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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

AVERY MAURICE JONES,

Defendant and Appellant.

B268920

(Los Angeles County  
Super. Ct. No. NA101315)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Andrea S. Bitar, 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, Assistant  
Attorney General, Margaret E. Maxwell and Timothy L. O'Hair,  
Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Defendant Avery Maurice Jones appeals his conviction for sale of a controlled substance, asserting that the trial court's erroneous admission of hearsay statements resulted in reversible error. Defendant also requests this Court to review the trial court's ruling on his *Pitchess* motion. We affirm because admission of the statements, if error, was harmless, and the trial court did not abuse its discretion in ruling on the *Pitchess* motion.

## **FACTS AND PROCEDURAL BACKGROUND**

### **1. The Drug Buy Operation**

On February 26, 2015, several Long Beach police officers conducted an undercover drug buy operation at MacArthur Park in Long Beach. For the operation, the officers used a confidential informant (CI), who the Long Beach Police Department has used for over 10 years to conduct similar undercover drug buys. To purchase the drugs, Detective Destefano provided the CI with a \$20 bill, which the detective had previously photocopied and recorded the serial number for this drug buy operation. Equipped with a camera recording audio and video, the CI approached Saroeun Lanh at the park and asked for \$20 worth of crystal methamphetamine. Lanh took the bill and left to obtain the drugs, providing the CI with his cellular phone to serve as collateral while he was gone.

The CI watched Lanh walk over to Defendant. Officer Kirk, who was in the park conducting surveillance on the drug buy and in contact with the officers on the operation, also observed Lanh approach Defendant. Officer Kirk observed Lahn sit on a park bench next to Defendant, where the two made a "hand-to-hand exchange." Following the exchange, Lahn walked

back to the CI. Officer Kirk maintained visual contact with Defendant until the time Detective Barajas detained Defendant.

Upon returning, Lanh gave the CI a bag of crystal methamphetamine. The CI told Lanh that the bag appeared to be worth only \$10 and not the \$20 he paid. Lanh explained that Defendant needed to get more crystal methamphetamine and would provide the other \$10 worth of drugs the next day. Lanh identified Defendant as the one he got the drugs from by describing what Defendant was wearing and where he was sitting.

At that point in time, a third individual, who called himself Reefer, approached the CI and Lanh. Reefer asked the CI if he needed another “dime,” i.e., \$10 worth of methamphetamine. The CI responded in the affirmative, indicating that he had paid \$20 and only received \$10 worth of drugs. Reefer then stated that he worked “with that guy . . . the guy you got [the drugs] from.” The CI asked if Reefer meant the black, bald man, and Reefer said yes, “somewhat bald.” Reefer told the CI that Defendant had to “re-up,” meaning he needed to obtain more drugs. The CI then asked where was his \$10. Reefer stated that Defendant will “give it to you tomorrow.” Reefer reassured the CI that Defendant “don’t do anybody dirty” and that Defendant is “going to get you more.” The CI then ended the transaction and left the park. The CI then went to Officer Destefano, and gave him the methamphetamine he received from Lanh.

The police officers immediately detained Lanh and Defendant. Officer Barajas detained and searched Defendant, finding a \$20 bill on his person. The \$20 bill recovered from Defendant matched the bill Detective Destefano had given the CI to purchase the drugs, as confirmed by the serial numbers. The

police also found a digital scale, a cellular phone, and codeine pills on Defendant's person. Defendant did not have a prescription for the codeine. A search of Lanh revealed a bindle of crystal methamphetamine. The codeine pills and the crystal methamphetamine obtained by the CI and recovered from Lanh were all usable amounts.

## **2. Trial on Drug Sale and Possession**

On March 30, 2015, an information was filed charging Defendant with one felony count of sale of a controlled substance pursuant to Health and Safety Code section 11379, subdivision (a), and one count of misdemeanor possession of a controlled substance under Health and Safety Code section 11350. On May 20, 2015, Defendant filed a motion for pretrial discovery seeking personnel information regarding Officers Destefano and Barajas, pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and *People v. Mooc* (2001) 26 Cal.4th 1216. An in camera hearing was held on the motion on June 19 and 22, 2015.

The jury trial began October 6, 2015. During the prosecution's direct examination of the CI, Defendant objected on hearsay grounds to testimony regarding the CI's conversation with Reefer. At sidebar, the prosecution first argued that the out of court statements made by Reefer were not hearsay because they were not testimonial. The prosecution asserted that the statements were offered to show why the CI did not try to get more drugs during the transaction and to further connect Defendant to the crime. The prosecutor argued that the statements were part of the drug buy transaction and that Reefer's statements should be admitted as a co-conspirator's statement. Finally, the prosecutor argued that the testimony

was admissible as a statement against Reefer's penal interest. Defendant argued there was no evidence that Defendant intended to enter into a conspiracy with Reefer and asserted the statements were being used as hearsay. Ultimately, the court found that the prosecutor did not make a prima facie showing that there was a conspiracy and found the testimony inadmissible.

Still at sidebar, defense counsel then informed the court that the audio and video recording of the drug transaction, which the prosecutor would play for the jury, included a portion that would need to be muted because it contained Reefer's inadmissible hearsay. The court responded that it was not going to take a break for Defendant to redact the audio, and that the parties needed to be prepared.

After the sidebar, the CI resumed testifying and the prosecutor played the unredacted recording of the drug transaction. The prosecutor also provided a transcript of the conversation to the jury, which in relevant part stated:

[Reefer]: You need another dime?  
[the CI]: Yeah dawg. [*Sic.*]  
[Reefer]: Alright, I work with that guy so . . .  
[the CI]: Who . . . who . . . who?  
[Reefer]: The guy you got it from.  
[the CI]: The black dude?  
[Reefer]: Yeah.  
[the CI]: With the bald head?  
[Reefer]: Not not . . . it's somewhat bald yeah.  
[the CI]: With the beige sweater on right?  
[Reefer]: The guy with the jacket on.  
[the CI]: He told me he only gave me a dime. Man.  
I gave him a dub.  
[Reefer]: He gotta re-up. [*Sic.*]  
[the CI]: Then where's my ten at?

[Reefer]: I thought was the . . .  
 [Lanh]: Dime only . . .  
 [the CI]: You want me [to] approach the guy that  
 he dropped on and uhhh . . . just get a[n]  
 eye on him? Is he still over there ok . . .  
 yeah I saw the guy . . .  
 [Reefer]: He'll give it to you tomorrow bro.  
 [the CI]: Ok ok. Alright.  
 [Reefer]: He don't do anybody dirty.  
 [the CI]: Alright, alright yeah both of them are.  
 The Asian guy and the black guy. Yeah.  
 Alright. Okay. Alright. Alright. Bye.  
 Man my girl is trippin' dawg. [*Sic.*]  
 [Reefer]: He's going to get you more.  
 [the CI]: I'll be right back man. What's your name G?  
 [Reefer]: Reefer.  
 [the CI]: Reefer? Mes man. [*Sic.*]  
 [Reefer]: What is it?  
 [the CI]: Mes. [*Sic.*] I'll be right back when I get  
 that . . .  
 [Reefer]: Hey . . . eh . . . for real he's gonna [*sic*] get  
 you some . . .

On October 7, 2015, the jury reached a guilty verdict on both counts. The trial court sentenced Defendant to the midterm of three years in state prison for count 1. The trial court imposed an additional six years' prison time as enhancements, to run consecutively, due to appellant's admission of prior crimes. This included: three years for a prior conviction under Health and Safety Code section 11352, one year each for admission of convictions under section 487, subdivision (c), section 487.2, and section 459. The trial court also imposed a sentence of 364 days for count 2, to run concurrently.

## DISCUSSION

Defendant appeals the court's admission of the statements by Reefer via the recording and transcript. Defendant also requests this court to independently review his *Pitchess* motion.

### A. Admission of the Hearsay Was Harmless Error

Assuming without deciding that the third party's out of court statements were inadmissible hearsay,<sup>1</sup> we conclude that their admission was harmless. The erroneous admission of evidence in violation of state law is not reversible unless it has resulted in a miscarriage of justice, measured under the test of *People v. Watson* (1956) 46 Cal.2d 818.<sup>2</sup> (*People v. Partida* (2005) 37 Cal.4th 428, 439; see Evid.Code, § 353; Cal. Const., art. VI, § 13; *People v. Breverman* (1998) 19 Cal.4th 142, 184-185 [the *Watson* reasonable-probability test "usually covers error under California law" and the *Chapman v. California* (1967) 386 U.S. 18, harmless-beyond-a-reasonable-doubt test "generally applies to error violative of the United States Constitution"].) A miscarriage of justice occurs when it appears reasonably probable that the verdict would have been more favorable to Defendant in the absence of the alleged errors. (*Watson*, at p. 836; *Partida*, at p. 439.) It is Defendant's burden to prove prejudice. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

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<sup>1</sup> We note only the first part of Reefer's statements, identifying Defendant, appears to be hearsay.

<sup>2</sup> Defendant does not complain of federal constitutional error, e.g., confrontation clause violations.

Here, ample evidence outside of the statements made by Reefer supported Defendant's conviction. The CI and police officers observed and testified about the drug transaction between the CI, Lanh, and Defendant. The CI testified to seeing Lanh go to Defendant to obtain the drugs after the CI provided Lanh with the prerecorded \$20 bill. Lanh also made statements to the CI, which were admitted in the recording and transcript, identifying Defendant as the person who sold the drugs.

Officer Kirk, who was surveilling the park and was aware of the transpiring events, testified that he observed Lanh walking through the park toward Defendant. Officer Kirk also observed Lanh sit on a bench next to Defendant and make a hand-to-hand transaction. After this hand-to-hand exchange between Lanh and Defendant, Lanh returned to the CI and gave him crystal methamphetamine. Detective Destefano testified that it was common to use a middle-man, like Lanh, in a drug transaction to distance the seller from the sale.

Officer Barajas testified that he discovered a \$20 bill on Defendant's person and found that it was the same prerecorded \$20 bill that was given to the CI, as confirmed by the bill's serial number. Officers also testified that Defendant possessed a digital scale, which is commonly found on people who sell drugs, as well as codeine pills without a prescription.

Thus, substantial evidence in the form of testimony and items removed from Defendant's person strongly supported Defendant's conviction, even without Reefer's minimal statements connecting Defendant to the crime. It was not reasonably probable that the verdict would have been more favorable to Defendant in the absence of the hearsay. The statements by Reefer connecting Defendant to the drug sale were



merely corroborative of the statements by Lanh, the CI's testimony, the testimony by officers conducting the operation, and the physical evidence found on Defendant.

Defendant argues that there was no evidence to place the drugs in Defendant's hands, and therefore there was a "fatal gap in the evidence," similar to the facts in *People v. Blackshear* (1968) 261 Cal.App.2d 65, 68 (*Blackshear*). In *Blackshear*, an inexperienced officer drove a confidential informant to a location where the officer had previously purchased narcotics. The officer handed the informant a \$10 bill before they got out of a vehicle. The informant approached the defendant, engaged in a brief conversation with him; the officer noticed their hands meet in what he assumed to be an exchange from his vantage point several feet away. After the officer and informant returned to the vehicle, the informant handed the officer a balloon containing heroin. The officer did not search the informant on the day of this alleged transaction. (*Id.* at pp. 66-67.) Two weeks later, the officer identified the defendant's mug shot while looking through pictures of known narcotic users and peddlers. (*Id.* at p. 66.) The defendant argued and the trial court agreed, "there was a fatal gap in the evidence. . . . [T]he officer did not search the informant before and after the transaction, that the officer did not see what was exchanged, and that the informant was not in the officer's view when the officer went to the driver's side of the car, thus making it possible for the informant to pocket the \$10 and produce the narcotic-filled balloon himself." (*Id.* at p. 68.)

The instant case is readily distinguishable. Here, the CI was searched before the sale and returned to the police officers immediately after the drug deal. Officer Destefano attested that the informant was not carrying drugs or money prior to being

given the prerecorded bills. Furthermore, the police gave him a prerecorded bill to complete the transaction and this bill was in Defendant's possession following the drug buy. The CI also wore a recording device, which documented the transaction that occurred and corroborated the testimony from the CI and the officers. The CI and multiple officers monitoring the drug buy testified at length about the circumstances of the drug buy operation and the precautions taken to identify the drug dealer, i.e., searching the CI before the transaction, using prerecorded bills, and monitoring the situation with multiple officers in the park area. Facts like those in *Blackshear*, which led to uncertainty regarding the origin of the drugs and whether any transaction took place, did not exist here.

As explained above, it is clear based on testimony and physical evidence that it was not reasonably probable that the verdict would have been more favorable to Defendant in the absence of the hearsay. Based on the foregoing, we conclude there was no reversible error and affirm the court's judgment.

**B. *Pitchess* Motion**

Defendant filed a motion seeking discovery of the law enforcement personnel records of Detectives Destefano and Barajas. (See *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531.) The trial court conducted an in camera examination of the officers' personnel records.

On appeal, Defendant asks this court to conduct an independent review of the sealed records of the trial court's hearing on his *Pitchess* motion. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1229; *People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366.) The People do not oppose the request. We will not disturb a trial court's ruling on a *Pitchess* motion absent an abuse of

discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

Having reviewed the *Pitchess* record, we find no procedural or substantive error in the trial court's handling of the motion or in its ruling. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1208-1209.)

### **DISPOSITION**

The judgment is affirmed.

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GOSWAMI, J.\*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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