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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

RICARDO CELIO,

Defendant and Appellant.

2d Crim. No. B280890
(Super. Ct. No. 2015012118)
(Ventura County)

Ricardo Celio appeals from the judgment entered after a jury had convicted him of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a).) The trial court found true an allegation that he had served one prior prison term. (*Id*., § 667.5, subd. (b).) He was sentenced to prison for seven years.

Appellant contends that the trial court erroneously admitted (1) evidence of a former codefendant's guilty plea to the same burglary with which appellant was charged, and (2) evidence of an uncharged prior residential burglary in which appellant had been involved. We affirm.

Facts: Charged Burglary

Early in the morning on April 15, 2015, Andrea Whalen left her house in Camarillo. She locked the doors. Nancy Derr lived next door to Whalen. She saw two men appear to break into Whalen's house through a sliding door. One was wearing a white baseball cap. Derr telephoned 911.

A few minutes after the 911 call, Sheriff's Deputy Rosalio Cobian arrived at the scene. He saw a gray Acura parked "almost directly across the street" from the front of Whalen's house. The engine was running, and appellant was in the driver's seat. Deputy Cobian knew that sometimes burglars "will have getaway drivers . . . waiting in their running vehicle." Appellant was detained. He told the police that "we were meeting up with some . . . girls."

Deputy Cobian entered the residence through the "wide open" front door. Some of the bedrooms had been "ransacked." A sliding glass door "had been pried open." At trial a detective opined that this was the burglars' point of entry into the residence.

Deputy Christopher Johnston drove to the rear of Whalen's residence. He saw two men "jump the rear fence coming out of the backyard" and run down a hill. One of the men was wearing a white hat. The suspects were arrested. They were Junior Celio (Junior), appellant's brother, and Juan Deleon. Jewelry was "falling out" of Deleon's pockets. Whalen identified the jewelry as having been taken from her residence.

Deputies escorted Whalen's neighbor, Derr, to Junior and Deleon immediately after their arrest. Derr was unable to positively identify them. But "[t]hey looked very similar to the men" she had seen outside Whalen's residence. They were the

"same height, same age" and the "same build." She positively identified the white cap that one of them was wearing. The court took judicial notice that Deleon had pleaded guilty to burglarizing Whalen's residence.

Appellant testified as follows: He lived in Huntington Park in Los Angeles County. He drove Junior and Deleon from Huntington Park to a residence in Camarillo in Ventura County. The purpose of the trip was to "[m]eet some girls." Upon arriving at the residence, Junior told appellant to stay in the car while he got the girls. Junior expressed concern that appellant "would scare them away" because of his appearance. Appellant's "[f]acial features aren't ideal or normal." Appellant was not "acting as a lookout" or "a getaway driver."

Deleon's Guilty Plea

The People sought to admit former codefendant Deleon's guilty plea for the limited purpose of proving that a burglary had been committed. The People explained that they "intend to prove [appellant] is guilty [of burglary] . . . under an aiding and abetting theory. In order to prove aiding and abetting, the first element the People must prove is that 'the perpetrator [Deleon] committed the crime.' [Citation.]"

Defense counsel objected that the guilty plea was not relevant and that its admission would constitute *Aranda-Bruton* error. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].) "'"*Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of [the other] defendant's right of confrontation and cross-examination, even if

a limiting instruction is given.' [Citation.]" [Citation.]' . . ." (*People v. Capistrano* (2014) 59 Cal.4th 830, 869.) [1]

The prosecutor responded that Deleon's guilty plea is "probative, relevant evidence" that should not be excluded under Evidence Code section 352, which 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."[2]

The trial court ruled that the guilty plea was admissible. It informed the jury: "'On December 15, 2015, Juan Deleon pleaded guilty to one count of residential burglary . . . . [¶] Mr. Deleon's guilty plea was to an incident that occurred on April 15, 2015 at [Whalen's residence].'"

On appeal, appellant contends that the admission of Deleon's guilty plea violated his right of confrontation under the *Aranda-Bruton* rule. If it did not violate that right, he claims that the trial court abused its discretion in failing to exclude the plea pursuant to section 352. The People argue that the trial court did not abuse its discretion. They also argue that the admission of the plea did not violate the confrontation clause because the plea "was not a 'testimonial' statement within the meaning of *Crawford*." (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].) "*Crawford* held the confrontation clause 'prohibits "admission of *testimonial* statements of . . . witness[es] who did not appear at trial unless

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[1] *Aranda* was abrogated on other grounds as stated in *People v. Capistrano*, *supra*, 59 Cal.4th at p. 868, fn. 10.)

[2] All further statutory references are to the Evidence Code.

[the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." [Citation.]' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1288, fn. omitted.) "[T]estimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.)

"The general rule is that evidence regarding the guilty plea or conviction of a coparticipant in a crime is not admissible to prove guilt of a defendant. [Citations.]" (*People v. Neely* (2009) 176 Cal.App.4th 787, 795.) But Deleon's guilty plea was not admitted to prove appellant's guilt. It was admitted to prove that Deleon had in fact burglarized Whalen's residence. Nevertheless, there was a danger that his guilty plea "invites the inference of guilt by association. [Citation.]" (*Ibid.)*

As to the confrontation issue, it has been held that a plea allocution is a testimonial statement within the meaning of *Crawford*. (*United States v. McClain* (2d Cir. 2004) 377 F.3d 219, 221 ["a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor"].) It is not clear whether Deleon's mere guilty plea without the allocution was a testimonial statement. (See *United States v. Massino* (E.D.N.Y. 2004) 319 F.Supp.2d 295, 298 ["guilty pleas are 'testimonial' within the meaning of *Crawford*"]; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1222 ["*Records of prior convictions are not 'testimonial' and therefore are not subject to Crawford's confrontation requirement*"].)

We need not decide whether the trial court abused its section 352 discretion or whether the admission of Deleon's guilty plea violated appellant's confrontation rights. Any error was harmless beyond a reasonable doubt because, without considering his guilty plea, overwhelming evidence established that Deleon had committed a burglary of Whalen's residence. (See *People v. Jennings* (2010) 50 Cal.4th 616, 652 [confrontation clause violation not reversible if harmless beyond a reasonable doubt].) Deleon was apprehended after having fled from the residence. Whalen's jewelry was "falling out of his pockets." Thus, the guilty plea was cumulative evidence. In his reply brief, appellant acknowledges that the "evidence was more than sufficient to establish, beyond a reasonable doubt, that a burglary had occurred." Appellant refers to "the cumulative evidence of Deleon's guilty plea."

Uncharged Prior Offense

The People made a pretrial motion in limine to admit evidence of appellant's uncharged prior commission of a residential burglary. They claimed that the evidence was admissible to prove appellant's intent and a common scheme or plan. Over appellant's objection, the trial court granted the motion. Immediately before the evidence was admitted, the jury was instructed that it could consider the evidence for the limited purpose of deciding whether appellant had the requisite intent or "'had a plan or scheme to commit the offense alleged in this case.'" Appellant claims that the trial court abused its discretion in admitting the evidence for this purpose.

Facts Underlying Uncharged Prior Offense

On November 21, 2014, approximately five months before the commission of the charged burglary, Officer James

Cataline went to a residence in Fountain Valley in Orange County. The residence had just been burglarized. A suspect had jumped over a fence in the backyard of the residence.

Officer Cataline opined that the burglars had entered the residence by prying open a window. The pry marks were an "exact match" to a pry tool he had found inside an Acura parked "a couple of streets" away from the residence. "[P]aint chips along the shaft [of the pry tool] were the same color as the paint on the windowsill." Another officer opined that the point of entry was a sliding glass door that had been pried open.

The Acura was the same model, color, and age as the Acura involved in the charged offense. A pay stub inside the vehicle had appellant's name on it.

Officer Cataline was informed that there were three suspects. One of the suspects had been found inside the Acura. The other two suspects were still at large.

Officer Shaun MacKay was dispatched to a location less than one-half mile away from the burglarized residence. He went there in response to a call that "an officer was in foot chase of a suspect of a possible residential burglary." MacKay saw appellant and identified himself as a police officer. Appellant "turned around and ran." With the help of a canine unit, MacKay found appellant "hiding in a bush." During a search of appellant's person, MacKay seized "a single key to an Acura vehicle."

Appellant told the police that, pursuant to directions from a person identified only as "Jay-man," he had driven from Huntington Park to Fountain Valley. "[U]pon arriving at the location, Jay-man got into [appellant's] vehicle and told him to leave [the area] . . . . [¶] As [appellant] started the vehicle and

started leaving the area, he saw police lights and a police vehicle behind him, so he put the vehicle in park and fled . . . on foot."

Appellant testified that he had not been involved in the Fountain Valley burglary. Pursuant to a "plea bargain," he had pleaded guilty to resisting a peace officer, not burglary.

No Abuse of Discretion in AdmittingEvidence of Uncharged Prior Offense

"'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,' such as . . . common plan[] or intent. [Citation.] Evidence of uncharged crimes is admissible to prove . . . common plan[] and intent 'only if the charged and uncharged crimes are sufficiently similar to support a rational inference' on these issues. [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 711.)

"'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.'"" (*People v. Foster* (2010) 50 Cal.4th 1301, 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 [under section 352] 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." [Citation]' [Citation.] 'Rulings made under [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.)

Appellant maintains that the charged and uncharged offenses are not sufficiently similar to warrant admission of evidence of the uncharged offense to prove intent and common plan. We disagree. The similarities are as follows: (1) the burglars entered the residences by prying open a window or a sliding glass door; (2) they fled from the residences by jumping over a backyard fence; (3) appellant drove the same vehicle from Huntington Park in Los Angeles County to another county to commit the burglaries; (4) appellant acted in concert with two other persons; and (5) after his arrest, appellant gave the same explanation for his actions - he was merely following someone else's directions and knew nothing about the burglary.

Even if the charged and uncharged offenses did not have the degree of similarity required to show the existence of a common plan, they clearly had the lesser degree of similarity required to prove appellant's intent to commit a burglary. Thus, if the trial court had erred in instructing the jury that evidence of the uncharged offense could be considered for the purpose of showing a common plan, the error would have been harmless. In similar circumstances our Supreme Court concluded: "Because [the uncharged 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, the existence of a common design or plan was also a "peripheral question at most." (*Ibid.*) The determinative issue was appellant's intent: Did he know that Junior and Deleon were going to commit a burglary, or did he believe that they were going to get the girls they had allegedly arranged to meet? "The chance that [appellant] acted with innocent intent . . . is sharply reduced by evidence that he [had been involved in a residential burglary] a few months earlier. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 532.)

We reject appellant's claim that the trial court abused its discretion under section 352 because the probative

value of evidence of the uncharged offense was substantially outweighed by the danger of undue prejudice. The evidence was highly probative in establishing that, as to the charged offense, appellant had acted with the requisite intent. Furthermore, "[t]he 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 . . . convicted [him] on the strength of [the] testimony . . . regarding the uncharged offense[], or that the jury's passions were inflamed by the evidence of [his] uncharged offense[]." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) In addition, appellant's uncharged acts resulted in his conviction of resisting a peace officer. This reduced "the danger that the jury might have been inclined to punish [him] for the uncharged offense[], regardless whether it considered him guilty of the charged offense[]." (*Ibid*.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

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