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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TODD ALAN YOUNG,<br><br>Defendant and Appellant. | B231420<br><br>(Los Angeles County<br>Super. Ct. No. PA067638) |

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed.

Michael W. Flynn, 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, Kenneth C. Byrne and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Todd Alan Young appeals from a sentence of four years in state prison following his convictions for second degree commercial burglary, petty theft, and possession of a smoking device. He contends his conviction for commercial burglary should be reversed because the trial court erred in admitting statements he made to a deputy sheriff before receiving *Miranda* advisements.[1] He also contends he received ineffective assistance of counsel. Finding no reversible error, we affirm.

## STATEMENT OF THE CASE

A jury found appellant guilty of second degree commercial burglary (Pen. Code, § 459; count one),[2] petty theft (§ 484, subd. (a); count two), and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364, subd. (a); count three). In a bifurcated court trial, appellant admitted two of his three prior prison terms (§ 667.5, subd. (b)). The remaining prior was dismissed on the People's motion.

The trial court sentenced appellant to state prison for four years as follows: the mid term of two years for count one, plus an additional year for each of the two priors, plus a concurrent term of 180 days in county jail for count three. The sentence on count two was imposed and stayed.

Appellant timely appealed from the judgment of conviction.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] All further statutory citations are to the Penal Code, unless otherwise stated.

## STATEMENT OF THE FACTS

Victor Zarate testified that on October 17, 2010, he was working as an undercover loss prevention officer for Walmart. At approximately 2:30 p.m., another Walmart employee alerted Zarate that a man -- appellant -- was behaving suspiciously, re-entering the store through the Gardening area multiple times. Zarate went to the Gardening area and located appellant. He observed appellant, who was wearing a backpack, walk around the store with an empty shopping cart. Appellant was "looking around everywhere" and appeared nervous. Appellant grabbed a bottle of laundry detergent and a suitcase from different areas of the store, and put those items in his shopping cart. Appellant then proceeded to the customer service counter, where he handed both items to a clerk. Appellant also handed the clerk a receipt. The clerk scanned the items, opened the register, and handed appellant some cash. A surveillance video showing appellant taking two items off the shelves and returning them at the customer service counter was played for the jury.

After Zarate observed appellant at the register, he approached appellant and identified himself. Zarate told appellant that he had been "watching him the whole time" and that he had seen appellant take the detergent and suitcase and "return" those items for cash. Appellant said, "Okay," and Zarate escorted him to the loss prevention office, which was connected to the customer service area.

Zarate recovered the $32.86 from appellant, which he returned to the customer service clerk. Zarate also recovered the receipt (dated September 22, 2010) that appellant had handed to the clerk. Because appellant had received more than $25 in cash, Zarate contacted the Los Angeles County Sheriff's Department. While Zarate began preparing paperwork, appellant began "acting real fidgety," so Zarate asked him to empty his pockets. Appellant complied, taking out his wallet,

some wads of paper, and what appeared to be a glass pipe. Appellant put the pipe inside his shoe, and put the other items inside his backpack, which was at his feet.

When Zarate asked appellant why he "did what he did," appellant responded that he "needed the money." Appellant was apologetic, and asked Zarate not to call the sheriffs. When Deputy Sheriff Juan Muralles responded to the scene, Zarate spoke with Deputy Muralles outside the security office. During this time, appellant took the pipe from his shoe and placed it inside a case of water bottles under his seat. A surveillance video of what transpired inside the loss prevention office was also played for the jury.

Deputy Muralles testified that when he first arrived, he spoke with Zarate. Deputy Muralles then entered the loss prevention office alone and asked appellant, "[W]hat happened?" Appellant said he had been laid off, and he went to Walmart because he was "out of cash and had an old receipt and got some items." Appellant said he "needed cash," so he took some items and returned them for cash. Appellant was remorseful. Deputy Muralles arrested appellant and took him to his patrol vehicle.

While at his patrol vehicle, Deputy Muralles was told about the glass pipe. He returned to the loss prevention office where he noticed a glass methamphetamine pipe inside a water bottle case. Deputy Muralles photographed the case and booked the pipe into evidence.

Appellant testified on his own behalf. He stated that on the morning of October 17, 2010, he "decided to go to Walmart and get a soda." When he did not find the sodas that cost $0.25, he took his wallet out to check if he had the money to purchase a different drink. That was when he saw the old receipt. Appellant testified, "I made a terrible judgment. I thought that I could get -- I could grab a couple items off the shelf and take them to the return counter and get a couple of

dollars. I had been laid off from my job six weeks prior. They denied my unemployment, which I was going to appeal, and I made a terrible judgment." Appellant admitted, "I grabbed two items, and I went to the return counter, and I was going to make a return with items that weren't mine." Appellant further admitted that the pipe found inside the security office belonged to him, and that he used this pipe to smoke methamphetamine. Appellant also admitted he had been convicted of two felonies, one for possession of methamphetamine for sale in 2003, and another for commercial burglary of Tower Records in 2005.

## DISCUSSION

Appellant contends his conviction for commercial burglary should be reversed because (1) the trial court improperly admitted the statements he made to Deputy Muralles, (2) his trial counsel failed to properly object to questioning about an uncharged prior commercial burglary, and (3) cumulative error.

### A. *Statements Made to Deputy Muralles*

Under *Miranda*, statements obtained during custodial interrogation can be used at trial only if the defendant had been given certain advisements. (*Miranda*, *supra*, 384 U.S. at p. 444.) "In determining whether a person is in custody . . . , the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' [citation], a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" (*Howes v. Fields* (2012) ___ U.S. ___ [132 S. Ct. 1181, 1189].) "Relevant factors include the location of the questioning, [citation], its duration, [citation], statements made during the interview, [citations], the presence or absence of physical restraints during the questioning, [citation], and the release of the interviewee at the end of the

questioning, [citation]." (*Ibid*.) However, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have 'decline[d] to accord talismanic power' to the freedom-of-movement inquiry, [citation], and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." (*Howes v. Fields*, at pp. 1189-1190.) Finally, *Miranda* violations are subject to harmless error analysis. (*People v. Davis* (2009) 46 Cal.4th 539, 588.)

Appellant contends his statements to Deputy Muralles in the security office should have been excluded because he was not given *Miranda* advisements when he was interrogated while in custody. The trial court ruled the statements were admissible because (1) appellant was detained and questioned in a security office, and not the police station; (2) he was not formally arrested and not in handcuffs; (3) he was interviewed by one officer; (4) he was asked a single investigative question, which was the first statement during the conversation; and (5) the length of the detention was fairly short. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 437-440 [*Miranda* advisements not required where defendant was temporarily detained and asked "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions"].)[3]

Here, the questioning by Deputy Muralles was not unduly coercive. Appellant was not in a police station or the back of a patrol vehicle. He was neither handcuffed nor subjected to a lengthy interrogation. He was not questioned by multiple officers, and there is no evidence Deputy Muralles threatened him. Appellant was asked a single question -- "What happened?" -- that did not

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[3] The trial court excluded a statement made by defendant while he was in the patrol car.

expressly seek incriminating evidence. On this record, we conclude appellant was not subject to custodial interrogation. In short, the trial court properly admitted appellant's statements to Deputy Muralles, as the questioning did not implicate the concerns raised in *Miranda*.

Moreover, had we concluded that appellant's statements to Deputy Muralles were obtained in violation of *Miranda*, we would find any error harmless beyond a reasonable doubt. The jury heard evidence that appellant entered the store with very little money, that he placed two relatively expensive items in his shopping cart, that he had an old receipt on his person, and that he used the old receipt to "return" the items for cash because he needed the money. This was more than sufficient to support the charged offenses. Even absent evidence of the statements appellant made to Deputy Muralles, we find it unlikely that a reasonable jury would have credited appellant's testimony that he formed the intent to steal only after he could not find a specific cheap soda. Zarate testified that after locating appellant near the store entrance in the Gardening area, he observed appellant walking around the store with an empty shopping cart. Zarate never saw appellant looking at sodas or saw appellant taking out his wallet. In light of the evidence in the record, we find no reasonable probability that the jury would have reached a more favorable verdict had it not heard appellant's statements to Deputy Muralles. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

B. *Ineffective Assistance of Trial Counsel*

Before appellant testified, the trial court ruled that the prosecutor could introduce evidence of a 2005 commercial burglary for impeachment purposes. During cross-examination of appellant, the prosecution inquired about this prior burglary.

Prosecutor: "The prior convictions that you had -- first let's talk about the one at Tower Records. You went in there, and you actually stole a couple C.D.'s. One of them was Metallica, a couple other C.D.'s, and your purpose was to go in there and not pay for them, correct?"

Appellant: "I already stated that I was guilty on that."

Prosecutor: "Well, I'm asking you specifically, you went to the Tower Records knowing that you didn't have the money for them, or if you did have the money for them, you didn't have any intention to pay for those items; is that correct?"

Defense counsel objected. At sidebar, the prosecutor argued that the underlying facts of the commercial burglary were relevant under Evidence Code section 1101, subdivision (b). Defense counsel stated, "I understand, and I would agree with counsel that he could go into that area. . . . I want to be careful we don't go too far with the facts of that incident because I think there are some facts that aren't relevant." Defense counsel was concerned about the fact that there was a struggle afterwards, and the prosecutor stated he would not inquire about the struggle. When cross-examination resumed, the following colloquy occurred:

Prosecutor: "[B]ut what I'm asking you is on that particular incident, as you remember the Tower Records incident, you actually before you entered that store, you already had the intent of stealing those items; is that correct?"

Appellant: "That is not true, no."

Prosecutor: "Isn't it true that you were not only apprehended for having those items on you, but you also had on your person a wire cutter, a broken magnet and a broken plastic security case?"

Appellant: "That is not true. I had no broken security case."

Prosecutor: "But you had wire cutters and a broken magnet."

Appellant: "Yeah. I just came from work."

> Prosecutor: "You always come from work, you have wire cutters in your back pocket as you enter a store in which you took two C.D.'s without paying for them?"
>
> Appellant: "When I left work, I had tools on me. I didn't empty my pockets."
>
> Prosecutor: "So it was pure coincidence you had the wire cutters when you entered the store?"
>
> Appellant: "Yes. I would say that was a coincidence."

After both sides rested, while discussing jury instructions, appellant's trial counsel objected to CALCRIM No. 375 -- which instructed the jury that it could consider appellant's prior commercial burglary when determining whether he entered the store with an intent to steal -- because there were not enough "factual similarities between the two incidents [of commercial burglaries] that would make it an appropriate use for intent." The trial court overruled the objection on the ground that the prior commercial burglary could be used to show intent under Evidence Code section 1101, subdivision (b).

Appellant now contends he received ineffective assistance because his trial counsel "failed to object properly to the prosecution's attempt to introduce the facts from the 2005 commercial burglary" of Tower Records to show intent. Because defense counsel objected to CALCRIM No. 375, we examine only defense counsel's failure to object to the prosecutor's questioning during cross-examination.

In order to prevail on a claim of ineffective assistance of counsel, appellant must show (1) that his trial counsel's representation fell below an objective standard for reasonableness under prevailing professional norms; and (2) that there was a reasonable probability that but for counsel's unprofessional errors, the result

would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Gray* (2005) 37 Cal.4th 168, 206-207; *People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) Here, appellant has shown neither deficient performance by trial counsel nor prejudice.

Under Evidence Code section 1101, subdivision (b), a prior offense may be used to show "motive, intent, preparation or identity." (*People v. Daniels* (1991) 52 Cal.3d 815, 856; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 15-16 [prior assault and robbery of single victim admissible under Evidence Code section 1101, subdivision (b) to show that defendant killed victim while intending to rob him].) In order to introduce evidence of an uncharged crime to show intent, the charged and uncharged crimes need only be "sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) In addition, the evidence of the uncharged crime must be more probative than prejudicial. (*People v. Walker* (2006) 139 Cal.App.4th 782, 796.) "A trial court's determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion." (*Id*. at p. 794.)

Here, trial counsel was not ineffective for failing to object to the prosecutor's questioning about the Tower Records burglary because any objection would have been futile, as the trial court did not err in determining that the questioning was permissible under Evidence Code section 1101, subdivision (b). The burglary of Tower Records was sufficiently similar to the burglary of Walmart for the prosecution to introduce evidence of the facts of the prior burglary. In both cases, appellant attempted to remove merchandise from a store, and the evidence indicated appellant entered the store with the intent to take the merchandise. In the Tower Records burglary, appellant entered the store with items that could remove

security devices. In the instant case, appellant had an old receipt that could be used to obtain cash. In both cases, it could be inferred that appellant had developed a plan to steal before entering the store, as he carried the materials necessary to implement that plan into the store. In short, trial counsel's performance was not deficient.

In addition, appellant has not shown prejudice. The prosecutor did not receive favorable answers to his questioning about the Tower Records burglary. Appellant denied entering Tower Records with an intent to steal. He also provided an explanation for having a wire cutter and magnet on his person. Moreover, for the reasons stated above, there is no reasonable probability that the jury would have reached a more favorable verdict had it not heard that appellant was found with a wire cutter and broken magnet on his person during the Tower Records burglary. (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

C. *Cumulative Error*

Finally, appellant contends there was cumulative error. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

## DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.