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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. EVER VASQUEZ, Defendant and Appellant.	B235544 (Los Angeles County Super. Ct. No. BA378823)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed as modified.

Kimberly Howland Meyer, 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, Chung L. Mar and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Ever Vasquez appeals from the judgment following his convictions for robbery (Pen. Code,[1] § 211) and making criminal threats (§ 422). He contends that the trial court abused its discretion in admitting the victim's testimony at trial regarding the details of a prior uncharged robbery allegedly committed by Vasquez against the same victim. We disagree. However, as the Attorney General concedes, pursuant to section 654 we must modify the sentence on the count for criminal threats to order that it be stayed, and not run concurrent to the sentence on the robbery offense, because the two crimes arose from one indivisible course of conduct. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Charges

Vasquez was charged with one count of robbery (§ 211) with a personal gun use allegation (§ 12022.53, subd. (b)), and two counts of making criminal threats (§ 422) with gun use allegations. (§ 12022.5, subd. (a).) The case proceeded to jury trial, during which the second criminal threats charge was dismissed for insufficient evidence.

Prosecution's Case-In-Chief

Witnesses Maria Mijares, her 13-year old daughter Jocelyne A., and Ramon Ortega, Jocelyne's uncle, testified at trial. On the morning of September 19, 2009, Mijares and Jocelyne were visiting Ortega at his apartment. Ortega's aunt was also present. Jocelyne and Ortega were in his bedroom, and Mijares was heading

[1] All subsequent undesignated references to code sections are to the Penal Code unless otherwise indicated.

towards the bedroom, when they heard Ortega's aunt screaming, "They're coming!"

Ortega closed and locked the door to the bedroom, leaving Mijares outside in the hallway. Jocelyne called 911 on the speakerphone, and said someone had broken in.[2] Through the door a man yelled that if they did not open the door he was going to shoot them with his gun. Jocelyne and Mijares testified that the man kicked the door open, but Ortega testified that he opened the door because he was scared the man would use the gun. Two men entered the bedroom; one of them pointed a gun at Ortega's head and demanded to know where the money was. The man also told Jocelyne not to say anything on the phone or he would shoot Ortega. Together the two men ripped the phone out of the wall, and the second man went through the drawers of a computer desk in the room and took money and jewelry out of them. The two men then fled the apartment.

The prosecution and defense stipulated that fingerprints recovered from the outside of the bedroom door were conclusively matched with Vasquez. Approximately one year after the robbery, Jocelyne was shown a six-pack photographic lineup and identified Vasquez as the robber holding the gun. At trial, Jocelyne also identified Vasquez as the man who threatened to shoot Ortega. Mijares had not been able to identify Vasquez from the six-pack photographic line-up shown to her but identified him in court.[3]

Ortega identified Vasquez at trial as one of the men who robbed him, but acknowledged that he had been unable to identify him at the preliminary hearing. He testified that Vasquez had looked different at the preliminary hearing than he

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[2] The audiotape of the 911 call was played for the jury and admitted into evidence.

[3] The second robber was never identified.

did on the day of the robbery, because he was bald whereas he had hair at the time of the robbery. Ortega also testified that he had not been wearing his glasses at the earlier hearing. He acknowledged that he had identified a photograph of Vasquez from a six-pack lineup, but at trial said he could not remember if the person in the photograph was Vasquez.

The prosecutor asked Ortega if he had told police officers that Vasquez had robbed him on another occasion prior to September 19, 2009.[4] Defense counsel did not object to the question. Ortega testified that Vasquez had previously robbed him and that he had seen Vasquez's face during that prior robbery. Defense counsel objected to further questions seeking to elicit details about the prior robbery, and the trial court sustained the objections under Evidence Code section 352.

Defense Evidence

Experimental psychologist Dr. Robert Shomer testified to his expert opinion that the accuracy of eyewitness identification of strangers is very low, particularly after the first 24 hours. He further testified that identifications made from six-pack photographic lineups are unreliable.

Guillermina Arambula, an investigator from the public defender's office, testified that Ortega told her approximately one month before trial that the two men who robbed him had been to his house before they robbed him, when one of them asked Ortega if he cashed checks. In addition, Vasquez took the stand and testified

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[4] Ortega's statements to the police regarding the prior robbery were recorded in a police report turned over to the defense during discovery. Detective Guillermo Medina also testified at trial that four days after the September 19, 2009 robbery, Ortega told Medina and his partner, Detective Marsden, that he had been robbed before by the same person.

that on September 19, 2009, he went to Ortega's apartment to cash a check, because a friend in the neighborhood told him the man who lived there cashed checks. He testified that he went up to Ortega's front door and asked him if he could cash a check, and that Ortega took the check and invited him inside. He said he followed Ortega down a hallway to a doorway, where Ortega asked him to wait. Ortega then went through the door and closed it, leaving Vasquez in the hallway; Ortega then came back out a minute later and returned the check to Vasquez, saying he could not cash the check because he did not cash personal checks. Vasquez testified that he may have touched the door while he was waiting there. He denied robbing Ortega previously, and stated he had never seen Ortega before the day he attempted to cash a check.

Prosecution's Rebuttal Evidence

The court ruled that by offering evidence suggesting that Vasquez's fingerprints were found in Ortega's home because he had been there to cash a check, and also that Ortega recognized his face only because he had been there to cash a check, the defense opened the door to further testimony during the prosecution's rebuttal case about details of the alleged prior uncharged robbery by Vasquez. On rebuttal, over defense objections, Ortega testified that approximately one month before the September 19, 2009 robbery, he had been robbed at home by two men, one of whom was Vasquez. He testified that he, his wife, and his aunt were in the apartment, at approximately 7:00 a.m. He and his wife were still asleep in the bedroom. His aunt was in the kitchen and had forgotten to put the latch on the front gate. The men entered the apartment, tied up the aunt in the kitchen, and put tape on her mouth. They then entered the bedroom, pointed a gun at Ortega's head, told Ortega and his wife not to move, and told them to hand over

everything or they would shoot Ortega's wife. They tied Ortega's hands and feet and forced his wife to give them money stored in the bedroom.

Ortega testified that he did not remember if Vasquez had come to his house to cash a check, but denied that he would have let a stranger such as Vasquez into his house.

Jury Instruction, Verdict and Sentencing

Near the conclusion of trial, the court informed the parties that it planned to give the following limiting instruction regarding evidence of the prior robbery based on pattern instruction CALCRIM No. 303: "During the trial, certain evidence was admitted for a limited purpose. Specifically, you heard testimony from witness Ramon Ortega that he had previously been a victim of a robbery by the defendant. This evidence may not be considered by you to find that the defendant is a person of bad character or that he has a propensity or a disposition to commit crimes. If you find the testimony to be true, you may consider this evidence if it assists you on the question of (1) the accuracy of Ramon Ortega's identification of the defendant and (2) the general credibility of Ramon Ortega as a witness. You may consider this evidence only for the limited purpose defined above and for no other." Neither party objected to the instruction and the court ultimately gave the above instruction to the jury.

The jury found Vasquez guilty of first degree residential robbery (count 1) and making criminal threats (count 2), and found true the allegations that Vasquez personally used a firearm in the commission of both offenses. He was sentenced to 16 years imprisonment in total. On count 1, the court sentenced him to the upper term of 6 years, with a 10-year firearm enhancement. As to count 2, the court found that the offense was an integral part of the robbery and part of one

continuous course of conduct, and the court imposed the upper term of 3 years, plus 10 years for the firearm use, with the sentence to run concurrent to the sentence on count 1.

Vasquez timely appealed.

DISCUSSION

I. *Admission of Evidence of Prior Robbery*

Vasquez does not challenge the admission of Ortega's testimony during the prosecution's case-in-chief that Vasquez had previously robbed him, but contends that the trial court erred in permitting Vasquez to testify on rebuttal to the *details and circumstances* of the prior uncharged robbery.[5] Vasquez contends that the evidence was inadmissible under Evidence Code section 1101 (section 1101) because it was offered principally to prove Vasquez's conduct in conformity with the prior robbery, and the details regarding the prior robbery were not relevant to establishing the identity of the armed robber or to supporting Ortega's credibility, the two purposes for which the jury was instructed it could consider the evidence. Vasquez further contends the trial court should have excluded the evidence under Evidence Code 352 (section 352), because the probative value of the evidence was substantially outweighed by undue prejudice. We find no abuse of discretion in the admission of Ortega's testimony regarding details of the prior alleged robbery for the related purposes of establishing Vasquez's identity as the armed robber and supporting the credibility of Ortega's eyewitness identification of Vasquez as the perpetrator of the charged offenses.

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[5] Because Vasquez does not challenge the admission of the fact of the prior robbery, we need not address the Attorney General's contention that Vasquez forfeited any objection to the admission of this initial testimony by failing to object at trial.

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).) Thus, evidence of uncharged crimes may be admitted to prove facts such as the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).) "Evidence of *identity* is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator." (*Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) Further, evidence of prior uncharged acts may be admissible if relevant to a witness's credibility. (§ 1101, subd. (c) ["Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness"]; *People v. Kennedy* (2005) 36 Cal.4th 595, 620 ["evidentiary limitations on the use of evidence of specific instances of prior misconduct . . . do not apply to evidence offered to support or attack the credibility of a witness"], disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

During the prosecution's case-in-chief, the trial court curtailed Ortega's testimony such that he was permitted to testify only that he previously had been robbed by Vasquez and had seen his face. However, the defense then offered an alternative explanation for why Ortega would have recognized Vasquez, who testified that he went to Ortega's apartment to get a check cashed. The court correctly found that it was unfair to limit testimony regarding Ortega's recall of the

details and circumstances of the alleged prior uncharged robbery, evidence which the jury would need in order to weigh Vasquez's and Ortega's relative credibility and the accuracy of Ortega's identification of Vasquez as the robber.

Even if the defense had not opened the door, the trial court would not have abused its discretion in admitting evidence regarding when and how the previous robbery unfolded (so long as the details were not subject to exclusion under section 352, a subject we consider below). Such details of a prior act are often necessary to enable the jury to properly determine whether an eyewitness such as Ortega had a sufficient opportunity to see the perpetrator's face, to assess whether this eyewitness's memory of the events permitted a solid identification, and to weigh the credibility of the witness's story. Truncating the testimony such that only the fact of the prior offense is before the jury is generally not required under section 1101.

We further reject Vasquez's contention that the alleged prior robbery was inadmissible to prove identity because that uncharged crime did not share sufficiently distinctive characteristics with the later offenses for which Vasquez was charged and tried. Generally speaking, "[f]or identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 403.) However, "'[w]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a "distinctive modus operandi" analysis of

other factors.' [Citations.]" (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 893; see *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 585 ["The requirement for a distinctive modus operandi does not apply when the prior and charged acts involve the same perpetrator and the same victim. The courts have concluded that evidence of prior quarrels between the same parties is obviously relevant on the issue whether the accused committed the charged acts."].) Because the two robberies involved the same victim (Ortega), the prosecution was not required to show that the uncharged and charged crimes shared unusually distinctive traits. The strength and credibility of Ortega's eyewitness identification of Vasquez as the perpetrator of the charged crimes was greatly bolstered by the fact that he recognized Ortega from the earlier robbery.

Further, notwithstanding that "evidence of uncharged misconduct '"is so prejudicial that its admission requires extremely careful analysis"'" (*People v. Lewis* (2001) 25 Cal.4th 610, 637), the trial court did not abuse its discretion under section 352 by admitting the details regarding the alleged prior robbery. Unless the dangers of undue prejudice, confusion, or time consumption "'substantially outweigh'" the probative value of relevant evidence, a section 352 objection should fail. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) "'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. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Scott* (2011) 52 Cal.4th 452, 491.) A trial court's exercise of discretion under section 352 shall not be disturbed on appeal absent a showing that such discretion was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In exercising its discretion to determine whether an uncharged offense has sufficient probative value that it should be admitted, the trial court weighs "'(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) In weighing the probative value versus prejudice to a defendant, a court should consider "whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211), which may lead jurors to punish a defendant for uncharged offenses even if they do not believe he is guilty of the charged offense. (*Ewoldt, supra*, 7 Cal.4th at p. 405.) "The probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense." (*Id.* at p. 404.) Further, the probative value of a prior offense is "further enhanced by the proximity of the two incidents in time . . . and in location." (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Plainly, the question whether Ortega was better able to identify Vasquez as the perpetrator of the charged offenses because he previously had been victimized by him is a material one. But Vasquez argues that the evidence did not have much probative value as to this point, because when Ortega was asked if he was looking at the person who told him to hand everything over during the first robbery, Ortega responded, "He did not permit me to lift up my sight," and when asked whether he could see the people who were robbing him, Ortega responded, "I don't remember very well, but they seem to be almost the same ones." However, Ortega went on to

give unqualified testimony that the person whose photograph he circled in the six-pack was the same man who had robbed him the first time, and that he was able to see the face of the man who was pointing the gun at him. Further, the probative value of the testimony was enhanced by the fact that the prior incident occurred in the exact same location, Ortega's apartment, only a month prior to the charged offenses. (*People v. Kipp, supra*, 18 Cal.4th at p. 371.)

The fact that it was Ortega, not an independent source, who testified as to the prior offense, is not disqualifying. In *Ewoldt*, the court suggested that having an independent source testify to a prior offense enhances the probative value of the evidence, but it did not hold that testimony regarding a prior bad act is not probative or should not be admitted merely because the source was not independent. (*Ewoldt, supra,* 7 Cal.4th at pp. 404-405.) Indeed, because Ortega was the victim of both offenses inside his apartment, it stands to reason that he would be the witness expected to testify to both crimes.

Finally, Vasquez contends that given the "graphic" details of the prior robbery that were far more inflammatory than the robbery offense with which Vasquez was charged, the testimony was unduly prejudicial. However, as described by Ortega, the uncharged offense was quite similar to the charged crimes, with Vasquez allegedly pointing a gun at Ortega's head in his bedroom while an accomplice took money in both instances. The additional fact that Ortega and his aunt were tied up during the prior alleged robbery does not elevate that offense to a substantially more violent or disturbing category than the charged armed robbery. Even though the jury learned that the prior incident had not been reported to the police, we do not believe that a substantial danger existed that the jurors would seek to punish Vasquez for the prior offense even if they did not

believe he committed the charged offense, particularly given the limiting instruction given to them by the court.

In sum, the probative value of Ortega's testimony on rebuttal substantially outweighed the possibility of prejudice, and we find no abuse of discretion in permitting the jury hear it.

II. *Sentence*

The trial court imposed a 13-year sentence with respect to count 2, to run concurrent to the 16-year sentence imposed on count 1. Vasquez contends, and the Attorney General concedes, that the trial court erred in failing to stay the execution of the sentence on count 2 because punishment for the threats in addition to the robbery is prohibited as both crimes arose from one indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) We agree.

Section 654 provides in relevant part: "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." (§ 654, subd. (a).) In this case, the trial court recognized that the conduct underlying count 2, criminal threats, was "an integral part of the robbery," count 1, and thus section 654 prohibited the court from imposing punishment on count 2 in addition to count 1. The court imposed a concurrent sentence.

However, our Supreme Court has held that section 654 does not permit the imposition of a concurrent sentence on the second offense in such an instance, because under such a sentence "'the defendant is deemed to be *subjected* to the term of *both* sentences although they are served simultaneously.' [Citations.]" (*People v. Duff* (2010) 50 Cal.4th 787, 796; see *People v. Correa* (2012) 54 Cal.4th

331, 337.) The Supreme Court instructed as follows: "[R]ather than dismissing charges or imposing concurrent sentences, when a court determines that a conviction falls within the meaning of section 654, it is necessary to *impose* sentence but to stay the *execution* of the duplicative sentence. . . . The sentencing court should stay execution of sentence pending completion of service of sentence upon the greater offense, with the stay to become permanent upon completion of that sentence." (*People v. Duff, supra,* 50 Cal.4th at p. 796.) We thus modify Vasquez's sentence accordingly.

DISPOSITION

The 13-year sentence imposed on count 2 (criminal threats) is stayed pending completion of service of the sentence on count 1 (robbery), with the stay to become permanent upon completion of the sentence on count 1. The trial court is directed to prepare an amended abstract of judgment reflecting that the sentence for count 2 is stayed, not concurrent to count 1, and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.