People v. Flores

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OPINION

Following a joint trial, Moses Flores and Christina Maestas separately appeal their drug related convictions. Flores contends his conviction must be reversed because the trial court prejudicially erred by: (1) allowing the jury to know he was on probation; (2) admitting prejudicial hearsay testimony; (3) failing to sua sponte instruct the jury pursuant to CALJIC No. 17.00; (4) committing these cumulative errors; and (5) by sentencing him in violation of Penal Code section 654. Flores additionally filed a writ of habeas corpus, which we deny by separate order. (See Cal. Rules of Court, rule 24(b)(4).) We reject appellant's claims of prejudicial error on appeal and, with a minor modification, affirm the judgment.

PROCEDURAL HISTORY

Appellant was charged by information with possession of methamphetamine for sale (Health & Saf. Code, [1] § 11378), maintaining a drug house (§ 11366), willful child cruelty (Pen. Code, § 273, subd. A(b).), being under the influence of a controlled substance (§ 11550, subd. (a)), and possessing drug paraphernalia (§ 11364). After a joint jury trial, the jury convicted appellant as charged. The trial court sentenced appellant to two years in prison. He timely appeals.

FACTS

In May of 2002, Kern County narcotics task force officers conducted a probation search at the residence where appellant was living. Appellant, who was the focus of the probation search, was living at the home with co-defendant Maestas and her four children, as well as Leticia Gonzales and her two children. Officers announced they were there for a probation search, and after a second request appellant answered the door. He was immediately detained.

Maestas was lying on a couch in the living room and was detained and searched. Officers found 9.87 grams of methamphetamine in plastic baggies in her sock. She also had almost $500 in her

possession. She was not under the influence of drugs. Other indicia of drug sales were found in the apartment, including plastic baggies and a calculator located in a desk drawer.

Officers detained two other men in the residence, who were both under the influence of a stimulant and had puncture marks in their arms. Appellant appeared to be under the influence of a stimulant at the time and told officers he "was dirty." He told officers he had placed the methamphetamine in Masteas's sock because he was the focus of the probation search and that the methamphetamine was for his personal use. He claimed he used "an eight ball a day." When confronted with what a large quantity of methamphetamine he was purporting to use, he stated he used a little less. Appellant did not appear to be a chronic user of methamphetamine.

An expert witness opined that all the adults in the house appeared to be "user dealers." Maestas's eight-year-old son testified that appellant used drugs and his mother sold drugs. A sign in the window of the residence read:

"No visitors after 11:00 p.m. No minors here after curfew. Make sure you have a way home. No more staying the night. No paraphernalia allowed."

Appellant and Maestas both testified. Maestas testified that she had cash in her possession because she had just cashed her welfare check. She did not recall telling officers that she had sold methamphetamine in the past and denied selling methamphetamine. She said she placed the sign in the window to keep troublemakers away. Appellant testified that he had a "very big habit" and the drugs found in Maestas's sock were for his personal use.

DISCUSSION

Evidence that appellant was on probation

Appellant's first claim on appeal is that the trial court erred by allowing the jury to hear that the purpose of the officer's presence at the residence was to do a probation search of appellant. The trial court had initially determined that appellant's probation status was not relevant. However, the prosecutor argued that appellant's probation status was "highly probative and highly relevant to my case to show that in preparing for a probation search they were hiding the narcotics inside Miss Maestas's sock." The court then agreed that appellant's probation status was relevant and the jury was allowed to hear that the officers were conducting a probation search.

Waiver

As an initial matter, we note that the parties do not agree on whether appellant has preserved this issue for appeal, having failed to object at the time the evidence was offered at trial. While an attorney raising an evidentiary objection only by in limine motion can risk failing to preserve the

issue for appeal, we see no such problem here. (See People v. Jennings (1988) 46 Cal.3d 963, 975, fn. 3 ["Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal."].) However, "[i]f a motion to exclude evidence is made raising a specific objection, directed to a particular, identifiable body of evidence, at the beginning of or during trial at a time when the trial judge can determine the evidentiary question in its appropriate context, the issue is preserved for appeal without the need for a further objection at the time the evidence is sought to be introduced." (People v. Crittenden (1994) 9 Cal.4th 83, 127); see also People v. Ramos (1997) 15 Cal.4th 1133, 1171 [sufficiently definite and express ruling on a motion in limine may preserve claim].) Here, the trial court had clearly and expressly ruled that evidence of appellant's probation status would be allowed in, and we see no change in that evidence or the posture of the case to alter the ruling such that an additional objection would have been worthwhile or necessary. Accordingly, we address the merits of his claim.

Parole Status Evidence

Appellant argues that allowing the jury to hear of his parole status was immaterial and prejudicial. We review the lower court's decision for abuse of discretion. (People v. Cox (2003) 30 Cal.4th 916, 955 ["An appellate court applies the abuse of discretion standard to review any ruling by a trial court on the admissibility of the evidence ... "].) Respondent maintains the evidence was material to show appellant's consciousness of guilt because - knowing that he was going to be the subject of the search - he delayed in answering the door and he hid the methamphetamine in Maestas's sock.

The trial court, after hearing argument by counsel, stated:

"[The prosecution] can use any number of things that are not charged for the purpose of showing consciousness of guilt, for instance, flight or bringing false statements or trying to mislead or trying to suppress evidence or destroy it or hide it. Those things don't have to be charged and they can be used as evidence of consciousness of guilt, and for you to say its not relevant, its highly relevant. As a matter of fact, we have instructions for that very purpose. They are CALJIC instructions about the concealment of evidence or attempts to destroy it or dispose of it or to intimidate witnesses or to influence witnesses and so forth. So your objection is noted but it's overruled, and your request that they be prohibited from saying that he is on probation is denied if they want to use it for a valid purpose."

Thus, the trial court concluded the evidence that appellant was subject to a probation search was relevant to show consciousness of guilt with respect to appellant's actions. Appellant argues that evidence was unaffected by the type of search being conducted, and thus there was no reason to establish it was a probation search. However, this argument ignores that appellant's specific knowledge that he was the subject of the search more expressly shows consciousness of guilt with respect to hiding the methamphetamine he was holding. [2] The trial court did not abuse its discretion.

In any event, contrary to appellant's argument, this was not a "close case." The amount of methamphetamine involved, the other evidence of narcotics transactions, and the properly admitted expert opinion that all the adults in the house were "user/dealers" render any error in admitting evidence of appellant's parole status harmless. [3] (See Evid. Code, § 353; People v. Watson (1956) 46 Cal.2d 818, 836.)

Admission of hearsay testimony

Appellant next argues the trial court erred when it failed to strike a statement by a testifying officer that the officers were at appellant's house to perform a probation search and "also to investigate information that I had that Mr. Flores was dealing methamphetamine." Defense counsel immediately objected that the statement was hearsay, and the court responded:

"Yes. The information that is received and what the officer just said [about appellant], whatever he said about him, you will not consider that for the truth of whatever was said, and what the witness said, that is not - you are not allowed to consider that for the truth of what was said but only to consider what action this witness took in response to that information. And you will be instructed in the instructions that you must consider that evidence only for that purpose.

Appellant now argues that the statement was hearsay and irrelevant and therefore the court erred in admitting it even for a limited purpose. Respondent contends appellant's relevance argument was waived for failure to raise it below. Regardless of the waiver issue, error, if any, was harmless. [4]

Appellant complains that the evidence was inadmissible because it was irrelevant. However, appellant is complaining about a statement that was entered into evidence by spontaneous declaration. Even if appellant is correct that the statement was irrelevant, then trial court would have merely ordered the statement stricken rather than instructing the jury to disregard it for the truth of whether or not appellant was dealing methamphetamine. Either way, the jury was properly instructed to not consider the evidence in determining whether or not appellant was dealing in methamphetamine. While appellant contends jurors are incapable of following such instructions, we presume that they are. (See People v. Cline (1998) 60 Cal.App.4th 1327, 1336 ["[W]e are required to presume that the jury understands and follows the instructions it is given."]; see also People v. Cruz (2001) 93 Cal.App.4th 69, 73.) Thus, the issue before us (contrary to appellant's implication) is not whether the jury should never have heard this statement at all, but rather whether a motion to strike would have cured the harm any more effectively than the limiting instruction given. Again, we presume the jury follows instruction, and having been instructed to disregard any evidence of "information" that appellant was dealing drugs we presume that the jury did just that.

Nevertheless, appellant additionally contends that the error could not have been harmless because the jury requested additional clarification regarding the phrase "intent to sell" with respect to certain of the instructions. Again, appellant continually refers to "Officer Geronimo's erroneously admitted

statement" without acknowledging that the statement was "admitted" only to the extent the court ordered the testimony limited rather than stricken. Appellant maintains that a jury note during deliberations asking whether "intent to sell" for purposes of count 2 (maintaining a place to sell methamphetamine) was the same as "intent to sell" for purposes of count one (possession with intent to sell) demonstrates the "erroneously admitted statement" prejudiced him. However, appellant does not show how that question demonstrates any confusion by the jury regarding Officer Geronimo's statement other than concluding "there existed too much danger the jury would consider Officer Geronimo's statement for the truth of the matter asserted," and that the jury's "uncertainty" regarding the intent to sell elements "underscores the prejudicial nature of Officer Geronimo's improperly admitted statement." We simply do not see how a jury question regarding the elements of maintaining a place to use methamphetamine shows the jury would disregard an instruction to limit testimony for a certain purpose.

Moreover, all of these conclusions are predicated upon appellant's assumption that this was "an extremely close case," a conclusion with which - as explained above - we disagree. Thus, even assuming trial court error in limiting Officer Geronimo's statement rather than striking it, the error could not have been prejudicial on this record, and the net effect would have been the same.

CALJIC No. 17.00

Appellant next claims the trial court erred in failing to sua sponte instruct the jury pursuant to CALJIC No. 17.00:

"You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to [both] [all] the defendants, but do agree upon a verdict as to any one [or more] of them, you must render a verdict as to the one [or more] as to whom you agree." (CALJIC No. 17.00 (6th ed. 1996).)

Respondent agrees that the trial court erred in failing to give this instruction. (See People v. Mask (1986) 188 Cal.App.3d 450, 456-457.) The question is whether appellant was prejudiced by the error. We conclude he was not.

First, the trial court gave other instructions that effectively informed the jurors they must decide separately each defendant's guilt of the charged offenses. CALJIC No. 1.00 instructed the jurors they "must not be influenced by pity for or prejudice against a defendant." (Italics added.) The court instructed pursuant to CALJIC No. 2.01 that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (Italics added.) Similarly, the court instructed under CALJIC No. 2.90: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him or her guilty beyond a

reasonable doubt." (Italics added.) [5] CALJIC No. 17.40 informed the jury that the "People and the defendant are entitled to the individual opinion of each juror." (Italics added.) The court also instructed the jurors to consider the instructions as a whole. (CALJIC No. 1.01.)

In addition, the court provided the jury with separate verdict forms for appellant and Maestas as to each charged offense. Considered as a whole, the instructions therefore effectively instructed the jurors they "must decide separately whether each of the defendants is guilty or not guilty." (CALJIC No. 17.00.) Additionally, in closing argument the prosecution pointed out the separate verdict forms to the jury and each defendant's counsel gave separate closing arguments clearly articulating the individual cases for each defendant. Further, in closing argument counsel specifically addressed the fact that the prosecution contended appellant was trying to "take the fall" for Maestas, making it even more apparent to any juror that the decision of guilt was a separate one as to each defendant.

In any event, under either a Watson [6] or Chapman [7] standard of review, the error in failing to instruct the jury with CALJIC No. 17.00 was harmless. Once again, despite appellant's claims to the contrary, we note that the evidence against him was very strong. Appellant argues repeatedly that the evidence was strong as to Maestas but that he was essentially simply convicted along with her. This argument ignores that appellant admitted to possessing an excessively large quantity of methamphetamine, expert testimony indicated he was not a chronic user of methamphetamine and did not use the amount he claimed to use, he gave inconsistent statements regarding how much methamphetamine he used, and that the jury was fully entitled to reject his testimony that the three large baggies of methamphetamine he attempted to hide on Maestas were for his personal use. Additionally, while appellant tries to point to all the other circumstantial evidence as relating solely to Maestas, the baggies, calculator, sign in the window and other indicia of sales were in the house where appellant and Maestas lived. Despite appellant's protestations, the evidence strongly suggested they were both dealing methamphetamine.

The trial court's failure to instruct with CALJIC No. 17.00 does not mandate reversal.

Cumulative Prejudice

Appellant next contends that the cumulative effect of the errors requires reversal of his convictions. We disagree. As set forth above, the evidence that appellant was on probation was properly admitted and utterly harmless in any event. Similarly, statements admitted regarding whether appellant and Maestas "used to sell" methamphetamine were just as likely helpful to the defense as harmful and thus, error, if any, was harmless. The hearsay statement regarding "information" about appellant dealing drugs was not admitted by the trial court - it was a spontaneous statement - that was followed immediately by an appropriate limiting instruction. To the extent that there was instructional error it too was utterly harmless given the instructions and trial as a whole. Thus, having ultimately found only limited error that was all harmless, we find no cumulative prejudice.

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Penal Code Section 654 Error

Finally, appellant argues that he was improperly sentenced to concurrent terms for his crimes. He claims his crimes were committed all within one course of conduct, so he can only be punished for one of the crimes pursuant to section 654 of the Penal Code. We agree, in part.

Penal Code section 654 provides in part:

"(a) An 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Section 654 of the Penal Code applies where a person suffers from multiple punishments for a single criminal act or omission. (People v. Beamon (1973) 8 Cal.3d 625, 637-638.) The provision also applies "when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction." (People v. Saffle (1992) 4 Cal.App.4th 434, 438.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (Neal v. State of California (1960) 55 Cal.2d 11, 19; People v. Latimer (1993) 5 Cal.4th 1203, 1208.)

Whether there was more than one intent or objective is a question of fact for the trial court and its finding will be upheld if there is substantial evidence to support it. Where the trial court does not make an express finding, we are to presume an implied finding that the crimes were divisible and the judgment must be upheld if supported by the evidence. (People v. Nelson (1989) 211 Cal.App.3d 634, 638.) As to the first three counts, appellant asserts that each of his crimes was committed pursuant to one intent and objective, namely, to continue his drug habit. However, the record amply supports a finding that he engaged in at least two separate courses of conduct with respect to those counts: there was evidence he was selling methamphetamine, and there was evidence he was allowing others to hang out and use methamphetamine in his residence (as opposed to just being there to buy his methamphetamine) and/or support his habit. Appellant himself testified he was allowing two persons under the influence of methamphetamine to be at his house "cleaning" his laundry room and that he and one of the men had recently used together. A conclusion by the jury that there was selling and "partying" going on at the residence was not, as appellant claims, "mere speculation." Sufficient evidence supported a finding of divisible conduct on counts 1 and 2. (People v. Green (1988) 200 Cal.App.3d 538, 543-544.)

However, we do find merit to appellant's contention that the child endangerment charge was incidental to the other charges. Respondent presents no evidence or argument as to what evidence supports a finding of a separate course of conduct with respect to the children. A review of the record

reveals that the prosecution's theory was that appellant was criminally negligent with respect to caring for the children as a result of his dealing and using drugs in the home, and allowing drug users to be in the home. There was no evidence of a separate criminal intent to endanger the children; to the contrary, the evidence showed that despite the drug environment and poverty the children were clothed, fed, and in school. The sole basis of the endangerment charge was the exposure to the drugs and potential violence of living in a drug house. Accordingly, the sentence on count 3 should have been stayed pursuant to Penal Code section 654. [8] We will order the abstract of judgment amended accordingly.

DISPOSITION

The abstract of judgment is ordered modified to reflect a stay of the concurrent six-month jail term on count 3 (child endangerment). In all other respects, the judgment is affirmed.

WE CONCUR:

Wiseman, J.

Levy, J

1. Further statutory references are to the Health and Safety Code except as otherwise noted.

2. Moreover, the explanation frankly made appellant look better than had the jury believed he was just trying to have Maestas take the fall for him.

3. Appellant also maintains that the error cannot be considered harmless because, in addition to allowing the jury to know he was on probation, the trial court improperly admitted Maestas's hearsay statement to an officer that she and appellant "hadn't sold methamphetamine in about a year." In his accompanying writ of habeas corpus, appellant submits a declaration by trial counsel that he had no tactical purpose for failing to object to this testimony. Even assuming error, however, we cannot say the exclusion of this testimony would have affected the outcome of appellant's trial. First, the amount of methamphetamine alone was sufficient to infer possession for sale and the jury was entitled to reject appellant's self- serving yet inconsistent claim about how much he used and that it was all for personal use. Moreover, the statement in fact bolstered appellant's claim that he was not selling - Maestas's prior inconsistent statement was that neither she nor appellant had sold methamphetamine in over a year, actually corroborating his claim that he possessed for personal use. Appellant has simply made no showing of prejudice and his claim by way of habeas petition that the evidence was "patently prejudicial as a matter of law" and, therefore, presumably could not be harmless is simply incorrect. (See Strickland v. Washington (1984) 466 U.S. 668; People v. Alcala (1984) 36 Cal.3d 604, 631, 636 [applying reasonable probability test of People v. Watson (1956) 46 Cal.2d 818 to admission of prior crimes evidence], disapproved on other grounds in People v. Falsetta (1999) 21 Cal.3d 903.)

4. Accordingly, irrespective of the waiver issue, there is no basis for a subsequent claim of ineffective assistance of

counsel on this issue.

5. Appellant maintains that the "him or her" designation would merely be understood by the jury to be common gender-neutral language. This argument ignores, however, that the written instructions to the jury clearly showed that the designation in the instruction was [him][her], and the word "or" was handwritten in. Thus, it was clear the "him or her" indicated each defendant individually rather than just a gender-neutral him/her description.

6. People v. Watson, supra, 46 Cal.2d at page 836.

7. Chapman v. California (1967) 386 U.S. 18.

8. After extended argument regarding why appellant's sentences in counts 2 and 3 should be stayed rather than run concurrent to the sentence on count 1, appellant then summarily states that this court should "stay[ ] the execution of the prison and jail terms under counts two through five." Having failed to make any argument or cite any authority as to why we should stay counts 4 (being under the influence) or 5 (possession of paraphernalia), appellant has waived the issue. (People v. Stanley (1995) 10 Cal.4th 764, 793 [points asserted without sufficient argument and authority deemed waived].)