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

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
LUIS JAMARILLO GUTIERREZ, JR.,  
  
Defendant and Appellant.

C065803  
  
(Super. Ct. No.  
08F04807)

Following a jury trial, defendant Luis Jamarillo Gutierrez, Jr., was convicted of conspiracy to sell cocaine (Pen. Code, § 182, subd. (a)(1)), transportation of cocaine between noncontiguous counties (Health & Saf. Code,<sup>1</sup> § 11352, subd. (b)),

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<sup>1</sup> Subsequent undesignated statutory references are to the Health and Safety Code.

and using a false compartment to transport cocaine (§ 11366.8, subd. (a)), with enhancements for more than 20 kilograms of the drug (§ 11370.4). The trial court sentenced defendant to a 21-year prison term.

On appeal, defendant contends the trial court erred in admitting prior uncharged misconduct evidence, imposing a conviction assessment fee (Gov. Code, § 70373) on a stayed count was unauthorized, and the court facility fee was an ex post facto punishment. We affirm.

#### FACTS

##### *The Initial Investigation*

In October 2006, Placer County Sheriff's Detective Scott Bryan was introduced to uncharged co-conspirator Jesus Ramirez by a confidential informant, and expressed interest in buying large quantities of methamphetamine and cocaine. Detective Bryan made several drug purchases from Ramirez over the next several months.

In February 2007, Detective Bryan expressed interest when Ramirez asked if he knew anyone who was interested in driving to Canada for \$10,000. Ramirez explained he was working with people to transport cocaine from Mexico to Canada, and there would be opportunities to make multiple trips each month. The plan involved driving new cars containing cocaine in a hidden compartment from California to Vancouver, British Columbia. They had a car dealership "on the hook," which allowed the driver to be placed on the registration and insurance.

The cocaine, worth \$16,000 to \$18,000 per kilogram in California, was worth \$30,000 per kilogram in Canada. Ramirez said that each car had a GPS system so they would know its location at all times. He advised Detective Bryan to take his girlfriend, make a hotel reservation, and sign up for a seminar in the area. Later, Ramirez told Detective Bryan that his "homeboy" wanted to meet him and have him make a test run.

Ramirez told Detective Bryan that a car was ready on two occasions, but the detective demurred both times, claiming he was out of town. Ramirez reiterated the offer in May 2007, but Detective Bryan expressed concerns about driving so much cocaine across the border. Ramirez said they were desperate enough that they might pay as much as \$15,000. Ramirez eventually offered \$12,000. From February to July 2007, Ramirez asked him to transport cocaine at least 10 times.

#### *The First Calls*

Wiretaps were placed on telephones associated with Ramirez and uncharged co-conspirator Rafael Cardona during July and August 2007.

On July 31, 2007, defendant called Cardona and told him he was with the "princess"<sup>2</sup> and she was ready. Defendant would guide her to Sacramento, where Cardona would have her sign the paperwork to get the SUV in her name. Cardona was to reserve a

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<sup>2</sup> The "princess" was later identified as defendant's distant cousin, Lorelee Ayala.

room for her so they could take care of the paperwork in the morning, since she might arrive after the dealership closed. Cardona would make some deposits so defendant could give a check to her.

On August 1, 2007, Cardona told defendant he would buy a "device" for her to stay in contact. Defendant mentioned that he had a program which allowed him to see exactly where she was. He also gave her written directions for how to get to Cardona. Cardona had advised her to tell people "at the line" that she was going to see some properties for a few days, even though he thought they would be cool. Cardona also said the "pigeon" would be waiting for her when she arrived in "Vanco."

Cardona told defendant she would take Highway 4 to downtown Stockton and Highway 99 north to Sacramento, getting off at either Laguna or Calvine. At 7:08 p.m., defendant told Cardona he would tell her directions so she could go there directly without fail. At 7:11 p.m., defendant told Cardona he would call to see where she was, so he would know how long it would take, and so that he could start guiding her. At 10:03 p.m., defendant told Cardona that she just got off and was at a Wendy's.

#### *The Drive*

On the evening of August 1, 2007, defendant's distant cousin Lorelee Ayala drove an Acura MDX from Colton to the Sacramento area. Defendant got her involved in driving the Acura for money, and she was paid \$2,500 before she left Colton.

According to Ayala, Cardona arranged for the Acura to be registered in her name at Ataya's Motors in Sacramento, fill the SUV with gas, and gave her telephones with pre-programmed numbers to use when she got to Canada.

Law enforcement conducted extensive undercover surveillance of Cardona and Ayala. On August 1, 2007, a Toyota FJ Cruiser driven by Cardona parked at an Elk Grove Holiday Inn Express. He went to his home 10 minutes later. At 10:16 p.m., Cardona met Ayala at a nearby Wendy's, took her to dinner, and then took her to the Holiday Inn Express.

At around 9:07 a.m. on August 2, 2007, Cardona drove his FJ Cruiser to the Holiday Inn Express and parked it next to Ayala's Acura. He then entered the hotel and came out with Ayala. They got into their respective vehicles and drove to a midtown Sacramento restaurant. Next, they drove to a car dealership, then to a gas station, back to the dealership, and back to the gas station again.

The Acura separated from the FJ Cruiser at 1:18 p.m., and headed out of Sacramento north on Interstate 5. Ayala eventually pulled into a gas station in Dunnigan and threw away a map with directions from Southern California to Sacramento. Officers continued to conduct surveillance on the Acura as Ayala drove to Redding.

#### *The Stop*

Shasta County Sheriff's Detective John Kropholler stopped Ayala's Acura on Interstate 5 in Redding for speeding and

following at an unsafe distance. Ayala appeared very nervous, the date of purchase was blank on the Acura's registration, and the insurance was dated for the next day. Detective Kropholler asked Ayala to get out of the Acura and obtained her consent to search the SUV.

Detective Kropholler found \$2,500 cash in the back seat. His canine alerted to drugs in the Acura's cargo area, where the carpet was misaligned and there were tool marks on the carpet screws. The Acura was eventually moved to the California Highway Patrol office in Redding, where the bumper was removed, and officers discovered a hidden trapdoor behind the bumper. Inside the trapdoor was a hidden compartment containing 26 kilograms of cocaine. The cocaine was worth \$780,000 wholesale in Canada and \$2.6 million retail in the United States.

Ayala testified that she had no idea the drugs were in the Acura. A phone found on Ayala had been recently used to call a number associated with defendant. Ayala eventually was released without charges to preserve the security of the investigation. She was arrested after the investigation was concluded.

#### *The Aftermath*

On August 2 at about 3:42 p.m., Cardona told defendant per a wiretapped phone call that "she" just called and it looked like she was going to get a speeding ticket. Cardona and defendant later expressed concern that she had not communicated with them since the ticket. They continued to exchange calls

expressing their concern over her unavailability later that evening and on the following day.

On August 3, defendant and Cardona discussed sending someone to find her because it would be "tough" if "she sings." Defendant suggested having someone tell her that she would be helped. He also told Cardona that the driver was Ayala.

Defendant and Cardona paid \$500 for an attorney to find Ayala. On August 4, 2007, Cardona and defendant learned Ayala was in Redding. Defendant did not think she had "sung" but wanted someone to see her soon so she would not get desperate. They hoped she just forgot to pay her parking tickets.

Defendant, who contacted Ayala by August 7, told Cardona that he believed Ayala was not "giving anything up." However, he was suspicious about the stop, and thought someone might be spying on Ayala.

On August 13, 2007, the surveillance teams noticed Cardona started to employ counter surveillance techniques. He parked the FJ Cruiser next to a Mitsubishi Montero at a South Sacramento McDonald's parking lot, and drove the Montero to a residence in Moreno Valley in Los Angeles County. Cardona drove the Montero and a grey BMW over the next few days, but the surveillance ended when he successfully employed counter surveillance methods while driving towards the Mexican border.

Ayala testified under immunity and was serving a state prison sentence for transportation of cocaine. She told law enforcement that she drove the Acura three times before the last

incident. Ayala once drove from Moreno Valley to the Mexican border, where she crossed on foot, picked up the Acura from Cardona, and drove it to the United States. Defendant and Cardona's special name for her was "princess."

The Montero was inspected by a United States Customs and Border Protection officer on December 27, 2007. The officer found inconsistencies in the vehicle's manufacturing -- the top of the carpet in the cargo area was glued with Bondo rather than free moving, the bolts were tampered with, and there was a crack on the modeling. A search of the car discovered a concealed compartment in the cargo area containing 24 packages of cocaine weighing a total of 26.9 kilograms.

*Prior Uncharged Misconduct*

On November 30, 2001, defendant drove a Ford Taurus to the port of entry at the U.S./Mexican border crossing in Calexico. An inspection of his trunk revealed the distinct odor of Bondo, and the trunk should have been much deeper than it appeared. Defendant was arrested and a drug sniffing dog alerted to the trunk area, where there was Bondo on the corners. The officer discovered a manufactured trunk layered on top of the trunk's original bottom. The false trunk contained 33 packages of marijuana, which weighed a total of 35.45 kilograms. In the officer's opinion, the space had been especially constructed for the storage of contraband.

## DISCUSSION

### I

Defendant contends the trial court committed prejudicial error in admitting evidence of the 2001 marijuana smuggling incident as prior uncharged misconduct. We disagree.

Evidence Code section 1101 prohibits the admission of prior misconduct evidence to show a defendant's bad character or propensity to commit bad acts except when relevant to prove other facts such as intent, identity, or common scheme or plan. (Evid. Code, § 1101, subds. (a) & (b).) "To be relevant, an uncharged offense must tend logically, naturally and by reasonable inference to prove the issue(s) on which it is offered. [Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) The trial court may admit such evidence in its discretion after weighing its probative value against its prejudicial effect. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Consequently, a trial court's ruling admitting prior instances of misconduct is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), the California Supreme Court discussed the amount of similarity required between a charged offense and a prior incident before evidence of the prior incident may be admitted. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . . In order 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.]’ [Citation.] [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate ‘not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.’ [Citation.] . . . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.] [¶] The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the 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.]” (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

The trial court admitted the prior misconduct evidence over defendant's objection, finding it admissible as evidence of intent, knowledge, and the method of operation to use an automobile to transport drugs from Mexico via a hidden compartment. Defendant asserts the prior misconduct evidence was not used to prove knowledge, intent was not at issue, the evidence was cumulative as to intent, and the prior incident was insufficiently similar to the charged offense to prove method of operation.

Intent is an element of using a false compartment to transport controlled substances.<sup>3</sup> "[A] fact -- like defendant's intent -- generally becomes 'disputed' when it is raised by a plea of not guilty or a denial of an allegation. . . . [and] remains 'disputed' until it is resolved." (*People v. Rowland* (1992) 4 Cal.4th 238, 260.) Since defendant did not stipulate to intent, the matter was susceptible to proof by prior misconduct evidence.<sup>4</sup>

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<sup>3</sup> Section 11366.8 provides in pertinent part: "(a) Every person who possesses, uses, or controls a false compartment with the intent to store, conceal, smuggle, or transport a controlled substance within the false compartment" is guilty of the crime of using a false compartment to transport controlled substances.

<sup>4</sup> Defendant asserts *Rowland* was wrongly decided. He recognizes we are bound to follow *Rowland* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and raises this claim to preserve it for review by the California Supreme Court.

The 2001 smuggling incident was similar to the instant offense -- using a concealed storage compartment in a vehicle's trunk to smuggle drugs from Mexico. It was thus highly probative of his intent to conceal the cocaine for transport. Although there was other evidence of defendant's intent -- his phone conversations with Cardona -- this evidence was wrapped in oblique references and code words. Rather than being cumulative, the prior misconduct evidence was supplemental to the other evidence of defendant's intent.

The prior misconduct evidence was also highly probative of a common scheme or plan to smuggle drugs into California from Mexico through hidden compartments in vehicles. To establish a common design or plan, couched by the trial court as a "method of operation", evidence of uncharged misconduct must be sufficiently similar to that of the charged crime to support an inference that the defendant committed the charged crime pursuant to the same design or plan as the uncharged misconduct. (*Ewoldt, supra*, 7 Cal.4th at p. 393.) "For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft, evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (*Id.* at p. 394, fn. 2.)

It is not necessary to prove that the defendant was executing "a *single*, continuing conception or plot" encompassing the charged and uncharged acts in order to show a common design or plan. (*Ewoldt, supra*, 7 Cal.4th at pp. 399, 401.) What must be shown is that the charged and uncharged acts share "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" [Citation.]" (*Id.* at p. 402.) However, "the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*Id.* at p. 403.)

The prior incident was not identical to the charged offenses -- the 2001 incident involved a different controlled substance, defendant was the driver then, and his hidden compartment was somewhat different than in the charged offenses. Nonetheless, these differences are largely superficial and do not diminish the significant similarity between the prior and instant offenses. In both instances, defendant was involved in attempts to smuggle large quantities of controlled substances across California's border with Mexico. The charged and prior crimes both showed a high degree of planning and professionalism with very similar methods -- using false compartments in car trunks. In short, the very similar but not identical 2001 offense was relevant to prove common plan or design.

"There is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.] On appeal, a trial court's resolution of these issues is reviewed for abuse of discretion. [Citation.] A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

The prior crime was not remote since it took place less than 10 years before the charged offenses. (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1497, fn. 14.) It did not involve more culpable conduct. Since defendant had different roles in the two offenses, there was no chance of confusing the jury. The evidence took little time to present -- 14 pages of trial transcript, and as we have already discussed, was not cumulative. It was not beyond the bounds of reason for the trial court to conclude that this relevant evidence was not outweighed by its potential prejudice, and it was not an abuse of discretion for the trial court to admit the prior offense.

## II

Government Code section 70373 mandates a \$30 conviction assessment "shall be imposed on every conviction for a criminal offense[.]" (*Id.* subd. (a)(1).) The trial court imposed a criminal conviction assessment of \$90, consisting of a \$30

assessment for each of his three offenses. Since the trial court stayed sentence on two of the three counts pursuant to Penal Code section 654, defendant contends only a single assessment was authorized. We disagree.

In *People v. Crittle* (2007) 154 Cal.App.4th 368, we held: “[Penal Code s]ection 654, which prohibits multiple punishment for the same act or course of conduct and generally bars the use of a conviction for ‘any punitive purpose’ if the sentence on that conviction is stayed [citation], does not apply to a court security fee because that fee is not punishment. [Citation.] . . . [¶] Accordingly, even though the trial court stayed the punishment for defendant's robbery conviction, it was required to impose a \$20 court security fee based upon that conviction. [Citation.]” (*Id.* at pp. 370-371.)

Similarly, contrary to defendant's view, the criminal conviction assessment is not punitive. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413 (*Castillo*); *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1488 (*Fleury*); *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 5-6.) Accordingly, there is no basis to stay such assessment under Penal Code section 654.

### III

Defendant contends the imposition of the Government Code section 70373 criminal conviction assessment violated the prohibition against ex post facto laws because the January 1, 2009, effective date of the statute was after his offenses were committed. He is mistaken.

We have repeatedly held that the criminal conviction assessment is not punitive and therefore may be imposed retroactively without violating the state and federal prohibitions against legislation. (*Fleury, supra*, 182 Cal.App.4th at p. 1494; *Castillo, supra*, 182 Cal.App.4th at pp. 1413-1415; *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1111-1112.) Defendant has given us no reason to depart from our uniform precedent to the contrary.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.