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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. VICTOR SAMUEL MCCOMB, Defendant and Appellant.	B264663 (Los Angeles County Super. Ct. No. MA065053)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric P. Harmon, Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

A jury convicted Victor Samuel McComb (defendant) of transporting methamphetamine for sale and possessing it for sale. On appeal, he argues that (1) his possession for sale conviction must be vacated because possession for sale is a lesser included offense of transportation for sale, and (2) both of his convictions must be vacated because testimony that "gang members" mentioned defendant's name during jailhouse calls, although stricken, unduly prejudiced him. We reject both arguments, and affirm.

FACTS AND PROCEDURAL BACKGROUND

One evening in December 2014, a Los Angeles County Deputy Sheriff pulled over a car in Lancaster after it violated a number of traffic laws. The car had two occupants—the driver and defendant, who was the front seat passenger. While the deputy placed the driver in the back seat of the patrol car, he saw defendant make "furtive movements" with his hands, moving them from the dashboard, to his waist, and then back to the dashboard. After the deputy asked defendant to step out of the car, the deputy searched him and found (1) a finger portion of a blue latex glove that was tied off and tightly packed with 9.997 grams of methamphetamine, and (2) $450 in cash, comprised of twenty-two $20 bills and one $10 bill. At the time of his arrest, defendant had no drug paraphernalia (for either ingestion or sales), did not appear to be under the influence of methamphetamine, and did not exhibit signs of methamphetamine use typically seen in regular users such as rotting or missing teeth, weight loss, or nervous hyperactive behavior.

The People charged defendant with (1) transporting a controlled substance for sale (Health & Saf. Code, § 11379, subd. (a)),[1] and (2) possessing a controlled substance for sale (§ 11378). The People further alleged that defendant had served five prior prison terms. (Pen. Code, § 667.5, subd. (b).)

A jury convicted defendant of both counts, and found true the allegations regarding all of the prior prison terms.

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

The trial court sentenced defendant to seven years in prison. The court imposed a sentence of seven years on the transportation for sale count, comprised of a midterm sentence of three years plus four one-year sentences for four of the prior prison terms. The court then imposed a two-year prison sentence on the possession for sale count, but stayed that sentence pursuant to Penal Code section 654.

Defendant timely appeals.

DISCUSSION

I. Possession For Sale as a Lesser Included Offense

Defendant argues that we must vacate his conviction for possession for sale because it is a lesser included offense of transportation for sale and because a defendant cannot stand convicted of both crimes. We review this argument de novo. (*People v. Villegas* (2012) 205 Cal.App.4th 642, 646 ["[t]he issue of whether multiple convictions are proper is . . . reviewed de novo"].)

As a general rule, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*), italics in original; Pen. Code, § 954 ["[a]n accusatory pleading may charge . . . different statements of the same offense . . . [and] the defendant may be convicted of any number of the offenses charged"].) Courts have nevertheless fashioned an exception to this rule: A defendant cannot stand convicted of a crime and any offense that is necessarily included in that crime. (*People v. Pearson* (1986) 42 Cal.3d 351, 355 (*Pearson*), overruled on other grounds by *People v. Vidana* (2016) 1 Cal.5th 632; *People v. Ortega* (1998) 19 Cal.4th 686, 692.) This exception ensures that a defendant is not twice convicted of the necessarily included, lesser offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702.)

In assessing whether one crime is a necessarily included, lesser offense to another crime where both crimes are charged, we look solely to the statutory elements of the two offenses and ask whether "the greater offense include[s] all of the statutory elements of the lesser offense." (*Reed, supra*, 38 Cal.4th at p. 1227; *People v. Sanders* (2012) 55 Cal.4th 731, 737; *People v. Bailey* (2012) 54 Cal.4th 740, 751.) In other words, "[i]f

the crimes are defined in such a way as to make it impossible to commit the greater offense without also committing the lesser," then the lesser is necessarily included in the greater and a defendant's conviction of the lesser must be vacated. (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467; *Reed*, at p. 1227 ["[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former"].)

Since 2014, to convict a defendant of transporting a controlled substance, the People have had to prove: (1) the defendant transported—that is, he "carr[ied] or convey[ed]"—a controlled substance; (2) he did so with the intent that he or someone else will sell it; (3) he knew of its presence; (4) he knew of its nature or character as a controlled substance; and (5) it was a useable amount. (§ 11379, subds. (a) & (c); *People v. LaCross* (2001) 91 Cal.App.4th 182, 185; *People v. Busch* (2010) 187 Cal.App.4th 150, 155-156; see also *People v. Ramos* (2016) 244 Cal.App.4th 99, 105 (*Ramos*) [for possession for sale, defendant need not have intent to "personally sell it"]; see generally CALCRIM No. 2300 [elements of transportation for sale].)

To convict a defendant of possessing a controlled substance for sale, the People must prove: (1) the defendant possessed a controlled substance; (2) he did so with the intent that he or someone else will sell it; (3) he knew of its presence; (4) he knew of its nature or character as a controlled substance; and (5) it was a useable amount. (*In re Z.A.* (2012) 207 Cal.App.4th 1401, 1427; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1175-1176 (*Montero*); *Ramos, supra*, 244 Cal.App.4th at p. 105; see generally CALCRIM No. 2302 [elements of possession for sale].)

Plugging these elements into the pertinent test, the question becomes: Is it possible to transport a controlled substance for sale without also possessing it for sale?

The answer to this question is "yes." This answer is dictated by the solid wall of precedent repeatedly holding that "possession . . . is not an essential element of [transportation]," and by the logic behind those decisions. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 (*Rogers*); *People v. Watterson* (1991) 234 Cal.App.3d 942, 947; *People v. Valerio* (1970) 13 Cal.App.3d 912, 921; *People v. Vasquez* (1955) 135

Cal.App.2d 446, 448; *People v. Watkins* (1950) 96 Cal.App.2d 74, 76-77.) Those decisions rest on the possibility that a person can transport drugs that are in the "exclusive possession of another." (*Rogers*, at p. 134.) For example, a defendant agrees to drive a friend across town and knows the friend is carrying a locked briefcase filled with drugs to which the defendant does not have the combination. In that instance, the defendant is knowingly transporting the drugs for sale but is not in possession of the drugs because the defendant has neither physical possession of them nor the "right to control" them. (*People v. Morante* (1999) 20 Cal.4th 403, 417 [possession may be actual, physical possession or constructive possession turning on the "right to control" an item]; *Montero*, *supra*, 155 Cal.App.4th at pp. 1175-1176.) Based on this logic, the court in *People v. Eagle* (2016) 246 Cal.App.4th 275, 279 (*Eagle*) recently held that simple possession of methamphetamine is not a lesser included offense to the crime of transporting drugs for sale. *Eagle*'s logic applies with equal force to the crime of possession for sale.

Defendant raises five objections to this logic.

First, he argues that our Legislature's decision to amend section 11379 to specify that transportation is illegal only if it is "for sale" wiped away all of the pre-2014 precedent outlined above. For support, he cites the following language contained in a committee report: "This bill makes it expressly clear that a person charged with this felony must be in possession of drugs with the intent to sell." (Assem. Com. on Public Safety, coms. on Assem. Bill No. 721 (2013-2014 Reg. Sess.) Apr. 15, 2013, p. 2.) We disagree. The 2014 amendment, as the legislative history makes plain, had a specific purpose—namely, to overrule that portion of *Rogers* and its progeny such as *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 and *People v. Eastman* (1993) 13 Cal.App.4th 668, 676-677, holding that a defendant is guilty of transporting drugs even if he was only transporting drugs intended for his own personal use (and thus not for sale to others). (See Assem. Com. on Public Safety, coms. on Assem. Bill No. 721 (2013-2014 Reg. Sess.) Apr. 15, 2013, pp. 2-3; see also Sen. Com. on Public Safety, coms. on Assem. Bill No. 721 (2013-2014 Reg. Sess.) June 10, 2013, pp. 4-5; accord, *Eagle*, *supra*, 246

Cal.App.4th at p. 278 ["[t]he amendment explicitly intended to criminalize the transportation of drugs for the purpose of sale and not the transportation of drugs for nonsales purposes such as personal use"].) Nothing in that purpose undermines *Rogers'*s other holding that it is possible for a person to transport drugs without possessing them.

And although the language in the committee report could be read to suggest that a person is guilty of transporting drugs only if he is also in possession of them, that suggestion is contrary to the decades of precedent cited above. Had the Legislature meant to overturn this precedent, it would have amended the statute to add a possession requirement. (Accord, *Juan G. v. Superior Court* (2012) 209 Cal.App.4th 1480, 1494 [courts will not infer a legislative intent to supersede "long-established principles of law" absent a clear statement or necessary implication].) The Legislature did not so amend the statute, and we must give the statutory text the Legislature *did* adopt dispositive weight because it is the *statute's* """language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports . . . ." [Citation.]'" (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 826-827.)

Second, and relatedly, defendant asserts that our Legislature's inclusion of a "for sale" requirement for transportation means that transportation and possession now both have a "for sale" element. This observation is accurate, but unhelpful. What matters is not whether an offense and its necessarily included offense share one or more elements (as they always will). Instead, what matters is whether it is possible to commit all elements of the greater offense without committing all elements of the lesser offense. Here, it is.

Third, defendant cites language in several cases suggesting that possession is a lesser included offense of transportation when the possession is incidental to the transportation. (E.g., *People v. Kilborn* (1970) 7 Cal.App.3d 998, 1003; *People v.*

Richardson (1970) 6 Cal.App.3d 70, 78; *People v. Johnson* (1970) 5 Cal.App.3d 844, 847.) However, our Supreme Court in *Reed* noted that "[t]he continuing validity of the rule stated in these old cases is dubious" (*Reed*, *supra*, 38 Cal.4th at p. 1228, fn. 2), and we agree. The focus of the inquiry into greater and lesser included offenses when both are charged is the elements of the offenses, not whether the two crimes happen to be incidental to one another in any given case. The overlap in any given case is addressed by Penal Code section 654 by staying multiple punishments for the same acts or acts incidental to one another; it does not require that one of the convictions be vacated.

Fourth, defendant hints that our analysis should be different because the judicially crafted exception to the general rule prohibiting convictions for a crime and necessarily included lesser offenses has constitutional moorings because it protects against violations of double jeopardy. We disagree. Our Supreme Court has frankly admitted that the reason for the exception is "unclear." (*Pearson*, *supra*, 42 Cal.3d at p. 355.) Although the courts' concern about being doubly convicted for the same act ostensibly raises some of the same concerns that underlie the protection against double jeopardy, the double jeopardy guarantee itself (1) """protects against a *second prosecution* for the same offense after acquittal"""; (2) """protects against a *second prosecution* for the same offense after conviction"""; and (3) """protects against multiple punishments for the same offense."""" (*People v. Sloan* (2007) 42 Cal.4th 110, 120-121, quoting *Brown v. Ohio* (1977) 432 U.S. 161, 165.) The first two are not implicated when a defendant only endures one prosecution, and the last is addressed by the bar against double punishment contained in Penal Code section 654. What is more, even if the judicially crafted exception to the general rule did have constitutional underpinnings, defendant has not articulated why that would alter how courts have been applying that exception for decades.

Lastly, defendant argues that it is impossible for a person to transport drugs for sale without, at a minimum, aiding and abetting the possession of those drugs for sale by whomever he is transporting, and therefore possession for sale is always a lesser included offense of transportation for sale. However, defendant waited until his reply brief on

appeal to present this argument, so it is not properly before us. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219 [“‘arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party’”].) It is without merit in any event. A person aids and abets a crime only if (1) he knows of the actual perpetrator’s unlawful purpose, (2) he, by his act or advice, aids, promotes, encourages or instigates the actual perpetrator’s commission of that crime, and (3) he acts with the intent or purpose to commit, encourage or facilitate the actual perpetrator’s commission of that crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) As these elements indicate, an aider and abettor’s liability is tied to the specific crime he aids and abets. Because a defendant who drives another person exclusively possessing drugs to a drug deal does not necessarily aid, promote, encourage or instigate that person’s *possession*, the defendant is not, by virtue of transporting that person alone, guilty of possessing the drugs on an aiding and abetting theory.

II. Mistrial

Defendant also contends that both of his convictions must be overturned because the People’s rebuttal narcotics expert gave testimony that, although stricken by the trial court, was so prejudicial that it required a mistrial even though defendant did not ask the court for one.

A. Pertinent facts

In its rebuttal case, the People called a second narcotics expert who opined that defendant possessed the 9.997 grams of methamphetamine for sale and not for personal use. On cross-examination, defense counsel had the following colloquy with the witness:

Q: Did you do any follow-up investigation in this case?

A: Yes, sir.

Q: What did you do?

A: The main thing that I [did] is I listened to jail phone calls . . . [¶] [Defendant] actually bonded out very quickly and didn’t make any calls,

> but he was—would come up oftentimes, and phone calls from people that were in custody, different gang members and narcotics . . .

Defense counsel immediately objected to the answer as "non-responsive," and at sidebar asked the trial court to "excuse the jury and admonish the [witness]" not to interject inflammatory comments in front of the jury. The court refused to admonish the witness because the witness's answer "was responsive to [defense counsel's] question." The court nevertheless sustained the objection, and instructed the jury that "[t]he last answer is stricken. You're not to consider it for any purpose whatsoever. Disregard the answer entirely." At the close of trial, the court also gave the standard instruction providing that "[i]f [the court] ordered testimony stricken from the record, you must disregard it and not consider that testimony for any purpose."

B. Analysis

As a threshold matter, defendant forfeited the argument that the trial court erred in not granting a mistrial because he never asked for one. (*People v. Chatman* (2006) 38 Cal.4th 344, 368 [defendant may not argue on appeal that "the court should have granted a mistrial he did not request"].)

Defendant's claim fails on the merits as well. A witness's volunteered statement may trigger a mistrial if it causes """"prejudice . . . incurable by admonition or instruction."""" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 955, quoting *People v. Collins* (2010) 49 Cal.4th 175, 198; *People v. Ledesma* (2006) 39 Cal.4th 641, 683.) "Ordinarily," however, "a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction." (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834; accord, *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935 [it is only in "exceptional case[s]" that prejudice from an improperly volunteered statement cannot be cured by jury admonition].) We review a trial court's decision to strike improper testimony and instruct the jury to disregard that testimony instead of declaring a mistrial for an abuse of discretion. (*People v. Clark* (2011) 52 Cal.4th 856, 990.)

This is not one of the "exceptional" cases in which the trial court abused its discretion in choosing to strike evidence rather than grant a mistrial. The expert testified only that defendant's name "would come up oftentimes" in conversations by gang members and possibly persons involved in "narcotics" (we do not know who, because defense counsel cut off the witness by objecting). There was no evidence of the capacity in which defendant's name came up, and no hint that defendant was himself a gang member. What is more, the court twice admonished the jury to disregard the testimony, and we generally presume that jurors obey such instructions. (*People v. Jackson* (2016) 1 Cal.5th 269, 352.)

Defendant responds that (1) gang evidence is different, and once mentioned, it cannot be removed from a jury's mind by a mere admonition, and (2) *People v. Bentley* (1955) 131 Cal.App.2d 687, 690-691, overruled on other grounds by *People v. White* (1958) 50 Cal.2d 428, and *People v. Hill* (1998) 17 Cal.4th 800, 845-846 dictate reversal. We disagree with both arguments. As explained above, the witness did not indicate defendant was a gang member; the witness said defendant's name came up in jailhouse calls among gang members. The connection to gangs is fleeting, tangential, and not of a type that an admonition is powerless to cure. *Bentley* and *Hill* involved far more egregious acts of witness misconduct than was present here: In *Bentley*, a prosecution witness during direct examination offered that the defendant on trial for child molestation had previously been investigated for child molestation (*Bentley*, at pp. 690-691); in *Hill*, the prosecutor engaged in "serious, blatant and continuous misconduct" throughout the trial (*Hill*, at p. 844).

DISPOSITION

The judgment is affirmed.

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_____, J.

HOFFSTADT

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST