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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SHAUN ANDREW TALBUTT, Defendant and Appellant.	2d Crim. No. B286151 (Super. Ct. No. 2016026220) (Ventura County)

Shaun Andrew Talbutt appeals his conviction for second-degree robbery (Pen. Code, § 211)[1] of a 99 Cent Store with personal use of a deadly weapon (§ 12022, subd. (b)(1)). Appellant was sentenced to three years state prison and contends that the trial court erred in receiving evidence that appellant committed a prior uncharged robbery at the same store. (Evid. Code, § 1101, subd. (b).) We affirm.

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

Facts

On July 13, 2016, Miguel Coria, the Ventura 99 Cent Store manager, saw appellant put candy bars in his backpack. Coria recognized appellant from a prior theft incident and told him to stop stealing. Appellant pulled out a knife and asked Coria and store employee, Andriana Gonzalez, "are you going to do something?" and "call the cops if you want." Appellant left the store without paying with the open knife in his hand. Gonzalez called 911.

Ventura Police Officer Sean Portillo "spotted" appellant a few blocks from the store and gave chase. Appellant had a pocket knife clipped to his back pocket and stolen candy on his person.

At trial, the People introduced evidence that appellant robbed the same 99 Cent Store months earlier. Coria, the store manager, testified that in April or May 2016, appellant entered the store, stole candy, and took out a knife when confronted. The trial court gave a limiting instruction that the uncharged prior offense could only be considered to prove identity, intent, or plan or scheme. (CALCRIM No. 375.) Appellant defended on the theory that it was a petty theft, not a robbery. Appellant admitted stealing candy and soft drinks but denied displaying a knife. Granting the motion, the trial court ruled that the prior uncharged offense was admissible under Evidence Code section 1101, subdivision (b) to show identity, intent, or common plan or scheme. The jury was instructed that it may, but was not required to "consider [the] evidence for the limited purpose of deciding whether: [¶] The defendant was the person who committed the offense alleged in this case; or [¶] The defendant acted with the intent to deprive the owner of the

property permanently [or] . . . [¶] The defendant had a plan or scheme to commit the offense alleged in this case." (CALCRIM No. 375.)

"'Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) "When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a common plan or scheme and still less similarity is required to establish intent. [Citations.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.] The decision whether to admit other crimes evidence rests within the discretion of the trial court. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

Appellant argues that the prior crime evidence was inadmissible because appellant conceded identity, intent, and plan to steal at trial. Appellant, however, pled not guilty to the robbery charge which put in issue all of the elements of the offense. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 23.) "Defendant argues that he conceded at trial the issue of

intent . . . . Even if this is so, the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent. [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) The other crimes evidence was highly probative because appellant entered the same store, stole candy from the same aisle, and displayed a knife when confronted by the store manager. It was an *Estes* robbery in which appellant stole merchandise in the immediate presence of a store employee and used force and fear to complete the taking. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 25-26.) The trial court reasonably concluded that the prior uncharged robbery was sufficiently similar to establish appellant's identity, intent, and plan to rob the store. (*People v. Steele*, *supra*, at p. 1243.)

Evidence Code section 352

Appellant argues that the other crimes evidence was prejudicial and cast appellant in a bad light. "The potential for such prejudice is 'decreased' when testimony describing the defendant's uncharged acts is 'no stronger and no more inflammatory than the testimony concerning the charged offenses.' [Citation.]" (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) That is the case here. The trial court gave a limiting instruction that the other crimes evidence could only be considered to show identity, intent, and common plan. (CALCRIM No. 375.) The jury was instructed not to consider the evidence for any other purpose or conclude that appellant "has a bad character or is disposed to commit crime." On review, it is presumed that the jury understood and followed the instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Finally, appellant contends that the trial court believed appellant had the propensity to steal and relied on his

life experiences rather than the evidence. We reject the argument because the jury was the fact finder not the trial court. It was instructed not to let bias, sympathy, prejudice, or public opinion influence its decision. (CALCRIM No. 200.) It was instructed that the other crimes evidence "is not sufficient by itself to prove that the defendant is guilty of Robbery as alleged in Count 1. The People must still prove the charge beyond a reasonable doubt." (CALCRIM No. 375.) The evidence was overwhelming, and it is not reasonably probable that appellant would have obtained a more favorable verdict if the prior uncharged robbery was not received. (*People v. Davis* (2009) 46 Cal.4th 539, 603.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

Angelina R. Lane, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General, Nikhil D. Cooper, Deputy Attorney General, for Plaintiff and Respondent.