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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHN D. CUNNINGHAM, Defendant and Appellant.	B272322 (Los Angeles County Super. Ct. No. MA065633)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

When police officers responded to a 911 domestic violence call, they encountered defendant and appellant John Cunningham (defendant) at the scene, partially hidden behind some trees. Unbeknownst to the officers when they arrived, defendant had not committed the reported incident of domestic violence, but he had very recently committed identity theft. Defendant belligerently refused to comply with certain of the officers' commands, and a scuffle ensued when the officers detained him. Defendant was charged with resisting-arrest-related offenses and with identity theft, and he was tried on all the charges in a single action and convicted on several counts. We consider whether the trial court prejudicially erred by joining the identity theft charges for trial with the resisting arrest charges, and by permitting the prosecution to introduce testimony regarding defendant's methamphetamine use as evidence of motive.

I. BACKGROUND

A. The Identity Theft Offense Conduct

In March 2015, defendant was living with his aunt, Thyra Isaac (Isaac), in Lancaster. Defendant took some of Isaac's checks without her consent. Two of the checks, dated March 15 and March 20, were forged with Isaac's signature and made out to a Frank Harris. Both checks were deposited—one on March 21, 2015.[1]

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[1] The March 21, 2015, date is taken from the amended information charging defendant with identity theft and the subsequent motion for joinder. A trial exhibit shows the check is dated March 20 and appears to have been cleared and posted to the account on March 24. Defendant does not contest that the

When Isaac noticed money had been withdrawn from her account on the two checks, she looked through defendant's belongings and found a third check of hers. This one was made out to defendant with Isaac's signature forged on it. She also discovered defendant had taken a check that a third party had made payable to her.

Defendant admitted to police detectives in May 2015 that he took several of Isaac's checks. He told the police two $250 checks were deposited into Frank Harris's account, but he took the money from one of them to pay for a room. Defendant said he gave the check made payable to Isaac by a third party to another man whose name he did not know. Defendant also claimed he never attempted to cash a check made out to himself.

B. The Resisting Arrest Offense Conduct

On the evening of March 22, 2015—i.e., the next day after one of the checks stolen from Isaac was deposited—Shayla Caldwell (Shayla) and her husband Keion Caldwell (Keion)[2] were at their home in Lancaster when they heard a woman screaming for help. They recognized the screams as coming from a transient woman who had been living with a man in a nearby garage attached to a vacant property.

Shayla called 911 while Keion went outside to investigate. The 911 operator did not ask for a description of the suspect, and Shayla offered none. Police officers responding to the call were

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check was deposited on March 21. Accordingly, we treat March 21, 2015, as the date of deposit.

[2] Because these witnesses share the same last name, we identify them individually by their first names.

told only of the address and that it was a potential domestic violence situation.

When Keion went to the garage, he saw the man who had been living there leave the property. Keion stayed with the victim, who had been stabbed, until the police arrived 15 to 20 minutes later.

Los Angeles County Sheriff's deputies Aaron Tanner and Donald Nelson arrived at the location around 7:20 p.m. When Deputy Tanner stepped into the front yard, he saw a pair of legs from the knees down behind two large trees. The deputy ordered the person, who turned out to be defendant, to come out, but defendant refused, saying he was "not involved in what [was] going on" and "[didn't] have to do anything [the officer said]." Deputy Tanner continued to order defendant to show himself; when defendant complied after 10 or 15 seconds, his hands were "balled up." The officers saw a dark metal object in defendant's left hand and ordered him to release it, which he did not do. Defendant told the deputies something along the lines of, "Fuck you. I don't have to do anything you say. I'm not involved in this. You're violating my rights."

Keion was waiting for the police near the garage when he heard yelling and screaming. He ventured toward the commotion and saw defendant standing before the officers with his hands raised to about shoulder level. Keion could see the fingertips of defendant's right hand and Keion saw defendant's left hand was fully open. Defendant was yelling something to the effect of, "I didn't fucking do anything."

Keion repeatedly shouted "that's not him" to the officers. Deputy Tanner heard Keion but did not respond to him.

Deputy Nelson drew a taser, and when that distracted defendant, Deputy Tanner grabbed defendant's left hand and pulled. Defendant stumbled, Deputy Nelson grabbed defendant's right hand, and the officers took defendant to the ground, where they handcuffed him. In taking defendant to the ground, Deputy Nelson landed hard on his knee and injured his kneecap. Once defendant was handcuffed, the officers discovered the object they had seen in defendant's hand was an open folding knife.

The entire encounter from the officers' arrival to defendant being handcuffed took no more than two minutes. Keion said defendant had been physically compliant and was "more just vocal than anything." According to Deputy Tanner, defendant did not try to punch or kick the deputies, but he had been "very verbal." Defendant twisted and kicked as the officers handcuffed him, and he was simultaneously yelling, "I'm not involved," "Fuck you," and "Get this shit on video."

Sheriff's deputy Gregory Whalen (Whalen) arrived at the scene after defendant was handcuffed. When officers placed defendant in the back of a patrol car, he continued to yell. Defendant slammed his head against the vehicle's rear passenger window, breaking it. After doing so, defendant told the officers his head hurt and Deputy Whalen and two other officers (not Nelson and Tanner) took defendant to a nearby hospital. Based on defendant's behavior, Deputy Whalen thought it was possible defendant was under the influence of narcotics.

At the hospital, defendant was "agitated" and "combative." A doctor examined defendant and cleared him to be transported to jail, but defendant refused to allow officers to approach him. Defendant told the officers he was not going to jail simply on a resisting arrest charge; he was "going to make it count . . . ."

Officers began videotaping defendant at that point. The videotape shows defendant with his left hand cuffed to a bench. Throughout the video, which is approximately 30 minutes long, defendant is moving around to the extent he can given the handcuff, and mostly standing or squatting on the bench, as opposed to sitting on it. He repeatedly tells the officers and medical personnel that he is not going to cooperate because he is "innocent," "falsely accused," and "going to jail for no reason." He tells them they will have to "break [his] arm," "beat [his] ass," or otherwise "do what they got to do" in order to take him into custody.

At one point, defendant lurched to grab some sort of rolling medical device. When an officer responded by pulling a taser and pointing it at defendant, defendant repeatedly urged him to "pop it" and told the officer he will "smack that shit from [him]." Defendant also warned: "First motherfucker run up, bro, I'm swinging. I'm just letting y'all know . . . and I'm about to wrap something up in my hand so I make sure that hurt, so that is going to hurt." Defendant then picked up some sort of medical implement and brandished it. He told the officers they "[m]ight as well tase" him because he is "just going to stand just like this and swing." He repositioned himself on the bench, muttering that he "just need[s] to make sure [he] got leverage . . . to spin and hit [them]."

After the officers stopped recording defendant, they approached him as a group from behind a ballistic shield. As Deputy Whalen took hold of defendant's arm, defendant bit him. Deputy William Zavala (Zavala) restrained defendant's feet, and the officers managed to handcuff him.

C. Procedural History

In September 2015, the Los Angeles County District Attorney charged defendant with seven crimes stemming from his interactions with the police in the field and at the hospital: two counts of assault on a peace officer in violation of Penal Code section 245, subdivision (c)[3] (count one relating to Tanner and count two relating to Nelson); one count of battery in violation of section 243, subdivision (d) (count three, relating to Nelson); and four counts of resisting an executive officer in violation of section 69 (count four relating to Nelson, count five to Tanner, count six to Whalen, and count seven to Zavala). The district attorney further alleged defendant had caused great bodily injury to Deputy Nelson within the meaning of section 12022.7, subdivision (a) and defendant had suffered three prior prison convictions within the meaning of section 667.5, subdivision (b).

The district attorney also filed a separate case against defendant for identity theft based on the checks he stole from Isaac. In January 2016, the district attorney moved to consolidate the cases and join all the charges. The prosecutor contended the incidents were connected in their commission, thereby justifying joinder of the charges, because "any reasonable observer" could see "defendant resisted detention because he was concerned there was already a warrant in the system for his arrest for passing stolen and forged checks." The prosecutor also contended joinder would not present a substantial risk of prejudice because the crimes in each case would likely be cross-admissible in separate trials, neither case was particularly

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[3] Undesignated statutory references that follow are to the Penal Code.

stronger than the other, and the charges would not create any spillover effect.

The trial court granted the motion for joinder and consolidation, over defendant's objection, relying on *People v. Merriman* (2014) 60 Cal.4th 1 (*Merriman*). In an amended information reflecting the consolidation of the two cases, the district attorney charged defendant with two counts of identity theft in violation of section 530.5, subdivision (a) (count 8 relating to the first check redeemed on March 15, 2015, and count 9 relating to the check redeemed on March 21, 2015).

After the People presented their case at trial, the court dismissed the great bodily injury allegation for insufficient evidence. The jury acquitted defendant on both counts charging assault on a peace officer and the sole count charging battery (counts 1-3). The jury found defendant not guilty of resisting an executive officer with respect to deputies Nelson and Tanner (counts four and five), but found him guilty of the lesser crime of resisting, delaying or obstructing an officer in violation of section 148, subdivision (a)(1). The jury found defendant guilty of the resisting an executive officer charges in counts six and seven (with respect to deputies Whalen and Zavala), and it found him guilty of the two identity theft charges (counts eight and nine).

Defendant admitted the alleged prison priors. The trial court sentenced him to eight years and four months in custody.

II. DISCUSSION

Defendant contends his conviction must be reversed because the jury was improperly influenced by two trial court rulings, including their cumulative effect: joining his resisting arrest and identity theft charges in a single trial, and admitting

evidence of his drug use. We reject both contentions. Joinder was not an abuse of discretion because the trial court reasonably concluded the two groups of charges were connected in their commission (the identity theft being at least part of the reason for resisting the officers, or so a jury could find) and defendant has not established a "clear showing of prejudice" that would warrant reversal. Admitting evidence concerning defendant's use of methamphetamine likewise provides no basis for overturning his convictions. The evidence was relevant and the trial court's balancing of the probative value of the evidence against any prejudicial effect was not error, let alone prejudicial error.

A. The Trial Court Committed No Error by Joining Defendant's Charges in a Single Trial

Section 954 allows a defendant to be tried on different charges in a single action so long as the charges are "of the same class" or "connected together in their commission." Crimes are "of the same class" if they "'possess common characteristics or attributes.'" (*People v. Landry* (2016) 2 Cal.5th 52, 76, citations omitted (*Landry*).) Crimes of different classes that do not relate "'to the same transaction or event'" are connected in their commission "'if there is a common element of substantial importance in their commission . . . .' [Citation.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 455 (*Armstrong*); see also *Landry*, *supra*, at p. 76 ["[O]ffenses which are committed at different times and places against different victims are nevertheless connected together in their commission when they are . . . linked by a common element of substantial importance"], internal quotation marks omitted.)

The law favors joinder for efficiency reasons. (*Landry*, *supra*, 2 Cal.5th at p. 75; *Merriman*, *supra*, 60 Cal.4th at p. 37.) However, charges that are statutorily joinable may be tried separately if a court determines there is good cause for separate trials in the interests of justice. (§ 954.)

Defendant contends the two sets of charges against him—those relating to resisting arrest, on the one hand, and identity theft, on the other—were not eligible to be joined under section 954 because they were not "connected together in their commission."[4] He further contends that even if joinder was statutorily permitted, the trial court abused its discretion in not ordering separate trials.

We review the trial court's decision to join the charges for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 221.) If the statutory requirements for joinder are satisfied, the defendant "must make a 'clear showing of prejudice' to establish that the trial court abused its discretion" in joining the charges for trial. (*People v. Simon* (2016) 1 Cal.5th 98, 122-123 ["A defendant seeking severance of properly joined charged offenses must make a stronger showing of potential prejudice than would be necessary to exclude evidence of other crimes in a severed trial"] (*Simon*).)

Our review proceeds in two stages. First, we consider the record before the trial court at the time of its joinder ruling. (*Armstrong*, *supra*, 1 Cal.5th at p. 456.) If we find no abuse of discretion at that juncture, we must then determine "'whether events *after* the court's ruling demonstrate that joinder actually

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[4] Neither party suggests the charged offenses were "of the same class," and we agree they were not.

resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.' [Citation.]" (*Simon*, *supra*, 1 Cal.5th at p. 129.)

Examining the court's ruling made prior to trial, we conclude the trial court was within its discretion to join the charges against defendant as connected together in their commission. In *Merriman*, *supra*, 60 Cal.4th 1, our Supreme Court held the defendant's charges for evading arrest and witness intimidation were connected in their commission to his murder charge "because defendant's apparent motive for resisting arrest and intimidating witnesses was to avoid criminal liability for [the victim's] murder." (*Id.* at p. 36.) In this case, the prosecution similarly argued defendant's charges were connected in their commission because his desire to escape prosecution for identity theft was a motive for resisting arrest. The trial court had sufficient information before it to make that inference. Defendant's encounter with the police happened just a day after the second check he stole was deposited, and both categories of crime took place in Lancaster. Under these circumstances—very close temporal proximity, some geographic proximity, and a readily understandable motive that linked both categories of crime (avoiding detention by the police, which might lead to an arrest)—the trial court reasonably concluded there was a common element of substantial importance linking both sets of crimes. (*People v. Alvarez* (1996) 14 Cal.4th 155, 188 [close proximity in time and location between rape and subsequent vehicle theft supported inference theft was motivated by desire to elude capture for rape].)

Defendant also has not demonstrated prejudice. In evaluating the trial court's decision, "[w]e first consider whether

evidence of each of the offenses would be cross-admissible in 'hypothetical separate trials.' [Citation.]" (*Armstrong*, *supra*, 1 Cal.5th at p. 456.) Cross-admissibility "is normally enough to justify the trial court's refusal to sever the charged offenses." (*People v. Trujeque* (2015) 61 Cal.4th 227, 259; see also *Armstrong*, *supra*, at p. 456.) If the evidence would not be cross-admissible, "'we consider three additional factors, any of which—combined with our earlier determination of absence of cross-admissibility—might establish an abuse of the trial court's discretion: (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense . . . . [Citations.] We then balance the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.' [Citation.]" (*Armstrong*, *supra*, at p. 456.)

In this case, the basis for connecting defendant's offenses—namely, that his recent commission of identity theft was a motive for him to evade custody—also rendered the evidence of those offenses cross-admissible. Evidence defendant took, forged, and benefitted from cashing his aunt's checks was admissible as a motive for his resistance to being arrested shortly after the check-related misconduct. And evidence of defendant's resistance was admissible to permit the jury to infer he was conscious of having committed the identity theft. (See *Merriman*, *supra*, 60 Cal.4th at p. 44 [evidence defendant resisted arrest would be admissible in a separate trial for murder to show consciousness of guilt, and evidence of murder would be admissible in a separate trial for

resisting arrest to show defendant's motive in evading capture]; see also *People v. Valdez* (2004) 32 Cal.4th 73, 120 [defendant's escape after pleading not guilty to murder admissible to indicate consciousness of guilt, while murder charge admissible to show underlying felony in escape prosecution]; *People v. Garcia* (2008) 168 Cal.App.4th 261, 283 ["Evidence of a defendant's resistance to arrest, like evidence of flight, is admissible as evidence of the defendant's consciousness of guilt"].) Defendant cannot establish error in joinder of the charges in a single trial where the evidence underlying each would have been admissible in separate trials.[5]

Continuing to the second stage of our analysis, which examines joinder not at the time of the ruling but in hindsight following trial, there was no gross unfairness resulting in a denial of due process because "[t]he evidence offered to prove defendant's guilt of the various charges arising from the two incidents was 'relatively straightforward and distinct,' while the evidence relating to each charge was 'independently ample' to support defendant's conviction on that charge. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 553; see also *People v. Soper* (2009) 45 Cal.4th 759, 784 ["Appellate courts have found '"no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even though such evidence might not have been admissible in separate trials"'"] (*Soper*).)

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[5] Having concluded evidence of both sets of crimes was cross-admissible, we need not engage in any extended analysis of whether some of the charges were inflammatory or whether a weak case was joined with a strong case or another weak case. We note, however, that neither consideration would support defendant's argument that joinder was an abuse of the trial court's discretion.

The evidence presented at defendant's trial was both straightforward and strong. As defense counsel acknowledged in his closing statement, a substantial portion of the evidence consisted of video and audiotapes. The jury watched defendant's conduct at the hospital, which related to two of the resisting an executive officer charges, and the jury heard defendant's statement admitting he stole Isaac's checks. Defense counsel spent little time discussing that evidence because the jury could interpret it themselves. Furthermore, the testimonial evidence relating to the circumstances of defendant's arrest by deputies Tanner and Nelson was neither complicated nor marred by significant disparities in what the witnesses reported.

In addition, the verdicts after trial persuasively suggest there was no spillover effect. None of the charges were particularly inflammatory, and the verdicts—including acquittals on some charges and convictions of lesser included offenses on others—provide some indication the jury properly considered each charge separately. (See *Soper*, *supra*, 45 Cal.4th at p. 784.)

B. The Trial Court Did Not Abuse its Discretion in Admitting Evidence Defendant Had Used Methamphetamine

On the eve of trial, defendant sought to exclude any evidence he had used drugs. The prosecutor argued evidence of defendant's drug use should be admitted because it was relevant to his motives for both sets of charged offenses: his need for money to buy drugs was motivation for stealing Isaac's checks and his addiction was also a motive to avoid custody, where he would have no access to narcotics. Defense counsel called the prosecution's motive theory speculative but "concede[d] . . . that

in [defendant's] statement [to the police], he does talk about the crystal meth. He talks about it being highly addictive and that he did have some need for money for the crystal meth."

The court was persuaded by the prosecutor's arguments. It found evidence of defendant's "simple possession, usage or being under the influence" was probative of "the issue of motive" and determined the probative value of that evidence was not substantially outweighed by a risk of undue prejudice or substantial consumption of time.

At trial, the prosecution presented the following evidence of defendant's drug use. Isaac testified she found a pipe for smoking methamphetamine while she was looking through defendant's possessions. When defendant was interviewed by the police in regard to the stolen checks, he said crystal meth "was the drug [he] was kind of attached to," he merely used drugs and did not sell them, he had previously been addicted to cocaine, and Isaac had been upset with him for doing drugs. Defendant also told detectives he did not cash any of Isaac's checks but "was trying to pull money off the credit cards to buy drugs." In addition, Detective Whalen testified that given defendant's "agitated and combative" behavior on the night he was arrested and brought to the hospital, defendant might have been under the influence of methamphetamine.

Evidence of a defendant's uncharged wrongful conduct is generally inadmissible to prove he or she committed a crime. (Evid. Code, § 1101, subd. (a) [subject to certain exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a

specified occasion"].) Such evidence may be admitted, however, if it bears upon "some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident, . . .) other than his or her disposition to commit [the offense]." (Evid. Code, § 1101, subd. (b).)

In deciding whether to admit evidence of a defendant's uncharged conduct under Evidence Code section 1101, subdivision (b), the trial court "'"must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, '[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" [Citation.]'" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114 (*Thompson*).)

Evidence determined to be relevant under Evidence Code section 1101, subdivision (b) may be excluded nonetheless under Evidence Code section 352 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." (Evid. Code, § 352.) We review a trial court's admission of evidence pursuant to Evidence Code sections 352 and 1101 for abuse of discretion. (*Thompson*, *supra*, 1 Cal.5th at p. 1114.)

Courts have admitted evidence of a defendant's drug use in theft cases where the defendant admitted to stealing in order to buy drugs. (See, e.g., *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392-1393 [defendant's statement that he burglarized apartment

in order to steal something he could sell to buy drugs admissible in trial for burglary]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 325-326 [defendant's statement that he supported his addiction to drugs by stealing admissible in trial for robberies and other crimes].) A defendant's drug use has been held inadmissible, however, where there is little to connect the drug use with a theft or robbery motive. (See, e.g., *People v. Reid* (1982) 133 Cal.App.3d 354, 362-363 [evidence defendant used drugs inadmissible to show motive to rob absent additional evidence defendant needed the money to support his habit] (*Reid*).)

The trial court did not abuse its discretion by admitting evidence of defendant's drug use in this case. When detectives asked defendant about stealing his aunt's checks, he told them he "didn't cash [any] check but [he] was trying to pull money off the credit cards to buy drugs." That statement, and reasonable inferences a jury could draw therefrom, places defendant's drug use squarely within the province of cases permitting the admission of such evidence. Having held there was no error in admitting the drug use evidence, we naturally reject defendant's related contention that admission of the evidence violated his federal due process rights by rendering the trial fundamentally unfair.

Indeed, we can also say that the admission of evidence concerning defendant's drug use cannot have resulted in any prejudice to defendant under the *People v. Watson* (1956) 46 Cal.2d 818 standard.[6] The evidence establishing defendant's

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[6] Erroneous admission of character evidence is reviewed for prejudice under *Watson*. (*People v. Malone* (1988) 47 Cal.3d 1, 22; see also *People v. Marks* (2003) 31 Cal.4th 197, 227 ["application of ordinary rules of evidence like Evidence Code

guilt, as we have said, was strong. Defendant told the police when, where, and with whom he took, forged, and deposited his aunt's checks. The conduct underlying defendant's resisting arrest charges was largely captured on video. Consequently, it is not reasonably probable the jury would have reached a different outcome had such evidence been excluded. (*Watson*, *supra*, at p. 836.)

C. There Was No Cumulative Error

Defendant contends that even if the effect of the asserted errors in this case do not merit reversal when considered individually, they do when considered cumulatively. We have rejected defendant's contentions of error, and defendant's cumulative error claim therefore fails. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

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section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson* . . ."]; *Reid*, *supra*, 133 Cal.App.3d at p. 363 [applying *Watson* review to determine whether error in admitting evidence of drug use was prejudicial].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.