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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JORGE LEON CAZAREZ, Defendant and Appellant.	B269912 (Los Angeles County Super. Ct. No. BA436846)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Abzug, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was charged with and convicted of possession for sale of a controlled substance (Health & Safety Code, § 11351).[1] He was sentenced to two days in county jail and placed on probation for three years. The jury was presented with evidence that when appellant was stopped by police officers after violating traffic laws, he was found in possession of a BB gun, along with two packages of cocaine, hundreds of dollars, dozens of baggies and a digital scale. On appeal, he contends the trial court abused its discretion by allowing evidence that he was carrying the BB gun in the trunk of his car. Finding no error, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

A. *Pretrial Motion to Exclude*

In pretrial proceedings, the defense objected to the introduction of the BB gun, as well as a ski mask found near it. The court initially reserved judgment, because the prosecutor did not know whether his narcotics sales expert would rely on either the gun or the mask to support his opinion that the cocaine found in the car was possessed for sale. A day later, the prosecutor informed the court that his expert believed the gun was indicative of sales because dealers often have guns to protect against being robbed of drugs and money.[2]

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[1] Appellant was also convicted of driving a motor vehicle without a driver's license (Veh. Code, § 12500, subd. (a)). That conviction is not at issue in this appeal.

[2] The expert saw no relevance to the mask.

Defense counsel did not dispute the relevance of the evidence, but objected "under [Evidence Code section] 352," stating the gun was "inflammatory" and "more prejudicial than probative" because it "ma[de] it look like [appellant] [was] . . . committing much more serious crimes . . . than simply possessing drugs for the purposes of sale."

The court ruled that evidence of the gun was admissible, initially observing that "the association of . . . violence with drug trafficking is well known," and that "by statute, drug trafficking is enhanced if a weapon is used." Accordingly, it was not "a stretch" that "the expert . . . also would agree that the fact that a weapon was found in close proximity to the narcotics is an indication of sale[s], since narcotics are a valuable commodity," and the evidence was probative of guilt. The court further noted that "in terms of the inflammatory nature of the weapon, it's a BB gun. It's not like he ha[d] a semi-automatic weapon, which would be more inflammatory than a BB gun. And on top of that, the prejudice, I believe, . . . the defense will [meet or] attempt to meet it by the testimony of witnesses that say there's an innocent explanation for the BB gun."

B. *Evidence at Trial*

1. *Prosecution Evidence*

On Monday, May 25, 2015, at approximately 7:00 p.m., three patrolling Los Angeles Police Department officers, John Kent, Jim Costello and Jennifer Grasso, noticed a silver Volkswagen Jetta travelling north at a high rate of

speed on Honduras Street near 48th Place in Los Angeles. It turned onto 46th Street and stopped behind a red truck. Both vehicles drove off together at a rapid pace, making a right turn through a stop sign onto Compton Avenue. The vehicles made two left turns as the officers activated their vehicles lights and sirens and pulled the Jetta over. The red truck sped away. Appellant was alone inside the Jetta. He did not have a driver's license, registration or insurance. After he exited the vehicle, two small baggies carrying an off-white substance were found on or near the driver's seat. After testing, the baggies were found to contain 2.04 grams of cocaine. Appellant did not appear to be under the influence.

When the vehicle was searched after appellant's arrest, the officers discovered approximately 80 unused ziplock baggies and a digital scale in the center console, inside a black vinyl satchel. They found two ziplock baggies in the glove compartment containing a substance that looked like rock cocaine.[3] In the trunk, they found a BB gun that looked like a semi-automatic handgun, but no ammunition for it. Appellant had $614 on his person consisting of three $100 bills, one $50 bill, twelve $20 bills, one $10 dollar bill, two $5 bills and four $1 bills. He also had a cell phone. The officers found no paraphernalia for consuming cocaine.

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[3] The contents of these baggies were later tested and found not to be a controlled substance. The material appeared to be a cut-up pill of some kind, and weighed 1.72 grams.

The prosecutor's narcotics sales expert, Officer Marco Oropeza, when presented with a hypothetical that summarized the evidence, opined that appellant possessed the narcotics for the purpose of sale. The fact that appellant had in his possession more than a gram of cocaine, packaged in different baggies, and that he also had over 50 unused baggies, the digital scale and a gun, supported the conclusion that the cocaine was possessed for sale rather than personal use.[4] The denominations of the bills also supported the inference that he was selling cocaine, which normally was sold a gram at a time and had a street value of $20 to $30 per gram. Officer Oropeza opined that the small quantity of non-narcotic material in the baggies found in the glove compartment could have been intended as an additive to mix with the cocaine and increase the sales profit. To Officer Oropeza, the most important factors in determining appellant's intent were the large number of baggies and the scale. In Officer Oropeza's experience, dealers sometimes bring their scales along to assure the buyer that he or she is getting the represented amount. It is uncommon, however, for buyers to carry scales. Nor it is common for a buyer to carry around multiple small baggies.

Specifically with respect to the BB gun, Officer Oropeza stated: "Narcotics dealers have used guns to protect themselves from being ripped off or [losing] . . . their

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[4] The officer found no significance to the absence of a large quantity of drugs because a dealer might sell out or leave his or her home with an amount that has been pre-ordered.

money. So if a narcotics user [sic] has a gun and he's selling to a customer, and -- you know this is a fake gun, but the user will not know it's a fake. So word on the street would be that, oh, yeah, he carries a gun. It would give that seller a little . . . less of a chance [of] . . . getting robbed or having someone take his money. [¶]. . .[¶] . . .If they know he carries a gun, [buyers are] not [going to] think about taking his money or stealing his drugs." Oropeza believed the absence of ammunition for the gun was irrelevant because the point of carrying the gun was to intimidate with a weapon that appeared to be real.

2. *Defense Case*

Rosa Perez, the custodian of records for appellant's employer, a meat packing plant, testified that appellant had been working for the company since November 2013. The job required him to operate dangerous machinery. The company drug tested when employees were hired, when they were injured and whenever an employee was observed behaving oddly. Perez had observed nothing about appellant's behavior at work to indicate he should drug test. On May 15, 2015, appellant was paid $424.77 by check. On May 22, three days before his arrest, he was paid $439.99 by check. An entity unaffiliated with the employer sent a van to the employer's location on payday (Fridays) to cash employee checks.

Appellant's mother, Braulia Camacho, testified that she had seen appellant and his sister taking turns shooting

the BB gun at plants in the yard sometime before Christmas. She told appellant to throw the BB gun away. Camacho had never seen appellant under the influence. Nor had she ever observed him to be overly-excited or unable to sleep at night.

Appellant testified on his own behalf. He said he had been a regular user of cocaine for about a year, consuming about a gram a week but only when he went out on the weekends. He bought the BB gun not long before his arrest. When his mother told him to get rid of it, he put it in his car trunk and left it there. Appellant always carried the gun and his cocaine in his car to keep them out of his mother's house. The Friday before his arrest, he cashed his check from the van at work. He did not have a bank account, and tried to carry less than $100 on his person. He was carrying more the night of May 25 because he was on his way to have his car fixed and needed cash to pay the mechanic. He planned to leave the car with the mechanic overnight and take a bus home, leaving the cocaine and gun in the trunk. When the officers first observed him on Honduras Street near 48th Place, he was near a friend's house. He realized his friend was not home and began to drive to the mechanic, who was located on 69th Street. He saw the officers following him and pulled a baggie containing cocaine from the coin box in his car planning to throw it away, but changed his mind and left it in his lap. He denied knowing who was in the red truck.

Appellant denied ever selling cocaine. He said he bought cocaine from a dealer who worked near a park, and

acquired the scale because he thought he was being "ripped off" and wanted to weigh his drugs after purchasing them. He had recently complained to the dealer about the quality of some cocaine he had purchased and was given a new batch. He had begun purchasing "eight ball[s]" -- approximately three and a half grams -- because the price was better than buying a gram at a time. That amount lasted him three weeks. He bought the baggies to divide his purchase into separate units in order to regulate his usage. In addition, he used the drug by dipping a key into the baggie and inhaling the powder cocaine from the key, and he found it easier to withdraw cocaine in that manner from a baggie.

The defense expert, John Jenks, testified that a new user of cocaine might appear agitated, talkative and fidgety, but that the signs of usage became less obvious over time, as the user's body developed a tolerance. Jenks was asked whether a person who used cocaine two or three times a month and was found with two packages of cocaine containing 2.04 grams and 1.94 grams, $614 in cash, the digital scale and a BB gun was a seller of cocaine. Jenks opined that such a person was not a seller because the amount was small, users commonly break down larger quantities into separate packages for their own use, and the amounts in the packages were not the quantities generally sold. Jenks further stated that drug users might possess scales for numerous reasons, including to check the weight after purchasing drugs. In Jenks's view, the cash held by

appellant was not indicative of sales because he had too many large bills. Jenks attributed no significance to the non-narcotic substance in the baggies in the glove compartment. He believed a seller would be likely to have multiple cells phones, not just one.

3. *Pertinent Closing Argument*

In closing, the prosecutor reminded the jury that Officer Oropeza had said "the two biggest points were the scale and the baggies," and that these two items alone "pushed it clearly into the range of sales." He next stressed the "large amount of cash" carried by appellant. Lastly, he discussed the gun, stating "If you're [selling drugs] . . . by yourself, people could take [drugs and cash] . . . from you. So having some way to ward off someone who may want to rob you or take your things, it's helpful for people who do sales." He argued there might be a reasonable explanation for each of the items individually but that "taken all together, it's no longer reasonable to believe that each one of them has . . . an innocent explanation."

The prosecutor pointed out that there was no confirming evidence appellant used drugs, as neither his mother nor Perez had ever observed him under the influence. He discussed the implausibility of appellant's claim to have been on his way to a mechanic where he intended to leave his car: "[H]e has his drugs. And they're not all packed up in a nice little attaché to be put in the trunk or taken with him on the bus. There's some in his coin

holder. . . . There's some in the glove compartment and there's a gun in the back." He also pointed out that the mechanic was located some distance from where appellant was stopped, and that appellant had not been driving in the right direction to get there. He described appellant's explanation for having the cash and being in the area as "a lie, trying to weave all this together," and questioned why appellant had gotten on the stand and related "this impossible-to-believe story" about being on his way to a mechanic. He argued in conclusion: "When you take a look at all of the evidence in totality and you evaluate . . . what is reasonable, you'll find that each one of the things that are pointed out points to possession for purposes of sale . . . ."

Defense counsel conceded that the prosecution had proven the majority of the elements of the crime of possession for sale: that appellant possessed a controlled substance, that he knew of its nature, and that the amount was usable. She contended that the evidence did not support the inference that he possessed the cocaine with intent to sell.

DISCUSSION

Appellant contends the court abused its discretion in allowing the jury to hear about the BB gun found in the trunk of his car. For the reasons discussed, we disagree.

"'"'[A]ll relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.]'"'" (*People v. Richardson* (2008) 43 Cal.4th 959,

1000-1001.) Relevant evidence is defined as """"evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."""""" (*Id.* at p. 1001, quoting Evid. Code, § 210.) """"The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts . . . . [Citations.]" [Citation.]""""" (*People v. Richardson*, *supra*, at p. 1001.)

Relevant evidence is subject to exclusion under Evidence Code section 352 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." Proffered evidence's probative value "'depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238.)

"'[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) An Evidence Code section 352 objection will fail "'[u]nless the dangers of undue prejudice, confusion, or time consumption, "'substantially outweigh"' the probative value of relevant evidence . . . .'" (*People v.*

Doolin (2009) 45 Cal.4th 390, 439.) The prejudice contemplated by Evidence Code section 352 "'is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant.'" (*Id.* at p. 438.) "'In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.'" (*Id.* at p. 439.)

Trial courts have broad discretion in determining the admissibility of evidence when an objection is made under Evidence Code section 352. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170; *People v. Jones* (2013) 57 Cal.4th 899, 949.) The court's exercise of discretion will not be disturbed except on a showing that it was exercised "'in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

Appellant was charged with possession of cocaine for sale in violation of Health and Safety Code section 11351. In order to establish his guilt, the prosecution was required to

prove he "'possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. [Citation.]'" (*People v. Harris* (2000) 83 Cal.App.4th 371, 374, quoting *People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.) Appellant's knowledge of the presence of the cocaine and its character was conceded. His intent was the key issue at trial. As he had not been caught in the act of selling drugs, his intent could be established only by circumstantial evidence. (See *People v. Harris*, *supra*, at p. 374.) The dual packets of cocaine, the scale and the dozens of baggies found in his car and the currency he had in his possession were circumstantial evidence of intent to sell. The BB gun also tended to "logically, naturally and by reasonable inference" prove the material fact of intent to sell. The jury could see it looked like a real weapon. As Officer Oropeza explained, persons selling drugs are in danger of being "ripped off" by anyone who knows they are likely to be carrying large sums of money or a significant quantity of valuable drugs. Because of this, sellers carry weapons -- real or authentic-looking -- in order to dissuade potential thieves. It was reasonable to infer that appellant possessed the BB gun to facilitate his ability to safely engage in drug sales, and contributed to the conclusion that he was a seller, not a mere user as he claimed.[5] The fact that the gun was in the trunk at the time of the stop did not diminish

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[5] We observe that appellant's expert did not contradict Officer Oropeza. He did not testify that drug dealers do not carry guns for purposes of protection or intimidation.

its significance, as Officer Oropeza did not suggest a dealer would need to keep a weapon close at hand in all situations. Once buyers and others "know [the seller] carries a gun," they will think twice about robbing him, and the weapon will have produced the desired effect.

On the other side of the section 352 equation, the likelihood that evidence of the gun would create undue prejudice, confuse the issues, mislead the jurors or inflame their emotions was negligible. It was not a dangerous weapon, and it was not loaded. There was no suggestion it was used for anything other than backyard target practice and deterring thieves or robbers. The prosecutor did not suggest appellant was a dangerous person because he carried the gun, or that he had committed more serious crimes than possession of drugs for sale. He argued merely that appellant's possession of the gun, along with other instruments used by drug dealers, was evidence that he was a drug dealer plying his trade when interrupted by police officers.

In short, the trial court did not err in admitting evidence of the BB gun. Moreover, even had we found error, we would not reverse. "We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.'" (*People v. Earp* (1999) 20 Cal.4th 826, 878, quoting Evid. Code, § 353, subd. (b).) It is unlikely that the jury would have reached a different verdict absent

the evidence of the gun. The presence of the scale, the dozens of baggies, the dual packets of cocaine, and the potential additive in separate baggies, as well as the absence of a credible explanation from appellant for why he was speeding through the area on a weeknight carrying two baggies of cocaine in his lap, would have persuaded the jury even in the absence of the evidence of the gun.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.