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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS DUBY, Defendant and Appellant.	B236676 (Los Angeles County Super. Ct. No. NA087449)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Michael R. Johnsen and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Thomas Duby was convicted, following a jury trial, of one count of possession of marijuana for sale in violation of Health and Safety Code section 11359 and one count of transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a). The jury found true the allegation that appellant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced appellant to the low term of two years for the possession for sale conviction, stayed sentence on the transportation conviction pursuant to Penal Code section 654 and struck the section 667.5 enhancement.

Appellant appeals from the judgment of conviction, contending that the trial court abused its discretion in admitting evidence of his prior uncharged conduct and text messages on his cell phone, and erred in failing to instruct the jury on his burden of proof under the Compassionate Use Act ("CUA") and failing to modify CALJIC No. 12.21 and CALCRIM No. 2361. Appellant further contends that the prosecutor committed misconduct in closing argument. We affirm the judgment of conviction.

Facts

On November 29, 2010, about 7:30 p.m., Long Beach Police Department Officer Robert Owens and Detective Tim Olson conducted a traffic stop of a car driven by appellant. Anthony Rodriguez was in the front passenger seat of the car and appellant's wife, Guadalupe Duby ("Guadalupe"), was in the back seat. Officer Owens saw open bottles of beer on the car console.

Detective Olson asked appellant if he had any weapons inside the car, and appellant replied that there was a knife under the middle console. The officers then asked appellant to step outside of the car for a patdown search. Appellant said that he was a medical marijuana user and had a pound of marijuana in the trunk of the car. Appellant and Rodriguez gave the officers Medical Advisory Center cards ("MAC cards").

Rodriguez told the officers that he, appellant and Guadalupe had pooled their money to buy the marijuana. He said that he had made the purchase at a marijuana dispensary located "right around the corner" from where the car was stopped.

Detective Olson went around the corner, saw a dispensary and then returned to appellant to confirm that it was the correct dispensary. Appellant agreed that it was. Detective Olson went inside the dispensary, which was called the High Quiggle Healing Center ("the Center"). He spoke with Kim and Edward Quiggle, who worked there. Detective Olson determined that appellant, Rodriguez and Guadalupe had not purchased marijuana from the Center.

The officers then searched the trunk of appellant's car. They found a metal lockbox which contained a functioning scale with marijuana residue on top, a magnifying glass, a marijuana grinder and a plastic bag holding 19.56 grams of marijuana. The officers also found two more plastic bags, one containing 225.32 grams of marijuana and the other 190.15 grams. In addition, the officers found a plastic prescription vial, Swisher Sweet cigarettes, a box of 65 plastic sandwich bags and an opened box containing 12 pairs of latex gloves.

The officers seized a cell phone and $265 from appellant, and a cell phone, $440 and a marijuana pipe from Rodriguez. They also seized a cell phone from Guadalupe. Officer Owens checked the "recently received" messages on Rodriguez's cell phone and discovered a message which read: "How much for a quarter ounce?" Officer Owens scrolled down and saw a reply that read: "For you 90."

At trial, the Quiggles testified for the prosecution. Both testified that Rodriguez and appellant had not come into the Center on the day in question. Kim Quiggle testified that the Center only dispensed one or two ounces at a time to its patients, packaged in bottles with warning labels similar to the ones used by drugstores. The Center's name was on the label. She did not allow a person to come into the store with paperwork for two or three other people and obtain marijuana on behalf of those persons. She did not accept MAC cards, or any other cards, believing that they meant nothing. She noted that such cards could be easily faked, and that she saw many fake cards. Ms. Quiggle only relied on a doctor's recommendation sheet with a stamp, and she called to verify the recommendation.

Long Beach Police Officer James Richardson testified about an uncharged incident in 2007 in which appellant had possessed methamphetamine for sale. The methamphetamine was discovered during a traffic stop of a truck appellant was driving. There was a passenger in the truck. Long Beach Police Officer James Richardson searched the truck and found a bag containing baggies of methamphetamine, and a functioning scale. He found a second scale inside a toolbox. Appellant had $1,538 in his pants pocket. Officer Richardson reviewed the text messages on appellant's cell phone. He described them as follows: "If you need money, it used dollar, dime or money. You got an 'O' . . . for 750 and 'eight ball.' It said, 'I will take it.' And it said, "You don't have to contact me. You can send it with a runner.'" According to the officer, "O" refers to an ounce and "eight ball" refers to an eighth of an ounce. Based on all these circumstances, Officer Richardson opined that appellant possessed the methamphetamine for sale.

Long Beach Police Detective Gregory Roberts testified as the prosecution's drug expert. He explained that sandwich baggies are often used to package controlled substances. Small digital scales are used to weigh controlled substances. Gloves are used to handle marijuana to avoid sticky residue from the flowering portion of the plant. Users, however do not care about getting residue on their hands. Most users do not use scales, but simply estimate the amount of marijuana. A magnifying glass may be used by marijuana sellers to inspect the quality of the marijuana to determine its value. A grinder turns marijuana into powder so that it can be more easily placed into cigarettes for smoking. The storage container found in appellant's car had a pressure valve and would be used to keep marijuana fresh for long periods of time.

Detective Roberts testified that most users smoke about one-third or one-half of a gram of marijuana at a time, with a total of about one gram per day. One pound of marijuana would be about 800 to 1,200 doses and would be worth about $3,000 to $4,000. He had never encountered anyone buying a pound of marijuana for personal use.

Detective Roberts explained that there are state-issued cards for medical marijuana users. The ones in this case were not state-issued. They were issued by a dispensary or private commercial entity. Detective Roberts had seen "some" fake cards that were

issued by private entities. In the detective's experience, almost everyone who sells marijuana also uses it. Sellers may use medical marijuana as a cover for their sales. Medical marijuana sold by dispensaries is generally packaged in small pill bottles.

Presented with a hypothetical matching the facts of this case, Detective Roberts opined that the marijuana was possessed for sale. He based his opinion on the amount of marijuana, the scale, the plastic baggies and the magnifying glass.

Appellant testified in his own behalf at trial. In April 2010, he went to the Medical Advisory Center ("MAC") in Westwood, where he had a physical and received a recommendation for the use of medical marijuana. He also received a card to carry to show that he was a medical marijuana patient. The back of the card stated that he was allowed to carry eight ounces of marijuana.

Appellant used the medical marijuana for headaches. In his experience, one gram of marijuana makes two cigarettes. He smoked two to four times a day, depending on the severity of the headache.

On November 29, 2010, he, his wife, and Rodriguez pooled their money to buy medical marijuana. Appellant gave Rodriguez $800 and expected to receive four ounces. He expected that his wife would also receive four ounces. The remaining eight ounces would go to Rodriguez. Appellant drove to East Broadway in Long Beach so that Rodriguez could buy the marijuana. Appellant lived in Bellflower. It was Rodriguez's idea to go to Long Beach to buy the marijuana. He said that a dispensary there was giving good deals because it was harvest time. Appellant had previously gone to dispensaries in Artesia and Paramount, which were closer to his home.

Appellant parked the car, and Rodriguez got out and walked away. Appellant did not see exactly where he went. Rodriguez returned with a bag in his hand and asked appellant to open the trunk. Appellant opened the trunk, and Rodriguez put that bag into the trunk, then got into the car. Appellant was just starting to drive away when he was stopped by the police.

Appellant told the officers that he was a medical marijuana user and that there was medical marijuana in the trunk. Appellant was not aware that the metal box was in the trunk, or the gloves. He believed that those items belonged to Rodriguez.

Appellant also presented the testimony of John Jenks as a drug expert. In Jenks's opinion, appellant possessed the marijuana for personal use, not for sale.

Discussion

1. Prior conduct

Appellant contends that the trial court abused its discretion in admitting evidence of a prior incident in which appellant was found in possession of methamphetamine, a scale and some baggies.[1] We see no abuse of discretion.

"The rules governing the admissibility of evidence of other crimes are well settled. '"Evidence of the defendant's commission of a crime other than one for which the defendant is then being tried is not admissible to show bad character or predisposition to criminality but it may be admitted to prove some material fact at issue, such as motive or identity. (Evid. Code, § 1101.) Because evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care. [Citation.]'" [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "In order to be admissible to prove intent, the uncharged misconduct

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[1] Respondent contends that appellant has forfeited this claim by failing to object on Evidence Code section 1101 grounds in the trial court. We do not agree. Appellant did in fact object. The issue came before the court on a motion by the prosecutor to admit the evidence pursuant to section 1101. When the court asked appellant's trial counsel if he had anything to say about the motion, counsel replied: "Defense would object to the motion." Counsel then argued briefly that the two incidents were not similar and that the evidence was more prejudicial than probative and should be barred under Evidence Code section 352. This is more than sufficient to preserve the section 1101 argument.

must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*Ibid*.)

More similarity is required in order to prove the existence of a common design or plan. "[E]vidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' (2 Wigmore [Evidence] (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) '[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.' (*Id.* at pp. 250-251, italics omitted; see also 1 McCormick [on Evidence (4th ed. 1992)] § 190, p. 805.)" (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.) "[T]he plan need not be unusual or distinctive." (*Id*. at p. 403.)

It is well established that a prior incident of possession or sale of the same controlled substance as the one in the charged offense is admissible to show intent and knowledge. (*People v. Goodall* (1982) 131 Cal.App.3d 129, 142; *People v. Hill* (1971) 19 Cal.App.3d 306, 319-320.) Appellant contends that this rule does not apply where, as here, the prior incident involves a different controlled substance than the charged offense.

The admissibility of a prior incident involving a different controlled substance will depend on the circumstances of the prior and current cases, and the use for which it is offered. Here, appellant's prior sale of methamphetamine was relevant to show intent to sell. In that instance, he and another person were transporting a large quantity of methamphetamine in a vehicle, along with scales and a large amount of cash. He communicated with potential buyers via text messages on a cell phone. In the present case, appellant and two other people were transporting a large quantity of marijuana in a vehicle, along with a scale and cash. There were two text messages on a cell phone in the vehicle which could reasonably be understood as involving an offer to sell the marijuana.

These are sufficient similarities to support an inference that appellant had the intent to sell the marijuana, and the knowledge of how to sell a controlled substance.

Appellant is correct that marijuana may be legally possessed in cases of medical need while methamphetamine can never be legally possessed. Appellant overlooks the fact that he was charged with *selling* marijuana, and he never contended that he was authorized to make such sales. Thus, the prior incident was sufficiently similar to be relevant to his intent.

Appellant also contends that even if the prior incident was admissible under Evidence Code section 1101, it should have been excluded under Evidence Code section 352 because its prejudicial potential outweighed its probative value. We do not agree.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

A trial court "need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.)

The "prejudice" referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against one side, with very little effect on the issues. (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.) It is "not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.)

Here, the prior incident was relevant to appellant's intent to sell the marijuana in this case. The prior incident did not involve violence, weapons, the threat of force or any other extraneous unpleasant conduct. It was not inflammatory in any way. Thus the trial court did not abuse its discretion in admitting the evidence.

2. Prosecutorial misconduct

Appellant contends that the prosecutor committed misconduct in his closing argument by telling the jury that appellant had the burden of proving a CUA defense. He also contends that the prosecutor committed misconduct by arguing that the MAC cards were not valid without having any evidence to support that argument. Respondent contends that appellant has forfeited these claims by failing to object in the trial court. Appellant contends that if his claims are forfeited, he received ineffective assistance of counsel.

In order to preserve a claim of prosecutorial misconduct, a defendant is required to object to prosecutorial misconduct in a timely fashion, and to request a curative admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Appellant did neither, and so his claim is forfeited.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

In evaluating a claim of ineffective assistance of counsel, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

(*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.) Courts should "accord great deference to counsel's tactical decisions" and "'should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925–926.)

a. Burden of proof

We will assume for the sake of argument that the prosecutor misstated or overstated appellant's burden of proof. Our Supreme Court has repeatedly pointed out that "'[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 443.)

Here, it might have been sound strategy for appellant's trial counsel to object to that portion of the prosecutor's argument concerning the burden of proof, but that was not the only strategy available to him. Counsel was aware that the court's instruction on this point would support his argument about the burden of proof. Counsel chose to directly respond to the prosecutor's remarks about the burden of proof, telling the jury that the prosecutor's argument on burden of proof was incorrect. He explained that the prosecutor had the burden of proving that appellant's possession was illegal, including proving that appellant's documents authorizing medical use of marijuana were false. He also reminded the jury to look to the court's instructions for the correct law. A point emphasized in closing argument may be more persuasive in a particular case than an objection and admonishment. The choice between such sound strategies is particularly in the province of trial counsel and not this court.

Further, even assuming for the sake of argument that appellant's trial counsel should have objected, we see no reasonable probability that appellant would have received a more favorable outcome in the absence of counsel's error.

The trial court's instruction on the CUA clearly and unequivocally told the jury: "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime."

Jurors are presumed to understand and follow the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662; see also *Tennessee v. Street* (1985) 471 U.S. 409, 415, fn. 6 ["The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue."].) That presumption is particularly strong here, where the parties themselves acknowledged that they were arguing different versions of the law and directed the jury to the court's instructions as the final word on the subject.

In addition, at the conclusion of closing arguments, the trial court told the jury: "If anything is said . . . about the law, by either attorney in their arguments, you follow what I tell you. Not what they tell you if there is any difference." The court also provided the jury with a written instruction which stated: "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." Accordingly, we see no reasonable probability (or possibility) that the prosecutor's argument caused the jury to misapply the law concerning the burden of proof under the CUA.

b. Medical cards

Appellant identifies several portions of the prosecutor's closing argument in which he referred to the MAC cards as being not valid or not real. In most of these instances, the prosecutor was referring to the cards belonging to appellant's wife and Rodriguez. The cards were not issued by a governmental agency. Without foundational testimony, the cards were simply pieces of paper. Appellant's wife and Rodriguez did not testify, and so there was no evidence to support or explain the cards, and no evidence that either person was medically authorized to use marijuana. Thus, the prosecutor's argument that

there was no evidence the cards were "valid" or "real" was perfectly proper as to appellant's wife's and Rodriguez's cards.

As for appellant's card, there is some evidence that the card was not "valid" in the sense that it was not an authorization to use or possess medical marijuana. Appellant himself acknowledged that the card was "not good to get into the clinic. To get into the clinic you have to have the paper, original." Quiggle testified that all privately issued cards were "not legit," they "meant nothing" and were "not considered legal."[2] Her testimony could reasonably be understood as claiming that these cards do not constitute a legally valid medical recommendation for marijuana use. Thus, there was some evidence to support the prosecutor's argument that the card itself was not a valid recommendation for the medical use of marijuana.

There is no evidence to support the prosecutor's argument that appellant's card was not "real," however. Appellant expressly testified that his card was one that he received as a result of a physical from the doctor at MAC. This is evidence that the card was "real." There was no contrary evidence that the card was not "real," that is not a card issued by MAC. Thus, the prosecutor's argument that appellant's card was not real was not supported by any evidence, directly or circumstantially.

It might have been sound strategy for trial counsel to object to that portion of the prosecutor's argument which referred to his card as not "real," but that was not the only strategy available to him. Counsel chose to address the prosecutor's arguments in his own argument, pointing out although there was testimony that some privately issued cards are fraudulent, no one, including the police officers involved in the case, testified that appellant's card was fraudulent. Counsel also pointed out that in addition to his card, appellant had a recommendation sheet from a doctor, which is what Quiggle looked for.

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[2] To the extent that respondent contends that Officer Roberts testified that cards were not real or valid, respondent is mistaken. Officer Roberts testified only that appellant's card was "typical of what's going to be issued by dispensary or clinics or some private commercial consumer." He stated that he did not have any way of telling whether such cards were real or fake.

Counsel's decision to not object but to wait to address the prosecutor's arguments during his own argument was equally sound. A point emphasized in closing argument may be more persuasive in a particular case than an objection and admonishment. The choice between such sound strategies is particularly in the province of trial counsel and not this court. Accordingly, appellant's claim of ineffective assistance of counsel fails.

3. Sua sponte duty – correction

Appellant contends that the trial court had a sua sponte duty to correct the prosecutor's misstatement of the law concerning the burden of proof under the medical marijuana laws and that the court's failure to do so conveyed to the jury that the prosecutor's statements about the appellant's burden of proof were legally sound and that the jury could rely on those statements. We do not agree.

Appellant's characterization of the court as "silent" is inaccurate. At the conclusion of closing arguments, the trial court told the jury: "If anything is said . . . about the law, by either attorney in their arguments, you follow what I tell you. Not what they tell you if there is any difference." The court also provided the jury with a written instruction which stated: "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." Further, the parties themselves acknowledged during argument that they did not agree on the burden of proof law, and that the jury should look to the court's instructions. Appellant offers no reason the jury would ignore the court's instructions on conflicts and the party's agreement with that instruction and instead decide that the court's failure to specifically mention the area of conflict was a directive to ignore the instructions and rely on the prosecutor's argument. We see none.

4. Sua sponte duty - modification

The law permits possession of a reasonable amount of marijuana for medical use. Appellant testified that only 4 ounces of the 16 ounces of marijuana found in his car was his. The court instructed the jury on the concepts of sole and joint possession. Appellant

contends that the trial court had a sua sponte duty to also instruct the jury on the concept of possessing something "severally" which he describes as separately or distinctly possessing part of the whole.

We will assume for the sake of argument that the trial court had such a sua sponte duty. There is no reasonable probability or possibility that the court's failure to define "several" possession contributed to the verdict.

The law permits possession of a reasonable amount of marijuana for medical use. Appellant testified, and his counsel argued, that only a portion of the whole was his, and that this was a medically reasonable amount. The prosecutor never argued that it was legally impossible for appellant to possess only part of the marijuana. The prosecutor argued only that the facts showed that the three people in the car jointly possessed the marijuana, intending to act together to sell it. At one point in his closing argument, the prosecutor argued that appellant could not legally transport his wife's or Rodriguez's marijuana, thus implicitly acknowledging that it was possible that only a portion of the marijuana was appellant's. Accordingly, we see no reasonable probability of a more favorable outcome if the court had instructed the jury on "several" possession.

5. Text messages

Appellant contends that the text messages to and from Rodriguez's cell phone were hearsay and the trial court erred prejudicially in admitting them.

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Except as provided by law, hearsay is inadmissible. (Evid. Code, § 1200, subd. (b).)

The text message sent to Rodriguez was a request to buy drugs. Requests are generally not considered hearsay. (*People v. Jurado* (2006) 38 Cal.4th 72, 117 [request "does not assert the truth of any fact [and so] it cannot be offered to prove the truth of the matter stated."].) A number of courts have specifically held that evidence of a request to buy drugs is not made inadmissible by the hearsay rule. (*People v. Morgan* (2005) 125

Cal.App.4th 935, 945; *People v. Ventura* (1991) 1 Cal.App.4th 1515, 1519; *People v. Nealy* (1991) 228 Cal.App.3d 447, 450-451.) The requests are either viewed as nonassertive conduct which does not amount to hearsay or circumstantial evidence that the (intended) recipient is selling or intends to sell drugs. (*People v. Morgan*, *supra*, 125 Cal.App.4th at pp. 940-941; *People v. Nealy*, *supra*, 228 Cal.App.3d at pp. 450-451.)

Appellant contends the message in this case was not sent to appellant but to Rodriguez and so was not relevant to show appellant's intent to sell, except under an improper guilt by association theory. We do not agree. There is more evidence of appellant's guilt than his mere association with Rodriguez. Appellant drove Rodriguez to the Long Beach area to buy the marijuana, and contributed money to Rodriguez to buy the marijuana. Rodriguez then did the actual purchasing. Appellant then began to drive Rodriguez away from that location when stopped by police. A scale, a box of small baggies and a box of gloves were found in the trunk of appellant's car, all consistent with drug sales. This is more than sufficient evidence to show that appellant and Rodriguez were working together to sell the marijuana. Under these circumstances, the text to Rodriguez was relevant and admissible to show all three people possessed the marijuana with the intent to sell.

Rodriguez's reply text is a different matter, however. In *Morgan*, *Ventura* and *Nealy*, *supra*, the request for drugs was received by a police officer, who answered a suspect's phone. There was no issue of a reply to the request. Respondent contends that this text is admissible under Evidence Code section 1230 as an admission against penal interest. That section requires a showing that the declarant is unavailable as a witness, and no such showing was made here.

We will assume for the sake of argument that the reply text was not admissible. We see no reasonable probability that appellant would have achieved a more favorable result if the reply text had not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818; *People v. Duarte* (2000) 24 Cal.4th 603, 619 [standard applicable to state law error in admitting hearsay is *Watson*].) The evidence that appellant intended to sell the marijuana was very strong. Appellant drove from his home in Bellflower to Long Beach to buy the

marijuana, passing at least two closer dispensaries along the way. He and his companions purchased a large quantity of marijuana which was not labeled as medical marijuana. Detective Olson testified that when the High Quiggle Healing Center was pointed out to appellant, he agreed that the marijuana was purchased from that Center, but testimony from the Quiggles contradicted that claim. When stopped by police, appellant and Rodriguez had a fairly large quantity of cash on their persons. There was a scale, box of gloves, box of baggies and magnifying glass in appellant's trunk, which were consistent with sales and inconsistent with personal use. Thus, any error was harmless.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.