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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT TATE ALLEN, Defendant and Appellant.	D059575 (Super. Ct. No. SCD227971)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

A jury convicted Robert Tate Allen of evading a police officer with reckless driving (Veh. Code, § 2800.2, subd. (a)). The court found true five prison priors within the meaning of Penal Code section 667.5, subdivision (b). Allen was sentenced to a determinate term of seven years in prison.

Allen appeals contending the trial court erred in admitting certain evidence that tended to show the commission of other crimes and that the court erred in holding an in

camera hearing on the sheriff's deputy's claim of privilege under Evidence Code[1] section 1040. We will find no error and affirm the judgment.

STATEMENT OF FACTS

Allen does not challenge the sufficiency of the evidence to support his current conviction. Accordingly, we will set forth a limited statement of facts in order to provide a context for the discussion which follows.

The events in this case took place at around 2:00 p.m., on June 14, 2010. At that time San Diego County Sheriff's Deputy Patrick McEvoy was following a silver Camaro, driven by Allen, on State Route 67 in a rural area of San Diego County. McEvoy observed the Camaro was speeding.

McEvoy was driving an unmarked car at the time and requested a deputy in a marked patrol car to stop Allen for speeding. Allen was traveling in excess of 80 miles per hour when McEvoy encountered him.

The marked patrol car got behind Allen and the deputy turned on the overhead lights and siren. At first it appeared Allen would stop, but he then abruptly turned off the highway onto another road. What followed thereafter was a high speed chase on various roads, including those in a residential area called Eucalyptus Hills. Deputies called for assistance from the sheriff's helicopter. A search followed which located the abandoned

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1 All further statutory references are to the Evidence Code unless otherwise specified.

Camaro and, with the assistance of citizens, located Allen. Allen yielded to authorities only after a deputy confronted Allen and pointed a rifle at him.

A search of the car following Allen's arrest produced a substantial amount of identification cards, U.S. mail, checks, blank checks, vehicle registrations, and copies of driver's licenses, immigration cards, social security cards and Bank of America identification cards with checking account numbers -- all in different names.

At the time of his arrest Allen had a driver's license bearing his photo, but in the name of Shawn Sheeron, a woman who does not know Allen and never gave him permission to use her name.

Allen did not testify and did not present any defense evidence.

DISCUSSION

I

OTHER CRIMES EVIDENCE

At the time the trial began there were three counts charged. In addition to the evading an officer count, Allen was charged in count 2 with using personal identifying information of another (Pen. Code, § 530.5, subd. (a)) and count 3 with receiving stolen property (Pen. Code, § 496, subd. (a)). At the end of the prosecution's case the court dismissed counts 2 and 3 for lack of sufficient evidence. However, prior to the time the court dismissed counts 2 and 3, the court admitted the various materials taken from the car into evidence over defense objection, which argued it was evidence of "other crimes." In overruling the objection the court said:

> "My view is even though these various items are not the basis of the charged counts, two and three, they are evidence of what was in the car at the time. They might bear on the reason why he was fleeing in the first place, because he knew there was other items in the car that were not lawful. So I think the jury is entitled to receive that."

Allen first complains the trial court erred in admitting evidence of the fake identification materials and other materials implicating identity theft and contends he was prejudiced thereby. Allen did not object on section 352 grounds in the trial court. He specifically raises the issue of prejudice for the first time on appeal. As we will explain, the trial court acted well within its discretion in admitting evidence of unlawful items found in the car as relevant to motive to flee from police. Even if we consider his late claim of prejudice, we find the probative value of the evidence outweighs any potential prejudice.

A. Standard of Review

Trial court rulings on the admissibility of evidence are reviewed under the abuse of discretion standard. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Under that standard a trial court decision will not be overturned in the absence of a clear showing of an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

B. Legal Principles

At trial, defense counsel objected to the admission of the items taken from the car. Counsel objected to "anything in the trunk." The ground stated for the objection was "evidence of other crimes." Counsel did not mention sections 1101, subdivision (b) or

352. The court overruled the objection finding the evidence was relevant to prove motive for Allen's flight from police.

Evidence of uncharged conduct is admissible if it is relevant to prove intent, motive, knowledge or absence of mistake. (§ 1101, subd. (b); *People v. Hayes* (1990) 52 Cal.3d 577, 616-617.) Trial courts have broad discretion to determine whether proffered evidence is relevant. (*People v. Cash* (2002) 28 Cal.4th 703, 727.)

Even if evidence of uncharged conduct is relevant in a given case, upon proper objection the trial court is required to weigh the probative value of the evidence against the prejudicial effect that evidence may have on the defendant's right to a fair trial. (§ 352; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) As we have noted, however, counsel did not mention section 352, nor did he make any argument about possible prejudice arising from the evidence. Rather, counsel presented a terse, generalized objection. Ordinarily, failure to raise a section 352 objection amounts to a forfeiture of the issue on appeal. Had such objection been timely raised the trial court would have had the opportunity to do the appropriate weighing of the evidence and make a record of its analysis. Thus, we consider the section 352 issue to be forfeited on appeal. (*People v. Ervine* (2009) 47 Cal.4th 745, 777.)

C. Analysis

The objection to the admission of the materials obtained from the car was made late in the trial. The objection was specifically to the materials that would be available for the jury to consider. The jury had already heard considerable evidence about the

search of the car and the nature of the material taken from it. As we have also noted, the objection was general, without articulating any added prejudice that would arise from permitting the jury to review the documents. In response to the objection the court specifically found the materials relevant to prove motive for Allen's dangerous, high speed flight from police. Allen does not seriously dispute the evidence was relevant to show motive or that motive, although not an element of the crime, is relevant to the question of guilt or innocence. (*People v. Roldan* (2005) 35 Cal.4th 646, 705-706.)

We are satisfied that even if we treated the section 352 issue as properly before us, we would reject Allen's claim of undue prejudice. There was nothing alarming or gruesome about the evidence in question. The jury had heard about the evidence and was well aware that identity theft type materials were in the car. We cannot conceive of any undue prejudice that might have arisen from the jury being provided an opportunity to see the material and assess their volume and the likely impact possessing such material would have had on Allen when confronted with what appeared to be an ordinary traffic stop. The court properly admitted the challenged evidence.

II

SECTION 1040 CLAIM OF PRIVILEGE

In a somewhat selective reading of the record, Allen contends the trial court committed procedural error when it held a in camera hearing on the claim of privilege made by Deputy Sheriff McEvoy. Allen contends the court lacked the authority to conduct such hearing without first identifying the issues to be considered. He further

contends the trial court was obligated to conduct an adversary hearing following the court's review of the evidence in camera. The difficulty with Allen's position on appeal is he never objected to the in camera hearing and did not request an adversary hearing on the claim of privilege. Further, the trial court did, in fact, discuss the issues presented by the claim of privilege, and although counsel had the opportunity to pose questions for the court to consider in the in camera hearing, no potential questions were ever offered. We will find no error in the manner in which the court handled the claim of privilege.

A. Standard of Review

A trial court's determination of the materiality of evidence for purposes of a section 1040 claim of privilege is reviewed for abuse of discretion. As is the case with all issues reviewed for abuse of discretion, we will only overturn a trial court's decision on a clear showing of abuse. (*People v. Walker* (1991) 230 Cal.App.3d 230, 237-238.)

B. Background

During the cross-examination of Deputy McEvoy, counsel asked the question: "Was there anything about that [Camaro] that would have given you some indication that it might be in violation of an area of law that you wanted to enforce?" The prosecutor's relevance objection was overruled. Deputy McEvoy then invoked the governmental privilege of section 1040. The matter was put over to a later time.

The next day, defense counsel raised the issue of the section 1040 claim of privilege and also discussed some redactions in the discovery he had received. Counsel explained:

> "There may be information out there that would help the defense in that the exchange of the car -- the information I have at the present time is that the car was bought or sold on June 4th. And this event happened on June 14. There's an issue as to whether the remnants in the car were actually my client's or someone else's, the previous owner. [¶] The discovery that I have gotten from Deputy West is that he talked with her. She said, this is the woman who sold the car, Ms. Siersma, that she -- he paid a certain amount of money down and she was letting him use the car until he got the rest of it paid off. Which leaves it wide open as to whether items in the car were still hers or not. [¶] And if they have that kind of information I think it's critical to the defense in this case, I would like to know that, your Honor."

Counsel further explained the question he asked might show law enforcement was "close in the investigation to know whether items left in the car that were not my clients." The trial court responded:

> "All right. So would you [the prosecutor] like to address that? When the 1040 privilege was claimed yesterday, I had intended to go back to that. And actually upon reviewing the question that was asked that led to that invocation, you had objected on relevance. And on further reflection I think I probably would have sustained, that at least for purposes in front of the jury. The question he had asked, [defense counsel] had asked, I probably should have sustained on grounds of relevance. So I don't think, at least for purposes of the testimony before the jury, that we need to go into the full 1040 privilege. [¶] But the issue he raises is a separate issue, which is if there's anything that has been excluded from, blocked or precluded from discovery based on a 1040 privilege but bears in some fashion on knowledge law enforcement has about the vehicle, that might perhaps be discoverable. Are you prepared to address that or do you need to talk with your agents first?
>
> "[Prosecutor]: I would prefer to talk to my agent first. And also going in camera before getting into too much detail about this.
>
> "[Court]: Well, certainly if there is anything that may bear on this, I might have to do that. I mean, if the answer is, no there's absolutely

> nothing related to some other investigation that bears on the vehicle or surveillance, I mean, maybe I have to go in camera to hear that answer, too. I don't know. I don't know what the 1040 was based on." [¶] So I don't think we have to solve this immediately this morning, but we do need to solve it before the case is submitted. So why don't -- at the break time you can follow-up on that issue."

When the trial court returned to the issue, the court said:

> "I think what would be the easiest for me is if I have counsel, Deputy West and the reporter come back to my chambers, so I can hear the 1040 evidence. And I will only come back out and tell you if I think there's anything needs to be disclose he said.
>
> "[Defense counsel]: You will do that at 9 o'clock?
>
> "[Court]: No, we will do it right now. I don't think it will take more than five or ten minutes.
>
> (Proceedings had in chambers, out of the presence of defense counsel, reported and sealed by the court.)
>
> "[Court]: We are back on the record in the courtroom. And I have had a conversation with Deputy West and Mr. Tag to review the information and I find that it does fall within the privilege for official information under Evidence Code 1040, that there is nothing that I find needs to be disclosed to the defense under *Brady*, due process or any other standard. And so that information will remain privileged. I order that the transcript of those proceedings would be sealed, available for appellate review if ordered by a court."

C. Legal Principles

Section 1040 provides in part:

> "(a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. [¶] (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the

> privilege is claimed by a person authorized by the public entity to do so and: . . . [¶] . . . [¶] (2) [d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding."

In reviewing a claim of privilege under section 1040, the court may utilize the in camera hearing as authorized by section 915, subdivision (b). The court's examination of the evidence, about which the privilege has been claimed, is to be reviewed for materiality. " '[T]he test of materiality is not simple relevance; it is whether the nondisclosure might deprive the defendant of his or her due process right to a fair trial.' [Citation.]" (*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1441; *People v. Garza* (1995) 32 Cal.App.4th 148, 153.)

As a general proposition the use of the in camera hearing process can be made only where the nature of the issue to be examined has been made clear in open court and the defense has been given the opportunity to express a position on the need for the information and propose questions for the court to ask, if appropriate. (*Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873-874 (*Torres*).) An adversary hearing may be necessary following the completion of an in camera review by the court. (*Id*. at p. 874.)

D. Analysis

Relying principally on *Torres, supra,* 80 Cal.App.4th 867, Allen claims the trial court's decision to hold an in camera hearing was erroneous because the issue to be

reviewed had not been raised in open court and counsel had not been given the chance to submit proposed questions, which the court might have used in the in camera review. He also contends that *Torres* requires that an adversary hearing be held after the in camera review.

As the record we have set out demonstrates, the issue presented by the question on cross-examination of McEvoy was made clear. Defense counsel was well aware of the proposed in camera review and made no objection and offered no questions for the court. It is also clear the court realized the question on cross-examination, which led to the invocation of privilege, was not relevant to the crime in this case. Allen fled from police at a high rate of speed. He endangered the lives and property of others by erratic driving through a residential area in his efforts to avoid apprehension. Whether or not McEvoy had some other suspicion about the car was indeed irrelevant to the issues in this case.

Even though the court regretted the overruling of the prosecutor's objection, it proceeded with the in camera review. At the conclusion of the review the court stated it found nothing in the evidence that was material to the defense. Defense counsel did not ask for any further hearing and made no further objection.

We find Allen's reliance on *Torres, supra,* 80 Cal.App.4th 867, is misplaced. In that case the trial court had ordered an in camera hearing without discussion of the issues at stake and without providing defense counsel an opportunity to pose potential questions for police. Significantly, the defendant in *Torres* sought writ relief in the appellate court to prevent the trial court from holding an in camera hearing without the necessary

preliminary steps. The defendant also argued for an adversary hearing to follow the in camera review. None of that happened here.

In the case before us the defense asked a question that was not relevant to the proceedings, apparently to do some fishing for information. Counsel never questioned the manner in which the court proceeded and appeared content with the outcome of the process. Perhaps the very experienced defense counsel recognized he was on a bit of a fishing expedition and saw no need to pursue the issue any further.

Torres, supra, 80 Cal.App.4th 867, does not stand for the proposition that a defendant can stand by and let the court conduct a review of a claim of privilege and then wait until appeal to first challenge the process. To the extent *Torres* might have required a different process had counsel objected, we find any claim of error has been forfeited by failure to raise it in the trial court.

We are satisfied the trial court properly addressed the deputy's claim of privilege and resolved the issue by properly applying the correct standard of materiality. There was no error.[2]

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[2] Allen requested this court to review the transcript of the in camera hearing to determine whether the trial court properly reviewed the privileged information and correctly determined it was not material. We ordered the preparation of the reporter's transcript and have reviewed the in camera proceeding. We find no error in the trial court's review of the claim of privilege. We have sealed the transcript of the in camera proceeding and have made it a part of the record on appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.