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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DWAYNE CANN, Defendant and Appellant.	B233482 (Los Angeles County Super. Ct. No. NA086086)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed.

Leonard J. Klaif, 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, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Michael Dwayne Cann appeals from a jury verdict convicting him of three counts of first degree robbery (Pen. Code, § 211). He contends it was prejudicial error for the trial court to: (1) admit evidence of his January 2005 conviction for attempted robbery in *People v. Cann* (Super. Ct. L.A. County, 2005, No.077857) and (2) deny his motion to exclude evidence of two cell phones recovered by police and given to the alleged victims. Appellant argues that the evidence relating to the January 2005 prior conviction was irrelevant to proving any fact cognizable under Evidence Code section 1101, subdivision (b),[1] and that it was unduly prejudicial. He further asserts that the cell phones were disposed of in violation of Penal Code section 1407 et seq., and evidence of those phones should have been excluded for that reason. He argues the admission of the latter evidence violated his rights to due process and jury trial.

We conclude the evidence regarding the January 2005 prior conviction was both relevant and admissible on the issue of intent. We also conclude the trial court did not abuse its discretion in finding Penal Code section 1407 inapplicable to the circumstances of this case. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On June 21, 2010, at about 12:10 a.m., appellant boarded a Metro Blue Line train with a group of friends (appellant's group). A group of three younger men, Antonio Dozier, Joshua Washington, and Elijah Boswell (the victims), were seated at the front of the same train car. The following events were captured on surveillance video, which was presented at appellant's jury trial.

Several members of appellant's group approached the victims and briefly spoke with them before returning to appellant's location at the back of the train car. Shortly thereafter, appellant and his companions approached the victims. Appellant's group demanded the victims' cell phones and proceeded to search their pockets. Appellant took a cell phone from each of two of the victims and aided another member of his group in taking the third victim's phone. Appellant then searched the pockets of one of the

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

victims and ripped one open in order to take a camcorder. Appellant's group forced the victims to exit the train. The victims then ran to a nearby patrol car to report the incident.

Long Beach Police Officer Harrison Moore responded to a call regarding a robbery on a Metro Blue Line train and detained appellant and several of his companions on the platform of the Metro train station at Willow and Long Beach Boulevard, one stop away from where the robbery occurred. Officer Moore did not see appellant throw a cell phone and was not aware of any phones being recovered by officers. Later that night, the victims identified appellant as one of the perpetrators.

Officers retrieved two of the cell phones and returned them to victims Boswell and Washington. Washington identified his cell phone based on the pictures and contacts it contained. Boswell identified his cell phone by make and color.

Appellant and three of his companions were tried for the robberies. The jury was unable to reach a verdict, and the court declared a mistrial. After his co-defendants each accepted plea offers, appellant was retried. He elected to represent himself. The prosecution and the defense each filed a motion in limine regarding evidence of two prior crimes of which appellant was convicted, one for attempted robbery in January 2005 and another for robbery in June 2005. The prosecution sought to admit this evidence under section 1101, subdivision (b), on the issue of intent. Appellant sought to exclude it as inadmissible. The trial court ruled the evidence admissible.

Appellant filed a motion in limine to exclude any evidence regarding the two cell phones obtained by police and returned to the victims. The motion asserted the cell phones were disposed of in violation of Penal Code section 1407 et seq., and admitting evidence regarding them at trial would violate his constitutional rights to due process and jury trial. The trial court denied the motion, indicating the statutory provisions were inapplicable but finding the evidence admissible regardless of whether or not the statute applied. The jury found appellant guilty of three counts of first degree robbery and the trial court found that each of these convictions amounted to a third strike under the "Three Strikes Law." (Pen. Code §§ 667, subds. (b)-(i), 1170.12.) Appellant was sentenced to concurrent sentences of 25 years to life for each of the three robbery counts.

In addition, two five-year enhancements were imposed based upon the prior convictions. This appeal followed.

DISCUSSION

I

Appellant contends the court erred in admitting evidence of the January 2005 prior conviction. He argues the evidence did not satisfy any of the provisions of section 1101, subdivision (b), for admission of such evidence and, in particular, was not admissible on the issue of intent.

A trial court's ruling on the relevance and the admission or exclusion of evidence under section 1101, subdivision (b), is reviewed for abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

The general rule is that evidence of other crimes or other acts of misconduct committed by a criminal defendant is inadmissible on the issue of character, such as propensity to commit a crime. (*People v. Malone* (1988) 47 Cal.3d 1, 17-18 (*Malone*); § 1101, subd. (a).) However, section 1101, subdivision (b), allows for admission of such evidence when offered to prove a fact other than the defendant's disposition to commit the charged crime. The admissibility of this type of evidence depends upon three principal factors: (1) the relevance of the evidence to some material fact in issue; (2) the tendency of the uncharged crime to prove or disprove that material fact; and (3) the existence of rules or policies limiting its admission, such as section 352. (*Malone*, at pp. 17-18.) Here, evidence regarding the January 2005 prior conviction was admitted on the issue of intent. Intent is an element of the crime charged and was put into question by appellant's defense that he did not intend to rob the victims when he confronted them, but merely sought the return of his own property. Thus, the first requirement is satisfied; we turn to its probative value.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505, our Supreme Court addressed the degree of similarity required between prior misconduct and the charged offense. Along the spectrum, the court found that the least degree of similarity is

required in order to prove intent, and the greatest to prove identity. (*Ibid*.) Identity is not at issue in this case. In order to be admissible to prove intent, the prior misconduct "must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ibid.*) On appeal, appellant concedes that the evidence regarding the June 2005 prior conviction was "sufficiently probative of a common intent," but argues that evidence of the January 2005 prior was not because it did not include any "facts underlying [this prior] incident." We disagree.

In its case in chief, the prosecution presented sufficient evidence to meet this requirement. The charge in that case was attempted robbery of a young man on a Metro Blue Line platform with the assistance of a confederate. A booking slip evidencing appellant's arrest for the prior crime and a certified record of his conviction for the offense were submitted to the court. An officer testified to his apprehension of appellant and of the subsequent identification of appellant by the victim and another witness. The evidence also included an "Admonition of Waiver of Miranda Warnings" form containing a description by the appellant of the events leading to his conviction. Finally, at trial, appellant was questioned about his participation in the attempted robbery and was able to describe the incident in his own words. He described the whole event as simply a fight that broke out between his friend and the victim. He claimed that he intervened only to protect his friend. He testified that he pleaded guilty to the crime in order to avoid the risk of additional jail time. The charges in the present case allege that appellant robbed young men on a Metro Blue Line train with the assistance of several confederates. Both the previous offense and the present charge involved the intimidation of victims through a show of force involving threats and greater numbers. The evidence of the January 2005 prior met the similarity standard set by the courts so that the jury could infer that appellant harbored the same intent in each instance.

The finding that a prior crime was relevant to prove the defendant intended to commit the charged crime does not end the inquiry; the final question is whether admission of the other crime evidence was unduly prejudicial under section 352. (*People v. Foster* (2010) 50 Cal.4th 1301, 1330.) That statute provides: "The court in its

discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." (§ 352.) Appellant contends that admission of the evidence of the January 2005 prior conviction was unduly prejudicial and that, but for its inclusion, it is reasonably likely that the outcome of the case would have been more favorable to him.

The evidence was "prejudicial" in the sense that it revealed to the jury a prior conviction for an attempted robbery. The issue is whether it was unduly prejudicial. The prejudice created by this evidence was no more than in any other instance where prior crimes are found admissible under section 1101, subdivision (b), and its probative value was clear. The sole basis for the defense was that appellant did not intend to steal when he approached the victims because he thought he owned the camcorder and was simply trying to retrieve it from the victims. His conduct on the prior occasion, where he and a confederate approached a young man on that same Metro line, is highly probative of his intent in the charged offense. Any prejudice that did exist was mitigated both by his own testimony on cross-examination in which he explained the circumstances of the attempted robbery in his own words and the court's clear instruction to the jury that the evidence could only be considered for the limited purpose of intent. We find no abuse of discretion.

In any event, admission of the evidence was harmless in this case were it error. It was not reasonably likely that an outcome more favorable to appellant would have resulted. There was significant evidence supporting the verdict, including the testimony of the three victims and videotape of the crimes. In addition, the jury heard uncontested testimony concerning appellant's June 2005 conviction for robbing another young man with the assistance of several confederates on the *same* Metro line. This included testimony from the victim that appellant demanded to search his pockets before forcefully doing so, and from the police officer who arrested appellant and recovered evidence linking appellant to the robbery. We affirm the evidentiary ruling below.

II

Appellant argues the trial court erred in denying his motion to exclude any evidence pertaining to the two cell phones allegedly stolen from the victims and later found by police. His argument relies on the contention that police officers mishandled the evidence under Penal Code section 1407 et seq. by returning the two cell phones to the victims, including one phone that appellant claims was his own property, rather than preserving them for trial. He asserts that his rights to due process and a jury trial were thereby violated. We find no violation of his constitutional rights and affirm the court's denial of the motion to exclude.

Penal Code section 1407 states: "When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he shall hold it subject to the provisions of this chapter relating to the disposal thereof." Penal Code sections 1408-1410 discuss proper procedures for dealing with property that comes into the custody of various government actors with a common requirement that notice be given "to the person from whom custody of the property was taken." (Pen. Code, § 1409.) Appellant argues that the police officers' disposal of the cell phones recovered in the robbery investigation at issue did not comport with these statutory requirements and therefore the admission of any evidence regarding the cell phones violated his constitutional rights to due process and a jury trial. He contends that he did not take any cell phones from the victims and that one of the cell phones returned to a victim was taken from appellant's person upon arrest and was actually his own property. The trial court heard testimony from a sheriff's deputy in appellant's first trial on the same charges that the phones were recovered from a nearby trashcan and were positively identified by the victims before they were returned. The only evidence about the cell phones offered by the prosecution at appellant's second trial was the testimony of the victims that their cell phones were stolen and returned. Appellant was then able to challenge that testimony on cross-examination and through his own testimony.

The underlying contention in this appeal is that the admission of evidence pertaining to improperly preserved property led to a violation of appellant's constitutional

rights. However, even assuming the police failed to preserve the phones in accordance with the cited statutory provisions, we find no violation of appellant's right to due process or jury trial. While not specifically cited on appeal, the appellant raises the constitutional consequences of failure to preserve evidence explored in the *Trombetta*/*Youngblood* line of cases. (*California v. Trombetta* (1984) 467 U.S. 479, 485-491; *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58.) Our Supreme Court has discussed the relevant due process principles many times. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1246; *People v. DePriest* (2007) 42 Cal.4th 1, 41.) In the constitutional context, the court has specifically stated that officers have a responsibility to preserve evidence only if it has readily apparent exculpatory value *and* the defendant would be unable to secure comparable evidence by other means. (*People v. Carter*, at p. 1246.) The duty is even more limited when "'the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citation.]'" (*Ibid*.) In such cases, unless there is a showing of bad faith on the officers' part, the "'"failure to preserve potentially useful evidence does not constitute a denial of due process of law." [Citations.]'" (*Ibid*.)

Appellant contends that officers failed to preserve the cell phone evidence properly and that this prevented him from identifying one of the phones as his for the jury. However, there is no evidence that the police acted in bad faith in returning the cell phones to the victims or that there was any apparent exculpatory value in the phones for appellant. In fact, the trial court judge heard testimony that the police returned the phones to the men whom they believed were the legitimate owners and only after the phones were positively identified. In denying the motion, the trial court stated: "I've read your sections that you quoted out of the Penal Code, 1409, and I don't think that applies. But whether that applies or not, I decline to grant your motion so far as the ramifications of your motion." Regardless of the applicability of the statute, the trial court found no basis for excluding any and all evidence pertaining to the stolen cell phones.

It is true that if the phones were kept in police custody they could have been subjected to tests by appellant and that it *might* have been of assistance in his defense. However, as the case law clearly indicates, without a showing of bad faith by the officers in this case, any negligence in preserving evidence did not violate appellant's rights to due process. On appeal, appellant asserts that the police took one of the phones from his person and did not return it to him, but he did not claim the police were acting in bad faith when they handed the phones over to the victims or even that the phones had clear exculpatory value. We affirm the judgment.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.