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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.

KEVIN JACKSON,

Defendant and Appellant.

B276119

(Los Angeles County
Super. Ct. No. MA068120)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kevin Jackson raises contentions of trial error following his conviction of three drug offenses. For the reasons discussed below, the judgment is affirmed in part, reversed in part, and remanded for resentencing.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

Los Angeles County Deputy Sheriff Scott Carter testified that sometime around midnight on March 2, 2016, he was on patrol in Lancaster when he noticed a bicycle traveling ahead of him that did not have any lights. Carter stopped the bicyclist, who turned out to be defendant Jackson. Jackson smelled of marijuana, but he told Carter that he had smoked before being stopped and he did not have any more marijuana on him. Upon searching Jackson, Carter discovered a baggie of marijuana in Jackson's right front pants pocket. In that same pocket, Carter found a black plastic baggie containing a small amount of what appeared to be methamphetamine. In Jackson's left front pants pocket, Carter discovered "a larger quantity of methamphetamine that was in a clear, plastic bagg[ie]." In the pocket of Jackson's jacket, Carter found four pipes of the type commonly used for smoking methamphetamine. All four pipes had a white residue on them.

The parties stipulated that the larger clear baggie was subsequently tested by a criminalist and "found to contain a net weight of 3.4117 grams of [a] solid substance containing methamphetamine." The smaller black baggie contained .3885 grams of a solid substance containing methamphetamine.

Carter testified the street value of 3.4117 grams of methamphetamine was about \$200, while the value of .3885 grams of methamphetamine was about \$30 or \$40.

Carter testified that after Jackson waived his right to remain silent under *Miranda v. Arizona* (1966) 384 U.S. 436, he asked Jackson “why the two bags [of methamphetamine] were separate. He told me the larger quantity I found in [his] left, front, pants pocket was methamphetamine he was going to deliver to a person named Mike” at the Arbor Courts Apartments. Jackson also said the smaller baggie “was his own personal methamphetamine he used.” Carter gave the following testimony at trial:

“Q. [Prosecutor] Did you ask him about delivering this methamphetamine to Mike?

“A. [Carter] Yes.

“Q. What did he say about that?

“A. He said that he had just picked it up, and he was delivering it on behalf of someone else to Mike.”

Jackson also told Carter that delivering drugs was “something that he’s done before, he’ll do it on occasion, and he’s usually compensated for it.” Jackson confirmed Carter’s suspicion that Jackson was acting as a “middleman,” i.e., that “he was delivering it, that he would work on behalf of a dealer and deliver to somebody else for them.” The following colloquy also occurred:

“Q. [Prosecutor] Now, when the defendant was speaking to you about compensation that he’s received in doing these deliveries, did he say what kind of compensation he’s received?

“A. [Carter] I remember specifically he said a dollar here and there. I asked about the smaller quantity that he had. He

said he has been paid in the past, but he would not speak specifically to the amount, whether that was compensation.

“Q. You said he has been paid in drugs before in the past?

“A. Yes, ma’am.”

Jackson told Carter that the four pipes containing white residue were for his personal use.

Carter explained that, with respect to the transportation of methamphetamine, “[a] middleman would act almost like a pizza boy. The user is going to contact the dealer and may order whatever they want . . . and then the middleman would be the person who facilitates that sale. They may transport the narcotics there and then return money back or vice versa.”

Carter testified that often the middleman is “a user of narcotics. And this comes into the payment aspect of this. Sometimes, they’ll pay in money, and sometimes the dealer will also pay in narcotics for their services.” Carter opined—based on the items he found in Jackson’s possession and on Jackson’s remark about being compensated for delivering methamphetamine—that Jackson had been keeping the smaller amount of methamphetamine in the same pocket as the marijuana because those drugs were for his personal use, while the larger amount of methamphetamine was what he was being compensated for delivering.

2. Defense evidence.

Jackson did not testify and the defense did not present any witnesses.

3. *Trial outcome.*

A jury convicted Jackson of three counts: (1) transportation of methamphetamine for sale (Health & Saf. Code, §§ 11379; count 1)¹; (2) possession of methamphetamine (§ 11377; count 2); and (3) possessing a device for smoking a controlled substance (§ 11364; count 3). Jackson admitted three of the 11 prior prison term enhancement allegations with which he had been charged. He was sentenced to a total term of ten years in county jail.

CONTENTIONS

Jackson contends: (1) his conviction for transporting methamphetamine for sale must be reversed because the trial court failed to properly instruct the jury on the specific intent element of that crime; (2) this court should review the trial court's in camera *Pitchess*² review; and, (3) the prior drug conviction enhancement under section 11370.2 must be stricken because the Legislature has amended the statute.

DISCUSSION

1. *Any error in failing to adequately instruct the jury on the sales element of transporting methamphetamine (§ 11379) was harmless.*

Jackson contends the trial court committed prejudicial error by failing to instruct the jury that to convict him of violating section 11379 (transporting methamphetamine for sale), the jury had to find that Jackson was transporting the methamphetamine with the intent that it be sold. We conclude

¹ All further statutory references are to the Health and Safety Code unless otherwise specified.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

that the instruction was not erroneous; in any event, any instructional error was harmless.

a. *Standard of review.*

“We review the wording of a jury instruction de novo to assess whether the instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) A jury instruction omitting an essential element from the jury’s consideration requires reversal unless the error was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 502–503.)

“ ‘ “In reviewing [a] purportedly erroneous instruction[], ‘we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.’ ” ’ (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) The instructions must be viewed in the context of all the instructions given to the jury ‘rather than in artificial isolation.’ (*People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1574.) We “assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” ’ (*Richardson, supra*, at p. 1028.) “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” ’ (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)” (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1013 (*Lua*).)

In considering whether a jury was likely to have been confused by an instruction, we consider whether any theoretical possibility of confusion may be diminished by the parties’ opening statements or closing arguments. (*Lua, supra*, 10 Cal.App.5th at p. 1013; see also *People v. Kelly* (1992) 1 Cal.4th 495, 524–527 [although trial court erroneously instructed jury it was legally possible to rape a dead body, it was not reasonably likely jury

misunderstood correct law regarding felony murder and rape special circumstances given remaining instructions and attorneys' jury argument]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1130 [closing argument can be relevant consideration in determining prejudice from conflicting instructions]; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1298, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [although jury instruction was erroneous because it eliminated essential element of crime charged, error was harmless under *Chapman*³ in part because "district attorney in both her opening statement and closing argument relied exclusively upon the [proper act of touching] as the lewd act forming the basis for the criminal charge"]; *U.S. v. McMillan* (8th Cir. 1987) 820 F.2d 251, 256 [jury instruction that misstated crucial offense element was harmless, in part because "[c]ounsel for both parties stated in their opening statements to the jury that gross negligence was an element of the crime charged, and repeated such remarks in their closing statements"].)

b. *Section 11379 and CALCRIM No. 2300.*

Prior to January 1, 2014, section 11379 provided that any person who "transports" specified controlled substances, including methamphetamine, shall be punished by imprisonment. (Former § 11379, subd. (a); Stats. 2011, ch. 15, § 174.) The courts had interpreted the word "transports" to include transporting controlled substances for personal use. (*People v. Rogers* (1971) 5 Cal.3d 129, 134–135; *People v. Eastman* (1993) 13 Cal.App.4th 668, 673–677.) The statute provided enhanced penalties for a person who "transports for sale," as opposed to for some other purpose, but a defendant could

³ *Chapman v. California* (1967) 386 U.S. 18.

be convicted of the offense without proof of intent to sell. (Former § 11379; Stats. 2011, ch. 15, § 174; see *Lua, supra*, 10 Cal.App.5th at p. 1012.)

Effective January 1, 2014, the Legislature amended section 11379 to provide that, for purposes of that section, “ ‘transports’ means to transport for sale.” (§ 11379, subd. (c); Stats. 2013, ch. 504, § 2.) “ ‘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.’ (*People v. Eagle* (2016) 246 Cal.App.4th 275, 278.)” (*Lua, supra*, 10 Cal.App.5th at p. 1012.)

Following the 2014 amendment of section 11379, CALCRIM No. 2300 was amended by inserting the words “for sale” after the word “transported,” as follows: “To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant (. . . transported *for sale* . . .) a controlled substance; . . .” (CALCRIM No. 2300, August 2014 update, italics added.)

c. The jury instruction was not prejudicially erroneous.

Consistent with CALCRIM No. 2300, Jackson’s jury was instructed that the elements of a section 11379 violation included the following: “To prove that the defendant is guilty of this crime, the People must prove that . . . the defendant transported *for sale* a controlled substance.” (Italics added.) The trial court also instructed the jurors pursuant to CALCRIM No. 250 as follows: “The crime[s] charged in this case require[] proof of the union, or joint operation, of act and wrongful intent. [¶] For you to find a person guilty of the crime of transportation of a controlled substance for sale as charged in count 1, possession of

a controlled substance as charged in count 2, and possession of a smoking device as charged in count 3, that person must not only commit the prohibited act *but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act*; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime.” (Italics added.)

Jackson contends on appeal that his conviction for transporting methamphetamine must be reversed because “the jury could have interpreted the transportation instruction to mean another person’s intent to sell was sufficient to prove guilt (such as the intent of the alleged seller [i.e., ‘dealer’] in the prosecution’s theory of the case), or that it was sufficient for the methamphetamine to be part of a drug sale without proof of anyone’s intent.”

We are not persuaded that the jury instructions, taken as a whole, constituted an incorrect statement of the law regarding the intent element of the offense of transporting a controlled substance for sale. Although Jackson correctly notes that CALCRIM No. 250 defines general intent, rather than specific intent, the distinction is not dispositive here. CALCRIM No. 250 instructed the jury that to find defendant guilty of transport for sale, it had to find that defendant “*intentionally [did] a prohibited act,*” and CALCRIM No. 2300 instructed that the act prohibited by section 11379 was transporting a controlled substance “*for sale.*” Considered together, we believe these instructions adequately advised the jury that to convict defendant under section 11379, it had to find that defendant transported methamphetamine for sale *with the intent to do so.*

In any event, even were the instructions ambiguous, we nonetheless would affirm because the parties' opening statements and closing arguments eliminated any reasonable possibility of confusion. (See *Lua, supra*, 10 Cal.App.5th at p. 1014.) In her opening statement, defense counsel told the jury: "I'm going to be straightforward with you, and I'm going to tell you that there's not going to be any dispute in this case that Mr. Jackson had methamphetamine on him. There's no dispute about that. He had the meth. The issue is *why* he had the methamphetamine[]." [¶] And while I can't predict to you what the evidence is going to be, I expect that the People are not going to be able to prove to you that it was for *the purpose of sales, which is what the transportation charge requires*. [¶] What the evidence will show is that Mr. Jackson is a methamphetamine user; hence, the pipes that were found on him . . . that's not going to be an issue. But *the issue is going to be why*." (Italics added.)

Subsequently, during closing argument, the prosecutor argued that "you [the jury] know that the defendant transported [the methamphetamine] for sale because of his statements, because of the amount that he had, the fact that he possessed it in different pockets. . . . [¶] . . . [¶] *Now, let's talk about the evidence for sales*. The defendant makes statements. He makes these statements, and he says that he is delivering it to another person, and he says that he often gets compensated for it Now, the amount is also a part of the reason we believe it to be [for] sale[]. 3.4117 grams of meth. A usable amount is only .02. That means there was an average use of 170 and a \$200 street value for this package."

Defense counsel was even more explicit in addressing the "for sale" issue, telling the jury: "Mr. Jackson, he's a meth addict.

That's all he is. He's not a drug dealer. There's no proof . . . that on the day of this incident, Mr. Jackson was transporting methamphetamine *for the purpose of sales.*" (Italics added.) "Let's go through the elements of the crime here because that's what that is. Your role as a jury is going to take those legal elements, plug in the facts, see if they match. [¶] . . . [¶] *What evidence do they have of sales?* Let me go through the People's list. Evidence of sales. Delivering it to Mike. Gets compensated. Again, that fact is only proven if you believe the deputy" (Italics added.) "*There's not a shred of evidence that [Jackson] was delivering drugs that were part of a sale. There's absolutely no indication whatsoever that the drugs at issue were being sold.* To have a sale, you must exchange value for money, services for money. We have no indication at all. Even assuming he's a delivery boy—he's delivering it to his friend, Mike—what evidence does that prove [*sic*] that it was part of the sale? Because this charge specifically requires that he transport for sales." (Italics added.) "[A]t the end of this trial, *there's not a shred of evidence that, that 3.4 grams of methamphetamine was up for sale.*" (Italics added.) "When you go back into deliberations, I'm going to ask you to read the law. Go through it. *Focus on the sales requirement*" (Italics added.)

When considered in light of this attorney argument, therefore, we conclude the instructions described above were sufficient to put jurors on notice that the People had to prove that Jackson intended a sale of the methamphetamine. Hence, even if the trial court's instructions were erroneously ambiguous, the error was harmless beyond a reasonable doubt, and Jackson's conviction of transporting methamphetamine for sale must be affirmed.

2. *Review of in camera Pitchess review.*

Jackson requests review of the trial court's ruling on his motion seeking discovery under *Pitchess*, *supra*, 11 Cal.3d 531. Review of the in camera hearing by this court reveals no abuse of the trial court's discretion. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

3. *Sentencing claim based on new statutory authority.*

Jackson contends he is entitled to resentencing so that he can benefit from a statutory amendment that effectively nullified the trial court's imposition of a prior drug conviction enhancement. We agree.

Prior to January 1, 2018, section 11370.2 required the imposition of three-year sentence enhancements for prior controlled substances offenses, including possessing certain controlled substances for sale. Effective January 1, 2018, section 11370.2 was amended to provide that the enhancement under this section applies only to prior convictions of *using a minor* in the commission of controlled substances offenses.

The Attorney General concedes that Jackson's prior offenses are no longer within the terms of section 11370.2, and also that Jackson is entitled to benefit from the change in law because the statute is retroactive and Jackson's appeal is not yet final. We agree. Our Supreme Court's seminal decision in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) "stands for the proposition that, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.' (*Estrada*, *supra*, 63 Cal.2d at p. 748.) . . . The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing

substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

As a result, we will vacate the prior drug conviction enhancement. However, given the fact that the trial court imposed concurrent terms on other counts, we conclude that the appropriate remedy in these circumstances is to remand this case to allow the trial court to consider restructuring Jackson’s sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 [“the trial judge’s original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased”]; *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614 [remand for resentencing proper where original sentence contained unauthorized enhancement]; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455–1458 [remand for resentencing proper where original sentence violated “double-the-base-term” rule]; *People v. Savala* (1983) 147 Cal.App.3d 63, 68–69, disapproved on other grounds by *People v. Foley* (1985) 170 Cal.App.3d 1039, 1044 [remand for resentencing proper where original sentence contained improper enhancement].)

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for resentencing. The section 11370.2, subdivision (c), prior drug conviction enhancement is vacated and the case is remanded for resentencing. After resentencing, the trial court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.