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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RONALD DAVENPORT, Defendant and Appellant.	B241685 (Los Angeles County Super. Ct. No. PA068709)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

David W. Scopp, 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, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Ronald Davenport of selling methamphetamine, a controlled substance, in violation of Health and Safety Code section 11379, subdivision (a). After a bifurcated trial the court found true the allegations that Davenport had suffered two prior convictions for selling a controlled substance (*id*., § 11370.2, subd. (a)) and that he had served one prior prison term (Pen. Code, § 667.5, subd. (b)). The court sentenced Davenport to state prison for a total term of seven years.

Davenport contends the trial court deprived him of due process by admitting into evidence a prior conviction for possession of methamphetamine to prove his knowledge that the controlled substance in this case was methamphetamine. We conclude that the trial court acted well within its discretion, both under Evidence Code section 1101, subdivision (b), and Evidence Code section 352, in admitting the challenged evidence and that Davenport has not demonstrated any due process violation. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of September 30, 2010 Los Angeles Police Detective Marco Taoatao from the Devonshire narcotics enforcement detail was driving in the area of Balboa Boulevard and San Fernando Mission Boulevard in Granada Hills. He saw a woman, later identified as Melonie Shelton, talking on a pay phone often used to conduct narcotics transactions. Detective Taoatao decided to investigate and parked his unmarked car nearby, communicating via walkie talkie with the other members of his detail, who were in another car.

After a brief and animated conversation on the pay phone, Shelton ran across the street to the northeast corner of the intersection and started to look at every vehicle that passed by. Shortly thereafter, Shelton walked back across the street and made another

brief call from the pay phone. She then walked to a strip mall parking lot and carefully looked at every vehicle that approached her.

After five to ten minutes, Davenport drove a white pickup truck into the parking lot and stopped in the traffic lane. Shelton immediately ran up to the driver's side of the truck, talked to Davenport through an open window, and handed him some folded currency. Davenport gave Shelton an item small enough to fit in the palm of her hand. Shelton put the item inside her purse. Specifically, she put her "cupped" hand inside her purse, and when she took her hand out of her purse, her hand was "open" and empty.

Detective Taoatao, who had "a clear and unobstructed view" of the exchange, believed that he had witnessed "a call and deliver type of narcotics transaction" between Shelton and Davenport. After notifying the other members of his narcotics detail, he approached Shelton and asked her what she had put in her purse. Shelton said she did not want to talk about it. Detective Taoatao detained Shelton and searched her purse. The first thing the detective saw inside Shelton's purse "right on top" of other items was "a clear baggy containing white crystal substance which [he] immediately recognized as a substance resembling methamphetamine." The plastic bag was approximately two inches tall by one and one-half inches wide. Detective Taoatao placed Shelton under arrest for possession of methamphetamine.

Meanwhile, the other members of Detective Taoatao's team drove into the parking lot and stopped behind Davenport's truck. Los Angeles Police Officer Daniel Jones approached Davenport, identified himself as a police officer, and directed Davenport to raise his hands. When Davenport complied, Officer Jones saw currency in Davenport's left hand. Officer Jones ordered Davenport to drop the money and to get out of the truck. Davenport again complied. The officer then handcuffed Davenport, completed a field identification card, and searched him. Officer Jones recovered $459 and a cell phone but found no contraband on him or in his truck. The officer also recovered the $14 that Davenport had dropped on the floorboard. After Detective Taoatao confirmed his initial suspicion that he had observed a narcotics transaction, he arrested Davenport for selling

methamphetamine. A chemist subsequently determined that the plastic bag recovered from Shelton's purse contained methamphetamine with a net weight of 1.12 grams.

At trial, the People asked the court for permission to introduce evidence of Davenport's prior conviction for selling methamphetamine, the same offense for which he was on trial, in order to establish knowledge and common scheme under Evidence Code section 1101, subdivision (b). The trial court's initial indication was to admit the evidence, but when the court learned that the method of sale in the prior case was different from the manner of sale in this case, the court excluded the evidence, explaining, "[i]t's getting too close to proclivity and propensity." Over Davenport's Evidence Code section 352 objection, however, the trial court allowed the People to introduce evidence of Davenport's prior conviction for simple possession of methamphetamine, a violation of Health and Safety Code section 11377, to establish his knowledge that the substance he sold in this case was methamphetamine.

During the trial, the court told the jury "that the defendant, Ronald Clifford Davenport, on the date of February 26th, 2002, in the County of Los Angeles . . . entered a plea to straight possession of methamphetamine in violation of [section] 11377 of the Health and Safety Code. There will be an instruction that will define how you may use that particular plea. And the lawyers will be arguing its relevancy or how you should approach that subject matter. But when I do instruct the jury limiting your ability to consider what I just told you, it's limited by the instruction as to how you can use that."

The trial court also gave the following limiting instruction: "The People presented evidence that the defendant committed another offense in the past, to wit, possession of methamphetamine. In considering this past offense you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant knew the controlled substance in this case was methamphetamine as required in the next instruction under element three. . . . Do not consider this evidence for any other purpose, except for the limited purpose of whether the defendant knew of the substance's nature or character as a controlled substance as required as element three of the next instruction which defines the crime charged herein. Do not conclude from this evidence that the

defendant has a bad character or is disposed to commit crime. This uncharged offense in the past is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the guilt of sale of methamphetamine. The People must still prove the charge beyond a reasonable doubt." The trial court also instructed the jury that in order to prove Davenport guilty of selling methamphetamine, the People had to prove that (1) defendant sold a controlled substance, (2) defendant knew of its presence, (3) defendant knew of the substance's nature or character as a controlled substance, and (4) the controlled substance was methamphetamine.

DISCUSSION

Evidence of prior convictions or uncharged crimes is inadmissible to establish propensity to commit a crime on a particular occasion. (Evid. Code, § 1101, subd. (a).) Subdivision (a) of Evidence Code section 1101 provides that subject to certain exceptions "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence of prior convictions or uncharged crimes is admissible, however, to prove "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) . . . ." (*Id*., subd. (b).)

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of evidence . . . .'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.) "The trial court has great discretion in determining the admissibility of evidence." (*People v. Williams* (2009) 170 Cal.App.4th 587, 606; accord, *People v. Valdez* (2012) 55 Cal.4th 82, 170.) A trial court's decision to admit evidence of uncharged offenses under Evidence Code sections 1101, subdivision (b), and 352 is reviewed for an abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301,

1328.) Reversal is warranted only if "'"the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*Id*. at pp. 1328-1329.)

In a prosecution for a drug offense, prior drug convictions are generally admissible to prove the defendant's knowledge of the nature of the controlled substance that is the subject of the current charge. (See *People v. Williams*, *supra*, 170 Cal.App.4th at p. 607 ["In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs."]; *People v. Thornton* (2000) 85 Cal.App.4th 44, 47 [defendant's admission of prior use of heroin was admissible to prove his knowledge that the substance he possessed was heroin]; *People v. Ellers* (1980) 108 Cal.App.3d 943, 953 [evidence of defendant's prior dealing relationship with informant was admissible "to prove knowledge of the narcotic nature of the heroin he sold" and "his intent to sell it"]; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [evidence of prior narcotics offenses admissible to show knowledge, motive, and intent where defendant's "knowledge of the narcotic contents of the drug and his intent to sell were at issue"].)

Davenport does not dispute that this is the law. He maintains, however, that evidence of his prior conviction was not relevant because while the act of selling methamphetamine was at issue in this trial, his knowledge of the narcotic nature of the substance recovered by the police was not. By entering a plea of not guilty, however, Davenport placed each and every element of the charged offense at issue, not simply the one he disputed at trial. (See *People v. Scott* (2011) 52 Cal.4th 452, 470; *People v. Booker* (2011) 51 Cal.4th 141, 171; *People v. Cowan* (2010) 50 Cal.4th 401, 476; *People v. Hendrix* (2013) 214 Cal.App.4th 216, 239-240.) "There is no requirement that a defendant dispute [a particular element of the crime] before a prosecutor may introduce relevant evidence on the issue. [Citation.] Thus, the '"prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."' [Citations.]" (*People v. Escudero* (2010) 183

Cal.App.4th 302, 313; accord, *People v. Jones* (2011) 51 Cal.4th 346, 372; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1395; *People v. Ellers*, *supra*, 108 Cal.App.3d at p. 953 ["[i]t is not necessary for the defendant to raise an issue as to his knowledge before the People can introduce . . . evidence" of prior criminal conduct].) Moreover, counsel for Davenport reminded the jurors to follow the instruction "that the prosecution has . . . to prove the case to you beyond a reasonable doubt as to each element beyond a reasonable doubt," and that for the four elements of the crime the jurors had "to find each one of those beyond a reasonable doubt." Because Davenport's knowledge of the nature of the substance in the small plastic bag was at issue in this case, his prior conviction of possession of methamphetamine was relevant to prove that he knew the controlled substance in the plastic bag was in fact methamphetamine.[1]

Davenport also argues that the conduct in his prior conviction was not relevant because it was not sufficiently similar to the charged offense in this case. He maintains that the distinction between mere possession of methamphetamine and sale of methamphetamine is significant and that the fact that both involved methamphetamine is insignificant. We conclude that the two crimes are sufficiently similar, that the probative value of the prior conviction for possession of methamphetamine is substantial, and that therefore Davenport's prior conviction was relevant and admissible.

People v. Hendrix, *supra*, 214 Cal.App.4th 216, though ultimately distinguishable, is instructive. The People charged Hendrix with knowingly resisting an executive officer by use of force or violence in the performance of his duty, a violation of Penal Code section 69. (*Id.* at p. 220.) Hendrix got into a fight with a private security guard at an apartment complex and then fled. Additional security guards in black uniforms and police officers in dark blue uniforms gave pursuit, and the police officers caught up to Hendrix first. Hendrix forcibly resisted when one of the police officers, Officer Mosely,

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[1] Davenport erroneously equates knowledge of the nature of the controlled substance with the requisite criminal intent needed to convict. Thus, his reliance on cases discussing the admissibility of uncharged crimes to prove intent is misplaced.

attempted to detain him. (*Id*. at p. 221.) At trial, the court permitted the People, over Hendrix's objection, to introduce into evidence facts pertaining to Hendrix's prior convictions for resisting arrest (Pen. Code, § 148) and resisting a police officer by means of threat or violence (*id*., § 69). (*Hendrix*, *supra*, at pp. 220, 221.) Hendrix argued that he did not know in the current case that he had resisted a police officer, rather than a security guard, because he had been pepper-sprayed, was intoxicated, and was arrested in poor lighting. (*Id.* at pp. 221-222.) The jury convicted Hendrix.

The court in *Hendrix* addressed the issues of "[w]hether similarity is required to prove knowledge," as opposed to "identity, common scheme or plan and *intent*," and, if "similarity is required to prove knowledge," then "what degree of similarity is required." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 240, 241.)[2] The court concluded: "Whether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime. For example, knowledge of the dangers of driving while under the influence can be obtained through the general experience of having suffered a driving under the influence (DUI) conviction [citation], from the knowledge obtained in DUI classes [citations] or from the admonition required by Vehicle Code section 23593 upon a DUI-related conviction. While prior similar driving conduct and other similar circumstances would enhance the probative value, other crimes evidence may be admissible even though similar only in a general way, i.e., the prior events involve prior DUI offenses. This is so because in any of these examples, the evidence supports an inference that the defendant was aware of the dangers of driving while under the influence at later times when he or she drove. Also, as

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[2] The court noted that "[i]t is well settled that various degrees of similarity are required to establish identity, common scheme or plan and intent." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 240-241, italics omitted; see *People v. Lindberg*, *supra*, 45 Cal.4th at p. 23; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) The *Hendrix* court, however, could "find no California case" discussing the similarity issue for knowledge. (*Hendrix*, *supra*, at p. 241.)

the prosecutor pointed out here, in narcotics prosecutions, evidence of prior drug convictions is relevant to prove knowledge of the narcotic nature of the substance. [Citations.] On this theory, the only necessary similarity is that the controlled substance be the same. [Citation.]" (*Hendrix*, *supra*, at pp. 241-242, fns. omitted.)

The *Hendrix* court concluded that Hendrix's prior convictions for resisting arrest and resisting a police officer by means of threat or violence and his current charge of resisting a police officer by means of threat or violence "were dissimilar in a material way" and therefore the prior convictions "lacked probative value" and should not have been admitted. (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 239.) With regard to similarity, the court observed: "Because the factual issue the jury was tasked to resolve here was whether defendant knew Officer Mosley was a police officer or whether defendant mistakenly thought Officer Mosley was another security guard, the admissibility of the uncharged offenses turns on whether the experiences defendant gained during those prior incidents prepared him to distinguish between security guards and the police. On this theory, the prior incidents would be probative if the circumstances under which defendant encountered the police on those prior occasions involved interaction with security guards. Indeed, we regard this as a crucial point of similarity here. [Citation.] For example, had the two previous encounters with uniformed police officers involved situations where the police issued commands and used force to detain defendant *after* defendant had been initially confronted by private security guards, it could be inferred that defendant learned from those experiences that the police become involved after an escalating confrontation with private security personnel, and because defendant knew that, it was less likely he mistook the police here for security officers. However, the prior incidents here provide no such analogue." (*Id.* at p. 243.) Given the lack of similarity between Hendrix's prior offenses and his current crime, his prior offenses "lacked probative value." (*Id.* at p. 244.)

Davenport's prior conviction for possession of methamphetamine and his charge in this case for the sale of methamphetamine are not "dissimilar in a material way." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 239.) Both crimes involved

methamphetamine, and Davenport's prior conviction for possession of methamphetamine had a very strong tendency to establish that he knew the substance in the plastic bag was methamphetamine. Thus, this case falls within the example in the *Hendrix* opinion that "in narcotics prosecutions, evidence of prior drug convictions is relevant to prove knowledge of the narcotic nature of the substance," and that "the only necessary similarity is that the controlled substance be the same." (*Id*. at p. 241.) The trial court did not abuse its discretion in concluding that Davenport's prior conviction for possession of methamphetamine was relevant and admissible under Evidence Code section 1101, subdivision (b).

Finally, Davenport contends that even if his prior conviction for possession of methamphetamine were relevant and admissible under Evidence Code section 1101, subdivision (b), it nevertheless was inadmissible under Evidence Code section 352. "Under this section, the court may exclude even relevant evidence if 'its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . .' (*People v. Lopez* (2013) 56 Cal.4th 1028, 1058-1059.) "'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. . . . "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.]" (*Id.* at p. 1059.)

As noted above, Davenport's prior conviction for possession of methamphetamine was highly probative of the issue of whether he knew the controlled substance in this case was methamphetamine. Any prejudice was minimized by the fact that the trial court only took judicial notice of the nature of Davenport's prior crime and told the jury that he had entered a plea to possession of methamphetamine; the jury did not hear the facts underlying his prior conviction for possession.

The trial court's limiting instruction further limited any prejudice. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 247 [in assessing prejudice under Evidence Code section 352, reviewing courts also "consider whether the trial court gave a limiting instruction"].) The trial court instructed the jury that it could only consider Davenport's prior possession conviction in deciding whether or not he knew the controlled substance in the plastic bag was methamphetamine and not for any other purpose. The court also instructed the jury that it could not conclude from Davenport's prior conviction that he was predisposed to commit the current offense or had a bad character, and that his prior crime alone was insufficient to prove his guilt of the crime for which he was on trial. We presume the jury followed the trial court's instructions. (See *People v. Lindberg*, *supra*, 45 Cal.4th at p. 26 [in evaluating the admissibility of evidence under section 352 of the Evidence Code the jury is presumed to have followed trial court's limiting instruction regarding other crimes evidence]; see also *People v. Pearson* (2013) 56 Cal.4th 393, 434-435, petn. for cert. pending, petn. filed June 18, 2013 [court presumes the jury followed admonishment to disregard an improper question about a witness' outstanding bench warrant]; *People v. Homick* (2012) 55 Cal.4th 816, 853, petn. for cert. pending, petn. filed May 21, 2013 [court presumes the jury followed instruction not to consider a codefendant's extrajudicial statement]; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1274 [court presumes the jury followed a curative instruction].)

Davenport argues that "the uncharged and charged conduct occurred over ten years apart." The fact that Davenport's prior conviction for methamphetamine possession conviction was in 2002, however, does not necessarily mean that the prior conviction was inadmissible. "People learn from their experiences. Even when those experiences occurred long ago, the knowledge gained from such experiences can be retained and recalled in the future." (*People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 242.)

We conclude the trial court acted well within its discretion under Evidence Code section 352 in ruling that the probative value of the uncharged crime was not substantially outweighed by danger of undue prejudice. (See *People v. Lindberg*, *supra*,

45 Cal.4th at p. 25.) We further conclude that Davenport has failed to demonstrate that he was deprived of due process of law. "Having concluded that the trial court did not abuse its discretion under [Evidence Code] section 352, we must also reject [Davenport's] argument that he was deprived of his constitutional right to a fair trial. '"The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."' [Citations.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 180; accord, *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *People v. Paniagua* (2012) 209 Cal.App.4th 499, 517.)

DISPOSITION

The judgment is affirmed.

SEGAL, J.*

We concur:

PERLUSS, P. J.

WOODS, 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.