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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS MARIO ALMANZA III,

Defendant and Appellant.

A130867

(Solano County
Super. Ct. No. FCR253623)

Defendant was convicted following a jury trial of unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), with an enhancement for the same prior offense.¹ In this appeal he claims that evidence of an uncharged offense was erroneously admitted by the trial court, and the verdict is not supported by the evidence. We conclude that the trial court did not abuse its discretion by admitting evidence of a prior similar offense, and substantial evidence supports the conviction. We therefore affirm the judgment.

STATEMENT OF FACTS

About 12:30 p.m. on February 15, 2008, Domenic Baldacchino was advised by the Elk Grove Police Department that his 2003 red Chevrolet Silverado truck he left for recall service at Meta Chevrolet in Elk Grove had been stolen from the lot. At approximately 10:15 that night, California Highway Patrol Officer Bill Wesselman was

¹ The jury acquitted defendant of the additional charge of evading a police officer with a willful disregard for the safety of others (Veh. Code, § 2800.2)

riding in a marked patrol vehicle with his partner on Interstate 80 in Solano County when he observed the red Silverado truck, license 7G75934, traveling westbound at a speed in excess of 80 miles per hour. The officers initiated a pursuit to attempt a detention of the Silverado, with patrol vehicle lights activated. The red Silverado “cut across” lanes of traffic and “suddenly exited” the freeway on the Midway Road off ramp. The officers followed the Silverado with siren activated.

On Midway Road, the Silverado ran through stop signs, crossed over the solid double yellow line into the opposite direction of travel at least five to ten times, and exceeded 90 miles per hour. Officer Wesselman testified that as the vehicle chase continued on Midway Road he observed three occupants in the Silverado: two males in the front seat, and a female in the rear seat.

Still proceeding westbound at a speed in excess of 90 miles per hour on Midway Road between Leisure Town Road and Interstate 505, the Silverado suddenly “blackened out” as the headlights and taillights were turned off. The officers informed “dispatch” of the pursuit, but lost sight of the vehicle.

Officer David Novelli of the Vacaville Police Department heard the report that a “red Chevy pickup truck” had evaded the California Highway Patrol Officers, and assisted in the pursuit. Fifteen to thirty minutes later at 3252 Vaca Valley Road near Pleasant Valley Road, an area that “would lead” from Midway Road, Officer Novelli observed the red Silverado with a matching license plate parked in a driveway. He found keys in the ignition, but no occupants in the vehicle or nearby. Officer Wesselman arrived momentarily and confirmed that the vehicle discovered by Officer Novelli was the same one he pursued.

Heather Archibald, a resident of the house at 767 Corte Granada Lane, very near Vaca Valley Road and Pleasant Valley Road, testified that between 10:00 and 12:00 that night a female and two males, one of whom she identified as defendant, came to her front door and offered her \$100 for a ride to Dixon. Archibald declined the offer and shut her door.

Michelle Wohler, a driver for Yellow Cab of Vacaville, was dispatched to meet passengers “in the court” at 767 Corte Granada Lane some time after 9:00 that night. On the way there, she encountered numerous police officers and a helicopter flying above. She spoke with a Vacaville Police Officer Andy Moriarty, then proceeded to the house. Officer Moriarty then “blacked out” his patrol vehicle and waited for her to return. Wohler waited at the house briefly, whereupon two males and a female, “all Mexican,” came out of a back yard and knocked on the passenger side of her cab. After they got into the back seat, Wohler began to drive her cab away.

Officer Moriarty, who was waiting for the “taxi to exit the court,” detained the cab and immediately arrested the three occupants as suspects in the pursuit of the Silverado. Defendant mentioned that he was from Elk Grove. He stated that the “female he was with” told him “about a party in the area of Vacaville.” Defendant volunteered that he had been “dropped off by his cousin,” who was driving a black Ford Expedition and was waiting for him at a Wal-Mart in Dixon.

During a subsequent interview at the California Highway Patrol office, defendant stated that earlier in the evening his uncle picked him up at his house in the Sacramento area in a “Ford SUV,” to go “to a party.” They left defendant’s house, but “didn’t make it to the party.” Defendant then invoked his *Miranda* rights and refused to make any further statements.

The prosecution also presented evidence of a prior uncharged vehicle theft and police pursuit. The sales manager for the Lasher Elk Grove Acura dealership testified that a new Acura MDX arrived at the dealership on January 29, 2008. The car was “inventoried” and placed, unlocked, in the service department lot for inspection and detailing the next day. The keys to the ignition were placed on an unsecured keyboard at the dealership. The sales manager did not report the vehicle stolen, but a few days later he received information that the Acura MDX had been recovered by the police.

About 11:45 p.m. on February 1, 2008, Police Officer Daniel Gill of the West Sacramento Police Department was in a marked patrol vehicle in the parking lot of an apartment complex on Lighthouse Drive when he noticed a new Acura MDX with

“Lasher Acura paper plates,” but not the typical “temporary DMV registration,” on the front windshield. As Officer Gill made a U-turn he observed the Acura leave the parking lot and proceed eastbound on Lighthouse Drive. As the officer engaged his overhead lights the Acura accelerated to 65 miles per hour over the I Street Bridge, then straddled the double yellow line on the roadway and ran red lights. After the officer activated his siren, the driver of the Acura entered Interstate 5, accelerated to 90 miles per hour, turned off his lights, and nearly collided with a truck. When the Acura turned eastbound onto Interstate 80, with heavier traffic, Officer Gill “decided to cancel the pursuit.” He advised dispatch and a Sacramento Police helicopter of his location. The Acura took the Northgate Boulevard exit as it pulled away from the officer, and the lights were turned back on.

Officer Daniel Paiz of the Sacramento Police Department learned of the pursuit and observed the police helicopter overhead. He saw the Acura stop at an apartment complex at 801 San Juan Avenue. The driver left the vehicle and fled into the apartments. Officer Paiz followed, and came upon muddy footprints leading to the patio area of one of the apartments, where the driver “was last seen.” The patio door was recently opened and “stuff was moved to the back of the patio.” The apartment was subsequently searched and defendant was discovered hiding in a bedroom closet.

Officer Gill then arrived at the apartment complex. He identified the Acura parked on San Juan Avenue as the vehicle he pursued, and defendant as the driver of the vehicle. The keys had been left in the ignition of the Acura. A “glass smoking pipe typically used to smoke methamphetamine” was found inside the Acura, as were “shaved car keys” and “additional car keys that looked like they might have been from a dealership.”

DISCUSSION

II. The Admission of Evidence of the Uncharged Vehicle Theft Offense.

Defendant argues that the trial court erred by admitting evidence of the prior “Sacramento incident” to prove his identity of the charged offense. He claims the uncharged offense was not sufficiently similar to the charged violation of Vehicle Code

section 10851 to qualify for admission under subdivision (b) of Evidence Code section 1101, and was more prejudicial than probative.²

Under section 1101, subdivision (b), evidence of other crimes is admissible if it tends logically, naturally, and by reasonable inference to establish any fact material to the prosecution other than general criminal disposition or to overcome any matter sought to be proved by the defense.³ (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Hamilton* (1985) 41 Cal.3d 408, 425.) “Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) 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.” (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

“If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant’s intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence ‘is “substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’” (Evid. Code, § 352.)’ [Citation.] ‘Rulings made under [sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]’ [Citation.] ‘Under the abuse of discretion standard, “a trial

² All further statutory references are to the Evidence Code unless otherwise indicated.

³ Section 1101 provides in pertinent part: “(a) . . . [E]vidence 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. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.”

court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1328–1329.)

A. *The Similarity of the Uncharged Offense.*

We first consider defendant’s complaint that the prior uncharged vehicle theft is not sufficiently similar to prove his identity of the charged crime. “When evidence is offered under Evidence Code section 1101, subdivision (b), the degree of similarity required for cross-admissibility ranges along a continuum, depending on the purpose for which the evidence is received.” (*People v. Scott* (2011) 52 Cal.4th 452, 470.) “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.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.) “The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. . . . [T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] “The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.” ’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 856.) “ “The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense.” [Citation.]’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003.) However, “The inference of identity need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together.” (*People v. Scott, supra*, at p. 473.)

The similar characteristics of the two offenses are many. First, the uniqueness of the two vehicle thefts is quite apparent. Both thefts occurred at dealership lots in the Elk

Grove area, only two weeks apart. After the thefts, the vehicles were observed by police officers and detentions were attempted. The drivers of both of the vehicles, one of them positively identified as defendant, refused to comply with efforts to effectuate voluntary stops, and initiated high-speed chases. On both occasions the drivers of the vehicles fled at highly excessive speeds and drove through red lights during the pursuits. A glaringly distinctive and uncommon factor is that at the conclusion of the pursuits the drivers turned the vehicle lights out to avoid detection, then left the vehicles and escaped on foot. The cars were both abandoned with the keys left in the ignitions. We realize that three participants engaged in the charged offense, while defendant apparently acted alone to commit the prior vehicle theft. Despite this single, perhaps fortuitous dissimilar feature of the two crimes, the meaningful common factors, when considered in the aggregate, lead to the inference that defendant committed both offenses. (*People v. Hovarter, supra*, 44 Cal.4th 983, 1004; *People v. Gray* (2005) 37 Cal.4th 168, 203; *People v. Medina* (1995) 11 Cal.4th 694, 748.)

B. Consideration of the Probative Value and Prejudicial Impact of the Uncharged Theft.

We turn the focus of our inquiry to whether the uncharged misconduct evidence still was subject to exclusion under section 352, as defendant claims. “The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citations.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, ‘[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.’ [Citation.]” (*People v. Daniels* (1991) 52 Cal.3d 815, 856; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 951; *People v. Johnson* (1991) 233 Cal.App.3d 425, 443.)

Looking first at the probative value of the evidence, as with other forms of circumstantial evidence, admissibility of testimony recounting prior uncharged criminal acts depends upon “ ‘the *materiality* of the fact sought to be proved or disproved’ ” and “ ‘the *tendency* of the uncharged crime to prove or disprove the material fact’ ” (*People v. Robbins* (1988) 45 Cal.3d 867, 879, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 315.) To be admissible, an uncharged offense must tend logically, naturally and by reasonable inference to establish any fact material to the People’s case, or to overcome any matter sought to be proved by the defense. (*Robbins, supra*, at p. 879.) “In order to satisfy the requirement of *materiality*, the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact ‘from which such ultimate fact[] may be presumed or inferred.’ [Citation.]” (*People v. Thompson, supra*, at p. 315, fns. deleted; see also *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 430.) As we have observed, the strikingly similar prior vehicle theft from the lot at the Elk Grove Acura dealership forcefully tends to prove the essential element of identity: that defendant was one of the three people who participated in the driving or taking of the Silverado from the Meta Chevrolet dealership in Elk Grove only two weeks later.

Against the appreciable probative value of the evidence we balance its prejudicial effect on the defense. “In general, ‘the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.’ [Citation.]” (*People v. Daniels* (2009) 176 Cal.App.4th 304, 316.)

The evidence of defendant’s commission of a recent vehicle taking offense was of course damaging to his defense that he did not participate in the taking or driving of the Silverado, but was not prejudicial in the sense contemplated by section 352. “ ‘In applying section 352, “prejudicial” is not synonymous with “damaging.” ’ [Citations.]” (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) “ ‘Undue prejudice’ refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis:

‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ ” [Citations.]’ (People v. Walker (2006) 139 Cal.App.4th 782, 806; see also People v. Garceau (1993) 6 Cal.4th 140, 178; People v. Killebrew (2002) 103 Cal.App.4th 644, 650–651.) Here, the highly probative prior offense evidence did not carry with it the undue prejudice section 352 seeks to avoid. “A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great.” (People v. Walker, supra, at p. 806.) The risks inherent in the jury’s consideration of the uncharged vehicle theft did not preclude the admission of the evidence. (People v. Foster, supra, 50 Cal.4th 1301, 1331.)

The uncharged offense evidence was also no more, or less, inflammatory than the charged violation of Vehicle Code section 10851, subdivision (a), the two offenses being essentially identical. The evidence carried no potential for confusion of the jury. An instruction was given to the jury to consider the prior vehicle theft for the limited purpose of proving identity, intent and knowledge. We must presume the jury followed the court’s admonition, and did not draw any other improper inferences from the evidence. (People v. Scheer (1998) 68 Cal.App.4th 1009, 1023.) The source of the evidence was also unrelated to the charged offenses, the two offenses were committed within an extremely brief time span, and the prior misconduct resulted in a criminal conviction, all factors that favor admission of the evidence. (People v. Hollie (2010) 180 Cal.App.4th 1262, 1274; People v. Zepeda (2001) 87 Cal.App.4th 1183, 1211.) We find no abuse of discretion in the trial court’s decision to admit the uncharged offense evidence. (People v. Lewis (2009) 46 Cal.4th 1255, 1288; People v. Prince (2007) 40 Cal.4th 1179, 1271–1272; People v. Roldan (2005) 35 Cal.4th 646, 707; Hollie, supra, at pp. 1276–1277.)

II. The Evidence to Support the Conviction for Unlawfully Driving or Taking a Vehicle.

Defendant also argues that the evidence fails to support the conviction of a violation of Vehicle Code section 10851. Defendant’s argument is partially based on his acquittal of willfully evading a police officer (Veh. Code, § 2800.2) as charged in count one. He claims the acquittal demonstrates that the jury impliedly found he was not the *driver* of the red Chevrolet Silverado truck that fled from the scene of the attempted police detention. His argument proceeds that the verdict of guilty of taking or driving a vehicle in violation of Vehicle Code section 10851 must necessarily must have been based on a finding that he “had stolen the Chevy,” rather than driven it. He maintains “that theory of liability cannot stand because the record is devoid of any evidence” that he “stole the Chevy.”

Our role as “an appellate court in reviewing the sufficiency of the evidence is limited.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; see also *People v. Lewis* (2001) 25 Cal.4th 610, 643; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) “ ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]’ [Citations.]” (*People v. Scott, supra*, 52 Cal.4th 452, 487.)

In our review of the evidence the jury verdict on the charge of evading a police officer is of no consequence. The offense of evading a police officer with a willful

disregard for the safety of others in violation of Vehicle Code section 2800.2 has many essential elements, any one of which the jury may have decided was not adequately established by the evidence.⁴ The acquittal of the evading charge does not mean the jury found that defendant was not driving the Silverado for purposes of the charge of taking or driving the vehicle.

In part, Penal Code section 954 provides: “An acquittal of one or more counts shall not be deemed an acquittal of any other count.” “ ‘ “Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury’s determination that evidence on another count was insufficient.” [Citation.]’ [Citation.] ‘An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]’ [Citation.]” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405–406, quoting from *People v. Lewis, supra*, 25 Cal.4th 610, 656.) The sole inquiry is whether the evidence supports the finding of defendant’s guilt of violating Vehicle Code section 10851, subdivision (a).

“Vehicle Code section 10851, subdivision (a) provides that a person is guilty of a crime if he or she ‘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 or without intent to steal the vehicle.’ ” (*People v. Moon* (2005) 37 Cal.4th 1, 26.) “To establish a defendant’s guilt of violating Vehicle Code section 10851, subdivision (a), the prosecution is required to prove that the defendant drove or took a vehicle belonging to another person, without the owner’s consent, and that the defendant had the specific intent to permanently or temporarily deprive the owner of title or possession.” (*People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1574.) “ ‘[O]n its face Vehicle Code section 10851

⁴ The essential elements of the crime are: “the offense is committed by one who, ‘while fleeing or attempting to elude a pursuing peace officer,’ drives his pursued vehicle in ‘a willful or wanton disregard for the safety of persons or property.’ [Citation.]” (*People v. Sewell* (2000) 80 Cal.App.4th 690, 695.)

can be violated either by *taking a vehicle* with the intent to steal it *or by driving it* with the intent only to temporarily deprive its owner of possession (i.e., joyriding).’ [Citation.]” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 205, italics added.)

We conclude that the evidence was sufficient to establish defendant’s guilt of a violation of Vehicle Code section 10851, subdivision (a). First, while no evidence directly connected defendant to the initial theft of the Chevrolet Silverado from the dealership lot, the prosecution was not required to prove that defendant committed the original act of taking the car from the owner. (*People v. Frye* (1994) 28 Cal.App.4th 1080, 1086; *People v. Malamut* (1971) 16 Cal.App.3d 237, 241–242.) Proof that he committed a taking *or* unlawful driving of the vehicle, with the requisite intent, is enough to prove a violation of Vehicle Code section 10851, subdivision (a), and once an unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851. (See *People v. Green* (1995) 34 Cal.App.4th 165, 181; *People v. Clifton* (1985) 171 Cal.App.3d 195, 200.)

Here, a Chevrolet Silverado reported stolen from an Elk Grove car dealership lot on February 15, 2008, was seen that same night in Vacaville. When an officer attempted to detain the stolen Chevrolet Silverado, the driver initiated a high-speed chase, then abandoned the vehicle after the lights were turned off to avoid detection. The pursuing officer observed two males and a female in the Silverado. Soon thereafter, defendant was found afoot with his two companions, a male and a female, in very close proximity – not much more than 50 yards – to the place where the vehicle had been left. A resident of the house where defendant was apprehended testified that he, another male, and a female appeared at her front door unexpectedly and offered her \$100 for a ride. After he was detained defendant acknowledged he was from Elk Grove, where the vehicle was stolen, and gave a decidedly vague, unconvincing explanation for his presence on foot in the vicinity of the abandoned Chevrolet Silverado in Vacaville.

The obvious inference is that defendant was one of the three persons seen by the officer in the stolen Chevrolet Silverado when the high-speed chase began. His flight upon detection or apprehension is sufficient to show that he participated in the taking or driving of the vehicle and had the specific intent to deprive the owner of possession. (See *In re Robert V.* (1982) 132 Cal.App.3d 815, 821; *People v. Miles* (1969) 272 Cal.App.2d 212, 218; *People v. Williams* (1968) 264 Cal.App.2d 885, 887–888; *People v. Parmenter* (1960) 186 Cal.App.2d 509, 511.) Add to that the evidence that only two weeks before defendant was observed driving a new Acura MDX stolen from another dealership in Elk Grove. When defendant was confronted by an officer, he fled in the vehicle at a high speed, turned off the lights, left the vehicle and ran into an apartment complex, where he was apprehended hiding in a closet. The evidence of the uncharged violation of Vehicle Code section 10851, subdivision (a) corroborates the evidence that defendant participated in the unlawful driving or taking of the Chevrolet Silverado. When viewed in its entirety, the evidence in support of the judgment is substantial.

DISPOSITION

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.