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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENNY DELARIOS, et al., Defendants and Appellants.	B234079 (Los Angeles County Super. Ct. No. KA092993)

APPEALS from judgments of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed as modified.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Kenny Delarios.

William C. Hsu, under appointment by the Court of Appeal, for Defendant and Appellant Lacey Rose Rodriguez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Kenny Delarios and Lacey Rodriguez of possession for sale of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11378[1] (count 1) and possession of a controlled substance with a firearm in violation of section 11370.1, subdivision (a) (count 3). The jury convicted Delarios of possession of a firearm by a felon with four priors in violation of Penal Code section 12021, subdivision (a)(1) (count 2). The jury found true the allegations that defendants were personally armed with a firearm in the commission or attempted commission of count 1 (Pen. Code, § 12022, subd. (c)). In a bifurcated proceeding, defendant Delarios admitted six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The trial court sentenced Delarios to nine years in state prison. The court exercised its discretion pursuant to Penal Code section 1385 and struck three prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).) In count 1, the trial court imposed the midterm of two years as the base term, enhanced by the midterm of four years pursuant to Penal Code section 12022, subdivision (c) and three years pursuant to Penal Code section 667.5, subdivision (b). The trial court imposed two concurrent two-year terms for the convictions for possession of a firearm by a felon with four priors (count 2) and felony possession of a controlled substance with firearm (count 3).

The trial court sentenced Rodriguez to a total of six years in state prison. The trial court imposed the midterm of two years as the base term for her possession of a controlled substance conviction in count 1, enhanced by four years pursuant to Penal Code section 12022, subdivision (c). Pursuant to Penal Code section 654, the court stayed defendant Rodriguez's sentence of the midterm of three years in state prison as to her conviction for possession of a controlled substance while having a loaded and operable firearm.

Delarios appeals on the grounds that: (1) there was insufficient evidence to support his conviction in count 3; and (2) his sentence in count 3 was unlawful under Penal Code

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[1] All further references to statutes are to the Health and Safety Code unless stated otherwise.

section 654. Delarios joins in all issues advanced by Rodriguez where applicable to him under California Rules of Court, rule 8.200.

Rodriguez appeals on the grounds that: (1) the trial court committed instructional error that violated her Fifth Amendment rights; and (2) there was insufficient evidence to support her conviction in count 1.

FACTS

Prosecution Evidence

On January 4, 2011, at approximately 9:44 p.m., six members of the Los Angeles County Sheriff's Department went to a Diamond Bar home to contact Lacey Rodriguez and enforce a court order. The home had three levels, with the entry on the middle level. Deputy Henry Saenz and the other deputies approached the entrance and saw Rodriguez inside the residence, approaching the front door. Rodriguez looked in the direction of the deputies and then turned around and ran. Deputy Geoff Grisso noticed a startled expression on Rodriguez's face when she looked in the direction of the deputies. Rodriguez went down some stairs to a lower family room area. The deputies entered the residence and descended to the lower level, which was found to contain a family room, bathroom, bedroom, and garage.

As Deputy Saenz ran after Rodriguez, he saw her place a shiny object on a bar and run into the bathroom. The object was later identified as a .25-caliber handgun. It was loaded with seven live rounds—one in the chamber and six in the magazine. Deputy Saenz told Rodriguez to put her hands up and to go into the family room area, a command he intended for her and the other persons present. Rodriguez did not comply. Through the open bathroom door, Deputy Saenz saw Rodriguez kneel at the toilet and begin pouring a crystallized substance resembling methamphetamine from a large freezer bag into the toilet. She kept flushing the toilet as she did so. There was water running in the sink at the same time. Rodriguez got up and moved from the toilet to the sink. Deputy Saenz later found three large, empty, and slightly wet freezer bags in the bathroom sink. He found a plastic bindle containing suspected methamphetamine on the sink counter. Deputy Saenz later saw

a cell phone on the counter near the gun. The cell phone contained images of pay-owe sheets.

In the family room, there were several persons who were later identified as Christopher Maddox, Collette Bodine, and defendant Delarios. Maddox and Bodine lay on the floor and put their hands on their heads when ordered to do so. Deputy Saenz saw Delarios run behind Rodriguez and then past her and into a hallway that led to the bedroom and garage. Deputy Saenz ordered Delarios to come back out, and he did so and lay on the floor.

Rodriguez eventually came out of the bathroom. She crawled out and lay on the floor as ordered. Deputy Saenz detained her.

Deputy Joe Mesa searched the bedroom and found a 12-gauge shotgun in the bedroom on a shelf. Next to the shotgun he saw a box of 22 rounds for the shotgun. There were two scales in the bedroom. He found a baggie of methamphetamine on the floor near the foot of the bed in the same area as the scales. He found $1,528 in cash in the bedroom in miscellaneous denominations. There were 75 to 100 small Ziploc baggies strewn about the bedroom. Both male and female items of clothing were in the bedroom, which contained one bed.

Deputy Grisso spoke with Delarios in the family room. Delarios told the deputy that he rented the downstairs portion of the home and had lived there approximately a month with Rodriguez. Deputy Grisso testified that Rodriguez told him the same thing and said that Delarios was her boyfriend.

Deputy Grisso noticed a safe in the family room. Delarios said it was his. He had a key, but it was already open. Inside, Deputy Grisso saw a large bag of a white substance, a scoop with white residue, and a small dish with white residue. Deputy Grisso saw no evidence of paraphernalia in the house, and no one directed him to any. Deputy Grisso was left with the impression that the methamphetamine was not being used in the house at all, or very seldom.

Deputy Grisso advised Delarios of his *Miranda*[2] rights and asked him if he was selling narcotics, and Delarios said that he was. When asked how long he had been selling, Delarios said "for a while." Delarios admitted that "that was all he did." When asked if the shotgun in the bedroom was his, Delarios acknowledged that it was. Delarios said "he had gotten it for dope."

Deputy Grisso also spoke with Rodriguez. After reading Rodriguez her *Miranda* rights, the deputy asked her what she was doing in the bathroom when Deputy Saenz entered, and Rodriguez replied, "you know what I was doing." Deputy Grisso asked her what she was doing with the gun and she did not respond but just lowered her head. Deputy Grisso stated, "I took that to mean she didn't want to talk to me anymore so I stopped talking to her."

In an upstairs bedroom the deputies found that there was surveillance being conducted. They found computer equipment attached to cameras that faced the street. There was audio coming from the driveway. Two other individuals were later found in the house, one of them in the upstairs bedroom that contained the surveillance system.

It was stipulated that People's exhibit Nos. 4 and 7 contained methamphetamine. The bindle found in the bathroom (exh. No. 7) contained approximately 11.84 grams of a white crystalline substance containing methamphetamine. The baggie found in the bedroom (exh. No. 4) contained approximately 2.06 grams of a crystalline solid substance containing methamphetamine. The cutting agent found in the safe weighed 64.1 grams.

Based on his training and experience, Deputy Grisso was of the opinion that the methamphetamine was possessed for sale because of the quantity (almost 700 uses), the currency found in different denominations, the weapons, the sophisticated surveillance system, and the placement of the narcotics in the bathroom for apparent quick disposal. The presence of the empty baggies, two scales, the scoop and the dish were also factors, as were

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

the large amount of white crystalline substance found in the safe for use as a cutting agent, the lack of drug paraphernalia, and the pay-owe sheets.

Defense Evidence

Neither Delarios nor Rodriguez presented affirmative evidence in their defense.

DISCUSSION

I. Sufficiency of the Evidence in Count 3 (Delarios)

A. Delarios's Argument

Delarios contends there was not substantial evidence to support a finding that, while possessing a controlled substance, he had a loaded, operable firearm available for immediate offensive or defensive use, or that he knew he had such a firearm available for immediate use. (§ 11370.1, subd. (a).) The shotgun in the bedroom did not meet the firearm requirements because it was not loaded. As for the .25-caliber handgun that Rodriguez put on the bar, Deputy Saenz observed only Rodriguez's personal possession of the handgun, and there was no evidence that the gun was available to anyone else but her and for her personal use. Furthermore, there was no evidence presented as to whether the handgun was operable or functioning, and there was no opinion by any witness as to how it was determined that the gun was operable.

B. Relevant Authority

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.) Given this court's limited role on appeal, Delarios bears an enormous burden in claiming there was insufficient evidence to sustain the verdict. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa, supra,* at p. 1206; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Alcala* (1984) 36 Cal.3d 604, 623.) The hurdle to secure a reversal is just as high when the prosecution's case depends on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

C. Evidence Sufficient

Section 11370.1, subdivision (a), provides in pertinent part that any person who unlawfully possesses any amount of substances containing various drugs "while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] As used in this subdivision, 'armed with' means having available for immediate offensive or defensive use."

Delarios appears to assert, incorrectly, that direct evidence of operability is required. It is well established that "[c]ircumstantial evidence may constitute substantial evidence of guilt." (*People v. Catlin* (2001) 26 Cal.4th 81, 142.) In *People v. Smith* (1974) 38 Cal.App.3d 401 (*Smith*), the court specifically rejected the need for direct evidence of operability, concluding: "The circumstantial evidence that the weapon was operable was more than sufficient: Defendant was armed with a shotgun during the robbery. When he was arrested, a loaded shotgun and additional shotgun shells were found in the vehicle in which he was riding. A jury could easily infer that defendant would not have carried a loaded shotgun with additional shells, if the weapon were inoperable." (*Id.* at p. 410.)

As in *Smith*, Delarios's jury could easily draw the inference that the handgun was operable. The handgun was found to be fully loaded with one round in the chamber. It formed part of the physical evidence and was shown to the jury during the testimony of Detective Saenz. (People's exh. No. 5.) Deputy Saenz stated that the gun was "ready for immediate use." There were no visible signs of inoperability or any impediment to its being

fired. There was, therefore, substantial circumstantial evidence that the handgun was operable.

As for the issue of whether the handgun was available for Delarios's immediate use, *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), a case that addressed the definition of arming for purposes of Penal Code section 12022, is instructive. In *Bland*, the court determined that drug possession is a continuing offense, and that a person "'armed with a firearm in the commission'" of a possessory drug offense is subject to the enhancement prescribed in Penal Code section 12022 even if he was inside a police vehicle rather than inside his home when police searched his residence, finding drugs in his bedroom and unloaded firearms under the bed. (*Bland*, at pp. 995, 999.) The court stated that, "when the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of [Penal Code] section 12022." (*Id*. at p. 995.)

Subsequently, the court in *People v. Pena* (1999) 74 Cal.App.4th 1078 (*Pena*) cited *Brand* in interpreting section 11550, subdivision (e), which imposed an additional penalty for anyone "under the influence" of certain controlled substances "'while in the immediate personal possession of a loaded, operable firearm.'" (*Pena*, at p. 1081.) The *Pena* court held that the term "'immediate personal possession,'" when applied to an occupant of a vehicle, requires the firearm to be located within the passenger compartment. (*Id*. at pp. 1087, 1088.) Because the firearm in *Pena* was found in a toolbox in the bed of the truck, the court concluded there was not sufficient evidence to support the conviction. (*Id*. at p. 1088.) The court stated it was adhering "to the policy of this state that the statute must be construed

as favorably to the defendant as its language and the circumstances of its application reasonably permit. [Citation.]" (*Ibid.*)

We believe that a reasonable application of the statute at issue here comports with a conclusion that appellant had a firearm available for his offensive or defensive use while possessing a controlled substance. The statute construed in *Pena* required "'immediate personal possession,'" a category that Pena contended had "a considerably narrower focus than 'armed' or 'personally armed.'" (*Pena, supra*, 74 Cal.App.4th at p. 1086.) In the instant case, however, the focus was not so narrow, and the reasoning of *Bland* applies. Although *Bland* dealt with a different statute, it nevertheless relied on language similar to that of section 11370.1 when stating that "[a] defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*Bland, supra,* 10 Cal.4th at pp. 997, 1001.) Here, testimony established that Rodriguez placed the handgun on the bar as she ran to the bathroom through the living room. Delarios was in the living room, and he followed in Rodriguez's path. The gun was not so far from Delarios that he could not access it and put it to immediate use. It was not necessary for the gun to be in Delarios's hand or in the exact same location as the narcotics for it to be available for his immediate use. It was found in a spot where Delarios could easily have grabbed it.

Furthermore, Delarios and Rodriguez, who placed the gun on the bar, lived together. The evidence showed that Rodriguez was a partner in Delarios's drug business, since she headed immediately for the bathroom to flush the evidence. The jury could reasonably draw the inferences that Delarios and Rodriguez both knew about the handgun and that both had it available for their offensive or defensive use. As stated in *Bland*, the possession of drugs constitutes a continuing offense, and if the prosecution shows that a firearm was found "in close proximity to the illegal drugs in a place frequented by the defendant," the jury may reasonably infer, inter alia, that the defendant had the firearm close at hand and available for immediate use at some point during the time he possessed the narcotics. (*Bland, supra,* at p. 995.) Delarios's arguments are without merit.

II. Section 654 and Count 3 (Delarios)

A. Delarios's Argument

Delarios contends there was not substantial evidence to support the trial court's failure to stay his sentence in count 3 under Penal Code section 654. Count 1 (possession for sale of a controlled substance with an enhancement for being personally armed with a firearm under Penal Code section 12022, subdivision (c)) and count 3 (possession of a controlled substance with firearm) were connected by their individual elements and were part and parcel of one course of conduct and one objective, i.e., Delarios's efforts to run a business to sell methamphetamine. Therefore, the sentence on count 3 must be stayed.

B. Relevant Authority

As noted, section 11370.1 provides in pertinent part that "every person who unlawfully possesses any amount of . . . a substance containing methamphetamine . . . while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years." (§ 11370.1, subd. (a).)

Penal Code section 12022, subdivision (c) provides: "Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section . . . 11378 . . . , shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for three, four, or five years."

Penal Code section 654 provides in relevant part: "(a) An[y] act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment[,] but in no case shall the act or omission be punished under more than one provision." The applicability of Penal Code section 654 to conceded facts is a question of law. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.) The correct procedure for sentencing a defendant who is convicted of several counts that fall within the purview of Penal Code section 654 is to stay execution of the sentences rather than to impose concurrent sentences. (*People v. Cruz* (1996) 38 Cal.App.4th 427, 434.)

The protections of Penal Code section 654 extend to situations in which several offenses are committed during an indivisible course of conduct. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the offenses are incidental to, or the means of accomplishing or facilitating a single objective, the defendant may be punished for any one offense but not more than one. (*People v. Harrison*, at p. 335.)

"On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . . Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) If the court makes no express finding on the issue, a finding that the crimes were divisible "inheres in the judgment" and must be upheld if supported by substantial evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

In *People v. Arndt* (1999) 76 Cal.App.4th 387, 394-395 the court noted the split of authority in the Courts of Appeal as to whether Penal Code section 654 applies to enhancements. Penal Code section 654 has been held inapplicable to sentence enhancements based on the fact of a defendant's status. (*People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519-520.) The California Supreme Court has not decided whether Penal Code section 654 applies to enhancements generally. (*People v. Palacios* (2007) 41 Cal.4th 720, 728 [declining to address this issue].)

C. Proceedings Below

At Delarios's sentencing, the trial court stated, "As to count 3, likewise there is an argument as to whether or not the court is precluded under 654. But since we are dealing with two separate amounts of narcotics and two separate firearms, it very easily could be argued that the defendant could be sentenced to consecutive time as to count 3. So the court will not stay it but I will run it concurrent, select midterm of three years on count 3 to run concurrent to count 1."

D. Delarios Correctly Sentenced

Although, as noted, there is a split of authority in the applicability of Penal Code section 654 to enhancements, we believe an analysis of the merits of Delarios's claim is warranted.

The evidence showed there were two firearms in Delarios's residence: the loaded handgun found on the living room bar counter, and the shotgun on a shelf in the bedroom, where a baggie of methamphetamine and a box of ammunition were also found. In the first section of this opinion, we determined that the jury reasonably found that Delarios possessed methamphetamine while armed with the loaded, operable handgun that Rodriguez placed on the bar. According to Delarios, he received the unloaded shotgun in the bedroom in exchange for "dope."

Penal Code section 654 applies only to "a course of conduct deemed to be indivisible in time"; if a course of conduct is "divisible in time," Penal Code section 654 is inapplicable. (*People v. Beamon* (1973) 8 Cal.3d 625, 639 & fn. 11.) If a defendant had separate objectives that "were either (1) consecutive even if similar or (2) different even if simultaneous," multiple punishment is permissible, even if the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Britt* (2004) 32 Cal.4th 944, 952; *People v. Harrison*, *supra*, 48 Cal.3d at p. 335.) Thus, even if offenses were committed with a single intent and objective, they may be punished separately if they were committed on different occasions. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) Factors often considered in determining the temporal divisibility of offenses are

whether the defendant had an opportunity to reflect upon and renew his or her intent before committing the next offense and whether each offense created a new risk of harm. (*Id*. at pp. 1255-1256.)

In applying Penal Code section 654, the defendant's objectives must not be "parse[d] . . . too finely." (*People v. Britt, supra*, 32 Cal.4th at p. 953.) In this case, the evidence does not show that defendant was armed for any purpose other than to sell methamphetamine. No evidence was produced to support a finding that defendant may have possessed the shotgun for different purposes or that he formed an intent and objective different from his intent and objective in being armed with the handgun. There was no evidence regarding the date when Delarios acquired the shotgun so as to divide the acquisition temporally from his possession of the handgun. Thus, there was one indivisible transaction shown and essentially one criminal act. Accordingly, the sentence for the section 11370.1, subdivision (a) offense in count 3, which received less punishment, must be stayed pursuant to Penal Code section 654.

III. Adoptive Admission Instruction (Rodriguez)

A. Rodriguez's Argument

Rodriguez asserts that her silence in response to Deputy Grisso's question as to what she was doing with the gun was an exercise of her right to remain silent. She contends that the trial court erred by reading sua sponte an instruction regarding adoptive admissions for the sole purpose of allowing the jury to consider her silence as an admission of guilt. According to Rodriguez, the error violated her Fifth Amendment rights and requires the reversal of the firearm allegation attached to count 1 and the guilty verdict in count 3.[3]

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[3] The trial court read CALCRIM No. 357 as follows: "If you conclude that someone made a statement outside of court that accused defendant Lacey Rodriguez of the crime or tended to connect defendant Lacey Rodriguez with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true: 1. The statement was made to the defendant or made in her presence. 2. The defendant heard and understood the statement. 3. The defendant would, under all the circumstances, naturally

B. Relevant Authority

Evidence Code section 1221 provides for adoptive admissions and states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." "Under this provision, 'If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." [Citation.] 'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential. [Citation.]' 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

It has been held that a defendant's silence in the face of a police officer's accusatory statement has little probative value, since it may indicate nothing more than reliance on his or her right to remain silent, especially when the defendant has been advised of his or her constitutional rights. Thus, "once *Miranda* [] warnings have been given, it may be constitutionally improper to introduce evidence of an accused's postarrest silence." (*People*

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have denied the statement if she thought it was not true. The defendant could have denied it but did not. If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose. You must not consider this evidence in determining the guilt of the other defendant."

v. Medina (1990) 51 Cal.3d 870, 890, citing *Fletcher v. Weir* (1982) 455 U.S. 603, 605-607; *Doyle v. Ohio* (1976) 426 U.S. 610, 619.)

D. Any Error Harmless

As noted in the facts section of this opinion, Deputy Geoff Grisso interviewed Rodriguez at the scene. After reading Rodriguez her *Miranda* rights, he asked Rodriguez what she was doing in the bathroom, to which Rodriguez replied, "You know what I was doing." Deputy Grisso then asked what she was doing with the gun, and in response Rodriguez "just lowered her head." Deputy Grisso said he "took that to mean she didn't want to talk to me anymore." Later, Deputy Grisso stated that his interview with Rodriguez "was cut short because, as I said, she indicated she didn't want to talk to me anymore so I stopped talking to her." During the discussion of jury instructions, the trial court stated that CALCRIM No. 357 was a necessary instruction. The court said that Rodriguez's reaction when confronted regarding the firearm was definitely an adoptive admission and was a "textbook example." Over defense counsel's objection, the trial court read the instruction. We agree with defendant that the issue is not forfeited despite the lack of a specific ground for the objection, since the issue affects defendant's substantial rights. (Pen. Code, § 1259.)

As Rodriguez repeatedly points out, Deputy Grisso himself interpreted Rodriguez's silence as an indication she did not wish to speak with him any longer. Although we do not believe the deputy's interpretation of Rodriguez's failure to respond is determinative of this issue, Rodriguez's reaction was undoubtedly ambiguous, coming so soon after she was advised of her *Miranda* rights. The United States Supreme Court has stated that *Miranda* warnings render every postarrest silence "insolubly ambiguous" and therefore constitutionally inadmissible, even for the limited purpose of impeachment. (*Doyle v. Ohio, supra*, 426 U.S. 610, 617-619; see also *United States v. Hale* (1975) 422 U.S. 171, 176 [Because it is so ambiguous, silence has little probative value in most circumstances, and the inherent pressures of custodial interrogation compound the difficulty of identifying the reason for the silence]; *People v. Sutton* (1993) 19 Cal.App.4th 795, 799-800 [Silence may be merely an arrestee's exercise of his or her *Miranda* rights].) Our California Supreme

Court has observed that "the use of the adoptive admissions rule may be unwarranted in some . . . custodial interrogations." (*People v. Medina, supra,* 51 Cal.3d at p. 891.)

In *People v. Cockrell* (1965) 63 Cal.2d 659, for example, the defendant was arrested and confronted by a witness who claimed to have purchased marijuana from him. A police officer asked the defendant "what he had to say about 'that,'" and the defendant remained silent. (*Id*. at p. 669.) The court concluded that the defendant's silence was constitutionally protected regardless of the adoptive admissions rule because, "even though it does not appear that [the defendant] made any statement indicating that he was invoking his privilege against self-incrimination, he had a right to remain silent and an inference adverse to him may not be drawn from his silence." (*Id*. at p. 670.)

In the instant case, however, any error in giving the adoptive admission instruction was harmless. Claims that a defendant's right against self-incrimination was violated is reviewed under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24; see also *People v. Earp* (1999) 20 Cal.4th 826, 856-858; *People v. Hardy* (1992) 2 Cal.4th 86, 157.) Rodriguez's argument that the adoptive admission instruction contributed "in some way" to the jury's true finding on the arming enhancement and the guilty verdict in count 3 is unsound. In the first instance, the adoptive admission instruction, by its own terms, only applied if the jury found, inter alia, that someone made a statement tending to connect Rodriguez to the crime and that she would naturally have denied the statement if she thought it was not true. The jury may not have found the deputy's question constituted an accusation that required a denial. The jury was also instructed that "some of these instructions may not apply," and not to "assume just because I give a particular instruction that I am suggesting anything about the facts." (CALCRIM No. 200.) Assuming the adoptive admission instruction did not apply, the jury presumably disregarded it.

It is true that the prosecutor called attention to the adoptive admission instruction. The prosecutor stated, "But that's basically when you're confronted with somebody and you have the opportunity to deny it but you don't. That's an adoptive admission. . . . That's

almost the same as saying, yeah, you know what, you are right. I did do whatever or I did have whatever. In here what was defendant asked. First, she was asked about the drugs. What was her response? 'You know what I was doing.' Then, when asked what she was doing with the gun, what did she do? She didn't deny it. Given her response, first response, 'you know what I was doing,' she knew she had been caught red-handed. She simply put her head down and stopped talking." Defense counsel effectively countered the prosecutor's argument by asserting that no one actually saw Rodriguez with the gun when she appeared in the front door or at any other time. Furthermore, the court told the jury that statements made by attorneys during argument are not evidence. (CALCRIM No. 222.)

Most importantly, the evidence adduced at trial regarding Rodriguez's possession of the handgun was strong. As the jury was instructed, the testimony of only one witness is sufficient to prove a fact. (CALCRIM No. 301.) Deputy Saenz told the jury he saw Rodriguez place a shiny object on the bar area before she ran into the bathroom. The shiny object was later shown to be the handgun. The jury clearly rejected Rodriguez's defense that she did not have a gun and she did not possess the drugs, and that there was no evidence she even lived there. The evidence overwhelmingly showed that Rodriguez participated in the methamphetamine selling business, and the jury clearly found Deputy Saenz's testimony to be credible.

Therefore, even if the adoptive admission instruction had not been given, the result would have been the same. In view of the totality of the evidence, we conclude that beyond a reasonable doubt the admission of evidence of defendant's silence and the prosecutor's reference to it in closing argument did not influence the jury verdict. (*Chapman v. California* (1967) 386 U.S. 18; see also *People v. Delgado* (2010) 181 Cal.App.4th 839, 853-854.)

IV. Sufficiency of the Evidence in Count 1 (Rodriguez)

A. Rodriguez's Argument

Rodriguez points out that Delarios did not mention or implicate Rodriguez when he admitted that he sold methamphetamine. There was no evidence that Rodriguez was the

owner of the cell phone or the pay-owe sheets it contained. The cash was not found on her person, and there was no evidence she ever possessed or controlled this money or that she ever used the digital scales. Rodriguez asserts that the evidence showed only that she lived with Delarios and attempted to destroy the evidence of the drugs. Hence, there was insufficient evidence to prove beyond a reasonable doubt that she possessed the specific intent to sell the drugs.[4]

B. Relevant Authority

As previously noted, "the test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt*, *supra*, 15 Cal.4th at pp. 667-668.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader*, *supra*, 5 Cal.4th at p. 640.)

C. Evidence Sufficient

The jury was instructed that, in order to find Rodriguez guilty of count 1, the prosecution had to prove that Rodriguez possessed methamphetamine in a usable amount, that she knew of its presence and its nature as a controlled substance, and that when she possessed the controlled substance she intended to sell it. (CALCRIM No. 2302.) "The specific intent with which an act is performed is a question of fact." (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1008.) Direct evidence of intent is rare, and intent is most often shown by circumstantial evidence of all the facts and circumstances surrounding the crime. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208

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[4] Of the two issues Rodriguez raises, this is the only one that could reasonably apply to Delarios. Delarios actually admitted that he sold drugs for a living, and Rodriguez's argument is based on claims that his guilt cannot be attributed to her. Under these circumstances, we do not believe a discussion as to the sufficiency of the evidence against Delarios in count 1 is warranted.

["Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"].)

In the instant case, ample evidence supported the jury's finding that Rodriguez possessed the specific intent to sell the drugs. The police found overwhelming evidence that the occupants of the residence where Rodriguez lived with Delarios were engaged in the sale of methamphetamine as testified to by Deputy Grisso. Rodriguez, who was seen to deposit a handgun on the bar after running away from the deputies at the entrance, rushed directly to the bathroom to begin flushing the methamphetamine down the toilet. This conduct alone was a strong indication of her involvement in the selling operation. Unlike the other occupants of the room, she took the risk of not complying with police orders in a desperate attempt to destroy evidence. Two scales were found in the apartment, which indicates a large-scale operation in which two people could cooperate. Police found no drug-user paraphernalia in Rodriguez and Delarios's living quarters, which indicates that it is unlikely Rodriguez was a mere user of methamphetamine. Her argument is to no avail, and there was sufficient substantial evidence to prove she had the intent to sell the methamphetamine.

DISPOSITION

Delarios's judgment is modified to stay the sentence for his conviction in count 3. In all other respects, the judgments against Delarios and Rodriguez are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ