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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GAILA JANETTE LOVELADY,

Defendant and Appellant.

A129765

(Del Norte County
Super. Ct. No. CRF10-9119)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN LEE PRESLAR,

Defendant and Appellant.

A129834

(Del Norte County
Super. Ct. No. CRF10-9119)

When deputy sheriffs conducted a probation search of a bedroom in the residence occupied by defendants Gaila Janette Lovelady and Allen Lee Preslar, they found plastic baggies suggestive of the drug trade. In Preslar's wallet was the combination to a safe located in the hallway outside the bedroom, in which was found a significant quantity of methamphetamine, digital scales, and ammunition. Based primarily on this evidence, Lovelady pleaded guilty to simple possession of methamphetamine and was convicted after trial of possession for sale and other crimes, as was Preslar. Finding no merit in defendants' challenges to their convictions, we affirm.

I. BACKGROUND

Defendants were charged in an amended information, filed April 22, 2010, with possession for sale of a controlled substance (Health & Saf. Code, § 11378), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364). In addition, Preslar alone was charged with possession of ammunition by a convicted felon (Pen. Code, former § 12316, subd. (b)(1)). The amended information alleged Preslar had served three prior prison terms (Pen. Code, § 667.5, subd. (b)) and suffered two prior drug felony convictions (Health & Saf. Code, § 11370.2).

The charges against both defendants were based on the results of a probation search of Preslar's residence. On the morning of March 17, 2010, deputy sheriffs went to a two-bedroom house in Crescent City. The residence was found to be outfitted with a two-camera surveillance system, wirelessly connected to a television in the living room. Present in the home were Preslar, Lovelady, her ex-husband, Jesse Lovelady (Jesse), and two other persons. One of them, Jennifer Gokey, said she was a visitor, while the other, Samuel Wright, said he was "staying there."

Lovelady was found sitting on a bed, partially clothed, in a bedroom that had been identified during a prior search as occupied by Preslar. Both men's and women's clothes were found in the room. Scattered about the bedroom were baggies containing residue of what the police surmised to be methamphetamine. Although some of the baggies contained jewelry stones, and were claimed by Lovelady as part of her jewelry-making activities, they also appeared to be "rinse baggies," baggies used to hold a controlled substance and "rinsed" after use to recover any residual material.

Jesse claimed to occupy the other bedroom. In that bedroom, deputies found a safe, which Jesse opened voluntarily, containing firearms and ammunition. Jesse told police the arms were his.

A second safe was in the hallway, near the bedroom doors. Both defendants denied any knowledge of the safe, explaining it had been there when they moved in. While looking through a wallet found on the nightstand in Preslar's bedroom, which

contained Preslar's Social Security card and photo identification, the officers found a slip of paper bearing the serial number and combination of the safe. When they opened the safe using the combination found in Preslar's wallet, the deputies found three bundles of currency, each containing exactly \$500, a handgun ammunition magazine, three digital scales, small plastic baggies, four unused hypodermic needles, pouches containing methamphetamine pipes and spoons, and 1.1 ounces of methamphetamine. At trial, the deputies explained how the various items discovered in the safe and around the residence suggested the methamphetamine was intended both for sale and personal use.

A toxicology screen of Lovelady conducted several months after her arrest was positive for methamphetamine. Over 25 years earlier, she had been diagnosed as suffering from multiple sclerosis. A defense expert testified about the disease, noting stimulants were often prescribed to treat its symptoms, as they had been for Lovelady. Sufferers could also use a stimulant such as methamphetamine to self-medicate. Lovelady also had been treated "for a prolonged period of time" with a prescription medicine that is self-administered by hypodermic syringe. The most recent prescription was dated five years prior to her arrest.

Lovelady pleaded guilty to the simple possession count a few days before the scheduled trial and proceeded to trial on the remaining charges. Defendants were convicted of all charges, and the prior prison term enhancements for Preslar were found true. Lovelady was placed on probation, and Preslar was sentenced to a total prison term of six years eight months.

II. DISCUSSION

A. Lovelady's Contentions

1. Simple Possession as a Lesser Included Offense

Notwithstanding her guilty plea to the charge of simple possession, Lovelady now contends the conviction "cannot stand" because simple possession is a lesser included offense of possession for sale. We agree with the Attorney General that Lovelady forfeited any challenge to her conviction for simple possession on these grounds when she entered the guilty plea.

“A defendant . . . cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act.” (*People v. Sanchez* (2001) 24 Cal.4th 983, 987, disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228–1229.) Defendant’s argument that, as a matter of law, her simple possession conviction was a lesser included offense of her conviction for possession for sale necessarily rests on the assumption that both convictions arose from the same criminal conduct, in a manner analogous to a defendant suffering two homicide convictions of different degrees based on the same killing. (*Sanchez*, at p. 989 [manslaughter is a lesser included offense of murder].) Unlike a killing, however, defendant’s possession of methamphetamine was potentially divisible. (Cf. *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334 [whether, for purposes of Pen. Code, § 654, a course of criminal conduct is divisible and therefore gives rise to more than one act depends upon the intent of the actor].) If all of the methamphetamine in defendant’s possession were intended for sale, simple possession would have been a lesser included offense of possession for sale. If, however, defendant intended to use some of the methamphetamine for sale and some for another purpose, such as personal use, both convictions would be supported by different criminal conduct. (E.g., *People v. Tenney* (1958) 162 Cal.App.2d 458, 463 [convictions for simple possession and possession for sale both supported when defendant sold undercover officer a portion of his heroin supply and left with the remainder].) As a result, whether simple possession was a lesser included offense of possession for sale in these circumstances was an issue of fact, not law.

Here, there was substantial evidence from which the jury could have concluded—had it not been precluded from considering the issue by defendant’s plea—that defendant possessed some of the methamphetamine for the purpose of sale and some for her personal use. As the deputies explained, the safe and bedroom contained evidence suggesting the occupants of the residence were conducting drug sales, including the precisely calculated rolls of cash, the sizable amount of methamphetamine, and the large

number of baggies. In addition, there was evidence Lovelady was a user of methamphetamine, and the hypodermic needles, pipes, and spoons were tools of use. On this basis, the convictions for simple possession and possession for sale could have been found to arise from different acts of possession, and the former would not have been an included offense of the latter.

By pleading guilty to the simple possession count, defendant prevented the jury from determining whether she possessed methamphetamine solely for sale or for another purpose as well. She cannot raise the issue for the first time on appeal. (See, e.g., *People v. Pinon* (1979) 96 Cal.App.3d 904, 909–910 [“There is, however, a more fundamental reason why these issues may not be raised on appeal: since they go to the question of guilt or innocence, they have been ‘removed from consideration’ by the guilty plea”].) Her lesser included offense argument was forfeited by her plea.¹

Defendant contends she could not have knowingly waived this argument because the second conviction had not yet occurred when she pleaded guilty. A defendant, however, does not preserve the right to appeal all errors occurring after entry of a guilty plea, but only those that are “unforeseen or unknown” at the time of the plea. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815; see *People v. Panizzon* (1996) 13 Cal.4th 68, 78 [“that the events supposedly giving rise to defendant’s disproportionality claim occurred afterwards likewise is of no consequence”].) Defendant’s second conviction was entirely foreseeable at the time she entered her plea, since the prosecution intended to proceed to trial on the charge of possession for sale within days afterward. If she intended to press her claim that one was a lesser included offense of the other, she was required to forego the plea and argue her case to the jury.

¹ Defendant argues she was entitled to raise this issue because it constitutes an illegal sentence, an issue that can be raised at any time. (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354.) Her complaint, however, is not with her sentencing—the trial judge stayed sentence on the simple possession count under Penal Code section 654, which she does not challenge—but with her convictions.

2. Lesser Included Offense Instruction

Lovelady also contends the jury should have been instructed that if a reasonable doubt existed as to whether she possessed the methamphetamine for sale, she could be convicted only of the lesser included offense of simple possession. (*People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*).) We review instructional issues de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

When a defendant is charged with two crimes, one of which is a lesser included offense of the other, this type of instruction, called a “*Dewberry* instruction,” is appropriate. (*Dewberry, supra*, 51 Cal.2d at p. 555.) Even if no lesser included offense is charged, the trial court ordinarily must instruct on the elements of any lesser included offense supported by the evidence and provide the jury the option of convicting on the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [sua sponte duty to instruct on all supported lesser included offenses]; *People v. Crone* (1997) 54 Cal.App.4th 71, 76 [instructional duty].)

The unusual situation presented here precluded use of the ordinary procedure. If the jury found a reasonable doubt with respect to Lovelady’s intent to sell but not her possession of methamphetamine, it would necessarily have concluded she possessed the drug exclusively for personal use. The jury could not be given the option of convicting her of simple possession with respect to that possession, however, because she had already been convicted, through her plea, of possessing the methamphetamine for a reason other than sale. (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2 [guilty plea is the legal equivalent of a verdict]; *People v. Bryant* (1992) 10 Cal.App.4th 1584, 1596–1597 [double jeopardy bars subsequent trial for same offense following guilty plea].) Accordingly, the trial court was precluded from giving the sua sponte lesser included offense instruction ordinarily required in these circumstances. Instead, if the jury found reasonable doubt with respect to an element of Lovelady’s possession of the methamphetamine for sale, it was required simply to acquit her of the charge, without convicting her a second time of the lesser offense.

This is the result effectively directed by the trial court’s instructions, which required the jury to find each element of the charges against Lovelady beyond a reasonable doubt. Because the jury’s only alternative was to acquit if reasonable doubt existed, the jury was properly instructed.²

3. Failure to Instruct on Authorized Possession of Hypodermic Needles

Lovelady contends the trial court erred in denying her request to instruct the jury that legally authorized possession of hypodermic needles was a defense to the charge of possession of drug paraphernalia. Again, we review claims of instructional error de novo. (*People v. Berryman, supra*, 6 Cal.4th at p. 1089.)

Authorized possession of a hypodermic needle—for example, possession pursuant to a doctor’s prescription—is an affirmative defense to a charge of possession of drug paraphernalia. (Health & Saf. Code, § 11364; *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045.) A defendant is entitled to an instruction on an affirmative defense if the record contains substantial evidence supporting the defense. (*People v. Mentch* (2008) 45 Cal.4th 274, 288.) Because authorization relates to the defendant’s guilt or innocence, it need not be proven by a preponderance of the evidence; rather, the evidence of authorization need only be sufficient to raise a reasonable doubt regarding the defendant’s guilt. (*People v. Mower* (2002) 28 Cal.4th 457, 480–481.) Accordingly, “substantial evidence supporting the defense” in this context means evidence that, if believed, could raise a reasonable doubt as to Lovelady’s guilt. (See *People v. Salas* (2006) 37 Cal.4th 967, 982.)

The only evidence Lovelady cites to support her claim of authorized possession is the record of a prescription, written five years earlier, for hypodermic needles to self-administer a multiple sclerosis medicine. There was no evidence the four hypodermic

² Lovelady argues there is a risk the jury might have convicted her despite a reasonable doubt about her intent to sell merely to avoid acquitting her, but that concern was mitigated when the court informed the jury of her plea of guilty to the simple possession charge. The jury had no reason to think Lovelady would go unpunished if it acquitted on the charge of possession for sale.

needles found in the search were actually obtained pursuant to that, or any other, prescription. To find reasonable doubt of Lovelady's guilt on the basis of the evidence in the record, the jury would have been required to infer that Lovelady obtained the hypodermic needles found in the safe in 2005, found it unnecessary to use them for her treatment at the time, and retained them for five years, eventually locking them in Preslar's safe. Particularly given the evidence that Lovelady was an active methamphetamine user, these inferences are so tenuous as to constitute speculation. The evidence therefore could not support a reasonable doubt. (*People v. Ramirez* (2006) 39 Cal.4th 398, 467.) The trial court was correct to refuse the requested instruction.³

4. Presentence Custody Credit

Lovelady contends she should have been afforded eight, rather than six, days of presentence custody credit. The Attorney General concedes the issue. Accordingly, we direct appropriate modification of the judgment.

B. Preslar's Contention

Preslar contends the trial court violated his due process right to present a defense by precluding him from challenging the quality of the police investigation. We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Hoyos* (2007) 41 Cal.4th 872, 898.)

This issue first arose during Lovelady's cross-examination of one of the investigating deputies. Counsel asked the deputy whether he had asked Wright, one of the other persons found in the home, if Wright owned the money found in the safe. The court sustained an objection, reasoning the question was irrelevant because any answer given by Wright to the deputy would constitute inadmissible hearsay. When counsel argued he was "entitled to check out the thoroughness of their investigation," the court

³ Defendant also contends that the exclusion of this evidence violated her due process right to present a complete defense, but the Supreme Court has ruled otherwise. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 343–344.) Further, given the dearth of evidence supporting a finding the hypodermic needles were legitimately possessed, the failure to instruct did not render her trial fundamentally unfair.

disagreed, saying, “It’s the results of the investigation, not the investigation itself that is . . . admissible evidence.”

Counsel for Preslar later asked the same deputy how many of the items marked in evidence belonged to Gokey, the person identified by police as a visitor. The deputy responded none, to his knowledge. When counsel asked for the basis of his belief, the prosecutor objected. In sustaining the objection, the court explained that questions about ownership, in this context, were necessarily based on hearsay and called for a legal conclusion. The court noted that counsel’s true purpose in asking the question was to suggest the investigation had been “shoddy,” which the court declined to permit. The court characterized repeated questions about the nature of the investigation as a “ ‘fishing expedition’ ” and reiterated its refusal to permit questions designed merely to suggest a deputy “could be a better investigator.”

Somewhat later in the trial, the prosecution raised the issue of a possible expert witness for the defense, a former supervisor in the local sheriff’s office who was prepared to criticize the manner in which the investigation was performed. The court told counsel it would not permit expert testimony criticizing the quality of the investigation, but it would allow testimony disagreeing with the deputies’ testimony explaining, for example, their conclusions the methamphetamine was possessed for sale.

Based on this record, defendant argues, “The trial court repeatedly ruled that neither defendant would be allowed to present evidence regarding the manner in which law enforcement conducted their investigation. This included prohibiting examination of law enforcement witnesses about the way the search of the house was conducted and regarding questioning of others present about ownership of the many items seized and taken into evidence. The court also precluded the defense from calling a former member of law enforcement to testify on the subject of investigation techniques followed in this case compared to good investigation practices.”

Stated this broadly, the record does not support Preslar’s argument. Although the trial court disallowed cross-examination and expert testimony challenging the quality per se of the investigation, it by no means precluded “examination of law enforcement

witnesses about the way the search of the house was conducted.” As to the digital scales found in the safe, for example, Preslar’s counsel was permitted to establish that the deputies took no fingerprints from the scales, never saw Preslar holding them, and never asked Preslar if he owned them. More generally, the attorney was permitted to ask whether the deputies wore gloves during the search, whether they investigated the residents’ income to determine whether they had a legitimate source for the money found, whether they determined if Preslar had ever touched the wooden box in which the methamphetamine was found, whether fingerprints were taken from the baggies, whether they determined if any of the residents had a legitimate need for the hypodermic needles, whether the scales were operable, and whether they knew who put various items in the safe. Lovelady’s counsel was permitted to ask similarly probing questions. In other words, the trial court’s general ruling in no way prevented defense counsel from exploring the nature of the deputies’ investigation.

Further, we find no abuse of discretion in the trial court’s conclusion that it was irrelevant how the deputies’ investigation compared to an ideal of police investigation. It was proper for defense counsel to explore the nature of the deputies’ procedures during the investigation to determine exactly what was done, since the nature of the procedures could call into question the reliability of the conclusions drawn from them. As noted above, such questions were not precluded by the trial court’s rulings. However, that additional measures could have been taken does not change the nature of the procedures actually employed or the conclusions properly to be drawn from them. Such testimony could easily have led to a time-consuming “trial within a trial,” since the deputies presumably would have been permitted to explain why they did or did not perform the additional procedures identified by the defense expert, a dispute far afield from the pertinent matters at trial.

Preslar specifies only two questions actually posed by counsel that were precluded by the court. We find no error in the trial court’s sustaining an objection to the question discussed above—why the deputy concluded Gokey did not own any of the items found. To the extent the answer was based on discussions with Gokey or anyone else, the answer

would have constituted hearsay. To the extent it was based on circumstances, the answer was self-evident: the evidence on which the deputy relied in concluding defendants possessed the items was also the evidence on which the deputy based his conclusion Gokey did not. The second specific question raised on appeal is whether the police fingerprinted the ammunition clip found in the safe attributed to Preslar. This was a foundational question for asking whose fingerprints were found, if any. The trial court did not explain its ruling that the question was irrelevant, and we agree with Preslar it could have led to relevant, although by no means conclusive, information regarding Preslar's possession of the clip.

To obtain a reversal on the basis of evidentiary errors, a defendant must demonstrate prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, that a more favorable result is reasonably probable had the trial court ruled differently. (*Id.* at p. 836.) The trial court's exclusion of evidence regarding the professionalism of the deputies' investigation, even assuming it was error, would have been harmless under this standard. As discussed above, the issue was not directly relevant to the issues at trial, and defense counsel were permitted to explore in cross-examination the actual nature of the deputies' investigation. In addition, the evidence of Preslar's possession of the items in the safe was very strong. They were locked in a safe, and Preslar's wallet contained a paper with the serial number and combination of the safe. Further, Preslar lied to police about his access to the safe, from which the jury could infer guilty knowledge of its contents. No evidence was presented to cast doubt on the inferences naturally drawn from these facts.

Defendant contends his question regarding fingerprints on the ammunition magazine might have led to a different result had it been answered, since the magazine contained ammunition fitting a weapon found in Jesse's safe. For purposes of Penal Code former section 12316, subdivision (b)(1), however, "possession" does not mean ownership or physical possession. The offense is satisfied by either actual or constructive possession, the latter defined as having " 'control or right to control over contraband,' " even if it is in the possession of another. (*People v. Scott* (2009) 45 Cal.4th 743, 757.)

Whether the deputies failed to test for fingerprints or actually found Jesse’s fingerprints would not change the fact that the ammunition was found in a safe to which Preslar had the combination. Even if the ammunition was actually owned by Jesse, there was no evidence any person other than Preslar controlled it, given his access to the safe. The trial court’s sustaining an objection to this line of inquiry was harmless.

Defendant contends the exclusion of this evidence also violated his due process right to present a complete defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324.) However, “ ‘as a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.’ ” (*People v. Dement* (2011) 53 Cal.4th 1, 53.) The exclusion of evidence regarding the quality of the deputies’ investigation did not prevent defendant from fully exploring the deputies’ actual conduct. There was accordingly no denial of the right of confrontation nor infringement of defendant’s right to present a defense.

III. DISPOSITION

The judgment against Lovelady is modified to award eight days of presentence custody credit and as so modified, the judgment is affirmed. The judgment against Preslar is also affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.