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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MASHHOUR KHOURY, Plaintiff and Appellant, v. MAHER MARTHA, Defendant and Respondent.	A120651 (Sonoma County Super. Ct. No. SCV236372)

Mashhour Khoury sued Maher Martha for negligence and failure to hold workers' compensation insurance after he fell through a ceiling at the premises of a disbanded bakery where he had previously been employed by Martha. He appeals from a judgment in favor of Martha on a jury verdict finding Martha was not negligent and appellant was not working as an employee at the time of the accident. Appellant contends the trial court erred in permitting evidence of his prior use of alcohol and drugs to be introduced at trial and in denying a motion to exclude testimony from witnesses who were allegedly not disclosed by the defense. We affirm.

STATEMENT OF THE CASE AND FACTS

Maher Martha ("Maher")[1] owned and operated a bakery where appellant worked, initially as a cook, then in food packaging.[2] Appellant's wife is the daughter of Maher's

[1] Martha is also the surname of another witness, Nimer Martha. For convenience, this witness will be referred to by his first name`. No disrespect is intended.

first cousin. Nimer Martha ("Nimer"), Maher's first cousin and the husband of Maher's sister, worked at the bakery as a delivery person. Maher closed the bakery on November 19, 2002, and laid off the employees, including appellant.

On March 7, 2003, while at the bakery premises, appellant fell through the ceiling from a storage area above Maher's office. Appellant maintained that he was working for Maher at the time, cleaning the bakery and removing items from that area. Maher's defense was that appellant was not at the bakery for employment purposes and was using drugs in the space above the office at the time of the accident, consistent with a practice of using the space for that purpose.

Appellant's first amended complaint for negligence and failure to hold workers' compensation insurance was filed on July 26, 2005. Trial was initially set for October 19, 2006, then continued a number of times and begun with pretrial motions on August 28, 2007.

One of appellant's motions in limine sought to exclude, under Evidence Code sections 787, 1101 and 352, evidence of his alcohol or drug use other than on the date of the accident. Maher sought to offer testimony about appellant's prior drug use to attack appellant's credibility and impeach his deposition testimony denying use of drugs or alcohol at work or on the date of the accident (Evid. Code, § 780); to show his "habit and custom" of using the area above the office to use or store drugs (Evid. Code, § 1105); and as bearing on damages in that drug and alcohol use could affect the course of appellant's treatment for depression and pain.

The court ruled that it would allow evidence of appellant's use of drugs on March 6 and 7, 2003, and evidence that appellant used drugs in the workplace limited to a period

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[2] Maher testified that appellant began to work at the bakery in late 1999 or early 2000. Appellant testified that he began to work at the bakery in 1997 or 1998.

of one year before the accident, but excluded evidence of prior drug use or treatment, including treatment appellant received in 1997 in connection with criminal proceedings.

Appellant also filed a motion in limine to exclude the testimony of several former bakery employees, Sandra Analgo, Maria Lopez, Emma Roque and Sinna Martha, arguing that these witnesses had not been disclosed in discovery and he had not deposed them, and that the purpose of their testimony had been expanded from describing appellant's complaints of back pain to offering evidence of prior drug use. These witnesses were identified by Maher in a September 18, 2006 response to a supplemental interrogatory and included in Maher's October 19, 2006 witness list for trial. After arguments, the court refused to exclude the testimony, stating that the defense had complied with its obligation to inform appellant of the witnesses when it knew of them and appellant had not followed up.

At trial, Maher described the area above his office in the bakery as a plywood platform about four feet wide, accessible only by ladder, where a compressor was located. Maher also kept a box of old tools and two van seats there. Nimer also testified that a box and chairs for the van were stored in the area above Maher's office, but nothing that employees needed for their jobs. Maher testified that in November 2002, after the bakery closed, he went up to the area above the office to unplug the compressor and saw the compressor, car seats, and box of tools, as well as a bottle of vodka, cans and bottles of beer, and what appeared to be drugs wrapped in foil and "some bags of speed, drug, whatever it is."[3] Maher testified there was no two-by-four wood, scrap metal, plastic piping or cement in the storage area. To Maher's knowledge, appellant had never

[3] Appellant objected to this testimony under Evidence Code section 352; the court held its probative value outweighed its prejudicial effect because the defense case was based largely on the theory that appellant was going to the area to use drugs rather than for work-related purposes.

been in the area above the office prior to March 7, 2003. Nimer testified that neither he nor other employees were required to go to this area for their jobs.

Appellant testified that Maher asked him to clean the bakery on March 6, 2003, and sent Nimer to pick him up in the bakery van that morning. Maher did not say he was asking this as a favor; he said the job would take two or three days and he would pay appellant at the end. When appellant and Nimer arrived at the bakery on March 6, Maher took appellant inside and told him to organize the equipment for a prospective buyer who was coming to look at it. Appellant showed the equipment to prospective buyers who came that morning and to another prospective buyer in the afternoon; he did not know where Nimer was at these times. Appellant organized items in the bakery, dusted and mopped the area, put garbage into the back of the van, and went with Nimer to the Sebastopol dump, then returned to the bakery, loaded more things into the van, and left a small pile of garbage near the roll-up door at the end of the day.

Appellant testified that his wife drove him to the bakery on the morning of March 7, where he found Maher and Nimer. Appellant was wearing black shoes, not slippers. Maher told appellant to clean the attic above his office and bring down the materials that were up there. Appellant had never been in that area before. First, appellant continued to clean downstairs. After Maher left, people from American Restaurant Sales arrived. Appellant borrowed a ladder from them, which they set up for him, to reach the area above the office. He saw plywood on top of the framing joists, seven bags of cement, two bench seats, two-by-fours, plastic pipe and a big box. There were several sheets of plywood and appellant walked from one to another, tossing things down to the floor by the office, while Nimer moved things out of the way. Appellant testified that he finished throwing items down and was pushing the box when he fell through the ceiling; he lost consciousness, woke in Maher's office and believed people helped him get up. Appellant recalled being in Maher's van, although he did not recall how he got there, beeping the horn and accidentally hitting the gear shift, causing the van to move and hit something.

Nimer got into the van and drove appellant to an urgent care center; on the way, Maher, on the phone, told him, "please, we family, don't say anything, I don't have insurance." Appellant testified that Maher came to the urgent care center and told the doctor that appellant had fallen from a ladder at appellant's house.

Appellant further testified that he went to Kaiser on March 10, and told the doctors how the accident really occurred; he was told to file a worker's compensation claim, which he did. Maher asked him not to file the claim, saying he would help appellant's family. Maher gave money to appellant's family, which they returned; he subsequently gave more money to appellant's mother-in-law, who used it to pay rent. When appellant told Maher he was not dropping the claim, Maher told him, "I treat you right, my brother, and you stab me in the back. And he tell me listen carefully, Mashour, I have to do what I have to make sure you lose your case."

Appellant denied smoking methamphetamine or consuming alcohol on March 6 or March 7, and denied ever hanging out at the closed bakery with Nimer smoking methamphetamine or drinking alcohol. He testified that he did not see Nimer between the bakery closing in November 2002 and March 6, 2003.

After the bakery closed, Maher allowed Nimer to use the van because Nimer did not have a car; Nimer had keys to the van and to the bakery. Maher, who was attempting to sell equipment from the bakery, arranged for Nimer to go to the bakery on March 6 to let prospective buyers in because Maher could not be there himself. Maher did not pay Nimer, who did this as a favor. Nimer testified that he picked appellant up, at appellant's request, and brought him to the bakery. Maher testified that he did not ask appellant to be there and had no knowledge that he was there that day. Nimer denied that Maher asked him to bring appellant to the bakery and testified that Maher was not there that day. He testified that he and appellant drank beers and smoked speed at the bakery before the people arrived to look at the equipment. Afterward, Nimer and appellant went to San Francisco to sell some stainless steel Nimer had taken the day before from a broken oven

in order to buy drugs. Nimer did not ask appellant to do any cleanup at the bakery that day and did not see him mopping or sweeping the floor; he testified that the bakery was clean and empty.

On March 7, Maher again arranged for Nimer to come to the bakery because the buyers who were coming to pick up equipment were late and Maher had to leave for a dental appointment. Both he and Nimer testified that Nimer did this as a favor and was not paid. While Maher and Nimer were at the bakery, before Maher left for his appointment, appellant arrived. Neither Maher nor Nimer had asked appellant to come. Appellant asked if any help was needed and Maher declined; Maher testified that there was no remaining clean up to be done at the bakery. Maher testified that appellant never worked for him after the bakery closed.

Nimer testified that before the buyers arrived on March 7, he and appellant smoked methamphetamine on the floor near the bakery office. Nimer denied that there was a small pile of garbage next to the roll up door when they arrived. Neither he nor appellant did any work at the bakery; there was none to be done. At some point, appellant grabbed a ladder from Ike, one of the men picking up the equipment, and climbed to the area above the office. Nimer called for him to come down and when he did not, Nimer climbed up and saw him smoking speed. Nimer saw the box and benches in the storage area but did not see any bags of cement or two-by-fours. A few minutes later, appellant fell through the ceiling. Nimer never saw appellant throwing things down from the storage area.

Nimer testified he was not aware of appellant losing consciousness because appellant immediately started to get up. Nimer and Ike Hubert, who was in the office, told appellant to stay down and asked if he wanted an ambulance, but appellant said he did not. Appellant took the keys, "took off with the van," and hit a truck, then Nimer took over and insisted on driving appellant to an urgent care center. They smoked some methamphetamine in the parking lot of the hospital before going inside. Appellant told

Nimer to tell the receptionist that he had fallen from at ladder at his house, and Nimer went along with him although it was untrue.

Nimer testified that during the year preceding appellant's accident, he used methamphetamine with appellant more than 100 times at the bakery when no one else was there. The two also drank beer together many times after work. After the bakery closed, Nimer and appellant would go there to smoke methamphetamine; Nimer had a key to the bakery and Maher did not know they did this. He also used methamphetamine with appellant after the accident on a couple of occasions.

Nimer also testified that appellant did not want him to testify in this case and stopped talking to him after he gave his first deposition.

Ike Hubert, supervising the crew collecting equipment on March 7, was in the bakery office when appellant fell. Hubert was certain that appellant was wearing slippers or sandals, with his toes exposed. Just before appellant fell, Hubert had heard Nimer call to appellant to be careful; he did not see Nimer go up the ladder. Hubert had not seen appellant throwing anything down from the ceiling onto the floor of the bakery, or doing any work, and he did not see any bags of cement, two-by-fours or plastic tubs or tubes on the floor outside the office or any piles of trash accumulating. After the accident, Hubert saw appellant "running so fast" to the van; appellant got in the driver's side and drove the van in reverse, hitting Hubert's truck, then Nimer came out, took over driving and drove appellant to the hospital. Hubert testified that he was laughing as he watched, because appellant "fell down like that" and was still running and driving the van. After the accident, Maher came to the bakery and Hubert helped him bring a cardboard box and van seats down from the area above the office. He did not see any evidence of drugs being used in the storage area or elsewhere at the bakery. Hubert testified that while he was at the bakery on March 7, Nimer was taking an oven apart for recycling.

Jose Francisco Bonilla, of American Restaurant Sales, testified that when he was at the bakery on March 7, appellant and another man were there, "moving stuff" and

throwing garbage, insulation and sheetrock to the side of the wall. Bonilla was present when appellant fell through the ceiling. Appellant got himself up and limped to the van, apparently in pain, and Bonilla saw another man tell him to get out of the driver's seat and drive him to the hospital. Bonilla did not see alcohol or drugs on the premises and did not smell smoke from a cigarette or methamphetamine.

Ricardo Jimenez, who was at the bakery on March 7 working for Bonilla, testified that he saw a van bench and several rolls of fiberglass insulation or carpet in the area above the bakery office.[4] Jimenez did not see appellant doing any work at the bakery and did not see him toss anything down from the storage area. After the accident, another man helped appellant get up and followed him to the van; appellant was not limping but was holding his side and seemed to be in pain.

Maria Lopez worked at the bakery for about eight years, until it closed. Between March 2002 and November 2002, Lopez saw appellant drink beer at work almost every day, buying it in the morning and putting it in a paper bag. Appellant typically bought a six pack of beer and finished it during the day. She once saw appellant and a man named Juan "up at the place where they had boxes and things like that" with a flour-like substance that she knew was a drug and Juan told her was cocaine. The area she was referring to was accessible by stairs. She sometimes observed appellant going into the ladies restroom and coming out "happier," and testified that the ladies room "smelled like some kind of drug." [5]

Sandra Analgo worked at the bakery for about four years, until it closed. Analgo saw appellant drink beer at work every day, when Maher was not there. Once, between

[4] Jimenez testified that he saw four or five rolls of fiberglass insulation. At his deposition, he had testified to seeing partial rolls of carpet. Between the time of his deposition and trial, Jimenez had had a medical condition that affected his memory.

[5] Appellant objected to and moved to strike Lopez's testimony for lack foundation as to time. The objection was overruled when Lopez testified that the incidents she described occurred between March 2002 and November 2002.

March and November 2002, she went into the bathroom and found appellant with drugs. Analgo was in the car on one occasion when a co-worker took appellant to buy drugs at a Motel 6.

Emma Aparicio Roque ("Roque") worked at the bakery until September 2002. She saw appellant drink beer during the workday "many times"—more than 50—and also saw him drink what she thought was brandy, but never in front of Maher. Appellant would ask her to buy beer for him, typically two 24 ounce bottles. Roque saw appellant using drugs at work six to ten times between March 2002 and when she left in September 2002, something in powder form that he burned and used with aluminum paper. Once, this was in the area where he was working; other times it was in the warehouse in the back or in one of the bathrooms. On five to ten occasions between March 2002 and September 2002, Roque drove appellant in her car to get drugs at a store or at a Motel 6. Sometimes Sandra Analgo was with them because Roque would give her a ride home. Roque testified that she once found appellant in the area above the office, an area where she said employees had no reason to be, but she did not see him doing drugs there and did not have an understanding of what he was doing. On cross-examination she testified that she saw appellant go into the area above the office "[m]any times, I cannot count them for you."

As characterized by Maher in the trial court, appellant claimed that his physical injuries (the fractured ankle and lower back pain), combined with depression, preclude him from ever again having gainful employment. The parties' briefs on appeal do not detail the damages appellant sought at trial, and the record does not include trial briefs or arguments to the jury.

A number of witnesses testified that appellant suffered from back pain before the accident. Maher testified that appellant changed from working as a cook to food packaging due to appellant complaining that the cook's job was too hard on his back. Maher, Lopez, and Analgo all testified that appellant told them he had hurt his back in a

fight. Nimer, Lopez, Analgo and Roque testified that appellant always wore a back brace at work and complained about his back hurting. Nimer saw appellant lying down on a couch at work on about 10 occasions, which appellant said was because of his back; Lopez testified that appellant would stop working and lie down on the tables when Maher left the bakery; Roque saw appellant lie down on the tables many times; and Analgo saw appellant lie down on a table in the break room on several occasions. Roque testified that appellant also complained of pain in his knees from a rheumatic condition, and Analgo testified that he complained his feet hurt and sometimes limped.

Dr. Jerilyn Wartell-Jackson, who treated appellant at the urgent care center, diagnosed a fracture of the left ankle and muscular strain of the back. X-rays of appellant's back showed early arthritic changes but no fractures, dislocation or acute injury from the fall. The doctor did not check for drug or alcohol use and would not routinely do so. Dr. Warbritton, who reviewed appellant's case and met with him in October 2006, testified that as a result of the accident appellant suffered a broken ankle, injured his back, either rupturing disks or aggravating and rupturing underlying degenerative disks, and developed "chronic pain syndrome."

Orthopedic surgeon Dr. Lawrence Guinney, who testified as a witness for Maher, evaluated appellant in the worker's compensation proceedings and examined him in May 2004. Appellant reported constant pain in his back, especially if he was not taking medication, and aggravated by prolonged sitting or standing, bending and lifting. He also reported constant pain in his ankle, which Guinney felt was exaggerated based on the type of fracture, which "uniformly heals with minimal, if any residual complaints." Guinney concluded appellant's back complaints made it reasonable for him to have a permanent disability precluding "very heavy" but not "heavy" work. Guinney testified that his opinion that appellant's back pain was related to his March 7 fall would change if he had evidence that appellant complained of back pain, used back supports and lay down at work to rest his back for a year or more before the accident. With evidence of pre-

existing back pain, Guinney would need to apportion the percentages due to the pre-existing condition and to the fall. Appellant had denied ever having back problems before the fall. Guinney testified that a history of prior drug or alcohol use would not necessarily impair recovery from a fracture or soft tissue injury but a chronic drug abuser might have greater pain than the average person and might need more medication to control pain because of having developed tolerances to medication.

Dr. Welch, appellant's treating psychiatrist, testified at trial but his testimony was not made part of the record on appeal. At the hearing on appellant's motions in limine, Maher's attorney stated that Dr. Welch had testified in his deposition that if appellant was using illicit drugs, the drugs could affect the effectiveness of the medication prescribed to treat appellant's depression, for example, by masking symptoms of depression or blocking the effectiveness of the prescribed medication. Appellant's attorney stated that Dr. Welch had said he did not suspect appellant was using illegal drugs, that he normally asked about alcohol and drugs and had noted that appellant said these were "not a concern," and that he did not know anything about appellant's past history with alcohol or drug abuse because this was not discussed with appellant.

At the conclusion of trial, the jury returned a defense verdict, finding in favor of Maher on appellant's negligence claim and finding that appellant was not an employee at the time of the accident. Judgment was entered on September 25, 2007.

Appellant filed a motion for a new trial based on the denial of his pretrial motions to exclude testimony by Lopez, Analgo, Roque and Nimer regarding prior alcohol and drug use, the denial of his request for a pretrial hearing on the admissibility of this evidence and the court's refusal to strike Maria Lopez's testimony. Maher opposed the new trial motion, relying on Evidence Code sections 1101, subdivision (c), and 1105. The court's order denying the motion was filed on December 27, 2007.

Appellant filed a notice of appeal on January 22, 2008.

DISCUSSION

I.

Appellant argues that evidence of specific instances of alcohol and drug use prior to the date of the accident was inadmissible under Evidence Code sections 786, 787 and 1101. As indicated above, the trial court permitted evidence of drug and alcohol use in the year preceding the accident to impeach appellant's assertions as to why he was at the bakery and in the storage area when he fell and as relevant to appellant's medical treatment and motivation to return to work.

Explicitly exercising its discretion under Evidence Code section 352, the court ruled before trial that it would allow evidence of appellant's use of drugs on March 6 and 7, and evidence that appellant used the area above the office to take drugs or otherwise used drugs in the workplace, limited to a period of one year before the accident, but would not allow evidence of prior drug use or treatment, including treatment appellant received in 1997 in connection with criminal proceedings. It held evidence of drug use after March 7 inadmissible subject to reconsideration for relevance to the issue of damages and treatment.

At a hearing on November 28, 2007, concerning the court's tentative ruling, when appellant's attorney argued that the evidence of alcohol use did not impeach appellant's testimony regarding the day of the accident because "alcohol is not involved in this case in any manner," the court stated that alcohol abuse evidence did tend to affect appellant's claims for lost wages and ability to earn, as well as his medical damage claim. The court's order denying the new trial motion stated that the challenged evidence was relevant and admitted to impeach appellant's assertions "as to why he was on the ceiling area at the time he fell; as to [his] motivation to be present at the site at the time of his injuries; and as to his injuries and motivation to return to work." The court noted that all the witnesses had worked with appellant and provided direct evidence that appellant was using drugs at or near the time he fell, that the witnesses' testimony contradicted

appellant's testimony "disavowing drug use to his medical providers and at the workplace," that the evidence was admitted to attack appellant's credibility with limits placed on the scope of the testimony to address concerns under Evidence Code section 352, and that the court had balanced the probative value and prejudicial effect of the evidence.

Evidence Code section 786 provides, "Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness." Evidence Code section 787 provides, "Subject to Section 788 [prior felony conviction], evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness."

"Section 1101, subdivision (a) provides that, subject to limited exceptions, 'evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.' [¶] As the Law Revision Commission explains, 'Section 1101 excludes evidence of character to prove conduct in a civil case for the following reasons. *First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' (Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 1101, p. 438.) [¶] . . . [¶] However, this evidence may be admissible for other reasons. Section 1101, subdivision (b) provides, 'Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent,

preparation, plan, knowledge, identity, [or] absence of mistake or accident …) other than his or her disposition to commit such an act.' " (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 923-924; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Subdivision (c) of section 1101 further clarifies, "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."[6]

"[A] three-pronged test has been developed for considering admissibility of evidence of uncharged bad acts under Evidence Code section 1101, subdivision (b): '(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence.' " (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 792, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879.)

"In ascertaining whether evidence of other offenses has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves ' "logically, naturally, and by reasonable inference" ' " to establish that fact. (*People v. Thompson* [(1980)] 27 Cal.3d 303, 316.) The court ' "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses

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[6] Section 1101 provides as follows:

"(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." ' (*People v. Thompson, supra,* 27 Cal.3d 303, 316, quoting from *People v. Schader* [(1969)] 71 Cal.2d 761, 775, fn. omitted.)" (*People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1061-1062.)

The trial court admitted the evidence to support the defense theory that appellant was at the bakery on March 7 to use drugs, not to work for Maher. The primary question at trial, with respect to liability, was appellant's reason for being at the bakery: Appellant testified he was employed by Maher to clean the bakery that day, while Maher and Nimer testified to the contrary. In the context of bad acts used to prove a charged criminal offense, the "least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (See *People v. Robbins, supra,* 45 Cal.3d 867, 880.) '[T]he 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 . . . .' (2 Wigmore, [Evidence] (Chadbourn rev. ed. 1979) § 302, p. 241.) 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.]' (*People v. Robbins, supra*, 45 Cal.3d 867, 879.)" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

Here, the issue is not the intent with which appellant committed a charged act but the intent with which he went to the bakery on the day of the accident. Evidence that he had repeatedly utilized the bakery as a place to take drugs tended to support the theory that this was his purpose in being at the bakery on the day at issue. The court expressly recognized that the only way for the defense to prove its theory was to demonstrate a non-employment related reason for appellant to be where he was at the time he fell.

Since the alleged reason was appellant's drug use, exclusion of evidence of drug use would have prevented the defense from presenting its only case against liability. As the trial court explained its ruling, "The issue of drug use is crucial to the defense position here. Ordinarily it would be something that would be excluded, but under the circumstances here, particularly with respect to the issue of why Plaintiff was in the bakery that closed at that point in time, there are two completely different viewpoints. Yours may be correct, yours may be the one that the jury buys, but the defense is presenting an entirely different story. And that story is based in part upon the fact that he was never asked to go to the bakery, which then would bring up the issue of well, if he wasn't asked to go, why was he there? And their argument is . . . that he was there either because he wanted to use drugs or retrieve drugs. And that would bring into question the issue of whether or not he had a custom and habit of using drugs in that location for a period of time."

Appellant does not challenge the admission of Nimer's testimony that he saw appellant using methamphetamine just before the accident; on this point, the jury had to decide whether to believe Nimer or appellant, who denied such use. Evidence that appellant used drugs at the bakery on prior occasions supported the defense theory of the case, indicating that the alleged drug use on the day of the accident was consistent with appellant's prior conduct. Without this evidence, Nimer's description of appellant's conduct would have appeared in a vacuum.

The situation in the present case is unlike that in *Springer v. Reimers* (1970) 4 Cal.App.3d 325, 339, upon which appellant relies. The plaintiff in *Springer* was injured when he fell while loading a truck at work. He maintained the fall occurred when the truck moved suddenly; the defense maintained the seizure was due to delirium tremens caused by chronic alcoholism. There was no evidence the plaintiff was intoxicated or suffering from delirium tremens at the time of the accident. Rather, the defense sought to portray the plaintiff as generally not credible because he was an alcoholic; the evidence

did not bear on any issue material to liability and did not specifically impeach the plaintiff on any point. In the present case, by contrast, the court admitted the evidence of appellant's use of alcohol and drugs at the bakery for the specific purpose of establishing an explanation for his presence at the bakery at the time of the accident and impeaching appellant's denial of using alcohol or drugs at the bakery.

Similarly, *Hernandez v. Paicus* (2003) 109 Cal.App.4th 452, 460, overruled on other grounds in *People v. Freeman* (2010) __ Cal.4th __, 2010 Cal. Lexis 112, held that evidence the plaintiff in a malpractice action was an illegal immigrant should have been excluded because it was not relevant to any issue in the case and was prejudicial. *People v. Willoughby, supra,* 164 Cal.App.3d 1054 found reversible error where an uncharged sexual offense was admitted in a prosecution for sexual offenses against a child. The evidence was admitted to demonstrate the defendant's intent to sexually molest the victim but, because the defendant denied any sexual conduct with her, his intent was not at issue and the court concluded the evidence could only have been used to infer the defendant's predisposition to sexually molest children. (*Id.* at pp. 1063-1064.) In *People v. Valentine* (1988) 207 Cal.App.3d 697, 704, introduction of evidence of intravenous drug use in a prosecution for cultivating and possessing marijuana was improper because it was not relevant to any issue in the case but only to portray the defendant having a propensity to commit drug offenses. All these cases differ from the present one in that the contested evidence was not relevant to any material issue in the case.

Appellant urges that the testimony provided by Lopez, Roque and Analgo was inadmissible because it concerned his conduct before the bakery closed and therefore was not relevant to what happened on March 7. Despite the difference in circumstances between drug use while working at an operational bakery and drug use on the premises of that bakery after it closed, the former employees' testimony tended to support the defense theory that appellant came to the bakery on March 7 to use drugs by demonstrating his repeated use of the premises in this manner. Under section 1105, "Any otherwise

admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." " 'Habit' or 'custom'[] is often established by evidence of repeated instances of similar conduct. (See, e.g., *Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 793-796.)" (*People v. Memro* (1985) 38 Cal.3d 658, 681, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181.) " ' "Habit" means a person's regular or consistent response to a repeated situation. "Custom" means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual.' (2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 33.8, p. 1267.)" (*Memro, supra,* 38 Cal.3d at p. 681, fn. 22.) Appellant argues that evidence he used alcohol or drugs at the workplace when the bakery was operational would not tend to suggest a habit of engaging in such conduct months after the bakery closed, when it was being cleaned and equipment being liquidated. We disagree. If anything, the evidence that that appellant had a habit of drinking alcohol and using drugs while working at the bakery, when Maher was not present, supports an inference that he would be even more likely to engage in the same behavior when at the closed bakery, with fewer witnesses to his conduct.

Nor was the testimony of the employee witnesses merely cumulative to Nimer's testimony. While Nimer described appellant's use of drugs at the bakery on the day of the accident and before, his testimony and appellant's presented the jury with a classic "he said, she said" situation. The testimony of the other employees supported Nimer's version of the facts by presenting instances in which other witnesses saw appellant acting consistently with the behavior Nimer described.

Appellant argues that evidence of his alcohol use was inadmissible because there was no evidence he consumed alcohol on the day of the accident or used the area above the office to store or use alcohol, and no evidence that alcohol use would impair appellant's recovery from his ankle fracture. Maher argues that appellant waived his argument that evidence of prior alcohol use, as distinct from drug use, should have been

excluded by failing to follow through on the alcohol issue when the trial court focused solely on drug use.

Appellant's motions in limine sought exclusion of both alcohol and drug evidence. At the hearing on these motions, however, appellant's attorney stated that he was seeking exclusion of evidence of drug use other than on the day of the accident, and the initial discussion was solely about evidence of drug use. After the court stated its inclination to preclude evidence of prior drug convictions and treatment, defense counsel voiced a concern about the records from that treatment because there were "some impeachment issues on alcohol use that I'm going to be getting into from those records." The ensuing discussion focused mainly on prior drug use, the only reference to alcohol being defense counsel's statement that evidence that appellant had a habit of using drugs at work went to his credibility, because in his deposition appellant denied "that he ever used drugs or alcohol at work." Defense counsel stated that in deposition testimony appellant's treating psychiatrist, Dr. Welch, had indicated illicit drug use by appellant could affect the course of his treatment for depression and pain; appellant's attorney stated that Dr. Welch indicated he normally asked about alcohol and drugs, appellant had told him this was not a concern, and he did not know anything about appellant's past history with alcohol or drug abuse. The court's ruling on appellant's motions addressed only evidence of drug use, limiting such evidence to the one-year period preceding the accident and excluding evidence of earlier drug use or treatment or of appellant's criminal drug charges, with no reference to alcohol use. Even after defense counsel noted that Dr. Guinney had stated in his deposition that alcohol abuse could have an impact on treatment for pain, the court only reiterated its ruling on evidence of drug use. Appellant's attorney sought no clarification as to evidence of alcohol use. Nor did appellant's attorney object when witnesses testified to observations of appellant's alcohol consumption at the workplace.[7]

[7] Appellant states that he moved to strike Lopez's testimony regarding his prior use of drugs and alcohol. In fact, the record reflects that this motion referred solely to

Accordingly, appellant failed to preserve for appeal the issue of admissibility of the evidence of appellant's prior alcohol use.

Appellant's motion for a new trial did address the alcohol issue as well as admissibility of evidence of prior drug use. But "[a] party litigant is deemed to have waived matters constituting grounds for a new trial which come to his attention during the course of the trial, or of which he should by the exercise of reasonable diligence have acquired knowledge, where he fails to make objection at the time of the occurrence and seek to have the defect cured. [Citations.]" (*Olmos v. Southern Pacific Co.* (1948) 84 Cal. App. 2d 765, 768.) "[A] party cannot sit back knowing of a claimed error and speculate upon the possibility of a favorable verdict, and then for the first time urge error after he loses. (*Zibbell v. Southern Pac. Co.*, [*supra,*] 160 Cal. 237; *Olmos v. Southern Pac. Co.*, [*supra,*] 84 Cal.App.2d 765.)" (*Marshall v. La Boi* (1954) 125 Cal.App.2d 253, 274.)

In denying the motion for a new trial, the trial court found the alcohol and drug evidence relevant, among other things, to appellant's "injuries and motivation to return to work." At the hearing on the court's tentative decision, when appellant's attorney argued alcohol use was not involved in the case and did not tend to explain why appellant was at the bakery, the court responded that alcohol abuse evidence "does have a tendency to

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testimony regarding drug use, without reference to alcohol, and was limited to foundation, not inadmissibility of character evidence. The record citation appellant provides is to the trial court's explanation of its denial of appellant's motion "to strike the testimony of Maria Lopez with respect to the use of drugs, that being cocaine, and the testimony relating that to flour by the plaintiff in this case." The court explained that it denied the motion to strike because the testimony came within the time frame to which the court had limited such evidence. The record reflects that when Lopez testified that appellant would go into the ladies restroom and come out seeming "happier," appellant's attorney objected that "there has been no foundation as to time." The court took the objection under submission and directed Maher's counsel to lay a foundation; appellant's attorney moved to strike; Maher's attorney elicited Lopez's affirmative response to the question whether what she described occurred "from March 2002 until the bakery closed in November of 2002"; and the trial court overruled appellant's objection.

affect the claim that your client made that he was entitled to lost wages and lost ability to earn wages." The court commented, "[H]e made those claims based upon how much work he did at the workplace and that history was extrapolated by Dr. Ben-Zion to form the basis of a lost ability, loss of ability to earn wages in the future. And it seemed to the Court at the time of trial and now that if your client was drinking beer on the workplace and not performing his work duties on the workplace, that would not only go to his wage loss and wage earning ability claim, but would also go to the medical damage claim that he was alleging."

Appellant argues there was no evidence prior alcohol use impacted his medical treatment because Dr. Guinney testified a history of drug or alcohol use would not necessarily impair appellant's recovery from a fracture. Appellant neglects to mention Dr. Guinney's testimony that a chronic drug or alcohol abuser might have greater pain than the average person and might need more medication to control pain because of having developed tolerances to medication. Moreover, the trial court specifically referred to testimony from Dr. Ben Zion with respect to this evidence, but the testimony of this witness was not included in the record on appeal and is therefore not available for this court's review.

Appellant further asserts that proof of reduced damages is not a material element of the defense and, therefore, evidence of prior alcohol or drug use could not be admitted under section 1101, subdivision (b). Appellant's only citation of authority for this point is to *People v. Willoughby*, *supra*, 164 Cal.App.3d 1054, which does not discuss any such distinction between liability and damages in a civil case.

Appellant additionally argues that the trial court abused its discretion in finding the drug and alcohol evidence admissible under section 352. "It is for the trial court, in its discretion, to determine whether the probative value of relevant evidence is outweighed by a substantial danger of undue prejudice. The appellate court may not interfere with the trial court's determination to admit the evidence, unless the trial court's

determination was beyond the bounds of reason and resulted in a manifest miscarriage of justice. (*People v. Waidla* (2000) 22 Cal.4th 690, 724; *People v. Dyer* (1988) 45 Cal.3d 26, 73; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) 'Prejudic[ial]' in Evidence Code section 352 does not mean 'damaging' to a party's case, it means evoking an emotional response that has very little to do with the issue on which the evidence is offered. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Evidence which has probative value must be excluded under section 352 only if it is 'undu[ly]' prejudicial despite its legitimate probative value. (*People v. Waidla, supra,* 22 Cal.4th at p. 724 [if it 'poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome"']).)" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 596-597.) " ' " 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not [to] be set aside on review.' [Citation.]" (*Schall v. Lockheed Missiles & Space Co*. (1995) 37 Cal.App.4th 1485, 1488, fn. 1.)' " (*Ajaxco Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 45.)

The premise of appellant's argument is that the evidence of prior alcohol and drug use had little if any probative value and enormous prejudicial effect. As discussed, the first premise is incorrect: The evidence was relevant and probative on the essential question of why appellant was at the bakery at the time of the accident. The trial court fully recognized the potential for undue prejudice, noting that in most cases such evidence would not be admissible. Accordingly, it limited the time frame for the evidence, excluding reference to drug use prior to one year before the accident, including appellant's prior criminal drug charges and treatment. We can not find an abuse of discretion in its decision that the probative value of the evidence, so limited, outweighed its prejudicial effect.

Finally, appellant argues, in a one-sentence section of his brief, that a limiting instruction was required to inform the jury the prior drug and alcohol evidence could be considered only on the issue of reduced damages. Again, appellant's premise is erroneous: The evidence was admissible on liability as discussed above. In any event, by failing to request the limiting instruction he now urges was necessary, appellant failed to preserve the issue for appeal. (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1711; *People v. Freeman* (1994) 8 Cal.4th 450, 495; *Schomaker v. Provoo* (1950) 96 Cal.App.2d 738, 740; *Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 809-810.)

II.

Appellant also argues the judgment must be reversed because the trial court failed to hold a hearing to determine whether Maher willfully failed to disclose witnesses. As indicated above, one of appellant's motions in limine sought to exclude the testimony of his former coworkers, Maria Lopez, Sandra Analgo and Emma Aparicio Roque, on the grounds that these witnesses had not been disclosed in discovery and he had not deposed them, and that the purpose of their testimony had been expanded from describing appellant's complaints of back pain to offering evidence of prior drug use. Appellant requested an Evidence Code section 405 evidentiary hearing, arguing that the witnesses had not been disclosed until he sent a supplemental interrogatory after discovery had closed, although he conceded he was not arguing there was a willful failure to disclose them earlier.

These witnesses were identified in Maher's September 18, 2006 responses to appellant's supplemental interrogatory and in Maher's October 19, 2006 trial witness list. Trial, which had been set for October 19, 2006, was continued a number of times, and the pretrial hearing at which the motion to exclude these witnesses' testimony was heard took place on August 28, 2007. Appellant had thus known of the former employee witnesses for almost a year, at a minimum; Maher's attorney noted that the names in documents such as payroll records that had been produced in discovery. Maher's attorney argued

that the drug issue was not new, as both Maher and Nimer had been deposed about prior drug use. The court stated that appellant had means to discover further information after receiving the supplemental interrogatories, such as having an investigator contact the witnesses for an informal statement, and that it was not inclined to preclude the testimony absent a showing of willful failure to disclose. Appellant's attorney argued that Maher had known of these witnesses all along, even if his attorney did not; defense counsel argued that the parties had agreed to extend discovery beyond the cut off and that he had had trouble interviewing the witnesses because they were "difficult to get a hold of" and he had to arrange for them to be interviewed in Spanish. Rejecting appellant's claim that he was being subjected to "trial by ambush," the court refused to exclude the witnesses' testimony, stating that the defense had complied with its obligation to inform appellant of the witnesses when it knew of them and appellant had not followed up on the information it was given.

Relying on *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270 (*Thoren*) and *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, appellant argues that the trial court erred in failing to conduct a hearing to determine whether Maher's "non-disclosure of surprise witnesses" was willful and that Maher's "willfully false" interrogatory response deprived appellant of the opportunity to prepare for trial.

In *Thoren*, the plaintiff identified one person in response to an interrogatory asking for all witnesses who arrived at the scene of the plaintiff's accident immediately or shortly after it occurred. (*Thoren*, *supra*, 29 Cal.App.3d at pp. 272-273.) In opening statement at trial seven months later, the plaintiff's attorney referred to expected testimony from a different person, Clubb, who had arrived at the scene shortly after the accident, had taken photographs, and could describe the conditions of the area. At a hearing outside the presence of the jury, evidence was presented that Clubb, the plaintiff's union representative, inspected the scene as soon as he heard about the accident and sent pictures to the plaintiff's attorney; the attorney testified that Clubb was

responsible for the case being referred to his office. The only reference to Clubb in discovery had been appellant's deposition statement that Clubb took pictures of the accident scene the day after the accident. The trial court found that omission of Clubb's name from the interrogatory response was willful and excluded his testimony. (*Id.* at p. 273.)

Thoren found substantial evidence for the trial court's conclusion that the failure to include Clubb in the interrogatory response was willful, as the plaintiff's attorney "knew that Clubb was a person of the class described in interrogatory B-2, or deliberately refrained from determining whether he was such a person." (*Thoren, supra,* 29 Cal.App.3d at pp. 275-276.) Addressing the trial court's power to exclude "the testimony a witness willfully excluded from an answer to an interrogatory seeking the names of witnesses to an occurrence" (*id.* at p. 273), *Thoren* explained, "[a]n order which bars the testimony of a witness whose name was deliberately excluded in an answer to an interrogatory seeking the names of witnesses protects the interrogating party from the oppression otherwise flowing from the answer. One of the principal purposes of civil discovery is to do away with 'the sporting theory of litigation—namely, surprise at the trial.' (*Chronicle Pub. Co. v. Superior Court* [(1960)] 54 Cal.2d 548, 561.) The purpose is accomplished by giving 'greater assistance to the parties in ascertaining the truth and in checking and preventing perjury,' and by providing 'an effective means of detecting and exposing false, fraudulent and sham claims and defenses.' (*Greyhound Corp. v. Superior Court* [(1961)] 56 Cal.2d 355, 376.) Where the party served with an interrogatory asking the names of witnesses to an occurrence then known to him deprives his adversary of that information by a willfully false response, he subjects the adversary to unfair surprise at trial. He deprives his adversary of the opportunity of preparation which could disclose whether the witness will tell the truth and whether a claim based upon the witness' testimony is a sham, false, or fraudulent. (Cf. *Luque v. McLean* [(1972)] 8 Cal.3d 136, 147.)" (*Thoren, supra,* 29 Cal.App.3d at p. 274.)

Appellant contrasts *Thoren* with *Biles, supra*, in which a panel of this court reversed a trial court's decision to exclude a witness's testimony. In opposition to a defense motion for summary judgment, the plaintiff in *Biles* submitted a declaration from a witness who had not been identified in earlier responses to interrogatories. The trial court found the plaintiff had failed in his duty to supplement the interrogatory response when he learned of the witness through deposition testimony in an unrelated case against the same defendant some two months before filing his opposition to the summary judgment motion. We held that the plaintiff did not have a duty to supplement interrogatory responses that were truthful when made, and that his response could not have been willfully false when made because he learned of the new witness some five months *after* responding to the interrogatory. (*Biles, supra,* 124 Cal.App.4th at pp. 1324-1325.)

What is significant to appellant in *Biles* is our discussion of the trial court's failure to hold a hearing to determine whether the interrogatory response was willfully false. Appellant quotes from our opinion: "Most importantly, before ruling on the motion to exclude the challenged testimony, the trial court in *Thoren* held a hearing, and concluded, based on substantial evidence, that at the time the interrogatory was answered, the plaintiff's counsel either had actual knowledge of the witness's role in the case, or deliberately refrained from finding it out before answering. Thus, the court determined that the interrogatory answer omitting the witness's name was not merely incomplete, but 'willfully false.' (*Biles, supra*, 124 Cal.App.4th at p. 1324.)" We went on to contrast the situation in *Biles* with that in *Thoren*, in that the *Biles* trial court "conducted no evidentiary hearing as to when Biles or his counsel first learned that [the new witness] was in possession of facts relevant to Exxon's potential liability for Biles's asbestos exposure. Instead, the court appears to have assumed that the information had been discovered only at, or shortly after, Bellamy's deposition on October 29, 2003. Even if this assumption was correct, the court did not find that Biles or his counsel were aware

that Bellamy was a potential witness any earlier than October 29, 2003—well *after* the interrogatory answer was served (and, indeed, after Exxon had already filed its summary judgment motion). Therefore, Biles's initial responses could not have been willfully false when made, and *Thoren* is distinguishable." (124 Cal.App.4th at p. 1324.)

Appellant takes from our discussion that a trial court must conduct an evidentiary hearing to determine whether an interrogatory response was willfully false rather than deciding the issue on the basis of an assumption. This characterization is fine, as far as it goes. But we did not hold that an evidentiary hearing is required in every case in which a party challenges its opponent's interrogatory response, no matter the situation. Our main point in *Biles* was that the trial court did not find, and there was no evidentiary basis for it to find, that the interrogatory response was willfully false when made and, without such willful falsity, exclusion of testimony was improper.

We also discussed, in *Biles*, the fact that the defense learned of the previously unidentified witness some seven months after the interrogatory response, in connection with a summary judgment motion filed before a trial date had been set. This was in contrast to *Thoren*, where the defendant first learned a witness had been omitted more than two years after the response, at the beginning of trial, after the jury had been impaneled, when " '[the] situation militat[ed] against solution of the problem by a continuance.' (*Thoren, supra,* 29 Cal.App.3d at p. 275.)" (*Biles, supra,* 29 Cal.App.3d at p. 1324.)

In the present case, as we have said, the former co-workers appellant characterizes as "surprise witnesses" were identified—at the latest—close to a year before trial. Appellant apparently did nothing following his receipt of the supplementary interrogatory response and the witness list to follow up on these witnesses. As the trial court mentioned, even after the discovery cut off, appellant could have attempted to follow up on an informal basis. According to Maher's attorney's representation, the parties had stipulated to continuing discovery, at least with respect to one deposition; appellant gave

no indication he had attempted to stipulate to a continuation of discovery with respect to the former employees. (Code Civ. Proc., § 2024.060.) Nor was there any suggestion he had sought a court order extending discovery after the initial trial date was continued. (Code Civ. Proc., § 2024.050.) In these circumstances, the characterization of appellant's former co-workers as "surprise witnesses" is rather disingenuous. We find no abuse of discretion in the trial court's decision not to exclude the testimony.

The judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.