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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. PAMELA ANN POTTER, Defendant and Appellant.	B236879 (Los Angeles County Super. Ct. No. VA111378)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Pamela Ann Potter guilty of transporting methamphetamine, a controlled substance, and of possessing methamphetamine for sale. Her sole contention on appeal is that instructing the jury with CALCRIM No. 362, consciousness of guilt, violated her due process rights. Being bound by California Supreme Court authority rejecting that contention, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution case.*

On June 24, 2009, Los Angeles County Deputy Sheriff Jeremy Draper conducted a traffic stop of Potter, who had made an unsafe lane change. As the deputy sheriff approached the car, Potter got out of it and tried to throw a baggy into some bushes. Believing that the baggy contained narcotics, Draper detained her and put the baggy into his pocket.[1] In Potter's car, Draper also found two larger plastic baggies containing an off-white crystalline substance and 19 smaller plastic baggies.

Potter told the deputy sheriff that the baggies contained dog medicine. Having lost the original packaging for the medicine, she kept the medicine in the plastic bags. She kept jewelry in the smaller bags, and the deputy sheriff did find loose jewelry in the car. The last time Potter used methamphetamine was seven months before.

A senior criminalist, who tested the substance in the baggy Potter tried to discard, testified that it contained 0.25 grams of methamphetamine. The contents of the other two baggies collectively contained 10.89 grams of methamphetamine. In addition to methamphetamine, the substance contained dimethylsulfone, a nontoxic cutting agent sometimes found with methamphetamine to produce a "higher yield of controlled substance product."

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[1] Deputy Sheriff Draper did not place the baggy into an evidence folder until he arrived at the police station, an hour and a half after he stopped Potter.

The People's expert witness, Deputy Sheriff James Copplin, testified, under a hypothetical modeled on the facts of the case, that in his opinion the methamphetamine was possessed for sale.

B. *Defense case.*

Laboratory scientist, Michael Dean Henson, also tested the substance found in the baggie retrieved from Potter. It tested negative for methamphetamine on two types of tests.

C. *Procedural background.*

On July 27, 2010, a jury found Potter guilty of count 1, transporting a controlled substance, methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and of count 2, possessing for sale a controlled substance, methamphetamine (Health & Saf. Code, § 11378).

The trial court sentenced Potter, on October 21, 2011, to the high term of three years on count 2 and to an additional three years based on prior convictions to which Potter admitted.

DISCUSSION

A. *Instructing the jury with CALCRIM No. 362 did not violate Potter's due process rights.*

Potter's sole claim on appeal is the trial court violated her due process rights by instructing the jury with CALCRIM No. 362. Under California Supreme Court authority rejecting this claim, we disagree.

At trial, Deputy Sheriff Draper testified that Potter told him the baggies contained dog medicine. That the substance was not methamphetamine was also her defense at trial. The prosecution, however, introduced evidence that the substance was methamphetamine. Over Potter's objection, the jury was therefore instructed: " 'If the defendant made [a] false or [] misleading statement before this trial which related to the charged crimes, knowing the statement was false or intending to mislead, that conduct may show she was aware of the guilt of the crime, and you may consider that in determining her guilt. If you conclude the defendant made this statement, it is then up to

you to decide its meaning, as well as its importance. However, evidence that the defendant made such a statement cannot prove guilt in and of itself.' " It is proper to give a consciousness of guilt instruction like CALCRIM No. 362 if it is supported by evidence of false or misleading pretrial statements. (*People v. Russell* (2010) 50 Cal.4th 1228, 1254.)

Potter, however, contends that the instruction improperly invites the jury, first, to convict upon proof less than proof beyond a reasonable doubt and, second, to engage in circular reasoning. As Potter acknowledges, our California Supreme Court has repeatedly rejected these contentions in connection with instructions on consciousness of guilt. (See, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1108; *People v. Jurado* (2006) 38 Cal.4th 72, 125-126; *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Kipp* (1998) 18 Cal.4th 349, 375; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1226.)

Jackson expressly rejected the first notion that a consciousness of guilt instruction lessens the prosecution's burden of proof: the instruction makes "clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1224.)

Potter's second argument is the instruction allowed the jury to indulge a circular logic to this effect: if the jurors did not believe that the substance was possessed as dog medicine and the extra baggies were for jewelry storage, then the jurors could "use that finding to infer consciousness of guilt, and then use your inference of consciousness of guilt to strengthen your view that [Potter] possessed those items not for the purposes she claims but for the purpose of sale of methamphetamine."

In support of her argument, Potter cites *U.S. v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332, where the court considered a similar consciousness of guilt instruction. The defendant denied participating in drug transactions, and the court said: "The only way the jury could find that the statements at issue in this case were false would be to conclude that Durham was a member of Montgomery's cocaine distribution conspiracy. That conclusion would necessarily render irrelevant consciousness of guilt. This circularity problem recurs whenever a jury can only find an exculpatory statement false if it already believes other evidence directly establishing guilt. Under such circumstances, it is error to give a false exculpatory statement instruction." (*Ibid.*; see also *U.S. v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 ["In effect, the jurors were told [based on a consciousness of guilt instruction] that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt. This is both circular and confusing"].)

We are not, however, bound by lower federal court decisions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Moreover, our California Supreme Court has also rejected this circularity argument. (*People v. Bacon, supra*, 50 Cal.4th at p. 1108 [rejecting contention that CALJIC No. 2.03, CALCRIM No. 362's predecessor, is logically circular].)

Not being at liberty to ignore Supreme Court precedent, we must therefore reject Potter's contention. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.