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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD CHEATUM,

Defendant and Appellant.

E039722

(Super.Ct.No. FVI017922)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont, Senior Deputy Attorney General, and Lynne G. McGinnis, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant was charged in a consolidated fourth amended information with having committed seven offenses in 2003 and 2004. In counts 1, 2, and 3, defendant was charged with possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 1), carrying a dirk or dagger (Pen. Code, § 12020, subd. (a)(4);[1] count 2), and false personation (Pen. Code, § 529; count 3) on September 28, 2003.

In count 5, defendant was charged with the second degree robbery of Stanley Crabaugh, a pizza delivery man, on December 8, 2003. (§ 211; count 5.) It was further alleged that defendant personally used a firearm in the commission of the robbery. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) In counts 4 and 6, defendant was charged with assaulting Debra Calvelli (Debra) with a deadly weapon, a knife (§ 245, subd. (a)(1); count 4), and making criminal threats on Debra (§ 422; count 6) on December 10, 2003.

In count 7, defendant was charged with attempting to dissuade a witness, Debra, from testifying against him while he was in jail in January 2004, awaiting his preliminary hearing on counts 4 and 6. (§ 136.1, subd. (a)(2); count 7). Finally, it was alleged that defendant had one prior serious felony conviction (§ 667, subd. (a)), which also constituted a prior strike conviction (§§ 667, subds. (b)–(i), 1170.12, subds. (a)-(d)). Defendant admitted the truth of the prior conviction allegation.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

A jury found defendant guilty as charged in counts 1 through 7, and found true the personal use allegation in count 5. Defendant's motion to release juror information for purposes of bringing a motion for a new trial, and defendant's motion for a new trial, were denied. Defendant was sentenced to a total term of 27 years 4 months in prison,[2] and appeals.

Defendant contends the trial court: (1) erroneously granted the People's motion to consolidate counts 1 through 7, which were originally filed in three separate actions, for trial; (2) erroneously refused to allow him to question a witness regarding a rifle found near the scene of the robbery on December 9, 2003, the day after the robbery; and (3) erroneously refused to instruct the jury on lesser-related offenses in counts 3 and 4.

Defendant further contends that: (4) insufficient evidence supports his conviction in count 3 for false personation; (5) the trial court erroneously overruled his objection to the admission of tape recordings of his telephone conversations on grounds they were not properly authenticated; and (6) the trial court erroneously denied his petition to release juror identifying information for purposes of a motion for a new trial.

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[2] Defendant's aggregate sentence included the upper term of five years on count 5 (the robbery conviction), doubled to 10 years based on the prior strike conviction, plus a consecutive 10-year term for the section 12022.53, subdivision (b) personal use enhancement on count 5. Consecutive terms of 16 months (one-third the middle term, doubled) were imposed on counts 1, 2, 3, and 6, and a consecutive term of 24 months (one-third the middle term, doubled) was imposed on count 4. A 16-month term was imposed but stayed on count 6, and a four-year term was imposed but stayed for the section 12022.5, subdivision (a) enhancement on count 5.

Finally, defendant contends (7) the trial court's imposition of the upper term on count 5 and consecutive terms on counts 1 through 5 and 7 violated his federal constitutional right to a jury trial. We conclude that the matter must be remanded for resentencing. In all other respects, we affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

A. *Counts 1, 2, and 3*

Counts 1, 2, and 3, in which defendant was charged with possessing a controlled substance, possessing a dirk or dagger, and false personation, arose from an incident that occurred in Victorville on September 28, 2003. That morning, at around 5:00 or 6:00 a.m., San Bernardino County Sheriff's Deputy Michael Reardon was on patrol and responded to a report of a prowler on the 15000 block of Green Hill Drive. When he arrived at that location, he saw defendant crouched down near a bush in a field next to a house.

As soon as Reardon stopped his patrol vehicle, defendant got up and began to walk toward the nearby house. Reardon asked defendant to come toward him. As defendant approached Reardon, he kept putting his hands in and out of his pockets. Reardon told defendant to keep his hands where he could see them, and directed him to an area near a sidewalk.

Reardon asked defendant whether he had anything on him that was going to poke or stick Reardon. Defendant began to reach into his front pocket. Reardon told defendant to "stop" and place his hands on top of his head. Reardon reached into defendant's front pocket, and retrieved a metal scribe, a tool used by metal fabricators for

placing marks on metal. In Reardon's opinion, the metal scribe was a weapon because it had a tape-wrapped handle, making it easier to grip, and because it was not being carried inside a work pouch or toolbox.

Reardon handcuffed defendant and searched all of his pockets. In defendant's left front pocket, he found a black pouch containing a crystal-like substance, which he suspected was a usable amount of methamphetamine, and a glass pipe. The substance later tested positive for methamphetamine, and weighed .24 grams.

When Reardon took defendant to jail and booked him, defendant had no form of identification on him. When asked for identifying information, defendant said his name was Claudiel Polk, and gave a birth date of October 6, 1976. Claudiel Polk is defendant's cousin, and his date of birth is October 6, 1976.

B. *Count 5*

The robbery charged in count 5 occurred on December 8, 2003. The victim, Stanley Crabaugh, was working as a pizza delivery man for Domino's in Victorville. At around 10:00 p.m., he delivered a pizza to an apartment on Green Hill Drive. As he was returning to his car, he heard someone quickly approaching and yelling in a loud voice. Crabaugh turned and saw a man, whom he later identified as defendant, with a homemade rifle in his hands. Defendant pointed the rifle at Crabaugh and demanded money. Crabaugh complied, handing defendant all the money he had, approximately $40.

Defendant then struck Crabaugh in the side of his head with the rifle butt. He then reached into Crabaugh's pocket for more money, but did not find any. Crabaugh

managed to slide sideways into his car and close the door. As Crabaugh attempted to drive away, defendant broke the driver's side window with the rifle butt, shattering the glass. Then, he struck at the rear passenger window.

Crabaugh identified defendant in court as the robber. At trial, Crabaugh testified that he recalled the robber being about 5 feet 10 inches tall, because when the robber stood in front of him the top of his head reached Crabaugh's nose, and Crabaugh was six feet tall. At trial, defendant stood side to side with Crabaugh, and showed he was four or five inches shorter than Crabaugh or five feet seven or eight inches tall. Crabaugh also identified defendant in a pretrial photo lineup as the robber. At trial, Crabaugh was "[m]ore than 90 percent" certain that defendant was the robber.

C. *Counts 4 and 6*

The assault with a deadly weapon and criminal threats charges in counts 4 and 6, respectively, arose from an incident that occurred on December 10, 2003. On that date, Debra and her husband, Michael Calvelli, were living in an apartment in Victorville. Defendant had lived with the Calvellis in their apartment for several months, but he was not living there on December 10, 2003, because he had been asked to move out.

On December 10, 2003, Debra came out of her bedroom and found defendant sitting in her living room. Her husband was not at home. An altercation ensued during which defendant struck Debra with his closed fist above her left eye. After hitting Debra, defendant verbally threatened her life as he pointed a knife with a four-inch blade at her from a distance of approximately 18 inches. The incident lasted about 10 minutes before defendant abruptly ran out of the apartment.

D. *Count 7*

The charge of attempting to dissuade a witness in count 7 arose while defendant was in custody in the West Valley Detention Center. On January 10 and 12, 2004, defendant made four phone calls, during which he spoke to Keesha, Nichole, Kendra, Mike, and various unidentified individuals. He asked these persons to be sure that "Debbie" (Debra Calvelli) did not appear in court to testify against him at his preliminary hearing. Over defendant's objections, tape recordings of the four phone calls were played to the jury and admitted into evidence.

III. DISCUSSION

A. *Counts 1 Through 7 Were Properly Consolidated for Trial*

Counts 1 through 7 were originally filed in three separate actions. Counts 1, 2, and 3 were filed in one action; counts 4, 5, and 6 were filed in a second action; and count 7 was filed in a third action. The People moved to consolidate the three cases for purposes of trial, and defendant opposed the motion. The trial court granted the motion, reasoning there was some cross-admissibility of the evidence, joinder would not be unduly prejudicial, and three trials with three juries would be an inefficient use of public resources.

Defendant contends the trial court erroneously granted the motion to consolidate counts 1 through 7, for purposes of trial, because the charges were not subject to joinder under section 954. Alternatively, he argues that even if the joinder order was proper when made, reversal is required because the joinder was so prejudicial it deprived him of a fair trial. We reject these claims.

1. Counts 1 Through 7 Were Subject to Joinder Under Section 954

Section 954 permits joinder of offenses of the same class of crimes or connected together in their commission. It provides, in pertinent part, that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

Offenses are "of the same class" if they share common attributes or characteristics, such as assaultive conduct against a person. (*People v. Poggi* (1988) 45 Cal.3d 306, 314, 320 [robbery, rape, burglary, and assault with a deadly weapon properly joined despite different victims].) Thus here, counts 4, 5, and 6 (assault with a deadly weapon, robbery, and criminal threats) were of the same class of crimes because each involved assaultive conduct against persons. In addition, count 2 (possession of a dirk or dagger) was of the same class of crime as count 4 (assault with a deadly weapon) because both involved the common characteristic of possession of a deadly weapon.

Offenses are "connected together in their commission" if they share an element of substantial importance, even if they are committed at different times and places or against different victims. (*People v. Valdez* (2004) 32 Cal.4th 73, 119.) Thus, here, count 7 was connected together in its commission with counts 4 and 6, because defendant's apparent motive for attempting to dissuade Debra from testifying (count 7) was to avoid prosecution for counts of assaulting Debra with a knife and making criminal threats upon her (counts 4 and 6). (*Ibid.* [charge of escape from custody properly joined with two

murder charges, because apparent motive for escape was to avoid prosecution for murder].)[3]

Counts 1, 2, and 3 were also connected together in their commission with count 5 within the meaning of section 954. When defendant was arrested for possessing methamphetamine (count 1) and the dirk or dagger (count 2) on September 28, 2003, he was found hiding in the bushes in the 15000 block of Green Hill Drive. The robbery of Carbaugh (count 5) took place in the same 15000 block of Green Hill Drive, less than nine weeks later, on December 8, 2003. The timing and location of these crimes showed a continuing course of criminal conduct on the part of defendant. This is a common element of substantial importance connecting the crimes together in their commission. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)

2. The Trial Court Did Not Abuse Its Discretion in Joining the Charges

"When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in [ordering the cases consolidated for trial]." (*People v. Mendoza, supra,* 24 Cal.4th at p. 160.) "In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling." (*Id*. at p. 161.)

"""'The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]

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[3] Similarly, defendant's apparent motivation for impersonating his cousin (count 3) upon being booked into jail on counts 1 and 2 was to avoid prosecution on counts 1 and 2.

[¶] 'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever [or consolidate] trial.' [Citation.]"'" (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.)

"'"Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [or] (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges . . . . [Citations.]"' [Citation.]" (*People v. Kraft, supra,* 23 Cal.4th at p. 1030.)

However, section 954.1 "prohibits the courts from refusing joinder strictly on the basis of lack of cross-admissibility of evidence." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.) "Although cross-admissibility ordinarily dispels any inference of prejudice [citation], the absence of cross-admissibility does not by itself demonstrate prejudice. [Citation.]" (*People v. Mendoza, supra,* 24 Cal.4th at p. 161.) To establish prejudice, "defendant must show more than the absence of cross-admissibility of evidence." (*People v. Mayfield* (1997) 14 Cal.4th 668, 721.)

Here, the trial court did not abuse its discretion in granting the People's motion to consolidate counts 1 through 7. First, the evidence on count 7 was cross-admissible with the evidence on counts 4 and 6. Thus, any possibility of prejudice resulting from the consolidation of counts 4 and 6 with count 7 was dispelled. Furthermore, none of the

charges were particularly inflammatory in relation to the others. And, despite defendant's arguments to the contrary, the strength of the evidence on the robbery charge (count 5) was not weak in relation to the evidence on counts 1, 2, and 3, or on counts 4, 6, and 7.

Indeed, the strength of the evidence on all of the charges was comparatively equal. First, Crabaugh identified defendant in a photo lineup *and* in court as the robber.[4] Similarly, counts 1, 2, and 3 were supported by the undisputed testimony of Reardon, Claudiel Polk, and the physical evidence recovered from defendant at the time of his arrest on September 28, 2003. Counts 4, 6, and 7 were supported by the undisputed testimony of Debra, the deputy sheriff who responded to the scene of the assault on Debra, and the tape recordings of defendant's four "jailhouse" phone calls. Thus, none of the evidence on any of the counts was very strong or weak as compared to the evidence on other counts.

3. The Joinder Did Not Prejudice Defendant

"Where, as here, the trial court's ruling on a motion to sever is correct at the time it was made, we must nevertheless reverse the judgment if the '"defendant shows that

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[4] Crabaugh's identification of defendant's photo was not "weak" even though, as defendant points out, Crabaugh was blind in one eye, he misjudged defendant's height by two or three inches, the area where the robbery occurred was poorly lit, and defendant's ears did not necessarily "stick out" or protrude in the way Crabaugh described.

Defendant also argues that the photo lineup shown to Crabaugh was unreasonably suggestive because defendant's photo was the only one without facial hair, and Crabaugh had not described the robber as having any facial hair. But this, too, did not make the robbery charge weak in relation to the other counts.

joinder actually resulted in 'gross unfairness' amounting to a denial of due process." [Citation.]' [Citation.]" (*People v. Grant* (2003) 113 Cal.App.4th 579, 587; *People v. Stitely* (2005) 35 Cal.4th 514, 531.) A defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts. (*Id*. at p. 533; *People v. Grant, supra,* at p. 588.) Here, defendant has not met this burden.

Based on the evidence he possessed methamphetamine in count 1, defendant argues it is likely the jury inferred he had a drug problem, and, on this basis, impermissibly inferred that he was the person who committed the robbery in count 5 to support his drug habit. Similarly, he argues that joining counts 4 and 5 resulted in the erroneous admission of propensity evidence (Evid. Code, § 1101, subd. (a)), because both charges involved evidence that he struck both victims. Specifically, the evidence on count 4 showed he struck Debra with his fist, and on count 5 the evidence showed he struck Crabaugh with a homemade rifle. Thus, defendant argues the evidence on counts 4 and 5 impermissibly bolstered each other.

Although we agree with defendant that the evidence on counts 1, 4, and 5 was not cross-admissible, we do not believe it is reasonably likely that the evidence on any of these individual counts affected the jury's verdicts on any other count. The prosecutor did not urge the jury to find defendant guilty on any count based on evidence admitted on another count. Nor did the trial court refuse to give a limiting instruction on any of the evidence. (Cf. *People v. Grant, supra,* 113 Cal.App.4th at pp. 589-591 [prejudice shown by lack of cross-admissibility together with prosecutorial and instructional error and weak evidence].)

Defendant further argues that Debra's pretrial identification of the same photo of defendant that Crabaugh identified in a separate photo lineup improperly "bolster[ed] the effect of Crabaugh's [photo] identification" and had a "spill-over effect" that strengthened Crabaugh's photo identification of defendant. We disagree. It is not reasonably likely that the two separate photo identifications of defendant affected the verdicts in counts 4 or 5, because the jury heard that Crabaugh and Debra identified defendant's photo in separate photo lineups on separate occasions, and in relation to separate charges. Furthermore, there was no evidence that either witness was aware, at any time, that the other had identified the same photo of defendant.

B. *The Trial Court Properly Excluded Defendant's Proffered Evidence Concerning a Rifle That Was Found the Day After the Robbery of Crabaugh*

Defendant contends the trial court violated his constitutional rights to due process, confrontation, and to present evidence in his defense, and abused its discretion, because it refused to allow defense counsel to question Detective Manni Mendoza, the officer who prepared the photo lineup presented to Crabaugh, about a rifle police found on December 9, 2003, in the general area where Crabaugh was robbed one day earlier, on December 8.

Defendant argues that his questioning of Mendoza would have raised a reasonable doubt whether defendant was the person who robbed Crabaugh. More specifically, he argues Mendoza's testimony would have shown that the rifle found on December 9 was, or at the very least may have been, the same rifle that was used during the robbery of Crabaugh on December 8, fingerprints recovered from the rifle did not match defendant's fingerprints, and because the modus operandi of the two robberies was similar.

We conclude that the trial court properly excluded defendant's proffered evidence concerning the rifle. There was no showing that Mendoza had any personal knowledge concerning the fingerprints recovered from the rifle, or whether they did not match defendant's fingerprints. Moreover, there was no showing that Mendoza could have competently identified the rifle found on December 9 as the same, or at least similar in appearance to, the rifle used in the robbery of Crabaugh on December 8.

1. Background

On cross-examination, defense counsel first asked Mendoza to clarify the distance between the location of the Crabaugh robbery in relation to Debra's apartment. Mendoza testified that Debra's apartment, where she was assaulted on December 10, was approximately 1.8 miles away from where Crabaugh was robbed on December 8.

Counsel then asked Mendoza why he placed defendant's photo in the photo lineup shown to Crabaugh. Mendoza first explained that Debra's identification and description of defendant matched the description of a "similar suspect" in "two different crimes" that occurred in the same general area as Debra's apartment. He further explained that defendant became a suspect in the Crabaugh robbery for three reasons: Crabaugh's description of the robber matched Debra's description, the assault on Debra and the robbery of Crabaugh both involved violent assaults, and both crimes occurred within the same general area.

Counsel then asked Mendoza whether a rifle had been recovered in the same area where the assault on Debra and the robbery of Crabaugh occurred. The prosecutor

objected to the question on relevance grounds. The trial court asked defense counsel for an offer of proof.

Outside the presence of the jury, counsel told the court that there had been another robbery on December 9 in the same general area where Crabaugh was robbed on December 8 and where Debra was assaulted on December 10. Counsel offered to prove that a rifle was recovered near the scene of the December 9 robbery and that fingerprints found on that rifle did not match defendant's fingerprints. He also offered to prove that the two robberies shared the same modus operandi, because in both robberies the robber struck the victim on the head with a rifle and stole $40.

Finally, noting that Crabaugh described the rifle used in the December 8 robbery as "homemade," counsel also offered to prove that the rifle found on December 9 also appeared to be "homemade," because it had a sawed-off barrel, its handle had been removed, and it had a tape-wrapped grip. Thus, counsel's theory was that, based on the fingerprint evidence, the similar modus operandi used in both robberies, and the similar "homemade" appearance of the two rifles, someone other than defendant used the same rifle to rob Crabaugh on December 8 and another person on December 9.

The court refused to allow the evidence on relevance grounds, because counsel's offer of proof was insufficient to show that the rifle found on December 9 was or may have been the same "homemade" rifle used in the Crabaugh robbery. Thus, the trial court sustained the prosecutor's objection.

2. Analysis

A trial court has broad discretion to determine the relevancy of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Heard* (2003) 31 Cal.4th 946, 973.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Wilson* (2006) 38 Cal.4th 1237, 1245.) "'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts . . . .'" (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

Here, the trial court correctly concluded that the proffered evidence concerning the rifle was irrelevant. First, and most fundamentally, defense counsel failed to make a sufficient showing or offer of proof *that Mendoza was competent to testify* the rifle found on December 9 appeared to be the same rifle used in the robbery of Crabaugh on December 8.

Crabaugh was the only witness who saw the rifle that was used in the December 8 robbery, and that rifle was apparently never found. Counsel did not offer to show that Crabaugh could have identified the rifle found on December 9 as the same or similar in appearance to the rifle that was used to rob him, even though counsel had a photo of the rifle found on December 9 and Crabaugh could have compared that photo to his recollection of the rifle used to rob him.

Nor did counsel offer to prove that Mendoza or any other witness had any personal knowledge of the fingerprint evidence found on the proffered rifle, that those fingerprints did not match defendant's fingerprints, or that the December 9 robbery involved a similar

modus operandi in that the victim was struck in the head with a rifle and $40 was taken from him (or her).

For these reasons, the proffered evidence concerning the rifle had no tendency in reason to prove any material fact of consequence to the action (Evid. Code, § 210), that is, that someone other than defendant robbed Crabaugh or, concomitantly, that Crabaugh must have been mistaken when he identified defendant from the photo lineup and in court as the man who robbed him.[5]

Finally, because the evidence concerning the rifle was irrelevant, its exclusion did not deprive defendant of his constitutional rights to a fair trial, confrontation, or presentation of a defense. (See *People v. Robinson, supra,* 37 Cal.4th at pp. 626-627; *People v. Hall, supra,* 41 Cal.3d at pp. 834-835.)

C. *The Trial Court Properly Refused to Instruct the Jury on Lesser-Related Offenses*

Defendant contends the trial court prejudicially erred in refusing to instruct the jury on the "lesser-related" offenses of brandishing a weapon (§ 417) to the charged offense of assault with a deadly weapon in count 4, and giving false information to a police officer (§ 148.9) to the charged offense of false personation in count 3. He

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[5] As the state Supreme Court has observed, "'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.)' [Citation.]" (*People v. Robinson* (2005) 37 Cal.4th 592, 625, fn. omitted, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834; accord, *People v. Lewis* (2001) 26 Cal.4th 334, 373 [trial court reasonably found third party culpability evidence too speculative to be relevant]; *People v. Babbitt* (1988) 45 Cal.3d 660, 682 [evidence is irrelevant if it produces only speculative inferences].)

maintains that the trial court's refusal to instruct on these lesser-related offenses deprived him of his federal constitutional right to present a defense in counts 3 and 4. Thus, he argues, his convictions in counts 3 and 4 must be reversed.

Defendant acknowledges that in *People v. Birks* (1998) 19 Cal.4th 108, 136 and footnote 19 (*Birks*), the state Supreme Court held that a defendant does not have a federal constitutional right to instructions on lesser-related offenses, unless the prosecution agrees the trial court may give such instructions. And, here, the prosecution did not agree to give any lesser-related offense instructions on counts 3 or 4.

Nevertheless, defendant argues that the distinction made in *Birks* between lesser-related offense instructions and defense instructions "is a distinction without a difference from the standpoint of [a] defendant's right to present a defense," particularly where, as here, his defense on counts 3 and 4 was to admit the lesser-related offenses and deny guilt of the crime charged. This argument was addressed and rejected in *Birks*, however (*Birks, supra,* 19 Cal.4th at pp. 117-138), and we are bound by the decision in *Birks* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Defendant further argues the trial court's failure to instruct on the lesser-related offenses prevented the jury from passing on two "crucial" questions. These were: (1) whether defendant did not assault Debra with a deadly weapon, but only displayed a weapon in a rude, angry, or threatening manner (§ 417); and (2) whether defendant did not falsely personate Claudiel Polk (§ 529) because he did not subject Polk to criminal prosecution (§ 529), but provided false information to a police officer (§ 148.9).

This argument confuses a defendant's constitutional right to present evidence in his defense (see, e.g., *People v. Robinson, supra,* 37 Cal.4th at pp. 626-627) with a right, which a criminal defendant does not have, to unilaterally demand that the jury be instructed on lesser-related offenses to charged offenses (*Birks, supra,* 19 Cal.4th at p. 136). Nothing prevented defendant from presenting evidence or arguing that he was not guilty of the crimes charged in counts 3 and 4, and that acquittal was therefore appropriate. (*Id*. at p. 136, fn. 19.)

D. *Substantial Evidence Supports Defendant's False Personation Conviction (Count 3)*

Defendant contends that insufficient evidence supports his conviction for false personation of his cousin, Claudiel Polk, in count 3, because there was no evidence he committed an "other act," beyond falsely personating his cousin, that may have subjected his cousin to criminal prosecution. (§ 529, cl. 3.) We conclude that substantial evidence supports the conviction.

1. Applicable Law

"'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the judgment, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In considering this question, an appellate court must view the evidence in the light most favorable to the judgment and presume in support of the judgment the existence of every fact the trier could have reasonably deduced from the evidence. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.)

As pertinent, section 529 provides: "Every person who falsely personates another in either his private or official capacity, *and in such assumed character* . . . : [¶] . . . [¶] 3. Does any *other act* whereby, *if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution*, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, *or whereby any benefit might accrue to the party personating*, or to any other person[.] [¶] Is punishable by . . . imprisonment in the state prison. . . ." (Italics added.)

2. Analysis

Defendant claims he did not commit any "other act" within the meaning of section 529, clause 3 that is, any act *other than* falsely personating his cousin. We disagree. Defendant committed two "other acts" within the meaning of the statute: possessing methamphetamine and possessing the dirk or dagger as charged in counts 1 and 2. By committing these acts under the "assumed character" of his cousin, defendant exposed his cousin to criminal liability for the crimes. (§ 529, cl. 3.) Concomitantly, defendant may have also realized a benefit to himself: avoiding prosecution for the crimes. Thus, crimes committed under the assumed name of another are among the types of "other acts" the statute contemplates: acts that, if committed by the person falsely personated, would subject either that person or another to prosecution or other harm. (See *Lee v. Superior Court* (2000) 22 Cal.4th 41, 45-47 (*Lee*) [one purpose of § 529, cl. 3 is to prevent harm to persons falsely personated and society as a whole].)

Defendant relies on *People v. Cole* (1994) 23 Cal.App.4th 1672 (*Cole*) to support his claim that he committed no "other act" within the meaning of the statute. In *Cole*, it

was held that the defendant's provision to an arresting officer of another person's middle name after the defendant had already given the officer that person's first and last names and date of birth, did not constitute an "other act" beyond false personation within the meaning of section 529, clause 3. Instead, the defendant's additional acts were merely part of the defendant's continuing act of false personation. Thus, the defendant's section 529, clause 3 conviction was reversed. (*Cole, supra,* at pp. 1674-1676.)

It is significant that, in *Cole*, the court was not called upon to consider whether the crimes the defendant committed under the assumed name of another, namely, burglary and attempted escape, constituted an "other act" or acts within the meaning of the statute. The People, relying on *People v Robertson* (1990) 223 Cal.App.3d 1277 (*Robertson*), argued only that the defendant's additional act of providing the other person's middle name and birth date, after having first provided that person's first and last names, was a "compounding act" which was sufficient to violate section 529, clause 3. (*Cole, supra,* 23 Cal.App.4th at pp. 1675-1676.)

In *Robertson*, the defendant falsely impersonated his brother when he was arrested for stealing a truck. Thereafter, the defendant continued to falsely represent himself as his brother at arraignment, and signed his brother's name on a booking form and a release form. The defendant's acts resulted in his brother's unjust incarceration for over one year. (*Robertson, supra,* 223 Cal.App.3d at pp. 1279, 1282.) The defendant's sole contention in *Robertson* was that section 148.9 barred application of section 529, clause 3 on the facts of the case, because the former statute was more specific and covered the

only act defendant committed: falsely representing himself to a police officer as another person.[6]

The court in *Robertson* upheld the defendant's section 529, clause 3 conviction, noting that section 529, clause 3 had a number of elements not included in section 148.9, including the "other act" element. Regarding the "other act" element, the court said "[the] initial falsehood on appellant's part was compounded many times by what happened thereafter." (*Robertson, supra,* 223 Cal.App.3d at pp. 1281-1282.) The court also found it significant that defendant's false personation had resulted in his brother's unjust incarceration. (*Id.* at pp. 1282-1283.) The court in *Cole* distinguished *Robertson* on the grounds "[i]t was abundantly clear from the record in *Robertson* that [the] defendant engaged in acts in addition to the act of providing false identification to a police officer." (*Cole, supra,* 23 Cal.App.4th at p. 1676.)

The court in *People v. Chardon* (1999) 77 Cal.App.4th 205 (*Chardon*) upheld a defendant's section 529, clause 3 conviction on the grounds that the defendant, in addition to falsely representing herself as her sister to a police officer, signed her sister's name on a traffic citation's promise to appear, thus exposing her sister to criminal liability for the traffic citation and for failing to appear at the scheduled hearing. (*Chardon, supra,* at pp. 209, 212.) The court rejected the defendant's argument, based on

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[6] Section 148.9, subdivision (a) states: "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . , upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor."

Cole, that her act of signing her sister's name to the citation was part of her original act of false personation. Instead, the court observed that "section 529 only requires that there *be* an additional act by the perpetrator which exposes the impersonated person to liability or benefits the perpetrator or another." (*Id.* at pp. 212-213.)

Although *Cole*, *Robertson*, and *Chardon* did not address the issue whether a crime committed under the assumed name of another constitutes an "other act" within the meaning of section 529, clause 3, none of these cases are inconsistent with our conclusion. As the *Chardon* court observed, the statute only requires an additional act beyond the act of false personation that exposes a person to harm or benefits the perpetrator or another. (*Chardon, supra,* 77 Cal.App.4th at pp. 212-213.) And here, defendant committed an additional act by committing the crimes charged in counts 1 and 2. Indeed, a person's act of committing a crime or crimes under the assumed name of another necessarily exposes that person to criminal liability and potentially benefits the defendant. That is all the statute requires.

Our conclusion is bolstered by the state Supreme Court's decision in *Lee, supra,* 22 Cal.4th 41. There, the court observed that section 529 has two purposes: preventing harm to the person falsely personated and ensuring the integrity of judicial and governmental processes. Thus, in *Lee*, the court held that the term "another," as used in section 529, clause 3, includes a deceased person, because the false personation of deceased persons can result in harms to others. (*Lee, supra,* at pp. 45-47.) Although the court in *Lee* did not address the meaning of the phrase "other act," its interpretation of the "full scope" of section 529 is consistent with our conclusion. *(Lee, supra*, at pp. 45-47.)

Indeed, the commission of an act beyond false personation, which exposes another person to harm or which may result in a benefit to the defendant or anyone else, is one of the key elements that distinguishes a section 529, clause 3 violation from a violation of section 148.9, subdivision (a). Section 148.9, subdivision (a) is violated by giving false identifying information to a police officer; it does not require an additional act that may result in harm to a person or in a benefit accruing to the defendant or another person.

E. *Defendant's Recorded Calls From the Jail Were Properly Authenticated*

Defendant contends the trial court prejudicially erred in overruling his objection to the admission of four recorded telephone calls he made from jail on the grounds the four recordings were not properly authenticated. We conclude that the objection was properly overruled because the recordings were properly authenticated.

1. <u>Background</u>

On direct examination by the People, Mendoza testified that he had had occasion to speak to defendant. He had listened to between one and twenty phone calls defendant made from the West Valley Detention Center, and he recognized the voice in the phone calls as defendant's.

Deputy Michael Precup later testified that he was a "custody specialist" assigned to the West Valley Detention Center. He specialized in inmate recording and other recording systems. His duties included upkeep of the surveillance equipment in the jail.

Precup testified that when an inmate is booked into the jail, he is assigned a 10-digit number which is used as a booking and personal identification number (PIN). In order to make a phone call from the jail, an inmate keys his PIN into the phone. An

inmate's phone calls are automatically recorded and stored for 90 days. Precup was able to retrieve recordings of an inmate's phone calls and place them on a compact disc (CD). He would do so by inputting the inmate's PIN, the dates of the phone calls, asking for complete or incomplete calls, and pressing a button.

Precup further testified that he made a CD of defendant's calls from the jail. He identified the People's exhibit 14 as an original CD he made of defendant's phone calls from the jail. Each call had a watermark on the recording. If any recorded call had been tampered with, the tampering could be detected by playing the recording of the call and checking to see whether the watermark was still present.

Precup identified the People's exhibit 13 as a true and correct copy of exhibit 14. He had listened to the calls on exhibit 13, and verified that they still had the watermark and had not been tampered with. He also identified four calls on exhibit 13 as having been made by defendant on January 10 and 12, 2004. These calls were denoted as 1A0810BM and 1A0801BW, made on January 10, 2004, and 1C0710AL and 1C0810CR, made on January 12, 2004. All four calls were made to phone number 760-243-5727. This was the contact number defendant gave in the event anything happened to him while he was in custody.

After Precup testified, the People rested subject to the admission of exhibits and the playing of four calls made on January 10 and 12, 2004. The defense objected to the admission of any of the calls on the grounds they were hearsay, lacked foundation, and were not properly authenticated. The prosecutor responded that the four calls, which were marked as People's exhibits 9, 10, 11, and 12, came directly from "the CD" (exhibit

13), and that defense counsel knew that because he had the transcript of the "20 or 30" calls that were on exhibit 13. The trial court overruled the objections without comment, and exhibits 9 through 12 were played for the jury.

After the four calls were played, defense counsel reiterated his objections outside the presence of the jury. He argued: "There was no verification that the information contained on those tapes was accurate, that it was unaltered, that the tapes were even recordings of what was on those CDs, and so Deputy Precup's testimony, there is no corroboration between everything he testified about and those tapes. Those tapes essentially came out of thin air.

"At the point that she put those tapes on and played them, Deputy Precup didn't stick around to listen to the tapes and say, yes, that's the same information that I listened to on the CDs or anything like that, so I am making a motion to strike everything in the record with regard to the tape and have the jury admonished to disregard everything that they heard in the tape and everything that . . . they read in the transcript."

In response, the prosecutor noted that Mendoza had listened to defendant's recorded calls and recognized defendant's voice on the calls, and that Precup testified that all of defendant's jailhouse calls were on exhibit 13. The trial court again overruled the defense objections, noting: "Any way you look at it, there is sufficient foundation for the jury to make a determination as to what this is." The court told defense counsel he was free to argue that the four calls played as exhibits 9 through 12 were not made by defendant or that it was not defendant's voice on the recording.

2. Analysis

A “writing” must be authenticated before it may be received in evidence. (Evid. Code, § 1401, subd. (a).) A “writing” includes a CD or tape recording. (*Id*., § 250.) “Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is . . . .” (*Id.*, § 1400.) Thus, a writing is authenticated “by testimony or other evidence ‘that it accurately depicts what it purports to show.’ [Citation.]” (*People v. Mayfield, supra,* 14 Cal.4th at p. 747.)

Defendant claims exhibits 9 through 12 were erroneously admitted because they were not properly authenticated as true and correct copies of four calls defendant made from jail on January 10 and 12, 2004. He acknowledges that exhibit 13 was authenticated, and that the four calls played as exhibits 9 through 12 *purportedly* came from exhibit 13. But, he argues, “[t]here was absolutely no testimony from any witness concerning the manner in which the four exhibits played for the jury were produced.” We disagree.

Contrary to defendant’s claim, exhibits 9 through 12 were properly authenticated. Precup testified that exhibit 13 consisted of a true, correct, and untampered copy of all phone calls defendant made from the West Valley Detention Center, including four calls defendant made on January 10 and 12, 2004. Precup identified the four calls as denoted by numbers 1A0810BM, 1A0801BW, 1C0710AL, and 1C0810CR. The four calls that were played to the jury as exhibits 9 through 12 were denoted by the same identifying numbers.

This evidence was sufficient to sustain a finding that exhibits 9 through 12 were what they purported to be. (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll. § 1400, p. 628 [writing is authenticated by evidence sufficient to sustain finding of authenticity].) And, as the trial court observed, it was for the jury to decide whether exhibits 9 through 12 were, in fact, calls defendant made from the jail on the dates indicated. (*Ibid.* ["[t]he trier of fact independently determines the question of authenticity"].)[7]

F. *Defendant's Petition to Release Juror Identifying Information Was Properly Denied*

Defendant contends the trial court erroneously denied his posttrial petition to release juror identifying information. We conclude that the petition was properly denied because defendant did not make a prima facie showing of good cause to justify a hearing on whether the release of the requested information was warranted.

1. Applicable Law

Access to juror identifying information in criminal cases is governed by Code of Civil Procedure sections 206 and 237. Under these statutes, a defendant is entitled to the release of juror identifying information if he "'*sets forth a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial*. . . . [¶]

[7] Contrary to defendant's suggestion, exhibits 9 through 12 did not appear to have been altered; thus, the prosecution was not required to account for any alteration. (Evid. Code, § 1402.)

Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by a disclosure of the juror information as a matter of right in each case.'" (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093-1094, italics added, quoting *People v. Rhodes* (1989) 212 Cal.App.3d 541, 551-552.)

2. Analysis

After the jury returned its guilty verdict, defendant petitioned the trial court to release juror information for the purpose of communicating with jurors to develop a motion for a new trial. (Code Civ. Proc., §§ 206, subd. (g), 237, subd. (b).) In support of the petition, defendant submitted the declaration of his trial counsel, Attorney Brandon A. Wood.

In his declaration, Attorney Wood stated that he, his investigator Mike Jones, and the prosecutor had spoken with several jurors following the verdict. Counsel also stated he had personally spoken with the jury foreman "specifically regarding the identification issues surrounding the [r]obbery charge. The jury foreman indicated that the entire jury was convinced that a [r]obbery had occurred[,] however, they were very confused about whether or not Mr. Cheatum committed the [r]obbery. The jury foreman informed me that he read the jury instruction pertaining to the [r]obbery count and the jurors began to match up the evidence presented with the elements. The jury foreman said, 'there were facts to support the elements, so we knew we had to vote guilty.' *I inquired about the identification issue further and the jury foreman stated [paraphrasing], there wasn't anything in that instruction about if he was the guy who did it; we just figured that was*

you all's problem to figure out. [¶] *Based on the foregoing, it is clear that juror misconduct occurred in this case in that the jurors did not find beyond a reasonable doubt that Mr. Cheatum was the person who committed the crime alleged*." (Italics added.)

Defendant maintains that he made a sufficient showing, through the declaration of his trial counsel, Attorney Wood, that jury misconduct occurred "in that the jury did not deliberate and find beyond a reasonable doubt that [defendant] was the person who committed the [robbery] as the jury was required to do in the instructions submitted to them."

We need not decide this question because, more fundamentally, defendant made no showing that "'diligent efforts were made to contact the jurors through other means'" (*Townsel v. Superior Court, supra,* 20 Cal.4th at p. 1093), that is, through means other than the court's release of juror identifying information. Attorney Wood's declaration did not state that he or his investigator, Mike Jones, asked any jurors for their contact information and that this information was refused. The petition could have been properly denied on this ground alone.

G. *Remand for Resentencing*

Defendant contends that the trial court's imposition of the upper term sentence on count 5 and consecutive sentences on counts 1 through 5 and 7 violated his Sixth and Fourteenth Amendment right to a jury trial, because these sentences were imposed by the trial court based on its own factual findings, rather than on findings by a jury beyond a reasonable doubt. In support of these claims, he relies on the United States Supreme

Court's recent decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*).

In *Cunningham*, the high court held that the imposition of an upper term sentence under California's determinate sentencing law (DSL) (§ 1170 et seq.), based on a judge's finding of fact other than the fact of a prior conviction, violates the defendant's Sixth and Fourteenth Amendment right to a jury trial. The high court further held that, under the DSL, the middle term is the maximum sentence a court may impose based on its own factual findings, other than the fact of a prior conviction.

The *Cunningham* court thus extended to the DSL the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*). As applied to the DSL, the *Apprendi* rule states: "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham, supra,* 127 S.Ct. at p. 860.)

First, we reject defendant's claim that the trial court's imposition of consecutive terms, based on its own factual findings, violated his right to a jury trial. *Cunningham* did not address the constitutionality of a judge's decision to impose concurrent or consecutive sentences under the DSL.

Moreover, a defendant is not entitled to a have a jury determine the facts a court may rely upon in imposing a concurrent or consecutive term under the DSL because, unlike the DSL's statutory presumption in favor of the middle term (§ 1170, subd. (b)), there is no statutory presumption in favor of concurrent or consecutive sentencing under

the DSL (§ 669). Instead, section 669 imposes an affirmative duty on a trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. A defendant who commits multiple crimes is entitled to the trial court's exercise of this discretion, but he is not entitled to a statutory presumption in favor of concurrent sentencing. This "makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely v. Washington* (2004) 542 U.S. 296, 309 [124 S.Ct. 2531, 159 L.Ed.2d 403].)

Regarding defendant's upper term sentence on count 5, defendant argues that this court must either reduce the sentence to the middle term or remand the matter for resentencing in light of *Cunningham*. The People maintain that the upper term sentence must be upheld, because it was based, at least in part, on the prior conviction exception or, more broadly, the recidivism exception to the *Apprendi* and *Cunningham* rules. (*Almendarez-Torres v. Untied States* (1998) 523 U.S. 224, 226 [118 S.Ct. 1219, 140 L.Ed.2d 350]; *Cunningham, supra,* 127 S.Ct. at p. 860; *People v. McGee* (2006) 38 Cal.4th 682, 700-703.)

In imposing the upper term, the court relied on numerous factors in aggravation including, but not limited to, the defendant's prior convictions or recidivism. The court said, "Okay. I have heard the trial in the case. I believe that considering the circumstances, not simply the prior violent felony convictions but the numerous cases faced by Mr. Cheatum and his long history and the fact that his crimes are of increasing significance, I believe that it is appropriate to impose the aggravated term . . . ." To the extent the trial court relied on its own factual findings concerning the circumstances of

the robbery in imposing the upper term (Cal. Rules of Court, rule 4.421(a)), it violated *Cunningham* and defendant's right to a jury trial.[8]

Furthermore, we cannot say that this *Cunningham* error was harmless beyond a reasonable doubt (*Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466], even if, as the People argue, *all* of the *other* factors the trial court relied upon fall under the recidivism exception to *Apprendi* and *Cunningham* -- a question we do not and need not decide (see *People v. McGee, supra,* 38 Cal.4th at pp. 700-709 [discussing scope of recidivism exception]). This is so because, even if the other factors the court relied upon fall within the recidivism exception, the record does not reflect the amount of weight the trial court placed on these factors as opposed to the circumstances of the robbery. Nor does the record indicate whether the trial court would have imposed the upper term based solely on the fact of defendant's prior convictions, had it realized at the time of sentencing that it could not constitutionally rely on its own factual findings concerning the circumstances of the robbery. (Cf. *People v. Calhoun* (2007) 40 Cal.4th 398, 406 [trial court did not violate *Cunningham* in relying on multiple victim factor in imposing upper term, where jury necessarily found there were multiple victims].)

The matter must therefore be remanded for resentencing.

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[8] The probation report listed several circumstances in aggravation related to the commission of the robbery (Cal. Rules of Court, rule 4.421(a)), including that: (1) the robbery involved great violence, threat of violence, threat of great bodily harm, cruelty, viciousness, or callousness; (2) defendant was armed with a weapon at the time of the commission of the robbery; (3) the victim was particularly vulnerable; and (4) the manner in which the crime was carried out indicated planning and sophistication.

IV. DISPOSITION

The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Hollenhorst
J.