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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LETZER SALGUERO PAIZ,

Defendant and Appellant.

2d Crim. No. B279327
(Super. Ct. No. 1481450)
(Santa Barbara County)

A jury convicted Letzer Salguero Paiz of possession of methamphetamine for sale and transportation of methamphetamine for sale (Health & Saf. Code, §§ 11378, 11379, subd. (a)). The trial court granted three years of probation on terms and conditions including 180 days in county jail. Paiz contends: (1) the jury instruction on uncharged conspiracy was defective because it did not identify any overt acts; (2) the court erred when it refused to instruct the jury on the prosecution's untimely disclosure of evidence; and (3) the court erred when it excluded statements his codefendant made upon contact with police. He also claims cumulative prejudice. We affirm.

BACKGROUND

A police officer saw Grizelda Martinez standing in an alleyway next to the open driver's door of a black Honda. She closed the door, walked over to Paiz's vehicle, and got inside. When Paiz and Martinez drove away, the officer "ran" the Honda's license plate. It had been reported stolen.

Because of Martinez's proximity to the Honda, the officer activated his lights and stopped Paiz's vehicle. The officer conducted a patdown search of Paiz and recovered a cell phone. Paiz then consented to a search of his car. During the search, officers found methamphetamine, a scale, plastic baggies, and four pipes in the center console, and another scale, a funnel, and more plastic baggies in the glovebox. They later searched Paiz's cell phone and recovered incriminating text messages and photographs.

DISCUSSION

Instructional error – uncharged conspiracy

The prosecution argued Paiz was guilty of the charged crimes as a direct perpetrator, as an aider and abettor, or as a coconspirator. As to the latter theory of guilt, the trial court instructed the jury pursuant to CALCRIM 416, Evidence of Uncharged Conspiracy. Paiz contends that instruction was erroneous because it did not identify the overt acts necessary for a conspiracy conviction. We disagree.

"[A]n uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. [Citations.]" (*People v. Belmontes* (1988) 45 Cal.3d 744, 788, overruled on another ground by *People v. Cortez* (2016) 63 Cal.4th 101, 118-119, and disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Failure to charge conspiracy

as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations].’ [Citation.]” (*Id.* at p. 789.) Those instructions must state that one element of a conspiracy is “the commission of an overt act . . . in furtherance of the conspiracy. [Citations.]” (*People v. Morante* (1999) 20 Cal.4th 403, 416.) We independently review whether the trial court’s jury instructions properly state applicable law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

The trial court did not err when it instructed the jury because uncharged conspiracy instructions need not identify a specific overt act. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1219-1220 (*Hajek*), abrogated on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see also *People v. Valdez* (2012) 55 Cal.4th 82, 151; *People v. Prieto* (2003) 30 Cal.4th 226, 251; *People v. Russo* (2001) 25 Cal.4th 1124, 1135-1136.) The court instructed the jury pursuant to CALCRIM 416, which told jurors that they had to find that at least one of the codefendants committed an overt act in furtherance of the conspiracy. CALCRIM 416 also defines “overt act.” No more is required. (*Hajek*, at pp. 1219-1220.)

Instructional error – untimely disclosure of evidence

During the trial’s second day of testimony, the prosecutor sought to introduce datestamps for two photographs retrieved from Paiz’s cell phone. Paiz objected that the evidence was not timely disclosed to him (see Pen. Code, § 1054), and requested that the trial court instruct the jury pursuant to CALCRIM 306, Untimely Disclosure of Evidence, if it were to

admit the evidence. “Let’s not do this conversation now,” the court replied. “[W]e will discuss that jury instruction at the time that we discuss the other jury instructions.” The court then permitted a police officer to testify to the timestamps.

Paiz contends the trial court’s refusal to instruct the jury on the untimely disclosure of evidence was prejudicial error because it may have altered the jury’s assessment of his testimony. But Paiz abandoned this contention when he did not mention CALCRIM 306 during the discussion on jury instructions with the court. (*People v. Mills* (2010) 48 Cal.4th 158, 170.) The issue is forfeited. (*Ibid.*)

Exclusion of codefendant’s statements

On direct examination, Paiz testified that Martinez started to panic when the police officer activated the lights on his cruiser. When Paiz began to relate what she said, Martinez lodged hearsay objections, which the trial court sustained. Paiz contends the court erred when it excluded Martinez’s statements because they qualify as nonhearsay or under an exception to the hearsay rule. But Paiz cannot raise this contention on appeal because he did not present these or any other grounds for admitting Martinez’s statements at trial. (*People v. Fauber* (1992) 2 Cal.4th 792, 854.)

Paiz’s contention is not preserved even though his attorney previewed Paiz’s planned testimony during his opening statement. Paiz’s attorney said, “And what [Paiz] will testify to is that [Martinez] said, ‘F,’ the expletive word, ‘I’m going to jail,’” when police pulled them over. But that statement does not identify the “substance, purpose, and relevance of the excluded evidence.” (Evid. Code, § 354, subd. (a).) Moreover, a brief mention of Paiz’s planned testimony during opening statements,

without a return to the matter or subsequent offer of proof, is not sufficient to preserve the matter for appeal. (*People v. Smith* (2015) 61 Cal.4th 18, 56, fn. 16; cf. *People v. Lightsey* (2012) 54 Cal.4th 668, 727 [trial court did not abuse its discretion when it sustained an objection because defendant made no offer of proof why witness should be permitted to answer].) The issue is forfeited. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 48.)

Cumulative prejudice

Paiz contends the cumulative effect of the trial court's instructional errors and exclusion of his codefendant's statements "r[o]se by accretion to the level of reversible and prejudicial error. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) But we "rejected his assignments of error." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1056.) Because "there is no reasonable possibility of a more favorable . . . verdict in the absence of the [alleged] errors," Paiz's claim of cumulative prejudice fails. (*People v. Malone* (1988) 47 Cal.3d 1, 56.)

DISPOSITION

The judgment is affirmed.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

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