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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LITTLE PHAROAH PERRY, Defendant and Appellant.	B230258 (Los Angeles County Super. Ct. No. BA366191)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alex Ricciardulli, Judge. Affirmed.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Little Pharaoh Perry appeals from a judgment entered after a jury convicted him of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) and transportation of a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a)). He contends that the trial court erred in admitting evidence of an uncharged 2002 offense of possession for sale of cocaine base. He also requests that we conduct an independent review of the trial court's in camera hearing following his *Pitchess*[1] motion. We affirm.

FACTS AND PROCEEDINGS BELOW

I. Prosecution Evidence

On December 26, 2009, at approximately 11 p.m., Officer Jorge Ortega was driving a marked patrol car on Olive Street near 7th Street with his partner, Officer Carlos Ocegueda. The officers saw Perry, who was riding a bicycle on the north sidewalk of 7th, cycle against a red light to cross the intersection of Olive. Without turning on lights or sirens, Officer Ortega pulled alongside Perry and ordered him to stop. Perry turned around, made eye contact with Officer Ortega, turned back around and continued riding, increasing his speed. The officers followed. As he was riding and steering with one hand, Perry reached into his right front pocket of his pants with his other hand, then turned left to go north on Hill Street still riding on the sidewalk. Officer Ocegueda saw Perry slow down, extend his right leg, pull an item out of his right front pocket, stop by the first planter on Hill Street, and drop a plastic bag into the planter.

Officer Ortega did not see Perry take anything from his pocket or drop anything from his hand.

Ortega pulled the patrol car in front of Perry and while Ortega took Perry into custody, Ocegueda watched the planter to see that no one approached it. Ortega handcuffed and searched Perry, finding $101 in cash, no weapons, no drugs and no drug

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

paraphernalia. Ocegueda went to the first planter and saw a bag inside; the bag contained 17 rocklike substances which were later tested and determined to be cocaine base.

Both officers testified that Perry did not exhibit signs of being under the influence of drugs. Ocegueda testified that because there were 17 rocks in the bag and generally users in the area only carry one rock, he believed it "was more than just simple possession." In Ocegueda's opinion, Perry possessed the 17 rocks of cocaine base for sale based on the number of rocks, the lack of paraphernalia on Perry, and the area.

Six and a half years earlier, on July 1, 2002, at approximately 2 a.m., Perry was sitting on a bench at 5th and Main Streets. Officer Christopher de la Torre saw Perry speak with an unidentified man, remove a plastic bindle from the rear of his waistband, open the bindle which contained items resembling cocaine base, remove an unknown number and hand them to the man, then reach back into the bindle and remove one more item to hand to the man who in turn handed Perry an unknown amount of cash. Perry then twisted the bindle back up, sat back down on the bench and replaced the bindle in the rear inner portion of his waistband. De la Torre and his partner took custody of Perry, finding $147.50 in cash and 13 rocklike substances which were tested and determined to be cocaine base. At the time of the 2002 offense, Perry did not appear to be under the influence of drugs and no drug paraphernalia was found on him.

A police expert testified that the amount of cocaine base found in the planter had a wholesale value of up to $250 and a retail value of up to $320. The expert also testified, based on a hypothetical describing the 2009 and 2002 incidents, that in his opinion the 2009 cocaine base was possessed for the purposes of sale. The expert further stated that the 2002 incident was significant to his opinion because "it indicates the person has a pattern or history of selling cocaine base on the street" and is "following the same mode or M.O. that they have[sic] been arrested for or observed in the past, hanging out on the street with a bindle of loose rock cocaine and cocaine base and conducting hand-to-hand transactions."

II. Defense Evidence

The defense read a stipulation that no fingerprints were recovered from the plastic bag found in the planter. Perry did not testify.

III. Prosecution Rebuttal

A forensic print specialist testified that it was not uncommon to be unable to recover a usable fingerprint impression from a plastic bag like the one found in the planter.

IV. Conviction and Sentence

The jury convicted Perry of two felony counts: in count one for possession for sale of cocaine base in violation of Health and Safety Code section 11351.5; and in count two for transportation of a controlled substance, cocaine base, in violation of Health and Safety Code section 11352, subdivision (a).

In a bifurcated proceeding on prior convictions, Perry admitted that he had one prior serious or violent felony conviction within the meaning of Penal Code sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d), for his conviction under Penal Code section 245, subdivision (d)(2). Perry also admitted that he had two prior convictions within the meaning of Penal Code section 667.5, subdivision (b), for his convictions under Penal Code section 12021, subdivision (a)(1), and Penal Code section 4502, subdivision (b). Perry further admitted that he had a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), for his conviction under Health and Safety Code section 11351.5.

The trial court sentenced Perry on count one to 11 years imprisonment, declining to strike any priors. The court calculated the term based on a low term of three years given the small amount of cocaine base involved, an additional three years because of the prior strike under Penal Code section 667, subdivision (e)(1), an additional three years because of Perry's Health and Safety Code section 11372.2 prior, and an additional two years for Perry's two Penal Code section 667.5, subdivision (b), priors. The court calculated Perry's time credit as 382 actual days plus 190 days of good time and work credits for a total of 572 days of pre-sentence credit.

DISCUSSION

I. *Pitchess* Motion

Before trial, Perry made a *Pitchess* motion for discovery of all "complaints . . . of fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, perjury, dishonesty, writing of false police reports, false or misleading internal reports, and any other evidence of misconduct amounting to moral turpitude . . . against Officers [sic] Ocegueda (#36448) and Officer Ortega (#38863)." Perry alleged that the factual statements in the police report were completely false and untrue, specifically claiming that Perry never removed anything from his pocket and did not throw anything into the planter.

The trial court granted in camera review of the records of both officers for false statements within the last five years. The court ordered disclosure of relevant complaints.

On appeal, Perry requests that we independently review the in camera proceedings to determine whether the trial court properly exercised its discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

The record indicates that the court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present and the custodian of records was sworn prior to testifying. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228, 1229, fn. 4; *People v. White* (2011) 191 Cal.App.4th 1333, 1339-1340.) The custodian of records complied with the requirement to bring all the relevant personnel records and submit them for the court to review and determine which documents were relevant. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

We have conducted an independent review of the transcript and the documents, and find no error occurred during the *Pitchess* hearing in chambers.

II. Evidence of Prior Criminal Act

Before trial, the prosecution moved under Evidence Code section 1101, subdivision (b), to be allowed to introduce evidence of the 2002 offense to show intent to sell. Perry opposed the motion, arguing that the prior offense was not sufficiently similar

to the charged offense and that it was unduly prejudicial under Evidence Code section 352. The court granted the prosecution's motion, finding it was "powerful" evidence on the contested issue of intent, was not too remote, and its probative value outweighed any prejudice. Perry renewed his objection later during trial, moving to dismiss at the close of the prosecution's case on the ground that the court had improperly allowed evidence of the uncharged offense.

The court instructed the jury that it could consider the 2002 offense only if the prosecution proved by a preponderance of the evidence that Perry in fact committed the uncharged offense, that the jury could but was not required to consider the evidence for the limited purpose of deciding whether Perry acted with intent to sell cocaine base as charged in count one, not to consider the evidence for any other purpose, not to conclude that Perry had a bad character or was disposed to commit crime, and that commission of the uncharged offense was only one factor to consider along with all other evidence and was not sufficient by itself to prove Perry guilty of the charged offense.

On appeal, Perry contends the trial court erred by admitting evidence of the prior uncharged offense because it was not probative of intent and was unduly prejudicial. He also argues for the first time on appeal that the admission violated due process. In particular, Perry contends that the prejudicial nature of this evidence was heightened because in closing arguments the prosecution drew an analogy to a friend who is a baker, asking the jury to compare it to a situation where you visit this friend and see he has baked a large number of cookies which he says he does not intend to eat but instead were for sale and when you visit the friend again years later and see a similar scene, you would know the cookies were again for sale and not for eating. Perry argues that this analogy was about a professional baker and equated him with a professional drug dealer. We disagree.

Evidence of other offenses or misconduct is inadmissible to prove criminal propensity, but may be admitted if relevant to prove a material fact such as intent. (Evid. Code, § 1101, subds. (a) & (b); *People v. Kelly* (2007) 42 Cal.4th 763, 783.) To be admissible, "such evidence 'must not contravene other policies limiting admission, such

as those contained in Evidence Code section 352. [Citations.]' [Citation.]" Because evidence of uncharged offenses is highly prejudicial, it must have substantial probative value, and the trial court must carefully analyze the evidence under Evidence Code section 352 to determine if its probative value outweighs its inherent prejudicial effects. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

We review the trial court's admission of uncharged misconduct evidence under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

"We have long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution."' [Citations.]" (*People v. Thomas* (2011) 52 Cal.4th 336, 355-356.) The least degree of similarity is required where, as here, a prior offense is offered to prove intent. The prior offense and the charged offense need only be sufficiently similar to support an inference that the defendant "'"probably harbored the same intent in each instance." [Citations].'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Applying these principles, we find no abuse of discretion in the admission of the 2002 offense. In both the 2002 offense and in the charged offense, Perry was in the same area late at night or early in the morning carrying cocaine base in a plastic bag, did not have any drug paraphernalia, and did not appear to be under the influence. In the 2002 incident, he had $147.50 in cash and 13 rocks. In the charged 2009 offense, he had $101 in cash and 17 rocks. While not particularly distinctive, these offenses are sufficiently similar to support an inference that Perry harbored the same intent in both instances. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Likewise, the trial court acted within its discretion under Evidence Code section 352 in finding the probative value of the evidence of uncharged robberies was not

substantially outweighed by the potential for undue prejudice. The evidence of the uncharged offense had substantial probative value on the central issue of intent and was not so remote from the charged offense given that Perry was incarcerated for the vast majority of the time between the offenses. The prosecution's use of the analogy to the baker was not unduly prejudicial as the prosecution never referred to the hypothetical friend as a "professional baker" and the trial court gave proper limiting instructions on the use of the uncharged offense evidence.

We also find no constitutional violation in the admission of the 2002 offense. "Because the trial court did not abuse its discretion under state law in admitting this evidence over defendant's objections, his claim that the admission of this evidence violated his constitutional right to a fair trial, to the extent it is preserved for appeal, also is without merit. (*People v. Riggs* (2008) 44 Cal.4th 248, 292 [a defendant's failure to raise a distinct constitutional claim at trial forfeits such a claim on appeal, and to the extent the appellate claim was 'merely a gloss on the objection raised at trial, it is preserved but is without merit because the trial court did not abuse its discretion in admitting the evidence'].)" (*People v. Fuiava* (2012) 53 Cal.4th 622, 670.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.