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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SALLY LOU LOPEZ, Defendant and Appellant.	2d Crim. No. B282387 (Super. Ct. No. 1506012) (Santa Barbara County)

Sally Lou Lopez was convicted by jury of aiding and abetting her boyfriend in the transportation of methamphetamine for sale. Probation was granted on certain terms and conditions including the service of 90 days in jail. (Health & Saf. Code, § 11379, subd. (a).)[1] She appeals, contending that the judgment is not supported by the evidence and that the trial court committed instructional error. We affirm.

[1] All statutory references are to the Health and Safety Code.

Facts and Procedural History

In May 2015, a confidential informant (CI) working for the police stayed at the Red Roof Inn in Lompoc to target drug dealers. Appellant was a housekeeper at the hotel and Robert Garrett's girlfriend. Garrett, aka Black Rob, was a drug dealer who frequented the hotel.

Garrett talked to CI about drug deals with appellant present. It was "a three-way conversation" and appellant held a clipboard as they negotiated present and future drug deals. Several days later, Garrett changed his phone. The CI asked appellant for Garrett's phone number. Appellant said she could make it happen and gave him Garrett's new phone number.

On May 7, 2015, Garrett agreed to meet the CI in the alley outside Jasper's bar to consummate the drug transaction. Officers watched the area and gave the CI a recording device and cash to make a controlled buy.

Appellant drove Garrett and a third person to the designated spot in her Toyota Camry. The CI approached, got into the back seat, and negotiated a sale price as appellant acted as a lookout. Garrett sold the CI a bindle of 2.1 grams of methamphetamine for $90. The CI handed Garrett $100 and asked for change. Appellant gave the CI $10 change.

At trial, appellant admitted that she knew Garrett used, gave away drugs, and did not have a job. Appellant did see Garrett and the CI discuss drugs but denied that she was a party to the conversations. Appellant also denied that she gave Garrett's new phone number to the CI. On the evening of May 7, 2015, Garrett asked appellant to drive him to Jasper's. It was the first time appellant had ever been to Jasper's with Garrett. After appellant parked, the CI got into the backseat. Appellant

did not pay attention to what was discussed or know it was a drug deal.

Substantial Evidence

Appellant contends that the evidence does not support the finding that she intended to aid and abet the crime of transporting methamphetamine for sale. As in any sufficiency of the evidence appeal, we review the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

In order to convict a defendant of transporting methamphetamine for sale, the prosecution must prove: (1) the defendant transported for sale a controlled substance; (2) defendant knew of its presence; (3) defendant knew of the substance's nature or character as a controlled substance; (4) the controlled substance was methamphetamine; and (5) the controlled substance was a usable amount. (§ 11379, subd. (a); CALCRIM No. 2300.) Appellant was convicted on an aider and abettor theory which required the prosecution to prove that appellant knew Garrett intended to commit the crime, appellant intended to aid and abet Garrett before or during the commission of the crime, and appellant, by her words or conduct, did in fact aid and abet the commission of the crime. (CALCRIM No. 401.)

The evidence shows that appellant was in a romantic relationship with Garrett and knew that he dealt drugs. Appellant provided Garrett's phone number to the CI, drove Garrett and the drugs to Jasper's to rendezvous with the CI, and

stayed in the car as Garrett and CI negotiated the sale price. The CI testified that appellant acted as a lookout, looking left and right. It was strong evidence of intent to aid and abet. (See, e.g., *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744 [serving as a lookout, taking charge of an auto with the engine running, or driving the getaway car].) When the CI agreed to buy the methamphetamine for $90 and asked for change, appellant gave him $10 change to facilitate the sale.

It took no leap of logic for the jury to infer that appellant aided and abetted Garrett in the transportation of drugs for sale. Appellant asks us to draw the inference that she lacked the requisite intent to aid and abet but the jury discredited appellant's testimony. On review, we are precluded from reweighing the evidence or determining witness credibility. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

Appellant argues that mere knowledge of the perpetrator's criminal purpose is not enough for aider and abettor liability. (See *People v. Beeman* (1984) 35 Cal.3d 547, 556.) The aider and abettor must have the intent to commit or assist in the commission of the crime. (*Ibid.*) Appellant claims the prosecution's case was akin to criminal negligence and was based on the theory that appellant knew or should have known that Garrett was transporting methamphetamine for sale. The jury was instructed that "the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her, an aider and abettor." (CALCRIM No. 401.) It rejected the defense theory that appellant did not know what the rendezvous was about and merely gave her boyfriend a ride.

Appellant argues there was no intent to aid and abet before they arrived at the bar. Specific intent may be inferred

from appellant's actions in providing Garrett's phone number to the CI, and driving Garrett and the drugs to Jasper's, a bar that they had never visited. The most damning evidence was that appellant acted as the lookout and provided $10 change to facilitate the sale. Transportation of a controlled substance can be established by circumstantial evidence and any reasonable inferences drawn from the evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) Ample evidence supported the jury finding that appellant intended to aid and abet Garrett in the transport of methamphetamine for sale.

CALCRIM No. 2300

Appellant argues that the trial court, in giving a standard CALCRIM No. 2300 instruction on transportation for sale, failed to instruct that the jury could not convict unless it found that appellant intended to transport drugs for sale. Appellant did not object to the CALCRIM No. 2300 instruction or request amplifying language, thereby waiving the error. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Hart* (1999) 20 Cal.4th 564, 622.)

Waiver aside, there was no instructional error. CALCRIM No. 2300 instructed on all the elements of the offense except specific intent. The trial court also gave CALCRIM No. 251 which instructed: "For you to find a person guilty of the crimes in this case, that person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state."

Combined together, the CALCRIM Nos. 2300 and 251 instructions were a correct statement of the law and instructed on all the elements of transportation of methamphetamine for sale. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1014.) Before

2014, section 11379 prohibited the transportation of drugs, including transportation for personal use. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-135.) Former section 11379 "provided enhanced penalties for a person who 'transports for sale,' as opposed to for some other purpose, but a defendant could be convicted of the offense without proof of intent to sell. [Citation.]" (*People v. Lua*, *supra*, at p. 1012.)

"Effective January 1, 2014, the Legislature amended section 11379 to limit the meaning of 'transports' under that statute to transportation 'for sale.' [Citation.] 'The 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.' [Citation.]" (*People v. Lua*, *supra*, 10 Cal.App.5th at p. 1012.) Subsection (d) was added to section 11379 to provide: "Nothing in this section is intended to preclude or limit prosecution under an aiding and abetting theory or a conspiracy theory." (Stats. 2013, ch. 504, § 2.)

Appellant complains that CALCRIM No. 2300 fails to state that intent to transport drugs for sale is an element of the offense. Other statutes punishing drug possession for sale make intent to sell an element of the offense, as do the standard instructions for those offenses. (See, e.g., § 11378 [possession for sale of a controlled substance] and § 11359 [possession for sale of marijuana]; CALCRIM Nos. 2302 and 2352 [possession of controlled substance for sale]; see discussion in *People v. Lau*, *supra*, 10 Cal.App.5th at p. 1013.) The error is harmless under any standard of review if the factual question posed by the omitted instruction was resolved adversely to the defendant under properly given instructions. (*People v. Flood* (1998) 18 Cal.4th 470, 484.) Here the jury was instructed that it could not

convict unless appellant intentionally committed the charged offense (CALCRIM No. 251), and that for aider and abettor liability, appellant had to specifically intend to, and did in fact, aid facilitate, promote, encourage or instigate Garrett's commission of the crime. (CALCRIM No. 401.) It was instructed to "[p]ay careful attention to all of these instructions and consider them together." (CALCRIM No. 200.)

Appellant argues that CALCRIM No. 2300 fails to "marry" intent to sell with the act of transporting drugs for sale. The instruction defines the act of selling, but does not state that the transportation has to be carried out with the intent to sell the drugs being transported. But that is covered by CALCRIM No. 251 which instructs there must be "proof of the union, or joint operation, of act and wrongful intent." In *People v. Lua*, *supra*, 10 Cal.App.5th at p. 1016, the Court of Appeal stated it was questionable whether CALCRIM No. 2300 standing alone, adequately explains the element of specific intent. The court, however, concluded that the use of CALCRIM No. 251 to instruct that transportation for sale is a specific intent crime, combined with the standard CALCRIM No. 2300 instruction adequately instructs on all the elements of the offense. (*Id.* at p. 1014.) "Correlating these two instructions, using a plain commonsense reading, the jury was adequately instructed that the prosecution was required to prove not only that defendant intended to transport methamphetamine, but that he intended to transport it 'for sale,' as required for a conviction under the current version of section 11379." (*Ibid.*)

The same analysis applies here. Like *People v. Lau*, the trial court gave the updated version of CALCRIM No. 2300 stating that the prosecution had to prove "defendant transported

for sale a controlled substance." The instruction defined "selling" and stated that "[a] person *transports* something if he or she carries or moves it from one location to another, even if the distance is short." CALCRIM No. 251 instructed that transportation for sale is a specific intent crime and CALCRIM No. 225 instructed that the prosecution had to prove appellant not only did the acts charged, but "acted with a particular intent and mental state." No reasonable juror would interpret CALCRIM Nos. 225, 251, and 2300 to mean that it could convict without finding that appellant transported the drugs with the intent that the drugs would be sold. (*People v. Lua*, *supra*, 10 Cal.App.5th at p. 1014.)

Appellant's reliance on *People v. Lopez* (2016) 6 Cal.App.5th 494 [217 Cal.Rptr.3d 23] (review granted Dec. 7, 2016, S239567) is misplaced. There, a pre-2014 version of CALCRIM No. 2300 was used. Unlike *Lopez*, the trial court gave the updated version of CALCRIM No. 2300 which made repeated references to the "transporting for sale" requirement. CALCRIM No. 2300, in conjunction with CALCRIM No. 251, was a correct statement of the law on specific intent to transport a controlled substance for sale.

Appellant argues that trial counsel in *People v. Lua*, *supra*, 10 Cal.App.5th 1004, told the jury that defendant had to have specific intent to transport the controlled substance for sale. (*Id.* at p. 1014.) That was touched upon by appellant's trial attorney who told the jury that "the prosecution [has] to prove to you this element, specific intent." "[Appellant] explained to you she didn't have any intention in forming a drug operation, in furthering a drug operation, and she didn't do that. . . . She was [only] giving her boyfriend a ride." The jury rejected the

argument, and for good reason. Appellant participated in a three-way conversation about drug deals, gave Garrett's new phone number to the CI, drove Garrett and the drugs to the agreed upon sale site, acted as the lookout, and made change to facilitate the sale.

But for the failure to give an amplifying instruction on intent to transport the drugs for sale, there is no reasonable likelihood that appellant would have obtained a more favorable result. (*People v. Lua*, *supra*, 10 Cal.App.5th at pp. 1015-1016.) We reject the argument that appellant was denied a fair jury trial under the Sixth Amendment.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

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