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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RYAN BRIAN BUI, Defendant and Appellant.	A119404 (San Mateo County Super. Ct. No. 061477)

Appellant Ryan Brian Bui (Bui) appeals from his conviction of two counts of burglary, one count of attempted burglary, and one count of receiving stolen property. He maintains that his constitutional right to a public trial was violated by the trial court's temporary exclusion of family members from the courtroom during jury voir dire. Bui also claims error in the court's exclusion of certain evidence offered in support of his defense theory of third party culpability. We affirm.

I. PROCEDURAL BACKGROUND

The San Mateo County District Attorney charged Bui by information with two counts of burglary (Pen. Code, § 460, subd. (a)),[1] one count of attempted burglary (§§ 460, subd. (a), 664), and one count of receiving stolen property (§ 496, subd. (a)). The information also alleged that Bui was on parole at the time he committed the last offense, and that he had a prior conviction for one count of residential burglary in San Francisco, and a San Mateo prior conviction for five counts of residential burglary.

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

These prior convictions were alleged as strikes under section 1170.12, subdivision (c)(2), and enhancements under sections 667.5, subdivision (b), and 667, subdivision (a).

A jury found Bui guilty of all four counts, and found all the enhancing allegations to be true. Bui moved for a new trial on the basis of denial of his right to public trial and exclusion of third party culpability evidence. The trial court denied the motion.

The court sentenced Bui to 25 years to life on the first count of burglary, and to a consecutive determinate term of 21 years 8 months on the remaining counts. This timely appeal followed.

II. FACTUAL BACKGROUND

On March 10, 2004, a number of homes in Foster City were burglarized. Sharon and Yao Chi reported jewelry and cash missing from their Beach Park Boulevard home that day. Police also discovered that the home of George and Pamela Hung, also of Beach Park Boulevard, was burglarized the same day.

A third homeowner, Tommy Hui, was at home on Williams Lane on March 10th. He heard the doorbell ring, but did not answer the door because he did not recognize the black Range Rover parked in front of his house. Ten or fifteen minutes later, Hui heard the noise of his gate opening, and then heard a metallic ringing sound. He went downstairs, and saw two men at his sliding glass door. Hui started yelling, and both men fled. Hui called police, describing the black Range Rover and giving them a partial license plate number.

Foster City police officer William Sandri responded to the call. Within two minutes of receiving the call, as he headed towards Williams Lane, Sandri saw a black Range Rover matching the description given. The Range Rover was stopped at a stop sign at the corner of Edgewater Boulevard and Port Royal Avenue. Sandri observed "two light skinned males" in the vehicle, which he followed. He lost sight of the vehicle for "a minute or more," then saw it again in front of a RadioShack store in a shopping center on Edgewater. Sandri turned on his emergency lights in order to stop the vehicle. The Range Rover turned down an alley "at a high rate of speed." Sandri pursued the vehicle, which came to a stop at the alley's dead end. The two men in the vehicle exited and fled

southbound out of the parking lot. Sandri gave chase and caught up with them near the south end of the shopping center. The two men were "doubled over out of breath," and Sandri ordered them to get on the ground. Sandri identified Bui as one of the men and Hoa Khuu as the second person.

Neither man complied with Sandri's order, instead "jump[ing a] wall" into the yard of a residence on Monterey Avenue. Sandri radioed for backup, and informed his colleagues of the direction the men were headed. Foster City police officer Mark Lee responded and met Sandri on the 1000 block of Monterey. Lee went through the backyard of a residence and saw an Asian male, later identified as Hoa Khuu, running along the water of a lagoon behind the house. Khuu first hid on a boat, then went in the water, saying to the officers "[G]o ahead and fucking shoot me." He then got out of the water and continued to run, eventually being found hiding in a garbage can.

That same day, Mary Elkington heard a noise outside her Bristol Court, Foster City home. She went outside and saw an Asian male in his 20s. She asked him what he was doing, then told him to leave. The man got down on his knee behind some trees and gestured as though "[h]e wanted [her] to be quiet." The man then got up and ran. Later, Elkington's husband found two pieces of paper in the spot where the man had hidden. One was Bui's interim driver's license, and the other was a list of names, addresses and telephone numbers. The Hung and Chi addresses were on the list, with a line through the Hung's address.

Foster City police officer Eric Egan also responded to Sandri's call. He went into the backyard of a house near Elkington's home, and saw Bui on the ground under some bushes. He told Bui to get out of the bushes and down on the ground. As Egan holstered his gun, Bui fled. Other officers joined the chase, and they and Egan "took [Bui] to the ground and placed him in handcuffs."

Khuu testified at trial[2] that he and Mark Pham had committed the burglaries, not Bui. He claimed that Pham utilized information gleaned during his employment at a real

[2] Khuu had already been convicted of the March 10, 2004 burglaries.

estate firm to make the list of names and addresses found by the Elkingtons, targeting Asian families based on a belief that they kept cash in their homes. Khuu said that he and Pham asked to borrow Bui's Range Rover (which was registered to Bui's sister) on March 10th, but did not tell him they intended to commit burglaries. He also borrowed Bui's driver's license, in case the police pulled them over. Khuu stated that Bui drove him and Pham to a shopping center in Foster City, then got out of the car. Khuu told Bui they were going to visit a friend, but instead they committed the burglaries. After a homeowner chased them, they went to pick up Bui who was waiting inside the RadioShack. Pham ran into the store and got Bui. Pham got into the back seat of the Range Rover and crouched down. A police car started following them about 30 seconds after he picked up Bui. Pham then asked him to pull over and let him out of the vehicle, which he did. While the police were chasing them down the alley, Khuu gave Bui's driver's license back to him, with the paper containing the list of addresses attached.

The jury found Khuu's testimony unconvincing and, as noted previously, convicted Bui on all charged counts.

III. DISCUSSION

A. Exclusion of Family Members From Voir Dire

Bui argues that he was denied his Sixth Amendment right to a public trial because three spectators, including two family members,[3] were excluded from the courtroom for about 45 minutes during jury voir dire. He maintains that this constituted structural error, requiring reversal of his conviction without the necessity of any showing of prejudice. We disagree.

"Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times. (See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15; see also Pen. Code, § 686, subd. 1.)" (*People v. Woodward* (1992) 4 Cal.4th 376, 382 (*Woodward*).) A

[3] The record is not entirely clear on the spectators' identities, but they are described in Bui's motion for new trial as his "mother, his aunt (who was visiting from Vietnam) and a person not related to the defendant, Lily Wong."

"defendant's state constitutional public trial right appears to be coextensive with the federal guarantee [citation] . . . ." (*Id.* at p. 381.) "Nearly a century ago this court declared in *People v. Hartman* (1894) 103 Cal. 242, 245 . . . : 'The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, . . . with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.' " (*Woodward, supra,* at 388 (conc. opn. of Mosk, J.), first ellipsis added.)

A trial open to the public "plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. [Citation.]" (*Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501, 508 (*Press-Enterprise*).) If a defendant has been denied his Sixth Amendment right to public trial, the error is structural in nature, and reversible per se. A "defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." (*Waller v. Georgia* (1984) 467 U.S. 39, 49–50, fn. omitted (*Waller*).)

The public trial right applies not only to the trial itself, but also to a pre-trial suppression hearing (*Waller, supra,* 467 U.S. at p. 48), preliminary examinations (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 526), closing arguments (*Woodward, supra,* 4 Cal.4th at p. 383), instructing the jury (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206–207), and voir dire. (*Press-Enterprise, supra,* 464 U.S. at p. 508.) "The general trend of the cases appears to be toward *expanding* application of the public trial right." (*Woodward, supra,* 4 Cal.4th at p. 383.)

In some limited circumstances, however, the public may be barred from a criminal trial. "The Sixth Amendment public trial guarantee creates a 'presumption of openness' that can be rebutted only by a showing that exclusion of the public was necessary to protect some 'higher value' such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings. [Citation.]" (*Woodward, supra*, 4 Cal.4th at p. 383.) "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press-Enterprise, supra,* 464 U.S. at p. 510.)

The discussion by the California Supreme Court in *Woodward,* addressing the right to public trial, is instructive here. In that case, the trial court directed that the courtroom doors be closed and locked during closing argument, and a sign placed on the courtroom door reading: "Trial in progress—Please do not enter . . . ." Defense counsel observed the sign on returning from a recess and moved for a mistrial. The court denied the motion, explaining that "the courtroom was the situs of the probate department, where various counsel seeking ex parte orders were apt to cause 'constant interruptions.' The bailiff had placed the sign 'sometime probably at lunch in order not to interrupt argument with the attorneys coming in and out.' " (*Woodward, supra,* 4 Cal.4th at p. 380.) The court agreed to take the sign down and unlock the courtroom doors. (*Ibid.*) The following day, the court stated that another reason for the temporary closure was that the trial posed unusual security risks. (*Ibid.*) The court indicated that defendant was a " 'kickboxer' and had been classified both as a violent offender and an escape risk. . . . [His] alleged offenses involved drug transactions, and defendant had indicated to the bailiff that some persons in the courtroom might attempt to kill him." (*Ibid.*) Due to the number of people entering the courtroom in the morning, the bailiff asked to close the doors and direct persons to a room, "where they could be more readily screened before admittance to the courtroom. Due to a shortage of security personnel, only a single

bailiff was available to secure the courtroom." (*Ibid.*) The court indicated that " 'during the entire afternoon session there were in fact people in the audience in the courtroom and . . . people were not prevented from coming in and being spectators.' " (*Ibid*.)

The *Woodward* court held that "the closure of the courtroom doors to additional spectators during part of the prosecutor's arguments, being both temporary in duration and motivated by legitimate concerns to maintain security and prevent continuous interruptions of closing arguments, and not involving the exclusion of preexisting spectators, did not constitute a denial of defendant's public trial right." (*Woodward, supra*, 4 Cal.4th at p. 381.) The court noted that "the courtroom was never cleared to remove all spectators for a significant period." (*Id*. at p. 385.) Moreover, the trial court had "expressed substantial reasons justifying the temporary closure, namely, to maintain court security and orderly courtroom proceedings." (*Ibid.)* The *Woodward* court held that "the de minimus rationale . . . is more pertinent to the circumstances of this case, in which the closure did not exclude preexisting spectators, did not include any of the evidentiary phase of the trial and lasted only one and one-half hours." (*Id*. at pp. 385–386.) Accordingly, the court held that "defendant had a public trial throughout the entire proceeding." (*Id*. at p. 385.)

In order to analyze whether Bui was denied his right to a public trial, we set forth the facts surrounding the claimed denial in some detail. During voir dire, Bui's attorney indicated he had "another motion . . . . [¶] . . . [¶] [A]t approximately 10:20, Mr. Bui's family came in and I noticed they arrived and they sat in the row, I think the second row together as much as they could. There were many empty seats at that point although the potential jurors were also seated in the body of the courtroom. I noticed that the bailiff removed them from the courtroom and they have been removed from the courtroom since. It is now 11:05. [¶] At the bench, the Court informed me that it is the Court's policy not to let members of the family sit in the audience while voir dire is going on and jurors are being selected for fear that the family might say something inappropriate and taint the process. While I appreciate the Court's concern and certainly do not wish any tainting on this process, this is a public proceeding and Mr. Bui's family and Mr. Bui

himself have the right to have a complete open and public process. And there are alternatives to the Court, for example, setting aside certain seats and sitting the jury in another section of the audience or admonishing the family. There are alternatives to summarily removing . . . the family from the courtroom during this proceeding, and for that reason, I would move that the panel be stricken and we start anew. . . . This is a public proceeding, and I don't believe the Court has the authority absent misconduct to remove anybody from viewing the proceeding." The court responded: ". . . I would agree with you that if I had been told that the family was going to be there or given any notice whatsoever, what I would [have] said to you is to admonish these people from not discussing anything in front of the prospective jurors, and we would [have] made provisions to have them sit that as best we could in a fashion that's segregated from the rest of the jurors, but they just showed up and there they were. I have to make these decisions at that moment, and I can't risk having potential jurors hearing conversation among the family, it would totally prejudice the panel, so I have to make these decisions quickly. And again, I wish it had not happened that way, but they're only excluded for a few minutes. I don't remember when they showed up, but you can certainly accommodate them after they have been admonished. I'm just not going to take that kind of chance."

The prosecutor interjected that, at the side bar, she "heard the Court say to [Bui's attorney] and I, of course, quietly and the reporter wouldn't [have] taken it down. What I remember the Court saying is something like unless you want to admonish them, which I took to be an offer to [Bui's attorney] to stop the process and have him make the appropriate admonition to the family members." Bui's counsel responded: "Your honor, at the bailiff's request, I actually did make an admonition to the family yesterday. I did not hear the Court saying unless you want to admonish them, had I heard that I would have happily said yes, I'm happy that they be admonished and be allowed to remain in the courtroom. I did not hear that, and I don't believe it was spoken in my presence." The court responded: "I think I did say that, but you didn't respond so you may not have heard what I said. But I just wasn't given any heads up that these people were going to

be here otherwise we would have discussed that issue and handled it in some fashion which we do all the time. It's not unusual, it's fairly typical to have family members watch a trial, we just need to kind of know these things so . . . we can handle them in one way or the other. So I don't think it's a great prejudice, the fact that they have been excluded from the courtroom for a few minutes, I mean literally so . . .[.]" Bui's attorney explained: "It has been a better part of an hour, and I'm not aware of any duty on the defense's part to inform the Court or anybody that members of the public are going to be witnessing the trial or any aspect." The court denied the motion to strike the jury panel, stating "It's not a member of the public . . . . I mean, you know as well as I do that people say things that they don't realize are being overheard by other people, that's my job to guarantee both sides a fair trial. So again, if I know these things are going to happen then I will deal with them appropriately, and hopefully fairly, but I have to deal with things as they happen. . . . [¶] . . . [¶] Well, they have been admonished; is that correct? [¶] [Bui's Counsel]: I admonished them yesterday to make no comments and to have no communication with Mr. Bui. [¶] [The Court]: Again, I didn't know that, we didn't have that discussion. [¶] All right. When they come back in, if you could have them seated somewhere that is not around the other jurors. I'm asking the bailiff to do that."

Bui represents that his family members did not return until the next day. Bui also represents that "members of the public mistakenly believed to be of Bui's family," apparently a reference to Lily Wong, were excluded in addition to family members.

There is no question here that three individuals were excluded from the voir dire examination for a period of roughly 45 minutes. The issue is whether this exclusion was "de minimus" and so did not violate the Sixth Amendment. (*People v. Woodward*, *supra*, 4 Cal.4th at pp. 379, 385.) Bui acknowledges the holding in *Woodward*, but relies on *Owens v. U.S.* (1st Cir. 2007) 483 F.3d 48 (*Owens*). In that case the trial court had cleared the courtroom of members of the public, including two members of the

defendant's family, to allow seating for the large jury panel required for the case.[4] (*Id*. at pp. 54, 61.) The public was not re-admitted, however, as seats became available, and as a result the public was excluded for an entire day of jury selection. (*Ibid*.) On review of denial of the defendant's habeas corpus petition, the court remanded for an evidentiary hearing to determine the nature and extent of the trial closure, noting that this "was not a mere fifteen or twenty-minute closure; rather, Owens' trial was allegedly closed to the public for an entire day while jury selection proceeded." (*Id*. at pp. 63.) The court concluded that if the trial court barred spectators from the courtroom as defendant alleged, he was denied his Sixth Amendment right to have a public trial and that he need not demonstrate prejudice.[5] (*Id*. at pp. 63–64, 66.) *Owens* is distinguishable on its facts. Not only was voir dire in that case closed to the public for an *entire* day, but *all* members of the public were excluded. (*Id*. at p. 62.) Further, even *Owens* appears to recognize, in contrasting "a mere fifteen or twenty-minute closure," that the Sixth Amendment right to a public trial "is not trammeled . . . by a trivial, inadvertent courtroom closure" (*Bowden v. Keane* (2d Cir. 2001) 237 F.3d 125, 129).

Here, as in *Woodward*, there was only a temporary exclusion of certain spectators, occasioned by the court's concern that the spectators, who would be in immediate proximity with the prospective jurors in the body of the courtroom, had not yet been admonished by defendant's counsel to refrain from comments that might prejudice the panel. The trial court indicated its concern that spectators in these circumstances might say something the potential jurors would overhear, "totally prejudic[ing] the panel," and potentially denying "both sides a fair trial." This was a legitimate concern. While on reflection other alternatives may have been available to the court, we recognize that the

[4] The court rejected defendant's argument that the absence of his family and friends at trial raised special concerns, finding that the same standard applied to family members as to the general public. (*Owens, supra,* 483 F.3d at p. 62, fn. 12.)

[5] Habeas relief was granted on remand. (*Owens v. U.S.* (D.Mass. 2007) 517 F.Supp.2d 570.)

court had no prior notice of the presence of Bui's family members among the venire until the situation actually presented itself.

We do not condone exclusion of any person from trial court proceedings without prior explicit consideration, on the record, of the criterion set forth in *Press-Enterprise* and *Waller* and appropriate findings. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1279.) We reiterate that "[t]he exclusion of any nondisruptive spectator from a criminal trial should never be undertaken without a full evaluation of the necessity for the exclusion and the alternatives that might be taken. This evaluation should be reflected in the record of the proceedings. The evaluation would fulfill the statutory requirements, if any, for exclusion of persons from a trial and assist in the evaluation of any alleged constitutional violation." (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 556, cert. den. *Esquibel v. California* (2009) 129 S.Ct. 1998.) We also agree, however, with the conclusion of the Second District in *Esquibel* that "the temporary exclusion of select supporters of the accused does not create an automatic violation of the constitutional right to a public trial." (*Id.* at p. 554 [exclusion of two spectators during the testimony of one witness because of gang intimidation concerns not a basis for reversal].)

Here three individuals were excluded for a very limited period, and not during the evidentiary phase of the trial. They were allowed in the courtroom once defense counsel assured the court that they had been appropriately admonished. Given the de minimus nature of the temporary exclusion of these individuals from only a limited portion of voir dire, we likewise find, as did the court in *Woodward*, that this "temporary 'closure' did not violate defendant's fundamental constitutional right to a public trial." (*Woodward*, *supra*, 4 Cal.4th at p. 379.)[6]

[6] Bui does not raise the issue of exclusion of the spectators without prior notice, as in *Woodward.* *Woodward* held that such "lack of notice does not establish denial of a public trial . . . [but] at most a procedural due process violation" analyzed under the *Chapman* test. (*Woodward*, *supra*, 4 Cal.4th at pp. 386, 387; *Chapman v. California* (1967) 386 U.S. 18.)

B. Exclusion of Evidence of Mark Pham's Alleged Criminal Background

Bui next argues that he was denied his due process right to present evidence of his "colorable third-party culpability defense," that Khuu committed the crimes with an individual named Mark Pham while Bui was having lunch and waiting at RadioShack. Bui acknowledges that he presented evidence of this defense, in the form of Khuu's testimony. He maintains, however, that it was error for the court to deny his proffered evidence that a woman had identified a photograph of Pham as the individual who burglarized her Daly City home four years prior, and that this error was of constitutional dimension.

States " 'have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.' [Citations.] This latitude, however, has limits. 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ' [Citations.] This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324–325 [citing, inter alia, *United States v. Scheffer* (1998) 523 U.S. 303, 308; *Crane v. Kentucky* (1986) 476 U.S. 683, 690].) "While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (*Id.* at p. 326.)

In California, third party culpability evidence is admissible if it is "capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833.) "This does not mean, however, that no reasonable limits apply. Evidence that another person had 'motive or opportunity' to commit the charged crime, or had some 'remote' connection to the victim or crime scene, is not sufficient to raise the requisite

reasonable doubt. [Citation.] Under *Hall* and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' " (*People v. DePriest* (2007) 42 Cal.4th 1, 43.) Courts "should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." (*People v. Hall*, *supra*, 41 Cal.3d at p. 834.) Under Evidence Code section 352, "[t]he 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." The trial court enjoys broad discretion in determining whether to admit evidence under Evidence Code section 352 and its exercise of discretion must not be disturbed on appeal unless arbitrary, capricious or patently absurd and resulting in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the excluded evidence was the proffered testimony of a burglary victim who would purportedly testify with "70 percent certainty" that she recognized Pham from a photograph as the person who burglarized her home in Daly City approximately four years prior to the Foster City burglaries. Pham had been investigated as a suspect in that case, but the prosecution declined to file charges "on an insufficient evidence basis."

Bui maintains this evidence was admissible under Evidence Code section 1101, subdivision (b), to show a common plan or scheme on the part of Pham, and that its exclusion denied him his due process rights. Evidence Code section 1101 provides in part: "Except as provided in this section . . . 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. [¶] Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . . .)." Bui claims the excluded

evidence supplied "powerful support" for his defense theory that Pham was Khuu's accomplice in the burglaries because the evidence demonstrated "Pham burglarized a house in 2000 employing a modus operandi that is in all relevant respects identical to the MO used in the 2004 burglaries." He describes those "relevant respects" as "enter[ing] the house in the homeowner's absence by prying open a sliding glass door in the rear[, and stealing] guns, jade necklaces, other jewelry, credit cards, stamps, and cash."

" 'To be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes.' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1154.) "In order to be relevant as a common design or plan, 'evidence 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 the individual manifestations." ' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 111.) "Reaching a conclusion that offenses are signature crimes requires a comparison of the degree of distinctiveness of shared marks with the common or minimally distinctive aspects of each crime. [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 937.) To show similarities in burglaries, simply taking the same types of items from similar targets is not sufficient. (See, e.g., *People v. Grant* (2003) 113 Cal.App.4th 579, 589. [burglaries three years apart, both of computer equipment by breaking into schools after hours, entry through open window or prying a door open].)

Here, there were no unique factors in both the charged Foster City burglaries and the Daly City burglary sufficient to support a strong inference that Mark Pham committed both crimes. There is nothing particularly distinctive, when committing a residential burglary, about prying open a rear door when the homeowner is absent and taking easily disposable items of readily apparent value. Moreover, the evidence linking Pham to the Daly City crime was not strong; the victim, four years prior, had been only "70 percent certain" it was Pham. Unlike Khuu's testimony, the proffered evidence did not link Pham "to the actual perpetration of the crime" in the instant case. (*People v. DePriest,*

supra, 42 Cal.4th at p. 43.) The trial judge found the evidence lacked probative value and would involve undue consumption of time. The court did not abuse its discretion in excluding this evidence, and its exclusion did not deny Bui his constitutional right to present a defense.

IV. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.