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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THANH HOA VAN NGUYEN,

Defendant and Appellant.

A139003

(San Mateo County
Super. Ct. No. SC075677A)

A jury convicted Thanhhoa Van Nguyen of several drug offenses: possession for sale of marijuana (Health & Saf. Code, § 11359),¹ transportation of marijuana (§ 11360, subd. (a)), possession of methylenedioxyamphetamine (MDMA), commonly called ecstasy (§ 11377, subd. (a)), possession of cocaine (§ 11350, subd. (a)), and possession of methamphetamine (§ 11377, subd. (a)). The court suspended imposition of sentence and placed defendant on probation conditioned upon serving seven months in jail.

Defendant appeals only his conviction for possession of MDMA. He contends insufficient evidence was presented to prove MDMA is a controlled substance and that the court erred in removing that question from the jury and effectively instructing that MDMA is, in fact, a controlled substance. We agree. MDMA is not listed as a controlled substance. (§§ 11054-11057.) Its possession may be penalized only upon proof that it is a “controlled substance analog” within the meaning of section 11401, a factual issue. We question whether the conclusory testimony offered by the prosecution’s expert was

¹ All further section references are to the Health and Safety Code.

sufficient to establish that fact, but in all events the jury instruction defining the crime was deficient in failing to state that the prosecution must prove that MDMA is an analog of a controlled substance. We shall therefore reverse the judgment as to the conviction for possession of MDMA, but affirm the judgment as to the remaining counts as to which no challenge is made.

Statement of Facts²

Traffic stop and vehicle search

On the evening of January 29, 2012, Daly City Police Officer Gary Thompson was monitoring traffic from a patrol car when he stopped a car driven by defendant for failing to make a full stop at a stop sign. The officer testified that defendant “appeared to be very nervous. He was very jittery. He had rapid speech. His hands were jittery and shaking.” Defendant’s nervous behavior made the officer think there was “something illegal in the car.” The officer called for another officer to assist with the traffic stop. When the second officer arrived, Officer Thompson ordered defendant from the car.

Officer Thompson asked to search the car and defendant consented. As the officer was walking toward the car to begin the search, defendant said, “I have a pound of marijuana in the trunk.” Defendant said he was a medical marijuana patient who grew marijuana at home and showed the officers a medical marijuana card.

The police searched the car and found a bag of marijuana in the trunk weighing over a half pound. The trunk also contained a box of small Ziploc bags and a cell phone. The center console in the car’s passenger compartment contained three additional cell phones, at least one of which “always seemed to be ringing.” Also in the center console was a small plastic bag holding three pills later determined to be methamphetamine. Defendant was arrested and a search of his person found a wallet containing \$475 in cash.

² We focus our summary upon those facts relevant to the MDMA conviction challenged on appeal and do not detail evidence relating to the other drug offenses.

Home search

Defendant consented to a search of his South San Francisco apartment to investigate his claimed compliance with medical marijuana laws. The police found marijuana plants, two scales with marijuana residue, a glass pipe, a cigarette rolling machine and numerous bags of marijuana, both large and small. There were also several small bags containing cocaine and pills containing MDMA.

Trial testimony

Mona Ten, a criminalist expert in controlled substance analysis and identification, testified for the prosecution. She analyzed the several substances found in defendant's car and home and found them to contain marijuana, cocaine, methamphetamine, and MDMA. Ten testified that marijuana, cocaine and methamphetamine are statutorily listed as controlled substances in California. She testified that MDMA "falls in a slightly different category" because it is not listed as a controlled substance. Ten said MDMA is an "analog" of methylenedioxyamphetamine (MDA), which is a controlled substance. She said "analog" means "something that has been derived from another substance." On cross-examination, Ten defined an analog as "a substance that is defined as related to another substance by structure in not exactly, exactly structure, but is related due to similar[ity]." Defense counsel asked if "MDMA is structurally related to MDMA" (likely meaning, is MDMA structurally related to MDA) and Ten replied, "Yes."

A police sergeant testified as an expert in the identification of controlled substances and possession of marijuana for sale. The sergeant testified that MDMA "is a stimulant" and "the most common drug present" at dance parties known as raves.

Discussion

Defendant was convicted of several drug offenses, including possession of MDMA, an analog of MDA, in violation of section 11377, subdivision (a).³ Section

³ Count 3 of the amended complaint charges that defendant willfully and unlawfully possessed "a controlled substance, to wit: MDMA, an analog of the banned drug MDA, within the meaning of Health and Safety Code section 11401, in violation of Health and Safety Code section 11377(a), a felony."

11377, subdivision (a) prohibits the possession of controlled substances listed in several statutory schedules. MDMA is not listed in any of those schedules. However, under section 11401, subdivision (a), a controlled substance analog shall be “treated the same as” the controlled substance of which it is an analog. A “controlled substance analog” is defined as “(1) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance . . . [or] [¶] (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance” (§ 11401, subd. (b).)

A substance listed in the statutory schedules is a controlled substance as a matter of law. (*People v. Davis* (2013) 57 Cal.4th 353, 362, fn. 5 (*Davis*).) MDMA, not being listed in the schedules, is treated as a controlled substance only if proven to be an analog of a controlled substance. Its status as such is a factual issue for jury determination that must be proven in each case. (*Id.* at p. 359; see also *id.* at p. 362 [conc. opn. of Chin, J].) “Proof that MDMA qualifies as a controlled substance or analog is an element of the crime[.]” (*Id.* at p. 359.) In *Davis*, decided subsequent to the trial in the case before us, the Supreme Court held that “evidence of MDMA’s chemical name, standing alone, is insufficient to prove the material is a controlled substance.” (*Id.* at pp. 356, 361.) It is “incumbent on the People to introduce competent evidence or a stipulation about MDMA’s chemical structure or effects” to support a conviction under section 11377. (*Id.* at p. 362) The prosecution may not rely upon the fact that the word “methamphetamine” (a controlled substance) is imbedded in MDMA’s chemical name, nor upon “common sense” or “common knowledge,” to prove that MDMA is a methamphetamine analog. (*Id.* at pp. 360-362.) “It may be widely accepted within the scientific community, and verifiable by resort to technical reference works, that a chemical name reflects its component elements. Yet many scientifically accepted facts remain far beyond the common knowledge of laypersons. [Citations.] Customarily, such information is

presented to the jury through qualified witnesses, subject to cross-examination.” (*Id.* at p. 361.)

As the Supreme Court pointed out in *Davis*, sufficient evidence to support a conviction was found where two prosecution experts testified that MDMA has a substantially similar chemical structure and effect to methamphetamine, making it an analog. (*Davis, supra*, 57 Cal.4th at p. 359, citing *People v. Silver* (1991) 230 Cal.App.3d 389, 392-393.) In *Silver*, a criminalist expert in chemical analysis “testified that in her opinion MDMA is substantially similar to methamphetamine, a controlled substance. When asked on cross-examination what ‘substantially similar’ meant to her, she replied, ‘Chemically the structures are very similar.’ She also testified that ‘substantially similar’ has no scientific meaning, but that ‘analog’ had the scientifically accepted meaning of being ‘[s]imilar to another substance.’ ” (*Id.* at p. 392.) A biochemist testified that “MDMA was substantially similar to methamphetamine. He explained that both compounds contain phenyl propylamines which act as a stimulant; that the addition of a methylene dioxy group would convert methamphetamine into MDMA; and that the addition would not create a substantial difference. Both compounds have the same general effect of stimulating the central nervous system, and although some people classify MDMA as an hallucinogen, he would classify it as a stimulant.” (*Id.* at pp. 392-393.)

Sufficient evidence that MDMA is a controlled substance analog was also found where a police investigator testified that MDMA “includes methamphetamine and, as such, has a stimulant effect substantially similar to the stimulant effect of methamphetamine.” (*People v. Becker* (2010) 183 Cal.App.4th 1151, 1156.) Concerning MDMA, the investigator testified: “ ‘It’s initially much like cocaine. It’s methyldioxy methamphetamine, that is what MDMA is. So from the methamphetamine, logically it’s a stimulant, so you would get a dramatically raised heart rate, your heartbeat would go to 120, 130 beats per minute. You would be infused with adrenaline, norepinephrine . . . your pupils would dilate and become very large. You would be very excited. . . .’ He

added that MDMA also has a ‘hallucinogenic effect where the person becomes fascinated with bright lights and loud noise.’ ” (*Id.* at pp. 1154-1155.)

The evidence here falls far short of the evidence presented in *Silver* or *Becker*. The criminalist Ten did not explain the chemical composition of MDMA but simply asserted that MDMA is an analog of MDA, a controlled substance. The Attorney General asserts this is sufficient: “It is not essential, as [defendant] claims, to present testimony regarding the statutory definition of an analog when an expert testifies that a substance qualifies as an analog.” We question whether such conclusory testimony, even from an expert witness, is sufficient. MDMA’s status as a controlled substance analog is an element of the charged crime to be determined by the jury upon the facts presented. (*Davis, supra*, 57 Cal.4th at p. 359.) There must be a “rational basis for a jury of laypersons to infer” that MDMA “has a substantially similar chemical structure or effect to methamphetamine or amphetamine.” (*Id.* at p. 362.) An expert may not “testify to legal conclusions in the guise of expert testimony. Such legal conclusions do not constitute substantial evidence.” (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841.) Here, the only support offered for Ten’s conclusion that MDMA is a controlled substance analog is her vague definition of an analog as “something that has been derived from another substance” and a substance “related to another substance by structure.” There was no testimony establishing that MDMA has a chemical structure *substantially* similar to a controlled substance or that it has or is intended to have the same effects as a controlled substance.

The Attorney General acknowledges that defendant never stipulated that MDMA is an analog of MDA, but argues that defense counsel “conceded as much in closing argument” and disputed only whether defendant knew the substance was a controlled substance. It is true that defense counsel focused her closing argument on what defendant knew but she did so only after her challenge to Ten’s testimony was rejected by the court. Counsel objected to the criminalist’s “conclusion that MDMA is an analog of MDA and request[ed] that that portion of her testimony be stricken as improper opinion evidence.” Alternatively, counsel requested a jury instruction informing the jury that “[i]t will be your function to determine whether MDMA is an analog of methamphetamine” and

“[t]he burden is on the prosecution to prove beyond a reasonable doubt that MDMA is an analog of methamphetamine.” The motion to strike Ten’s testimony and the alternative request for a jury instruction were taken under submission and, apparently, denied. During closing argument defense counsel had no choice but to focus on the element of defendant’s knowledge. Counsel acknowledged in argument: “And again, the controlled substance was meth, ecstasy or cocaine and was a usable amount. Not going to dispute that. You heard the toxicology evidence, Ms. Ten has been around a long time. And I think the conversation is really about what [defendant] thought this stuff was.” We do not regard this statement as a concession that MDMA is a controlled substance analog that forfeits defendant’s contentions and objections on appeal. Defense counsel’s prior unsuccessful challenge preserves the issue for review.

Whether or not Ten’s conclusory statement provides sufficient evidence to support a finding that MDMA is an analog of MDA, the instruction given to the jury, former CALCRIM No. 2304, unquestionably was deficient in failing to state that the prosecution must prove that MDMA is an analog of a controlled substance. After the Supreme Court’s decision in *Davis*, CALCRIM No. 2304 was revised to expressly state this requirement. The absence of this essential element plainly requires reversal. The issue is not forfeited for failure to object in the trial court, as the Attorney General contends, because defendant requested a special instruction on the issue, as noted above. Moreover, “it is well settled that no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge.” (*People v. Mil* (2012) 53 Cal.4th 400, 409.)

The jury was given the following instruction, in relevant part: “The defendant is charged in counts 3, 4 and 5 with possessing a controlled substance in violation of Health and Safety Code sections 11377, 11350 and 11377 respectively. [¶] To prove the defendant is guilty of these crimes, the People must prove that: [¶] 1. The defendant unlawfully possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance’s nature or character as a controlled substance; [¶] 4. The controlled substance was MDMA in count 3, cocaine in count 4 and

methamphetamine in count 5; and [¶] 5. The controlled substance was in a usable amount.”

The revised instruction, adopted after defendant’s trial, adds the following statement following the enumeration of elements: “In order to prove that the defendant is guilty of this crime, the People must prove that _____<insert name of analog drug> is an analog of _____ <insert type of controlled substance>. An analog of a controlled substance: [¶] 1. Has a chemical structure substantially similar to the structure of a controlled substance; [¶] OR [¶] 2. Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.” (CALCRIM No. 2304 (2014 rev.).)

The Attorney General asserts that the absence of this statement is immaterial because “[i]t is not reasonably likely the jury failed to understand that, as to the MDMA, it had to find it was an analog of MDA, and therefore a controlled substance.” We disagree. The instruction states clearly that “[t]he controlled substance was MDMA in count 3.” The jury was required to find only that the substances were MDMA, cocaine and methamphetamine, respectively, without any need to find that MDMA is an analog of MDA. The instruction treats all three substances alike, requiring the jury to find that defendant possessed a controlled substance and “[t]he controlled substance was MDMA in count 3, cocaine in count 4 and methamphetamine in count 5.” As defendant argues, the MDMA was conclusively deemed a controlled substance, just like cocaine and methamphetamine.

The omission of an element from the jury’s consideration requires reversal unless the instructional error is harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Mil, supra*, 53 Cal.4th at p. 415.). We cannot say the instructional error was harmless. Had the jury been properly instructed, it may well have concluded that the prosecution failed to prove MDMA to be an analog of MDA.

Disposition

The judgment is reversed as to the conviction for possession of MDMA, a controlled substance (count three). The judgment is affirmed on all remaining counts.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.