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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD TUNSTILL, JR., Defendant and Appellant.	B277716 (Los Angeles County Super. Ct. No. MA065922)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher Estes, Judge. Modified in part and conditionally reversed and remanded.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Tunstill (defendant) was convicted by a jury of one count of sale or transportation of cocaine base (Health & Saf. Code,[1] § 11352, subd. (a)) and one count of possession for sale of cocaine base (§ 11351.5). Defendant admitted he had suffered a prior conviction for possession for sale of a controlled substance (§ 11370.2) and a prior violent strike conviction (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). The trial court sentenced defendant to the midterm of four years for the section 11352 conviction, doubled to eight years pursuant to the Three Strikes law. The court also imposed a three-year enhancement term pursuant to section 11370.2 for defendant's prior narcotics conviction, for a total of 11 years in prison. The court stayed sentence on the current section 11351.2 conviction pursuant to Penal Code section 654.

Defendant appeals from the judgment of conviction, contending the trial court erred prejudicially in admitting a text message related to uncharged sales of a controlled substance. He also requests that we independently review the court's in camera hearing on his *Pitchess*[2] motion. In a supplemental brief, defendant contends the section 11370.2 enhancement must be stricken due to recent amendments to that section. Respondent agrees the section 11370.2 enhancement term must be stricken.

The text messages were relevant to show defendant's intent in possessing the cocaine in this case. The trial court did not abuse its discretion in ruling there were no discoverable *Pitchess* records.

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[1] Further undesignated statutory references are to the Health and Safety Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

The section 11370.2 enhancement term must be stricken in light of amendments to that section. We affirm the judgment of conviction in all other respects.

BACKGROUND

On March 31, 2014, Los Angeles County Sheriff's Deputy Estevan Perez conducted a traffic stop of defendant because defendant's car had a broken taillight and a license plate on the dashboard. When defendant rolled down his window, Deputy Perez smelled marijuana smoke. Deputy Perez ultimately searched both defendant and the car. The deputy found $3,800 on defendant's person, divided between two locations. Inside a hat on the front seat of the car, the deputy found a small container of marijuana, a marijuana cigarette and five packages containing a substance resembling rock cocaine. The substance was later tested and determined to be cocaine base with a weight of approximately 36 grams. Thirty-six grams of cocaine was worth about $1,500 at the time. Deputy Perez found no drug paraphernalia in the car.[3]

Deputy Perez advised defendant of his rights, then asked him about the cocaine-like substance. Defendant stated he was aware there was rock cocaine in the hat, and that he had picked it up for someone else. Defendant did not answer any further questions.

At some point during the stop, Deputy Perez found a cell phone. Defendant asked the deputy to call his wife. Deputy Perez agreed. As he made the call, he noticed a series of text messages on the phone and photographed them. The messages read: "80 yellow?" "Tomorrow" "OK. 145,

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[3] Deputy Perez acknowledged that cocaine could be put into a marijuana cigarette such as the one found in defendant's car and smoked with the marijuana, but explained that this was commonly done with cocaine powder, not rock cocaine.

80 yellow" "Thanks" and "Cool." Deputy Perez opined that the texts were a discussion of a sale of pain pills such as Vicodin or Oxycontin.

At trial, Deputy Perez testified as an expert for the prosecution. In response to a hypothetical mirroring the facts of this case, he opined that the cocaine was possessed for sale. Deputy Perez explained that 36 grams was a large amount of cocaine for an individual to possess, and would constitute a two-month supply for an everyday user. He explained that a typical user would possess up to one gram, and would carry paraphernalia to ingest the drug. Deputy Perez also explained that in his experience it would be unusual for a person to carry over $3,000 in small bills, divided between two locations on his person. In his experience, drug dealers divided their cash to keep count of their money.

Deputy Perez also discussed the text messages from defendant's cell phone. He explained that it was common for drug dealers to sell multiple drugs. Text messages were a way for modern drug dealers to keep track of what they sold and who owed them money.

In a variation on the original hypothetical, the prosecutor asked if it would change Deputy Perez's opinion if the person with the cocaine was only seasonally employed and made only $300 to $400 every two weeks. The deputy replied that it would strengthen his opinion that the cocaine was possessed for sale.

Defendant did not testify and did not call any witnesses. The defense introduced records from defendant's most recent employment into evidence. The parties agreed that the records show defendant earned $4,990 for the first three month of 2014. Arithmetically, this averages out to $383 per week.

DISCUSSION

I. Text messages

Defendant claims his text messages about pills were not relevant or material but were highly prejudicial. He contends the trial court abused its discretion in failing to exclude the messages pursuant to Evidence Code sections 352 and 1101. He further contends the admission of the text messages rendered his trial fundamentally unfair in violation of the Due Process Clause and requires reversal.

A. Law

Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a person's character, including evidence in the form of specific instances of conduct, "when offered to prove his or her conduct on a specified occasion." Subdivision (b) of that section, however, provides that such evidence that a person committed a crime, civil wrong, or other act is admissible when relevant to prove some fact in issue, "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."

"When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a common plan or scheme and still less similarity is required to establish intent. [Citations.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the

defendant probably acted with the same intent in each instance. [Citations.] The decision whether to admit other crimes evidence rests within the discretion of the trial court. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.)

"In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs. (*People v. Pijal* (1973) 33 Cal.App.3d 682, 691, 109 Cal.Rptr. 230.)" (*People v. Williams* (2009) 170 Cal.App.4th 587, 607.)

Even when evidence is relevant under Evidence Code section 1101, subdivision (b), a trial court must still determine that the evidence should not be excluded under Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) 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." 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.)

A trial court's decision applying Evidence Code section 352 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, 1124-1125.)

B. Analysis

The text messages support an inference that at the time of his arrest, defendant was in the midst of arranging to sell about 80 pain pills the following day. As Deputy Perez's testimony shows, the messages were offered for the permissible purpose of showing defendant's intent in possessing the cocaine found in defendant's car at the time of his arrest. (See *People v. Williams, supra,* 170 Cal.App.4th at p. 607.)

Defendant contends, correctly, that the text messages are not clear on their face and involve the sale of a different controlled substance than does the charged offense. Deputy Perez offered expert testimony explaining the texts. The difference in drugs does not render the prior incident irrelevant in this case. Deputy Perez testified that it is common for street level dealers to sell a variety of narcotics. (See also *United States v. Vo* (9th Cir. 2005) 413 F.3d 1010, 1017–1019 [evidence of a prior cocaine trafficking conviction admissible in methamphetamine trafficking case to establish intent, knowledge and absence of mistake because the evidence showed that defendant had a familiarity with drug trafficking in general].) Thus, the text messages were relevant to support the reasonable inference that defendant possessed the cocaine with the intent to sell it. The trial court did not abuse its discretion under Evidence Code section 1101, subdivision (b) by admitting the text messages. (See *People v. Williams, supra,* 170 Cal.App.4th at p. 607.)

Defendant contends that even if the text message had some slight relevance, that relevance was outweighed by the prejudicial potential, and the trial court abused its discretion in failing to exclude the evidence under Evidence Code section 352.

Defendant had $1,500 worth of cocaine in his possession and $3,800 in cash, a large amount of both drugs and cash. The cocaine was enough for

1,800 doses. The possibility that he had arranged to sell less than a hundred pills was not likely to invoke an emotional bias against defendant. Further, the trial court instructed the jury that defendant had not been charged with any crimes in connection with the pills, making it even less likely that the jury would develop an emotional bias against defendant. Thus, the trial court did not abuse its discretion under Evidence Code section 352 by admitting the text messages.

Assuming for the sake of argument the text messages should have been excluded, there is no reasonable probability that defendant would have received a more favorable outcome in the absence of the text messages. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [error in admitting Evid. Code, § 1101 evidence tested by *People v. Watson* (1956) 46 Cal.2d 818, 836, harmless error standard].)[4]

The evidence that defendant possessed the cocaine for sale was extremely strong. The cocaine amounted to 1,800 doses, which would be a two-month supply for a typical user. Defendant, however, had no paraphernalia in the car for ingesting the cocaine. The cocaine was worth about $1,500, which was about one-third of defendant's seasonal income for the first three months of 2014. The combined value of the cocaine and cash in

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[4] We do not agree with defendant that any error in the admission of the text messages violated his federal constitutional rights and so requires review under the *Chapman v. California* (1967) 386 U.S. 18 standard of review. In light of the very strong evidence that defendant possessed the cocaine for sale, however, we would find any error harmless under that standard as well. (See, e.g., *People v. Doolin* (2009) 45 Cal.4th 390, 439 ["In the interest of complete review, we note that . . . any error would be harmless, whether assessed under the federal constitutional [citation] or state [citation] standard of review. There was overwhelming evidence of defendant's guilt."].)

defendant's possession was $5,300. This exceeded defendant's total income from his documented seasonal work for the preceding three months. Further, Deputy Perez made it clear that the text message formed only a small part of his opinion that defendant possessed the cocaine for sale. Thus, there is no reasonable probability or possibility the jury would have reached a more favorable outcome in the absence of the text messages.

II. *Pitchess* hearing

Defendant requests that we independently review the sealed transcript of the in camera hearing on his *Pitchess* motion for discovery of peace officer personnel records. Respondent does not object to this request.

The trial court granted defendant's motion for discovery of complaints of "[dis]honesty and fabrication" by Deputy Perez. On April 12, 2016, the court conducted an in camera review of the deputy's records. No records were produced.

When requested to do so by a defendant, we independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) We have reviewed the transcript of the in camera hearing, but find it insufficient. The description of the records produced at that hearing lacks sufficient detail to determine whether they involve dishonesty or fabrication of evidence. Accordingly, we conditionally reverse the judgment and remand this matter for a new *Pitchess* hearing in which the custodian of records provides a more detailed summary of the records. (See *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.) The trial court should then rule on any need for disclosure.

III. Section 11370.2 Enhancement

Defendant contends that the law governing section 11370.2 was recently amended, and he should receive the benefit of that amendment and have his section 11370.2 enhancement term stricken. Respondent agrees.

Senate Bill No. 180 was signed by the Governor on October 11, 2017, and becomes effective on January 1, 2008. The bill narrows the scope of section 11370.2 to apply only to prior convictions for narcotics sales involving a minor in violation of section 11380. Defendant's prior conviction was for possession for sale in violation of section 11351.5.

Absent some indication to the contrary in the bill, courts presume that the Legislature intended amendments to the Penal Code which reduce the punishment for a crime to apply retroactively, at least in cases which are not yet final. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324; see also *In re Estrada* (1965) 63 Cal.2d 740.) Nothing in Senate Bill No. 180 indicates the Legislature intended prospective application only. (Stats. 2017, ch. 677, § 1.) Accordingly, defendant's enhancement term must be stricken.

DISPOSITION

The three-year enhancement term imposed pursuant to section 11370.2 is stricken. Defendant's total sentence is now eight years. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting these changes and to deliver a copy to the Department of Corrections and Rehabilitation.

The judgment is otherwise conditionally reversed. The cause is remanded to the trial court with directions to hold a new hearing on defendant's *Pitchess* motion in conformance with the procedures described in this opinion. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct such further proceedings as are

necessary and appropriate. If the court finds there are no discoverable records, or that there is discoverable information but defendant cannot establish he was prejudiced by the denial of discovery, the judgment shall be reinstated as of that date.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.