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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. ANDREW MICHAEL TALAMANTES, Defendant and Appellant.	B276261 (Los Angeles County Super. Ct. No.VA139454)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed.

Donna Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Andrew Michael Talamantes was convicted of transporting marijuana for sale. On appeal he argues the jury was incorrectly instructed as to the elements of the crime, and his conviction must be reversed as a result. The Attorney General agrees, as do we.

FACTUAL AND PROCEDURAL BACKGROUND

Because the general facts in this case are not disputed and the primary argument on appeal is an issue of law, we include only a truncated version of the relevant facts and background. While defendant was stopped for a traffic violation in June 2015, Los Angeles County Sheriff's deputies smelled fresh marijuana in the car. Upon searching a backpack and boxes in the car, deputies found baggies and boxes containing marijuana, 16 boxes of cannabis oil, edible cannabis confections, and "heat sources for burning hash marijuana oil." Defendant was arrested.

The Los Angeles County District Attorney charged defendant with one count of felony sale/offer to sell/transportation of marijuana (Health & Safety Code, section 11360, subd. (a),[1] count 1) and one count of felony possession of marijuana for sale (§ 11359, count 2).

Trial began in June 2016. The deputies present at the search testified that defendant said he was delivering marijuana products to people who had ordered them. Defendant testified that the car he was driving belonged to his cousin, and he did not know any marijuana was in the car. Defendant denied that he told deputies he was delivering marijuana products. Although

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[1] All further statutory references are to the Health & Safety Code unless otherwise indicated.

defendant had a medical marijuana card and personally used marijuana, he testified that he neither sold nor intended to sell any marijuana.

As to count 1, the court instructed the jury, "Every person who transports, offers to transport or attempts to transport more than 28.5 grams of marijuana is guilty of a violation of Health and Safety Code section 11360, subdivision a, a crime. In order to prove this crime, each of the following elements must be proved: One, a person unlawfully transported more than 28.5 grams of marijuana; and two, that person had knowledge of the presence of the substance and of its narcotic character; three, that person had a specific intent to transport the substance."

The jury convicted defendant on count 1, transportation of marijuana for sale, and acquitted defendant of count 2, possession of marijuana for sale. The court suspended imposition of a sentence and placed defendant on three years' formal probation.

Defendant timely appealed.

DISCUSSION

Defendant argues that the trial court incorrectly instructed the jury as to count 1 regarding the elements of a violation of section 11360, subdivision (a). The Attorney General agrees.

Before 2016, section 11360 prohibited the "transport" of marijuana, and courts had interpreted "transport" to include any movement of a controlled substance, whether for personal use or for sale. (See *People v. Rogers* (1971) 5 Cal.3d 129, 134; *People v. Ramos* (2016) 244 Cal.App.4th 99, 102 (*Ramos*).) Effective January 1, 2016, the Legislature amended section 11360 to define "transport" to mean "transport for sale." (§ 11360, subd. (c); Stats. 2015, ch. 77 § 1.) "The practical effect of this amendment

is that transportation of [marijuana] for sale as opposed to personal use is now an element of the offense that must be decided by a jury by proof beyond a reasonable doubt." (*Ramos supra,* 244 Cal.App.4th at pp. 102-103 [discussing a similar "transport for sale" amendment to section 11352, relating to other controlled substances]; see also *People v. Eagle* (2016) 246 Cal.App.4th 275, 278 (*Eagle*) [same, and noting that "[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."].)

Here, the alleged offense occurred in 2015 when the previous version of section 11360 was in effect. Defendant was tried in 2016, after the new statute was in effect. The parties agree that the amendment applies to defendant under the *Estrada* rule. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [where a new statute decreases the penalty for a crime, courts may reasonably infer that the Legislature intended for the new penalties to apply in cases in which a judgment of conviction is not yet final].)

The jury was not instructed that in order to find defendant guilty of count 1, it had to find that the marijuana in defendant's possession was for sale rather than personal use. "A jury instruction omitting an essential element from the jury's consideration requires reversal unless the error was harmless beyond a reasonable doubt." (*People v. Lopez* (2016) 6 Cal.App.5th 494, 498.) The parties agree that the omission here was not harmless, and as a result defendant's conviction must be reversed.

The jury acquitted defendant on count 2, possession of marijuana for sale under section 11359. Defendant argues that

because the jury acquitted him of *possessing* marijuana for sale, it could not have found him guilty of transporting that same marijuana for sale. As a result, defendant argues, any retrial of count 1 is barred by double jeopardy. "'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal.'" (*People v. Eroshevich* (2014) 60 Cal.4th 583, 588.)

The Attorney General agrees that double jeopardy bars a retrial: "Since the jury acquitted appellant on possession of marijuana for sale, respondent concedes that he cannot be retried on transportation of marijuana for sale." Both parties point out that the acquittal sets this case apart from *Ramos, supra*, in which the defendant's conviction was reversed following a similar change in the law regarding transporting controlled substances "for sale." The court in *Ramos* held that remand was appropriate because evidence had not been presented at trial regarding whether the heroin at issue was for sale or for personal use. (*Ramos, supra*, 244 Cal.App.4th at p. 103; see also *People v. Figueroa* (1993) 20 Cal.App.4th 65, 72, fn. 2 [retrial appropriate where factual issues were not raised in earlier proceeding].)

Similarly, in *Eagle, supra*, 246 Cal.App.4th 275, which also involved a reversal relating to the change in transport "for sale" statutes, the court held that retrial was appropriate because "whether defendant transported the methamphetamine for sale was not relevant to the charges at the time of trial and accordingly, this question was never tried." (*Id.* at p. 280.) Here, by contrast, whether the marijuana was for sale was at issue in the trial, and the parties presented evidence about whether defendant intended to sell the marijuana products found in the car. Retrial is therefore not appropriate here.

Defendant also argues that the prosecutor's closing argument improperly shifted the burden of proof, and he asks that we review the sealed *Pitchess*[2] hearing to determine whether any personnel records should have been provided to defendant. Because defendant's conviction must be reversed and defendant cannot be retried, these arguments are moot and we do not address them.

DISPOSITION

Reversed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.