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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LATASHA INEZ ROUGELY et al.,

Defendants and Appellants.

2d Crim. No. B294505
(Cons. w/ Nos. B294518
& B294579)
(Super. Ct. No. 2018007143)
(Ventura County)

Latasha Inez Rougely, Shaquille O'Neal Gordon, and Jyree Renard Kaiser appeal from the judgment after a jury found them guilty of residential burglary (Pen. Code,[1] § 459; count 1), conspiracy to commit residential burglary (§ 182, subd. (a)(1); count 2) and grand theft of a firearm (§ 487, subd. (d)(1); count 3). The trial court found true that: (1) Rougely suffered one prior "strike" conviction (§§ 667, subds. (c) & (e), 1170.12, subds. (a) &

[1] Further unspecified statutory references are to the Penal Code.

(c)), one prior serious felony conviction (§ 667, subd. (a)) on counts 1 and 2, and two prior prison terms (§ 667.5, subd. (b)); (2) Kaiser suffered one prior strike conviction (§§ 667, subds. (c) & (e), 1170.12, subds. (a) & (c)), one prior serious felony conviction (§ 667, subd. (a)), and one prior prison term (§ 667.5, subd. (b)); (3) Gordon suffered two prior strike convictions (§§ 667, subds. (c) & (e), 1170.12, (a) & (c)), two prior serious felony convictions (§ 667, subd. (a)), and two prior prison terms (§ 667.5, subd. (b)).

The trial court sentenced Rougely and Kaiser to 17 years in state prison (upper term of 6 years for count 2, doubled pursuant to the three strikes law (§ 667, subd. (e)), and a consecutive five-year term for the prior serious felony enhancement (§ 667, subd. (a)(1))). The court stayed the sentence for count 1 pursuant to section 654, but imposed a concurrent middle term of four years for count 3. The court sentenced Gordon to 35 years to life in state prison (25-years-to-life for count 2 pursuant to his two prior strike convictions (§ 667, subd. (e)(2)(a)), and consecutive 10-year terms for the two prior serious felony enhancements (§ 667, subd. (a)(1))). The court stayed a 25-year-to-life sentence for count 1 pursuant to section 654, but imposed a concurrent middle term of four years for count 3.

Appellants raise several arguments including a *Batson*/*Wheeler*[2] challenge, evidentiary issues, and sentencing issues. We remand for resentencing, but otherwise affirm.

**BACKGROUND**

Around 3:30 p.m. on July 9, 2017, M.J. returned to her house in Thousand Oaks. She noticed boot marks on her

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 *(Wheeler*).

front door; the shutters were "thrown open"; and the house was a "big mess." She called 911.

Ventura County Sheriff's Deputies responded to the call. The deputies tried entering the house through the front door, but the deadbolt was jammed. The deputies entered through a rear sliding door. The metal rim of the door had "scrape marks" and "pry marks" and was "very badly dented in." The deputies found a side window with the screen removed and "pry marks" on the window. They also observed the rear laundry room door was "kicked in" and "forcefully pushed open." The deputies concluded the suspects attempted to enter through the front door, the rear sliding door, and the window, but ultimately entered the house through the laundry room door.

The house had been "completely ransacked." M.J. and her husband (collectively the Victims), noticed items were missing from their home, including: jewelry worth about $15,000, a GoPro camera, an assault rifle in a camouflage case, and one pillowcase.

Their neighbor across the street testified that he arrived at his house around 3:27 p.m. He saw a "young African-American man" wearing a white t-shirt get into a white Buick Sedan. The neighbor followed the Buick and took a picture of the license plate. The neighbor also had eight surveillance cameras, including one pointed toward the Victims' home.

### ***Investigation***

#### *Surveillance Video*

Sergeant Jason Louis and Deputy Andja Marco of the Ventura County Sheriff's Office investigated the crime. Louis reviewed the neighbor's surveillance video "5 to 20 times," and Marco reviewed the video "[b]etween 15 and 20" times. The video

showed Rougely getting out of the Buick Sedan around 3:00 p.m., walking to the Victims' front door, and returning to the car. Gordon wearing a blue shirt, and Kaiser wearing a white shirt, got out of the car and approached the front door. After kicking the front door, they entered the back yard through a side gate. Minutes later, they came through the side gate carrying a camouflage bag and a white pillowcase.

*Rougely's Arrest and Buick/Apartment Search*

Louis reviewed Department of Motor Vehicles (DMV) information. The Buick was registered to Fallon Tooks. Based on Tooks's DMV photo and information, Louis concluded Tooks "did not appear to be the person that was in the [surveillance] video."

Louis searched the law enforcement database and found a police contact involving Tooks and Rougely. Louis viewed photos of Rougely from DMV records and social media accounts. She appeared to match the description of the suspect getting out of the Buick at the Victims' home. Louis obtained a phone number for Rougely, then obtained a search warrant to retrieve information from Rougely's phone service provider: (1) subscriber information (i.e., account creator and person paying bills), (2) the signals sent from the cell phone company to the phone (called "pings") showing the general vicinity of the phone in real time, and (3) call detail records showing a historical record of the towers the phone used in the past.

The search revealed no subscriber information associated with the phone number, but there was an IMEI number—a unique "security number on a phone." Louis reviewed "pings" from July 20 to July 25, from which he narrowed the location of the phone to a cross street in Los Angeles. Louis went

to the location and found the Buick in the back lot of an apartment building.

Deputies conducted surveillance of the apartment building and saw Rougely enter and leave one of the apartment units multiple times a day. The deputies then obtained a search warrant for the apartment.

On August 3, Louis and several other deputies stopped the Buick when Rougely was driving it. The deputies ordered Rougely out of the car and told her to place her cell phone on the trunk. She complied.

During the encounter and ensuing arrest, Louis "was able to look at" and "get a good visual on" Rougely. He opined that she was "the same person that [he] had seen in the surveillance footage." Marco also opined that Rougely was the woman in the video.

Louis retrieved Rougely's cell phone. The IMEI number on the back matched the one he obtained from the phone service provider. Louis also searched the Buick's trunk and found a GoPro camera and case.

Marco reviewed the images in the GoPro camera. It contained photos of the Victims and a video of Rougely. The Victims later identified the camera and case as their own.

Marco searched Rougely's apartment and found a white pillowcase with jewelry inside. The Victims later identified the jewelry and pillowcase as their own.

*Rougely's Cell Phone*

Louis obtained a search warrant for Rougely's cell phone. He conducted a "phone download" of "all the files" on the phone, including text messages, a call log, and internet searches for the period from July 1 to August 17.

The search revealed multiple photos of Rougely taken seven hours before the burglary. Rougely appeared to be wearing the same clothing and hairstyle as in the surveillance video. There were also several photos from July 17 that depicted the Victims' assault rifle laying on top of the camouflage bag.

The search of Rougely's text messages/call log revealed that at 11:46 a.m. on the date of the burglary, she texted Gordon's brother, "[t]ell yo bro im bout to pull up." An hour later, Rougely texted a contact listed as "Queen" to ask if she could borrow her car "for about a hour or two" because she had "sum important business . . . Gotta do." At 1:34 p.m., Rougely searched the internet for "wealthiest cities near me." About 15 minutes later, she called Gordon (listed as "Fly" in her phone), and spoke with him for seven minutes.

At 3:00 p.m. and 3:07 p.m., Rougely called Gordon. At 3:07 p.m., Rougely texted Gordon, "Yall good." Ten minutes later, Rougely searched the internet for "best police scanner." About five minutes later, Rougely searched the internet for "best police scanner near me."

Around 7:00 p.m., Kaiser texted Rougely to ask whether she was coming back, and he called her three times. Around 11:00 p.m., Kaiser texted Rougely asking her about the "t[y]pe of gun." Rougely responded "Hold on," and then searched the internet for "mascom rifles" and other similar search terms. Kaiser texted Rougely, "Send me a pic ov da gun." She replied that "Its at da house" and that she was in Hawthorne. She then conducted internet searches related to rifles and gun shops. On July 29, Rougely texted a photo of the assault rifle laying on top of a camouflage bag to two different phone numbers.

*Kaiser and Gordon's Arrest*

Louis obtained Kaiser's phone number from Rougely's phone contacts. He searched the law enforcement database, and found a match for an address associated with Kaiser. He also found Kaiser's Facebook profile and obtained a search warrant to search Facebook records. The Facebook search revealed that about 13 hours before the burglary, Kaiser posted photos of himself and Gordon standing next to each other. Kaiser was wearing a white shirt and white shoes with a "red swoosh" on them. In the photo, he appeared taller than Gordon. Gordon was wearing "dark color" shoes with "white bottoms." These items of clothing appeared to be the same as those worn by the male suspects.

Louis opined that Kaiser was the taller individual wearing the white shirt in the surveillance video, and Gordon was the individual wearing the blue shirt. Marco also opined that Kaiser was the individual in the white shirt and Gordon was the individual in the "darker" shirt.

Louis searched Kaiser's "friends" on his Facebook account and found Gordon's Facebook account (using the moniker "Fly Guy Siete"). Louis sent the photograph of Kaiser and Gordon to a police officer who had regular contact with Gordon. The officer identified Gordon in the photograph. The officer also identified Gordon's cell phone number as the same one Rougely contacted during the burglary. The officer testified that Gordon "resemble[d]" the suspect wearing the dark shirt in the surveillance video.

On August 17, Louis arrested Gordon and Kaiser. Louis obtained a search warrant for the phone service provider

for Kaiser and Gordon's phone numbers to obtain their call detail records and other information.

*Call Detail Records*

A crime analyst analyzed the call detail records for Rougely, Kaiser, and Gordon's cell phone numbers. Based on the records, the analyst testified that Rougely and Gordon's phones connected to cell towers within three miles of the Victims' home around 3:00 p.m. on July 9. The call detail records also show that before and after the burglary, Rougely, Kaiser, and Gordon's phones were in Los Angeles.

## DISCUSSION

### Batson/Wheeler *Motion—All Appellants*

Rougely, Gordon, and Kaiser contend the prosecution violated their constitutional rights when it used a peremptory challenge to excuse the only Black juror on the panel. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 16; *Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) We disagree.

*Peremptory Challenge*

R.M. was the only Black person on the jury panel. She disclosed she had a driving under the influence (DUI) conviction from the year before. When asked if she "[g]ot that taken care of," and whether it was "all behind" her, R.M. responded, "Yes." R.M. also said that she was not "mad at the police," could be "fair to both sides," and would listen to the evidence.

Rougely's counsel asked R.M. about her DUI conviction. R.M. said that she pled guilty to the offense and that she did not hold "anything against" appellants for taking their

cases to trial. She explained she pled guilty in her case because "she "knew what [she] did was wrong."

Gordon's counsel asked R.M. how she felt "about being a judge of the facts of this case." R.M. responded that it was a "privilege" and "definitely an experience that [she]'d like to take on." When Gordon's counsel asked her if she would have "any hesitation rendering a verdict of guilty" if the prosecutor met his burden of proof, she answered, "No."

The prosecutor asked R.M. whether her DUI was in Ventura County. R.M. said, "Yes." The prosecutor asked what agency "pulled [her] over." R.M. replied, "It was the sheriff." R.M. stated that she felt like she was treated "completely fairly throughout the process," and that she "came into court and dealt with it accordingly." When the prosecutor asked if she had "hard feelings with the sheriff's office" or "with my office," R.M. answered, "No." The prosecutor asked whether she thought it was "possible that people can plead not guilty and be guilty." R.M. responded, "Yeah." The prosecutor used his seventh peremptory challenge to excuse R.M.

Batson/Wheeler *Motion*

Rougely, Gordon, and Kaiser brought a *Batson*/*Wheeler* motion. They argued the prosecutor dismissed R.M. because of her race. They noted that R.M. had a "great background," was "'a perfect juror'" for both sides in this matter, and did not say "anything remotely close to disqualifying her." They argued: "We have three African-American defendants, and we have a sea of non-African-American jurors, and when the first one comes up, she's dismissed."

The trial court found a prima facie showing of discrimination and allowed the prosecutor to explain his reasons.

The prosecutor explained: "My concern . . . was specifically that just a year ago, [R.M.] got a DUI. My belief is she's currently on probation." He further explained that she "had interactions with the police and my office because of that DUI." Additionally, the prosecutor said that when he asked her whether she thought people that pled not guilty can be guilty, "she hesitated before she answered the question." The prosecutor also said that when Gordon's counsel asked if she would have "any hesitation rendering a verdict of guilty" if the prosecutor met his burden of proof, she "hesitated" before answering "No." Gordon and Kaiser's counsel stated that they did not notice any hesitation by R.M. before answering the questions.

The trial court denied the *Batson*/*Wheeler* motion, stating:

> I did say at the bench that I was shocked that [the prosecutor] excused that juror. However, jurors may be excused on a party's belief in whether or not they'll be a fair and impartial juror without any reference to a particular class of people, and I think in this case, while I and perhaps others may think that [the prosecutor's] observations might be questionable, I don't think they're unreasonable under the circumstances, and, for that reason and no other, the defense motion is denied.

*Juror TJ11*

Later the same day, Juror TJ11[3] was called to the jury box. During voir dire, Juror TJ11 stated she was arrested for a DUI nine years earlier, and pled no contest. The prosecutor

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[3] The record does not disclose Juror TJ11's race, but appellants assert that she was White.

asked in what county she was arrested. Juror TJ11 said, "L.A. I guess. It was Redondo Beach." The prosecutor asked if she was "no longer on probation." She responded that she was not on probation, and she "guess[ed] it [lasted] three years." Juror TJ11 also stated that she felt she was treated fairly by law enforcement and had no hard feelings against Los Angeles police officers. The prosecutor accepted her on the panel.

*Analysis*

The state and federal Constitutions prohibit the use of peremptory strikes to remove prospective jurors based on race or gender. (*Batson*, *supra*, 476 U.S. at p. 89; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) The *Batson*/*Wheeler* inquiry consists of three stages: First, the defendant must make a prima facie case by showing the totality of the relevant facts raises an inference of discriminatory purpose in the exercise of a peremptory challenge. (*People v. Scott* (2015) 61 Cal.4th 363, 383.) Second, the burden shifts to the prosecutor to explain the reason for excusing the juror by offering "permissible, nondiscriminatory justifications." (*Ibid.*) Third, the trial court must decide whether the defendant has established that there was "purposeful discrimination." (*Ibid.*) "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the [defendant]." (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).)

We presume that the prosecutor used peremptory challenges in a constitutional manner. (*People v. O'Malley* (2016) 62 Cal.4th 944, 975 (*O'Malley*).) When the defense makes a prima facie showing that the prosecution excused a prospective juror based on impermissible criteria, the prosecutor must provide a "'clear and reasonably specific explanation'" of "'legitimate reasons'" for exercising the challenge. (*Batson*,

*supra*, 476 U.S. at p. 98, fn. 20; *People v. Winbush* (2017) 2 Cal.5th 402, 434 (*Winbush*).) "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Arias* (1996) 13 Cal.4th 92, 136.) A prospective juror may be excused based on facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (*Winbush*, at p. 434.)

"At the third stage of the *Wheeler*/*Batson* inquiry, 'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at p. 613.) The critical question is whether the defendant has proved purposeful discrimination because the prosecutor's reasons are so """implausible or fantastic""" as to signal a pretext for discrimination. (*People v. Johnson* (2015) 61 Cal.4th 734, 755 (*Johnson*).) The third stage "focuses on the subjective genuineness of the reason, not the objective reasonableness." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.)

"Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justification for exercising peremptory challenges "'with great restraint.'" [Citation.]" (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

Substantial evidence supports the trial court's determination. The prosecutor provided the following race-neutral reasons for dismissing R.M.: (1) she was convicted of a

DUI "just a year ago" and was likely still on probation; (2) she had "previous interaction with the police and" the Ventura County District Attorney's Office for that offense; (3) the prosecutor believed she hesitated when answering the questions of whether she believed people that pled not guilty can be guilty; and whether she would hesitate in rendering a guilty verdict if the prosecution met its burden of proof. These reasons were not """implausible or fantastic."""  (*Johnson*, *supra*, 61 Cal.4th at p. 755; see *People v. Lomax* (2010) 49 Cal.4th 530, 575 [juror's prior arrest is an accepted race-neutral reason]; see also *People v. Cox* (2010) 187 Cal.App.4th 337, 359 [hesitation in responding to questions about bias was an acceptable race-neutral reason].) The trial court found the proffered reasons to be not "unreasonable under the circumstances." We defer to the trial court's credibility determinations. (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

Appellants contend the prosecutor's acceptance of Juror TJ11 shows that his peremptory challenge of R.M. was racially motivated. Appellants raised their *Batson*/*Wheeler* claim before Juror TJ11 was questioned, so the trial court did not conduct a comparative juror analysis. (*O'Malley*, *supra*, 62 Cal.4th at p. 975.) Regardless, we must conduct a comparative juror analysis "when reviewing claims of error at *Wheeler*/*Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons." (*Lenix*, *supra*, 44 Cal.4th at p. 607.) There are, however, "inherent limitations" to doing so on a "cold appellate record." (*Id*. at p. 622.)

These "inherent limitations" are apparent here. The record does not disclose the race of Juror TJ11. We are bound by

the record before us, and we are unable to meaningfully review the claim of error without an adequate record. (*People v. Barton* (1978) 21 Cal.3d 513, 517; see *People v. Bryant* (2019) 40 Cal.App.5th 525, 542 [declining to engage in a comparative juror analysis without an adequate record].)

Even assuming Juror TJ11 was White, we conclude there was no error. Although R.M. and Juror TJ11 both had prior DUI offenses, Juror TJ11's DUI occurred nine years prior, whereas R.M.'s DUI occurred one year prior. (See *People v. Stevens* (2007) 41 Cal.4th 182, 196 [prosecutor's proffered reasons were not pretextual where a seated juror had an eight-year-old DUI conviction and the stricken juror had a "substantially more recent" DUI conviction].) The prosecutor reasonably believed R.M. was still serving probation for that offense. Moreover, R.M. was arrested by the Ventura County Sheriff's Office (there were several Ventura County Sheriff's deputies who testified at trial) and was prosecuted by the Ventura County District Attorney's Office. In contrast, Juror TJ11 was arrested (and presumably prosecuted) in Los Angeles County. These are "material differences" which support the prosecutor's race-neutral reasons to excuse R.M. (*O'Malley*, *supra*, 62 Cal.4th at p. 977.)

***Deputies' Testimonies—Rougely and Gordon***

At trial, Louis opined that Rougely was the woman in the surveillance video; Gordon was the "shorter individual wearing the blue shirt"; and Kaiser was the "taller individual wearing the white shirt." Marco also opined that the woman in the video was Rougely, the man in the white shirt was Kaiser, and the man in the "darker shirt" was Gordon. Rougely and Gordon contend the trial court erred when it admitted Louis and Marco's lay opinion identifying Rougely, Gordon, and Kaiser in

the video pursuant to Evidence Code section 800.[4] We conclude the testimony was properly admitted.

"A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.) '[T]he identity of a person is a proper subject of nonexpert opinion . . . .'" (*People v. Leon* (2015) 61 Cal.4th 569, 601 (*Leon*).) We review the trial court's ruling for abuse of discretion. (*Id*. at p. 600.)

In *Leon*, our Supreme Court determined that an officer's identification of the defendant in surveillance videos of two robberies was proper lay opinion testimony. (*Leon*, *supra*, 61 Cal.4th at p. 600.) There, the officer testified that he became familiar with the defendant's appearance through the officer's participation in the arrest and from subsequently seeing the defendant "nearly 10 times." (*Id*. at p. 601.) The officer also noticed the jacket the defendant wore during the arrest looked like the jacket in one video. (*Ibid*.) The court held the officer's familiarity with the defendant's appearance "around the time of the crimes" was sufficient foundation for the lay opinion. (*Ibid*.) In so holding, the court rejected the defendant's claim that the officer's personal knowledge was insufficient because he did not have contact with the defendant before the crimes. Moreover, the court stated that "[q]uestions about the extent of [the officer]'s familiarity with defendant's appearance went to the weight, not the admissibility, of his testimony." (*Ibid*.)

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[4] Kaiser does not separately raise a claim regarding the admissibility of the deputies' lay opinion, but raises the claim in his sufficiency of evidence claim. (At pp. 20-21, *post*.) We therefore discuss Kaiser's identification in this section.

The trial court did not abuse its discretion here. Louis and Marco became familiar with appellants' appearances "around the time of the crimes." (*Leon*, *supra*, 61 Cal.4th at p. 601.) During the course of the investigation, Louis reviewed the surveillance video "5 to 20 times." He saw photos of Rougely from the DMV database and through her social media accounts. Louis was also present during Rougely's arrest, where he "was able to look at" and "get a good visual on" her. Louis looked at multiple photos of Rougely taken on her cell phone hours before the burglary, and he testified that she appeared to be wearing the same clothing and hairstyle as in the video. Louis also saw and identified Rougely in court. Louis saw photos of Gordon and Kaiser on their social media accounts, including photos that were taken 13 hours before the burglary. Louis testified that he was able to compare certain items of clothing and their relative heights in the photographs and the video. Louis also participated in Gordon and Kaiser's arrest, and saw and identified them in court.

Marco had personal knowledge of appellants' appearances through the investigation and court proceedings. Marco watched the surveillance video "between 15-20" times. During the investigation, Marco looked at videos of Rougely on the GoPro camera. Marco testified she also looked at the Facebook photos of Gordon and Kaiser. Moreover, Marco transported Gordon from Los Angeles to Ventura County after his arrest. She also saw Kaiser in court on August 17 and on "numerous occasions" thereafter.

Louis and Marco's testimony was helpful to the jury because they were able to highlight their "'awareness of [certain] physical characteristics'" such as clothing worn on the day of the

burglary. (*Leon*, *supra*, 61 Cal.4th at p. 601.) Louis and Marcos's identification also assisted the jury to the extent that the quality of the footage was unclear or "grainy." (See *People v. Ingle* (1986) 178 Cal.App.3d 505, 513 [lay opinion testimony is admissible to aid the trier of fact where a photo is "unclear," a defendant's appearance has changed, or where a photo is inconclusive as to identity].)

Rougely and Gordon argue the deputies' personal knowledge of appellants' appearances was insufficient. But this issue "went to the weight, not the admissibility" of the evidence. (*Leon*, *supra*, 61 Cal.4th at p. 601.) It was the jury's duty to evaluate and weigh the lay opinion. "[B]ecause the surveillance video was played for the jury, jurors could make up their own minds about whether the [people] shown [were] defendant[s]." (*Ibid*.)

The trial court also instructed the jurors on lay opinions, stating that they "may but are not required to accept those opinions as true or correct" and that they may give "whatever weight you think appropriate." The court also instructed the jury to "[c]onsider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based." We presume the jury followed the court's instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

***Prior Burglary Convictions—Gordon***

Gordon contends the trial court erred when it admitted evidence of two prior burglaries pursuant to Evidence Code section 1101, subdivision (b). We conclude that any error in admitting such evidence was harmless.

*Prior Burglaries*

In 2012, K.D. was at home in Diamond Bar. Around noon, he was upstairs in his office when he heard someone knock on his front door. He looked out the window to see a car parked in front of his house. He heard a loud noise and saw Gordon walking up his stairs. Gordon ran out of the house when he saw K.D. K.D. later noticed that his front door was kicked open.

In 2014, M.M. was at a Malibu home to do landscaping work. A side gate was open. When he walked into the backyard through the side gate, Gordon and a woman ran past him. They got into a vehicle driven by a third person, and drove away. The screen to the rear sliding door was cut and there were pry marks on the door.

*Relevant Proceedings*

Before trial, the prosecution moved to introduce evidence of the prior burglaries pursuant to Evidence Code section 1101, subdivision (b). The trial court granted the motion and admitted evidence of the 2012 and 2014 burglaries "to prove specific intent, [modus operandi] and/or identity." The court found the probative value of the evidence outweighed the prejudicial value. It denied the prosecutor's motion to introduce evidence of an uncharged burglary on July 21, 2017 (two weeks after the current offense).

The trial court instructed the jury that it could only consider the evidence of the prior burglaries if the prosecution proved them by a preponderance of evidence. If the burden was met, the jury could only consider the evidence for the limited purposes of identity, intent, motive, and plan or common scheme. The court further admonished the jury not to consider the

evidence for any other purpose, such as concluding Gordon had a bad character or predisposition to commit crimes.

*Analysis*

Evidence that a defendant had committed prior bad acts is admissible if it is relevant to prove some fact other than the person's character or disposition, such as intent, motive, common plan or scheme, and identity. (Evid. Code, § 1101, subds. (a) & (b).) To admit such evidence, the trial court must determine that: (1) the evidence is relevant to "prove the issue[s] upon which it is offered," (2) the issues to be proved are material, and (3) Evidence Code section 352 does not require exclusion of the evidence. (*People v. Schader* (1969) 71 Cal.2d 761, 775.) To be relevant, there must be some degree of similarity between the prior bad act and the charged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The "least degree of similarity . . . is required in order to prove intent," and the "greatest degree of similarity is required . . . to prove identity." (*Ibid*.)

Gordon contends evidence of his prior burglaries should have been excluded because they lacked sufficient similarities to the instant offense, and the evidence was more prejudicial than probative. We need not resolve these issues, however, because any error in admitting that evidence was harmless. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Here, there was overwhelming evidence to support the jury's convictions. Rougely's call log revealed that about three hours before the burglary, she texted Gordon's brother: "[t]ell yo bro im bout to pull up." Before and after the burglary, Gordon's cell phone was located in Los Angeles, where he resided. A cell phone analyst testified that Gordon's phone connected to

cell towers within three miles of the Victims' home in Thousand Oaks around the time of the burglary. There was surveillance footage of Gordon participating in the burglary. Louis, Marco, and another officer who had regular contact with Gordon, identified Gordon in the video. Based on this evidence, it is not reasonably probable the jury would have rendered a more favorable verdict absent any error admitting evidence of the prior burglaries. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

***Cumulative Error—Gordon***

Gordon argues cumulative error. Because we have determined that his claims lack merit or that error, if any, was harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

***Substantial Evidence—Kaiser***

Kaiser contends there was insufficient evidence to prove he participated in the burglary. We uphold the jury's conviction if it is supported by substantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We view the evidence in the light most favorable to the prosecution and "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*Ibid.*)

Substantial evidence supports the jury's finding that Kaiser participated in the burglary. The evidence shows that Kaiser communicated with Rougely 12 times on the day of the burglary. The jury was shown surveillance video of the burglary, and Louis and Marco identified Kaiser in the video. The next day, Kaiser contacted Rougely to ask about the "t[y]pe of gun" and asked for a picture of the gun. He also sent her a photo similar to photos he posted on his Facebook account 13 hours before the burglary. The photos show him standing next to

Gordon with both of them wearing items of clothing similar to clothing shown in the surveillance video.

Kaiser argues that Deputies Louis and Marco's lay opinion testimony identifying him as the suspect in the video was "based on conjecture and speculation," "which is not sufficient." But as discussed, the deputies' lay opinions were admissible (*ante*, pp. 14-17), and we do not reweigh or reevaluate the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) In any event, the jurors were shown the video and were in a position to evaluate the accuracy of the deputies' opinions.

***Prior Felony Enhancements—All Appellants***

Rougely, Gordon, and Kaiser contend that remand is warranted to allow the trial court to exercise its discretion to strike the five-year prior serious felony conviction enhancements. (§ 667, subd. (a).) At the time of their sentencing, the trial court lacked discretion to strike the enhancement in the interest of justice. Effective January 1, 2019, Senate Bill No. 1393 amended sections 667 and 1385 to remove that prohibition. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) The parties agree the amendment applies to appellants because their cases are not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; *In re Estrada* (1965) 63 Cal.2d 740, 744.)

The Attorney General argues that remand is unwarranted because the court "clearly indicated" that it would not have struck the enhancements. A trial court must exercise "informed discretion" when sentencing a defendant. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).) If the court proceeds on the assumption that it lacks discretion, remand for resentencing is required unless the record "clearly indicates" that

the court would have reached the same conclusion had it been aware of its discretionary powers. (*Ibid*.)

Here, the record does not "clearly indicate[]" that the trial court would not have imposed the enhancements if it was aware of its discretion to strike them. When the court sentenced appellants, it mentioned the seriousness and sophistication of the crimes and noted the lack of mitigating factors. But it did not clearly indicate its intent to impose the maximum sentence. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) Notably, the court selected a mid-term sentence for count 3, rather than an upper term. Moreover, when it sentenced Rougely, the court mistakenly believed it had discretion to impose a consecutive term for count 3, but it nonetheless imposed a concurrent term. Furthermore, when Kaiser's counsel alerted the court that imposition of the enhancement would be discretionary effective January 2019, the court did not state it would impose the enhancement even if it had discretion to do so. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) Remand is therefore required. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391.)

***Section 654—All Appellants***

Rougely, Gordon, and Kaiser contend the trial court erred when it imposed a concurrent sentence for count 3. They argue the court should have stayed the sentence pursuant to section 654. The Attorney General concedes but requests that we modify the sentence rather than remand to the trial court.

We agree the trial court erred. Because we remand for resentencing on the prior felony enhancement, we direct the trial court to stay the sentence for count 3.

### ***Racial Bias in Sentencing—Kaiser***

Kaiser contends the trial court's selection of the upper term for count 2 (conspiracy) was motivated by racial bias. The record does not support his contention.

The trial court provided race-neutral reasons for imposing the upper term on count 2. The court noted that "this is a serious situation and serious in part because the defendant was released from prison just days before this happened." The court "considered the aggravating factors" and stated that it did not "think there's any mitigating factors at all." It found that "this is a serious crime that indicated planning, sophistication, and it was an organized group to accomplish this conspiratorial scheme to commit residential burglary in an area that was many dozens of miles from where defendant resides." The manner in which the crime was carried out is a proper basis for imposing an upper term. (See Cal. Rules of Court, rule 4.421(a)(8).)

Kaiser argues the trial court's consideration of the fact that he chose a location many miles from his residence shows racial bias because Thousand Oaks, as opposed to South Los Angeles, is a "predominantly White neighborhood." Any inference of racial bias is speculative. There is nothing on the record that shows the selection of the upper term was racially motivated. Because Kaiser has not carried his burden to demonstrate racial bias, we presume the judgment was correct. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

### ***Fines and Fees—Kaiser***

Kaiser contends that the trial court erred when it imposed a $5,000 restitution fine (§ 1202.4, subd. (b)), a $534.48 booking fee (Gov. Code, § 29550), and a $10 burglary fine (§ 1202.5) without determining his ability to pay them. (*People v.*

*Dueñas* (2019) 30 Cal.App.5th 1157, 1172 (*Dueñas*).) We conclude Kaiser forfeited his claims because he did not object below.

First, Kaiser forfeited his challenge to the restitution fine. Section 1202.4, subdivision (d) provides that if the restitution fine is in excess of the statutory minimum amount, "the court shall consider any relevant factors, including, . . . the defendant's inability to pay . . . . A defendant shall bear the burden of demonstrating [their] inability to pay."

Here, the trial court imposed a $5,000 restitution fine, which is above the statutory minimum ($300). Kaiser had an opportunity to object and bring to the court's attention any factors relevant to his ability to pay, but he did not do so. Accordingly, he forfeited his claim. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 [forfeiture where the defendant did not object to a restitution fine above the statutory minimum].)

Second, Kaiser forfeited his claim to the booking fee (Gov. Code, § 29550). Government Code section 29550 permits a county, "whose officer or agent arrests a person" to recover a booking fee from the arrested person. (*Id*. at subd. (c).) "When the court has been notified . . . that a criminal justice administration fee is due the agency . . . [¶] . . . A judgment of conviction *may impose* an order for payment of the amount of the criminal justice administration fee by the convicted person." (*Id*. at subd. (d)(1), italics added.)

Unlike the fines and fees discussed in *Dueñas*, *supra*, 30 Cal.App.5th at page 1163, the booking fee was not mandatory. The trial court had discretion to impose it. (Gov. Code, § 29550, subd. (d)(1).) Thus, Kaiser was required to object in order to

preserve his claim on appeal. (See *People v. McCullough* (2013) 56 Cal.4th 589, 596.)

Lastly, Kaiser's failure to object to the burglary fine forfeited his claim. Section 1202.5, subdivision (a) imposes a fine for a defendant convicted of certain crimes, including burglary (§ 459). The statute provides that the court determine the defendant's "ability to pay all or part of the fine . . . In making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any other fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution." (§ 1202.5, subd. (a).)

Because the trial court was required to consider Kaiser's ability to pay the burglary fine, Kaiser was required to object in order to preserve the claim on appeal. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [trial court's failure to make a finding as to a defendant's ability to pay a burglary fine does not require reversal if the defendant did not object in the trial court].)

**DISPOSITION**

We remand to the trial court with directions to hold a hearing to exercise its discretion to impose or strike the prior serious felony enhancements. Appellants have the right to assistance of counsel at the hearing(s), and, the right to be present. The court shall also stay the sentences for count 3 pursuant to section 654. Upon resentencing, the clerk of the court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Shaquille O'Neal Gordon.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant Jyree Renard Kaiser.

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