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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KENTRAILL WEBB, Defendant and Appellant.	B279057 (Los Angeles County Super. Ct. No. BA443578)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Reversed.

Melissa L. Camacho-Cheung, 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, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kentraill Webb[1] appeals from the judgment entered after a jury convicted him of two counts of possession of methamphetamine for sale on two different dates, and found true various sentencing enhancements. At trial, defendant admitted possession of the methamphetamine; the issue at trial was whether that possession was for personal use or sale. Defendant contends the trial court abused its discretion by admitting, among five prior convictions, evidence of three unsanitized felony drug-sale convictions.

Defendant also argues that the prosecutor committed misconduct by disobeying an evidentiary ruling regarding not informing the jury that defendant's companion at the time of one of his arrests was a minor, and that the three-year enhancement imposed under former Health and Safety Code section 11370.2 should be stricken from his sentence. Because we conclude the admission of defendant's prior drug-sale convictions constituted prejudicial error, we reverse the judgment without reaching defendant's remaining contentions.

FACTS AND PROCEDURAL BACKGROUND

A. The Information

The People charged defendant in an amended two-count information with possessing methamphetamine for sale (Health & Saf. Code § 11378) on January 7, and March 14, 2016.

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[1] The clerk's transcript spells defendant's first name as "Kentarill." However, the reporter's transcript spells his first name as "Kentraill," which defendant verified was the correct spelling when he was sworn in to testify at trial.

The People specially alleged defendant committed the March 14, 2016 offense while released from custody on bail (Pen. Code, §12022.1). The People also alleged defendant had suffered a prior drug conviction within the meaning of former Health & Safety Code section 11370.2 and two prior serious or violent felony convictions pursuant to the "three strikes" law (Pen. Code, §§ 667, subd. (b)-(i), 1170.12).

B. The Trial

Defendant did not deny possessing methamphetamine when the police encountered him on the alleged dates. The primary issue at trial was whether he possessed the drug for sale or personal use. The police officers, testifying as the People's drug experts, opined defendant possessed the methamphetamine for sale, although, as set forth in our discussion below, their testimony was not entirely consistent.[2] Defendant testified that he possessed the methamphetamine solely for personal use.

1. Testimony regarding the January 7, 2016 arrest

On January 7, 2016, Los Angeles Police Department (LAPD) Officers Jose Reyes and Gilbert Gaxiola were patrolling the area of Santo Tomas Drive and West Boulevard in Los Angeles, which was known for illegal drug activity. They noticed a car parked in a red zone. Defendant was in the car smoking a marijuana cigarette and holding a clear plastic bag containing a

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[2] Defendant is not contesting the police officers' qualifications as drug experts (see Evid. Code, § 720). Thus, we do not describe them in our factual presentation.

"large crystallized substance resembling methamphetamine." The officers approached, and defendant dropped the bag inside the car. They ordered him out of the car, conducted a search, and recovered the crystalline methamphetamine. The officers also found $1,550.00 in cash and another plastic bag containing five bindles of methamphetamine. The cash consisted of fourteen $100 bills, five $20 bills, four $10 bills, one $5 bill, and five $1 bills. The crystalline methamphetamine weighed 13.43 grams, and the five bindles weighed 4.19 gross grams.[3] The officers did not find any glass pipes or other drug paraphernalia typically carried by methamphetamine users, nor did they observe any symptoms of defendant's being under the influence of methamphetamine.

Officers Reyes and Gaxiola testified as drug experts. They each opined defendant possessed methamphetamine for sale. They based their opinions on the area in which defendant was arrested, currency recovered, lack of drug paraphernalia, and absence of any signs that defendant was under the influence. The officers also explained that the amount of methamphetamine found on defendant was too large to be associated with personal use, and the amount and denominations of the cash were consistent with possession for sale. Officer Reyes further testified that a drug seller typically uses social media to arrange a drug sale at a designated location. He explained that in an effort to be undetected by law enforcement, a seller would drive

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[3] Based on information from the Forensic Science Division of the LAPD, the parties stipulated the clear plastic bag and five bindles contained 12.52 grams of methamphetamine.

to the location, contact the buyer, conduct the sale from the car, and then leave.

2. Testimony regarding the March 14, 2016 arrest

On March 14, 2016, LAPD officers conducted a traffic stop of defendant for an outstanding warrant. An unidentified female acquaintance accompanied defendant in the car. Officer Oliver Malabuyo searched the car and found seven bindles of methamphetamine, four inside a flashlight and three inside a deodorant stick. The bindles each weighed 2.6 grams and the street value of the bindles was $150 to $300.[4] From the center console, Officer Malabuyo recovered a digital scale commonly used by sellers to weigh drugs to be packaged for sale. In the trunk, the officer found $255 in cash inside a pair of pants in the following denominations: six $20 bills, four $10 bills and 19 $5 bills. Officer Malabuyo did not find a glass pipe or other drug paraphernalia on defendant or inside his car. The officer did not observe any symptoms of defendant's being under the influence of methamphetamine.

Testifying as a drug expert, Officer Malabuyo opined defendant had possessed the methamphetamine for sale. He based his opinion on the quantity of methamphetamine found, the way the drug was packaged, the presence of the digital scale, and the quantity and denominations of the recovered cash.

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[4] Based on information provided by the LAPD's Forensic Science Division, the parties stipulated the seven bindles each contained 2.02 grams of methamphetamine.

3. Defendant's testimony

Defendant testified he "had been using" methamphetamine for five to seven years, and his daily dose was three to four grams. For the last two years, defendant lived in his car, where he kept all his money and possessions. Although defendant had received $1,000 from a former girlfriend for a hotel room, he testified he was spending the money on drugs instead. Defendant stated he earned money by selling music to tourists.

Defendant also stated that on January 7, 2016, he purchased a week's supply or 12 grams of methamphetamine for $125. He admitted that at the time of his arrest, he was under the influence of marijuana and crystal methamphetamine, and further testified that at that time, he offered to take a drug test. He opined the officers refused because they intended to arrest him for possession for sale. Defendant accused the officers of lying when they testified he had no drug paraphernalia. He admitted he had two methamphetamine pipes; one was in his hand. Defendant explained that he had the digital scale on March 14, 2016 to ensure he was getting the amount of methamphetamine he had purchased. He asserted that all of the methamphetamine found by the police was for defendant's personal use, not for sale.

C. The Jury's Verdict and Sentencing

The jury found defendant guilty on both counts of possession of methamphetamine for sale. In bifurcated proceedings, the People elected not to proceed on one prior strike allegation, and the trial court denied defendant's motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 to dismiss the other prior strike conviction. The trial court found

true the remaining special allegations and sentenced defendant to an aggregate state prison term of 10 years 4 months, which included the Health and Safety Code section 11370.2 three-year enhancement.

DISCUSSION

Defendant contends the trial court committed prejudicial error by admitting three unsanitized drug-sale convictions to impeach his credibility because (1) the contested issue at trial was whether defendant's possession of methamphetamine on January 7 and March 14 was for personal use or sale; (2) the People's expert testimony regarding the indicia of possession for sale was weak because of inconsistencies in that testimony; (3) the three prior drug convictions were substantially similar to his charged offenses; and (4) there were other prior convictions admitted for the purpose of impeaching his credibility.

I. Relevant Proceedings

Following the People's presentation of evidence, the prosecutor told the trial court if defendant testified, she intended to impeach him with his six prior convictions. Defense counsel objected "based on the prejudicial nature." Counsel argued all the convictions were over ten years old. In the alternative, counsel asked the court to sanitize defendant's conviction for assault on a police officer.

The trial court ruled defendant could be impeached with five of his six prior convictions:[5] his 2001 conviction for

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[5] "Here's my ruling. I will allow the People to ask the defendant—if he denies it, you can introduce evidence of [the five above-referenced convictions]."

possession of cocaine for sale, his 2003 and 2007 convictions for possession of marijuana for sale, and his 2006 misdemeanor conviction for falsifying information to a police officer. The court sanitized defendant's 2008 conviction for aggravated assault by directing the prosecutor to make no reference to the victim being a police officer. The court excluded evidence of the 2001 robbery conviction for impeachment.

After conferring with counsel, defendant elected to testify and admitted his five prior convictions on direct examination. The trial court did not instruct the jury at that time that the prior convictions could be considered only in evaluating defendant's credibility.

While cross-examining defendant, the prosecutor inquired about the car he had been living in for two years. After she showed him a copy of the car's registration, defendant acknowledged he must have purchased the car two months before his January 7, 2016 arrest. Defendant testified he could not recall having purchased the car, and he was probably under the influence at the time. Defendant again stated he had been living in a car for almost two years, albeit in different cars.

On redirect examination, defense counsel had defendant clarify whether the last car he was living in was a Mercury, and before that, a Chevy Cavalier.

The prosecutor then conducted the following recross-examination without defense objection:

"[Prosecutor:] Now, isn't that the same Cavalier that you were arrested in when you were found to have marijuana for sales back on the incident in 2007?

"[Defendant:] Strong possibility. Probably so, yeah.

"[Prosecutor:] And isn't it true, on that day, when you were found with the marijuana for possession for sales you told the officers that that car wasn't yours?

"[Defendant:] I've never told officers that. I probably told them the vehicle wasn't registered to me, but I wouldn't recall saying the car—if I'm in the vehicle, it's my vehicle. It's just that simple.

"[Prosecutor:] Were you in a vehicle—in a Chevy Cavalier in the incident from 2007 when you were convicted for possession for sale of marijuana?

"[Defendant:] I'm pretty sure I probably was.

"[Prosecutor:] Isn't it true you told officers that vehicle didn't belong to you, that it belonged to your friend?

"[Defense counsel:] Asked and answered.

"[Court:] Overruled. [¶] Is that what you said?

"[Defendant:] That the vehicle don't belong to me, that it belong to a friend?

"[Court:] Yes.

"[Defendant:] I'm pretty sure I probably did. I did tell officers that because the car wasn't registered to me.

"[Prosecutor:] On that incident, you were also arrested after a traffic stop; right?

"[Defendant:] If I recall, yes.

"[Prosecutor:] It was in the same area of Baldwin Hills near where Santo Tomas Drive and West [Boulevard] is?

"[Defendant:] That's where the drugs at.

"[Prosecutor:] On that day, you were selling marijuana; right?

"[Defendant:] Not that I recall, no.

"[Prosecutor:] Isn't it true that's the basis for the underlying conviction in 2007?

"[Defendant:] If I took the conviction on it, then, yes, that was the plea bargain, yes."[6]

After the parties rested, the trial court instructed the jury pursuant to CALCRIM No. 316, which reads: "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

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[6] " 'The scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense." ' (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267.) "However, if in 'admitting' the prior felony conviction 'the defendant first seeks to mislead a jury or minimize the facts of the earlier conviction' [citation] he may properly be questioned further." (*Ibid.*) Here, defendant testified on direct that he had three prior drug-for-sale convictions and pleaded guilty to the charges. Thus, the prosecutor's examination regarding otherwise inadmissible evidence regarding the events of those convictions merely to impeach defendant on the collateral matter of his car ownership was improper. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) "A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations.] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*Ibid.*) Defendant did not object below and does not raise the propriety of this examination on appeal. We set forth the prosecutor's examination only because, as discussed below, it contributed to the prejudicial effect of admitting three similar unsanitized felony drug convictions.

fact and whether that fact makes the witness less believable." The trial court, however, omitted the bracketed "only" in spite of the direction in the following use note: "If a felony conviction or other misconduct has been admitted only on the issue of credibility, give the bracketed word 'only.' " (Bench Note to CALCRIM No. 316 (2017 ed.) p. 88.)

II. Defendant's Assertion of the Prejudicial Nature of the Multiple Prior Convictions for Impeachment Was Sufficient to Preserve His Attack on Their Admission Because of Their Similarity to the Charged Offenses

The People argue that defendant forfeited his challenge to the admissibility of defendant's prior drug convictions because defendant did not argue below that they were too similar to the charged offenses, but only that they were remote in time. At the hearing on the admission of defendant's prior convictions, defendant objected: "[W]e would obviously object to that based on the prejudicial nature." Defendant specifically noted the remoteness of the convictions relevant to the offenses at issue at trial.

The People correctly argue that a challenge to the admission of evidence must be made at trial or risk being forfeited on appeal. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 823.) Evidence Code section 353, subdivision (a) provides that a judgment "shall" not be reversed "by reason of the erroneous admission of evidence" unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" Specificity is required both to enable the court to make

an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) On the other hand, Evidence Code section 353 " 'does not exalt form over substance.' " (*People v. Partida*, *supra*, 37 Cal.4th at p. 434.) No particular form of objection is necessary, so long as the court and the opposing party are apprised of the reason for the objection. (*Id.* at pp. 434-435.)

Defense counsel's objection was sufficient to preclude forfeiture. In response to the prosecutor's request to introduce defendant's prior convictions, counsel stated, "Your honor, we would obviously object to that based on the prejudicial nature." In other words, counsel objected to the admissibility of the prior convictions, including the prior drug-sale convictions, as more prejudicial than probative under Evidence Code section 352.

As more fully set forth below, admissibility of a defendant's prior convictions for impeachment purposes turns on whether the probative value of this evidence is substantially outweighed by its undue prejudicial effect or by the risk of confusing the jury. This analysis requires considering several factors, including the number of prior convictions proffered for impeachment purposes, the remoteness in time of those convictions, and the similarity of the convictions to the charged offenses. These factors are interrelated and not divisible in the manner the People advocate.

Defendant's objection below to all six of the prior convictions as "based on the prejudicial nature," adequately apprised the trial court and the prosecutor of defendant's basis for objecting to the admission of the prior convictions under the weighing of factors required by Evidence Code section 352.

Accordingly, there was no forfeiture of defendant's undue prejudice claim on appeal.

III. The Trial Court Abused Its Discretion in Admitting the Unsanitized Drug Sale Convictions for Impeachment Given That Possession for Sale Was the Issue at Trial and There Were Other Convictions Available for Impeachment

We review the trial court's ruling regarding the admissibility of a defendant's prior convictions for impeachment purposes for abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) "Exercises of discretion must be ' "grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." ' " [Citation.] Thus, although the abuse of discretion standard is deferential, 'it is not empty.' " (*People v. Diaz* (2014) 227 Cal.App.4th 362, 377.) To determine whether a trial court has abused its discretion, we must consider "the legal principles and policies that should have guided the court's actions." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Evidence Code section 788[7] and the California Constitution[8] provide that a witness may be impeached by a felony conviction.

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[7] Evidence Code section 788 provides in pertinent part, "[f]or the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony."

[8] Article I, section 28, subdivision (f) of the California Constitution provides in pertinent part that "[a]ny prior felony conviction of any person in any criminal proceeding, whether

In criminal cases, case law requires that the felony conviction involve a crime of moral turpitude, subject to the trial court's discretion to exclude the prior conviction under Evidence Code section 352.[9] (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark)*.) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Ibid.)*

The parties do not dispute possession for sale of a controlled substance is a crime of moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 317.) Although the prior convictions were somewhat remote in time relative to the charged offenses—including at least two occurring more than ten years earlier—that factor does not itself demonstrate undue prejudice. Here, " 'the systematic occurrence' " of defendant's five prior convictions over a five-year period could be seen as a pattern of criminal activity relevant to his credibility. (*People v. Green* (1995) 34 Cal.App.4th 165, 183.)

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adult or juvenile, shall subsequently be used without limitation for purposes of impeachment."

[9] Evidence Code section 352 states: "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."

Defendant's prior drug-sale convictions were essentially identical to the charged offenses. The sole distinction among them was the type of drug that defendant possessed on each occasion: cocaine and marijuana in the prior convictions and methamphetamine in the charged offenses.

We acknowledge cases holding that the similarity of prior convictions to the charged offenses is not " 'dispositive' " of undue prejudice. (*People v. Edwards* (2013) 57 Cal.4th 658, 722 [quoting *Clark*, *supra*, 52 Cal. 4th at p. 932].) We also acknowledge the cases holding that admission of similar prior convictions is not an abuse of discretion if necessary to dispel a "false aura of veracity" where there are no other prior convictions. (*Clark*, *supra*, 52 Cal.4th at p. 932, internal quotation marks omitted.)

Here, however, the entire focus of the trial was whether defendant's admitted possession of methamphetamine on January 7 and March 14 was for personal use or sale. Admission of three unsanitized prior convictions for essentially the same offenses as those before the jury carried the serious risk that the jury would consider those convictions not for impeachment, but as inadmissible propensity evidence. Put more plainly, if defendant did it three times before, he must have done it again on January 7 and March 14. Generally, "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." (Evid. Code, § 1101, subd. (a).) " 'The general rule is that evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the

crime charged, because the probative value of such evidence is outweighed by its prejudicial effect.' " (*People v. Sam* (1969) 71 Cal.2d 194, 203.) We also observe there was no danger of creating a "false aura of veracity" had the trial court excluded some or all of the prior drug-sale convictions, or sanitized them. The jury already had defendant's convictions of falsifying information to a police officer and aggravated assault to impeach his credibility.[10]

For all these reasons, the trial court abused its discretion in admitting the three unsanitized convictions for possession of drugs for sale.

IV. The Erroneous Admission of Defendant's Prior Drug-Sale Convictions Was Prejudicial Under *Watson*

"We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.' " (*People v. Earp* (1999) 20 Cal.4th 826, 878, quoting Evid. Code, § 353, subd. (b) and citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) To establish prejudice under the *Watson* standard, " '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for [the] . . . errors, the result of the proceeding would have

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[10] Whether the admission of the prior convictions would have affected defendant's decision to testify does not appear to be dispositive because defendant, in fact, testified after the trial court ruled on the admissibility of his prior convictions.

been different.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) "A 'reasonable probability' is one sufficient to 'undermine[ ] confidence in the outcome.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 473, quoting *U.S. v. Bagley* (1985) 473 U.S. 667, 678.)

This case turned on credibility, to wit, whether the jury believed the officers when they testified about the indicia of possession for sale, or believed defendant's testimony about personal use and his rebuttal of the officer's testimony.

Although the officers testified that the amount of methamphetamine and cash recovered from defendant indicated possession of methamphetamine for sale, we observe their testimony was not always consistent. For example, Officer Malabuyo testified that approximately .03 or .04 grams constituted typical daily use, and 2.65 grams comprised over 132 single uses. He estimated that this quantity would produce "nearly 1600 hours of feeling the effects of methamphetamine" at .02 grams per use. He further stated that 2.65 grams could be sold for between $150 to $300.[11]

On the other hand, Officer Reyes testified that two grams constituted daily use, and that a 13.43-gram shard of methamphetamine constituted about 10 uses. Officer Gaxiola testified that a 13.43-gram shard of methamphetamine would cost about $200 and that the five bindles recovered from defendant's floorboard totaling 4.19 grams could sell for between

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[11] Officer Malabuyo conceded upon cross-examination that for some users, .02 grams would have "close to no effect." He also conceded that an "eight ball" containing 3.5 grams of methamphetamine is a "common" vehicle for purchasing the drug.

$5 to $50. Officer Reyes explained that a $100 bill was not "typically" used in hand-to-hand drug sales, but Officer Gaxiola testified that $100 bills can be "common" currency for such sales.

As set forth in the preceding section, where the issue at trial was whether defendant's possession of methamphetamine was for sale or personal use, admission of three unsanitized convictions for drug possession for sale created a serious risk that the jury would not use that evidence to evaluate defendant's credibility but instead, to infer improperly that defendant's prior possession of drugs for sale proved that he did so again on January 7 and March 14. The prosecutor's cross-examination compounded this danger by questioning defendant about the events of the prior convictions under the guise of impeaching defendant on the collateral issue of car ownership. We recognize that the parties do not raise the propriety of the prosecutor's questions on appeal nor did defense trial counsel do so below. We do not address the propriety of that examination either. We have considered the prosecutor's cross-examination only to the extent it flavored the prejudice broth.

Finally, the trial court too compounded the prejudice by giving an incomplete jury instruction when it failed to instruct the jury it could consider the prior convictions only to evaluate defendant's credibility. We cannot conclude under all these circumstances, that there was no reasonable probability that the erroneous admission of the unsanitized drug-sale convictions affected the outcome of the trial.

DISPOSITION

The judgment is reversed.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.