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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD LUIS RIBAS,

Defendant and Appellant.

A141532

(Contra Costa County
Super. Ct. No. 01-161060-9)

A jury convicted defendant Edward Luis Ribas of one count of possession of methamphetamine. The trial court suspended imposition of sentence and placed defendant on probation for 36 months. On appeal, defendant contends the trial court erred in failing to instruct the jury on the defense of transitory possession. We affirm.

I. EVIDENCE AT TRIAL

A. *Prosecution's Case*

On July 22, 2012, around 8:30 p.m., Pleasant Hill Police Detective Anderson was on patrol when he saw an older model pickup truck or SUV with a rear paper license plate. Because the vehicle was from the 1980s or early 1990s, Detective Anderson became suspicious, as vehicles that old do not typically have new dealer paper plates on them. After seeing that the vehicle did not have any temporary registration, he initiated a traffic stop. Defendant was the sole passenger.

Detective Anderson asked defendant for his name. As defendant spoke, Detective Anderson observed that he was “animated” and seemed nervous. Defendant said his

name was Edward Ribas. According to Detective Anderson's police report, defendant spelled his first name as "E-E-D-U-A-R-D." Detective Anderson provided the name to police dispatch and learned that this was not the correct spelling of defendant's name.

The driver gave Detective Anderson permission to search the vehicle. In order to safely search the vehicle, Detective Anderson asked defendant to get out of the vehicle. Detective Anderson asked defendant if he had any weapons or contraband on his person. Defendant whispered, " 'Yes, I have a little crystal in my pocket here,' " and nodded his head to his right. Detective Anderson asked defendant if "crystal" meant "methamphetamine," and defendant nodded his head affirmatively. Defendant allowed Detective Anderson to retrieve the substance, which was located in the coin pocket of the shorts defendant had been wearing. Detective Anderson confiscated a small Ziploc style baggie containing a white crystal substance, which was later identified as methamphetamine, as well as a glass pipe with white residue on it. Detective Anderson explained that this type of glass pipe was typically used to smoke methamphetamine.

B. Defense

Defendant testified that he worked for two to three contractors, doing construction plumbing, air conditioning/heating work, and sometimes trimming trees. On the day of the offense, he was on his way to pick up a freezer from a client for whom he had recently done some tree trimming work. Defendant had asked a person named Woody, whom he had met two days earlier at another job site, for help getting the freezer. Woody had a GMC truck and said he would help.

On the way to the pickup location, Woody became "fidgety and nervous" when he saw a police officer. Woody "started freaking out" when he noticed that the officer was looking at him. Woody said, " 'Oh God, I don't have any — my tags are not there. The plates are not really the plates.' " When the officer turned on his lights and started to pull them over, Woody said, " 'Oh, man, I can't catch another case.' " As he pulled over, Woody reached under his seat and grabbed "the paraphernalia" and "a little baggie," and dumped it on defendant's lap. Just before he opened the door to walk out and meet the officer, Woody said, " 'I can't afford to catch another case.' "

Defendant did not want to throw the items out of the window because he feared he would be arrested. So instead he stuffed everything in his right pocket. Defendant did not put the contraband back under Woody's seat because he was still worried that the officer would find it and that he would be incriminated. Believing he was no longer on probation and not subject to being searched, defendant put the methamphetamine in his pocket. Defendant did, however, plan to throw it away.

A few minutes later, the officer asked defendant for his name and inquired if he was on probation or parole. Defendant gave his name "exactly"¹ and said that he was no longer on probation. A little while later, the officer told him he was still on probation and asked him to step out of the vehicle. Defendant was surprised to learn that he was still on probation because his probation officer had told him, " 'You are good. You are clean. You are free.' "

When the officer asked defendant if he had anything on him, defendant said in a low voice, " 'There is a pipe in my right pocket and there is a little baggie with it,' " and he explained that Woody had just dumped everything on his lap. Defendant explained that he spoke in a low voice because he "didn't want to look like [a] snitch" in front of Woody. Defendant denied that he waited until after being arrested and read his rights at the station before he told the officer about Woody dumping everything in his lap. Defendant said the officer was mistaken in his testimony, because the officer failed to mention that defendant told him the methamphetamine belonged to Woody.

Defendant admitted that he knew the baggie contained methamphetamine and that it was a controlled substance because he had used methamphetamine in the past. He also acknowledged that when contacted and searched by an Antioch police officer in 2007, he told the officer, " ' Hey, just so you know, I got some crank in my small, right-front change pocket.' " Defendant denied that in the instant offense he also had methamphetamine in the small front, right-front change pocket. Defendant explained that the methamphetamine was in the same pocket but was in the "big pocket" not the small

¹ Defendant explained that he had been born and raised in the Philippines and that he considered "Eduardo" and "Edward" to be the same name.

coin pocket. Defendant did not hear Detective Anderson testify that the methamphetamine was found in his coin pocket.

Defendant admitted that he been convicted of two counts of second degree burglary in 2008 and another felony crime of moral turpitude in 2010.

II. DISCUSSION

Defendant contends the trial court erred by refusing to instruct the jury with the defense of transitory possession for the purpose of disposal.

A. *Background*

Defendant requested the court to instruct the jury with CALCRIM No. 2305. That instruction provides: “ If you conclude that the defendant possessed <insert name of controlled substance>, that possession was not illegal if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that: [¶] 1. The defendant possessed <insert name of controlled substance> only for a momentary or transitory period; [¶] 2. The defendant possessed <insert name of controlled substance> in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it; [¶] AND [¶] 3. The defendant did not intend to prevent law enforcement officials from obtaining the <insert name of controlled substance>. [¶] The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the three listed items is true.”

In denying the request, the trial court explained as follows: “I think that this is the type of instruction that occurs when you have, for lack of a better term, a hot potato defense. [¶] In other words, the person has it. They don’t want to have the drugs. They abandon it immediately, they throw it away, they walk away from it. It’s that type of situation, so you have a problem with Element No. 2 as I see it. [¶] And in terms of Element No. 3, putting it in your pocket cuts the other way. In other words, when you hide something from law enforcement instead of just leaving it out in the open, then what you are doing is trying to prevent law enforcement from obtaining the drug. [¶] I mean,

clearly once he was asked about it, he talked about it, but unless and until the officer asked him, and with the defendant not thinking he is on probation so he can't be searched, it appears from the evidence that he was trying to conceal it. So Element No. 3 is also not satisfied, so the Court is not going to give [CALCRIM No.] 2305.”

B. *The Trial Court Did Not Err in Failing to Give CALCRIM No. 2305*

“ ‘A trial court has no duty to instruct the jury on a defense--even at the defendant's request--unless the defense is supported by substantial evidence.’ [Citation.]” (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1101, overruled on another in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5.) In *People v. Mijares* (1971) 6 Cal.3d 415, 423 (*Mijares*) the California Supreme Court held that, under limited circumstances, momentary or transitory possession of an unlawful narcotic for the sole purpose of disposing of it can constitute a defense to a charge of criminal possession of the controlled substance. The court has characterized this as “the affirmative defense of transitory possession for disposal” (*People v. Martin* (2001) 25 Cal.4th 1180, 1182.) “It has always been the rule under *Mijares*, and embodied in CALJIC No. 12.06 [and CALCRIM No. 2305], that such a defense does *not* extend to possession and control for the purpose of preventing imminent seizure by law enforcement. [Citations.]” (*People v. Padilla* (2002) 98 Cal.App.4th 127, 136-137.)

Here, there was insufficient evidence that defendant's purpose in exercising control over the drugs was for anything other than preventing the imminent seizure by law enforcement. Indeed, defendant testified that he did not throw the contraband out the window because he did not want to be incriminated. Believing that he was no longer on probation and subject to a search, he put the methamphetamine and the pipe in his pocket so that it would be out of the officer's view. Defendant failed to establish that he intended to dispose of the methamphetamine and that he did not intend to prevent law enforcement officials from obtaining it. Accordingly, the trial court did not err in failing to give CALCRIM No. 2305.

C. Any Error Was Harmless

Even assuming for the sake of argument that there had been substantial evidence to support the giving of CALCRIM No. 2305, any failure to give the challenged instruction would be harmless under any standard. (See e.g., *People v. Salas* (2006) 37 Cal.4th 967, 984 [California Supreme Court has “not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense.”].)

It was the exclusive province of the jury to determine defendant’s credibility. (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.) His story that the contraband belonged to Woody was incredible, i.e. that defendant, a person with at least two prior felony convictions, was willing to hide contraband for someone he had only known for two days. Moreover, the manner in which he disclosed the contraband to Detective Anderson was nearly identical to the way he acted when stopped by police in 2007. And tellingly, defendant was unable to refute the assertion that he first mentioned Woody after only being arrested and read his rights. Rather, he merely contended that Detective Anderson was mistaken in his testimony and in his report. He also attempted to refute the similarity of the location by stating that it was in the large pocket, claiming only that he did not hear Detective Anderson’s testimony that the contraband was located in the same small coin pocket. The jury clearly rejected defendant’s story. This coupled with the fact that defendant admitted that he hid the contraband to avoid detection by the police, we confidently conclude any failure to instruct the jury with CALCRIM No. 2305, would be harmless beyond a reasonable doubt. (See, e.g., *People v. Salas, supra*, 24 Cal.4th at p. 984.)

III. DISPOSTION

The judgment is affirmed.

Reardon, J.

We concur:

Ruvolo, P.J.

Streeter, J.