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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.

BRITTON FRANKLIN MODE,

Defendant and Appellant.

A132306

(Del Norte County  
Super. Ct. No. CR-F-10-9517)

Following a jury trial, defendant was convicted of one count of possession of marijuana for sale. He contends his conviction must be reversed because the court failed to instruct sua sponte on the definition of marijuana and defense counsel provided ineffective assistance of counsel by failing to request the instruction. Finding no instructional error, we affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was charged in an information with unlawful possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1; count 1), possession of methamphetamine (Health & Saf. Code, § 11378; count 2), possession of marijuana for sale (Health & Saf. Code § 11359; count 3), and possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 4). The information alleged two prior prison terms. (Pen. Code, § 667.5, subd. (b).)

A jury found defendant guilty of possession of marijuana for sale, but was unable to reach verdicts on the remaining counts.<sup>1</sup> Defendant admitted the two prior prison terms.

The trial court sentenced defendant to the middle term of two years for possession of marijuana for sale and enhanced the sentence with a one-year term for each of the prior prison terms for a total sentence of four years.

Defendant filed a timely notice of appeal.

#### **A. *Prosecution Case***<sup>2</sup>

A parole search was conducted simultaneously at two separate locations, defendant's residence and his "garage-type shop." Seth Cimino, an investigator with the Del Norte County Sheriff's Office, searched the shop assisted by his dog Ronin, who was trained to detect the odor of several controlled substances, including marijuana. Ronin alerted Cimino's attention to a large garbage bag inside of which was a large Tupperware-style container. Inside the container was an orange shoe box containing 9.8 ounces of marijuana bud, the most sought-after part of the plant with the highest concentration of THC, the substance "that produces the high." Inside the "tub"<sup>3</sup> Cimino observed 2 pounds, 14 ounces of "shake, the stem, sticks and leaves, the excess of something other than the bud."<sup>4</sup> The "sticks" according to Cimino, meant "[t]he stalks, the branches." In total just under three and a half pounds of marijuana was seized from the shop.

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<sup>1</sup> The three counts on which the jury was unable to reach a verdict were retried and once again the jury was unable to reach any verdicts. The People chose not to retry the three counts a third time. These counts were dismissed by the court on the People's motion.

<sup>2</sup> Because the jury was unable to reach a verdict on the remaining counts, we focus only on the facts relating to the marijuana for sale conviction.

<sup>3</sup> We presume Cimino was referring to the Tupperware-style container.

<sup>4</sup> Cimino weighed both the marijuana bud and shake upon his return to the sheriff's office.

Cimino testified shake also contains THC and produces a high, but is half the price of bud. Shake is commonly found in schools because students cannot afford “premium bud.” Shake can also be used by patients for their medical needs; however, Cimino, did not see a doctor’s recommendation during the search of the shop or any other indication the marijuana was for medicinal purposes.

Cimino was qualified as an expert in the “investigation, identification and sales of marijuana.” Based on the “sheer weight . . . , three and a half pounds of marijuana,” he opined the marijuana discovered at the shop was possessed for sale. This constituted about three years worth of consumption for one person. Because marijuana deteriorates rapidly, according to Cimino, a user would not keep such a large quantity.

Senior criminalist Dale Cloutier without objection was qualified as an expert in the “testing and analysis of controlled substances.” Cloutier tested two samples, one from an orange shoe box and one from a large brown bag underneath the shoe box.<sup>5</sup> In each sample he identified the “plant material as marijuana.”

## ***B. Defense Case***

Defendant did not testify. Witnesses called by the defense testified about the other charged offenses not relevant to this appeal.

## **II. DISCUSSION**

### ***A. Omission of the Definition of Marijuana***

Defendant contends the trial court committed reversible error by omitting the definition of marijuana from the instructions it gave on possession for sale and the lesser included offense of simple possession.

#### ***1. Background***

Before Cimino testified, defendant objected to his anticipated testimony identifying the substance as marijuana, arguing Cimino had not conducted any laboratory

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<sup>5</sup> Cimino placed the shake in a paper bag to weigh it.

test. The court first noted defense counsel had acknowledged in his opening statement “that the marijuana in question was found at your client’s shop.” The court also reminded defense counsel it had previously offered to hold a hearing for defendant to challenge whether the substance was indeed marijuana, an offer that had been declined. Again, the court offered to hold a hearing; however, the prosecutor proposed to have the substance tested in a laboratory by the next day. Defense counsel then asked the court, “And your Honor, in the interim, can we have—since it does reek of marijuana, so if it could be in the meantime maybe taken out of here.” As noted above, Cloutier subsequently testified the samples he tested contained marijuana.

Before instructions and closing arguments, the court asked defense counsel if he was “in agreement with the instructions, and there are no objections.” Counsel replied, “Yes.”

During closing argument, defense counsel argued the marijuana found in defendant’s shop was not possessed for sale, but at most for personal use—simple possession of marijuana. Counsel never questioned whether the substances seized from the shop were marijuana.

Following the jury’s guilty verdict for possession for sale of marijuana, defendant filed a motion for new trial raising for the first time insufficiency of the evidence to support a conviction for possession for sale of marijuana. In essence, defendant claimed since stalks are not part of the legal definition of marijuana, it was “improper” for Cimino to have considered “something which appears to be statutorily prohibited as being considered marijuana” as the basis for his opinion that because of the sheer weight, the marijuana was possessed for sale. The motion for new trial was denied.

During the motion for bail pending appeal, defense counsel reiterated, “a substantial portion of what he was caught with was not marijuana; that really what meets the definition of marijuana was about nine ounces,” referring to the buds.

## 2. *Analysis*

Defendant focuses on Cimino's testimony that he counted as marijuana the stalks of the plant that are excluded from the applicable legal definition. Because the total weight was "crucial to [Cimino's] opinion that it was held for sale," defendant contends the definition was necessary for the jury to understand the case. We disagree for reasons we shall explain.

Health and Safety Code section 11018 defines marijuana as "all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. *It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, . . . or the sterilized seed of the plant which is incapable of germination.*" (Italics added.) Both CALCRIM No. 2352, possession for sale of marijuana, and CALCRIM No. 2375, simple possession of marijuana, a lesser included offense, include a paragraph defining marijuana in accordance with Health and Safety Code section 11018. The trial court omitted from both instructions the definition of marijuana.

The legal definition of marijuana was not relevant under the circumstances of this case. The prosecution had no burden to prove the purity of the marijuana, only that defendant possessed it in a useable amount. (See *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67.) Cimino observed the shake and testified in substance based on his training and experience it was saleable as marijuana in the form in which it was found. His opinion it was possessed for sale did not depend on 100 percent of the shake meeting the legal definition of marijuana, but on the fact the shake was saleable as marijuana and far exceeded the amount that would be kept for personal use. Cloutier's testing confirmed the shake was marijuana. Defense counsel never argued otherwise. He only argued to the jury the marijuana was possessed for personal use rather than for sale. He neither claimed nor implied shake was a substantial part of the marijuana plant material seized

nor suggested shake or any portion of it cannot produce a high or had no value. Defense counsel even asked the court to have the marijuana taken out of the courtroom because it “reek[ed].” Further, counsel’s postconviction assertion the marijuana could not have been possessed for sale because it contained an unknown amount of shake was unsupported by the evidence adduced at trial, significantly, Cloutier’s testimony the samples he tested were marijuana.

Instructing on the definition of marijuana potentially could have caused jury confusion. Cimino made it clear there were 2 pounds, 14 ounces of marijuana shake in the “tub,” further explaining shake is the stems, sticks, leaves, and part of the plant other than the bud, and shake has THC, which produces a high. Because there was no evidence, and the defense never implied the shake or any part of it was not part of the Cannabis, the instruction defining marijuana would not have assisted the jury in understanding the issues raised by the evidence and the trial court had no sua sponte duty to give it. Basically, the court omitted the chance to give the jury a confusing botany lesson.<sup>6</sup>

In short, no instructional error was committed by the court.

### **B. *Ineffective Assistance of Counsel***

To establish ineffective assistance of counsel, the defendant bears the burden of showing that (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s deficient representation subjected the defense to prejudice, i.e. there is a reasonable probability that but for counsel’s failings the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

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<sup>6</sup> We note the definition contains seemingly contradictory elements. It states marijuana encompasses, “all parts of the plant *Cannabis sativa* L.,” yet it also excludes the “mature stalks of the plant” and certain derivatives thereof. At least one court reconciled the contradiction by holding that to be excluded the stalks had to be found in separated form. (*State v. Wolpe* (Ohio 1984) 463 N.E.2d 384, 385.)

Defendant contends he was denied effective assistance of counsel when his trial attorney failed to ask the court to instruct the jury on the statutory definition of marijuana, which as noted above excludes mature stalks and fiber produced from the stalks. He claims the record indicates his attorney was “apparently” unaware of the statutory definition of marijuana until he first raised it during the hearing on his motion for new trial.

As explained above, the trial court did not err by failing to instruct sua sponte on the definition of marijuana because the instruction was irrelevant and potentially confusing to the jury. The evidence was undisputed shake was part of the marijuana plant, produces a high, and consists of the stems, sticks, leaves, and parts of the plant other than the bud. Consequently, considering the undisputed evidence, counsel’s failure to request an instruction defining marijuana was reasonable.

Defendant also argues without further discussion that “competent defense counsel might have gone either [*sic*] further by having the shake divided between the stalks and the rest of the shake, to determine just how much of the weight of what Deputy Cimino deemed the shake consisted of stalks.” This would have been an exercise in futility. The stems, sticks, and leaves constituting the shake were all part of the marijuana plant. No evidence was presented the shake contained mature stalks of the plant, fiber produced from the stalks, or oil or cake made from the seeds of the plant.

**III. DISPOSITION**

The judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.