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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. FRANCISCO GUZMAN et al., Defendants and Appellants.	B231904 (Los Angeles County Super. Ct. No. VA115586)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Judgments are affirmed and remanded.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Guzman.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Teodoro D. Mesa.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant Leonel Valencia.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Israel Oseguerra.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Francisco Guzman, Teodoro D. Mesa, Leonel Valencia, and Israel Oseguera, appeal the judgments entered following their convictions for possession of methamphetamine for sale, possession of marijuana for sale (Guzman only), transportation of or offering to sell methamphetamine, possession of a concealed firearm (Oseguera only), with arming (Oseguera only) and drug weight enhancements. (Health & Saf. Code, §§ 11378, 11359, 11379, 11370.4; Pen. Code, §§ [former] 12025, subd. (a)(2), 12022.)[1] The defendants were sentenced to the following prison terms: six years and eight months (Guzman); six years (Mesa and Valencia); and, nine years (Oseguera).

The judgments are affirmed; the matter is remanded for partial resentencing.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence*.

On June 3, 2010, the Los Angeles County Sheriff's Department was engaged in an undercover drug-buy operation involving two informants who were trying to purchase five pounds of methamphetamine. Defendants Mesa and Oseguera drove a pickup truck to a meeting with the informants at a donut shop. There, Mesa offered to sell the informants methamphetamine and directed them to follow the truck to a Taco Bell restaurant.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

At the Taco Bell, the informants met defendant Guzman, who had arrived in a green Jeep. While Oseguera remained in the pickup truck, Mesa and one of the informants, John Rosales, went with Guzman into the Jeep. Guzman drove about 300 feet and then showed Rosales a small amount of methamphetamine.[2]

"Q. And then what happened?

"A. I told them that's nothing. I am not looking for that. I want to see the five pounds.

"Q. And then what happened?

"A. They told me we'll call you later, so I just got off the Jeep. Me and [Mesa] got off. And we waited for awhile and then after that we followed [Guzman]. He told us to go back to Norwalk actually."

Rosales followed the pickup truck to 14533 Helwig Avenue in Norwalk. When he arrived, defendants Guzman, Mesa, Oseguera and Valencia were all there. Mesa and Oseguera walked with Rosales through a gate into the backyard. When Rosales asked "[W]here's the stuff," they said "[W]ell, we need to see the money." After further discussion Rosales agreed to bring the money. He drove off to meet with Detective Nicholas Acosta so he could pick up the cash.

Rosales was meeting with Acosta when Mesa called to say the drugs had arrived and Rosales should return to complete the sale. Meanwhile, a deputy who had been watching the Helwig Avenue house saw Valencia drive up in a white Jetta Volkswagen. Valencia went up the driveway and parked in the backyard. Valencia was the only occupant of the Volkswagen.

Rosales testified that when he returned to the Helwig Avenue address there was a white car in the backyard. Guzman opened the trunk and showed Rosales the methamphetamine. Rosales testified that when Guzman opened the trunk, Guzman,

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[2] Rosales testified Guzman showed him just an ounce or half an ounce of methamphetamine.

Mesa and Oseguera were standing right around him, and Valencia "was sitting somewhere on the side." There were no other men in the backyard except for the four defendants, none of whom appeared to be armed.

Deputy Kenneth Daily was in a plane flying over the Helwig Avenue address and conducting aerial surveillance. He saw the white Volkswagen drive into the yard and then he saw someone open the trunk. He heard a radio transmission from officers on the ground saying "a load of narcotics had arrived and that they were going to hit the house."[3] Within seconds, Daily saw officers moving in to make arrests. As they did, he saw two suspects flee:

"Q. What did you see?

"A. Some of the people complied. However, I saw two suspects run from the location.

"Q. And where did they run?

"A. They both ran north [and] . . . they climbed over a north wall to the property. And one of them went into a shed on the north side of the property that's just to the north of the structure. And then the second suspect turned west and went . . . towards I believe it's Madris, towards that street.

"Q. That's the next street over?

"A. Yeah, one street to the west."

Deputies Paul and Canfield discovered defendant Oseguera hiding inside an eight-by-ten foot metal shed located in the backyard of an adjacent residence. Oseguera was the only person inside the shed. Canfield testified there was a loaded nine-millimeter semiautomatic handgun on the floor of the shed next to where Oseguera had been crouching: "[Oseguera] was kneeling next to what appeared to be a paper barrel. And right where he stood up and came outside, the firearm was actually leaned up against the

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[3] Rosales testified he had already left the location before the arrest team arrived. It appears from Rosales's testimony that he walked back to his vehicle and made a phone call informing the waiting officers he had seen the methamphetamine in the Volkswagen.

paper barrel. It was right next to him." In addition, Oseguera had a loaded firearm magazine in his pants pocket. This magazine matched the recovered handgun.

A few minutes after the arrest team moved in, Valencia was apprehended as he emerged from the rear yard of a house on Madris Avenue.

The Helwig Avenue property consisted of two structures, a front house and a rear house which were joined by a common wall, but had separate entrances. In the rear house, police found pay/owe sheets in the living room, 15.6 grams of methamphetamine in a kitchen drawer, and 26 pounds of marijuana in a bedroom. Inside Guzman's bedroom in the front house, police found 58 grams of cocaine base. The methamphetamine in the trunk of the Volkswagen weighed 2,230 grams (about 4.9 pounds).

Detective Acosta opined the recovered methamphetamine was intended for sale and that its street value was approximately $100,000. He characterized the trafficking operation as "large scale, mid level sales of methamphetamine." The pay/owe sheets appeared to record transactions in the amount of $10,000, which would have been a reasonable sum "at that time and for that quality for a pound of methamphetamine." Acosta also opined the marijuana recovered from the back house, more than 25 pounds valued at $500 per pound, was also intended for sale.

2. *Defense evidence.*

Defendants Guzman, Oseguera and Valencia did not testify.

Guzman's girlfriend, Susanna Benitez-Ulloa, and her mother, Esperanza Benitez, testified they lived with Guzman and other family members in the front house at 14533 Helwig Avenue. Esperanza testified they did not rent the rear house and she didn't know who lived there. Susanna testified the two houses had separate backyards and there was a gate enclosing the rear house's backyard. However, she acknowledged she and other family members regularly used the backyard of the rear residence to access trash receptacles.

Susanna also testified there had not been any broken windows at the front house on June 3, 2010, and so far as she knew no one had arranged for any house repairs that day.

Defendant Mesa testified he went to the Helwig Avenue address that day in order to repair windows at the front house. Upon arrival, he parked and walked up to the house, examined the work he needed to do, and then telephoned the contractor he was working for to say he had arrived. The contractor told Mesa to wait for him to get there. As Mesa was walking back to his vehicle he was arrested by the police. He denied knowing any of the other defendants and he denied having gone to Helwig Avenue in order to sell drugs.

CONTENTIONS

1. There was insufficient evidence to sustain Guzman's conviction for possessing marijuana for sale.

2. There was insufficient evidence to sustain Valencia's convictions.

3. There was insufficient evidence to sustain Oseguera's conviction for carrying a concealed weapon.

4. The trial court erred by denying Oseguera's *Pitchess* motion.

5. The trial court gave the jury an erroneous uncharged conspiracy instruction.

6. The trial court failed to properly sentence defendants on a drug weight enhancement finding.

DISCUSSION

1. *There was sufficient evidence Guzman possessed marijuana for sale.*

Guzman contends there was insufficient evidence to prove he had been in possession of the marijuana discovered in the rear house.

a. *Legal principles*.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to

support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

"The elements of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug. [Citations.] Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. [Citation.] The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence." (*People v. Newman* (1971) 5 Cal.3d 48, 52, disapproved on other grounds by *People v. Daniels* (1975) 14 Cal.3d 857, 862.)

"Proof of opportunity of access to a place where narcotics are found will not, without more, support a finding of unlawful possession. [Citation.] But the necessary elements (that the accused exercised dominion and control over the drug with knowledge of both its presence and its narcotic character) may be established by circumstantial evidence and any reasonable inferences drawn from such evidence; and *neither exclusive possession of the premises nor physical possession of the drug is required*. [Citations.]" (*People v. Harrington* (1970) 2 Cal.3d 991, 998, italics added.) "As might be expected, no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic in a place to which he had access, but not exclusive access, and over which he had some control, but not exclusive control." (*People v. Redrick* (1961) 55 Cal.2d 282, 287.)

b. *Discussion*.

Guzman argues there was insufficient evidence he possessed the marijuana discovered in the back house because that house was a separate residence from the front house where he lived, there was no evidence he had resided in the back house, and there was no evidence anyone had ever seen him inside the back house. He points out the rear

house "was separate from the front. It was sparsely furnished. No documents were recovered from the rear house such as bills, letters, etc., which would indicate who resided at this unit." Guzman asserts the Attorney General's "argument that appellant was using the rear residence to store narcotics for the purpose of sale based on the present offense is inapposite because there is no nexus with the present transaction to anyone or anything contained in the rear residence."

We are not persuaded. Although there was no direct evidence connecting Guzman to the rear house, there was a wealth of circumstantial evidence. Although the two houses had separate entrances, there was a physical connection between them: they shared a common wall, a yard and a driveway. The pay/owe sheets recording $10,000 transactions established a nexus with the methamphetamine in the Volkswagen because Detective Acosta testified these records reflected sales of comparable methamphetamine. A police video taken at the time the back house was searched showed it was probably not being lived in; there were a couple of mattresses on the floor and almost no other furniture. Taken together with the absence of any personal documents in the back house, this evidence supported an inference the back house was not being used as a residence, but rather as a work space for the drug operation, i.e., a place to store and package illegal drugs, etc.

The evidence also tended to indicate Guzman had been playing a leading role in the attempted sale of the five pounds of methamphetamine. It was Guzman who first showed Rosales a small amount of methamphetamine and, after Rosales said he wanted much more than that, it was Guzman who directed him to the Helwig Avenue address in Norwalk. Guzman admitted to Detective Acosta that he lived in the front house at the Helwig Avenue address. When Valencia delivered the methamphetamine, he parked the Volkswagen in the yard right behind the front house. It was Guzman who opened the Volkswagen trunk to show Rosales the methamphetamine. More methamphetamine was found in the rear house, along with the 26 pounds of marijuana, and the pay/owe sheets recording $10,000-per-pound transactions for methamphetamine. Guzman does not contest his conviction for trafficking the five pounds of methamphetamine in the

Volkswagen. To believe he had no connection to the pay/owe sheets and the marijuana would have meant believing Guzman was dealing drugs from the front house at the same time that an entirely independent drug ring had coincidentally set up shop in his own backyard.

Hence, the evidence gave rise to the reasonable inference Guzman was in charge, either solely or jointly, of a drug trafficking operation being run out of the two houses at 14533 Helwig Avenue, and that the 26 pounds of marijuana was one of the products the operation was selling. There was sufficient evidence to sustain Guzman's conviction for possessing marijuana for sale.

2. *There was sufficient evidence to sustain Valencia's drug trafficking convictions.*

Valencia contends there was insufficient evidence to sustain his convictions for possession for sale of a controlled substance, transportation of a controlled substance, and offering to sell a controlled substance. He asserts there was no proof he was aware the Volkswagen was carrying methamphetamine. This claim is meritless.

a. *Legal principles.*

"Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. [Citation.] Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.] 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, 1745-1746.) Offering to sell an illegal drug involves the specific intent to make the sale. (See *People v. Daniels, supra,* 14 Cal.3d at 861 ["In an offer to sell a narcotic, the proscribed act is the making of the offer. An accompanying intent to do a further act, i.e., to sell, is inherent, making the offense a specific intent crime."].)

"Knowing possession of narcotics may be inferred from circumstances such as 'the conduct of the parties, admissions or contradictory statements and explanations' [citations]." (*People v. De La Torre* (1968) 268 Cal.App.2d 122, 125.)

b. *Discussion*.

The trial evidence established the following facts. Right around the time Mesa called Rosales and told him to return to Helwig Avenue to collect the methamphetamine, Valencia drove the Volkswagen into the backyard of the Helwig Avenue address. Valencia was there when Rosales arrived and Guzman opened the trunk to show him the methamphetamine. When the police swooped down to make arrests, Valencia fled from the scene and tried to escape. He was apprehended coming out of the backyard of a nearby house where he had apparently been hiding.

The Attorney General argues the jury could have made the following reasonable inferences on the basis of this evidence. It was not just coincidental that Valencia showed up with the methamphetamine at the precise location of the proposed drug sale and just when the sale was about to be consummated. Valencia drove the Volkswagen into the backyard so the sale could take place without being seen by witnesses. Valencia would not have been permitted to maintain sole control over a vehicle containing five pounds of methamphetamine unless he knew what was going on.[4] Valencia fled when the arrest team swooped down because he knew he was guilty of drug trafficking.[5]

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[4] See, e.g., *People v. Meza, supra,* 38 Cal.App.4th at p. 1746 ("It is unlikely the residence's other occupants, who knew what was in the car, would allow someone not involved in drug trafficking to ride in a vehicle delivering cocaine worth $3 million."); *People v. Upton* (1968) 257 Cal.App.2d 677, 685 ("A suitcase full of marijuana was found in the trunk of a car that defendant was driving. It is unreasonable to suppose that the true owner of the car, if he loaned the car to defendant, left a suitcase full of marijuana in the trunk without making that fact known to defendant, especially if defendant and his passengers were taking a trip to Seattle.")

[5] See, e.g., *People v. Hutchinson* (1969) 71 Cal.2d 342, 345-346: "If the evidence showed only that two boxes containing marijuana were found hidden in the closet and under a bed in a bedroom defendant shared with his brothers and to which guests also had

Valencia argues the evidence showed he had been "excluded" when Guzman and the other defendants displayed the contents of the Volkswagen trunk to Rosales because Valencia "was distanced from the transaction, sitting on a bench somewhere on the side, away from the vehicle." But this evidence did not demonstrate he had been excluded from the transaction. Rather, Rosales merely testified that at this particular moment Valencia was sitting in the backyard somewhere off to the side. Moreover, this was not Valencia's only appearance on the scene. Rosales testified that, the first time he went to Helwig Avenue, Valencia was there along with the three other defendants.

There was sufficient evidence to sustain Valencia's convictions.

3. *There was sufficient evidence to sustain Oseguera's conviction for carrying a concealed weapon.*

Oseguera contends there was insufficient evidence to sustain his conviction for carrying a concealed weapon because there was no evidence the gun found in the shed where he was hiding had ever been concealed. This claim is meritless.

Former section 12025, subdivision (a)(2),[6] provided: "A person is guilty of carrying a concealed firearm when the person does any of the following: [¶] . . . [¶] Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person."

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access, the applicable rule would be that 'proof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession.' [Citation.] There was more in this case, however, for defendant fled from his home when his mother confronted him with the marijuana, demanded an explanation, and threatened to call the police. The jury was not required to accept defendant's explanation that his flight was motivated only by a wish to escape from his mother's emotional outburst. The jury could reasonably infer that his flight reflected consciousness of guilt and that he therefore knowingly possessed the marijuana found in the bedroom and closet."

[6] Former section 12025, subdivision (a)(2) was repealed effective January 1, 2012, and its provisions continued without substantive change in section 25400, subdivision (a)(2).

Oseguera argues there was no proof of concealment because the evidence only showed that, when the police arrived to make arrests, he "ran into a shed, pursued by two deputies. He was ordered out of the shed, and searched. The shed was searched as well. A magazine for a 9mm handgun was found in his pocket, and a 9 mm handgun was found propped up in plain sight next to a barrel in the shed. This is the only appearance of the handgun in the entire transaction." From these facts Oseguera concludes he was convicted "of carrying a concealed weapon despite the fact that there was no evidence that this weapon was ever concealed."

However, although there may not have been any direct evidence showing Oseguera had concealed the gun on his person, there was certainly circumstantial evidence to that effect. Rosales testified he never saw Oseguera with any type of gun. Oseguera fled from the police, hid in the nearby shed, and the gun was discovered in his hiding place. Based on this evidence the jury could have reasonably concluded Oseguera must have had the gun in his possession during the narcotics transaction, and that he must have been carrying it in a concealed fashion. In other words, just because the gun was unconcealed at the moment of its discovery does not mean it had not been concealed when Oseguera was carrying it at an earlier point in time.

There was sufficient evidence to sustain Oseguera's conviction for carrying a concealed weapon.

4. *Trial court properly denied Oseguera's Pitchess motion.*

Oseguera contends the trial court erred by denying his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, to discover complaints of fabrication and dishonesty against the deputies who arrested him in the shed. This claim is meritless.

a. *Legal principles.*

"Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 . . . , allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case. [Citation.]

This court has held that the good cause requirement embodies a 'relatively low threshold' for discovery and the supporting declaration may include allegations based on 'information and belief.' [Citation.] Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid. Code, § 1045, subd. (b).) The statutory scheme balances two directly conflicting interests: the peace officer's claim to confidentiality and the defendant's compelling interest in all information pertinent to the defense. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

The good cause showing under Evidence Code section 1043 requires a "specific factual scenario" establishing a "plausible factual foundation" for the allegations of police misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85, 86.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1026.)

The trial court's ruling on whether a motion to discover police personnel records has been supported by an affidavit sufficient to show good cause and materiality is reviewed for an abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.) Even if the trial court erroneously denies a *Pitchess* motion, reversal is not required unless the defendant can demonstrate prejudice. (See *People v. Samuels, supra,* 36 Cal.4th at p. 110 ["even if the trial court erred because defendant made a showing of good cause in support of his [*Pitchess*] request . . . , such error was harmless [under *Watson*[7]]"]; *People v. Memro* (1985) 38 Cal.3d 658, 684, disapproved on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2 ["It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery."].)

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[7] *People v. Watson* (1956) 46 Cal.2d 818.

b. *Background*.

Oseguera's *Pitchess* motion referred to the portion of the police report narrating the circumstances of his arrest. The report said Deputies Canfield and Paul had been alerted by an aerial surveillance unit to Oseguera's presence in the shed. The officers looked inside and saw Oseguera crouched behind a paper barrel and a metal filing cabinet. When Canfield ordered him to show his hands and come out, Oseguera complied. Paul felt a handgun magazine in Oseguera's right front pants pocket and recovered it. This magazine was loaded with five nine-millimeter rounds. Canfield found a loaded nine-millimeter handgun sitting on the ground "propped up along the paper barrel" Oseguera had been "hiding behind."

A declaration signed by defense counsel and attached to Oseguera's *Pitchess* motion challenged his connection to the gun and the magazine: "Both these statements, made by both these deputies, are false. Rather, Mr. Oseguera was never in possession of a 9mm magazine, in his right front pants pocket or otherwise. Likewise, there was no 9mm pistol propped up along a barrel in front of Oseguera. Rather, another individual – unacknowledged in the reports – was in the shed location at issue, and the weapon was in the vicinity of that person."

The trial court denied the *Pitchess* motion, finding Oseguera had "failed to establish good cause and materiality, and also failed to set forth a plausible alternative factual scenario."

c. *Discussion*.

The Attorney General argues Oseguera's good cause showing was insufficient because he failed to provide " 'a non-culpable explanation for his presence' in the area of [the] narcotics transaction." But we agree with Oseguera this is an irrelevant consideration because the apparent aim of the *Pitchess* motion was only to challenge the gun charge, not the drug charges. Hence, Oseguera's presence at the crime scene, i.e., his involvement in the drug deal, was not the issue; the issue was whether or not he had been carrying a concealed weapon.

On the other hand, we agree with the Attorney General and the trial court that Oseguera failed to set forth either a proper "assertion of specific police misconduct" (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1026), or a "plausible factual foundation" for his allegations of police misconduct. (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at pp. 85, 86.)

The declaration's initial assertion, that Oseguera was never in possession of the loaded magazine, does not directly accuse the officers of having lied about finding the magazine but it certainly infers that they did. However, Oseguera had been charged with carrying a concealed weapon, not possessing a loaded magazine. As to the gun, Oseguera's declaration fails to set forth a sufficiently *specific* factual scenario. Indeed, the declaration is so vague on crucial factual points that it does not necessarily accuse the officers of any relevant dishonesty.

The declaration states "another individual . . . was in the shed . . . and the weapon was in the vicinity of that person." This assertion does not say the other person actually had the gun, although that is one logical inference. The assertion does not say if this other person was still in the shed when the officers arrived. If the person was still there and had been in plain view, it would imply the officers had dishonestly ignored that person and decided to pin the gun on Oseguera. But if the person had already left the shed before the officers arrived, or was still inside the shed but hiding out of sight, the declaration merely implied the officers had mistakenly, but in good faith, assumed the gun was Oseguera's. This inference would not support *Pitchess* discovery. If there really had been another person in the shed, Oseguera would have known the answer to all these questions. Hence, his *Pitchess* showing was fundamentally incomplete.

Moreover, if another person had really dropped the gun, the scenario becomes implausible because the implication that the officers planted the magazine on Oseguera means they just happened to be carrying a throw-down magazine matching the gun left behind by the mystery person. An alternative, but equally implausible, scenario would be that the officers had engaged in an elaborate conspiracy with the mystery person to frame Oseguera. "*Warrick* did not redefine the word 'plausible' as synonymous with 'possible,'

and does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318-1319; see, e.g., *People v. Lewis and Oliver, supra,* 39 Cal.4th at pp. 991-992 [trial court did not abuse its discretion by denying *Pitchess* motion predicated on grandiose conspiracy claim].)

The trial court here did not abuse its discretion by denying Oseguera's discovery motion.

5. *There was no prejudicial error with regard to the conspiracy instructions.*

Valencia contends his convictions must be reversed because the trial court made two errors when instructing the jury on an uncharged conspiracy: (1) an incorrect statement of the specific intent required to become a coconspirator, and (2) a failure to instruct on the defense of withdrawal from a conspiracy. We conclude the trial court's single error while instructing on conspiracy's specific intent element did not cause any prejudice.

a. *Uncharged conspiracy instruction was incorrect.*

The jury was given an uncharged conspiracy instruction based on CALJIC No. 6.10.5, which explains: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of _____, *and with the further specific intent to commit that crime*, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case." (Italics added.)

However, the uncharged conspiracy instruction actually given by the trial court here left out the italicized language, *ante*, and read: "A conspiracy is an agreement between two or more people with the specific intent to agree to commit the crime of sale of methamphetamine, followed by an overt act committed in this state, by one or more of the parties, for the purpose of accomplishing the object of the agreement. [¶] Conspiracy is a crime, but is not charged as such in this case."

Our Supreme Court has held "the crime of conspiracy requires dual specific intents: a specific intent to agree to commit the target offense, and a specific intent to commit that offense. [Citations.] We have cautioned trial courts not to modify CALJIC No. 6.10[8] to eliminate either of these specific intents. [Citation.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 123.)

Valencia argues that as a result of this misinstruction his convictions must be reversed. "Here, the omission of this essential element in the conspiracy instruction is not harmless error because there was no proof of appellant's specific intent to commit the crimes." "[T]he California Supreme Court [in *Jurado*] very specifically warned courts that it is not acceptable to eliminate either of the two specific intent requirements from the conspiracy instructions. Therefore, the omission of the specific intent to commit the crime element of conspiracy in this case was not harmless error."

But Valencia's argument ignores the fact *Jurado* itself found the error harmless: "Although the trial court erred in modifying CALJIC No. 6.10 to delete mention of the required specific intent to commit the target offense of murder, defendant suffered no prejudice. For a conspiracy to commit murder, intent to commit the target offense means an intent to kill. [Citation.] As defendant concedes, the jury's verdict that defendant was guilty of . . . first degree murder . . . necessarily included a finding that defendant himself had that intent. He argues, however, that the jury made no similar finding for either Denise Shigemura or Anna Humiston, the other alleged conspirators. But defendant does not identify any evidence in the record that could lead a rational juror to conclude that Shigemura and Humiston agreed to kill Holloway, with the specific intent to agree to do so, but without a specific intent to actually kill her. Because we find in the record no evidence that could rationally lead to such a finding, we are satisfied that the instructional

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[8] CALJIC No. 6.10 contains the definition of the crime of conspiracy, which is the same as for the uncharged conspiracy defined in CALJIC No. 6.10.5.

error was harmless beyond a reasonable doubt." (*People v. Jurado, supra,* 38 Cal.4th at p. 123.)

Both aspects of the *Jurado* harmless error analysis apply here. A conspiracy to possess methamphetamine for sale requires a specific intent to make the sale. Valencia's jury was instructed it could convict him of possessing methamphetamine for sale only if it found he "possessed the controlled substance with the specific intent to sell the same." The counts alleging transportation of methamphetamine and offering methamphetamine for sale both involved the same methamphetamine as the possession for sale count and, therefore, the specific intent finding necessarily carries over. In addition, Valencia has not identified any evidence that could have led a rational juror to conclude he had agreed to engage in these drug trafficking crimes "with the specific intent to agree to do so, but without a specific intent to actually" traffick drugs. (*People v. Jurado, supra,* 38 Cal.4th at p. 123.)

Hence, the trial court's failure to properly instruct on the dual specific intents of the uncharged conspiracy was harmless error.

b. *No withdrawal instruction required.*

Valencia contends the trial court erred by failing to instruct the jury on the defense of withdrawal from a conspiracy. He argues he "withdrew from any conspiracy when he distanced himself from the codefendants as they opened the trunk of the [Volkswagen] and showed the methamphetamine to the informant. Appellant sat on a bench, and had no participation in the transaction or communication with those involved."

But a withdrawal defense requires "an affirmative repudiation communicated to [one's] coconspirators." (*People v. Belmontes* (1988) 45 Cal.3d 744, 793, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)
"A defendant's mere failure to continue previously active participation in a conspiracy . . . is not enough to constitute withdrawal; there must be an affirmative and bona fide rejection or repudiation of the conspiracy, communicated to the coconspirators." (*People v. Crosby* (1962) 58 Cal.2d 713, 730.)

The evidence cited by Valencia shows at most that, after delivering the methamphetamine to the backyard of the Helwig Avenue address, he was sitting off to the side when Guzman showed Rosales the drugs. This evidence did not warrant a withdrawal instruction because there was no showing Valencia had actually repudiated the conspiracy or communicated such a repudiation to his codefendants.

Hence, the trial court did not err by failing to give the jury a withdrawal instruction.[9]

6. *Remand for partial resentencing.*

Mesa contends he must be resentenced because it is unclear if a drug trafficking weight enhancement (Health & Saf. Code, § 11370.4) was stricken, or if it was imposed and stayed. The Attorney General concurs, and suggests further uncertainties in the sentencing of the other defendants.

a. *The sentencing.*

Health and Safety Code section 11370.4, subdivision (b)(1), provides, in pertinent part: "Any person convicted of a violation of, or of conspiracy to violate, Section 11378, 11378.5, 11379, or 11379.5 with respect to a substance containing methamphetamine . . . shall receive an additional term as follows: [¶] (1) Where the substance exceeds one kilogram by weight, or 30 liters by liquid volume, the person shall receive an additional term of three years." Subdivision (e) of this statute provides: "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."

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[9] Valencia also claims that, even if each asserted instructional error does not by itself require reversal, their combination does. However, we have found only one error and determined it was harmless.

Because the defendants here were convicted of violating Health and Safety Code sections 11378 *and* 11379, multiple weight enhancement penalties could have been imposed on each of them. At a joint sentencing hearing, and just prior to pronouncing each defendant's sentence, the trial court said: "The court does not feel that striking the term of the weight enhancement would be appropriate in this case. This was a very significant amount of methamphetamine, and the three-year enhancement will be imposed as to each defendant."

The trial court then sentenced each defendant on count 5 (Health & Saf. Code, § 11379 [offering to sell methamphetamine]) to a three-year midterm on the substantive offense and a consecutive three-year term for the weight enhancement. However, the trial court's treatment of the count 1 charges (Health & Saf. Code, § 11378 [possession of methamphetamine for sale]) was not the same for each defendant and, at times, was confusing. As to Guzman, the trial court imposed and then stayed, under section 654 (the proscription against multiple punishment), a two-year term on the substantive offense and an additional term for the weight enhancement. But the trial judge also said: "The court will strike the term of the enhancement as to count 1." As to Oseguera, the court said it was imposing and staying, under section 654, both a substantive term and the weight enhancement on count 1. As to Mesa and Valencia, the court merely said it was staying count 1 pursuant to section 654.

The Attorney General agrees with Mesa there was a problem, but asserts it was not limited to Mesa's sentencing: "Although the trial court struck the weight enhancement appended to count 1 as to appellant Guzman, it did not state on the record its reasons for striking it. Moreover, the record is unclear whether the trial court intended to impose and stay the weight enhancement for appellants Mesa and Valencia as it properly did for appellant Oseguera." The Attorney General suggests remanding this case for resentencing on count 1.

Guzman disagrees. While acknowledging the sentencing hearing was "not the model of clarity," Guzman argues: "The record is clear that the trial court intended and did stay sentence on count 1 pursuant to section 654. In doing so, the enhancement attached to the subordinate term ceases to have an independent life of its own. . . . [¶] Either the trial court simply misspoke when it stated it was going to strike the weight enhancement as to count 1 or it did an act that is not authorized under the law. In either event, the sentence was correctly imposed . . . ."

We believe, however, the prudent course in this situation would be to remand so the trial court can clarify this aspect of its sentencing, i.e., the treatment of each defendant's conviction for possessing methamphetamine for sale and the attached weight enhancement. This would also apply to Valencia's conviction for transportation of methamphetamine with a weight enhancement.

DISPOSITION

The matter is remanded for resentencing in accordance with the views expressed in this opinion. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.