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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ADAM KARTIGANER, Defendant and Appellant.	B166724 (Los Angeles County Super. Ct. No. SA045394)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephanie Sautner, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter and Robert F. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Adam Kartiganer appeals from the judgment for his conviction following a road rage assault. We affirm.

FACTS AND PROCEDURAL BACKGROUND

One autumn evening Howard Reuben was driving on Wilshire Boulevard in Santa Monica with a passenger. Reuben made a right turn on a red light, cutting in front of appellant Adam Kartiganer. Appellant, who was apparently forced to brake when Reuben turned in front of him, started blaring his horn. Taking offense from the horn, Reuben slowed down to about 10 miles per hour. Not to be outdone, appellant deliberately rammed his car three times into Reuben's car.

Reuben pulled over and got out of his car. Appellant continued driving, bearing down on Reuben at two or three miles per hour. When appellant was eight to twelve feet away, Reuben jumped back into his car. Appellant drove alongside Reuben's car, scrapping it while staring at Reuben. He then drove away without stopping.

A jury convicted appellant of two counts of assault with a deadly weapon against Reuben and his passenger (Pen. Code, § 245, subd. (a)(1)), and one count of hit and run driving (Veh. Code, § 20002, subd. (a)). The court sentenced appellant to nine months in county jail and five years probation. In addition, the court revoked his driver's license for life.

DISCUSSION

1. Prior Bad Act

The court admitted evidence of appellant's involvement in a previous road rage incident in 1988. In that incident, appellant repeatedly rammed into the rear of a car stopped at a red light.[1] The passenger in the other car got out to exchange information

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[1] Appellant asserts he hit the car only once, but one witness testified it was two or three times. As we must construe the record in the manner that best supports the trial court's rulings, we assume multiple hits.

with appellant. As the passenger approached appellant's car, appellant backed up and struck the passenger before driving away.

Evidence Code section 1101, subdivision (a) generally prohibits evidence of uncharged prior misconduct to prove appellant committed the current offense. An exception exists, however, if the misconduct is offered to prove appellant's intent. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) Here the court admitted the 1988 evidence under that exception to show the absence of an accident or mistake by appellant.

Appellant contends the court erred in admitting the evidence because his current offense of assault with a deadly weapon is a general intent crime for which the prosecution need prove no particular intent, making evidence of his intent superfluous and thus immaterial. In support, he cites *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018 (*Scheer*). In that decision, the defendant was charged with hit-and-run driving. At trial, the court admitted prior misconduct evidence of the defendant having once fled from police officers. On review, the appellate court held it was error to admit the prior misconduct because fleeing from police said little, if anything, about one's intent under the different circumstances of fleeing the scene of an accident.

Appellant misreads *Scheer* to argue that prior misconduct evidence is never admissible when the current offense is a general intent crime. His reading of *Scheer* draws plausible support from language in the decision, particularly the court's statement that, "Intent, which pertains to the defendant's state of mind, is not an element of a general intent offense. The prior flight evidence was not admissible to show appellant's intent since felony hit and run . . . is a general intent crime." (*Id*. at p. 1019.) We conclude, however, that the *Scheer* court did not intend appellant's broad interpretation. Rather, it merely meant that fleeing an officer does not illuminate one's intent in leaving an accident scene; in short, whether one ran from an officer does not address whether one left the scene of a traffic collision deliberately, or inadvertently. In the present context, evidence of defendant's road rage was relevant to show he committed the assaultive behavior purposefully, not out of mistake or accident. (See *People v. Cotton*

(1980) 113 Cal.App.3d 294, 301-302 [defendant who sped into intersection at 100 miles per hour and hit another car guilty of reckless driving, but not assault with a deadly weapon, because no evidence he intended to hit other car]; see also *In re Gavin T.* (1998) 66 Cal.App.4th 238, 240-241 ["one cannot unintentionally commit the crime of assault. In order to be found guilty of a criminal assault, one must have either the intent to batter, hit, strike, or wrongfully touch a victim; or one must have a general criminal intent to do an act which is inherently dangerous to human life--such as firing a cannon at an inhabited castle, or driving an elephant into a crowded judicial conference."].)

Appellant also contends the court erred because the two events were too dissimilar to show his intent as to the current offense. He notes that they were separated by 13 years, and the 1988 incident involved his hitting a car stopped at a light, suggesting he was at most a bad or inattentive driver. In contrast, Reuben triggered the current incident by turning in front of appellant and then provocatively slowing down.

Appellant's contention is unavailing, however, because the least similarity is enough to prove intent with prior misconduct evidence. (*Ewoldt, supra,* 7 Cal.4th at p. 402; see, e.g., *People v. Burnett* (2003) 110 Cal.App.4th 868, 881 [defendant's beating a dog to death with a stick sufficiently similar to road rage incident where defendant grabbed dog from another's car and threw it into traffic].) Both incidents were similar in that they involved traffic collisions where appellant overreacted by ramming the other car several times. The similarity continued in his threatening the other car's occupants when they got out to exchange information. And, finally, the similarity culminated in his leaving the scene of the collision without stopping.

Appellant last contends the 1988 incident was more prejudicial than probative because it arguably showed his propensity toward road rage. We review for abuse of discretion the court's balancing of the prejudice of prior misconduct against its probative value. (*People v. Ramos* (1982) 30 Cal.3d 553, 558, fn. 22.) Here, however, appellant concedes no probative value to the evidence and thus his discussion on the point engages in no such balancing. In any event, as we have already determined that the evidence had probative value, appellant's contention fails to get out of the starting blocks.

2. Assault as a Lesser Included Offense

Appellant requested that the court instruct the jury on simple assault as a lesser included offense of assault with a deadly weapon. (*People v. Toledo* (2001) 26 Cal.4th 221, 226.) The court was obligated to instruct the jury on lesser included offenses supported by substantial evidence. (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) No such obligation existed, however, if there was no evidence that the offense was less than that charged. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1410.) The court refused a simple assault instruction here because it was undisputed that if appellant committed any assault he did so with his car, meaning his offense was nothing less, in the court's view, than assault with a deadly weapon.

Appellant contends the court erred because whether his car was a deadly weapon was a question of fact for the jury to decide, not the court. He argues that a car's suitability as a deadly weapon depends on how it is used. (See *People v. Jones* (1981) 123 Cal.App.3d 83, 96-97 [reckless driving not assault with a deadly weapon; must drive car intending to commit an assault]; accord *People v. Herd* (1963) 220 Cal.App.2d 847, 850 ["Although not an inherently deadly weapon, a knife becomes such when used in such a manner as to cause severe bodily injury."].) According to him, his car was not a deadly weapon because he was moving only two or three miles per hour as he bore down on Reuben outside his car, which gave Reuben plenty of time to get out of the way and avoid injury.

We are unpersuaded because appellant's car endangered Reuben not because of its speed but because of its weight, which was sufficient to crush him had he fallen under its wheels. (*People v. Morlock* (1956) 46 Cal.2d 141, 145 [a deadly weapon is "one likely to produce death or great bodily injury"].) Moreover, appellant's contention ignores his using his car to repeatedly ram Reuben's car at 10 to 20 miles per hour. Thus, even if it were error for the trial court not to instruct on simple assault for appellant's driving toward the unprotected Reuben standing beside his car, the lesser included instruction had no relevance to the other acts of assault with a deadly weapon. And as the

prosecution did not elect which act constituted assault with a deadly weapon, the court's error, if any, in failing to instruct on simple assault was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

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RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.