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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD SCOTT REEVES, Defendant and Appellant.	B228294 (Los Angeles County Super. Ct. No. MA 048296)

APPEAL from the judgment of the Superior Court of Los Angeles County. Richard E. Naranjo, Judge. Affirmed.

Tanya Dellaca, 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, Steven E. Mercer and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Richard Scott Reeves appeals from his conviction of the offense charged in count 1 of the information for the sale, transportation or offer to sell heroin in violation of Health and Safety Code section 11352, subdivision (a). Defendant contends there is no substantial evidence to support the conviction, and the trial court erred in failing to give a unanimity instruction and in giving CALCRIM No. 223. We find no merit in any of his contentions and affirm the judgment.

The crime charged in count 1 occurred on February 12, 2010. There was evidence of other drug-related crimes on January 29, 2010. We will focus our discussion on the events of February 12 as charged in count 1. We only mention briefly that there was substantial evidence that, on January 29, 2010, three Los Angeles County Sheriff's deputies executed a search warrant at a trailer defendant had rented. Defendant was not there, but the deputies found a young woman named Alicia Jones, asleep in the bedroom, despite the commotion the deputies had made in knocking repeatedly to announce they had a warrant and entering the trailer. The deputies had difficulty rousing Ms. Jones from sleep. They repeatedly yelled at her to wake up, shook the bed on which she slept, and tugged on the sheets. She was "very out of it" when she finally awoke, confused and incoherent. Drugs, including heroin, and drug paraphernalia were recovered from the bedroom.

On February 12, the sheriff's deputies executed another search warrant at another trailer where defendant was believed to be staying. The deputies found defendant sitting on a bed with Ms. Jones, both fully clothed. Ms. Jones appeared to be very drowsy and under the influence of heroin. She had cold and clammy skin, scabs all over her face, droopy eyelids and constricted pupils. Defendant and Jones were arrested. In the room, the deputies found $295 in cash (one $100 bill, eight $20 bills, three $10 bills, and a $5 bill), a cell phone belonging to defendant, seven hypodermic syringes in defendant's sock, two chunks of black tar heroin, empty plastic baggies, a scale, strips of folded aluminum foil (one of which had drug residue on it), and a glass pipe for smoking methamphetamine. Inside defendant's backpack, they found two rolls of tinfoil, precut

tinfoil squares, a plastic bag with empty rubber balloons, another hypodermic needle containing a clear liquid, a bag of marijuana, and a box of sandwich bags.

During the search, defendant's cell phone rang. One of the deputies answered and pretended to be defendant. A female voice said, "I need a 40," which the deputy understood to mean $40 worth of narcotics. The deputies also found a text message from someone named Sherrie complaining, "[Y]ou gave me shit with heroin in it a few times," and stating, "Just make it right and give me a little bit of some good shit."

A sheriff's department criminologist testified the items collected included heroin and other drugs. A sheriff's department detective testified as an expert on drug use and sales, explaining the balloons are used to package heroin, and a person possessing heroin for personal use would not possess such balloons in the condition found on defendant. The expert testified in response to hypothetical questions mirroring the facts of this case and based on his own experience that, in his opinion, the heroin was possessed for sale, based on the quantity of heroin found, the money recovered, and the presence of new, unused syringes, of typical packaging materials such as the balloons and aluminum foil, and the electronic gram scale.

Defendant concedes the heroin and other drugs and drug paraphernalia were found in the room where he was arrested. He also concedes one of the sheriffs intercepted a phone call to his cell phone from a woman asking to buy drugs. He contends, however, there was no substantial evidence that he sold or furnished drugs on February 12. We disagree. The court correctly instructed the jury with CALCRIM No. 2300 that the prosecution had to prove defendant sold or furnished a controlled substance, defendant knew of its presence, defendant knew it was a controlled substance, and the controlled substance was heroin. There was substantial evidence, described above, that defendant possessed heroin for sale on February 12 and that he furnished heroin to Ms. Jones on that day.

Defendant's first claim of instructional error is that the court failed to give the unanimity instruction in CALCRIM No. 3500 sua sponte. The court did give CALCRIM No. 3550, which states, in part, "Your verdict on each count and any special findings

must be unanimous. This means that, to return a verdict, all of you must agree to it." A trial court has a sua sponte duty to give an additional unanimity instruction when the defendant is charged with a single criminal act and the evidence suggests more than one criminal act was committed, thus requiring the trial court to instruct the jury they must unanimously agree on the same specific criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) This additional unanimity instruction is not required if the prosecutor clearly tells the jury what act is relied upon to prove the offense. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539.)

We find no additional unanimity instruction was required in this case. First, defendant's possession of heroin and other drugs and drug paraphernalia, along with the cell phone call and text message, proved defendant was a heroin dealer, but the only evidence that defendant sold or furnished drugs on February 12 was Jones' presence in the room with defendant under the influence of heroin. Second, the prosecutor clearly told the jury what act proved the sale or furnishing of heroin on February 12. The prosecutor's discussion of the drugs, drug paraphernalia and cash made clear to the jury that evidence demonstrated defendant was a drug dealer selling heroin and other narcotics. Then the prosecutor said, "That gets to the selling or furnishing of heroin, which is the subject of count 1, because we're talking about the heroin that was found on February 12th and the purpose for that. And when you look at what's going on with Alicia Jones on January 29th, and what's going on with her on February 12th, it's no big stretch that he's supplying her with heroin." The prosecutor pointed out there was no evidence Ms. Jones was a dealer, and the evidence showed she was an addict who got her drugs from defendant. On rebuttal, the prosecutor again told the jury that Ms. Jones being under the influence of narcotics in a room full of drugs and drug paraphernalia proved defendant furnished heroin to her on February 12: "That's Alicia Jones with the heroin. You know, the heroin that only people call the defendant about. And she is under the influence of it. And that's the furnishing. That's . . . where that comes in."

Defendant's second claim of instructional error is that the court erred in giving CALCRIM No. 223, the instruction on direct and circumstantial evidence, because,

according to defendant, that instruction undermined the presumption of innocence and shifted the burden of proof to the defense. CALCRIM No. 223 states, in pertinent part: "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence." The courts of appeal have consistently upheld CALCRIM No. 223 and rejected challenges similar to defendant's claim. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 930; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186; *People v. Smith* (2008) 168 Cal.App.4th 7, 18.) We agree with these authorities that CALCRIM No. 223 correctly states the law regarding direct and circumstantial evidence and does not in any way undermine the reasonable doubt standard or presumption of innocence.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.