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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN CHRISTOPHER FULSOM,

Defendant and Appellant.

E058152

(Super.Ct.No. INF10000394)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Parag Agrawal, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Ryan Christopher Fulsom of seven felonies—three counts of burglary (Pen. Code, § 459), including two counts of burglary in the first degree and one count of burglary in the second degree, two counts of vehicular theft (Veh. Code, § 10851, subd. (a)), and two counts of grand theft (Pen. Code, § 487, subd. (a))—and one misdemeanor count of possessing a stolen access card (Pen. Code, § 484e, subd. (c)). The trial court found true that defendant had three serious felony prior convictions (Pen. Code, § 667, subd. (a)), two prior prison terms (Pen. Code, § 667.5, subd. (b)), and four strike prior convictions (Pen. Code, §§ 667, subds. (c) & (e)(2)(a), 1170.12, subd. (c)(2)).¹ The trial court imposed an indeterminate sentence of 25 years to life, plus a determinate sentence of 23 years.

On appeal, defendant challenges the trial court’s admission of evidence regarding prior crimes by defendant, which he committed in 2001 and 2002, and for which he was convicted and punished. He contends that the trial court erred, both by admitting the prior crimes evidence and by suggesting and adopting an additional theory of admissibility besides the one raised by the prosecution in its briefing of the issue. He argues that these purported errors require reversal of his convictions. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

At all times relevant to defendant’s current charges, he was a parolee monitored by his parole officer using a global positioning system (GPS) monitoring device locked onto

¹ The abstract of judgment erroneously indicates the two enhancements for prior prison terms as being pursuant to Penal Code section 667, subdivision (a), rather than section 667.5, subdivision (b). The additional penalty the trial court imposed with respect to these enhancements, however, is accurately reflected in the abstract of judgment.

defendant's ankle. The evidence at trial established that the GPS device takes a reading approximately once every minute, and is accurate to within a 50-foot margin. From the information regarding the distance between subsequent readings, not only location at a particular time, but also speed of travel can be calculated. As defendant notes in his briefing on appeal, the GPS device directly shows only its own location; the location of the individual to whom the device is assigned is an inference. Nevertheless, no evidence was introduced at trial suggesting that defendant's GPS device was removed from his ankle at any relevant time.²

A. Current Charges

Defendant's parole officer noticed from GPS readings in January and February 2010 that defendant had been violating his curfew, and had been detected at locations that the parole officer found suspicious. Specifically, the data indicated that defendant was at various gated communities and country clubs in Palm Desert, Indian Wells, and Rancho Mirage during the middle of the night. Defendant's parole officer contacted the sheriff's office to see if the GPS data from defendant's monitoring device could be correlated with any crimes that had been reported.

Defendant's current charges arise from three separate incidents, to which defendant was connected by means of the GPS data, as follows:

² Defendant's parole officer removed defendant's GPS monitoring device on February 5, 2010, but only to immediately replace it with a model less affected by the aluminum in defendant's residence.

1. January 10, 2010

On the morning of January 10, 2010, victim 1 noticed that the window of her car, a Toyota, which she had parked the previous night in front of her residence in Palm Desert, had been shattered. Missing from inside the car were various items, including her wallet, credit cards, debit card, cash, and a diamond necklace. Later in the day, when victim 1 called her bank to cancel her debit card, she learned that \$200 had been withdrawn from her account that morning at 5:40 a.m.

Defendant's GPS monitoring device showed defendant moving towards victim 1's address at shortly before 5:00 a.m. on January 10, 2010. He was in the vicinity of victim 1's address for approximately five minutes, before leaving the area at 5:04 a.m. From 5:30 a.m. to 5:50 a.m., defendant was at the bank location where \$200 was withdrawn from victim 1's account at 5:40 a.m. Video surveillance of the location showed someone—not defendant—exit the passenger side of a vehicle and use victim 1's debit card to make the \$200 withdrawal.

2. February 3, 2010

Victim 2 stored his car, a BMW, at the residence of victim 3, located in a gated community with a golf course in Rancho Mirage. In the early morning of February 3, 2010, victim 2's BMW was parked in victim 3's garage, along with victim 3's own car, a Lexus; the keys to both cars were in the Lexus. At approximately 2:35 a.m., victim 3 heard noises coming from his garage. He went to the garage and saw a male sitting in the BMW. Victim 3 shouted at the man, who quickly started the BMW, backed out of the garage, and drove away from the location. Victim 3 noted that numerous golf clubs had

been stolen from his garage. The car, with the missing golf clubs inside, was recovered the next day.

Defendant's GPS monitoring device showed defendant to be at victim 3's address from approximately 2:30 to 2:35 a.m. on February 3, 2010. From 2:35 a.m. to 2:40 a.m., the GPS device showed defendant moving rapidly away from that location.

3. February 4, 2010

On February 4, 2010, victims 4 and 5, a husband and wife, lived together at a home located inside a country club community in Rancho Mirage. On that date, they left their house at approximately 6:40 p.m., leaving their Porsche parked in the garage, and returned at 9:00 p.m. Upon their return, they observed that the Porsche was missing, along with various items from inside the house.

Defendant's GPS monitoring device showed defendant near victims 4 and 5's address by about 6:37 p.m. on February 4, 2010. He remained in the vicinity of the address from 6:37 p.m. to 7:03 p.m. By 7:03 p.m., defendant had left that location and was travelling rapidly towards the exit of the country club. Video surveillance of the location shows victims 4 and 5's Porsche exiting the country club's gates at about 7:00 p.m.

B. Prior Crimes Evidence

Evidence of prior crimes was presented at trial in the form of testimony from two members of the Riverside County Sheriff's Department who had taken confessions from

defendant.³ Lieutenant Dean Agnoletto testified that defendant confessed to stealing golf clubs from the garages of four separate residences in the Springs Country Club in 2001. Defendant told Lieutenant Agnoletto that he focused on golf clubs because he could sell them for cash at a local business. He also told Lieutenant Agnoletto he had attempted to steal golf clubs at several other country clubs and gated communities but had been unsuccessful. Additionally, Sheriff's Deputy James Armstrong testified that in September 2002, defendant confessed to stealing three cars from the PGA Country Club located in the City of La Quinta. He also admitted to stealing and using credit cards he located in one of the cars he stole. He further admitted taking items out of another vehicle, a sports utility vehicle (SUV) parked at the country club. Defendant explained to Deputy Armstrong that he accessed the country clubs through unmanned gates, or by jumping the wall. Defendant stated that he worked with others to commit these crimes, rather than acting alone.

Prior to trial, the prosecution moved to admit the prior crimes evidence summarized above. In its written briefing, the prosecution argued that the prior crimes evidence was admissible to prove common scheme or plan, citing *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*), among other cases.

At oral argument, the trial court focused on *Ewoldt* as controlling authority regarding the degree of similarity to the current offenses required for prior criminal acts

³ Defendant's convictions following these confessions were not described to the jury, pursuant to a stipulation bifurcating the issue of defendant's strikes, and providing that no mention of prior strike convictions would be made to the jury.

to be admissible. The court first confirmed with the prosecution that it asked for the evidence to be introduced for the purpose of showing a common scheme or plan; the prosecution responded in the affirmative, stating also “there are other purposes” that it had not briefed: “It could go to intent, but I won’t argue that because I haven’t briefed it.” The court then remarked, “Let’s just talk about this a little bit,” and quoted at length the standards set out in *Ewoldt* for admission of evidence of uncharged criminal acts. Next, the court raised the question of whether the prior crimes evidence in this case showed the necessary features of a plan, as opposed to a series of spontaneous acts; the prosecution and defense both responded. The court ruled that the prior crimes evidence was admissible both for the purpose of showing a common scheme or plan and to show intent. Finally, the court considered whether the evidence should be excluded pursuant to Evidence Code section 352, and concluded that it should not be excluded.

After the close of evidence, the court instructed the jury that the prior crimes evidence was to be used only for the limited purpose of deciding whether defendant acted with “intent to steal or burgle in this case,” or whether he “had a plan or scheme to commit the offenses alleged in this case.” It further instructed the jury that it must “not conclude from this evidence that the defendant has bad character or is disposed to commit crimes,” and that the prior crimes evidence was “not sufficient by itself to prove that the defendant is guilty of the crimes charged.”

II. ANALYSIS

A. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Defendant's Prior Crimes

Defendant challenges the admission of evidence of his prior crimes. He contends that it was an abuse of discretion for the trial court to admit the evidence for the purpose of proving intent or common plan or scheme, because the prior crimes were insufficiently similar to the current charges to be admissible and were admitted to prove facts that were not in dispute. We disagree.

Evidence of other crimes committed by a defendant is admissible under Evidence Code section 1101 when relevant to prove some fact, such as motive, opportunity, intent, or plan, other than the defendant's propensity or disposition to commit such acts. (Evid. Code, § 1101, subd. (b).) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) On appeal, we review the trial court's ruling for abuse of discretion. (*Ibid.*) Even assuming an abuse of discretion, the judgment will not be reversed unless it is reasonably probable that a result more favorable to defendant would have resulted absent the error. (*Ibid.*)

The admissibility of prior crimes evidence "turns largely on the question whether the uncharged acts are sufficiently similar to the charged offense to support a reasonable inference of the material fact they are offered to prove." (*People v. Burnett* (2003) 110 Cal.App.4th 868, 881-882 [quoting *People v. Erving* (1998) 63 Cal.App.4th 652, 659-

660].) The degree of similarity required depends on the purpose for which the evidence is introduced.

The least degree of similarity is required to admit prior crimes evidence for the purpose of showing that a defendant acted with the requisite degree of criminal intent. To be admissible for the purpose of showing intent, the uncharged conduct need only be sufficiently similar to the charged conduct as to “support the inference that the defendant probably harbored the same intent in each instance.” (*People v. Yeoman* (2003) 31 Cal.4th 93, 121; accord, *Ewoldt, supra*, 7 Cal.4th at p. 402.)

Prior crimes evidence proffered to show a common scheme or plan must have more similarity to the current charges than evidence admitted to show intent to be admissible, though the difference is one of “degree, rather than of kind.” (*Ewoldt, supra*, 7 Cal. 4th at p. 403.) “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.” (*Ibid.*) There need not be anything to indicate a “single, continuing plot”; it is enough that the “modus operandi of uncharged offenses committed by a defendant is markedly similar to the charged offense . . . to establish that the uncharged offenses and the charged offense are manifestations of a common design or plan.” (*Id.* at p. 399.)

Evidence of prior crimes proffered to show identity—that is, to show that the same person must have committed both the charged offense and the uncharged offense—requires “[t]he greatest degree of similarity.” (*Ewoldt, supra*, 7 Cal. 4th at p. 403.) To be admissible to establish identity, the evidence of uncharged acts must be “so unusual and

distinctive as to be like a signature.” (*Ibid.*) It is undisputed that the prior crimes evidence at issue here does not meet this most stringent standard.

Thus, to prevail in his challenge to the admission of the prior crimes evidence, defendant must show that the trial court abused its discretion—either because the prior crimes were not sufficiently similar to the current offenses to be admissible for the purposes the evidence was admitted, or because the trial court abused its discretion in weighing the evidence’s probative value under Evidence Code section 352—and must further show that it is reasonably probable that the result at trial would have been more favorable to him absent that abuse of discretion. He has not made such a showing, so the judgment will be affirmed.

The evidence of defendant’s prior crimes was admissible to show he acted with the requisite criminal intent during the incidents giving rise to his current charges. Defendant’s contentions on appeal notwithstanding, his intent was very much at issue at trial. By pleading not guilty, defendant put all elements of the crimes with which he was charged at issue, including intent. (*People v. Scott* (2011) 52 Cal.4th 452, 470.) The prosecution was required to prove beyond a reasonable doubt that defendant was not just at the scene of a crime committed by another person, but himself acted with criminal intent, either as a direct perpetrator or as an aider and abettor. The similarities between the charged offenses and defendant’s confessed prior crimes—burglaries at country clubs and gated communities, committed by defendant with others at night, and involving theft of cars, golf clubs, and access cards—are sufficient to tend to show that he probably was acting with similar criminal intent during the charged incidents. (*See Ewoldt, supra*, 7

Cal.4th at p. 402.) The prior crimes evidence was therefore admissible to show defendant's intent.

The prior crimes evidence was also admissible to demonstrate a common scheme or plan. Defendant notes that none of the common features shared by the current charges and the prior crimes are “‘distinctive’ or ‘signature-like,’” and argues that it would be unreasonable to conclude the current charges are part of a single plot “hatched before the 2001 burglaries.” But, as noted above, no such showing is required for the evidence to be admissible: the common features need not do more than “indicate the existence of a plan” (rather than a series of spontaneous events), which itself need not be “distinctive or unusual,” and need not indicate a single, continuing plot. (*Ewoldt, supra*, 7 Cal. 4th at pp. 399, 403.) The relevant similarities here do indicate a common design or plan, albeit arguably not a particularly unusual or distinctive one, rather than a series of spontaneous events. Defendant did not chance to find himself in gated communities or country clubs, on a series of occasions, and each time spontaneously act on an impulse to steal; rather, the evidence tends to indicate he had a plan to steal from particular types of neighborhoods (country clubs and gated communities), with a focus on particular items (cars, golf clubs, access cards), working at night rather than during the day, and with others rather than alone. The similarities are sufficient to conclude that the current offenses are manifestations of the same common scheme or plan implemented in defendant's prior crimes. The prior crimes evidence was therefore admissible to demonstrate, given the GPS data indicating his presence at the scene, that defendant

“committed the act alleged,” and did so “in the manner alleged by the prosecution.” (*Id.* at p. 394, fn. 2 [discussing use of evidence of common design or plan].)

Furthermore, the trial court did not abuse its discretion in determining that the probative value of the prior crimes evidence substantially outweighed the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. In *Ewoldt*, the Supreme Court notes that in most prosecutions for crimes like burglary or robbery, evidence of uncharged acts to demonstrate a common design or plan (that is not sufficiently distinctive to establish identity) would be “merely cumulative regarding an issue that was not reasonably subject to dispute”: the only issue is whether the defendant was present at the scene of the crime. (*Ewoldt, supra*, 7 Cal.4th at p. 406.) In this case, however, evidence that defendant “engaged in the conduct alleged to constitute the charged offense” (*ibid.*) was not merely cumulative: defendant was placed at the scene of the crimes by the GPS data, but by pleading not guilty nevertheless claimed that he did not engage in the charged conduct.

Other factors relevant to the court’s exercise of discretion under Evidence Code section 352 include the circumstance that the charged offenses are not particularly remote in time from defendant’s prior crimes, given that for most of the intervening years he had been incarcerated. (See *People v. Davis* (2009) 46 Cal.4th 539, 602 [17 years between charged and uncharged crimes not so remote as to warrant exclusion, where defendant had been free from incarceration for total of three years in the intervening period].) The evidence of defendant’s prior crimes was no more inflammatory than the evidence of the charged crimes, because the same type of crimes is involved in both. (See *Ewoldt, supra*,

7 Cal. 4th at p. 405.) And the prior crimes evidence at issue consisted of law enforcement officers' testimony regarding defendant's confessions; there was therefore less of a danger that the jury would be inclined to believe defendant should be punished for the prior crimes, regardless of whether it considered him guilty of the charged offenses. (Cf. *ibid.* [noting heightened prejudicial effect because the defendant's uncharged acts did not result in criminal convictions].)

Thus, we cannot say on this record that the trial court abused its discretion by admitting the evidence of defendant's prior crimes.

Finally, even if the court abused its discretion in admitting evidence of defendant's prior crimes, the error would not require reversal. If the prior crimes evidence were disregarded, there would still be more than enough evidence to support defendant's convictions. The jury had before it virtually uncontradicted evidence in the form of GPS data that places defendant on the scene of the three separate incidents, and correlates with eyewitness testimony and video surveillance evidence of the events at issue. The GPS data is powerful, if ultimately circumstantial, evidence that defendant was involved with the charged crimes, either as a perpetrator or as an aider and abettor. There is no evidence in the record suggesting a plausible innocent interpretation of the GPS data. Accordingly, it is not reasonably probable that a result more favorable to defendant would have resulted had the prior crimes evidence not been admitted. (See *Cole, supra*, 33 Cal.4th at p. 1195.)

B. The Trial Court Did Not Improperly Assist the Prosecution

In addition to challenging the merits of the trial court's admission of prior crimes evidence, defendant also argues that the trial court erred in its process of making that ruling. Specifically, defendant argues that the judge improperly assisted the prosecution by suggesting and then adopting an additional theory of admissibility—intent—that had not been raised by the prosecution in its briefing. We are not persuaded that the trial court acted improperly in any way.

First, there is nothing improper about a court ruling on the admissibility of evidence based on whatever legal theory might be applicable, whether based on the arguments of the parties or on issues raised by the court sua sponte. The admissibility of evidence is a question of law, which the court is charged with answering correctly. (Evid. Code, § 310, subd. (a) [“All questions of law (including but not limited to questions concerning . . . the admissibility of evidence . . .) are to be decided by the court”].) If the parties fail to raise a theory of admissibility of evidence that the court considers pertinent under the controlling authority, it is well within the court's discretion to raise that issue at oral argument, to engage the parties in a discussion of the issue, and to base its admission or exclusion of evidence on that theory, as it deems appropriate.

Second, if defendant believed that the court's adoption of a new theory of admissibility, not raised by the prosecution in its written briefing, constituted an “unfair surprise to the defense,” as he now claims on appeal, he should have objected in the trial court on that basis. He did not. He could have asked for an opportunity to brief the new issue (as he requested, and was granted, an opportunity to brief another evidentiary issue

at the same hearing). He did not. Nor did he ever object at trial that the judge was demonstrating any sort of bias in favor of the prosecution. As such, the argument was waived. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1184) [grounds for objection to admission of evidence not raised at trial may not be raised on appeal]; *People v. Downey* (2000) 82 Cal.App.4th 899, 910 [claim of judicial bias waived for failure to raise appropriate objection in the trial court].)

Third, there was no unfair surprise to the defense. As noted, the authority discussed by the court at oral argument and relied on in admitting the challenged evidence was cited first by the prosecution in its written briefing. Defense counsel should have been prepared to discuss any aspect of that authority at the hearing. And again, to the extent the defense was not prepared to respond to a particular issue, counsel could have asked for an opportunity to brief it at a later time.

Finally, defendant's authority cited in support of the proposition that the trial court improperly aided the prosecution is inapposite. Boilerplate invocation of the right to fair trial is unhelpful here; no one disputes defendant has a right to "a fair trial in a fair tribunal." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904 [quoting *Withrow v. Larkin* (1975) 421 U.S. 35, 46].) Cases in which a defendant was convicted before a judge who himself was later convicted of taking bribes (*Bracy, supra*, at p. 905), or where the judge developed additional incriminating evidence for the prosecution by having evidence sent to a laboratory for testing (*People v. Ramirez* (1952) 113 Cal.App.2d 842, 849-850), or where the judge engaged in ex parte communications with jurors, defense counsel, and an investigator hired by the defense, interfering with the defense's investigation in

preparation for a posttrial hearing (*People v. Brown* (1993) 6 Cal.4th 322, 328-329), are, to say the least, distinguishable. Defendant cites no case, and we are aware of none, in which a court's suggestion of a legal theory for consideration and argument by the parties is considered improperly aiding one side or the other.

In short, defendant's argument that the trial court improperly aided the prosecution, in violation of his right to a fair trial, is without merit.

III. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.