015 criminal threats charge: the threat caused brother "reasonably to be in sustained fear for his . . . own safety." (§ 422, subd. (a).) Brother witnessed appellant's commission of the 2011 prior offense. Appellant "came charging towards" him. Brother was scared for himself and for his "mom's life." Evidence Code section 1101 poses no bar to the admission of evidence of prior conduct to establish elements of the charged offense. (*People v. Garrett* (1994) 30

Cal.App.4th 962, 967-968; see also *People v. Wilson* (2010) 186 Cal.App.4th 789, 808 [""The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear""]; *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1143.)

We reject appellant's claim that, pursuant to Evidence Code section 352, the trial court abused its discretion because evidence of the 2011 prior offense was "highly prejudicial" and "had very little, if any, probative value as to any material issues in the case." The evidence was highly probative in establishing that (1) appellant had the specific intent that his statements to brother be taken as a threat, and (2) the statements reasonably caused brother to be in a state of sustained fear. (§ 422, subd. (a).) "The testimony describing [appellant's] uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offense[]. This circumstance decreased the potential for prejudice, because it was unlikely that the jury disbelieved [brother's statements to the police] regarding the charged offense[] but nevertheless convicted [appellant] on the strength of [the] testimony . . . regarding the uncharged offense[], or that the jury's passions were inflamed by the evidence of [appellant's] uncharged offense[]." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

Appellant maintains that "evidence of the 2011 incident is cumulative to any material issues in the case" because brother's "statement that appellant threatened to kill him . . . and threatened him with a screwdriver . . . was enough to establish" appellant's specific intent and brother's sustained fear. But a court is not required to exclude relevant evidence simply because other evidence is sufficient to establish disputed facts. (See

People v. Gallego (1990) 52 Cal.3d 115, 172 ["We specifically reject defendant's suggestion that the [other crimes] evidence was inadmissible simply because there may have existed independent evidence sufficient to sustain the People's claim that defendant had the intent to kill"].) "By pleading not guilty, [appellant] placed all the elements of the [criminal threats charge] in dispute at trial. [Citation.] On the issue[s] of intent [and sustained fear], [appellant did not offer] to stipulate [to these elements of the charged offense]." (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

The trial court gave a modified version of CALCRIM No. 375 on uncharged offenses. The modification allowed the jury to consider evidence of the 2011 prior offense "for the limited purpose of . . . evaluating [mother's] credibility." In support of his argument that the court abused its discretion under Evidence Code section 352, appellant claims that the modification "could very well have misled the jury by inviting it to improperly consider appellant's propensity to carry weapons." But this is an instructional issue that has no bearing on the Evidence Code section 352 evidentiary issue. In any event, we perceive no reason why the modification would have "misled the jury by inviting it to consider appellant's propensity to carry weapons."

Denial of Motion to Dismiss Strike

Appellant contends that the trial court abused its discretion in denying his motion to dismiss the strike. "[A] court's [refusal] to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In determining whether to dismiss a strike, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and

the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, . . . and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Garcia* (1999) 20 Cal.4th 490, 503.)

The trial court concluded that "[appellant] and his conduct fall within the spirit of the three-strikes law." The court considered his "significant and violent history going back to when [he was] a young person."

The trial court did not abuse its discretion. Appellant has a lengthy and serious juvenile criminal record. The probation report states, "[Appellant] is a career criminal with a record that began at age 12, which includes resisting arrest, vandalism, theft, assault, gang, and drug related offenses." From May 2006 to March 2010, the juvenile court sustained 14 violations of probation.

Since the age of 11, appellant has been affiliated with Colonia Chiques, a criminal street gang. He was served with a gang injunction prohibiting him from being at mother's and brother's apartment because it "was within the Colonia Chiques injunction safety zone."

In his few years of adulthood, appellant served two separate prison terms. In July 2011 when he was 18 years old, he was sentenced to prison for two years for threatening to kill mother with a knife. (This is the prior offense that was admitted in evidence at trial.) The probation report states that, during the commission of this offense, appellant "yelled gang-related aphorisms at his brother." He was paroled in May 2012. In February 2013 he was sentenced to prison for two years, eight

months for being a felon in possession of a sawed-off shotgun. He was paroled on March 12, 2015. Approximately one month later, he committed the present criminal threats offense against brother.

In June 2015 appellant was arrested for and charged with violating the Colonia Chiques gang injunction. At the time of his arrest, he was with a "fellow documented Colonia Chiques gang member." While in jail after December 1, 2015, appellant "incurred two major jail discipline reports for battery on another inmate and failed to obey staff."

Appellant claims that the trial court erroneously failed to consider relevant factors. But "[t]he court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. [Citation.] Thus, the fact that the court focused its explanatory comments on [a particular factor] does not mean that it considered only that factor." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) Here, the record does not affirmatively show that the trial court failed to consider relevant factors.

Appellant asserts, "The court improperly found that appellant expressed no remorse when, in fact, he did." (Bold omitted.) The court stated, "I really heard nothing indicating that you take any responsibility whatsoever for your actions. I was looking for anything that indicates some remorse." Appellant alleges: "This is incorrect. In his statement [in mitigation], appellant expressed 'He is beyond remorseful for the incident and the *argument* that ensued between him and his brother.'" (Italics added.)

The trial court reasonably construed appellant's statement as not expressing genuine remorse. The present offense cannot

be characterized as a mere "argument." Appellant threatened to kill brother, armed himself with a screwdriver or a knife, and took an aggressive stance. Had mother not intervened, appellant may have attacked brother. The statement in mitigation notes, "In regards to the present offense, [appellant] feels that there was *misunderstanding* between him and his family." (Italics added.) By saying that the present offense was based on a "misunderstanding," appellant failed to acknowledge the gravity of his violent, threatening conduct.

Accordingly, the trial court reasonably concluded that appellant did not fall outside the "spirit" of the Three Strikes scheme. (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.) Whether he was on probation as a juvenile, on parole as an adult, or in jail awaiting trial, appellant was unable to conform his conduct to the requirements of the law. He consistently failed to take advantage of opportunities for rehabilitation.

Denial of Motion to Reduce Felony Offense to Misdemeanor

A violation of section 422 is a "wobbler," i.e., punishable as a felony or a misdemeanor. Appellant was convicted of a felony. He argues that the trial court abused its discretion in denying his motion to reduce the offense to a misdemeanor pursuant to section 17, subdivision (b).

"When the court properly exercises its discretion to reduce a wobbler to a misdemeanor, it has found that felony punishment, and its consequences, are not appropriate for that particular defendant. [Citations.]" (*People v. Park* (2013) 56 Cal.4th 782, 801.) For the reasons discussed above concerning the denial of appellant's motion to dismiss the strike, the trial court did not abuse its discretion in concluding that felony punishment was appropriate.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Gilbert A. Romero, Judge

Superior Court County of Ventura

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