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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

DAVID MICHAEL VELEZ,

Defendant and Appellant.

2d Crim. No. B272024
(Super. Ct. No. 2014034812)
(Ventura County)

David Michael Velez appeals a judgment following his conviction for possession of a firearm in violation of a probation order. (Pen. Code, § 29815, subd. (a)),[1] a felony. We conclude, among other things, that 1) substantial evidence supports the judgment, 2) the trial court did not abuse its discretion by admitting evidence about Velez's prior gun possession crime, 3) the trial court did not err by denying his request to reduce the conviction to a misdemeanor, and 4) Velez has not shown that

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

one of his probation conditions is overbroad or unconstitutional. We affirm.

FACTS

On November 14, 2014, Police Officer Roque Rivera saw a "possible burglary." He saw Andrew Acosta trying to cut a lock to enter a garage. Acosta tried to run away and was arrested.

Police Officer Moses Martinez talked to Velez's parents who owned the garage. They said a "majority of the items" in it belonged to Velez. Martinez also talked to Velez. Velez told him that "all of the items in the garage were his" and that he keeps medical marijuana in a safe in that garage.

Velez and the officers went to the garage. The safe was in the front of the garage. Velez told Martinez the safe was "the only thing that was amiss" because it had been moved from the back of the garage to the front. Velez said he believed Acosta went to the garage to "steal his medical marijuana." The safe was "closed."

Martinez asked Velez to open the safe to see if something was missing. Velez opened the safe. With his right hand he pulled out a gun, and with his left hand he held the gun's magazine. The gun was a "semi-automatic pistol." Martinez did not hear the sound of the magazine being ejected from the gun. Martinez said Velez did not appear to be "surprised" and his "demeanor" was "like [he had] just been caught."

Velez pointed the barrel of the gun in Martinez's direction. Martinez testified that he grabbed Velez's right hand and "shoved him up against the wall." Martinez told Velez, "[Y]ou knew what was in your safe" and "your life almost ended today." Velez responded, "[Y]eah, my bad."

Over a defense objection, the trial court allowed the People to present evidence about Velez's prior 2012 conviction. It involved his unlawful possession of a .32 caliber semiautomatic handgun that police found in his car.

In the defense case, Velez testified that he was surprised to find the gun in his safe. He did not own it or put it there. He was on probation and he knew he could not possess a gun. He knew Acosta. The two of them had previously "worked out together." Velez kept his marijuana in the safe.

The jury found Velez guilty of "the crime of possession of firearm by person prohibited by court order," a felony. (Capitalization omitted; § 29815, subd. (a).) The trial court denied Velez's request to reduce the conviction to a misdemeanor. It placed him on probation. One of his probation conditions prohibited him from associating "with any person who is using or trafficking in any controlled substance, including marijuana."

DISCUSSION

Substantial Evidence

Velez contends the evidence is insufficient to support his conviction for possession of a firearm in violation of probation. We disagree.

In reviewing the sufficiency of the evidence, we must draw all reasonable inferences from the record in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not weigh the evidence or decide the credibility of the witnesses, as those are matters exclusively for the triers of fact. (*Ibid.*)

The trial court instructed the jury that a conviction under section 29815, subdivision (a) required "the People to prove that: [¶] 1. The defendant possessed a firearm; [¶] 2. The defendant knew that he possessed the firearm; [¶] AND 3. A court had

ordered that the defendant not possess a firearm." (CALCRIM No. 2512.)

Velez testified he was on probation and he knew he was "not allowed" to possess a gun. He said he did not own the gun and did not keep it in the garage or in the safe. Martinez testified that Velez said he was "surprised" to find the gun in the safe.

But the issue is not whether some evidence supports appellant, it is only whether substantial evidence supports the judgment. The jury did not find Velez to be credible. The verdict is supported by Martinez's testimony.

Martinez testified that Velez said that "nobody had permission to enter the garage" and "all of the items in the garage were his." When Martinez first saw the safe, it was "closed." Velez unlocked it by turning the dial with the correct combination. Velez pulled the gun from his safe.

Martinez said Velez's "demeanor" was "like [he had] just been caught" and he looked like a "deer in headlights." Velez did not look "surprised." Martinez told Velez, "[Y]ou knew what was in your safe" and "your life almost ended today." Velez responded, "[Y]eah, my bad." The evidence is sufficient.

Admission of Evidence About a Prior Gun Possession Crime

Velez contends the trial court erred by "allowing the prosecution to introduce his 2012 misdemeanor conviction for carrying a concealed weapon." The People claim the court acted within its discretion in admitting this prior crime evidence which showed Velez's common plan in storing guns.

The trial court permitted Police Officers Matt Crenshaw and Jonathan Ballow to testify about Velez's prior offense. Crenshaw said in 2012 he searched Velez's car and found

marijuana and an unloaded .32 caliber handgun under the driver's seat. The magazine for the gun was in Velez's girlfriend's purse. Ballow testified Velez told him a pistol "is a good idea to have when you have a large amount of marijuana." Velez admitted the marijuana "was his" and that he took "the loaded magazine out and gave it to his girlfriend . . . ." He also said he did not own the gun and he wished that the person who owned it "would come forward and admit to it."

A trial court may admit "evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) "[E]vidence of uncharged similar misconduct may be employed to establish a common design or plan." (*Id.* at p. 394.) There must be "'sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan.'" (*People v. Balcom* (1994) 7 Cal.4th 414, 418.) The "recurrence of a similar result" may show criminal intent. (*Ewoldt*, at p. 402.)

The court must weigh the probative value of this evidence. Such evidence may be prejudicial where: 1) the uncharged acts are "more inflammatory than the testimony concerning the charged offenses," and 2) the "defendant's uncharged acts did not result in criminal convictions." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Where there are no convictions for the uncharged acts, the danger is jurors might be "inclined to punish defendant for the uncharged offenses, regardless whether [they] considered him guilty of the charged offenses . . . ." (*Ibid.*)

Before trial, Velez sought to exclude evidence about his 2012 conviction. His counsel said Velez pled guilty to possession

of a "similar" semiautomatic gun. But the gun in the 2012 crime "was found" in a "substantially different place."

In overruling the objection, the trial court said the evidence about the 2012 crime showed "a common plan or scheme." In both cases "the weapons are small caliber semi-automatic handguns." In both there is a connection "between the defendant's possession of the weapon" and possession of marijuana. There was a similarity with how the guns "were stored" with the magazines separate from the guns.

In addition to the common method of possessing and storing guns, in both cases Velez's conduct was similar. He told the police that the gun he possessed was not his. Moreover, evidence that a defendant possessed another gun may have "circumstantial relevancy" to disprove a defendant's claims about his or her innocent state of mind. (*People v. Smith* (2003) 30 Cal.4th 581, 614.)

The trial court also said, "[T]here's no undue prejudice." "[T]he jury's already going to hear of his conviction. So they're going to know that he suffered a prior crime and that as a punishment . . . he was ordered not to use or possess weapons . . . ." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 417.) At the beginning of trial, the court told jurors that the parties stipulated that Velez was on probation before the current charged offense and the probation terms prevented him from possessing firearms and ammunition.

The 2012 crime is not more inflammatory than the current offense. (*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 417.) In the current case Velez engaged in much more dangerous conduct. He held a gun in his hand in the presence of a police officer who had to take protective action. The court instructed the jury that

it could not conclude from the evidence about the prior crime that Velez had "a bad character or is disposed to commit crime." Velez has not shown an abuse of discretion.

Moreover, even had the trial court erred, there is no reasonable probability that the exclusion of this evidence would lead to a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) The gun was in Velez's locked safe. Velez had the combination. Martinez's testimony shows that Velez's demeanor and words were incriminating.

Denying the Request to Reduce the Conviction to a Misdemeanor

Velez contends the trial court abused its discretion by denying his request to reduce his conviction to a misdemeanor under section 17, subdivision (b).

The People note that the trial court had discretion to reduce this offense to a misdemeanor (§ 17, subd. (b); *People v. Mendez* (1991) 234 Cal.App.3d 1773, 1779), but it had ample justifications for not doing so. We agree. During sentencing, the court said it was denying his "17(b) motion," and it was appropriate to "let the matter remain as a felony."

The trial court may consider a number of factors in deciding not to reduce a conviction to a misdemeanor. These include "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*People v. Superior Court* (*Alvarez)* (1997) 14 Cal.4th 968, 978.) The court said, "This is a weapons violation. And in that respect, to paraphrase Yogi Berra, this is déjà vu all over again. This is very similar conduct to his prior violation." The trial court was concerned with the seriousness of this offense

and Velez's recalcitrance. It observed Velez's credibility at trial. The probation report indicates that Velez "has a history of criminal activity and his criminalistic behavior is not improving with time." Velez has not shown an abuse of discretion.

The Probation Condition

Velez was placed on "formal probation for 36 months." One of his probation conditions is that he "shall not associate with any person who is using or trafficking in any controlled substance, including marijuana." Velez contends that because the condition does not expressly set forth "a knowledge requirement" it is "unconstitutionally vague and overbroad." We disagree.

"California case law already articulates . . . a general presumption that a violation of a probation condition must be willful . . . ." (*People v. Hall* (2017) 2 Cal.5th 494, 501.) "So long as the requisite scienter is readily discernible, its omission from the text of the statute or probation condition poses little risk of 'trap[ping] the innocent.'" (*Ibid.*) There was no error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Mark S. Borrell, Judge

Superior Court County of Ventura

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

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