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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID THOMAS OSTRANDER,

Defendant and Appellant.

A130602

(Contra Costa County
Super. Ct. No. 5-100942-2)

I.

INTRODUCTION

Appellant David Thomas Ostrander appeals from his conviction for auto theft (Veh. Code, § 10851, subd. (a)). He claims the trial court erred by admitting evidence during his trial that he had suffered two prior convictions for auto theft in 2004 and 2009, and that he had in his possession at the time of his arrest “lock[-]picking kits.” We conclude that the trial court did not abuse its discretion in admitting the evidence, and that in any case, any such claimed error was not prejudicial.

II.

PROCEDURAL BACKGROUND

Appellant was charged by criminal information with one count of auto theft (Veh. Code, § 10851, subd. (a)), and one count of receiving stolen property (Pen. Code, § 496d). Both offenses were alleged to have occurred on July 19, 2010.¹ As to each

¹ All further dates are in the 2010 calendar year, unless otherwise indicated.

offense, the information also alleged that appellant was convicted of auto theft in 2004 and 2009, and further alleged that appellant had served three prior state prison terms, within the meaning of Penal Code section 667.5, subdivision (b). The information also alleged that, based on his prior convictions, appellant was not eligible for probation in the event of convictions for the current offenses. Appellant entered a plea of not guilty to all charges and denied the enhancements and special allegations.

Trial commenced on October 20. On the morning of trial, written in limine motions were filed by appellant seeking to exclude evidence under Evidence Code sections 1101, subdivisions (a) and (b), and 352 of appellant's prior convictions for auto theft, and of two "lock[-]picking kits" found on his person and inside the vehicle appellant allegedly stole. A brief supporting the admission of these prior offenses was filed by the prosecution, and the trial court ultimately denied appellant's motion to exclude the evidence on the second day of trial.

Trial concluded on October 27, with the jury finding appellant guilty of auto theft, and not guilty of receiving stolen property. Sentencing took place on November 15, at which time appellant was denied probation and was sentenced to serve a total aggregate state prison term of five years less credit for local custody time, calculated as follows: the midterm of three years in state prison for the auto theft conviction, plus two consecutive one-year terms based on the two prior prison enhancements found true.

III.

EVIDENCE PRESENTED AT TRIAL

Testimony commenced with that of Christopher Albans (Albans), the owner of the 1988 dark gray Honda Accord that appellant was alleged to have stolen. Albans parked his car near Cordelia Automotive on July 14, which was located next door to his mother's place of employment in Fairfield. He left it there because he was having an overheating problem and the engine was to be checked on the morning of July 16.

On the morning of July 16, Albans received a telephone call from his mother telling him that his car was missing. Albans had not given anyone permission to take his car. He filed a police report.

San Pablo Police Officer Brett Bennett testified about his experience with automobile thefts. According to Bennett, typically, someone taking a vehicle might use a shaved key that will fit into the car's ignition to start it. In some cases, the steering column is tampered with and the car started by "hot wiring" it.

While Officer Bennett was on patrol on the morning of July 19, he saw an older model Honda Accord driving on San Pablo Dam Road. Bennett completed a U-turn because he wanted to run the license plate on the vehicle because it was a model type that is often stolen. There was only one person inside the Honda. When he was close enough to read the license number, he "ran" the number through his patrol car's computer, and it came back a "hit" for a stolen vehicle.

As Bennett closed in on the Honda, it accelerated into a nearby casino parking lot. The Honda sped through the parking lot, turned abruptly into an empty parking space, and stopped. As the officer stopped and parked his patrol car, appellant already had the door of the Honda open. Bennett activated his lights and drew his weapon, telling appellant to "stay in the car." Backup officers arrived about a minute later.

Appellant had also taken the key out of the ignition, and the key and key ring were examined by Officer Bennett. He noticed that the key had file marks on it. The filing down of the key allows it to fit into the ignition of some older model cars. One of the keys on the key ring had been intentionally filed down, in the officer's opinion.

Appellant was placed under arrest and searched. During the search of appellant's person, Bennett found a black case that he recognized as a lock-picking kit. Inside the case were multiple tools which are used for accessing locks. Bennett has come to know that sometimes these kits are used to gain entry and to start vehicles. He also found another lock-picking kit on the right passenger seat inside the Honda when it was later searched. Bennett also noted that the ignition housing on the steering wheel of the Honda appeared to have been tampered with.

While being transported to the police station, appellant was asked his name, and he told the officer "Robert White." During the booking process, Officer Bennett learned that "Robert White" was an alias for appellant. Appellant was also found to be in

possession of two other key rings. Altogether he had about 12 keys in his possession. Bennett found this suspicious because often car thieves carry different keys that can be used to access different model cars.

California Highway Patrol Officer Clarence Bullen testified about a stolen vehicle investigation in which he participated in Riverside County in 2008. On that occasion, appellant was found to be driving a black Acura that was reported stolen. The trial judge took judicial notice that this incident resulted in appellant's conviction for auto theft in 2009, and the jury was so advised.

California Highway Patrol Officer William Chamberlain testified about a stolen car incident he investigated in San Diego County in 2004. During that investigation, Chamberlain learned that appellant had been arrested for driving a stolen Toyota van.

California Highway Patrol Officer Alan Calica also testified about the 2004 stolen car incident in San Diego County. Calica was dispatched to Crooked Arrow Road to investigate an alleged stolen vehicle report and spotted a red Toyota van being driven by appellant. He was stopped and detained. The trial judge took judicial notice that this incident resulted in appellant's conviction in 2004 for auto theft, and the jury was so advised.

IV. DISCUSSION

A. Standard of Review

As noted, appellant's challenges on appeal the trial court's admission of two prior incidents of car theft which resulted in convictions in 2004 and 2009. He also claims that the admission of testimony by Officer Bennett concerning "lock[-]picking kits" found on appellant's person upon his arrest, as well as on the front passenger seat, was error under Evidence Code section 352.

Evidence of a person's character is inadmissible to prove his or her conduct on a specified occasion, but evidence of prior bad acts may be admitted to prove a material fact at issue such as motive, intent, knowledge, or identity. (Evid. Code, § 1101, subs. (a), (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, fn. 6 (*Ewoldt*)). An appellate court

applies the abuse of discretion standard of review to trial court rulings on the admissibility of evidence, including rulings under Evidence Code sections 1101 and 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725; *People v. Memro* (1995) 11 Cal.4th 786, 864.)

B. Trial Court’s Rulings on Prior Incidents of Auto Theft and Possession of Lock-Picking Kits

On the afternoon of October 20, a hearing was held prior to jury selection in connection with appellant’s written motions to exclude the evidence of his 2004 and 2009 convictions for auto theft, and to exclude Officer Bennett’s testimony concerning his discovery of lock-picking kits. The prosecutor made clear that the evidence of the prior auto theft convictions were being offered as evidence to prove that appellant had the intent to steal the Honda in the current case.

After hearing the arguments of counsel, the trial court ruled “tentatively” that the 2009 prior conviction for auto theft would be admitted to prove the intent element of the current offense of auto theft, but not the 2004 incident.² The court specifically excluded any evidence in connection with the 2008 incident, which resulted in the 2009 conviction, that appellant was evading police at the time he was apprehended as “more prejudicial than probative.”

Turning to the lock-picking kits, the judge noted that he could not “conceive not admitting them,” particularly if there was some expert opinion that such kits are used in effecting car thefts. The trial court was of the view that such evidence was admissible on the issue of intent.

C. Analysis

Vehicle Code section 10851, provides in material part:

“(a) Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and *with intent either to permanently or temporarily deprive the owner thereof* of his or her title to or possession of the vehicle, whether with

² The trial court later decided that both prior convictions were admissible on the issue of intent.

or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense. . . .” (Italics added.)

The pattern jury instruction relating to this offense, CALCRIM No. 1820, includes an intent element: “1. The defendant took or drove someone else’s vehicle without the owner’s consent; [¶] AND [¶] 2. When the defendant did so, [he] *intended to deprive the owner of possession or ownership of the vehicle* for any period of time.” (Italics added.)

Here the evidence of appellant’s prior convictions was directly relevant to prove, by inference, that appellant harbored the intent to deprive Albans of his Honda by taking it. “ ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.’ [Citation.] The more often a similar result occurs, the less likely it is the defendant acted inadvertently or in self-defense. Consequently, ‘to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]” ’ [Citations.]” (*People v. Walker* (2006) 139 Cal.App.4th 782, 803; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15.)

“ ‘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.’ [Citation.]” (*People v. Gallego* (1990) 52 Cal.3d 115, 171, italics omitted.)

Appellant attempts to distinguish this case from others where prior act evidence was admitted to prove intent by arguing he made no effort to dispute intent, pointing out that appellant himself did not testify at trial. However, as respondent correctly notes, by pleading not guilty, appellant put his intent at issue. (*People v. Catlin* (2001) 26 Cal.4th 81; *People v. Rowland* (1992) 4 Cal.4th 238, 260 [defendant’s intent generally becomes “disputed” when raised by plea of not guilty].)

Therefore, we conclude there was no abuse of discretion in admitting the two prior convictions for auto theft to prove intent. In reaching this conclusion we are mindful too that the trial court took significant care to “sanitize” the evidence relating to the prior

auto thefts, including precluding the prosecution from delving into the details of those past events in order to militate against prejudicing appellant. This preclusive order, for example, prevented the jury from hearing how appellant attempted to evade police which, at least as to one of the incidents, resulted in a high speed chase.

While the trial court allowed admitted testimony by Officer Bennett that he discovered two sets of lock-picking kits on appellant's person and in the Honda, that testimony came in only after Bennett testified about his knowledge of the use of such kits to effectuate vehicle thefts. In light of that evidence, we agree with the trial court's observation that the possession of these kits to prove intent in an auto theft case was highly probative.

Even if we assume that the trial court erred in admitting the challenged evidence, appellant has failed to demonstrate his trial was prejudiced by any such error. The evidence of appellant's guilt, including that relating to the element of intent, was strong. Appellant was found driving a stolen Honda in San Pablo that had gone missing three days earlier from Fairfield. He had no consent from the owner to be in possession of the vehicle. The ignition had been tampered with, and appellant had on his key ring a filed-down key commonly used by auto thieves to start cars.

“No judgment shall be set aside . . . on the ground of . . . the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13; see also Evid. Code, § 354 [“A verdict . . . shall not be set aside . . . by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error . . . is of the opinion that the error . . . complained of resulted in a miscarriage of justice”].)

Even if the court's admission of the prior offense evidence was erroneous, the error would be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Under the *Watson* test, the trial court's judgment may be overturned only if “it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.” (*Ibid.*; *People v. Welch* (1999) 20 Cal.4th 701, 749-

750 [erroneous admission of other crimes evidence subject to *Watson* harmless error standard]; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1152 [applying *Watson* harmless error analysis to allegedly erroneous admission of prior crimes evidence].)

Given the strength of the evidence pointing to appellant's guilt, we conclude on this record that, even assuming error, it is not reasonably probable that the admission of this evidence affected the outcome at trial.

V.

DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.