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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN GUZMAN CARDENAS, AND
FILMON CAMACHO GAXIOLA,

Defendants and Appellants.

2d Crim. No. B234014
(Super. Ct. No. 2010035510)
(Ventura County)

Joaquin Guzman Cardenas and Filemon Camacho Gaxiola appeal from the judgments entered after a jury convicted them of possession for sale of cocaine (count 1 - Health & Saf. Code, § 11351);¹ transportation of cocaine (count 2 - (§ 11352, subd. (a)); possession for sale of methamphetamine (count 3 - § 11378); transportation of methamphetamine (count 4 - § 11379, subd. (a)); possession of over \$100,000 obtained as a result of the sale of cocaine (count 5 - § 11370.6, subd. (a)); and sale of cocaine (count 6 - 11352, subd. (a).) As to counts 1 and 2, the jury found true allegations that the cocaine weighed in excess of one kilogram. (§ 11370.4, subd. (a)(1)). As to count 6, the jury found true allegations that the cocaine weighed in excess of four kilograms. (§ 11370.4, subd. (a)(2)). Cardenas was sentenced to prison for eight years. Gaxiola was sentenced to prison for 11 years, 4 months.

¹ All statutory references are to the Health and Safety Code unless otherwise stated.

Appellants contend that (1) expert witnesses were erroneously allowed to opine that appellants possessed the requisite criminal knowledge and intent, and (2) the evidence is insufficient to support their convictions. Gaxiola separately contends that the trial court (1) violated the proscription against multiple punishment of Penal Code section 654, and (2) erroneously calculated his credit for presentence confinement. As to Gaxiola, we modify the judgment to correct a section 654 violation and award him additional credit for presentence confinement. In all other respects, we affirm.

Facts

Law enforcement officials were conducting a narcotics investigation of Pablo Arroyo (Pablo) and Alejandro Arroyo (Alejandro). They obtained authorization to place a wiretap on Alejandro's cell phone.

In the morning on March 17, 2010, Pablo and Alejandro discussed a narcotics transaction over the telephone. Alejandro said he had enough cash to buy six kilos of cocaine. In another telephone conversation that evening, Alejandro confirmed that he was ready to buy the six kilos. Pablo said that the seller of the cocaine "is on his way already."

Later that evening, law enforcement officials saw Pablo standing in the doorway of a residence. A white Nissan Sentra arrived at the residence, and Alejandro exited the vehicle. Alejandro carried a brown paper bag into the residence. The bag contained an object with a "square rectangle" shape.

About an hour later, a Chevrolet HHR (HHR) arrived at the residence. Pablo came out of the residence and opened the gate to the driveway. The HHR drove into the driveway and parked in the garage. "[E]verybody walked into the garage." The garage door was then closed.

About 45 minutes after the arrival of the HHR, Alejandro exited the residence. He was carrying a duffle bag over his shoulder. The duffle bag appeared to contain "a weighted object." Alejandro entered the Nissan Sentra and drove away. A few minutes later, the HHR backed out of the driveway and drove away.

California Highway Patrol officers were directed to stop the Nissan Sentra. A high-speed pursuit ensued. During the pursuit, Alejandro threw packages out of the vehicle. When the packages hit the ground, "[s]ome of them would explode into a white puff of smoke or dust." The pursuit ended when officers deployed a spike strip and disabled the tires of the vehicle. Alejandro was arrested. "He had cocaine all over him." Officers found "a substantial amount of [cocaine] on the seat and on the floorboards" of the Nissan Sentra. Cocaine was also found "along the side of the freeway" where the pursuit had occurred.

Ventura County deputy sheriffs stopped the HHR. The driver of the vehicle was a man named Zuniga. Appellant Gaxiola was seated in the front passenger seat. Appellant Cardenas was seated in the rear seat. Cash in the amount of \$119,580 was hidden underneath the rear seat. Six kilos of cocaine would sell for about that amount. Also hidden underneath the rear seat were three kilos of cocaine and one pound of methamphetamine.² The street value of the methamphetamine was about \$18,000.

Deputy sheriffs searched the residence where the drug deal had occurred. In the kitchen they found two knives covered with a powdery residue that appeared to be cocaine. A roll of duct tape was next to the knives. In the kitchen trash can the deputies found "a piece of green plastic kilo wrapper type of plastic material."

On the date of the drug deal, Gaxiola and Pablo used their cell phones to contact the same "push-to-talk" telephone number. They contacted the push-to-talk number within a few minutes of each other, as if they were having a conversation. An expert testified that "a lot of drug traffickers have found that push to talk is an efficient means to keep in contact with their couriers or lieutenants." "[I]t's like a radio function. It's something hard for law enforcement to collect or monitor."

Expert Testimony on Criminal Knowledge and Intent

Gaxiola contends that his due process rights were violated because "the prosecutor's experts testified in response to hypothetical questions that [Gaxiola], by his

² The three kilos of cocaine inside the HRH were the basis for the convictions of possession for sale of cocaine (count 1) and transportation of cocaine (count 2).

mere presence, knew of the presence of the controlled substance and contraband currency and . . . was involved in the alleged drug trafficking." Gaxiola asserts that "the [experts'] opinions as to [his] knowledge and subjective intent usurped the jury's fact-finding role" Cardenas argues that his due process rights were also violated because the People's experts were allowed to opine that he had the requisite criminal knowledge and intent.

An expert may not opine on the knowledge or intent of a specific defendant. "[T]he reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. . . . ' " [O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' [Citations.]" (*People v. Vang* (2011) 52 Cal.4th 1038, 1048) On the other hand, the prosecutor is not barred from "*the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons.*" (*Id.*, at p. 1047.) Thus, "[e]ven if expert testimony regarding the defendants themselves is improper, the use of hypothetical questions is proper." (*Ibid.*) The hypothetical questions "must be rooted in the evidence of the case being tried, not some other case." (*Id.*, at p. 1046.) "Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Id.*, at p. 1051.)

Two experts – Sergeant Guy Moody and Sergeant Carlos Macias – properly expressed opinions in response to hypothetical questions asked by the prosecutor. The prosecutor questioned Sergeant Moody based on the following hypothetical: "[Y]ou had information from an electronic interception or a wiretap that there was supposed to be a six kilo narcotics transaction taking place at a location, you had a car pull into the garage, the door come[s] down. Approximately 45 minutes later the car leaves. And when stopped, that car has three individuals in it, three kilos of cocaine, a pound of methamphetamine and just under \$120,000." Sergeant Moody opined that the "three individuals" in the hypothetical "were involved in a narcotics transaction." Sergeant

Moody explained that "it's been [his] experience that . . . [e]verybody that shows up at a transaction of this magnitude has a job and are [*sic*] involved. There's nobody that's allowed to just show up and watch or standby [*sic*] and watch."

The prosecutor properly asked Sergeant Macias whether "somebody involved in a large scale drug transaction would . . . bring someone along who wasn't aware of what was about to happen." Sergeant Macias replied, "It wouldn't be common." He explained that a drug dealer who was "going to do a six kilo deal" for \$120,000 would want to be with persons whom he trusted, "and if you're trusting the person, you're going to relay the information to the people who are in the car with you."

The prosecutor later posed the following hypothetical question to Sergeant Macias: "Assuming again from the position of being Mr. X [a drug dealer] and it's a large scale narcotics transaction on the scale of receiving \$120,000 in payment, in your training and experience, is Mr. X sending somebody he doesn't trust and who has knowledge of what's about to take place?" Macias replied: "Yes, absolutely. He has knowledge."

Agent Michael Nielsen was the third and final expert questioned by the prosecutor. The prosecutor properly asked Agent Nielsen: "During these large scale transactions, based on your training and experience, . . . does everyone present have a role?" Nielson responded, "They do, yes." "Everybody that's involved in a drug trafficking organization does have a job." Agent Nielsen noted that, in large-scale transactions where the parties do not know each other, "you expect that there's going to be more than one person" present because there is "[s]afety in numbers." Other persons will be there "just to make sure that . . . someone doesn't get ripped off."

Later, the prosecutor asked Agent Nielsen a question that was not hypothetical because it concerned a specific defendant: "In addition to the facts you've just described, were there other facts that indicated to you apart from the forensic evidence a connection for defendant Cardenas to the sale of narcotics?" Agent Nielsen responded: "Yes. . . . [F]rom my past experience, the individuals in the vehicle, particularly with a high volume drug transaction, are going to be somehow involved with that transaction. You're not going to have an innocent bystander or just grab any old buddy to ride along with you

when you're handling [\$]120,000 That's a lot of money that you just don't invite someone along and you don't explain what's going on. [¶] So the individuals in the vehicle, to my mind, had some role in that each had a part."

Agent Nielsen's response was arguably inadmissible because he in effect opined that appellants, rather than hypothetical persons, knew about the cocaine sale.³ But appellants did not object to the prosecutor's question and did not move to strike Nielsen's response. The issue, therefore, has not been preserved for appellate review. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21.)

We reject Gaxiola's contention that his counsel was ineffective for not objecting to the prosecutor's question or moving to strike Agent Nielsen's respons. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Counsel may have reasonably believed that an objection was inappropriate because the prosecutor's question concerned Cardenas and not his client, Gaxiola. Counsel may also have reasonably believed that a motion to strike would have highlighted Nielsen's adverse testimony.

In any event, Gaxiola has failed to show that he was prejudiced by trial counsel's allegedly deficient performance. A defendant who claims that his counsel was ineffective "must prove prejudice that is a 'demonstrable reality,' not simply speculation." [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

³ In his reply brief, Gaxiola asserts: "Respondent's assertion that the 'opinions elicited from the detectives' were not of 'guilt o[r] innocen[c]e' of the actual defendants [citation] is perhaps accurate with regard to Detectives Macias and Moody – but the same cannot be said with regard to the opinion of Agent Nielsen."

outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

It is not reasonably probable that the result would have been different if an objection to the prosecutor's question had been sustained or if Agent Nielsen's response had been stricken. The evidence against Gaxiola was overwhelming. Admissible expert testimony made clear that a hypothetical person in Gaxiola's situation would have been aware of and played a role in the drug deal. Moreover, it is reasonable to infer that Gaxiola arranged the deal by conversing with Pablo through a push-to-talk telephone number.

In his reply brief, Cardenas argues that *People v. Covarrubias* (2011) 202 Cal.App.4th 1 "is dispositive of respondent's argument for admissibility of the expert testimony at issue" because it held "that testimony concerning the structure of drug trafficking organizations is inadmissible to establish a defendant's knowledge of the presence of drugs in his possession." *Covarrubias* was decided on December 20, 2011, after the filing of Cardenas's opening brief.

In *Covarrubias* the defendant was arrested at the Mexican border. Government officials found 193 pounds of marijuana hidden in the truck he had been driving. The defendant claimed that he did not know he was transporting marijuana. An expert gave lengthy and detailed "testimony concerning the structure and practices of drug trafficking organizations." (*People v. Covarrubias, supra*, 202 Cal.App.4th at p. 16.) He "described the various roles of participants in a drug trafficking organization, including growers, packagers, recruiters, transporters, distributors, and street level dealers." (*Id.*, at p. 10.) He explained how transporters, referred to as "mules," smuggle drugs across the border. (*Ibid.*) "[A] 'blind mule' is a term that is used to refer to a 'courier [who] doesn't know what they have on them.' [The expert] testified that a blind mule is a 'mythical character,' and that he had never been involved with, nor heard of, a case involving a blind mule." (*Id.*, at p. 6.) The *Covarrubias* court held: "Because the People presented no evidence

associating [defendant] with [a drug-trafficking] organization, the trial court abused its discretion in admitting this evidence pursuant to Evidence Code section 352."⁴ (*Ibid.*)

Covarrubias is of no assistance to appellants. Unlike the defendant in *Covarrubias*, appellants were not merely occupants of a vehicle that contained hidden drugs. They had just left a residence where a major cocaine transaction had occurred. It is reasonable to infer that they and the driver of the HRH had been involved in that transaction. These facts constitute evidence associating appellants with a drug-trafficking organization that included at least the three occupants of the HRH. Moreover, in contrast to the expert in *Covarrubias*, the experts here did not suggest that appellants were involved in a large-scale, sophisticated drug trafficking organization. They did not describe "the various roles that individuals in drug trafficking organizations perform." (*People v. Covarrubias, supra*, 202 Cal.App.4th at p. 6.) They testified that drug dealers do not allow the transportation of large quantities of drugs by persons who are unaware of what they are transporting. *Covarrubias*, therefore, does not show that the trial court here abused its discretion under Evidence Code section 352.

Sufficiency of the Evidence

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "The crimes can be established by circumstantial evidence and any reasonable inferences drawn from that evidence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.)

⁴ 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."

Substantial evidence supports appellants' convictions of the drug offenses. A reasonable trier of fact could conclude that they knew about the drugs in the HRH and either perpetrated or aided and abetted the perpetration of the offenses involving the drugs. " '[A]n aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.)

As the experts properly opined, hypothetical persons in appellants' situation would not have been innocent bystanders to a drug deal of this magnitude. It is reasonable to infer that appellants drove together in the HRH to the residence because each of them had a role to play in the drug deal to be conducted there. (See *People v. Meza, supra*, 38 Cal.App.4th at p. 1746 [reasonable to infer that passenger in vehicle transporting hidden cocaine worth \$3 million was present to assist the driver in delivering the cocaine; persons who knew what was in the vehicle would not "allow someone not involved in drug trafficking to ride in a vehicle delivering cocaine worth \$3 million"].) It is also reasonable to infer that (1) Gaxiola and Pablo were in contact with each other through a push-to-talk telephone number, and (2) during the 45 minutes that the HRH was parked inside the garage, appellants entered the residence and either witnessed or participated in the dividing up of the cocaine in the kitchen and the payment of the \$120,000.

Penal Code Section 654

Cardenas was sentenced to prison for eight years: the lower term of three years for count 6 (sale of cocaine) plus five years for the enhancement that the weight of the cocaine exceeded four kilograms. In sentencing Gaxiola, the trial court designated count 6 (sale of cocaine) as the principal term and imposed the lower term of three years. It added five years for the quantity enhancement. In addition, the court imposed consecutive sentences of 16 months on count 2 (transportation of cocaine), one year on count 4 (transportation of methamphetamine), and one year on count 5 (possession of over \$100,000 obtained as a result of the sale of cocaine). Pursuant to Penal Code section

654, the court stayed the sentences on counts 1 (possession for sale of cocaine) and 3 (possession for sale of methamphetamine). The aggregate term was 11 years, 4 months.

Gaxiola argues that, pursuant to Penal Code section 654, the sentences on counts 4 and 5 must be stayed. " 'Section 654 prohibits multiple punishment for a single criminal act and for two crimes arising from a single indivisible course of conduct in which the defendant had only one criminal intent or objective. [Citation.] Thus: "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct." [Citation.] [Citation.]' (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1296.) Section 654 bars multiple punishment only for violations of different provisions of law, not violations of the same provision of law. (*People v. Correa* (2012) 54 Cal.4th 331.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

The People concede that the sentence on count 5 (possession of over \$100,000 obtained as a result of the sale of cocaine) should be stayed "because the evidence showed that the \$120,000 in cash was obtained by selling the cocaine in count 6." The People explain: "[T]he possession of first the money and then the drugs, or vice versa, forms part of an indivisible course of conduct with the same intent and objective: exchanging one for the other." We accept the concession.

Gaxiola argues that the court also violated section 654 by imposing consecutive sentences for the simultaneous transportation in the HRH of cocaine (count 2) and

methamphetamine (count 4). Gaxiola relies on *In re Adams* (1975) 14 Cal.3d 629. There, our Supreme Court held: "Where . . . different kinds of drugs are simultaneously transported in one, indivisible transaction, with the single intent and objective of delivering them to another person, only one act of illegal transportation occurs" for purposes of section 654. (*Id.*, at p. 632.) The court noted that defendant's "simultaneous transportation of the various drugs in his possession was clearly motivated by the single objective of delivering them to [his codefendant,] Gregory." (*Id.*, at p. 635.)

Adams is distinguishable. There is no evidence that, when Gaxiola drove away from the residence, his objective was to deliver the drugs in the HRH to a single person. The trial court could have reasonably concluded that Gaxiola intended to deliver the drugs to multiple buyers. The drugs were not packaged together. Each of the three kilos of cocaine was separately wrapped. The methamphetamine was by itself in a plastic Tupperware container. Furthermore, "the difference between the drugs suggests they were 'directed at different buyers' [citation]" (*People v. Blake* (1989) 68 Cal.App.4th 509, 512; see also *People v. Briones* (2008) 167 Cal.App.4th 524, 529 ["There were two types of drugs in large amounts. This supports the inference Briones intended multiple sales to different customers."].) "Because the evidence . . . supports a finding that [Gaxiola] had separate objectives in transporting the methamphetamine and [cocaine], . . . the trial court correctly imposed sentences for both transportation convictions." (*People v. Blake, supra*, 68 Cal.App.4th at p. 512.) "It would be absurd to hold that a criminal who deals in one contraband substance can expand the scope of his inventory without facing additional consequences." (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1297.)

Unauthorized Sentence

On count 2, Gaxiola was convicted of transporting the three kilos of cocaine found inside the HRH. The jury found true an enhancement allegation that the weight of the cocaine exceeded one kilogram. (§ 11370.4, subd. (a)(1).) The trial court refused to strike the enhancement. On count 2, the court imposed a consecutive term of one-third the four-year middle term (16 months). It did not impose a consecutive term of one-third

the three-year enhancement (one year). (§ 11370.4, subd. (a)(1).) During sentencing, the court never mentioned the enhancement. We requested counsel to file supplemental letter briefs discussing the following matter: "Since the court did not strike this enhancement, was it required by law to impose a consecutive one-year term for the enhancement? [Citations.] . . . (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 ["The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal'].)"

Appellant argues, and the People concede, that a consecutive one-year term for the enhancement cannot be imposed pursuant to *People v. Estrada* (1995) 39 Cal.App.4th 1235. We agree. In *Estrada* the trial court imposed separate quantity enhancements for transporting 29 kilograms of cocaine inside a suitcase and for possessing for sale 38 kilograms of cocaine inside an apartment. The appellate court concluded that only one quantity enhancement could be imposed for both offenses. It reasoned: "The quantity enhancement is concerned with the total amount of drugs involved, not the varied crimes for which the defendant may be held culpable. [Citation.]" (*Id.*, at p. 1240.)

Credit for Presentence Confinement

The trial court gave Gaxiola credit for 917 days of presentence confinement, consisting of 459 days of actual custody and 458 days of conduct credit. The court relied upon the probation officer's calculation of credits. Gaxiola contends, and the People concede, that he is entitled to credit for 924 days of presentence confinement, consisting of 462 days of actual custody and 462 of conduct credit. We accept the concession.

Disposition

As to Gaxiola, we reverse the one-year consecutive sentence imposed on count 5, possession of over \$100,000 obtained as a result of the sale of cocaine. (§ 11370.6, subd. (a).) The judgment against Gaxiola is modified to stay sentence on that count pursuant to Penal Code section 654. The judgment against Gaxiola is further modified to award him credit for 924 days of presentence confinement, consisting of 462 days of actual custody and 462 days of conduct credit. In all other respects, the judgments against appellants are affirmed. As to Gaxiola, the trial court is directed to

prepare an amended abstract of judgment and transmit a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kent M. Kellegrew, Judge
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