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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

JOHN THOMAS PIANI,

Defendant and Appellant.

2d Crim. No. B236860
(Super. Ct. No. 2011009370)
(Ventura County)

John Thomas Piani appeals from the judgment of conviction by jury of first degree burglary. (Pen. Code, §§ 459, 460, subd. (a).)[1] In bifurcated proceedings, the trial court found true the allegations that appellant had one prior serious felony conviction (§ 667, subd. (a)(1)) and one prior strike conviction (§§ 667, subd. (e)(1), 1170.12, subds. (b) & (c)(1)). It sentenced him to nine years in state prison (a 2-year low term for burglary, doubled, under the Three Strikes law, and a 5-year prior serious felony enhancement). Appellant's sole contention on appeal is that the court violated his due process rights and abused its discretion under Evidence Code section 352 by admitting evidence of a prior offense. (Evid. Code, § 1101, subd. (b).) We disagree and affirm.

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

FACT

On March 15, 2011, just before 7:00 a.m., Nemesio (Nick) Gomes entered the garage of his Simi Valley home and turned on the string of holiday lights he used for illumination. He found appellant, crouched down, next to the Gomes's car, putting items in a red bag. Gomes yelled, "Hey, stop," and appellant ran out the side door. Gomes chased him across the street and down the block. It was still dark outside.

Gomes lost sight of appellant and walked home. While walking, he saw his neighbor, Wendi Boudreau, who asked what had happened. She had heard Gomes yell, and seen him run after appellant. Boudreau called the police. Gomes returned to his garage and noticed that his fanny pack, car keys and cell phone were missing. Within minutes, Boudreau yelled, "Nick, he's coming back." Gomes returned to the street, saw appellant, and said, "That's him." Appellant ran down the street, and jumped (or "flopped") over a gate, and ran away again.

Simi Valley Police Department (SVPD) Officer Patrick Coulter arrived within minutes of appellant's over-the-gate escape. Gomes showed him the gate where he last saw appellant. Coulter searched the area and found Gomes's fanny pack and other items that belonged to Gomes, as well as a phone that was not his.

Appellant called his fiancée, Patricia Kenney, before 8:00 a.m. He told her his phone was gone, and asked her to meet him at a gas station. After she drove there, appellant used her phone and dialed his phone number. SVPD Detective Stephen Collett, who was then holding appellant's phone, answered it. Appellant said that the phone belonged to him. Collett identified himself as "Jeff," and told appellant that he was at the SVPD station, where he would leave the phone for him. Appellant urged Collett to meet him at a nearby Arco gas station instead. Collett agreed. Appellant said he would be in a maroon Lexus.

Collett and several other SVPD personnel went to the Arco station and surrounding area in unmarked cars, wearing plain clothes. Kenney drove appellant

toward the Arco station. Before they arrived, appellant got out of the car, in a church parking lot adjacent to the station. Kenney continued to the station, parked and waited in her Lexus. A SVPD detective took the phone to her. She accepted it and drove away. Appellant then started walking through the church parking lot, where another SVPD detective detained him. Gomes arrived at the parking lot, with police, and identified appellant as the man he saw in his garage. He recognized appellant's face, facial hair, and clothing. The police then arrested and interviewed appellant. He asked what they "had on him." He denied any involvement in the burglary, and claimed that his cell phone was stolen on the prior night.

Appellant's phone contained several text messages, including one that was sent from his phone at 6:32 a.m. on March 15. The Gomes burglary was reported before 7:00 a.m. that day. One of the text messages on appellant's phone had a weird nickname that Kenney said was consistent with those used by appellant and his brother.

At trial, Kenney testified that appellant lived in his truck in March 2011. On the evening of March 14th, she helped him work on his truck because he had limited use of his injured right hand. He could not hold objects in that hand, or raise the hood of the truck without assistance. On March 15, shortly after his arrest, the police took appellant to a hospital to get treatment for his injured hand. Appellant introduced medical records concerning that visit.

Appellant did not testify at trial. He challenged the evidence of identity, and cited the poor lighting in the Gomes garage, and the brief time that Gomes observed the burglar, from a significant distance. He also argued that his hand injury would have prevented his scaling a gate as the burglar had done on March 15.

DISCUSSION

Appellant argues that the trial court violated his due process rights and abused its discretion under Evidence Code section 352 by admitting evidence of an uncharged offense. We disagree.

The trial court allowed the prosecution to present evidence of appellant's 1991 attempted robbery pursuant to Evidence Code section 1101, subdivision (b). It admitted that evidence because it was relevant to show appellant's intent to steal upon entering Gomes's garage. Appellant's former probation officer testified that on October 22, 1991, appellant went to a grocery store to steal cigarettes. He walked to the back of the store, picked up a fire extinguisher and used it to hit locks on employee lockers. He then hit an employee, while trying to take his money. The court excluded many older offenses offered by the prosecution, including several burglaries and a robbery that appellant committed as a juvenile, and two adult petty theft convictions.

We review a trial court's ruling under Evidence Code sections 1101 and 352 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) Evidence of a defendant's criminal conduct on another occasion may be admitted to prove motive, intent, or lack of self-defense. (Evid. Code, § 1101, subd. (b).) "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 . . . the presence of the normal, i.e., criminal, intent accompanying such an act. . . .' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

A not guilty plea places all elements of the charged crime at issue. (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) Entry with the intent to commit theft or any felony is an essential element of burglary. (§ 459.)

Citing *People v. Lopez* (2011) 198 Cal.App.4th 698, appellant argues that the trial court erred by admitting other crimes evidence because its potential for prejudice outweighed its probative value. (Evid. Code, § 352.) We disagree. In *Lopez*, the defendant was charged with and convicted of residential burglary. The Court of Appeal concluded that the trial court erred in admitting evidence of a prior burglary and theft to prove intent. "Evidence regarding the [charged] burglary showed

that someone entered the . . . [victim's] residence and took two purses. Assuming appellant committed the alleged conduct, his intent in so doing could not reasonably be disputed—there could be no innocent explanation for that act. Thus, the prejudicial effect of admitting evidence of a prior . . . burglary and . . . theft outweighed the probative value of the evidence to prove intent as to the [charged] burglary. [Citation.]" (*Lopez,* at p. 715.) Appellant claims that his prior attempted robbery had no significant probative value because, based on the "otherwise admissible evidence in this case," there was no dispute that the person who entered Gomes's garage did so with "the requisite criminal intent." The record belies his claim. During trial, the court received and filed a juror note with the following inquiries: "Is [appellant] homeless?" and "Where did he sleep the night before?" It received other juror notes, including one that asked whether appellant was "employed at the time of the crime." The juror inquiries, and testimony that appellant lived in his truck at the time of the Gomes burglary, support the inference that it was unclear whether he entered Gomes's garage with the intent to seek shelter or the intent to steal.

We also reject appellant's related claim that because the prejudicial impact of the attempted robbery outweighed its probative value, the court abused its discretion by admitting evidence of that crime. (Evid. Code, § 352.) The claim rests on the erroneous premise that such evidence lacked any significant probative value because the issue of intent was "not disputed at trial." Appellant stresses the 20-year age of the attempted robbery and its violent nature. The minimal evidence regarding the attempted robbery was not unduly prejudicial. It was not graphic and did not suggest that the victim suffered serious injury. The record supports the trial court's discretionary determination that the probative value of the appellant's prior attempted robbery outweighed its prejudicial impact. In addition, before the jury heard evidence concerning appellant's prior offense, the court instructed the jury that it could only consider that evidence for the limited purpose of "deciding whether [appellant] entered the garage with the intent to commit theft." It repeated that instruction among its final

instructions to the jury. (CALCRIM No. 303, CALCRIM No. 375.) We presume that the jury followed the court's instructions. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) Because the disputed evidence was relevant and admissible on the issue of intent, its admission did not implicate appellant's federal due process rights. (*People v. Catlin* (2001) 26 Cal.4th 81, 122-123.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

William Paul Melcher, 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, Steven E. Mercer, J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.