

Filed 2/10/12 P. v. Huato CA
Received from court on 5/22/12

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE HUATO et al.,

Defendants and Appellants.

C064155

(Super. Ct. No.
09F02688)

A jury convicted defendants Jose Huato and Hugo Garcia of conspiracy to transport/sell methamphetamine (Pen. Code, § 182, subd. (a)(1) -- count one), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a) -- count two), and possession of methamphetamine for sale (Health & Saf. Code, § 11378 -- count three).¹

¹ Prior to trial, codefendant Omar Guzman pleaded no contest to count one and was sentenced to state prison for two years. Codefendant Rafael Guevara-Sanchez was tried with defendants

The court sentenced both defendants to state prison for the upper term of four years on count two. The court stayed punishment on counts one and three. (Pen. Code, § 654.)

Both defendants appeal.

Defendant Huato lumps several contentions under one heading: the trial court erred in ruling on a hearsay objection, in denying his mistrial motion, and in failing to instruct the jury sua sponte to disregard certain volunteered testimony; counsel rendered ineffective assistance in failing to request a curative instruction and to object "with more vigor"; and absent inadmissible hearsay, insufficient evidence supports his convictions. We reject these contentions.

Defendant Garcia contends his conviction for conspiracy must be reversed because the trial court failed to give a unanimity instruction. We reject his contention.

Both defendants contend the trial court failed to conduct a hearing prior to ordering them to pay attorney fees. The People concede, suggesting this court remand or strike the orders. We accept the concession and will strike the orders.

Finally, both defendants contend they are entitled to additional presentence custody credit. We agree and will modify the judgments accordingly.

Huato and Garcia. The jury found Guevara-Sanchez not guilty on all three counts as well as not guilty of simple possession.

FACTS

On April 8, 2009, Cal-MMET (California Multi-Jurisdictional Methamphetamine Enforcement Team) conducted a buy/bust operation that resulted in the arrest of defendants. Detectives Salvador Robles, Chris Rogers, and Thomas Coulombe, who testified at trial, participated in the buy/bust operation with four to five other officers, all assigned to Cal-MMET.

Detective Avila, the officer in charge of the investigation, instructed a confidential informant (CI) to set up the purchase of methamphetamine from defendant Huato at the parking lot of a Home Depot on Truxel Road and Interstate 80. The CI had previously set up purchases from Huato. The CI made two calls in the presence of Detectives Avila and Robles. During one of the calls, the CI handed the cell phone to Detective Robles, who spoke first with a person later identified by Detective Robles as defendant Huato, and then with a person later identified by Detective Robles as defendant Garcia. Detective Robles agreed with defendant Garcia to change the location for the transaction to a Mexican restaurant on San Juan and Northgate.

Detective Rogers testified that he went to the restaurant and parked nearby to watch. A van that was being followed by a surveillance team arrived and parked six stalls behind Detective Rogers. Detective Coulombe saw the van parked at the restaurant.

According to Detective Rogers, defendant Huato came out through "the passenger side sliding door" of the van while

defendant Garcia came out through the front passenger door of the van. Defendant Garcia reached back under the front passenger seat and pulled out a black bag. A third person, later identified as Omar Guzman, came "across the front of the van from the driver's side." Defendant Garcia and Guzman walked into the restaurant while defendant Huato went to the rear of the van and smoked a cigarette, watching something across the street. After about five minutes, defendant Huato went into the restaurant.

Detective Robles, in plain clothes and an unmarked car, arrived at the restaurant, located in a strip mall. Detective Robles was instructed to go into the restaurant and determine whether the arrest should occur there. Detective Robles entered and saw defendants Huato and Garcia and another person he could not identify sitting near the door. Detective Robles recognized defendant Huato from "previous surveillance." On the floor next to defendant Garcia, Detective Robles saw a paper shopping bag. Detective Robles walked past them and ordered a drink. While waiting, Detective Robles heard defendant Garcia say that he was "not going to wait much longer." Detective Robles also heard the other two talk about waiting and recognized defendant Huato's voice.

Less than five minutes after entering, Detective Robles left the restaurant, informed Detective Avila what had transpired, and returned to his car. Detective Avila decided that the location should be changed back to the Home Depot

because the restaurant was not a safe location (the parking lot was too small and there were too many civilians in the area).

Defendant Huato and Guzman came out of the restaurant. Defendant Huato stood in the parking lot, smoking and watching traffic. Defendant Huato then approached a Honda parked in the parking lot and began talking to a Hispanic male, later identified as Rafael Guevara-Sanchez, standing by the Honda. According to Detective Rogers, defendant Garcia and Guzman approached and joined in "what looked like a pretty serious conversation." Defendant Garcia separated from the group and got on the phone, rejoined the group, then got back on the phone. Guzman got into the driver's seat of the Honda and defendant Huato got into the passenger seat of the Honda. Guevara-Sanchez got into the driver's seat of the van and defendant Garcia got into the passenger seat of the van. Both of the vehicles then left the parking lot.

The van and the Honda made their way to the Home Depot parking lot with the detectives following. As the van parked, Detective Coulombe activated the "red and blue take-down lights" of his unmarked vehicle, and Detective Robles provided backup. Guevara-Sanchez was driving the van and defendant Garcia was the front seat passenger. When Guevara-Sanchez got out, he started dialing his cell phone, ignoring instructions from Detective Coulombe. Defendant Garcia had a hands-free device in his ear. Two cell phones were on the ground near defendant Garcia. Detective Robles heard defendant Garcia speaking and recognized his voice as the second person on the phone and the impatient

person at the restaurant. In the passenger floorboard area of the van where defendant Garcia had been sitting, Detective Coulombe found 448 grams of methamphetamine in two gallon-sized Ziploc plastic bags inside the shopping bag that Detective Rogers saw defendant Garcia carry into the restaurant and that Detective Robles saw on the floor next to defendant Garcia in the restaurant. A second shopping bag containing clothing was also found in the van. Detective Robles testified that the 448 grams of methamphetamine had a street value of \$19,000 to \$22,000 and was possessed for sale.

Detective Rogers and two other officers stopped the Honda. Guzman was the driver and defendant Huato was in the front passenger seat. A cell phone was found on the center console.

Defendant Garcia's fingerprint was found on the gallon-sized Ziploc plastic bag containing the methamphetamine.

An officer who transported the four suspects as well as two other unrelated prisoners to jail found one-inch-square plastic baggies containing small amounts of methamphetamine each, near the seat where Guevara-Sanchez had been sitting.

Defendant Huato called Linda Shell, a defense investigator, to testify. She visited the restaurant to take photos and interview employees. She went on three occasions at 5:30 p.m. The first two visits were in early December 2009. On all three occasions, she testified that there was "a pretty high noise level for an eatery." On her first visit, there was one other customer. On her second visit, there were two other customers. On her third visit, there were no other customers.

DISCUSSION

I

Defendant Huato contends that without the "volunteered hearsay, innuendo, speculation and prejudicial testimony" from Detective Robles, the other evidence was insufficient to support his convictions. He argues that such testimony violated statutory rules precluding hearsay and denied him the constitutional right to confront the witnesses against him. Defendant Huato further argues the trial court erred in denying his mistrial motion based thereon and in failing to instruct the jury to disregard the inadmissible, volunteered testimony of Detective Robles. Recognizing that he did not object to much of the evidence he now claims to be inadmissible and that his counsel also failed to request the instruction he now insists should have been given, defendant Huato claims counsel rendered ineffective assistance.

We will conclude the court erred in admitting certain hearsay testimony but that the error was not prejudicial. As to the claimed violation of the right to confrontation, we will conclude that the issue was forfeited by counsel's failure to make a specific and timely objection, and even if not forfeited, any error was harmless beyond a reasonable doubt. We further conclude that defendant Huato cannot complain of testimony admitted without objection and that sound tactical reasons for not objecting preclude a finding that counsel's failure to object constituted ineffective assistance. The trial court did not err in denying defendant Huato's mistrial motion based on

Detective Robles's volunteered testimony, in light of defendant's decision to forego an instruction that would have cured any harm caused by the testimony. And finally, the court did not err in failing to instruct the jury to disregard the inadmissible testimony, and counsel's failure to request such an instruction did not constitute ineffective assistance.

Background

On direct examination, Detective Robles testified about the telephone calls made to set up the buy. Detective Robles testified that Detective Avila instructed the CI to "set up the buy/bust or make contact with the individual who he had been dealing with already." Defendant Huato's attorney objected on hearsay grounds. Defendant Garcia's attorney joined in the objection, which the trial court overruled.

When Detective Robles volunteered that it appeared the negotiation between the CI and the person on the other end of the call was not "going anywhere," defendant Huato's attorney objected based on speculation, and the trial court sustained the objection. The prosecutor then asked the detective to "tell us what happened," and he responded.

Detective Robles testified without objection to the following: that the CI was instructed to set up the location for the buy/bust at the Home Depot on Truxel and Interstate 80; that the CI was directed to call and arrange the transaction; that after the location was changed to the restaurant and the suspects arrived, Detective Avila instructed Detective Robles to enter the restaurant "and see what was going on"; that he saw

defendants Huato and Garcia and another person sitting inside the restaurant; that he saw a shopping bag (later found to contain methamphetamine) on the floor near defendant Garcia; that the buy location was changed to the parking lot of the Home Depot and he heard over the car radio that the suspects had left the restaurant; that once he arrived at the Home Depot he saw the suspects' cars circling around the parking lot; and that other detectives stated over the radio they were going to stop the suspects' cars.

Defendant Huato's counsel cross-examined Detective Robles about his identification of defendant Huato as having been in the restaurant. Detective Robles did not write a report on the buy/bust operation. Defendant Huato's counsel asked Detective Robles what his recollection was based on. Without objection, Detective Robles responded, "On surveillance. On the fact that I knew that surveillance had actually already was established on Mr. Huato's house, on the fact that the house that I was being asked to go to was Mr. Huato's house. [¶] And surveillance had already established that. There was actually someone in front of your client's house." Defendant Huato's counsel asked if Detective Robles had "ever seen any of these individuals before," eliciting his response that he had seen defendant Huato. Defendant Huato's counsel later established that Detective Robles recognized defendant Huato "from previous surveillance," not based on personal observations but based on information from others. Defendant Huato's counsel then asked the following:

"Q. I want to know what you personally observed, what you personally know. Okay. With respect to the initial phone conversation when the informant handed you the telephone --

"A. Correct.

"Q. You said you talked to two individuals?

"A. Correct.

"Q. That first person that you talked to, you said that was Mr. Huato, right?

"A. Correct.

"Q. You didn't know that at the time, correct?

"A. Well, I don't know if you want to --

"Q. Based on the information that you had at the time, did you know who that person was that you were talking to you [sic]?

"A. I knew -- well, I assumed it was Mr. Huato.

"Q. Did you know that? Did that person identify himself as Mr. Huato?

"[Prosecutor]: Your Honor, can we approach?

"THE COURT: Certainly."

After an unreported conference held between the court and counsel at bench, defendant Huato's counsel simply obtained Detective Robles's confirmation that he had not personally surveilled defendant Huato.

Defendant Garcia's counsel also cross-examined Detective Robles regarding his identification of defendants Huato and Garcia in the restaurant. Detective Robles repeated that he first spoke to defendant Huato on the phone and then defendant

Garcia. Detective Robles later elaborated on the nature of the call:

"Q. But in fact, you had a conversation that you don't remember all of the words that were used during that conversation, correct?

"A. Like I testified yesterday, the nature of the call itself was basically me being in an undercover role first with Mr. Huato. Obviously Mr. Huato in this case was introducing me to the heavy source or the individuals [sic] who was in charge of the drugs.

"Q. You're making this assumption, correct?

"A. Based on my training and experience, correct.

"Q. You don't know that to be the case. You're making that assumption?

"A. Yes.

"[Defendant Huato's counsel]: Move to strike as nonresponsive.

"THE COURT: It is sustained."

Detective Robles had never seen defendant Garcia prior to that day. Defendant Garcia's counsel established that a CI is generally "someone who has actually been arrested on a case" and has a "contract" with police to "set up deals." Detective Robles added that the CI here had "no criminal history." Defendant Garcia's counsel responded, "That's not what I asked you." Defendant Garcia's counsel did not ask the court to strike the testimony.

On redirect, the prosecutor again questioned Detective Robles about Detective Avila's instructions to the CI to call defendant Huato, during which Detective Robles volunteered that he and others had been given a photo of defendant Huato at the morning briefing. The court sustained defendant Huato's counsel's objection (nonresponsive). The prosecutor's later attempt to refer to the photo was met with yet another sustained objection.

Later, outside the presence of the jury, defendant Garcia's counsel moved for a mistrial on the ground that Detective Robles volunteered that the CI had no criminal history, thereby giving the CI credibility. Defendant Garcia's counsel complained that she had no information about the CI's history in order to challenge Detective Robles's testimony. Defendant Huato's counsel joined in the mistrial motion.

The prosecutor stated that he was not relying on the CI's statements, that defense counsel never moved to strike, and that any error could be cured by an admonition. The trial court stated that the defense may choose not to highlight the testimony but asked defense counsel to respond. Defendant Huato's counsel claimed the CI's credibility was at issue and complained that he had not been able to cross-examine the CI. Defendant Garcia's counsel requested a hearing under Evidence Code section 402 to question Detective Robles about the CI. The court denied the mistrial motion; stated its intent to admonish Detective Robles not to volunteer information, which the court

stated it had previously directed the prosecutor to do; and stated it planned to conduct an evidentiary hearing.

Defendant Huato's counsel then complained that he had no information about "other surveillances" and other cases related to defendant Huato, and requested a mistrial. The court was concerned because defendant Huato had been painted in a different light based on the "unexplained surveillances, unexplained cases" and asked the prosecutor to address the issue the next day. The court commented it was "not suggesting that [the prosecutor had] withheld anything." The court admonished Detective Robles not to volunteer information.

The next day, the court recalled that it had denied the motion made by defendant Garcia's counsel, in which defendant Huato's counsel had joined. The court also recalled defendant Huato's pending mistrial motion was based on Detective Robles's volunteered information about other cases involving defendant Huato. The prosecutor confirmed with defendant Huato's counsel that Detective Robles testified about "prior surveillances" of defendant Huato. Defendant Huato's counsel was concerned that Detective Robles's testimony was not based on his personal knowledge but instead "gleaned" from the CI and others and that he (counsel) had no information regarding the other surveillances. The prosecutor responded that defendant Huato's counsel had put Detective Robles "in some really tough spots," having asked whether Detective Robles had seen defendant Huato before seeing him in the restaurant. The prosecutor recounted a sidebar discussion where he suggested that Detective Robles had

previously seen defendant Huato's photograph and then, when the prosecutor attempted to establish that fact (with which "everybody seemed to be on board") on redirect examination, defendant Huato's counsel successfully objected. The prosecutor claimed that Detective Robles was doing his best under the circumstances. Defendant Huato's counsel claimed he had no reason to believe that Detective Robles would refer to prior surveillances when he (counsel) had no information about the same.

The court denied the mistrial motion but offered to instruct the jury that defendant Huato was being tried for only the current incident and "not for anything else," and to instruct the prosecutor not to inquire further about the surveillances. Defendant Huato's counsel asked to "reserve" on whether he wanted an instruction because there were "additional issues." The court offered to instruct if counsel so requested.

At the Evidence Code section 402 hearing, counsel for defendants Huato and Garcia questioned Detective Robles; Detective Robles confirmed that the CI had never been arrested or found to be in possession of controlled substances. Detective Robles had run a rap sheet on the CI. The CI was being paid and was not "working off a case." Detective Avila worked with the CI but did not come into contact with the CI through criminal activity of the CI. Prior to the current incident, Detective Robles had worked with the CI. Members of the task force had "used" defendant Huato in "two previous cases." Defendant Huato "introduced" them to "other narcotic

traffickers that have been arrested just like in this case.” Defendant Huato “began as a target” but then was used “unwitting[ly]” to lead task force members to “bigger fish” (“other narcotic traffickers”). Based on information from the CI, defendant Huato became a target. Defendant Huato was a “middleman.” Defendant Garcia’s counsel requested that the court again admonish Detective Robles not to volunteer information. The court did so.

The record does not reflect that defendant Huato’s counsel requested the court to give an instruction to the jury concerning Detective Robles’s testimony.

Hearsay. Denial of Confrontation.

Defendant Huato’s counsel objected on hearsay grounds when Detective Robles testified that Detective Avila instructed the CI to “set up the buy/bust or make contact with the individual who he had been dealing with already.” The trial court simply overruled the objection without asking the prosecutor for a response. Defendant Huato claims the trial court erred in overruling the hearsay objection and the error “deprived [him] from cross-examining Avila, who did not testify at the trial.” The People claim that the contested testimony was not hearsay because it was not offered for the truth of the matter stated, but instead was offered to “establish the cause for the officers’ resulting actions,” citing *People v. Smith* (1970) 13 Cal.App.3d 897, 910 (*Smith*), and was a statement not offered to prove the truth of any facts in the statement, citing *In re Robert W.* (1977) 68 Cal.App.3d 705, 712 (*Robert W.*).

The People's reliance upon *Smith* and *Robert W.* is misplaced. In *Smith*, an officer who arrested the defendant shortly after a purse snatching was permitted to testify that a witness told him of seeing the suspect running away from the crime scene in a particular direction. Rejecting a defense objection to the testimony as hearsay, this court concluded the declaration was not hearsay because it was not offered for its truth, but only to establish the cause for the officer's pursuit. (*Smith, supra*, 13 Cal.App.3d at pp. 901, 910.) In contrast, Detective Robles's testimony that Detective Avila instructed the CI to set up the buy with the person he had been dealing with already did not explain Detective Robles's conduct at all. Neither is *Robert W.* of any assistance to the prosecution. The police officer's instruction to the appellant in *Robert W.* to put on a coat for a showup was not offered for the truth that the coat belonged to the appellant. (*Robert W., supra*, 68 Cal.App.3d at pp. 710-713.) Here, Detective Robles's statement recounting Detective Avila's instruction to the CI to set up the buy with the person he had been dealing with already was most certainly offered to prove that the CI had previously been dealing with the person he called.

Thus the trial court abused its discretion in overruling the hearsay objection. However, the error is harmless beyond a reasonable doubt. Detective Robles testified that the CI made a call, spoke to the person on the other end, and then handed the phone to Detective Robles. Detective Robles identified defendant Huato, based on his voice, as the first person with

whom he had spoken on the cell phone to set up the transaction at the Mexican restaurant. Detective Robles identified defendant Huato as being inside the restaurant, recognizing both his voice as well as his appearance from prior cases. Detective Rogers also identified defendant Huato. The van was followed by the surveillance crew to the restaurant, where defendant Huato got out along with defendant Garcia, who retrieved a shopping bag. Detective Robles saw a shopping bag next to defendant Garcia in the restaurant. When the van was searched, a shopping bag was found that contained the methamphetamine. The erroneously admitted hearsay added little to the evidence of guilt.

Defendant Huato claims the erroneous admission of Detective Robles's testimony also deprived him of the opportunity to cross-examine Detective Avila, the source of the hearsay statement, and thus violated his right of confrontation. However, Huato objected to Detective Robles's testimony on hearsay grounds; no mention was made of his right to confrontation. In general, a judgment is not reversed based on the erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) Defendant Huato's failure to make a specific and timely objection or motion to strike in the trial court to the evidence on the basis of his right to confrontation forfeits

that issue on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

We also reject any claim that counsel's failure to make a timely confrontation clause objection constituted ineffective assistance. To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Defendant did not suffer prejudice because any error in admitting the testimony was harmless beyond a reasonable doubt.

Defendant Huato claims that having unsuccessfully objected to hearsay testimony once, counsel cannot be blamed for thereafter failing to object on hearsay grounds to subsequent questioning of Detective Robles. Huato asserts that an objection would have been "futile" in view of the court's determination to overrule his first hearsay objection, which led counsel to believe that "the court was disposed to admit hearsay." The record contradicts his claim: defendant Huato's counsel later objected to other testimony based on hearsay and the court sustained his objections.

Certainly, counsel may choose to forego an objection, but the issue underlying the objection cannot be raised on appeal, nor can counsel's failure to object become a viable basis for appeal. "'Whether to object to inadmissible evidence is a tactical decision . . . accorded substantial deference . . . ,

[and] failure to object seldom establishes counsel's incompetence.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) To prevail on a claim of ineffective assistance of counsel, "the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.' [Citation.]" (*Ibid.*) Defendant Huato's counsel may have chosen not to object to other questioning calling for hearsay because doing so would have highlighted the answer.

Mistrial Motion. Failure to Instruct.

As to certain volunteered evidence, defendant Huato's counsel did object and later sought a mistrial. "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) On review, we apply the deferential abuse of discretion standard. (*Ibid.*)

Here, the trial court determined that Detective Robles's improper volunteered testimony was not incurable by admonition or instruction. Defendant Huato claims otherwise, citing *People v. Navarrete* (2010) 181 Cal.App.4th 828 as instructive. In *Navarrete*, the detective's conduct of referring to the defendant's suppressed statement suggesting he confessed after the detective had been instructed not to was deemed prejudicial misconduct. (*Id.* at pp. 831-832, 834-837.) Even defendant

Huato concedes that Detective Robles's conduct "did not rise to the level" of the detective's misconduct in *Navarrete*. The trial court instructed Detective Robles not to volunteer evidence and offered to instruct the jury. Defendant Huato's counsel chose to think about it and the record does not reflect he ever so requested.

Defendant Huato complains that the trial court did not give an instruction to disregard or to limit the use of certain evidence. We reject this claim. The court generally has no duty to give a limiting instruction *sua sponte*. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.) During the discussion on his mistrial motion, defendant Huato's counsel did not request a curative instruction, instead stating that he would reserve because there were other issues. The court did grant defendant Huato's counsel's motion to strike certain testimony at the time of his objection and later instructed the jury as follows:

"During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose." (CALCRIM No. 222.) The instruction adequately addressed the issue. We reject defendant Huato's contentions and find no prejudicial error.

Insufficient Evidence

Defendant Huato perfunctorily asserts that when the "volunteered hearsay, innuendo, speculation and prejudicial testimony" from Detective Robles is disregarded the other evidence was insufficient to support his convictions. Defendant Huato's argument concedes the evidence admitted at trial was sufficient to convict him on all counts with Detective Robles's testimony. As already discussed, we cannot disregard properly admitted evidence to which no objection was made. Given the perfunctory nature of the assertion, we need not consider it further.² (See *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

II

Although the trial court instructed on unanimity with respect to counts two and three, transportation of methamphetamine and possession of methamphetamine for sale, the court did not instruct on unanimity with respect to count one, conspiracy to transport/sell a controlled substance. Rejecting defendant Garcia's claim to the contrary, we find no error.

² Defendant Huato cites the standard of review and simply argues: "All that was left without Robles' testimony was that appellant was present in the vicinity of the drugs, essentially in the same position as Guevara-Sanchez. As the jury obviously concluded in Guevara-Sanchez' case, this mere presence was not enough to convict. Without the court's guidance, the jury obviously considered at least some of Robles' hearsay and volunteered statements."

"[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).

In determining whether to instruct on unanimity, the court asks whether "(1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction. [¶] In this case, the question thus becomes whether the evidence suggested two discrete crimes, i.e., two discrete conspiracies, or merely possible uncertainty on how the defendant is guilty of a particular conspiracy." (*Russo, supra*, 25 Cal.4th at p. 1135.)

"[T]he specific crimes that constitute the object of the conspiracy are not elements of the conspiracy. Rather, they are the means by which the purpose of the conspiracy was to be achieved." (*People v. Vargas* (2001) 91 Cal.App.4th 506, 560.)

There was no requirement here to instruct on unanimity. There was only one conspiracy to transport and sell methamphetamine. There was no risk that the jury would divide on transporting and selling methamphetamine. Instead, the

evidence presented the possibility, at most, that the jury might be uncertain as to how some of the defendants were guilty.

III

The trial court asked both counsel whether they were retained or appointed (both appointed) and ordered both defendants to reimburse the county for services of counsel; the trial court did not state or order a dollar amount.

Defendants Huato and Garcia contend the trial court erred in ordering them to pay attorney fees without providing for a noticed hearing on their ability to pay. (Pen. Code, § 987.8, subd. (b).) The People concede that defendants' arguments have merit and that since both defendants were sentenced to state prison for four years, the trial court would have to find that there were unusual circumstances to order defendants to pay attorney fees. (§ 987.8, subd. (g)(2)(B).) We accept the concession and will strike the attorney fees orders.

IV

The trial court awarded both defendants 279 actual days and 138 conduct days for a total of 417 days of presentence custody credit. Defendants Huato and Garcia contend they are entitled to additional presentence custody credits pursuant to the recent amendments to Penal Code sections 2933 and 4019.³ We agree.

The amendments to section 4019 apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d

³ All further statutory references are to the Penal Code unless otherwise indicated.

740, 745 [statutory amendments lessening punishment for crimes apply "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying the rule of *Estrada* to an amendment involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to an amendment involving custody credits].)

On September 28, 2010, as an urgency measure effective on that date, the Legislature enacted Senate Bill No. 76 (2009-2010 Reg. Sess.), which amended section 2933 regarding presentence conduct credits for defendants sentenced to state prison. (See Stats. 2010, ch. 276.) The amendment gives qualifying prisoners one day of presentence conduct credit for each day of actual presentence confinement served (§ 2933, former subd. (e)(1), (2), (3)), eliminating the loss of one day of presentence conduct credit under the prior rate when the person served an odd number of days and eliminating the directive in section 4019 that no presentence conduct days are to be credited for commitments of fewer than four days. (§ 4019, subd. (g).)

The amendment effective September 28, 2010, which supersedes the amendments effective January 25, 2010, does not state it is to be applied prospectively only. Consequently, for the reasons we concluded the amendments increasing the rate of earning presentence conduct credit, effective January 25, 2010, applied retroactively to defendants sentenced prior to that date, we similarly conclude the rate provided in section 2933 pursuant to the September 28, 2010, amendment applies

retroactively to all appeals pending as of September 28, 2010. Defendants are not among the prisoners excepted from additional accrual of credit. (§ 2933, former subd. (e)(3).) Both having served 279 actual days, defendants are entitled to 279 conduct days, for a total of 558 days of presentence custody credit.

We note the trial court erroneously used a form abstract of judgment for an *indeterminate* term for both defendants Huato and Garcia. Defendants were sentenced to determinate terms. We assume the trial court will use the correct form in amending the abstracts.

DISPOSITION

The judgments are modified, striking the attorney fees order and awarding 279 conduct days for a total of 558 days of presentence custody credit. The trial court is directed to prepare amended abstracts of judgment accordingly and to forward certified copies of each to the Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

_____ RAYE _____, P. J.

We concur:

_____ ROBIE _____, J.

_____ MAURO _____, J.