

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Appellant,

v.

SANDRA ROSINA STARKEY,

Defendant and Respondent.

C067483

(Super. Ct. No.
MF032038C)

The People appeal from an order granting a new trial. After the defendant was convicted of possession of methamphetamine for sale, the trial court granted the defendant's motion for new trial because the court had not instructed the jury on aiding and abetting. We conclude that the trial court erred by granting the motion for new trial. We therefore reverse.

BACKGROUND

When the police searched a motel room in Manteca, they found several people, including the defendant, in possession of methamphetamine and other contraband. The defendant identified

her purse, and a search of the purse revealed five individual plastic bags of methamphetamine (four of the bags together in a larger bag) and two scales, both with methamphetamine residue on them.

The total amount of methamphetamine found in the defendant's possession was 3.87 grams. A prosecution expert testified that the totality of the circumstances indicated that the methamphetamine found in the defendant's purse was possessed for purposes of sale. To make this determination, he relied on the number of bags containing methamphetamine, two scales with methamphetamine residue on them, a motel room paid for with cash, and an amount of methamphetamine sufficient for 38 doses. Also, the methamphetamine was worth about \$400, and the defendant was unemployed.

The defendant testified that she was in the motel room using methamphetamine the evening of the search. Her boyfriend, Chad Olson, was one of the other people in the room that evening, using methamphetamine. But he was also a dealer. Olson gave the defendant the loose bag of methamphetamine, found later in the defendant's purse, when he first entered the motel room. He then went to the back part of the room, where a counter and mirror were located, and weighed out portions of methamphetamine, using one of the scales found in the defendant's purse. Later, Olson started preparing to go to work. He told the defendant that he had put the methamphetamine in her purse. Olson also put the scales in the defendant's purse. The defendant admitted that she knew that Olson sold

methamphetamine and that she had held methamphetamine for him in the past.

The defendant was charged by information with one count of simple possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and one count of possession of methamphetamine for sale (Health & Saf. Code, § 11378). She was tried by jury, with Judge K. Peter Saiers presiding.

During the conference concerning jury instructions, the prosecutor requested the trial court to instruct the jury on aiding and abetting. The trial court refused.

During closing argument, the prosecutor asserted that the defendant possessed the methamphetamine in her purse and knew that Olson intended to sell it. The prosecutor stated: "She doesn't have to be the main participant in this crime, as long as she's a participant in this crime to be guilty of it. So she wants you to believe that she's the lesser participant in this, so you find her not guilty. But guess what? Even if you believe again -- it goes back -- even if you believe her entire story, she's guilty of the crime according to her story because she's sitting there with the knowledge of having methamphetamine for sale in her purse. Okay? She's helping out -- if you believe her story, again -- you might as well believe it because she's guilty of the [possession for sale] count if you believe her. She's assisting somebody else in --" At that point in the argument, defense counsel objected, but the trial court ruled that it was "proper argument within the limits of the

instructions." The prosecutor continued by arguing that two people can possess drugs at the same time.

Defense counsel argued that the methamphetamine was not possessed for sale and that the defendant was not a dealer. The methamphetamine found in her purse belonged to Olson.

During a break in the defense's closing argument, the prosecutor again asked the trial court to give the jury instructions on an aiding and abetting theory. The court refused, stating that the facts did not support aiding and abetting instructions but that they supported a theory that she was a direct perpetrator.

In rebuttal, the prosecutor argued that the facts of this case, even assuming the defendant's testimony was true, were like a "Ma and Pa business." "Pa does all the work. He collects all the oranges. He boxes up all the oranges. He takes all the oranges from the field and brings them out and puts them out on the street. [¶] All that Ma does is she watches the oranges when he's not around." Comparing the crime here to a homicide, the prosecutor said that a "person who is an associate and a participant in the crime is just as guilty as the person who actually pulls the trigger."

The jury convicted the defendant on both counts.

The defendant filed a motion for new trial as to the possession for sale count only. (Pen. Code, § 1181.)

Judge Michael Garrigan heard the motion for new trial and granted it based on the court's failure to instruct the jury on aiding and abetting. The court stated: "I think that there was

a need for an aider and abettor instruction. I don't necessarily -- certainly factually the argument was fine, but I think that there was a need for the instruction. Judge [Saiers] did not give it. My concern is that conceivably an appellate court could reverse the entire conviction based on the failure to give that instruction."

Judge Garrigan did not address whether the error was prejudicial.

DISCUSSION

The parties agree that Judge Saiers erred by not instructing the jury concerning aiding and abetting. We need not consider whether Judge Saiers erred because, regardless of whether the aiding and abetting instruction should have been given, there was overwhelming evidence that the defendant was a direct perpetrator of the possession for sale crime.

The standard of review on appeal after the trial court grants a motion for new trial based on misinstruction of the jury depends on the issues raised. Generally, we review a trial court's conclusion that an instructional error caused prejudice under the abuse of discretion standard. (*People v. McCord* (1936) 15 Cal.App.2d 136, 140.) Acknowledging this general rule, the People observe that, because Judge Garrigan, who granted the motion for new trial, was not the judge who presided at trial, the proper standard of review on appeal is independent review. Judge Garrigan was required to decide the issue of prejudice on the record, no different from the review in this court. While this argument has some merit, we need not conclude

that independent review is the appropriate standard because, even under the abuse of discretion standard, the order granting a new trial must be reversed.

A court may grant a motion for new trial only if the defendant demonstrates prejudicial error. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159-1160, overruled on another ground in that *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The trial court is bound by the rule that prejudicial error is the basis for a new trial, and has no discretion to grant a new trial for harmless error. (Cal. Const., art. VI, § 13; *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 694.)

Here, there was no prejudicial error because there was overwhelming evidence that the defendant was guilty of possession of methamphetamine for sale as a direct perpetrator. "[E]very person who possesses for sale any controlled substance . . . shall be punished by imprisonment in the state prison." (Health & Saf. Code, former § 11378; Stats. 2001, ch. 841, § 6, p. 6870.) Health and Safety Code section 11378 proscribes possession of methamphetamine "for sale." It does not require possession with the intent to sell it personally. (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1731-1732.) "The requisite mental state is satisfied when the drugs are possessed with the specific intent that they be sold, regardless of whether the possessor intends to sell them personally." (*Id.* at p. 1732, fn. 4.)

The defendant admitted that she possessed the methamphetamine found in her purse, and the evidence that she

knew that Olson intended to sell it is overwhelming. According to her own testimony, she knew that Olson sold methamphetamine, she knew that he was in the back part of the motel room weighing and bagging methamphetamine, and she knew that he put the methamphetamine in her purse. She did not say that she complained about having the methamphetamine put in her purse, but explained that Olson did it because he could not take it to work. On this evidence, any reasonable jury would have concluded that the defendant knowingly possessed methamphetamine for sale.

Despite this overwhelming evidence, the defendant asserts that the prejudicial error in this case is that her attorney was not allowed to argue concerning aider and abettor liability. That is simply a red herring. Although some of the prosecutor's arguments may have included echoes of aider and abettor liability, the evidence was that she was a direct perpetrator. No amount of argument concerning aiding and abettor liability would have changed that.

In the absence of prejudice, the trial court abused its discretion in granting a new trial.

DISPOSITION

The order granting a new trial is reversed and the case is remanded for sentencing.

We concur: _____ NICHOLSON _____, Acting P. J.

_____ ROBIE _____, J.

_____ HOCH _____, J.