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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. SANTOS MEJIA, Defendant and Appellant.	B232296 (Los Angeles County Super. Ct. No. BA352520)

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

Steven A. Brody, 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, Senior Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Santos Mejia was convicted, following a jury trial, of one count of possession for sale of a controlled substance, cocaine, in violation of Health and Safety Code section 11351. The jury found true the allegation that the amount of cocaine exceeded 40 kilograms within the meaning of section 11370.4, subdivision (a)(5). The trial court sentenced appellant to three years in state prison for the possession for sale conviction plus a 20 year enhancement term for the weight allegation.

Appellant appeals from the judgment of conviction, contending that the trial court erred in responding to jury questions during deliberations, denying appellant's *Pitchess* motion, excluding testimony from appellant's daughter and denying his motion to strike the weight enhancement. Appellant also contends that he received ineffective assistance of counsel. We affirm the judgment of conviction.

Facts

On February 4, 2009, members of a United States Drug Enforcement Agency joint task force ("HIDTA 44") were conducting a narcotics investigation focusing on Edgar Quintero and a location at 5175 Wood Avenue in South Gate. Members of the task force included Los Angeles Police Detectives Sal Duarte, Julius Resnick, Gerald Kennelly and Nick Vascones and Pasadena Police Officer Jose Urita. Detective Duarte learned that other law enforcement personnel had followed Quintero to a location in South Gate and that Quintero had engaged in suspicious activity, consistent with either doing a vehicle swap or visiting a stash location, where narcotics or narcotics proceeds are concealed. Detective Duarte waited at the Wood Avenue location for Quintero to return in a blue Chevrolet Avalanche.

The blue Avalanche arrived at Wood Avenue about 9:30 p.m. and parked in the driveway in front of the garage. Quintero and two other men walked back and forth from the garage to the Avalanche several times.

Sometime before 10:00 p.m., Quintero drove the Avalanche to Rosenbery's truck yard in Moreno Valley. A black Nissan Frontier followed the Avalanche to the yard and members of the HIDTA 44 surveillance team followed both vehicles. At the truck yard,

the Avalanche drove inside the yard while the Frontier drove back and forth in front of the yard. The detectives believed that individuals in the Frontier were conducting counter-surveillance.

Detective Resnick saw appellant walk up to the Avalanche and speak with the occupants. The detective then lost sight of the Avalanche and of appellant. About five minutes later, the Avalanche drove out of the yard and away from the area. Detective Resnick believed that a narcotics transaction had just occurred, and so he stayed at the yard rather than follow the Avalanche.

About 11:00 p.m., Detective Resnick got out of his vehicle and walked to the truck yard. As he entered the front gate, he saw appellant come out from between two trailers. One trailer was attached to a tractor and the other was not. Appellant went to a white Toyota car parked on the sidewalk outside the yard, got in the car and started it. Detective Resnick, who was not in uniform, walked back to the sidewalk. Appellant came up to the detective and asked him if he should leave the gate open. Detective Resnick told him no and added that he was just waiting for his wife to pick him up. Detective Resnick sat down on the sidewalk. Appellant locked the gate, drove away from the yard, then drove back and forth in front of the yard several times, looking into the yard as he drove past. Detective Resnick believed that appellant was engaging in counter-surveillance activity.

Other members of the HIDTA 44 team followed appellant, but he drove slowly and made a series of u-turns. The team stopped following him because they did not want to compromise the operation.

A narcotics-sniffing dog was brought to the truck yard. The dog did not go on full alert, but did indicate some excitement at the trailer near where appellant and Quintero had met.

The next morning, Detective Kennelly spoke with Steve Rosenbery, the owner of the truck yard. His yard provided secure storage for the parking of trucks and trailers. Rosenbery knew appellant as an owner-operator and independent contractor to whom he sometimes brokered freight. Rosenbery believed that the last time appellant had carried a

load for him was in October 2008. At the time of the surveillance, appellant was paying rent to keep a trailer in the yard. This was the trailer that the task force had under observation. Rosenbery did not know if the trailer belonged to appellant, but he did know that it was the trailer that appellant had pulled in the past. Appellant and anyone else who rented space in the yard got a key to the yard and had 24-hour access. Rosenbery gave Detective Kennelly appellant's address in Riverside. It was in a large gated apartment complex.

Detectives Duarte and Kennelly went to appellant's apartment complex and waited until appellant approached the white Toyota and then detained him. Appellant's daughter was with him. The detectives obtained permission to search appellant's apartment. Detectives Vascones, Duarte and Kennelly conducted the search. They found a "permanent trailer identification card" from the Department of Motor Vehicles for the trailer that was under surveillance. The registration was in the name "Maurice Alfaro Lopez." The detectives also found many registrations for other trucks. Detective Vascones recovered what he believed was a "pay and owe sheet" of the type that narcotics dealers would use.

A search warrant was obtained for the trailer. The surveillance team went to the truck yard, taking appellant with them. Appellant denied that the trailer under surveillance was his, but admitted that he paid $200 per month for the space where the trailer was parked. The detectives cut the lock on the trailer, searched it and found 59 bricks of a substance resembling cocaine. Some bricks were inside boxes and plastic bags, while others were in plastic wrap and in plain view.

Appellant told detectives that he had received a phone call from an unknown person telling him to go to the yard and meet someone in an Avalanche. That person gave appellant boxes, which appellant secured inside the trailer. Appellant said that he did not know any information about the people who called him. Appellant was paid $1,000 to store the boxes and because of that payment he believed that the boxes contained drugs or something illegal. Appellant also told police that someone called him later and told him that there was possibly police surveillance or law enforcement

presence in the area. On cross-examination, Detective Duarte denied that he made any kind of statement to appellant that he would "take" appellant's daughter or that she would go into custody if appellant did not cooperate.

The bricks recovered from the trailer were analyzed and found to contain cocaine. The total weight of the bricks were 60.6 kilograms, with a wholesale value of over $1 million. Detective Duarte opined that appellant's claim that he only received $1,000 to store the cocaine was not credible. He also opined that the narcotics organization that owned the cocaine would only entrust such a large amount of it to a trusted individual. Detective Duarte further opined that a person with such a large amount of cocaine would obtain a legitimate delivery load and transport that load and the cocaine out of state.

Discussion

1. Jury questions

The jury sent the court questions relating to the meaning of the term "controlled substance" three times. Appellant contends that the trial court abused its discretion in failing to answer the second and third sets of questions. We do not agree.

Once the jury has begun deliberating, "if they desire to be informed on any point of law arising in the case . . . . the information required must be given" to them. (Pen. Code, § 1138.) "This provision imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 755.) Where there is no ambiguity in the original instructions, "the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) However, "a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Ibid*.) Any error under section 1138 is subject to the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

Here, the jury was instructed with CALCRIM Nos. 2302 and 2300 on the elements of possession for sale of cocaine and transportation of cocaine. "CALCRIM No. 2302 captures all of the elements of the crime of possession for sale. It correctly states the elements of possession and knowledge in a manner reasonable jurors are able to understand." (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [rejecting claim of instructional error as to dominion and control element of possession for sale].) CALCRIM Nos. 2302 and 2300 both identify cocaine as a controlled substance, and list as one of the elements of the offense that "the defendant knew of the substance's nature as a controlled substance." Both instructions also stated: "The People do not need to prove that the defendant knew which specific controlled substance he possessed, only that he was aware of the substance's presence and that it was a controlled substance."

Despite the clear language of the instructions, the jury asked several questions. The jury first asked: "What is the legal definition of a controlled substance?" The court replied: "Please see CALCRIM Nos. 2300 (paragraph 4), 2302 (paragraph 5), and 2304 (paragraph 4). Cocaine is a controlled substance." Appellant does not claim error in this response.

Second, the jury asked: "To meet the requirement of knowing a substance's nature or character as a controlled substance, what exactly does the defendant have to know about the substance – does he have to know the exact type of drugs? (What about the nature or character of the substance did he need to know?)" In response to these questions, the trial court permitted the attorneys to present an additional argument. The court did not itself provide any answer to the jury. Appellant contends that the trial court's failure to provide an answer to the jury's questions was a "total abdication" of its responsibilities and permitting counsel to argue the law before the jury was arguably worse than no answer at all.

The court understood the jury's questions as being, at least in part, a question about "how does [the instruction] apply to the evidence." Given such an understanding, it was not arbitrary or capricious to permit the attorneys to offer some additional argument concerning the application of the instructions to the evidence. We see no prejudice to

appellant from what was essentially additional closing arguments. These arguments did not answer the jury's questions, however.

The jury soon sent a third set of questions sent to the court. The jury's note read: "(1) If the defendant admitted to possessing illegal drugs, is that enough for us to find him guilty of 'knowing the substance's nature or character as a controlled substance[?]' [¶] (2) Can we equate 'illegal drugs' with 'controlled substances'?" Over appellant's objection, the court replied: "I am sorry but I cannot answer these questions. Please refer to the jury instructions. Cocaine is a controlled substance."

Appellant contends that there are many drugs which cannot lawfully be possessed, transported or sold and which are therefore "illegal drugs" but which are not "controlled substances" within the meaning of the Health and Safety Code. He gives the example of Viagra, which under federal law may not be possessed without a prescription, but which is not a controlled substance within the meaning of the Health and Safety Code. (28 U.S.C. § 844.)[1] He concludes that at a minimum the trial court should have answered no to the jury's questions set forth above.

The phrase "illegal drugs" was introduced to the jury by appellant's counsel, who was paraphrasing appellant's statement to police that he did not know that drugs were in the trailer but that he thought it was "probably something illegal. Maybe drugs." Thus, the real issue for the jury was what appellant meant when he made those remarks. It was not whether federal law prohibits the possession without a prescription of some drugs which are not listed as controlled substances in California's Health and Safety Code.[2]

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[1] Appellant also points out that Vehicle Code section 312 defines "drug" to include alcohol, and that there is a California statute which bars the transportation of drugs into county jail, and that this statute has been interpreted to include alcohol. (*People v. Buese* (1963) 220 Cal.App.2d 802.)

[2] Similarly, the issue is not whether various provisions of California law use the term "drug" to include alcohol when discussing impaired driving or prohibited substances in county jail. (Veh. Code, § 312; *People v. Buese*, *supra*, 220 Cal.App.2d 802.)

The term "illegal drugs" is commonly used to refer to drugs such as cocaine, heroin and methamphetamine which are manufactured illegally and sold surreptitiously by individuals in non-traditional settings such as street corners or cars. If appellant used the term "illegal drugs" as that term is commonly used in everyday life, then his admission would be sufficient to convict him, as those drugs are controlled substances. While it is theoretically possible that by "illegal drugs" appellant meant prescription drugs such as Viagra, there is nothing in the record to support an inference that appellant meant Viagra or similar drugs, as opposed to the ordinary "street" drugs usually indicated by the phrase. In any event, it was for the jury to decide what appellant meant by the term, not the court. Thus, the court properly told the jury that it could not answer the questions.

Appellant further contends that even if the phrase "illegal drugs" does not apply to a larger group of substances than the phrase "controlled substances," the jury's questions indicated that they did not understand the knowledge element of the offense. He concludes that the court should have instructed the jury that a defendant must have specific knowledge of exactly which substance is in his possession in order to be convicted of possession of a controlled substance, or at a minimum must believe that the substance was one proscribed by the same statute as the substance he actually possesses. He relies on *People v. Innes* (1971) 16 Cal.App.3d 175 to support this contention.

Appellant's reliance on *Innes* is misplaced. In *Innes*, the defendant offered to sell mescaline to an undercover officer. In fact, the capsules she offered, and sold, contained LSD. She was convicted of offering to sell mescaline and of offering to sell and selling LSD. The court in *Innes* made it clear that the knowledge for selling a restricted dangerous drug is generally "knowledge of the dangerous drug character of the substance." (*People v. Inness, supra*, 16 Cal.App.3d at p. 178.) However, as the court pointed out, Innes was convicted not simply of offering to sell "a restricted dangerous drug but . . . a *named* restricted dangerous drug." (*Id*. at pp. 178-179, original italics.) The court found it inappropriate to convict the defendant based on "[c]ontradicting inferences . . . drawn from the same evidence" to support convictions for offering to sell

and selling two different named substances, mescaline and LSD, when the evidence showed only one dangerous drug and thus one criminal act. (*Id*. at p. 179.) The court found that "under the circumstances peculiar to this case" it was unreasonable to find that Innes believed that the capsules contained LSD. (*Ibid*.) The conviction for offering to sell and selling LSD was reversed; the conviction for offering to sell mescaline was affirmed.

As this Court explained many years ago, the required knowledge is "the controlled nature of the substance and not its precise chemical composition." (*People v. Guy* (1980) 107 Cal.App.3d 593, 600-601.) "Any more stringent rule as to knowledge would, for all practical purposes, make the statute inapplicable to anyone who had not personally preformed a chemical analysis of the contraband in his possession. Needless to say, such was not the Legislature's intent." (*People v. Garringer* (1975) 48 Cal.App.3d 827, 835.)

2. *Pitchess* motion

Appellant contends that the trial court abused its discretion in denying his *Pitchess* motion for discovery of complaints in the personnel records of Officers Vascone and Duarte. We see no abuse of discretion.

The procedure to obtain peace officer personnel records is set forth in Evidence Code sections 1043 through 1045. "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. (§ 1043, subd. (b)(3).) This two-part showing of good cause is a 'relatively low threshold for discovery.' [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.)

"To show good cause as required by section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence

or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses." (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1024.)

The affidavit filed in support of a *Pitchess* motion must also "describe a factual scenario supporting the claimed officer misconduct." (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1024.) In some circumstances, the factual scenario "may consist of a denial of the facts asserted in the police report." (*Id*. at pp. 1024-1025.) Such a denial may establish a reasonable inference that the reporting officer may not have been truthful. (*Id*. at p. 1022.) This is not true for all cases. "What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. [Citations.]" (*Id.* at p. 1025.)

A trial court's denial of a *Pitchess* motion is reviewed for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

Here, the trial court stated: "Now first of all, let me address the Pitchess situation. Mr. Cohen [the city attorney] is present, and he's filed a response to [appellant's] Pitchess motion, and among other things, Mr. Cohen, you note here that there was no police report attached; no preliminary hearing transcript, of course, which is rarely attached; that the – pleading is merely a denial. There's no scenario laid out. [¶] So you feel – and I know you can speak for yourself quite well, but the motion is deficient in a number of ways; is that correct?" The court ruled: "I'm going to have to tell you, [appellant's counsel], based on the deficiencies that I see here so far, I cannot grant the discovery request, so I'm going to deny your Pitchess motion."

We agree with the trial court that there were numerous deficiencies in the motion. First, the *declaration* did not contain the required factual scenario supporting the claimed officer misconduct. (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1024.) The declaration in support of the motion stated only that "[a] substantial issue in the trial of this case is the fabrication of evidence, Miranda violations and/or an illegal search and seizure due to dishonesty on the part of the Officers involved." This is not "a specific factual scenario of officer misconduct" as is required for a *Pitchess* motion. (*Id.* at p. 1025.)

A slightly more detailed description of the allegedly false statements was contained in the motion itself, but that is not the proper place for them. It read: "[Appellant] disputes the allegation that he told Officer Vascones and Duarte that he: [¶] 1) Was told to wait for someone at the truck yard; [¶] 2) Was paid $1000 to store contraband in any trailor [sic]; [¶] 3) Believed the boxes contained drugs; and [¶] 4) was alerted to potential police surveillance." Further, this statement represents appellant's understanding of what the officers would say appellant said. Such an understanding may or may not be accurate.

Appellant did not attach any supporting documentation showing what the officers' testimony was going to be. As the trial court recognized, this was another deficiency in appellant's motion. Typically, the supporting documentation is a police report. (See *People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1338, fn. 5 ["in our review of the *Pitchess* case law, which has been substantial, we have found no published case where [the police report] was not attached" to the motion].) As the Court of Appeal in *Sanderson* pointed out, Evidence Code section 1043 does not expressly require that the police report be attached. (*Id*. at p. 1338.) In *Sanderson*, at defense counsel's request, the trial court took judicial notice of the subject officer's preliminary hearing testimony as "corroboration" of the defendant's statements of facts. No such request was made here. Thus, the trial court had no basis for determining if appellant had accurately stated what the officers' testimony would be.

A review of the record in this case demonstrates the need for supporting documentation. The police report is not a part of the record on appeal, but the preliminary hearing transcript is. At the preliminary hearing, Officer Vascones gave a summary of appellant's statements which differed from the statements described in appellant's motion. For example, appellant indicated that the officer would claim that appellant stated that he "was told to wait for someone" at the yard. Officer Vascones testified that appellant stated that he was told to "meet up with the blue Avalanche" at the

yard.[3] These statements are similar but not identical. Thus, appellant's dispute that he told the officers that he was supposed to "wait" for "someone" is not a direct denial that he told the officers that he was supposed to "meet up" with a "blue Avalanche" and so does not create an inference of dishonesty on the officer's part.

The lack of a police report or similar supporting documentation also made the motion deficient in other ways. A police report does more than just provide corroboration of an appellant's claims. It provides a detailed statement of the officers' account of the crime. Absent such an account, it is difficult to impossible to assess whether the factual scenario set forth by a defendant is plausible. (See *Warrick, supra,* at p. 1025 ["What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents."].)

Since appellant did not show the required factual foundation for his claims of officer misconduct, the trial court did not abuse its discretion in denying appellant's motion.

3. Voluntariness of confession

Before trial, appellant moved to suppress his statements to police on the ground that the statements were not voluntary. At the hearing on this motion, Jocelyn testified about events which occurred at appellant's house when the police came. Her version differed from the police version. There is no dispute, however, that at some point, appellant left the house with police and went to the truck yard, and that Jocelyn did not accompany them and was not present at the truck yard. Near the conclusion of the hearing, the prosecutor clarified that he was only seeking to introduce statements made by appellant at the truck yard after he had been advised of and waived his *Miranda* rights. The court found appellant's statements at the truck yard to be voluntary.

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[3] Similarly, appellant indicated that Officer Vascones claimed that appellant stated that he "was alerted to potential police surveillance." Officer Vascones testified that appellant told him that he received a phone call "saying that police might be in the area and for him to watch out."

Near the end of the People's case, appellant sought to call Jocelyn as a witness. The court ruled that Jocelyn could not testify about the voluntariness of appellant's statements to police, but could testify about matters which would impeach Detective Duarte's credibility. This included Jocelyn testifying that Detective Duarte told appellant at the house that police would arrest Jocelyn if appellant did not go to the truck yard with police.

Appellant contends that the trial court erred in limiting Jocelyn's testimony to impeachment testimony. Appellant contends that the evidence was admissible because it was for the jury to determine whether his confession was freely and voluntarily given. Appellant is mistaken.[4] The trial court did not err.

"With the adoption of the Evidence Code, effective January 1, 1967, California now gives the trial judge the final responsibility for determining the admissibility of confessions, and the court is required to determine the admissibility of a confession outside the presence of the jury if the party so requests. (Evid. Code, §§ 400, 402, subd. (b), 405; *People v. Lindsey* (1972) 27 Cal.App.3d 622, 631 [103 Cal.Rptr. 755].)" (*People v. Culver* (1973) 10 Cal.3d 542, 547, fn. 8; see *People v. Carroll* (1970) 4 Cal.App.3d 52, 59 [if court finds confession voluntary and admits it, jury may not disregard confession on the ground that jury believes it to be involuntary].) Thus, Jocelyn's testimony was not admissible at trial on the issue of voluntariness, because that was not an issue for the jury to decide.

As the United States Supreme Court has explained, while the voluntariness of a confession is a legal issue for the trial court, the separate factual question of the confession's reliability is an issue for the jury. (*Crane v. Kentucky* (1986) 476 U.S. 683, 688.) Thus, a defendant may present "evidence about the manner in which a confession was obtained" as relevant to its "reliability and credibility." (*Id.* at p. 691.) The trial court permitted appellant to present such evidence.

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[4] To support this contention, appellant relies on *People v. Fox* (1944) 25 Cal.2d 330. Although this case has never been expressly overruled by another opinion, it has clearly been superseded by Evidence Code section 402.

4. Ineffective assistance of counsel

Appellant contends that his counsel was ineffective for failing to introduce testimony from his daughter which would have impeached Officer Duarte's testimony. We do not agree.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

When an appellant makes an ineffective assistance claim on appeal, we look to see if the record contains any explanation for the challenged aspects of the representation. If the record is silent, then the contention must be rejected "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [citation]." (*People v. Haskett* (1990) 52 Cal.3d 210, 248.)

The decision whether to call witnesses is a matter of trial tactics and strategy which a reviewing court generally may not second-guess. (*People v. Bolin* (1998) 18 Cal.4th 297, 334; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059-1059.) Tactical errors are generally not deemed reversible, and counsel's decisions must be evaluated in the context of the available facts. (*People v. Stanley* (2006) 39 Cal.4th 913, 954; *People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Here, Jocelyn's testimony, if believed by the jury, would have cast doubt on Detective Duarte's testimony. Thus, it would have been reasonable trial strategy to call her. The case against appellant did not rest on his statements to Detective Duarte, however, and calling Jocelyn in an attempt to discredit appellant's admissions was not the only sound strategy available to trial counsel. Trial counsel decided to use appellant's statements to his own advantage by arguing that they showed that appellant was not

inside the trailer. That was equally sound strategy, as the jury's focus on the question of appellant's knowledge showed. The choice between such sound strategies is particularly in the province of trial counsel and not this court. Accordingly, appellant's claim fails.

5. Weight enhancement

Appellant contends that the trial court abused its discretion in refusing to strike the weight enhancement because the court gave substantial weight to several impermissible factors in reaching its decision. Specifically, appellant contends that the trial court based its ruling on the grounds that appellant had exercised his right to a jury trial and hired private counsel, and maintained his innocence after conviction and showed no remorse. We do not agree.

At the sentencing hearing in this matter, appellant personally addressed the court, stating: "I made the decision to have a jury trial for my case because I am – I feel I'm innocent. I made this decision because it wasn't right for me to plead guilty to a crime I didn't commit. . . . [¶] I just need justice. I really feel disappointed because society's safety is in the hands of only one person, this one individual with all the authority vested in him or her; and with one single stroke of a pen could change our future and destroy an entire family in just a matter of seconds. We are helpless before this circumstances. [¶] I also feel disappointed in light of the jury's decision because a jury should really make a decision based on factual evidence by way of videos, photographs, fingerprints, of – [¶] . . . [¶] . . . intercepted calls, telephone calls, and witnesses. I'm in a position to show with factual evidence what they're saying; not based on a story fabricated from a cartoon or a story fabricated by an agent without factual evidence. And they should not base their decision, the jury, on what the attorneys say. That's what – how an investigation of over a year culminated with the fabrication of this story, a story in which I never took place. I didn't have any role in this story because I was never really part of the story this way. They can save time and energy if this job had been completed and I will be home with my family and the real guilty person would be here in my place."

Appellant's counsel then addressed the court, arguing that the court should strike the weight enhancement because there was no hidden compartment for the drugs in the trailer, the evidence indicated that appellant was storing the drugs for someone else, it was possible that appellant stored the drugs due to a threat to his family (although there was no evidence of this), the cocaine was not packaged for individual sale, appellant had told police that it was the first time he had done something like this and the crime did not involve planning or sophistication.

The trial court then heard argument from the People, and sentenced appellant. We see nothing in the trial court's remarks to indicate that the court based its sentencing decisions on appellant's exercise of his right to a jury trial or to hire counsel of his own choosing. We understand the trial court's sentencing remarks about the trial as a response to appellant's assertion that his trial was not fair.

The trial court stated: "Whenever someone goes to prison, particularly for an extended time, the family certainly suffers; however, the responsibility for that suffering lies not with the court or the district attorney's office, but with the defendant who chose to commit this offense. [¶] I have certainly had many trials where after trial the defendant continues to profess his innocence, and [appellant] has an absolute right to do that. I've rarely had a defendant who has been so vociferous in his disregard of the jury's time and efforts." Following a brief digression on the role of the jury as one of the cornerstones of democracy, the court returned to the actions of the jury in this case, stating, "In this case, the jury found beyond a reasonable doubt, all 12 of them, unanimously, that [appellant] had committed the crime in which he was charged in count 3, and that the amount of the substance exceeded 40 kilograms. [¶] The fact that they followed their duty and did a careful job is evident in the fact that they found him not guilty on the other count. So they didn't just go back there and say, 'Let's vote guilty because there is a lot of dope here.' They obviously went through the elements of the instructions and followed the law." The court also noted appellant "had not only a jury trial, but he had counsel of his own choosing, who did an excellent job in defending him, as reflected by the acquittal on one of the two counts."

It is less clear whether the trial court considered appellant's lack of remorse as a sentencing factor. The court stated: "[Appellant] has taken no responsibility. To say that he is not remorseful is an understatement. He has refused to take any responsibility for this and says that – he suggests the court and the district attorney's office and I guess the jury is destroying his family. [¶] Cocaine destroys families. People who are addicted to cocaine and have access to cocaine, that destroys families. And the amount of cocaine involved here obviously was a lot of cocaine."

This statement is perhaps best understood as a further response to appellant's claim that his trial was unfair. Even assuming for the sake of argument that the trial court did consider appellant's lack of remorse as a sentencing factor, we would see no abuse of discretion. A defendant's lack of remorse or refusal to take responsibility for the offense may not be used as an aggravating factor if the defendant has denied guilt and the evidence of guilt is conflicting. (*People v. Leung* (1992) 5 Cal.App.4th 482, 507.) Here, the evidence of guilt was not conflicting. As the court pointed out, appellant "told the police he was paid $1,000. He met with a man whose name he didn't know . . . he didn't know exactly what was in the boxes, but he figured it was narcotics based on the fact that he was getting paid for it."

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J. KRIEGLER, J.