

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KORRY ABRAMSON,

Defendant and Appellant.

C063948

(Super. Ct. No.
09F03073)

Defendant Korry Abramson was convicted of burglary and possession of a completed check with the intent to defraud. The trial court sentenced him to three years in prison.

On appeal, defendant contends (1) the trial court should have excluded reports of defendant's prior misconduct under Evidence Code sections 1101 and 352; (2) the trial court erred in admitting the reports of defendant's prior misconduct under the hearsay exception for writings previously made by a witness (Evid. Code, § 1237); and (3) the trial court should not have

excluded other evidence that defendant believes would have supported his defense.

We will affirm the judgment.

BACKGROUND

On January 27, 2009, defendant went to Wal-Mart and cashed what appeared to be a payroll check from Wheels America to defendant in the amount of \$1,400. Rose Cuellar, Wal-Mart's asset protection coordinator, learned that the check had been forged and informed Police Officer Benjamin Kema. Cuellar provided Officer Kema with a copy of a surveillance video; a photocopy of the check, which included defendant's name and driver's license number; and a still image of defendant cashing the check.

Officer Kema contacted Wheels America and learned that the company did not issue the check to defendant. The check, which was number 1971, was out of sequence from other company checks, the font was different, and the business telephone number was absent.

On March 12, 2009, Officer Kema went to defendant's home and talked to him about the incident. Officer Kema showed defendant the still photograph and defendant admitted he cashed the check at Wal-Mart. Defendant claimed, however, that he did not know the check was fraudulent. Defendant said he received the check when he sold two diamond rings to a man who approached him outside a 7-Eleven and admired one of the rings. But defendant could not describe the buyer other than as being a

Caucasian male, and Kimberly Coolidge, defendant's fiancée, told Officer Kema that defendant never owned any diamond rings.¹

Over defendant's objection, the trial court admitted into evidence two reports pertaining to a fraudulent check defendant attempted to pass at Winco Foods in January 2002.

The first report was from Duskin Franz, an employee of Winco Foods. It provided: "24:00 hours. 1/19/02. I, Duskin Franz, working as a Loss Prevention Agent, was watching the store through the camera system when I was called to come to the front of the store. When I reached the lobby area, and say [sic] the suspect later identified as Korry Abramson, being asked to come to the store conference room. Abramson was taken to the store conference room. Abramson admitted to writing the bad check. The Sheriff's Department was called. My signature, Duskin M. Franz, number 36071."

The second report was prepared by Officer Todd Hoganson and provided: "02:25 hours. I arrived and contacted Loss Prevention Officer Duskin Franz, witness number three, and a male, later identified as Korry Abramson, suspect number one. [¶] Franz related to me that he had been requested by other employees in the business to respond to take custody of a male, suspect number one, who had tried to pass a bad check. Franz detained the male who told Franz the checks he had were bad (see Franz's attached written statement). [¶] Franz provided me with

¹ At trial, Coolidge testified that she merely told Officer Kema that she had no knowledge about any diamond rings.

the checks and the driver's license he had recovered from Abramson. The two checks were in the name of Raymond E. Cobbs through Bank of America, numbers 3822 and 3823. Number 3822 had been filled out as payable to Winco Foods in the amount of \$96.63 and signed as 'Raymond Cobbs.' [¶] The driver's license, California driver's license number N, as in Nora, 9158844 had a picture of Abramson on it, but was in the name of Raymond Eugene Cobbs. The license had no hologram image on it, some of the printing was blurred, and the signature (Raymond Cobbs) was done in ballpoint ink and not dignity [sic] produced onto the card. [¶] These items were photographed and the originals were later booked as evidence at the Northwest Station. [¶] Franz signed a citizen arrest form for Abramson."

Defendant was convicted of burglary and of possession of a completed check with the intent to defraud. (Pen. Code, §§ 459, 475, subd. (c).) He admitted serving a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced him to three years in state prison.

DISCUSSION

I

Defendant contends the evidence of his prior misconduct at Winco Foods was inadmissible character evidence and should have been excluded under Evidence Code sections 1101 and 352.

Evidence Code section 1101, subdivision (a) prohibits the admission of an uncharged criminal act against a defendant when offered to prove the defendant's conduct on a specific occasion. However, subdivision (b) of section 1101 provides that such

evidence is admissible when relevant to prove some material fact, such as motive, opportunity, intent, preparation, plan or knowledge.

Defendant was charged with violating Penal Code section 475, subdivision (c), which provides: "(c) Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery." Thus, intent was an element of the charged crime, which defendant placed in dispute by pleading not guilty. (*People v. Roldan* (2005) 35 Cal.4th 646, 705-706, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In order to prove intent, the acts need only be sufficiently similar to support the inference the defendant probably harbored the same intent in each instance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) But such evidence must not contravene other policies limiting the admission of evidence, such as those contained in Evidence Code section 352. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) The probative value of the proffered evidence must not be substantially outweighed by the potential that undue prejudice will result from the admission of the evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) We review the trial court's admission of evidence of uncharged crimes under the deferential abuse of discretion

standard. (*People v. Roldan, supra*, 35 Cal.4th at p. 705; *People v. Cole, supra*, 33 Cal.4th at p. 1194.)

Defendant argues the prior incident was too dissimilar from the present incident because "writing a bad check is not the same as attempting to pass it." But Winco Foods would have had no basis to detain defendant unless he attempted to pass the bad check. The Winco Foods and Wal-Mart offenses are sufficiently similar because in both cases defendant possessed a fictitious check in an effort to defraud a store.

Defendant further asserts that the prior misconduct was seven years old. However, the 2002 Winco Foods incident was not too remote given that defendant was incarcerated for a portion of the intervening time (*People v. Walker* (2006) 139 Cal.App.4th 782, 807) and had not led a blameless life since the Winco Foods offense. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.)

In addition, defendant points out that the Winco Foods charges were ultimately dismissed. The prosecutor asserted in the trial court that the dismissal occurred as part of a plea deal in another case resulting in a prison commitment, but the trial court observed there was no definitive showing in that regard. In any event, the trial court said it was satisfied that the conduct had significant probative value despite the dismissal.

The trial court did not abuse its discretion. It instructed the jurors in the language of CALCRIM No. 375, advising them that the People presented evidence that defendant

committed another offense, they could consider the evidence "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offense," and if the People did not meet their burden of proof, they must disregard the evidence. Furthermore, if they decided that defendant committed the offense, the jurors could consider the evidence for the limited purpose of deciding whether defendant acted with the intent to defraud in the present case, could not consider the evidence for any other purpose, and could "not conclude from this evidence that the defendant has a bad character or is disposed to commit crime." Thus, the trial court properly instructed on the limited purpose for which the jury could consider the evidence, and we presume the jurors followed this instruction. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919, overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

II

Defendant also contends the trial court erred in admitting the two reports regarding the Winco Foods incident under the hearsay exception for writings previously made by a witness (Evid. Code, § 1237).

Evidence Code section 1237, subdivision (a) provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully

and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement."

Defendant does not dispute that the statement that he "admitted to writing the check" would be admissible as an admission by defendant if Franz were to so testify. (Evid. Code, § 1220.) In addition, there is no question that Franz had insufficient recollection of the events to testify fully and accurately about it. However, at an Evidence Code section 402 hearing, Franz stated he had absolutely no recollection of the events, and did not know if defendant made the admission to him or some other person, thereby adding another possible layer of hearsay. All that Franz could say was that what he wrote was accurate and truthful as was his custom when writing reports.

Defendant contends the statement that he admitted writing a bad check is inadmissible because Franz could not adequately authenticate his report and demonstrate that it was a true statement of what defendant said and that he had said it to Franz. Defendant argues Officer Hoganson's report is similarly inadmissible because Hoganson did not remember writing the

report, it was based on what Franz related to Hoganson, and Franz was not able to testify as to its accuracy or otherwise authenticate it because he had no recollection of the incident.

Defendant relies on *People v. Simmons* (1981) 123 Cal.App.3d 677 (*Simmons*), in which the appellate court upheld the trial court's exclusion of a statement where the witness had suffered amnesia, had no recollection of giving a statement to the police, did not recall any event recorded in his prior statement, and did not recall any circumstance surrounding the preparation of his statement. (*Id.* at p. 682.) It was not sufficient that the witness testified that his statement was true to the best of his knowledge because "he could have stated with equal conviction to the best of his (nonexistent) knowledge he had had ample reason to lie. The fact is, he simply has no knowledge at all." (*Simmons, supra*, 123 Cal.App.3d at pp. 682-683.)

The decision in *Simmons* was based in large part on a finding of an impairment of the defendant's right to confront and cross-examine the witness due to the witness's memory lapse. (*Id.* at pp. 682-683.) Assuming *Simmons* is still good law (see *People v. Cowan* (2010) 50 Cal.4th 401, 467; *People v. Gunder* (2007) 151 Cal.App.4th 412, 419, fn. 7) and assuming, without deciding, that the trial court erred in admitting the reports, the error is not prejudicial. Defendant unquestionably passed a fraudulent check at Wal-Mart, which naturally raises an inference of a fraudulent intent absent a plausible explanation. (*People v. Norwood* (1972) 26 Cal.App.3d 148, 159 [possession of

forged documents is evidence of knowledge of their spurious nature, and fraudulent intent may be inferred from the defendant's unauthorized possession of them]; *People v. Valdes* (1957) 155 Cal.App.2d 613, 615, 617-618 [ordinarily an intent to defraud may be, and often must be, inferred from the circumstances in which a false instrument is executed or issued, but not where the established facts refute such intent].)

Defendant claimed he met a stranger outside a 7-Eleven who happened to like defendant's rings, and defendant sold them to him without learning the stranger's name or otherwise verifying that the \$1,400 check he allegedly accepted in exchange for his valuable property was legitimate. Defendant's story of how he obtained the check simply was not plausible. It is not reasonably probable the jury would have reached a different verdict if the evidence of the Winco Foods incident had been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Defendant further contends he was deprived of his constitutional right to present a defense when the trial court excluded evidence of a Craigslist scam involving checks from Wheels America. Defendant sought to demonstrate that he was a victim who had been duped into accepting and cashing a forged Wheels America check. To support his claim, he sought to introduce evidence that there were other fraudulent Wheels America checks circulating in the economy.

At an Evidence Code section 402 hearing, Margaret Hurlburt, the chief financial officer for Wheels America, testified that

in August and September 2008, she detected fraudulent activity on the company checking account. There were approximately 30 fraudulent checks. The checks lacked the company's phone number and were in a different font. Hurlburt discovered that the checks were part of a scam involving a solicitation on Craigslist for mystery shoppers. Interested individuals would receive documentation and a check, and were asked to cash the check and wire the cash to an address in exchange for a shopping assignment.

However, defendant did not claim to be involved in the Craigslist mystery shopper scam, nor provide any evidence that he was linked to it. His defense was that an unknown man outside a 7-Eleven gave him a \$1,400 check, number 1971, to purchase two diamond rings from defendant. But the check was in an amount and number sequence different from the checks involved in the scam. Hurlburt testified that none of the checks involved in the Craigslist scam were for \$1,400, and none were in the number 1900 or 1970 sequence.

Under the circumstances, the trial court correctly found that there was no correlation between the checks involved in the Craigslist scam and defendant's check with respect to date or presentation; the amount of defendant's check differed from those in the Craigslist scam; the face of the checks differed; and there was nothing directly connecting defendant to the scam. Thus, the fact a Craigslist scam existed had no logical tendency to support his defense, and the trial court did not abuse its discretion in ruling that the probative value of the evidence

was outweighed by the substantial danger of confusing the issues and misleading the jury. Moreover, because the trial court appropriately excluded the evidence under Evidence Code section 352, defendant was not deprived of his due process right to present a defense. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289 [the routine application of state evidentiary rules does not implicate a defendant's constitutional right to present a defense].)

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

NICHOLSON, J.