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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MATTHEW GONZALEZ, Defendant and Appellant.	2d Crim. No B283162 (Super. Ct. No. 2016037229) (Ventura County)

Ruben Matthew Gonzalez appeals judgment after conviction by jury of attempting to possess alcohol (pruno) in jail. (Pen. Code, §§ 664/4573.8.) In a bifurcated proceeding, the trial court found that he served a prior prison term. (Pen. Code, § 667.5.) It sentenced him to four years in state prison. Gonzalez contends the court abused its discretion when it admitted

evidence that he possessed pruno in jail two months after the charged incident. (Evid. Code,[1] § 352.) We affirm.

FACTUAL AND PROCEDURAL HISTORY

Sheriff's deputies searched a cell that Gonzalez shared with one person. On the top bunk was a box. Gonzalez's name was on it. When a deputy lifted the box, two bags of pruno fell out. This charge followed.

Two months later and just before Christmas, a deputy saw Gonzalez empty a bag of pruno into the toilet of his cell. Gonzalez smelled of alcohol and so did the contents of the toilet. He seemed to be under the influence of alcohol. A week later, Gonzalez said in a recorded telephone call "they caught me trying to make a forty-ounce. . . . I was going through some things during Christmas and New Year's and I wanted to make me a little forty, you know." No charge was filed regarding this (December) incident.

The People moved in limine under section 1101, subdivision (b) (similar acts) to admit evidence of the December incident to prove Gonzalez knew the nature of the beverage, among other things. (Pen. Code, § 4573.8 ["knowingly" in possession in custody].) The court admitted the evidence over Gonzalez's objection. It gave a limiting instruction pursuant to CALCRIM No. 375 that the jury could consider the December incident only if proven by a preponderance of the evidence and only for the purpose of deciding: whether Gonzalez "was the person who committed" the charged offense; whether he "knew of the beverage's nature as an alcoholic beverage"; or whether he "had a plan or scheme" to commit the charged offense.

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

DISCUSSION

Gonzalez concedes the evidence was admissible to prove knowledge under section 1101, subdivision (b), but he argues it was unduly prejudicial and the trial court did not make findings on each factor relevant to its probative value and prejudicial effect. (§ 352; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405 [factors include similarity, independent source, resulting criminal conviction, relative inflammatory nature, remoteness, etc.].)

Section 352 does not require express findings. (*People v. Hayes* (1990) 52 Cal.3d 577, 617.) "The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) The record shows that the trial court did weigh prejudice against probative value. After it determined that the evidence was relevant to prove matters other than propensity, the court said, "I don't think it's particularly prejudicial, same kind of conduct, so I don't see anything about it that's inflammatory."

We uphold the trial court's exercise of discretion under section 352 because it was not palpably arbitrary, capricious, whimsical, or patently absurd. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Gonzalez argues that the offenses were dissimilar because he was under the influence in one and sharing a cell in the other; that the December incident was uncertain because there "was absolutely no way to prove beyond a reasonable doubt that it was pruno" without testing; and that proof of the December incident was unduly time consuming because it required an additional witness. But weighing these

concerns against the probative value of the evidence was within the province of the trial court.

The December incident involved the same conduct in the same place only two months after the charged offense. It was highly probative on the question whether Gonzalez or his roommate committed the charged offense, whether he knew what was in the bags, and whether the offense was part of his pattern of possessing pruno in jail. It was no more inflammatory than the charged crime. The court did not abuse its discretion when it admitted the evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

Andrea Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.