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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
WAYNE EUGENE PEPPER,  
  
Defendant and Appellant.

C069730  
  
(Super. Ct. No.  
11F01306)

On September 13, 2011, a jury convicted defendant Wayne Eugene Pepper of vehicle taking (Veh. Code, § 10851 [count 1]), receiving stolen property (Pen. Code, § 496 [count 2]), and possession of hydrocodone (Health & Saf. Code, § 11350 [count 3]). In connection with count 1, defendant admitted he had suffered four prior convictions for vehicle taking (Pen. Code, § 665.5). He also admitted he had suffered a strike conviction for first degree burglary and had suffered three separate convictions resulting in prison terms (Pen. Code, § 667.5).

On November 18, 2011, the trial court sentenced defendant to an aggregate term of 11 years in prison: four years for count 1, doubled due to the prior strike; concurrently run midterms of two years each for counts 2 and 3; and one additional year for each of the three prior prison terms.

Defendant timely appeals. He contends that the trial court prejudicially erred in admitting evidence of his prior convictions. Disagreeing, we shall affirm the judgment.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *Present Offense*

Lorene Hines testified that on February 14, 2011, she drove Kevin Keller's car, which she had borrowed, to work. She believed that she dropped the keys on her way back to work when she retrieved something from the car at around 2:00 p.m. When she returned to the parking area at about 5:00 p.m. that evening, the car was gone. She had not given anyone permission to take Keller's car. Keller reported the car stolen on the following day. He testified that no one but Hines had permission to use the car.

When the car was recovered, some of Hines's property that had been inside the car was missing, including a gas credit card and a Flying J rewards card. The last time she saw it, the gas credit card was inside a white envelope inside her log book, on the passenger's seat. The Flying J card was also inside the log

book. Keller testified that although the car was undamaged when recovered, it did not appear or smell as if it had been cleaned or otherwise "detailed."

California Highway Patrol (CHP) Officer Chad Hertzell testified that on February 15, 2011,<sup>1</sup> he initiated a traffic stop on a car that had been reported stolen; defendant was the driver. Defendant pulled over almost immediately, and was "very" cooperative. Two female passengers were also in the car; one was later identified as Crystal Gehrke. CHP investigator Joel Corralejo testified that he recovered a Flying J rewards card with Hines's name on it from defendant's front left pants pocket, and an envelope containing a gas credit card from defendant's jacket pocket. The car keys were on the driver's side floorboard of the car, and the car's ignition switch did not appear to have been tampered with.

Defendant told Corralejo that on February 14, 2011, at around 6:00 p.m., he was at a 7-Eleven gas station and saw a friend named "Leif," who asked if defendant wanted an auto detailing job for \$80. Defendant agreed, and Leif told him to return the car to the 7-Eleven in two days at around the same time. Defendant said he had known Leif for about eight years,

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<sup>1</sup> Although the officer actually affirmed the prosecutor's question as to whether he made the relevant traffic stop on February 15, 2010, that appears to be an error.

but was unable to provide Leif's last name, address, phone number, or description. He said only that he had Leif's permission to take the car and that Leif said his boss's wife wanted the car detailed. Defendant explained that the Flying J card was on the floor of the car, so he picked it up. He also picked up the gas card "for safe keeping."

*Evidence of Prior Convictions*

Sacramento Police Department (SPD) Officer Michael Smith testified that on March 8, 2007, he contacted defendant after he pulled into a driveway while driving a stolen car. The keys were inside the undamaged car, on the center console. On April 13th, 2007, defendant was convicted of stealing that car.

SPD Officer Raul Becerra testified that on June 6, 2005, he saw a car, which he later determined had been stolen, moving and subsequently stopped in the middle of the roadway. Defendant, Crystal Gehrke, and two others were in the car; defendant had the keys to the car in his pants pocket. SPD Officer Shannon Gunnison took defendant's statement on the scene. He told Gunnison that a friend of his, Sherry, was having marital problems. They met in the parking lot of a market, and she asked him to drive her car for a few days so that her husband would not damage it. He was supposed to return it to her at the same parking lot, no later than the morning of June 7. He was unable to provide Gunnison with Sherry's last name, phone

number, or address. Gehrke was driving the car because defendant had been drinking earlier. On June 20, 2005, defendant was convicted of stealing that car.

SPD Officer Travis Hunkapiller testified that on February 27, 2004, he pulled defendant over for driving a car that had been reported stolen. There was no damage to the car and defendant was cooperative. On May 18, 2004, defendant was convicted of stealing that car.

*Litigation Concerning Prior Convictions*

Before trial, the People moved to admit evidence of defendant's three prior convictions for vehicle taking (occurring in 2004, 2005, and 2007) to establish defendant's "knowledge, intent, plan, and absence of mistake or accident," pursuant to Evidence Code section 1101, subdivision (b) (section 1101(b)).<sup>2</sup> Defendant opposed the motion, arguing the evidence was irrelevant and unduly prejudicial, such that it should be excluded under Evidence Code section 352 (section 352) as more

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<sup>2</sup> Section 1101(b) provides in relevant part that the general prohibition on the admission of character evidence to prove defendant's conduct on a specified occasion does *not* "prohibit the admission of evidence that a person committed a crime . . . 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."

prejudicial than probative, as the evidence was by its very nature only relevant as propensity evidence.

The trial court concluded that evidence of defendant's prior convictions was "highly probative on the issue of intent" and also probative to refute any argument defendant's actions in taking the vehicle at issue in the instant case were accidental, and therefore admissible under section 1101(b). The court further concluded that, pursuant to section 352, this probative value was "not substantially outweighed by the risk of prejudice, undue consumption of time or confusion of issues."

Before the jury began its deliberations, the court provided it with CALCRIM No. 375, in relevant part as follows:

"The People presented evidence that the defendant committed three auto theft offenses not charged in this case. [¶]  
. . . [¶]

If you decide that the defendant committed the uncharged offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

The defendant acted with the intent to deprive the owner of possession or ownership of the vehicle in question in this case for any period of time; the defendant knew the vehicle was stolen when he allegedly acted in this case; the defendant had a plan or scheme to commit the offense alleged in this case.

In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense.

Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

Do not consider this evidence for any other purpose.

If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of unlawful taking or driving a vehicle. The People must still prove the charge beyond a reasonable doubt."

#### **DISCUSSION**

Defendant now argues that the trial court erred in admitting evidence of his prior convictions because its primary value was as improper evidence of predisposition. On appeal, the admission of evidence of uncharged offenses is reviewed for abuse of discretion by the trial court. (*People v. Gray* (2005) 37 Cal.4th 168, 202.) Here, the trial court's ruling shows an appropriate analysis under sections 1101(b) and 352.

Preliminarily, the trial court properly concluded defendant's prior convictions were admissible pursuant to section 1101(b); as the court noted, the priors were highly probative on the issue of intent.<sup>3</sup>

Defendant's plea of not guilty and statement to the arresting officer put his intent at issue--he had maintained

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<sup>3</sup> Further, given the particular factual circumstances in this case, the facts of the prior convictions tended to disprove defendant's claim that he was found in possession of the stolen car due to some mistake or accident on his part, a separate basis for admission which was also touched upon by the trial court.

that he had extended permission to take the car at issue, rather than the intent to deprive, as required for conviction.

Section 1101(b) allows the admission of evidence of prior acts where relevant to prove knowledge, intent, and absence of mistake or accident, inter alia. The uncharged acts need not be overwhelmingly similar to the charged offense to be relevant.

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.

[Citation.] 'The recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*)).

Further, the trial court properly weighed the probative value of the evidence against its possible prejudicial effects, pursuant to the requirements of section 352. Although defendant argues that "[a]ny fair balance of probative value versus prejudicial confusion of the issues and misleading of the jury here could not result in anything but a decision that the prior vehicle taking evidence should have been excluded," we disagree. As the trial court noted, the evidence of defendant's past association with stolen vehicles demonstrated a pattern to

defendant's conduct that tended to suggest intent, as well as the absence of accident or mistake, which is "[t]he principal factor affecting the probative value of the evidence of defendant's uncharged offenses." (*Ewoldt, supra*, 7 Cal.4th at p. 404.) Because the evidence was of such high value to prove a material issue in dispute, the court's conclusion that this probative value outweighed the possibility of undue prejudice was not an abuse of discretion.

Defendant contends that, in lieu of exclusion, the prior convictions should have been admitted by stipulation to better temper their prejudicial effect. He further contends that the People's argument at trial heightened the prejudice by implying that defendant was a serial car thief. We are not persuaded.

First, by defendant's own admission, the idea of stipulating to the priors rather than eliciting testimony was neither "explored" nor even "thought of" while the case was before the trial court. We decline to address this argument for the first time on appeal. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 670 [where defendant did not ask trial court to redact prison records, his claim that the court should have "sanitized" the records is forfeited on appeal].)

Second, the prosecutor properly argued that the evidence of prior convictions showed that in the instant case, defendant "intended to deprive the owner of the car." Both parties

emphasized the limited role of the section 1101(b) evidence, and the court properly described its limited use to the jury. The court provided the jury with instruction CALCRIM No. 375, set forth *ante*, which accurately described the limited function of section 1101(b) evidence and safeguarded against possible prejudice. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Absent evidence to the contrary, and here we see none, we presume the jurors followed the court's instructions and did not consider the evidence of defendant's prior convictions for an unauthorized purpose.

**DISPOSITION**

The judgment is affirmed.

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DUARTE, J.

We concur:

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ROBIE, Acting P. J.

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MAURO, J.