Filed 10/23/14 P. v. Maldonado CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

ILSA MALDONADO,

Defendant and Appellant.

2d Crim. No. B251056
(Super. Ct. No. 2013008201)
(Ventura County)

Isla Maldonado appeals the judgment entered after a jury convicted her of possessing a controlled substance for sale (Health & Saf. Code,[1] § 11378), two counts of selling, transporting, or offering to sell a controlled substance (§ 11379, subd. (a)), child endangerment (Pen. Code, § 273a, subd. (b)), and being under the influence of a controlled substance (§ 11550, subd. (a)). The trial court suspended imposition of sentence and placed appellant on four years of formal probation with terms and conditions including that she serve a year in county jail. Appellant contends the court prejudicially erred in failing to give a unanimity instruction on the child endangerment count. We affirm.

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

STATEMENT OF FACTS

In early 2013, the Ventura County Sheriff's Department was investigating appellant for selling methamphetamine. On February 20th, detectives arranged to have an informant make a controlled buy from appellant. The informant called appellant and she agreed to "do some business" with him in the parking lot of the Best Buy store in Oxnard. Before the informant drove to the location he was fitted with a wireless transmitting device and his person and car were searched. The detectives and other surveillance officers followed the informant and positioned themselves at various locations in the parking lot.

Appellant arrived in a Jeep Cherokee and signaled for the informant to get in the back seat. Appellant's boyfriend Victor Gomez was driving the Cherokee and she was sitting in the front passenger seat. Her 10- and 17-year-old daughters were in the back seat. Appellant offered to sell the informant a "quarter" of methamphetamine for $250. Gomez measured out seven grams of methamphetamine on a scale. The informant gave appellant $250 in exchange for the methamphetamine and got out of the Cherokee.

On March 13, 2013, the informant made another controlled buy from appellant at the same location. Appellant arrived in the same Jeep Cherokee with Gomez and her daughters, but this time she was in the back seat with one of her daughters and her other daughter was in the front passenger seat. Gomez got out and handed the drugs to the informant as he sat in his vehicle. The informant gave Gomez $50 and asked to speak to appellant. Appellant got out of the Cherokee and sat in the front passenger seat of the informant's car. After discussing future transactions, appellant got out of the informant's car and returned to the Cherokee.

The police stopped the Cherokee shortly after it left the parking lot. Appellant did not comply with commands to exit and the police removed her from the vehicle. Her two daughters were crying hysterically. Several baggies of methamphetamine were recovered from the Cherokee.

Appellant appeared to be under the influence of methamphetamine and admitted she had used the drug that morning. Her urine subsequently tested positive for methamphetamine.

Detective Vincent Alvarez testified to the dangers of exposing children to drug sales. The detective also opined that appellant possessed the methamphetamine found in the Cherokee for distribution and sale.

Gomez testified it was he who sold the methamphetamine to the informant on both occasions. He acknowledged that appellant and her two daughters were with him, but claimed appellant had nothing to do with the sales. Gomez was impeached with his prior statement to the police. After waiving his *Miranda*[2] rights, Gomez told the police that he and appellant had both sold the methamphetamine to the informant. Gomez also said that he and appellant had around seven or eight regular customers and sold the drugs to provide for appellant's daughters.

DISCUSSION

Appellant contends the court erred in failing to give a unanimity instruction (CALCRIM No. 3500[3]) on the charge of child endangerment (§ 273a, subd. (b)). The charge was based on the allegation that appellant's two minor daughters were present when she sold methamphetamine to the informant. Although the information expressly alleges the offense was committed "[o]n or about March 13, 2013," appellant notes that the prosecution presented evidence that appellant's daughters were present during both the March 13th drug sale and the prior sale on February 20th. Appellant argues that a unanimity instruction was thus required to ensure the jury's verdict was unanimously based on the same incident. We disagree.

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2 *Miranda v. Arizona* (1966) 384 U.S. 436.

3 CALCRIM No. 3500 states: "The defendant is charged with <insert description of alleged offense> [in Count ___] [sometime during the period of ___ to ___]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

When a defendant is charged with a single criminal act and the evidence at trial shows more than one such act, "the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) Here, count 4 of the information states that appellant committed the crime of child endangerment "[o]n or about March 13, 2013[.]" Moreover, the verdicts reflect that the jury found appellant guilty of violating section 273a "as alleged in Count 4 of the information." Because the prosecution elected the March 13th incident in count 4 of the information and the jury found appellant guilty as alleged in that count, no unanimity instruction was required notwithstanding the fact that the evidence at trial showed appellant committed the same crime on a different date.[4]

Even if a unanimity instruction should have been given on the child endangerment count, the error would be harmless. There is currently a split of authority whether error in this context is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562.) Because the Supreme Court has yet to decide the issue, we shall evaluate the error under both standards.

The failure to give a unanimity instruction is harmless if the record reflects the jury resolved the basic credibility dispute and would have convicted the defendant on any of the offenses shown by the evidence. (See *People v. Jones* (1990) 51 Cal.3d 294, 307, and cases cited therein.) The prosecution's case hinged on the credibility of the informant. Appellant argued that the informant was lying, and the jury obviously found otherwise. The informant and Gomez both testified that appellant's daughters were present during the February 20th sale, and there is no rational basis for disputing that both girls were present during the March 13th sale. Because it is beyond a reasonable doubt

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[4] In light of our conclusion, we need not address the People's claim that no unanimity instruction was required because the two separate instances of child endangerment were part of a continuous course of conduct. (See, e.g., *People v. Napoles* (2002) 104 Cal.App.4th 108, 115-116.)

the jury would have convicted appellant of endangering her children on both February 20th and March 13th, any error in failing to give a unanimity instruction was harmless. (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

David Hirsch, Judge

Superior Court County of Ventura

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan J. Kline, Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.