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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK R. KENNEDY,

Defendant and Appellant.

D065439

(Super. Ct. No. SCD244806)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed with directions.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Sean M. Rodriquez, Deputy Attorneys General, for Plaintiff and Respondent.

After conducting surveillance of defendant and appellant Patrick Kennedy's motor home, narcotics investigators searched the motor home and found a variety of illegal and prescription drugs in various amounts. A few months before the investigators searched

the motor home, Patrick told them he lived in the motor home, which was parked in front of Timothy Kennedy's home. Timothy¹ is Patrick's father. In addition to the contraband, the investigators also found documents in the motor home that apparently belonged to or identified Patrick. The motor home had room for only one person to sleep and contained clothes that did not fit Timothy.

Contrary to Patrick's argument on appeal, the record contains sufficient evidence to support his convictions of maintaining a place for selling or giving away controlled substances and possession of a usable amount of heroin. We also reject Patrick's contention he could not be convicted separately of possessing both alprazolam (Xanax) and diazepam (Valium).

However, the parties agree the abstract of judgment needs to be corrected so that it lists Patrick's conviction under count 3 as a conviction for possessing a controlled substance in violation of Health & Safety Code section 11375, rather than Health & Safety Code section 11377. Thus, we affirm the judgment of conviction but direct the trial court to correct the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Investigation

On September 30, 2012, law enforcement officers visited the motor home that was parked in front of Timothy's home in Poway. During the visit, Patrick told the officers he lived in the motor home, which was very dirty and filled with various belongings.

¹ To avoid confusion and for the sake of clarity, we identify appellant and his father by their first names, Patrick and Timothy.

Following their September 2012 visit, the officers began conducting surveillance of the motor home.

On November 5, 2012, while a detective was on routine patrol in the area, he observed a well-known methamphetamine addict make a very brief visit to the motor home. Later, officers stopped the addict and searched him; they found three grams of methamphetamine in one of his pockets.

On November 30, 2012, another man was observed visiting the motor home. Shortly after he left the motor home, officers stopped the visitor's vehicle; the visitor was under the influence of heroin and in possession of heroin paraphernalia.

On November 30, 2012, Timothy was also seen briefly entering the motor home on and off throughout the day.

The officers obtained a search warrant for both Patrick's motor home and his father's house and executed it on December 5, 2012. When searching Timothy's home, the officers noticed a white substance around Timothy's mouth and it appeared that he might be under the influence of methamphetamine. However, officers found no contraband in Timothy's house. Timothy's house was extremely filthy with spoiled food, clothes and other items on the floors and various surfaces; because of the cluttered and filthy condition, it was difficult to perform a search. Timothy apparently lived in the home with Patrick's stepmother.

The motor home was locked; inside the motor home, the officers found 15.33 grams of methamphetamine, 112 hydrocodone (Vicodin) pills, 49 Xanax pills, 14 diazepam (Valium) pills, seven doses of suboxone, and a 0.08 gram piece of heroin. The heroin was found on a shelf near the rest of the contraband; at trial, one of the officers

explained that heroin is sometimes ingested by users who burn small pieces of it and inhale the smoke. The officer testified that 15.33 grams of methamphetamine is much more than someone would need for his or her personal consumption. The officer further testified that single pills of Xanax, diazepam and suboxone are commonly sold on the street.

In addition to the contraband substances, the officers found: a digital scale, commonly use in drug transactions, which was coated in heroin residue; a methamphetamine pipe; burnt spoons used for heating and ingesting heroin; a rifle; and live ammunition in a cooler. The rifle was found in front of a child's toy fire truck.

In conducting their search of the motor home, the officers found a work ID with Patrick's name and photograph on it and a wallet which contained a piece of paper that had Patrick's name and photograph on it. The officers also saw pictures of Patrick, with his young son, on the walls of the motor home. The officers also found clothes in the motor home. Patrick is much thinner than Timothy and none of the clothes found in the motor home were large enough to fit Timothy.

Like Timothy's home, the motor home was filthy and extremely cluttered.

B. Trial Court Proceedings

Patrick was charged in an information with 11 offenses. Counts 1 through 3 and count 6 alleged he possessed for sale: hydrocodone (Health & Saf. Code, § 11351; count 1), methamphetamine (Health & Saf. Code, § 11378; count 2), Xanax (Health & Saf. Code, § 11378; count 3) and diazepam (Health & Saf. Code, § 11375, subd. (b)(1); count 6). Counts 4 and 5 alleged simple possession of: heroin (Health & Saf. Code, § 11350, subd. (a); count 4) and suboxone (Health & Saf. Code, § 11350, subd. (a); count 5).

Count 7 alleged he was a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)), count 8 alleged he was unlawfully in possession of ammunition (Pen. Code, § 30305, subd. (a)(1)), and count 9 alleged he maintained a place for the use and/or sale of narcotics (Health & Saf. Code, § 11366). Counts 10 and 11 alleged Patrick failed to appear while on bail (Pen. Code, § 1320.5).

The information also alleged Patrick had suffered one strike prior within the meaning of Penal Code section 667, subdivisions (b) through (i).

Patrick pled not guilty; during the course of the trial, the trial court dismissed count 5, which alleged simple possession of suboxone. Thereafter, the jury returned a verdict finding him guilty on all the remaining counts. Although the jury acquitted Patrick of all four counts alleging the possession for sale of contraband (counts 1 through 3 and count 6), with respect to each of those counts the jury nonetheless found Patrick guilty of the lesser included offense of simple possession of the respective types of contraband: hydrocodone (count 1), methamphetamine (count 2), Xanax (count 3) and diazepam (count 6).

The jury also found Patrick guilty of possessing heroin (count 4); being a felon in possession of a firearm (count 7); unlawfully possessing ammunition (count 8); maintaining a place for the use and/or sale of narcotics (count 9); and failing to appear (counts 10 and 11).

The trial court denied Patrick's *Romero*² motion, sentenced Patrick to a total term

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

of five years four months,³ and imposed \$700 in court operations and convictions assessments. (Pen. Code, § 1465.8; Gov. Code, § 70373.)

Patrick filed a timely notice of appeal

DISCUSSION

I

In his principal argument on appeal, Patrick contends there was insufficient evidence he maintained his motor home as a place to sell or give away drugs on a continuous and repeated basis in violation of Health and Safety Code section 11366. We reject this contention.

A. Standard of Review

When, on appeal, a criminal defendant challenges the sufficiency of the evidence supporting his or her conviction, we review the trial court record "in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the offense] beyond a reasonable doubt." (*People v. Bolden* (2002) 29 Cal.4th 515, 553.) Thus, " " " "[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal of the judgment." " [Citations.]' " [Citation.]' [Citation.]" (*People v. Harris* (2013) 57 Cal.4th 804, 850.) We may reverse

³ The total term was composed of two years eight months on count 1, which was the lower term, doubled; concurrent, lower term doubled sentences on the remaining drug possession, weapon and ammunition convictions (counts 2–4 & 7–9); consecutive terms of one-third the middle term on the two failure to appear convictions (counts 10 & 11); and a concurrent 365-day sentence of the possession of diazepam (count 6).

a verdict on the grounds it is not supported by sufficient evidence when " ' "upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, italics added.)

B. Health and Safety Code section 11366

Health and Safety Code section 11366 states: "Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison."

"The elements of the opening-or-maintaining offense are that the defendant (a) opened or maintained a place (b) with a purpose of continuously or repeatedly using it for selling, giving away, or using a controlled substance. [Citations.]" (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 680; see CALCRIM No. 2440.) "[S]ection 11366 does not apply to an individual's continuous or repeated use of controlled substances at home, absent evidence that the individual opened his or her home to others for the purpose of selling or giving away to them, or for the use by them of such substances." (*People v. Franco* (2009) 180 Cal.App.4th 713, 724-725.) Importantly, however, the statute "does not require that the place be maintained for the purpose of selling; it can be violated without selling, merely by providing a place for drug abusers to gather and share the experience." (*People v. Green* (1988) 200 Cal.App.3d 538, 544.)

C. Analysis

The evidence presented to the jury was more than sufficient to sustain Patrick's conviction of violating Health and Safety Code section 11366. The evidence, including, in particular, Patrick's own September statement to investigators and the documents found in the motor home, show in a fairly convincing manner that Patrick was living in the motor home. The quantity and variety of drugs found in the motor home was also sufficient to show that they were for more than any individual's personal use.

Admittedly, there was no strong evidence Patrick sold drugs to either of the two drug users observed by the law enforcement officers; indeed, the record does not show that Patrick was in the motor home at the time they came and left. The evidence also showed that Timothy had access to the motor home and suggested that he was a drug user.

On this record, while a reasonable jury may have been hesitant to conclude beyond a reasonable doubt that Patrick, rather than Timothy, was selling drugs, a reasonable jury could quite easily conclude both that Patrick maintained the motor home and that, with his knowledge, it was being used to facilitate the provision of drugs to others, either by himself or his father.

In particular, the jury could conclude the motor home was being used for narcotics distribution on the required continuous and repeated basis. (See *People v. Hawkins*, *supra*, 124 Cal.App.4th at p. 680.) Although only two other drug users were seen coming and going from the motor home, the record does not suggest the motor home was subject to continuous surveillance; indeed, one of the visitors was observed during a routine patrol of the area. Thus, the fact the apparently random surveillance detected two drug

users visiting the motor home supports the conclusion the motor home was being used fairly regularly by drug users; the quantity and variety of drugs found in the motor home of course also supports that inference.

In sum, there was sufficient evidence to support the jury's verdict with respect to violation of Health and Safety Code section 11366.

II

Patrick also challenges his conviction for possession of heroin in violation of Health & Safety Code section 11350. Contrary to his argument, there was sufficient evidence a usable amount of heroin was in the motor home.

The record shows a 0.08 gram piece of heroin was found on a shelf in the motor home near the other narcotics; the detectives also found burned spoons in the motor home. A detective testified that an addict can ingest heroin by heating the heroin and inhaling the resulting fumes. Given this evidence, a jury could reasonably conclude the piece of heroin found on the shelf was being "saved" for later use by someone in the motor home. This is not an instance where only an unusable residue or trace was recovered during a search. (See *People v. Rubacalba* (1993) 6 Cal.4th 62, 65-66.)

III

Alprazolam (Xanax) and diazepam (Valium) are listed as distinct controlled depressants under Health & Safety Code sections 11057, subdivision (d) and 11375. Accordingly, contrary to Patrick's argument, possession of them could be charged as separate offenses and support separate convictions. (See *People v. Schroeder* (1968) 264 Cal.App.2d 217, 228.)

Although both alprazolam and diazepam are depressants and listed as such under

Health & Safety Code section 11057, subdivision (d), they are but two of 32 separately listed depressants; if, as Patrick suggests, they are to be considered as the same substance, we would be required to find that all 32 substances are to be treated as the same substance. The Legislature's separate listing of 32 depressants is entirely incompatible with such an interpretation. We also note that under the statute, "any material, compound, mixture, or preparation containing any of the" listed 32 depressants is also a controlled substance. (Health & Saf. Code, § 11057, subd. (d).) This general expansion of each of the specified substances subject to control is of course consistent with an intention that all the listed substances be considered as separate controlled substances.

IV

The parties agree the abstract of judgment must be corrected to reflect that on count 3 (alprazolam), Patrick was convicted of violating Health & Safety Code section 11375, subdivision (b)(2), rather than Health & Safety Code section 11377.

Contrary to the Attorney General's argument, the abstract of judgment reflects Patrick's conviction under count 6 as a misdemeanor for which he was sentenced to a concurrent term of 365 days. Although not listed as one of the felony convictions, it is listed in the abstract under a provision for "Other orders."

DISPOSITION

The judgment of conviction is affirmed. The trial court is directed to correct the abstract of judgment to reflect that on count 3 (alprazolam), Patrick was convicted of violating Health & Safety Code section 11375, subdivision (b)(2); the trial court is further directed to transmit a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.