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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

JUAN CARLOS TOSCANO,

Defendant and Appellant.

2d Crim. No. B280373
(Super. Ct. No. 2016007307)
(Ventura County)

Juan Carlos Toscano appeals from the judgment entered after his conviction by a jury of first degree residential burglary. (Pen. Code, §§ 459, 460.)[1] The court found true allegations that he had served four prior prison terms. (§ 667.5, subd. (b).) The court struck the prison terms. It sentenced appellant to prison for the four-year middle term.

Appellant contends that the trial court erroneously (1) admitted evidence of two prior shoplifting offenses to show he

[1] All statutory references are to the Penal Code unless otherwise stated.

had the specific intent to commit theft when he entered the victim's residence, and (2) admitted evidence of two prior felony convictions to impeach his credibility. In addition, appellant argues that the court erroneously failed to instruct the jury sua sponte pursuant to CALCRIM Nos. 375 and 316. We affirm.

Facts

People's Evidence

One afternoon in February 2016, Astrid Rodriguez looked out her kitchen window and saw appellant about five feet away. She called her father and 911. She then ran into her bedroom. She heard papers being shifted or moved "in the kitchen/living room area." When she emerged from her bedroom, the kitchen/living room area was "messy." "The kitchen window had the screen pulled off and was propped open."

When Rodriguez's father received his daughter's telephone call, he immediately drove home. He saw appellant in the backyard next to the kitchen door. Father asked him, "[W]hat are you doing in here? What are you looking for?" Appellant ran and jumped a fence.

About 30 minutes later, the police arrested appellant. In his possession they found father's hammer. They also found the "same type of" fruit, water bottle, and lotto tickets that had been inside the residence earlier that day.

Appellant told the police that he had entered the residence through a window. His purpose was to get food. He had not eaten for almost two days. He had taken fruit from the residence's refrigerator. Appellant initially said that he had taken the lottery tickets from the residence, "[b]ut then later he specifically said, no, I did not take those from the house."

Appellant's Evidence

At trial appellant testified as follows: His mother said she had rented a room in the back of a nearby house and appellant should look for her at around 1:00 p.m. She did not give her address. She pointed in the direction where appellant would find her.

When appellant went to look for his mother, he entered a house's backyard because the back fence was open and "it looked like a room . . . was being rented out." He walked into the kitchen through an open door. The owner's son, Luis Delgado, escorted him off the property.

Later, while driving a Jeep, Delgado chased appellant, who was on foot. Appellant sought refuge in the backyard of Rodriguez's residence. He entered the residence through an unlocked door in search of water to drink and a place to hide. He did not intend to steal anything. Once inside, he took a water bottle and fruit. He did not take the lottery tickets. He found them in the trash.

Admission of Prior Shoplifting Offenses to Show Appellant's Intent

To prove the charged residential burglary, the People were required to show that appellant had entered the residence with the intent to commit theft. (§ 459.) In closing argument defense counsel told the jury, "[T]he real and only issue in this case is the intent in the mind of [appellant] at the time he entered the [residence]." Appellant argues that the trial court erroneously admitted evidence of two prior shoplifting offenses to prove his intent upon entering the residence. Appellant objected to the court's ruling.

One shoplifting offense occurred in December 2015. Appellant entered a CVS store, took a pair of socks, concealed them, and walked out of the store without paying. Appellant admitted the theft, but claimed that he had not formed the intent to steal until after entering the store.

The other offense occurred in September 2015. Appellant entered a Walmart store, put a container of deodorant inside his back pocket, and walked out of the store without paying. The parties stipulated that appellant was convicted of petty theft for both offenses.

When the trial court admitted the prior offense evidence, it instructed the jury: "The charge before you is burglary. One of the elements of that charge is the People have to prove beyond a reasonable doubt that not only did the individual enter a structure without permission but that at the time he entered it, he had the intent to steal. . . . So this evidence is being admitted for you to consider whether . . . the defendant at the time that he entered the residence in this case did, in fact, have the intent to steal."

"'Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove . . . the intent with which the perpetrator acted in the commission of the charged crimes. (Evid.Code, § 1101.) . . .'" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328 (*Foster*).) Such evidence, however, is admissible "'only if the charged and uncharged crimes are sufficiently similar to support a rational inference of . . . intent. [Citation.]' [Citation.]" (*Ibid.*) "'The inference to be drawn is not that the actor is *disposed* to commit

such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.' [Citations.]" (*People v. Gallego* (1990) 52 Cal.3d 115, 171-172.)

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, . . . the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid.Code, § 352.)'[2] [Citation.]" (*Foster*, *supra*, 50 Cal.4th at p. 1328.)

"'Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]' [Citation.] 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*Foster*, *supra*, 50 Cal.4th at pp. 1328-1329.)

The prior shoplifting offenses involved facts different from those of the charged offense. The prior offenses were based on appellant's petty theft inside stores open to the public. The charged offense was based on appellant's entry into and petty theft from a residence. But there is one key point of similarity:

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[2] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

at some point in time, appellant intended to steal property from the premises. Because of this common feature, the trial court did not abuse its discretion in admitting evidence of the prior shoplifting offenses to prove appellant's intent when he entered the residence. Based on the priors, a reasonable trier of fact could infer that appellant entered the residence with the specific intent to steal.

That the court did not abuse its discretion is supported by *People v. Jones* (2011) 51 Cal.4th 346 (*Jones*). There, a jury convicted the defendant of two first degree murders. It found true special circumstances that the murders had been committed during a robbery-burglary. (Pen. Code, § 190.2, subd. (a)(17)(A), (G).) The evidence showed that, after unlawfully entering the home of a married couple, the defendant and an accomplice "hog-tied them, stabbed them to death, and stole their property." (*Jones, supra*, at p. 351.) The prosecutor presented evidence that eight years earlier defendant and an accomplice had robbed three men at gunpoint. The men were leaving a furniture store where they worked. Appellant arrived at the scene in a car that "stopped abruptly in front of them." (*Id*. at p. 370.) The trial court instructed the jury to consider the prior offense "only on the question of intent to commit robbery or burglary." (*Id*. at p. 371.)

In concluding that the trial court had not abused its discretion, our Supreme Court reasoned: "The [uncharged] robbery and the [charged] home invasion were not particularly similar, but they contained one crucial point of similarity - the intent to steal from victims whom defendant selected. Evidence that defendant intended to rob the [three men] tended to show that he intended to rob when he participated in the [charged] crimes. This made the evidence relevant on that specific issue,

which is all that the court admitted it for." (*Jones, supra,* 51 Cal.4th at p. 371.) Likewise, evidence that appellant intended to steal from the CVS and Walmart stores tended to show that he intended to steal when he entered the residence.

Appellant claims that the court abused its discretion under Evidence Code section 352 because evidence of the prior shoplifting offenses "unduly prejudiced" him. We disagree. The prior offenses were highly probative on the sole disputed material issue: appellant's intent when he entered the residence. The prior offenses were recent. They occurred only a few months before the charged offense. "The evidence was presented quickly, and the parties did not dwell on it." (*Jones*, *supra*, 51 Cal.4th at p. 371.) "The testimony describing [appellant's] uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offense[]. This circumstance decreased the potential for prejudice, because it was unlikely that the jury disbelieved [the] testimony regarding the charged offense[] but nevertheless convicted defendant on the strength of [the] testimony regarding the uncharged offenses, or that the jury's passions were inflamed by the evidence of defendant's uncharged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) "The fact that [appellant] was convicted of the [uncharged offenses] reduced any prejudicial effect, as the jury would not be tempted to convict [him] of the charged offense[] in order to punish him for the previous crime[s] . . . ." (*Jones*, *supra*, at pp. 371-372.)

Admission of Prior Felony Convictions to Impeach Appellant

Appellant argues that the trial court abused its discretion in admitting two prior felony convictions to impeach his credibility. One conviction occurred in 2001 and was for petty

theft with a prior theft conviction. (§ 666.) The other conviction occurred in 2005 and was for receiving stolen property. (§ 496, subd. (a).)

"'Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352.' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 512.) Moral turpitude involves a "'readiness to do evil.'" (*People v. Castro* (1985) 38 Cal.3d 301, 314.) Theft and receiving stolen property are crimes of moral turpitude. (*People v. Gray* (2007) 158 Cal.App.4th 635, 641.) "Therefore, evidence of those [felony] convictions was relevant to the issue of [appellant's] credibility . . . ." (*Ibid.*)

Appellant claims that the 2001 felony conviction was remote in time because it "happened in 2001, fifteen years before the current offense." "However, convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.) Since the 2001 conviction, appellant has not led a legally blameless life. In 2005 and 2008 he was convicted of felonies and sentenced to state prison.

Appellant contends that "[b]oth prior felony convictions were for similar type offenses, which tended to show his character as a thief." But "the identity [or similarity] of the offense charged and impeaching prior convictions does not dictate exclusion. The identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion." (*People v. Castro* (1986) 186 Cal.App.3d

1211, 1216.) In view of the strong impeachment value of the prior felony convictions and the importance of the credibility issue, the trial court acted within its discretion. (See *Id*. at p. 1216 & fn. 2.)

Jury Instructions: CALCRIM Nos. 375 and 316

Appellant maintains that the trial court erroneously failed to instruct the jury sua sponte pursuant to CALCRIM No. 375, which applies when evidence of uncharged offenses is admitted to prove intent. The instruction would have informed the jury that it can consider the two uncharged shoplifting offenses only for the purpose of determining whether appellant had the specific intent required for burglary.

The Bench Notes to the instruction state: "The court must give this instruction on request when evidence of other offenses has been introduced. [Citations.] The court is only required to give this instruction sua sponte in the 'occasional extraordinary case'" as described in *People v. Collie* (1981) 30 Cal.3d 43, 63-64. There, our Supreme Court held, "[I]n general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*Id*. at p. 64, fn. omitted.) The court recognized the following exception to this general rule: "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence." (*Ibid*.) The instant case is not such an extraordinary case. Thus, the trial court did not have a duty to instruct sua sponte pursuant to CALCRIM No. 375.

Appellant asserts that the trial court erroneously failed to instruct sua sponte pursuant to CALCRIM No. 316, "which would have informed the jurors that the fact of a conviction does not necessarily destroy or impair a witness's credibility."[3] The Bench Notes to the instruction state: "There is no sua sponte duty to give this instruction; however, the instruction must be given on request. [Citations.]" (See *People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [no sua sponte duty to give equivalent CALJIC No. 2.23 instruction].) The court, therefore, did not have a duty to instruct sua sponte pursuant to CALCRIM No. 316.

Appellant contends that his trial counsel was ineffective for not requesting instructions pursuant to CALCRIM Nos. 375 and 316. The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) To prove prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

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[3] CALCRIM No. 316 provides: "If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

Had the trial court given CALCRIM No. 375, it is not reasonably probable that the result would have been different. When evidence of the shoplifting offenses was admitted, the trial court instructed the jury, "[T]his evidence is being admitted for you to consider whether . . . [appellant] at the time that he entered the residence . . . did, in fact, have the intent to steal." During closing argument, the prosecutor stressed that the shoplifting offenses had been admitted for the limited purpose of showing appellant's intent: "The law allows you jurors to consider these two prior convictions . . . when you're determining what was [appellant's] intent when he entered the house." Furthermore, the trial court gave CALCRIM No. 303, which provided: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." "The presumption is that limiting instructions are followed by the jury. [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Thus, we presume that the jury considered the uncharged shoplifting offenses only for the purpose of showing appellant's intent upon entering the residence.

As to the two prior felony convictions admitted to impeach appellant's credibility, the court gave CALCRIM No. 226 on factors relevant to the credibility of a witness. The instruction lists 10 factors, the last of which is, "Has the witness been convicted of a felony?" The instruction makes clear that a witness's felony conviction is one of many factors to be considered in determining his credibility, so that a felony conviction "does not necessarily destroy or impair [his] credibility." (CALCRIM

No. 316.) Accordingly, it is not reasonably probable that the result would have been different had the jury been instructed pursuant to CALCRIM No. 316.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

David R. Worley, Judge

Superior Court County of Ventura

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