

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESUS GOMEZ

Petitioner

v.

STATE OF CALIFORNIA

Respondent

On Petition for Writ of Certiorari
to the Supreme Court of the State of California

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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APPENDIX TO
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DOCUMENTS

	<u>Pages</u>
App. A: California Court of Appeal Opinion on direct Appeal (July 9, 2018)	1-16
App. B: California Supreme Court Order denying review (September 12, 2018)	17

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS GOMEZ,

Defendant and Appellant.

A147167

(San Mateo County
Super. Ct. No. SC083131A)

Jesus Gomez appeals a judgment of conviction for one count of first degree burglary (Pen. Code, § 460, subd. (a)) and one count of resisting a peace officer (Pen. Code, § 148). He contends that the trial court erred in admitting evidence of two prior burglary convictions for the purposes of proving identity and to impeach his credibility when he took the stand at trial. We see no prejudicial error and shall affirm.

I. BACKGROUND

A. Procedural History and Admission of Prior Crimes Evidence

On April 24, 2015, Gomez was charged with one count of first degree residential burglary in violation of Penal Code section 459 (Count 1) and one count of resisting a peace officer in violation of Penal Code section 148, subdivision (a)(1) (Count 2). The felony information for Count 1 alleged that

Gomez had sustained three prior serious felony convictions that were strikes¹ (Pen. Code, §§ 667, subds. (a)(1) & (b)-(j), 1170.12, subds. (b) & (c)), that he had served a prison term (Pen. Code, § 667.5), and that he had committed the offense while on parole for a serious or violent felony (Pen. Code, § 1203.085, subds. (a) & (b)).

Trial began on August 31, 2015. Prior to trial, the prosecution filed a motion under Evidence Code section 1101, subdivision (b)² (1101(b) motion) to admit evidence of six uncharged prior burglaries Gomez committed for the purposes of showing intent, motive, lack of mistake, and identity. In its motion in limine, the prosecution also requested that evidence of Gomez's three prior convictions (which were also three of the uncharged burglaries) be admitted for purposes of impeachment pursuant to section 788 should Gomez choose to testify. In response, Gomez filed his own motions in limine, one seeking to exclude the prior charged and uncharged offenses pursuant to section 1101, subdivision (b) and another one seeking to exclude any convictions offered for impeachment under *People v. Beagle* (1972) 6 Cal.3d 441 (*Beagle*) and section 352.

As to the 1101(b) motions, the court admitted evidence of a residential burglary committed on August 13, 2012 on Serra Drive in South San Francisco (the Serra Drive burglary) to show identity. At a hearing on the motions concerning other crimes evidence, the court considered the facts of all the burglaries individually and reasoned that evidence of the Serra Drive burglary was admissible to prove identity because that burglary in particular, unlike the other "generic" burglaries, was "strikingly similar to the charged offense." The

¹ The prosecution amended the information on the first day of trial to charge the case as a two-strike case instead of three. The court then granted Gomez's motion to bifurcate trial on the prior conviction allegations, on which Gomez had waived his right to a jury trial.

² All further statutory references are to the Evidence Code unless otherwise designated.

court made this finding based on two similarities: 12-inch Nike shoe prints and forced entry. Weighing the prejudicial and probative value of the other crimes evidence under section 352, the court again concluded that the combination of factors “create[d] a sufficient . . . degree of characteristics to suggest that the person that committed [the Serra Drive burglary] is the same person that committed [the charged offense].”

The court also allowed evidence of a felony conviction for a March 16, 2012 burglary on Fairfax Way in South San Francisco (the Fairfax Way burglary) to be admitted for purposes of impeachment should Gomez choose to testify. The court agreed with the prosecution that allowing just the Serra Drive burglary in under section 1101, subdivision (b) and no other burglary convictions admitted for impeachment would “leave the triers of fact with a false impression that [Gomez’s] veracity is impacted potentially only by a single act of residential burglary,” when he had in fact committed several acts. The court therefore indicated that “[s]hould the defendant elect to testify, the People will be allowed to impeach him with a residential burglary that is distinct from the residential burglary whose facts they will be allowed to present through 1101(b).”

B. Trial Evidence

1. Current Offense

On March 27, 2015 at 9 p.m., Christopher Cattaneo returned to his ground floor condominium on Mission Road in South San Francisco. Immediately, he noticed that a living room window, which he had left ajar, was open all the way with the screen pulled off. He also saw muddy footprints leading from the window into the hallway. A man then emerged from one of the bedrooms and ran toward the front door. Cattaneo chased him and managed to grab his sweatshirt, but the man escaped. Cattaneo watched the man run toward Commercial Avenue.

Cattaneo then called the police. Cattaneo had not seen the man’s face or skin, but he described the intruder as a man with a stocky build, approximately

six feet tall and 200 pounds, wearing a black hooded sweatshirt, a baseball hat, blue jeans, and black and white Nike shoes.

When the police arrived, the responding officers inspected the condominium with Cattaneo. Lifts of the muddy footprints measured 12 inches and had a tread pattern consistent with Nike Air Jordans or Dunks. There were additional muddy footprints in Cattaneo's bedroom in front of his dresser, the top drawer was open, and \$750 in cash was missing.

In the living room, the screen of the window through which the burglar entered was cut. A DNA sample was taken from the windowsill, but the results did not identify Gomez as a possible contributor. The prosecution later pointed out through expert testimony, however, that a person wearing gloves would not typically leave DNA after touching a surface. Further, even with an ungloved hand, touching a surface does not always leave DNA.

On the ground outside the window, the police recovered a backpack. The ground there was wet due to sprinklers that had been operating earlier that evening, but only the part of the backpack that had been in contact with the ground was wet.

The contents of the backpack included Gomez's driver's license, birth certificate, and social security card, as well as other personal documents. They listed two addresses for Gomez in South San Francisco: 3736 Fairfax Way and 846 Commercial Avenue. In a front pocket of the backpack was a white Samsung phone containing "selfie" photographs of Gomez, photographs of his car, and a photograph of six pairs of shoes identified as Nike Air Jordans or Dunks or a similar brand. Clothing items were arranged neatly in the inner pockets. Other contents included a pair of latex gloves, three men's watches, a pair of sunglasses, a set of keys, two single dollar bills, and a small bag of marijuana.

Based on the identifying information found in the backpack, the officers on the scene alerted others via radio to search for Gomez. The alert included

broadcasting Gomez's photograph to police officers patrolling South San Francisco. A police dog followed the scent of the burglar to the 900 block of Commercial but lost the scent at Chestnut and Commercial. At about 10:30 p.m., Officer Andrew Sargent, driving a patrol vehicle, saw Gomez standing alone, directly underneath a streetlamp, at the intersection of Chestnut and Mission, about a three-minute walk from the Cattaneo residence. Sargent attempted to speak to him, but Gomez took off running and escaped the officer and others in pursuit by jumping over a fence.

Officer Sargent and another officer, Officer Andrew Baggetta, described Gomez as wearing a white t-shirt, jeans, and white shoes and testified they were "100 percent sure" the suspect they chased was Gomez. The confidence of the officers was based in part on prior contacts with Gomez: Officer Sargent had had a prior contact with Gomez in 2014 and also immediately recognized him when he pulled up a picture of Gomez in the database prior to spotting him at the intersection of Chestnut and Mission. Officer Baggetta also testified that he had had prior contacts with Gomez and had looked at his photograph prior to spotting him during the chase.

Two days later, Gomez went to the police station in South San Francisco, and an officer placed him under arrest. The officer who booked Gomez into custody stated that Gomez was wearing red, black, and white shoes, size 10.5, with soles that measured 12 inches. Gomez had fresh scratches on his arm, stomach, and under his right eye, but no bruising or swelling anywhere.

2. Defense

Gomez took the witness stand at trial and denied committing the charged offense. He presented the following defense.

In March 2015, Gomez's primary residence was his grandmother's house at 846 Commercial Avenue, but he often spent the night elsewhere. For that reason he carried his personal items in the backpack found at the scene of the burglary.

On the afternoon of Thursday, March 26, 2015, the day before the Cattaneo residence was burglarized, four gang members stole the backpack from Gomez while he was walking on Centennial Trail to his fiancée's house. As he neared the San Bruno station of Bay Area Rapid Transit (BART), Gomez was knocked down by a punch to the back of his head. Once he was on the ground, the four men continued kicking and punching him, and he sustained injuries on his arm, stomach, and under his eye.

In addition to his backpack, the robbers took items off his person including his wallet, money in his pocket, and his iPhone.³ The Samsung phone in his backpack was empty when he was robbed, so Gomez found it strange that the police found photographs of him and his belongings on that phone when it was recovered. Gomez did not report the attack because he feared retaliation from the gang members.

On the day of the charged offense, Friday, March 27, 2015, Gomez took BART from South San Francisco to his mother's house in Antioch, where he spent the weekend. He said when he initially got to his mother's house, no one was home, but his sisters came home around four or five o'clock in the evening. While he was there, his fiancée told him that the police had recovered his backpack and were looking for him. He returned to South San Francisco on Sunday to go to the police station, where he was arrested.

3. Prior Burglaries

The prosecution presented evidence that Gomez committed the Serra Drive burglary in August 2012. The Serra Drive burglary occurred between 6 a.m. and 4 p.m., when the resident returned home to find the rear door to his garage and a pet door kicked in, leaving a 12-inch footprint. A firearm was missing from the bottom drawer of a dresser in one of the bedrooms. Two days

³ Testimony from Gomez's fiancée contradicted some of his statements. For example, she recalled that when he arrived at her house after he was robbed, he still had his iPhone and that he left her house with his backpack on the day of the charged offense. She later stated that she got confused with the dates.

after the crime, an officer contacted Gomez in South San Francisco and found the stolen firearm in his possession. Gomez claimed he had found the firearm in the bushes outside a liquor store. The officer later went to Gomez's bedroom at 3736 Fairfax Way and found size 10.5 Nike Air Jordans.

At the time of the Serra Drive burglary, Gomez at first denied to police that he had been involved, but, after an officer pointed out the similarities between his shoes and the footprint found on the door at the Serra Drive residence, Gomez admitted to burglarizing the house with a friend. He explained that he had jumped the fence, kicked the door open, and taken the firearm from the dresser.

While testifying at trial in this case, Gomez admitted to committing the Serra Drive burglary in August 2012. For that offense, he was convicted and sentenced to custody until his release on July 12, 2014. Gomez also admitted that he had a prior conviction for the Fairfax Way burglary.

The jury was instructed that it could consider evidence of the Serra Drive burglary for determining the identity of the burglar in the charged offense at the Cattaneo residence, and further, that it could consider evidence of both the Serra Drive burglary and the Fairfax Way burglary for the purposes of deciding Gomez's credibility as a witness.

After five days of trial, the jury found Gomez guilty of the charged offenses. The court entered the verdict and, following a bench trial, found all the alleged enhancements true. Gomez was sentenced to a total prison term of 17 years. This timely appeal followed.

II. DISCUSSION

A. Admission of Evidence of Prior Burglary Convictions

1. *Legal Principles*

Three related sets of principles governing other crimes evidence are relevant to our admissibility analysis in this case. First, and most fundamentally, section 1101, subdivision (a) "prohibits admission of evidence of a person's

character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.” But under the so-called “signature conduct” exception, section 1101, subdivision (b) provides that this rule does not prohibit admission of “evidence that a person committed a crime” when such evidence is relevant to establish some fact other than the person’s character of disposition, such as identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400.)

The requisites of this exception are quite demanding. Comparing the charged crime to the evidence of a crime committed on some prior occasion—referred to in the section 1101, subdivision (b) case law as an “uncharged” crime (for which the defendant may or may not have suffered a conviction)—“‘[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.’ (*People v. Lynch* (2010) 50 Cal.4th 693, 736.) ‘The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.’ (*People v. Thornton* (1974) 11 Cal.3d 738, 756.) ‘The inference of identity, however, “need not depend on one or more unique or nearly unique common features: features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.”’ ” (*People v. Edwards* (2013) 57 Cal.4th 658, 711, italics omitted.)

Second, even if section 1101, subdivision (a) does not require the exclusion of evidence of uncharged crimes, such evidence may nevertheless be inadmissible under section 352 if its prejudicial effect outweighs its probative value. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) “‘Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice.’ ” (*People v. Griffin* (1967) 66 Cal.2d 459, 466.) “Therefore, the law places other restrictions on its admissibility. . . . [T]he probative value of this evidence must outweigh its prejudicial effect. [Citations.] Since ‘substantial

prejudicial effect [is] inherent in [such] evidence,’ uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded. [Citation.]” (*People v. Thompson* (1980) 27 Cal.3d 303, 318.)

Third, the naked fact of a prior felony conviction—without any of the underlying circumstances of the crime—is always potentially admissible against a testifying defendant for impeachment purposes under article I, section 28, subdivision (d) of the California Constitution. (*People v. Williams* (2009) 170 Cal.App.4th 587, 607-608.) Under section 1101, subdivision (c), the value of proffered prior misconduct evidence “to support or attack the credibility of a witness” must be considered. While “[s]ection 1101 limits the admission of prior misconduct to prove conduct on a particular occasion. . . . it does not ‘affect[] the admissibility of evidence offered to support or attack the credibility of a witness.’ [Citations.]” (*People v. Turner* (2017) 13 Cal.App.5th 397, 408.)

“Generally speaking, [any] evidence ‘that has any tendency in reason to prove or disprove the truthfulness of a [witness’s] testimony’ is admissible. (§ 780; see also § 210.)” (*People v. Turner, supra*, 13 Cal.App. 5th at p. 408.) Although “[n]ot all past misconduct has a ‘tendency in reason to prove or disprove’ a witness’s honesty and veracity” (*ibid.*), under section 788 “[a] witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion to exclude it under section 352.” (*ibid.*), just as the admissibility of evidence under section 1101, subdivision (b) is always subject to discretionary exclusion under section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306.)

On appeal, a trial court’s admission of prior misconduct evidence, like all admissibility determinations, is reviewed with deference. Thus, we apply the abuse of discretion standard, viewing the record in the light most favorable to the

trial court's ruling. (*People v. Edwards, supra*, 57 Cal.4th at p. 711.) And, of course, all the foregoing is subject to the overarching principle that only prejudicial error warrants reversal. If error is found, a miscarriage of justice requiring reversal "should be declared only when the court," after an examination of the entire cause, including the evidence, is of the "opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.''" (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Analysis

Gomez contends that the trial court erred in admitting evidence of the Serra Drive burglary under section 1101 to establish identity. The gist of his argument is that the Serra Drive burglary and the burglary forming the underlying conviction in this case "do not display a pattern and characteristic so unusual and distinctive as to be like a signature." He also contends it was error for the court to admit both the Serra Drive and Fairfax Way burglaries for impeachment purposes.

The trial court admitted the evidence based on the 12-inch Nike shoe prints and forced entry. As Gomez pointed out in the trial court and continues to argue on appeal, however, forced entry is not sufficient to meet the "signature" criteria because most residential burglaries will involve forced entry of some kind. Although the shoe print is somewhat more distinctive, Nike shoes measuring 12 inches in length could potentially be found in a number of crimes.

There were indeed many dissimilarities between the crime for which Gomez was tried here and the Serra Way crime. The Serra Way offense occurred during daytime hours, whereas the burglary in the underlying case occurred at night. The forced entry at Serra Way was through a door that was kicked in forcefully; the forced entry in the current case was through a popped window screen in a window that was left ajar. In addition, although property was taken in both, the property taken in the Serra Way burglary was a gun.

whereas in the charged burglary the property taken was \$750 in cash. Despite the many differences between these crimes, however, the court saw enough similarity in the mode of commission to “create a sufficient . . . degree of characteristics to suggest that the person that committed [the Serra Drive burglary] is the same person that committed [the charged offense].”

Whether the circumstances of the Serra Drive burglary were sufficiently distinctive to warrant admission of all the details surrounding it under section 1101, subsection (b) seems fairly debatable, particularly with the added filter of section 352. But regardless, we see no prejudice even assuming error in the admission of that evidence. By taking the stand and offering an alibi defense together with an attempted explanation of the presence of his backpack at the Cattaneo residence, Gomez put his credibility squarely at issue and, as a result, exposed himself to being impeached with his convictions for *both* the Serra Drive and the Fairfax Way burglaries. Gomez does not dispute that burglary is a crime of moral turpitude. “[B]urglary remains in all cases the fundamentally deceitful act of entering a house or other listed structure with the secret intent to steal or commit another serious crime inside. A felony conviction of such an act demonstrates a ‘readiness to do evil’ and hence necessarily involves moral turpitude.” (*People v. Collins* (1986) 42 Cal.3d 378, 395, fn. omitted.) That means both prior burglary convictions were admissible under section 788 as long as they were not otherwise excludable under section 352. (*People v. Castro, supra*, 38 Cal.3d at p. 307.)

There is no basis for us to say it was an abuse of discretion under section 352 to allow at least one of these admitted felony convictions to be placed before the jury.⁴ No matter what, therefore, when the jury rendered its verdict in this

⁴ As a consideration to be taken into account along with the weighing process called for by section 352, our Supreme Court explained in *Beagle, supra*, 6 Cal.3d 441 that “[a] special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown,

case it would have known of prior conduct by Gomez leading to at least one, and probably two, convictions for crimes similar to the charge in this case. In the counterfactual scenario that the *Watson* prejudice test requires us to imagine—a hypothetical trial in which Gomez was impeached with one or more of the prior burglary convictions while the details surrounding the Serra Drive burglary were excluded—we see no reasonable possibility the outcome would have been different from what it was.

This was not a close case. The circumstantial evidence of guilt was strong and Gomez's defense depended entirely on the jury finding his uncorroborated testimony credible. Physically, Gomez matched the description of the intruder in height, weight, and clothing. The muddy footprints found in the Cattaneo residence were consistent with the size and tread of his shoes. His backpack was found outside the scene of the burglary and appeared untampered with, although he claimed robbers had stolen it the day before. Inside the backpack was a cell phone containing photographs of Gomez and his possessions, in contrast to his testimony that his cell phone was empty when it was stolen from him.

Further undermining his claim that he was beaten up and robbed, Gomez had no bruises or other injuries consistent with that story. The officers searching for the burglar were certain they saw Gomez in the neighborhood of the Cattaneo residence shortly after the incident. And the officers who identified Gomez as

strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly.' " (*Id.*, at p. 453, citing *Gordon v. United States* (1967) 383 F.2d 936, 940.) Conversely, "[n]o witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity. The general rule is that felony convictions bearing on veracity are admissible. We have previously said: The defendant must weigh the danger of impeachment by the introduction of prior convictions for every witness he calls for the defense. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances." (*Beagle, supra*, at pp. 453-454, italics added.)

the person fleeing testified as to their certainty based on the fact that Gomez was known to both officers from prior contacts. Both identifying officers had viewed a photograph of him just prior to seeing him out in the field, and both also saw Gomez flee and jump a fence, which is consistent with Gomez having fresh scratches when he was arrested at the police station.

Perhaps most tellingly, Gomez was unable to provide corroborating alibi evidence. He testified he had taken BART to his mother's house in Antioch on the day of the Cattaneo burglary and spent the whole weekend there with his mother and sisters. But he did not call any other family members to testify to that fact. Although he was not required to put on evidence, his testimony alone was clearly not enough to overcome the testimony of the officers placing him near the scene of the burglary in South San Francisco on the night it occurred. Given all of this, even assuming section 1101, subsection (b) error, there is simply not enough to warrant the conclusion that Gomez suffered a miscarriage of justice warranting reversal under *People v. Watson, supra*, 46 Cal.2d 818.

Citing primarily federal precedent, Gomez argues for application of the more exacting harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) on the ground that erroneous admission of prior misconduct evidence here "created an unacceptable risk of conviction on the basis of character inference" and "made it impossible for the jury to fairly consider [his] defense and recognize the weaknesses in the prosecution's case."⁵ Putting aside the fact that the cases he cites all involved prior uncharged misconduct evidence that was admitted for no relevant purpose other than to prove criminal propensity, we do not agree that admitting prior convictions invariably, inevitably, and unfairly, spells doom for a defendant.

⁵ See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1385; *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 204.) In addition to these cases, Gomez cites *People v. Garneau* (1993) 6 Cal.4th 140, 186, but that case assumes without deciding that *Chapman* applies.

Accepting Gomez's logic in its full breadth, prior convictions that indisputably have probative value would never be properly admissible to impeach credibility or for any other purpose. The argument sweeps too broadly. Gomez fails to account for the careful screening that must always accompany the admission of such identity evidence, a screening which clearly did occur here given the amount of proffered other crimes evidence that was excluded based on Gomez's largely successful pretrial motion in limine. Thus, we reject his reliance on federal cases "discussing due process limitations on the admission of *irrelevant* character or criminal propensity evidence [as] unpersuasive." (*People v. Catlin* (2001) 26 Cal.4th 81, 123.)

III. DISPOSITION

Affirmed.

Streeter, Acting P.J.

We concur:

Reardon, J.

Schulman, J.*

* Judge of the Superior Court of California, City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

SUPREME COURT
FILED

Court of Appeal, First Appellate District, Division Four - No. A147167

SEP 12 2018
Jorge Navarrete Clerk

S249921

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JESUS GOMEZ, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice