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

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
HERBERT HALE, SR.,  
  
Defendant and Appellant.

C069812  
  
(Super. Ct. No. 11F00299)

A jury found defendant Herbert Hale, Sr., guilty of transportation of heroin and deadlocked on a count of possession of heroin for sale. Defendant admitted having four prior narcotics convictions and having served five prior prison terms. The trial court granted the prosecution's request to dismiss all but two of the prior convictions. At sentencing, the trial court found the transportation was for sale and sentenced defendant to county jail for 11 years, consisting of the upper term of five years plus six years for the prior convictions,

pursuant to Penal Code<sup>1</sup> section 1170, subdivision (h) (realignment). He was awarded 285 days' custody credit and 285 days' conduct credit.

On appeal, defendant contends: (1) his request for an instruction allowing the jury to determine whether his transportation of heroin was for personal use, rather than sales, was erroneously denied; and (2) the evidence is insufficient to support the trial court's determination that the transportation was for the purpose of sales. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

##### I

##### *Trial*

Sacramento's McClatchy Park is known for "fairly heavy" narcotics sales. In December 2006, at the park, defendant sold an undercover detective two plastic bindles that contained black tar heroin. Defendant pulled the bindles from a brown paper bag that contained additional individually wrapped bindles of heroin. When contacted by a uniformed officer, defendant stated he was on parole for a fraud conviction. In fact, defendant was on parole, but not for fraud. When arrested, defendant had currency on his person: five \$20 bills and some \$10 and \$1 bills. The denominations were "[v]ery consistent with street-level narcotics sales." Police found no scales or pay-owe sheets.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

Five years later, on a morning in January 2011, McGeorge School of Law security officer Gary Galbreath was parked near McClatchy Park. He saw four black male adults standing across the street in an area frequented by people who sold narcotics. The males looked nervously in all directions.

After several minutes, defendant arrived in a green car and parked. One of the males approached the car, opened the passenger door, stuck his hand inside the car, made an exchange with defendant's right hand, got out of the car, and returned to the group.

Galbreath telephoned Sacramento Police Officer Mark Callaghan and related the foregoing facts. Callaghan arrived and Galbreath pointed out defendant's car. Callaghan followed the car and, when it ran a stop sign, initiated a traffic stop. Defendant was alone in the car. He appeared nervous and his hands shook so much that, when he retrieved his wallet, his identification fell on the floor.

Officer Callaghan asked defendant if he was on probation or parole; as before, defendant claimed he was on parole for fraud. Callaghan later learned that defendant's parole was for felony transportation or possession of narcotics for sale. During a parole search, officers found \$630 on defendant's person: 20 \$20 bills, 9 \$10 bills, 24 \$5 bills, and 20 \$1 bills. Defendant was handcuffed.

Officer Callaghan searched defendant's car. In the driver's map pocket, he found a clear plastic baggie containing 10 individually wrapped and identically sized bindles of black

tar heroin. The heroin weighed 3.08 grams. Defendant showed no signs of being under the influence. Black tar heroin most commonly is injected with a syringe and needle. Heroin users commonly possess needles; spoons with residue or evidence of burning; a cooking container, such as a soda can; a filtering device; and a vein tie-down. Officer Callaghan found no such items in the searches of defendant's car and person. A search of defendant's residence yielded no contraband or items to facilitate heroin use.

Sacramento Police Detective Justin Johnson testified for the prosecution as an expert in the transportation or possession for sale of heroin. He testified that heroin typically is sold on the street in quantities of 0.1, 0.2, 1.0, and 3.5 grams. At the time of trial, 3.5 grams would sell for \$150 to \$180. Individual bindles of heroin typically sold for \$10 to \$20. A 3.5 gram piece of tar heroin could be divided and sold as individual pieces. However, a user who acquires 3.5 grams of heroin in a single transaction typically receives a single bindle rather than multiple bindles.

Detective Johnson concluded that defendant possessed the heroin for sale rather than for personal use. This opinion was not altered by the fact that defendant had used heroin for 35 years. Heroin users also sell heroin, and heroin dealers also use heroin.

Donzetta White Hale testified that she and defendant have been married for 43 years. For 10 years, defendant had regularly played the lottery, buying multiple tickets at a time.

He would accumulate winning tickets for months before cashing them in.

On December 29, 2010, defendant told his wife that he was going to redeem multiple winning lottery tickets at a local grocery store. When he returned, he had \$817 in various denominations.

Apart from lottery winnings, defendant received \$840 per month from Social Security. The couple's monthly income was \$1,700; after monthly expenses, approximately \$300 remained.

Defendant kept syringes in the house because he took insulin for diabetes and has used heroin since 1970. Although his wife did not allow defendant to use heroin in the home, he sometimes injected it in the bathroom. Although she had never seen him inject drugs, she sometimes would notice that, upon leaving the bathroom, he had a strange look on his face and blood on his clothing.

On January 8, 2011, defendant told his wife he was going to the grocery store. She telephoned his cell phone but he did not answer, which was unusual. About the same time, police officers arrived at her home and she allowed them to enter and search. There were syringes in the home, and his wife told officers about them. She also told them there was no contraband in the house.

Donzetta White Hale acknowledged that McClatchy Park was not far from their home. She knew that people bought and sold drugs there.

## II

### *Jury Verdict And Sentencing*

Before trial the defense requested a special jury finding in connection with the charge of transportation of heroin. That is, if defendant was found guilty of transportation, the defense wanted a special finding whether the heroin was transported for sale or personal use.

The prosecutor objected to such a finding and argued the issue of the transportation's purpose should be decided by the court at sentencing, rather than by the jury.

The trial court agreed and rejected the request for a special finding.

## DISCUSSION

### I

#### *Trial Court Or Jury Determination*

Defendant contends the trial court erred by refusing his request that the jury make a special finding, whether he transported the heroin for personal use or for sale, within the meaning of section 1210, subdivision (a). (Proposition 36.) We disagree.

Section 1210.1 governs a defendant's eligibility for treatment under Proposition 36. It provides in relevant part: "any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program." The term "nonviolent drug possession

offense'" is defined as "the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance . . ." including heroin. (§ 1210, subd. (a).) "The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing . . ." (§ 1210, subd. (a).)

Defendant's claim that he was entitled to a jury determination of the personal use/sale issue is based on *People v. Harris* (2009) 171 Cal.App.4th 1488, in which a jury found the defendant guilty of transportation of cocaine base, and *the trial court allowed the jury to make a special finding pursuant to instructions, including the reasonable doubt instruction (CALCRIM No. 220), that "transportation of the controlled substance 'was . . . for personal use within the meaning of . . . section 1210[, subdivision] (a).'*" (*Harris*, at pp. 1491, 1494.) *Harris* held that, because the jury had made the finding beyond a reasonable doubt, and the defendant was not otherwise disqualified from Proposition 36 treatment, the trial court erred in sentencing him to prison rather than probation. (*Id. Harris*, at pp. 1496-1497.)

Defendant *concedes* that *Harris* does not create a sua sponte duty to instruct the jury regarding the purpose of the transportation, but nevertheless reads *Harris* as suggesting the instruction is appropriately given upon request. Thus, "[h]aving specifically requested the instruction," he claims "it was error for the trial court not to so instruct the jury." We disagree.

An appellate opinion is not authority for propositions not discussed or considered. (E.g., *People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) *Harris* had no occasion to, and did not, consider whether a trial court has discretion to deny a request for a jury determination of the personal use/sale issue. Nothing in *Harris* suggests the court *must* submit the issue to the jury *whenever* the defense so requests. *Harris* simply holds that, where the court in its discretion *does* submit the issue to the jury, and the jury finds transportation for personal use beyond a reasonable doubt, the trial court cannot then make a contrary finding of transportation for sale by the lower standard of preponderance of evidence. (*People v. Harris*, *supra*, 171 Cal.App.4th at pp. 1496-1497.) There was no error.

## II

### *Sufficiency Of The Evidence*

Defendant contends there was insufficient evidence to support the trial court's finding that heroin was transported for the purpose of sale, rather than for his personal use. We disagree.

Following the jury verdict, the defense filed a motion arguing the totality of circumstances proved by a preponderance that defendant possessed the heroin for personal use.

The prosecution opposed defendant's motion. The prosecution argued that the evidence establishes, "at the minimum, by a preponderance of the evidence that [defendant] transported heroin for the purpose of sale. The weight of the heroin (between 2.86 and 3.08 grams), the amount of currency and

the fact it was in various denominations commonly used in narcotics transactions (\$630 in twenty \$20 bills, nine \$10 bills, twenty-four \$5 bills, and twenty \$1 bills), and the fact that [defendant] was found near McClatchy Park, a known high-narcotics[-]volume location, all led Detective Johnson, the only trained, experienced, narcotics detective to testify as an expert in the possession and transportation of heroin for sale, to conclude that [defendant] possessed and transported the heroin for the purpose of sales." The memorandum also addressed evidence that defendant had been seen making a hand-to-hand exchange, that he had made false statements regarding his parole status, that he had been convicted of selling the same substance in the same location in 2006, and that he had a lengthy criminal record.

The trial court found "by a preponderance of the evidence that the transportation [of] drugs in this case was for sales or a combination of personal use and sales."

Where, as here, the jury's verdict leaves open the possibility that the drugs were transported for a reason other than personal use, the trial court must make a factual finding whether the drugs were transported for that reason. The standard of proof is preponderance of evidence. (*People v. Dove* (2004) 124 Cal.App.4th 1, 10-11.)

"To determine sufficiency of the evidence, . . . one must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To

be sufficient, evidence of each of the essential elements . . . must be substantial and one must resolve the question of sufficiency in light of the record as a whole." (*People v. Hernandez* (1988) 47 Cal.3d 315, 345-346.)

"If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citing *People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

"Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. [Citation.]" (*People v. Harris* (2000) 83 Cal.App.4th 371, 374, quoting *People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.)

The evidence showed that in 2006, in a hand-to-hand transaction at McClatchy Park, defendant sold an undercover officer black tar heroin, packaged in individual bindles, from a bag containing additional bindles; and he tried to mislead an officer by falsely claiming his parole was for a conviction for fraud. At the time, the money on his person was in denominations "[v]ery consistent with street-level narcotics sales."

The prior offense is circumstantial evidence of defendant's intent and knowledge in the present case. (*People v. Harris*, *supra*, 83 Cal.App.4th at p. 374; *People v. Glass* (1975) 44

Cal.App.3d 772, 774.) In a hand-to-hand transaction at the same venue as the prior offense, defendant sold an individually packaged bundle from a bag containing additional bundles of heroin. He again tried to mislead an officer by claiming his parole was for fraud. Once again, the money on defendant's person was in denominations consistent with street-level narcotics sales. Police did not find a "hype kit" during searches of defendant's person, car, and home. The prosecution's expert testified that, given all of these facts, defendant possessed the heroin for sale.

Defendant's insufficiency of evidence claim is, at bottom, an argument that the "circumstances might . . . reasonably be reconciled with a contrary finding." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 60.)

The trial court was under no obligation to draw an inference of transportation for personal use. The court's finding that the transportation was for the purpose of sales is supported by substantial evidence.

### III

#### *Conduct Credits*

In his opening brief, defendant contended he was entitled to additional presentence custody credit. Through his appellate counsel, he also asked the trial court to review its credit determination. On May 9, 2012, the trial court awarded 570 days' custody credit. Thereafter, defendant withdrew his appellate contention.

DISPOSITION

The judgment is affirmed.

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ROBIE, J.

We concur:

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RAYE, P. J.

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MURRAY, J.