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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID GRANT, Defendant and Appellant.	B265788 (Los Angeles County Super. Ct. No. MA063572)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Michael David Grant, of two counts of second degree robbery. (Pen. Code, § 211.)[1] The trial court found true prior conviction and prison term allegations under sections 667, subdivision (a)(1), and 667.5, subdivision (b). Defendant was sentenced to 13 years in state prison. We affirm the judgment.

II. THE EVIDENCE

On July 12, 2014, defendant walked into a Lancaster Home Depot with a shopping cart and a backpack. He selected an orange bucket and placed it in the cart. He proceeded to the hardware section where he selected multiple high-price items and placed them in the orange bucket. In the garden area of the store, defendant transferred the items in the orange bucket to his backpack. Defendant purchased the orange bucket and left the store. Defendant's movements to that point were captured on surveillance videotape. Defendant was also observed by two loss prevention officers.

The loss prevention personnel confronted defendant outside the store about the unpaid for items in his backpack. Defendant attempted to flee. Following a struggle, the officers detained defendant. While being escorted back into the store, defendant "slipped his cuffs," that is, he brought his hands from behind his back to his front. Another struggle ensued. The officers recovered the stolen merchandise from defendant's backpack.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

Scotty Southwell was one of the loss prevention officers defendant struggled with at the Lancaster Home Depot. The defense presented evidence Mr. Southwell had been arrested on April 3, 2010, after an argument with his then girlfriend, Anaiz Alvarez. Police officers observed that Ms. Alvarez's arm was red. Ms. Alvarez did not press charges. At trial, Ms. Alvarez denied defendant had harmed her.

III. DISCUSSION

A. Prior Theft Arrests

1. Relevant legal principles

The prosecution presented evidence defendant had sustained two prior arrests in similar theft cases. Pursuant to Evidence Code section 1101, subdivision (b), other crimes or bad acts evidence is admissible to prove a relevant fact other than a defendant's disposition to commit such an act. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095; *People v. Jones* (2012) 54 Cal.4th 1, 49.) Under Evidence Code section 352, a trial court may, in its discretion, exclude such evidence if its probative value is outweighed by its prejudicial effect. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194-1195; *People v. Daniels* (1991) 52 Cal.3d 815, 856.) Our review is for an abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Harrison* (2005) 35 Cal.4th 208, 230). An abuse of discretion occurs the trial court acts in an arbitrary, capricious or patently absurd manner. (*People v. Merriman* (2014) 60 Cal.4th 1, 74; *People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

2. April 22, 2010

On April 22, 2010, Deputy Sean Struebing responded to a call about a suspect at an Apple Valley Home Depot. The suspect was stealing items and placing them in his backpack. After conferring with a loss prevention officer, Deputy Struebing arrested defendant. Defendant was handcuffed with his hands behind his back. Detective Struebing placed defendant in the rear of a patrol car. Later, defendant had slipped out of his handcuffs. The trial court ruled that under Evidence Code section 1101, subdivision (b), this prior arrest was relevant on common scheme and plan grounds.

Our Supreme Court has explained: "[E]vidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. [¶] . . . [¶] The least degree of similarity (between the uncharged act and the charged offense) is required to order to prove intent. . . . [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan. . . . [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] . . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus

revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-403; see *People v. Edwards* (2013) 57 Cal.4th 658, 710-712.)

Defendant argues the facts in the 2010 case were not significantly similar to the present case: "Taking items off a shelf and putting them in a [backpack] would hardly appear to a reasonable person as common feature representative of a general plan either to shoplift or commit a robbery. In addition, the slipping of the handcuffs, which occurred in both the charged and the prior crimes, *after* the offenses were committed, are not acts related to the commission of the crimes. As such, this act is not a similarity justifying the admission of the 2010 theft as a reflection of a common scheme or plan." We disagree. In 2010, as in the present case, defendant used a backpack to commit a theft at a Home Depot store and, following his arrest, slipped his handcuffs. These common features indicate a plan to commit theft at Home Depot locations by use of a backpack and to evade handcuffing if detained. No abuse of discretion occurred .

3. February 2, 2012

On February 2, 2012, defendant entered an Apple Valley Target store. Defendant selected a Playstation 3, "flipped off" the loss prevention officer, walked out a fire exit door and ran. The loss prevention officer, Deputy Tyler McGee, observed defendant's activities. Defendant was chased to an apartment building. Defendant was subsequently arrested. The trial court ruled that under Evidence Code section 1101, subdivision (b), this prior arrest was relevant to intent.

As our Supreme Court further explained in *Ewoldt,* "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402; see *People v. Rogers* (2013) 57 Cal.4th 296, 326-327.)

Defendant argues offering the 2012 evidence to prove intent was merely cumulative, hence its prejudicial effect outweighed its probative value. In 2012, as here, defendant committed a theft from a retail store. In 2012, as here, when discovered, defendant exhibit defiance. In both cases, defendant ran from loss prevention personnel. Without abusing its discretion, the trial court could rule the 2012 evidence supported an inference defendant harbored the same intent in each instance. The trial court could reasonably rule the challenged evidence was not merely cumulative.

4. Evidence Code section 352

Defendant claims the trial court did not properly exercise its Evidence Code section 352 discretion. Defendant asserts the trial court "failed to address the fact

that neither of the uncharged thefts resulted in a conviction," which was "a significant factor heightening the prejudicial erect of the evidence." There is no evidence the trial court failed to consider these factors. But defendant does not point to any evidence in the record showing whether either prior offense resulted in a conviction. In any event, a conviction is not required for a prior theft to be admitted under Evidence Code section 1101, subdivision (b). (*People v. Leon* (2015) 61 Cal.4th 569, 597; *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1849, disapproved on another point in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3.) No error occurred.

5. Any purported error was harmless

Even if the trial court did abuse is discretion, any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Foster* (2010) 50 Cal.4th 1301, 1332-1333; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) There was overwhelming evidence of defendant's guilt. His movements inside the store were captured on surveillance videotape. Defendant's conduct was also observed by two loss prevention officers who ultimately detained him. The jury was instructed to consider the other crimes evidence, if at all, only as to defendant's intent or plan.[2] It is not reasonably probable the result would

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[2] The jury was instructed: "If you decide that the defendant committed the [other] offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to deprive the owner of property permanently; or [¶] The defendant had a plan or scheme to commit the offenses alleged in

have been more favorable to defendant had the prior crimes evidence, either collective or singularly, been excluded.

B. Jury instruction

Defendant asserts further prejudice in that the trial court failed to instruct the jury which of the two prior thefts was admitted on the issue of intent and which on the issue of common plan or scheme. When instruction pursuant to CALCRIM No. 375 is given, the trial court should limit it to the issues—e.g., intent, identity, common scheme—to which the evidence relates. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1171; *People v. Swearington* (1977) 71 Cal.App.3d 935, 949.) Here, the trial court limited the instruction to intent to deprive the owner of property permanently and plan or scheme to commit the alleged offenses. Defendant never requested the instruction be further modified. Generally, there is no sua sponte duty to instruct on the limited admissibility of evidence of uncharged criminal conduct. (*People v. Mendoza* (2012) 52 Cal.4h 1056, 1094, *People v. Collie* (1981) 30 Cal.3d 43, 63.) This issue has been forfeited. Even if the issue is properly

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this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Counts 1 and 2. The people must still prove every charge beyond a reasonable doubt." (CALCRIM No. 375.)

before us, we independently consider the instructions as a whole to determine whether it is reasonably likely CALCRIM No. 375 as given confused or misled the jury. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075; *People v. Mayfield* (1997) 14 Cal.4th 668, 777, disapproved on another point in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) It is not reasonably likely the jury was confused or misled by CALCRIM No. 375 as given.

C. Consecutive Sentencing

Defense counsel requested the trial court "merge" counts 1 and 2 under section 654, subdivision (a). The discussion was as follows: "[Defendant's attorney Christopher] Sharpe: . . . I'm asking for the court to, under 654, merge counts 1 and 2. It was the same course and conduct as to both security guards and the victim was actually one victim from Home Depot. [¶] The Court: What is the People's position on that? [¶] [Deputy District Attorney Louis G.] Morin: Your honor, I believe that does not apply, that there is an exception when you have multiple victims, and the case on that is *People [v]. Perez*, [(1979)]23 Cal.3d 545. [¶] Since each of these robberies was committed against a different person, not against a corporation, I believe consecutive sentencing is appropriate. [¶] The Court: Do you want to respond to that, Mr. Sharpe? [¶] Mr. Sharpe: If the court does side with the prosecution's argument, I ask the court to say one of the counts. [¶] Submitted. [¶] The Court: Do I have authority to stay a count? You're talking about count 2 to stay? [¶] Mr. Sharpe: Yes, Your Honor. [¶] The Court: Under what authority? [¶] Mr. Sharpe: I don't have any case cites. [¶]

The Court: 654 is what you're asking for. Any other reason? [¶] Mr. Sharpe: No. [¶] . . . [¶] The Court: . . . [¶] As to count 2 . . . the defendant is sentenced to state prison for the subordinate and consecutive term of two years, which is one-third the midterm doubled because of the strike. [¶] The court has imposed a consecutive sentence by reason of the separate nature of the offenses and where 654 may not apply where there are multiple victims of a violent offense."

On appeal, defendant argues sentencing on count 2 was governed by sections 667, subdivisions (c)(6), (c)(7) and 1170.12, subdivisions (a)(6), (a)(7). According to defendant, those statutory provisions permitted the trial court to impose concurrent sentences. (*People v. Deloza* (1998) 18 Cal.4th 585, 590-591; *People v. Hendrix* (1997) 16 Cal.4th 508, 511-514.) Defendant asserts this case must be remanded for resentencing because: "[T]he trial court misunderstood the scope of its discretion regarding the consecutive sentence imposed for Count 2. The court expressly stated since section 654 did not bar a consecutive sentence, a consecutive sentence was compelled because of the multiple victims. No consideration was expressed regarding the court's discretion to impose a concurrent sentence." Defendant forfeited this argument by failing to request concurrent sentences in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Gonzalez* (2003) 31 Cal.4th 745, 748, 751-752.) But even if preserved, defendant's argument is without merit. The record in never way indicates the trial court believed it lacked discretion to impose concurrent sentences. We

presume the trial court was aware of and followed the applicable law. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179; *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1260-1261.)

IV. DISPOSITION

The judgment is affirmed.

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TURNER, P.J.

We concur:

KRIEGLER, J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.