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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RICKEY DEWAYNE HILL, Defendant and Appellant.	2d Crim. No. B282238 (Super. Ct. No. YA094894) (Los Angeles County)

Appellant Rickey Dewayne Hill was charged with second degree robbery. (Pen. Code, § 211.) It was alleged that appellant personally used a deadly and dangerous weapon in the commission of the offense. (*Id.*, § 12022, subd. (b)(1).) He pled not guilty and denied all allegations.

A jury convicted appellant of robbery and found true the allegation that he personally used a deadly and dangerous weapon. The trial court sentenced him to six years in state prison, consisting of the upper term of five years for the robbery plus one year for the deadly and dangerous weapon enhancement.

Appellant contends that evidence of a similar uncharged offense was inadmissible to prove intent under Evidence Code section 1101, subdivision (b).[1] We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND

Charged Offense

On August 28, 2016, Raul Frias and Jose Canales were working at a market in Gardena. Appellant approached Frias, who was in an enclosed cash register area, and asked him for a dollar. Frias refused to give appellant money and told him to leave the store. Appellant then asked a customer for money. Frias instructed appellant to go outside to panhandle.

Appellant then took two cans of beer from the cooler. He placed the beers on the counter but did not have enough money to pay for them. Frias took the beers and told appellant to leave the store. Instead, appellant went to the cooler and grabbed two more beers. Appellant brought the beers to the counter, but Frias confiscated them and once again told appellant to leave. Appellant turned around and walked back to the cooler, where he attempted to take two more beers. Frias closed the cooler's door on him and put the beers back. Frias asked appellant to leave since he did not have enough money to purchase the beer. Appellant told Frias to leave him alone or he would "shank" Frias. Frias understood this to mean that appellant would "stab" him.

Frias walked back to the cash register area and called the police. Appellant took two more beers. Frias called for Canales to help him keep appellant from leaving the store with the beers. Canales closed the door as appellant attempted to

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[1] All statutory references are to the Evidence Code unless otherwise specified.

leave. Appellant told Frias this was "the last time" he would ask Frias to sell him the beer. Otherwise, he would leave the store with it.

Appellant then pulled out a box cutter, which caused Frias to grab a "blade" used for cleaning vegetables. Frias again demanded that appellant leave the store. Appellant left with a can of beer.

Gardena Police Officers Sterling Kim and Steve Kim responded to Frias's call. Officer Steve Kim detained appellant and gave Officer Sterling Kim a box cutter and two cans of beer that had been taken from appellant.[2] Officer Sterling Kim searched appellant's person and found $2.38. Appellant did not appear intoxicated.

Uncharged Offense

Ten days earlier, on August 18, 2016, appellant entered a liquor store in Los Angeles and grabbed two cans of beer. He placed one can in his rear pants pocket and handed a second can to someone else. As appellant was walking out of the store, the cashier, Kim Han Sung, demanded that he return the beer. Appellant grasped Sung's neck with one hand and pushed him toward a desk. Appellant struck Sung with his fist three times. Sung hit appellant once and tried to escape, but appellant hit him again. When Sung kicked appellant, the beer fell out of appellant's pocket. Sung bent down to pick it up, and appellant started to hit him again. Sung swung a magazine rack at appellant, who pulled out a knife and made a stabbing motion. Sung grabbed a bat and told appellant to leave. Appellant left with the can of beer. Sung had some scratches and "a little bit" of

[2] It is unclear from the record whether appellant took one or two beers from the market.

blood on his neck and chest. The store's surveillance camera recorded the incident.[3]

Trial Court's Evidentiary Ruling

Before trial, the prosecution moved to admit evidence of the uncharged liquor store offense to prove intent and common plan or scheme. (§ 1101, subd. (b).) The parties agreed the court could consider the probation report, which states that appellant told officers at the time of his arrest that he attempted to pay for the beer, but the cashier would not take his money. The court determined this raised an issue regarding appellant's intent and that evidence of the uncharged offense should be admitted "for limited purposes of establishing intent." It also found under section 352 that the probative value of the evidence outweighed the prejudice and stated that a limiting instruction would be given.

The jury was instructed with CALCRIM No. 375, which stated, in relevant part: "If you decide that the defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether: A. The defendant acted with the intent to permanently deprive the owner of the property in this case; or B. The defendant had a plan or scheme to commit the offense alleged in this case. In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offense. Do not consider this evidence for any other purpose except for the limited purpose of intent or common plan or scheme."

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[3] The surveillance camera recording was played for the jury.

DISCUSSION

Standard of Review

"We review any ruling on the admissibility of evidence for abuse of discretion. [Citation.] A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Myers* (2014) 227 Cal.App.4th 1219, 1224 (*Myers*).)

No Error in Admitting Evidence of Uncharged Offense

Appellant contends the trial court abused its discretion by admitting evidence of the uncharged liquor store offense for the purpose of showing intent because the issue of intent was uncontested and the probative value of the evidence was outweighed by the prejudicial effect. The People respond that the uncharged offense was properly admitted under section 1101, subdivision (b). They claim appellant placed his intent at issue by pleading not guilty, and that the admission of the evidence did not create substantial danger of undue prejudice. We agree with the People.

Section 1101 generally prohibits evidence of a defendant's uncharged conduct to prove his or her conduct on a specific occasion or his or her propensity for criminal activity. (*Id.*, subd. (a).) But such evidence may be admitted if it is relevant to establish a material fact in the case, such as motive, intent or common design or plan. (*Id.*, subd. (b).) In order to be admissible to prove intent, the uncharged offense must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.) Moreover, "[t]he close proximity in time of the uncharged offense[] to the charged

offense[] increases the probative value of [the] evidence." (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) Here, not only were the offenses very similar, but there was only 10 days between them.

Also, to be admissible, the "evidence 'must not contravene other policies limiting admission, such as those contained in . . . section 352. [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) "Because evidence of prior offenses is highly prejudicial, it must have substantial probative value, and the trial court must carefully analyze the evidence under section 352 to determine if its probative value outweighs its inherent prejudicial effects." (*Myers*, *supra*, 227 Cal.App.4th at p. 1224.) Under section 352, 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." (See *Myers*, at p. 1224.)

Second degree robbery is a "specific intent" crime. (*People v. Clark* (2011) 52 Cal.4th 856, 943.) To prove appellant guilty of that offense, the prosecution was required to demonstrate appellant's intent to permanently deprive the victim of the property. (*Ibid.*; see Pen. Code, § 211.) Appellant contends evidence of the uncharged offense had little, if any, probative value on the issue of intent because the issue was undisputed.

It is true that "[w]hen a prior offense is proffered to prove an ultimate fact, that fact must be in dispute. [Citation.] A defendant's plea of not guilty puts the elements of the crime in issue for purposes of . . . section 1101, 'unless the defendant has taken some action to narrow the prosecution's burden of proof.'

[Citations.]" (*Myers*, *supra*, 227 Cal.App.4th at p. 1225; see *People v Rowland* (1992) 4 Cal.4th 238, 260 ["a fact -- like defendant's intent -- generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation"].) As the People point out, appellant made no effort to limit the admission of the prior uncharged offense by stipulating to certain issues. (See *People v. Scott* (2011) 52 Cal.4th 452, 470.) In the absence of such a stipulation, the issue of intent remained in dispute until it was resolved by the jury. (*Rowland*, at p. 260.)

Appellant's reliance on *People v. Lopez* (2011) 198 Cal.App.4th 698 (*Lopez*), is misplaced. In *Lopez*, the defendant was charged with and convicted of residential burglary, and the trial court admitted evidence of a prior car burglary and car theft. (*Id.* at pp. 714-715.) In concluding the trial court abused its discretion, the appellate court reasoned that "[e]vidence regarding the Mendicino burglary showed that someone entered the kitchen of the Mendicino residence and took two purses. Assuming [the defendant] committed the alleged conduct, his intent in so doing could not reasonably be disputed -- there could be no innocent explanation for that act. Thus, the prejudicial effect of admitting evidence of a prior car burglary and prior car theft outweighed the probative value of the evidence to prove intent as to the Mendicino burglary charge. [Citation.] [¶] Simply put, evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute." (*Id.* at p. 715.)

Here, unlike in *Lopez*, appellant's intent was not beyond dispute. The facts of the charged robbery offense did not eliminate any doubt as to whether he acted with the requisite mental state. At the time of his arrest, appellant told the officers that he attempted to pay for the beer, but the cashier would not

take his money. At the hearing on the prosecution's motion, appellant informed the trial court that if the uncharged offense is admitted, he is "going to be on the witness stand testifying to tell the truth about the situation." Appellant did not waive his right to testify until after the prosecution had presented its case-in-chief. The fact that appellant left open the possibility of testifying regarding his intent supports admission of the uncharged offense. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 757-758 [when a defendant fails to isolate an issue until after the prosecution has presented its case-in-chief, the court does not abuse its discretion in admitting evidence of prior criminal conduct to prove an element of the offense].) Appellant also fails to show that admission of the uncharged offense unduly consumed trial time or confused the jury. (See *Lopez*, *supra*, 198 Cal.App.4th at p. 715.) Inasmuch as the probative value of the evidence outweighed its prejudicial effect, the court did not abuse its discretion in admitting the evidence under section 352. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Alan B. Honeycutt, Judge
Superior Court County of Los Angles

R.E. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

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