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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NINH KIM NGUYEN, Defendant and Appellant.	B232937 (Los Angeles County Super. Ct. No. A564897)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Sharon M. Jones, 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, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ninh Kim Nguyen appeals from the judgment entered following a jury trial that resulted in his convictions for first degree murder and grand theft. The trial court sentenced Nguyen to a term of 31 years to life in prison.

Nguyen contends: (1) his Kentucky conviction for rape was void due to an illegal probation condition and was therefore improperly admitted for impeachment and as the basis for a sentence enhancement; (2) other crimes evidence was erroneously admitted; (3) the evidence was insufficient to support his conviction for murder; and (4) the cumulative effect of the errors requires reversal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

(i) *The murder.*

In August 1983, victim Khuyen Bui, her teenage son Calvin Tai Lam, and her friend Yung Rigg lived together in an apartment in Alhambra. From August 3 through August 5, Rigg's friend, Kim Lan Alenbaugh and appellant Nguyen, who was romantically involved with Alenbaugh, stayed with them.[1]

Bui was having financial difficulties and hoped to sell her jewelry, which was worth approximately $30,000. Nguyen arranged a meeting for her with a potential buyer or buyers. On August 4, 1983, Bui, accompanied by her son Lam and Nguyen, visited a Chinatown beauty shop to meet with the buyers. Lam carried the jewelry, which included rings, bracelets, earrings, a necklace, and loose diamonds, in a red silk bag. Their efforts to sell the jewelry were unsuccessful, however, and Nguyen arranged for Bui to meet with other potential buyers the next day. Bui asked Lam to come home from school early the next day so he could accompany them. Lam gave the bag of jewelry back to his mother when they returned home. Alenbaugh and Nguyen spent the night at Bui's apartment.

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[1] Rigg also went by the name "Jenny"; Alenbaugh also went by the names "Cathy" or "Chieu."

On the morning of August 5, 1983, Bui told Lam she and Nguyen were going somewhere that morning to attempt to sell the jewelry. Before Lam left for school at 9:00 a.m., he observed his mother and Nguyen leave the apartment in Bui's Cadillac. Alenbaugh did not accompany them.

When Lam arrived home from school at about noon, the front door of the apartment was open. Bui was dead, lying on the living room floor. A knife protruded from her neck, and there was "a lot" of blood. A kitchen utensil drawer was open, which was unusual for Bui, who kept the apartment clean and tidy.

Alenbaugh arrived at the restaurant at around 10:00 a.m. Nguyen did not arrive until close to noon. He had changed his clothes, and did not appear to have any injuries. When Alenbaugh asked where Bui was, Nguyen told her Bui was at home. After leaving the restaurant the pair went to a jewelry store. Nguyen told Alenbaugh to wait outside. After about five minutes, he returned and they travelled to a second jewelry store, where Nguyen again told Alenbaugh to wait outside. After about 10 minutes, Nguyen returned and the pair travelled to yet a third jewelry store, where Alenbaugh again waited outside. After that, Nguyen and Alenbaugh spent the afternoon shopping and dining. Nguyen purchased clothes for Alenbaugh. Nguyen also gave Alenbaugh $500 in cash and told her that if anyone asked, she should say she had not seen him that day. He also told her to wipe his fingerprints from her car. She dropped him at a hotel at approximately 6:00 p.m., and never saw or heard from him again.

(ii) *The investigation.*

Police and firefighters arrived at the Alhambra apartment to find Bui "saturated with blood." A kitchen knife protruded from the back of her neck, and she had multiple stab wounds. Several knives in the kitchen utensil drawer were similar to the one in Bui's neck. There were varying amounts of blood on the inside of the front door knob, the telephone receiver, the telephone, the couch, a coffee table, a wall, the carpet, and the kitchen. A purse, jewelry, a pocketbook, papers, and other items were spread out on Bui's bed. A small red pouch containing a ring and two bracelets was pinned inside Bui's blouse. Lam told police other items of jewelry were missing.

A fingerprint found on a cocktail glass in the downstairs bathroom matched one of Nguyen's prints. Two small white buttons with green thread were on the living room floor. On the morning of the murder, Nguyen had been wearing a Kelly green shirt with small white buttons.

Bui's green Cadillac was found abandoned approximately one-tenth of a mile from the Thanh Vi restaurant. There was blood on the steering wheel, the driver's side, and the back seat. DNA analysis determined that the blood in the car was Bui's. Analysis of fingernail clippings taken from Bui revealed the presence of Nguyen's DNA.

An autopsy determined that Bui died of multiple stab wounds to the chest. She had been stabbed nine times: once in the nose, once in the lower lip, once in the armpit, once in the right arm, once in the upper chest, three times in the upper back, and once in the knee. Five of the wounds were fatal. The chest wound was four inches deep. The wound to the arm pierced "all the way through," exiting the other side. The knife protruding from her neck had been sunk almost entirely in her back, with only an inch of the knife exposed. Bui also had defensive wounds to her hands and arms. She was 4 feet 11 inches tall and weighed 93 pounds.

(iii) *Alenbaugh's statements to detectives.*

The day after the murder Alenbaugh and her husband, Richard, spoke to a sheriff's homicide detective. Alenbaugh spoke to a detective again in April 1998, May 1993, and October 2010. She provided the following information. The night before the murder Nguyen told Alenbaugh not to go sell the jewelry with Bui the next morning, but to go instead to a Chinatown restaurant, Thanh Vi, at 10:00 a.m. During the night, Nguyen woke Alenbaugh twice to remind her to meet him in Chinatown. Alenbaugh thought this was odd because she had told Bui and Lam that she would accompany them when they went to sell the jewelry that morning. When Nguyen and Alenbaugh went to the jewelry stores on August 5, Nguyen was carrying a red jewelry bag. After their visits to the jewelry stores, Nguyen gave Alenbaugh $300 to purchase a bracelet and $200 for a pair of shoes. Alenbaugh was suspicious because the day before, Nguyen had neither money nor jewelry. When Alenbaugh asked Nguyen, " 'What did you do?' " he replied,

" 'Nothing. I got in a fight with her.' " He also stated that he loved Alenbaugh and "did what he did for her" but "never would say just what he did."

(iv) *Interview of Nguyen in Cambodia.*

In January 1998, FBI Special Agent Ralph Horton interviewed Nguyen in Phnom Penh, Cambodia. Nguyen signed the following statement: " 'I was in California in 1983. I was involved in a struggle with a Vietnamese woman. I don't remember her name. We were in her house, or apartment. We were discussing business. The business involved buying and selling jewelry. During the discussion, she lost her temper. She and I became involved in a struggle. Before the struggle, she was cutting fruit with a knife. She hit me. Both of us fell on the . . . floor. Then I saw her . . . laying [*sic*] down on the floor with a knife inside of her. At first she was yelling. When I left, she was unconscious. I did not intentionally injure the woman. I was afraid. And I departed the United States.' " Nguyen did not tell Agent Horton that Bui had stabbed him.

(v) *Uncharged theft of jewelry.*

Over a defense objection, the People presented evidence that approximately two weeks before the murder, Nguyen stole jewelry from his sister-in-law, Quynh Chau. On July 24, 1983, Chau and her husband, Ninh Nguyen,[2] who was appellant's brother, celebrated their daughter's birthday at their home. Many of their relatives, including appellant, were present. Chau put jewelry she planned to wear to a wedding the next day in Ninh's briefcase, and placed the briefcase in their bedroom closet. That evening, Chau discovered the jewelry—a necklace, bracelet, a pair of earrings, a pin, and her wedding and engagement rings—was missing.

A few days later Chau and Ninh ran into appellant in Chinatown. They asked appellant if he knew where the missing jewelry was. He did not respond. All three returned to Chau's and Ninh's home, where Ninh again asked if appellant knew the whereabouts of the missing jewelry. Appellant again failed to respond. When a detective

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[2] For ease of reference, and with no disrespect, we sometimes hereinafter refer to appellant's brother as "Ninh," and refer to appellant as "Nguyen."

interviewed Ninh and Chau in 2010, Chau told him that appellant had admitted the jewelry was gone. Ninh told the detective that appellant said he would try to get some of it back. A few days later, appellant returned two of the missing pieces to Ninh. Appellant's mother returned a pin and bracelet to Chau.

b. *Defense evidence.*

Nguyen testified in his own behalf. He had agreed to sell Bui's jewelry and split the profit with her fifty-fifty. The morning of the murder, Bui told him she would only give him 20 percent of the profit; Nguyen did not agree. They went into her apartment and discussed the jewelry sale. The discussion became heated. Bui cursed at Nguyen and insulted his parents. She hit him, and he grabbed her hands. They fell in front of the coffee table, and two buttons from Nguyen's shirt tore off. While Nguyen was smoothing his clothing, Bui, standing behind him, said, " 'Oh, you hit me, huh?' " When he turned around, she stabbed him in the chest with a knife. He became angry, grabbed the knife, and "stabbed her back." They fell. Nguyen stabbed Bui more than once, but did not recall how many times. He washed his hands, picked up some diamonds that had fallen on the floor, drove Bui's car to a friend's house near the Thanh Vi restaurant, changed his clothes, and went to meet Alenbaugh. He was afraid to call police or paramedics. He sold Bui's diamonds at the jewelry stores he and Alenbaugh visited, obtaining over $2,000 for them. That afternoon he took a plane to Hawaii. When he told the FBI agent that Bui had hit him, what he meant was that she had stabbed him.

Nguyen admitted he had been convicted of rape in Kentucky in 1977.

2. *Procedure.*

Trial was by jury. Nguyen was convicted of first degree murder (Pen. Code, § 187, subd. (a))[3] and grand theft (§ 487). The jury found Nguyen personally used a deadly and dangerous weapon, a knife, during commission of the crimes. (Former § 12022, subd. (b).) Nguyen admitted suffering the Kentucky rape conviction, a serious

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[3] All further undesignated statutory references are to the Penal Code.

felony (§ 667, subd. (a)(1)). The trial court denied Nguyen's motion for a new trial and sentenced him to a term of 31 years to life in prison. It ordered payment of victim restitution and imposed a restitution fine, a suspended parole restitution fine, a court security assessment, and a criminal conviction assessment. Nguyen appeals.

DISCUSSION

1. *The Kentucky rape conviction.*

a. *Additional facts.*

Prior to trial, the prosecutor informed the court that if Nguyen testified, the People would seek to impeach him with his Kentucky rape conviction. Defense counsel argued that the rape conviction was unconstitutional and void because it was pursuant to a plea bargain in which one of the probation conditions required that Nguyen leave the United States and not return while he was on probation. Nguyen urged that the State of Kentucky could not constitutionally induce him to enter into a plea agreement conditioned on leaving the United States, because deportation was within the sole purview of the federal government. Defense counsel also argued that there was no evidence the plea was a "legitimately negotiated settlement," and that Nguyen might not have been afforded a Vietnamese interpreter during the proceedings.

The trial court examined certified court documents from the State of Kentucky. They indicated Nguyen had been accused of committing two rapes. Nguyen pleaded guilty to one of the charges, in exchange for a 10-year suspended sentence. The Kentucky court imposed several probation conditions, including that Nguyen leave the United States and not return during the period of his probation, five years. The trial court observed that the Kentucky court documents indicated Nguyen had been represented by counsel; the Kentucky court found his plea was voluntary; Nguyen had waived his rights to a jury trial, to confront witnesses, and against self incrimination; and the Kentucky court found there was a factual basis for the plea.

After balancing the potential for prejudice against the probative value of the evidence, the trial court ruled that Nguyen could be impeached with the rape conviction, but precluded the prosecutor from questioning him about the underlying facts. At

sentencing, over Nguyen's renewed objection, the trial court imposed a five-year serious felony enhancement pursuant to section 667, subdivision (a)(1), based on the Kentucky conviction.

b. *Applicable legal principles.*

When sentencing a criminal defendant, a trial court may not rely on a prior conviction obtained in violation of the defendant's constitutional rights. (*People v. Allen* (1999) 21 Cal.4th 424, 435.) "It is well recognized . . . that a prior conviction that has been determined to be constitutionally invalid may not be used to enhance the punishment for a subsequent offense." (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 959.) A plea is valid if the record shows it was voluntary and intelligent. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) To ensure voluntariness, before a defendant pleads guilty or admits a prior conviction allegation, he or she must be advised of, and waive, his or her rights to a jury trial, to confront witnesses, and against self-incrimination. (*People v. Mosby* (2004) 33 Cal.4th 353, 359-360; *In re Tahl* (1969) 1 Cal.3d 122; *In re Yurko* (1974) 10 Cal.3d 857, 863.) Proper advisement and waivers of these rights in the record establishes the defendant's plea or admission was voluntary. (*People v. Mosby*, *supra*, at p. 356.)

Here, according to the trial court's review of the certified Kentucky documents, Nguyen was properly advised of, and waived, his constitutional rights. He was represented by counsel. The Kentucky court found his plea was voluntary and had a factual basis. The plea was therefore voluntary and was not obtained in violation of Nguyen's constitutional rights.

Nguyen, however, contends that because the Kentucky plea was conditioned on "banishment" from the United States, it was void for all purposes. In support of his argument, Nguyen relies primarily upon *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385 (*Alhusainy*) and *In re Babak S.* (1993) 18 Cal.App.4th 1077 (*Babak*). In *Alhusainy*, the defendant entered into a plea bargain in which he would plead guilty to two of the charged crimes; sentencing would be postponed and he would be released on his own recognizance on the condition he leave California and remain outside the state.

The court made it clear Alhusainy could avoid imposition of sentence altogether if he failed to appear for sentencing, as the court expected. To assure Alhusainy would not return, the court and parties agreed that when he failed to appear for sentencing, the resultant bench warrant would specify that it could only be served in California. (*Alhusainy, supra,* at p. 389.) Sentencing was continued and, "in accordance with the plea agreement," Alhusainy failed to appear. (*Ibid.*)

Alhusainy subsequently returned to California, was arrested, and moved to withdraw his plea on the ground that, inter alia, the portion of the plea bargain requiring that he leave California constituted banishment in violation of his constitutional rights. (*Alhusainy, supra,* 143 Cal.App.4th at p. 390.) *Alhusainy* concluded the banishment condition was impermissible and invalidated the plea. (*Ibid.*) The move-away condition was geographically overbroad and contained no temporal limit. (*Id.* at pp. 391-392.) The court further reasoned that "banishment out of state . . . has interstate policy implications." (*Id.* at p. 392.) Thus, the "requirement petitioner leave the state was invalid, not only because it was not narrowly tailored or reasonably related to his crimes, but also because public policy precludes banishment of felons from the state." (*Id.* at p. 393.) Moreover, an "essential term of the plea agreement was that, as long as petitioner stayed outside California, he would not be sentenced. Yet a sentencing hearing was to be set, and, as part of the plea agreement, when petitioner did not appear the court would order a bench warrant issued. This made petitioner a felon fleeing the jurisdiction to avoid sentencing." (*Ibid.*) The effect of the plea "was to require petitioner to commit another felony." (*Ibid.*) Under these circumstances, the court found the plea was "void from its inception" and granted his motion to withdraw the plea. (*Ibid.*)

In *Babak,* several juvenile petitions against the minor were sustained and he was committed to the Youth Authority. The juvenile court suspended the commitment on condition that, inter alia, the minor reside with his parents in Iran for two years. When the minor returned within the two-year period and violated another term of his probation, he was committed to the youth authority. (*Babak, supra,* 18 Cal.App.4th at pp. 1082-1083.) The appellate court found the "banishment condition" lacked any reasonable

nexus to the minor's criminality and violated his constitutional rights of travel, assembly, and association, and constituted a de facto deportation. (*Id.* at p. 1085.) The order committing Babak to the youth authority, based on his violation of the probation condition, was reversed. (*Id.* at p. 1091.)

Relying on these authorities, Nguyen contends that his Kentucky plea was "void from its inception and the resulting conviction [is] invalid." We agree, based on *Alhusainy* and *Babak*, that the probation condition imposed by the Kentucky court was constitutionally overbroad, but disagree that this circumstance voided the plea. There are at least two crucial differences between *Alhusainy* and the instant case. First, in *Alhusainy* the plea agreement required that the defendant evade the court's process and commit another felony. (*Alhusainy*, *supra*, 143 Cal.App.4th at p. 393.) It is readily apparent that such an agreement—which required the court and prosecutor to acquiesce in and approve future criminal conduct by the defendant—was void. Here, in contrast, the Kentucky plea agreement does not suffer from a similar flaw. While the probation condition itself may be overbroad, the plea agreement did not contemplate that Nguyen would be required to commit another felony in order to comply with it.

Second, in *Alhusainy*, the issue was "banishment in the context of a plea agreement without the imposition of sentence." (*Alhusainy, supra,* 143 Cal.App.4th at p. 390.) The unconstitutional condition in *Alhusainy* was part of the plea agreement itself. Here, in contrast, it is a condition of probation. Generally, when a probation condition is unconstitutional, the remedy is to modify or strike the condition, not void the agreement. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 892 [where a probation condition was unconstitutionally vague, modification was necessary]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [same].)

For example, in *In re James C.* (2008) 165 Cal.App.4th 1198, a minor entered into a negotiated disposition and was placed on probation, on condition he reside with his grandparents in Tijuana and not return to the United States while on probation. (*Id.* at p. 1201.) The appellate court found the probation condition was unconstitutional, in that it effectively banished James, a United States citizen, from the United States. It was not

narrowly drawn or specifically tailored, and violated his rights of travel, assembly, and association. (*Id.* at p. 1205.) The court did not, however, invalidate James's negotiated admission. Instead, it reversed the part of the dispositional order conditioning probation on James's living in Mexico. (*Id.* at p. 1206.) Likewise, in *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1182-1184, a minor who lived with his mother in Mexico admitted in juvenile court proceedings that he had smuggled marijuana into the United States. The appellate court held that a probation condition severely restricting the minor's right to enter the United States was not closely related to his crime or criminality, and was therefore unconstitutional. (*Id.* at p. 1183.) Consequently, the court ordered the offending portion of the juvenile court's order vacated. (*Id.* at p. 1184; see also *People v. Barajas* (2011) 198 Cal.App.4th 748, 751-752, 761-763.)

Thus, the existence of the overbroad probation condition does not require a finding that the Kentucky conviction is void. If enforcement of the Kentucky probation condition was at issue, the remedy would be to strike or modify it. Of course, at this juncture enforcement of the Kentucky probation condition is simply irrelevant; the condition has long since expired, and Nguyen is not facing penal consequences from its violation. Nguyen's contention that he could not be impeached with a constitutionally invalid prior conviction (*People v. Coffey* (1967) 67 Cal.2d 204, 218; *People v. Patterson* (1969) 270 Cal.App.2d 268, 274), does not assist him. The Kentucky prior was not obtained in violation of his right to counsel, as were the convictions in the cases he cites. Accordingly, the trial court correctly found the existence of the overbroad probation condition did not preclude use of the conviction to impeach Nguyen or to enhance his sentence under section 667, subdivision (a)(1).

c. *The trial court did not err by allowing Nguyen to be impeached with the prior rape conviction.*

Impeachment of Nguyen with the rape conviction was otherwise proper. "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." (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

"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." (*People v. Clark, supra,* at p. 931.) Because the trial court's discretion to admit or exclude impeachment evidence is broad, a reviewing court ordinarily upholds the trial court's exercise of discretion. (*Id*. at p. 932; *People v. Hinton* (2006) 37 Cal.4th 839, 887.)

Here, most of the relevant factors point to the conclusion the evidence was properly admitted. Rape is a crime involving moral turpitude (*People v. Lewis* (1987) 191 Cal.App.3d 1288, 1295; *People v. Mazza* (1985) 175 Cal.App.3d 836, 844), and reflected adversely on Nguyen's credibility. The crime of rape is dissimilar to murder and theft, diminishing the possibility of prejudice. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926.) Admission of the prior for impeachment did not deter Nguyen from testifying. The trial court was clearly aware of its discretion and appropriately weighed and balanced the probative value of the evidence against the possibility of prejudice under Evidence Code section 352. To guard against undue prejudice, the court prohibited the prosecutor from inquiring about the underlying facts. Moreover, the court excluded admission of a theft conviction Nguyen suffered in Vietnam. Nguyen was not entitled to be clothed in a false aura of veracity. (*People v. Clark, supra,* 52 Cal.4th at p. 932.)

Even assuming arguendo that admission of the prior conviction to impeach was erroneous, any error was manifestly harmless. The erroneous admission of evidence requires reversal only if it is reasonably probable that the appellant would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878.) The evidence against Nguyen was overwhelming. Among other things, he admitted taking and selling Bui's diamonds. His own statements, and the DNA evidence, established that he was the one who stabbed Bui. His conduct after the crime and his statements to Alenbaugh were strong indicators he

fully intended the theft and killing. His contention that the 93-pound victim stabbed him was singularly unbelievable in light of his contradictory statement to the FBI agent that she had hit him, his failure to obtain help for the victim, and his calculated and callous actions after the killing. Alenbaugh did not notice that Nguyen had any injuries when they met at the restaurant immediately after the murder. Had evidence of the prior been excluded, there is no reasonable probability Nguyen would have obtained a more favorable result.

2. *Admission of other crimes evidence.*

Prior to trial the People moved in limine to admit the evidence that Nguyen stole jewelry from his sister-in-law, Chau, approximately two weeks before he committed the theft and murder of Bui. The prosecutor argued that the evidence was relevant to show motive, intent, and absence of mistake. Defense counsel countered that the evidence was speculative; his brother had not come forward with it in a timely fashion; and it was unduly prejudicial under Evidence Code section 352. Over a defense objection, the trial court admitted the evidence, as detailed *ante*. Nguyen contends this was error. We disagree.

Evidence that a defendant committed misconduct other than that currently charged is generally inadmissible to prove conduct on a specified occasion, or to show the defendant has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kelly* (2007) 42 Cal.4th 763, 782; *People v. Rogers* (2009) 46 Cal.4th 1136, 1165; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, such evidence is admissible if it is relevant to prove, among other things, motive, opportunity, intent, knowledge, preparation, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400.)

The least degree of similarity between the crimes is needed to prove intent. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Kelly, supra,* 42 Cal.4th at p. 783; *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "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.]’ [Citation.]” (*People v. Ewoldt, supra,* at p. 402.) The recurrence of a similar result tends to establish criminal intent. (*People v. Kelly*, *supra*, at p. 783.) It has long been 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.’ ” [Citation.]’ . . . .” (*People v. Thomas, supra,* at pp. 355-356.) A greater degree of similarity is required to prove the existence of a common design or plan; there must be “ ‘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 the individual manifestations,’ ” rather than a series of similar, spontaneous acts. (*People v. Ewoldt, supra,* at pp. 402-403; *People v. Kelly*, *supra*, at p. 784.) The plan “need not be distinctive or unusual.” (*People v. Ewoldt, supra,* at p. 403.)

Even if other crimes evidence is admissible under Evidence Code section 1101, subdivision (b), it may be excludable under Evidence Code section 352 if its probative value is substantially outweighed by concerns of undue prejudice, confusion, or undue consumption of time. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491; *People v. Thomas, supra,* 52 Cal.4th at p. 354; *People v. Kipp, supra*, 18 Cal.4th at p. 371; *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt, supra,* at p. 404.) “ ‘ “ ‘Prejudice’ as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent’s position or shores up that of the proponent.’ ” ’ ” (*People v. Scott, supra,* at pp. 490-491.) The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the

defendant as an individual and which has very little effect on the issues. (*Id.* at p. 491.) " 'Prejudicial' " is not synonymous with " 'damaging.' " (*Scott*, at p. 491.) We review the trial court's rulings under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Scott, supra*, 52 Cal.4th at p. 491; *People v. Thomas, supra,* 52 Cal.4th at pp. 354-355; *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

We discern no abuse of discretion here. The challenged evidence was probative to prove Nguyen's motive and intent as to both the theft and murder. In both thefts, Nguyen knew the victims, and knew where their jewelry was kept. In both instances he took advantage of an opportunity to steal their jewelry. Nguyen's defense was that he and Bui argued, she stabbed him, he stabbed her, and he took the jewelry when she was unconscious. Evidence showing that he went to Bui's home intending to steal her jewelry was therefore highly probative on the issues of premeditation and deliberation. His theft of Chau's jewelry demonstrated his intent and motive in the crimes against Bui just two weeks later. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1381 [evidence of uncharged crimes admissible where both charged and uncharged crimes are " '*explainable as a result of the same motive*' "].) Further, although motive is not an element of the charged crimes, " 'the absence of apparent motive may make proof of the essential elements less persuasive . . . .' [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 604.)

Nor was the challenged evidence unduly prejudicial under Evidence Code section 352. The evidence was highly probative. The source of the evidence was independent of the evidence of the charged crime, and the theft from Chau occurred in close proximity to the charged crimes. (*People v. Balcom* (1994) 7 Cal.4th 414, 427 [the "close proximity in time of the uncharged offenses to the charged offenses increases the probative value of this evidence"].) The evidence of the Chau theft was weaker and less inflammatory than the evidence of the charged crime, decreasing the potential for prejudice. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [the potential for prejudice is decreased when testimony describing the defendant's uncharged acts is no stronger and no more inflammatory than the testimony concerning the charged offenses].) Unlike the theft of

Bui's jewelry, Nguyen took Chau's jewelry without force and returned some of it. Moreover, the trial court gave a limiting instruction, further reducing the probability of prejudice.[4]

Nguyen argues that admission of the evidence unfairly disadvantaged him, because the crime had never been reported to police, occurred 27 years previously, and left him with little to offer in defense. We disagree. The lengthy delay in prosecution was entirely attributable to Nguyen's flight from the United States immediately after the murder. But even apart from that fact, he was certainly not without the ability to challenge the evidence. Ninh testified that he made a police report about the theft shortly after it occurred. Both Chau and Ninh testified at trial and were subject to cross-examination. Appellant testified and could have given his own version of events; he could also have attacked the evidence on the very ground that that the alleged theft had never been reported. We discern no unfairness severe enough to require exclusion under Evidence Code section 352.

Finally, even if the evidence was admitted in error, it was harmless. (Evid. Code, § 353, subd. (b); *People v. Thomas, supra,* 52 Cal.4th at p. 356 [*Watson* test for harmless error applies to alleged errors in the admission of other-crimes evidence]; *People v. Earp, supra,* 20 Cal.4th at p. 878.) As we have discussed in section 1.c., *ante,* the evidence against Nguyen was overwhelming. Admission of the uncharged crime evidence was therefore harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

3. *The evidence was sufficient to support the murder conviction.*

Nguyen contends the evidence was insufficient to support a finding that the murder was premeditated and deliberate. We disagree.

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[4] The court instructed: "[T]his testimony is being admitted for a limited purpose. You may consider this testimony only for the limited purpose of motive, intent, or lack of mistake and you must abide by this instruction."

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Carrington* (2009) 47 Cal.4th 145, 186-187; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard applies when the conviction is based primarily upon circumstantial evidence. (*People v. Zamudio, supra*, at p. 357; *People v. Maury* (2003) 30 Cal.4th 342, 396.)

A murder that is premeditated and deliberate is murder of the first degree. (§ 189; *People v. Burney* (2009) 47 Cal.4th 203, 235; *In re C.R.* (2008) 168 Cal.App.4th 1387, 1393.) To prove premeditation and deliberation, the People must establish more than the intent to kill. (*People v. Halvorsen, supra*, 42 Cal.4th at p. 419.) " ' " '[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " ' " (*People v. Burney, supra*, at p. 235; *People v. Jurado* (2006) 38 Cal.4th 72, 118.) An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection, rather than an unconsidered or rash impulse. (*People v. Burney, supra*, at p. 235.)

A reviewing court normally considers three types of evidence when determining whether a finding of premeditation and deliberation is adequately supported: planning activity by the defendant; motive; and the manner of killing. (*People v. Burney, supra*, 47 Cal.4th at p. 235; *People v. Halvorsen, supra*, 42 Cal.4th at p. 420; *People v. Romero* (2008) 44 Cal.4th 386, 401; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) These

factors are not the exclusive means to establish premeditation and deliberation, and need not be present in any particular combination to establish the evidence was sufficient. (*People v. Burney, supra*, at p. 235; *People v. Tafoya* (2007) 42 Cal.4th 147, 172; *People v. Lenart* (2004) 32 Cal.4th 1107, 1127.) "A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with evidence of either planning or manner." (*People v. Romero, supra*, at p. 401.) " ' "The process of premeditation . . . does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .' [Citations.]" ' [Citation.]" (*People v. Halvorsen, supra*, at p. 419; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Here, evidence of all three categories supported the jury's verdict. Nguyen had an obvious motive to commit the killing: financial gain. Nguyen was not employed, and did not have a car or his own residence. The jury could reasonably infer he needed money. Bui's jewelry was worth approximately $30,000. After killing Bui, Nguyen took and sold her jewelry. With the proceeds, he bought gifts for his girlfriend and fled the country. The jury could easily and reasonably infer that he committed the murder in order to obtain and sell Bui's jewelry.

There was also evidence of planning. Nguyen knew Bui had the jewelry at her home. The night before the murder, Nguyen told Alenbaugh not to accompany him and Bui the next morning, but instead instructed her to meet him at a restaurant at 10:00 a.m. From this evidence, the jury could infer Nguyen did not intend to meet with a potential buyer the next morning, as Bui believed, but instead used this as a ruse to get her alone with the jewelry so he would have the opportunity to kill her and steal the diamonds. The jury could reasonably infer that Nguyen directed Alenbaugh to go to the restaurant to ensure she was out of the way when he committed the crimes. Nguyen was so intent on ensuring that Alenbaugh went to the restaurant that he woke her twice during the night to remind her. The timing of the murder also suggested planning: Nguyen was careful to wait until Bui's son left for school before committing the killing. The open kitchen

drawer, and the similarity of the knife to those found therein, suggested Nguyen purposely and deliberately obtained the knife from the kitchen and took it to the living room in order to commit the murder. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at p. 1082 [defendant's act of arming himself and following victim was evidence of planning]; *People v. Wharton* (1991) 53 Cal.3d 522, 547 [defendant's act of retrieving a hammer would constitute planning activity].) Nguyen's citation to various cases in which different, or stronger, evidence of planning activity was present is unavailing. That more, different, or stronger evidence may have been present in other cases does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

Finally, the manner of the killing suggested premeditation and deliberation. Bui was stabbed nine times. Contrary to Nguyen's contention, the wounds were not inflicted in a "random" manner. Eight of her wounds were to the upper torso and face; five were fatal. The fact the multiple wounds were clustered in areas containing vital organs tended to suggest a preconceived design to kill, rather than a sudden explosion of violence. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1253; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [three potentially lethal knife wounds and 80 other stab and slash wounds could be construed as intimating a preconceived design to kill]; *People v. Lewis* (2009) 46 Cal.4th 1255, 1293.) In sum, the evidence of premeditation and deliberation was sufficient to support the jury's verdict.

4. *Cumulative error.*

Nguyen contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial and require reversal. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.