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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KASIM HAMAD ALSAEDI,

Defendant and Appellant.

D068114

(Super. Ct. No. SCD258012)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed as modified, with directions.

John L. Dodd, 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 Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Kasim Hamad Alsaedi guilty of possession for sale of morphine, possession for sale of codeine, possession for sale of methamphetamine (two counts) and

transportation for sale of methamphetamine. The court sentenced Alsaedi to an aggregate 18-year term, applying various enhancements, but staying enhancements for two prior drug convictions under Health and Safety Code section 11370.2, subdivisions (a) and (c).<sup>1</sup>

Alsaedi contends his transportation of methamphetamine for sale conviction must be reversed based on erroneous jury instructions on the element of specific intent to sell. He also asserts the trial court erred in staying, rather than striking, duplicative section 11370.2 enhancements on three of the counts. The People concede, and we agree, that the trial court should have stricken the section 11370.2 enhancements.

We find no reversible error, except we modify the judgment to strike the section 11370.2 enhancements for counts 2, 3 and 5. As so modified, the judgment is affirmed.

#### FACTUAL BACKGROUND

On August 15, 2014, Special Agent Michael Wasser, of the United States Drug Enforcement agency (and other members of his team), executed a warrant for Alsaedi's arrest. Upon contacting Alsaedi at his apartment in El Cajon, he identified one of the bedrooms in the unit as his. Inside the bedroom, agents found bags of methamphetamine, two digital scales with suspected methamphetamine residue, around 500 small empty plastic baggies, other empty baggies containing residue, a spoon and three glass pipes of the type commonly used for smoking methamphetamine.

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<sup>1</sup> All unspecified statutory references are to the Health and Safety Code.

The methamphetamine seized was dispersed among several bags of various amounts, with a total net weight of approximately 11 ounces. The agents also found prescription pill bottles, only one of which was in Alsaedi's name, and a variety of other loose pills. There were also 180 tablets containing codeine, and 63 morphine pills. In addition, agents found a notepad containing "pay and owe sheets" (a record of drug transactions) in Alsaedi's bedroom. No other drugs were found in other rooms within the unit.

On September 11, 2014, Officer Michael Doyle, of the El Cajon Police Department, noticed a blue Ford Ranger truck with a nonfunctioning brake light and conducted a traffic stop. The truck had an extended cab with a rear seat; the bed of the truck was filled with personal property. Alsaedi was seated in the rear seat. Officer Doyle noticed Alsaedi reaching toward his waistband, fidgeting and acting nervous during the stop.

Alsaedi had a black briefcase at his feet in the rear seat, and admitted it belonged to him. Officer Doyle searched the briefcase and found notebooks, four cell phones, identifying and personal documents, and \$479 in cash. Two of the phones were inoperable and one of the operable phones was a Cricket Wireless cell phone, described by Officer Doyle as "one of the most popular burner phones." The briefcase also contained a green notebook and a red notebook, each containing "pay and owe" sheets with names and corresponding numerical amounts.

In the bed of the truck, officers found a suitcase with three baggies (two sandwich size and one smaller baggie) containing methamphetamine. The two larger baggies

contained 64.38 grams and 57.79 grams and the smaller baggie contained 9.82 grams of methamphetamine.

The driver and front passenger of the truck testified the truck bed was empty when they picked up Alsaedi at a hotel; some men filled the truck with property from Alsaedi's hotel room; and none of the property in the truck bed belonged to them. Alsaedi claimed the property in the truck bed was not his, but admitted to Officer Doyle that it was being taken to his storage unit. A K-9 unit arrived to investigate the truck and the dog alerted only to the rear cab area, where Alsaedi had been sitting.

Regarding Alsaedi's arrest at his apartment, Agent Wasser, an expert witness for the prosecution, testified the total methamphetamine found in Alsaedi's bedroom was approximately 11 ounces and would allow for more than 5,600 individual doses (a "tremendous amount of methamphetamine"), with a wholesale value of "[a]pproximately \$2,750 to \$3,000 [in the] current market." He further explained the methamphetamine could be worth up to "quadruple" that amount if cut and sold at retail. In Agent Wasser's opinion, the methamphetamine was possessed for purposes of sale, based on the quantity of methamphetamine; the large amount of packaging material found in the room; the numerous pay and owe documents; the two functioning digital scales; and the spoon (likely used to scoop out methamphetamine from the larger bags). He further testified that in his opinion the other controlled substances, codeine and morphine, were possessed for purposes of sale and had a "street value" of approximately \$900 to \$5,400 and \$300 to \$1,800, respectively.

Regarding the September 11, 2014 traffic stop, Agent Wasser described the methamphetamine found in the truck as totaling five ounces, comprising approximately 1,400 doses. He characterized the three bags as being packaged to be "sold as is," with the two larger bags likely to be sold at the wholesale level and the smaller bag sold at retail. In Agent Wasser's opinion, the methamphetamine in the truck was possessed for purposes of sale in light of the quantity of methamphetamine, manner of packaging and the pay and owe documents seized during the same traffic stop. Agent Wasser also testified that the names "Sam" and "Lorna," written on the pay and owe sheets collected from Alsaedi's briefcase during the September 11, 2014 traffic stop, were also on documents found in Alsaedi's bedroom on August 15, 2014.

The jury convicted Alsaedi of possession for sale of morphine (§ 11351; count 1), possession for sale of codeine (§ 11351; count 2), two counts of possession for sale of methamphetamine (§ 11378; counts 3 and 5), and transportation for sale of methamphetamine (§ 11379, subd. (a); count 4).

Notably, the five ounces of methamphetamine found in the truck Alsaedi was traveling in formed the bases for his convictions on both count 4 (transportation of methamphetamine for sale) and count 5 (possession of methamphetamine for sale). On appeal, Alsaedi does not argue there was insufficient evidence to support the possession of methamphetamine for sale conviction (count 5) or that the specific intent instructions given for that count were insufficient.

## DISCUSSION

### I. *Transport for Sale Instructions*

Alsaedi asserts that the jury was improperly instructed on the specific intent requirement of section 11379 (transportation of methamphetamine for sale; count 4) because: (1) CALCRIM No. 2300 did not accurately reference an intent to sell; (2) CALCRIM No. 252 instruction regarding specific intent to sell omitted reference to count 4; and (3) the verdict form did not reference transportation with the intent to sell. Alsaedi argues that such errors constituted an "omission of the intent requirement" compelling a per se reversal, or alternatively, that the error relates to Alsaedi's fundamental constitutional rights and due process, requiring we find the error harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. Although we agree the court erred in failing to instruct the jury that count 4 required a specific intent to sell, we conclude there was no prejudicial error.

#### A. *Background*

Section 11379, subdivision (a) imposes punishment by imprisonment for "every person who transports" certain controlled substances (with limited exceptions). (§ 11379, subd. (a).) Section 11379, subdivision (c), clarifies that "[f]or purposes of this section, 'transports' means to transport for sale." Methamphetamine is a controlled substance within the meaning of section 11379, subdivision (a). (§§ 11055, subd. (d)(2), 11379, subd. (a).)

As detailed below, during the course of the trial, the jury heard numerous references to the legal requirements related to the drug charges. Count 4 was repeatedly

described as requiring "transport[ation] for sale" and possession for sale was characterized as requiring specific intent to sell.

More specifically, during voir dire, the judge described count 4 as alleging that Alsaedi "unlawfully transported for sale methamphetamine, in violation of Health and Safety Code section 11379 (a)." The court also orally summarized the allegations against Alsaedi as follows:

"The allegations are that these substances were knowingly possessed by Mr. Alsaedi for sale, and that they were significant quantities. Not some little quantity for personal use by him or somebody else. He ultimately was going to sell it. Somebody else was going to use it but he possessed it with the intent to sell."

Later, when instructing the jury, the court described count 4 as follows:

"Count four alleges the crime of transportation for sale of a controlled substance. Again, substance being identified as methamphetamine. Same elements of knowledge. Have to know of its presence. Have to know of its nature as a controlled substance. The allegation here is that he transported for sale. And, again, it was present in a usable amount."

This instruction came shortly after the possession for sale instruction in which the court emphasized the "intent to sell" element:

"So that's the next element that when he knowingly possessed the controlled substance he intended to sell it. And selling within the — this context of this law means exchanging the substance for money, services, or anything of value. So it's not just he possessed it, but possessed it with the specific intent to sell it."

The "transportation for sale" element for count 4 was also included in the written jury instructions. Using CALCRIM No. 2300, the court instructed the jury in relevant part:

"The defendant is charged in Count Four with transporting for sale Methamphetamine, a controlled substance in violation of, section 11379.

"To prove that the defendant is guilty of this crime, the People must prove that:

- "1. The defendant transported for sale a controlled substance;
- "2. The defendant knew of its presence;
- "3. The defendant knew of the substance's nature or character as a controlled substance;
- "4. The controlled substance was Methamphetamine;

"AND

- "5. The controlled substance was in a usable amount."

For counts 3 and 5 (for possession for sale of methamphetamine), the trial court instructed the jury using CALCRIM No. 2302 [Possession for Sale of Controlled Substance]. Among other things, it instructed that the People must prove "[w]hen the defendant possessed the controlled substance, he intended to sell it." Count 4 was not included in this instruction.

Next, the court instructed with CALCRIM No. 252 [Union of Act and Intent: General and Specific Intent Together]. For all of the possession for sale counts (counts 1, 2, 3 and 5) this instruction stated that the crimes required specific intent and that "[t]he specific intent required for the crimes of Possession for Sale of a Controlled Substance is specific intent to sell." For count 4, the instruction stated "[t]he following crime and allegations require general criminal intent: Transport of Controlled Substances, weight of the substance containing 28.5 grams or more of methamphetamine," then stated:

"For you to find a person guilty of this crime or to find the allegations true, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime or allegation."

During argument, both the District Attorney and defense counsel argued regarding Alsaedi's intent to sell (or lack thereof) in their closing arguments. The prosecutor repeatedly referred to Alsaedi as a drug dealer, characterizing him as being in court "because he sells methamphetamine" and other drugs. She explained that, for count 4, "he's charged with the transportation of methamphetamine for the purposes of sales." Regarding the methamphetamine found in the truck, she argued "[w]e know that it was meth, and we know that he intended to sell it," emphasizing the large quantity of methamphetamine and its packaging in baggies ready to be sold "as is." She further referenced the fact that some of the names on the pay and owe sheets found in Alsaedi's briefcase in the truck were also on documents found in his apartment. She characterized Alsaedi as having an "ongoing business" and argued that the pay and owe sheet paper trail "tells us exactly what is going on."

By contrast, Alsaedi's counsel argued that the prosecution had failed to prove Alsaedi's specific intent to sell the drugs located in the suitcase in the truck. She noted "[t]here are no scales found inside of the brown suitcase, which would have been indicative," and also "[n]o spoons," "[n]o bindles," "[n]o baggies." She emphasized "[p]ossession of something is not enough," and "[p]ossessing drugs is different than possession and sale of drugs or intent to sell drugs."

The jury returned a verdict of guilty on all counts, including count 4, transport of controlled substances. The verdict stated as follows:

"We, the jury in the above entitled cause, find the defendant, Kasim Hamad Alsaedi, Guilty of the crime of TRANSPORT OF CONTROLLED SUBSTANCES, to wit: METHAMPHETAMINE, in violation of section HS11379(a), transport, as charged in Count Four of the Information."

At trial, Alsaedi's counsel did not raise any objections to the jury instructions or to the verdict form.

### B. *Relevant Law*

We review de novo a defendant's claim that the trial court's jury instructions did not correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220 (*Hajek*)). " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*Ibid.*) " '[W]e must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) " 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments. . . .' " (*Hajek*, at p. 1220, brackets in original.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Furthermore, even if instructional error occurs, such error is "harmless beyond a reasonable doubt under circumstances in which 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" (*People v. Wright* (2006) 40 Cal.4th 81, 98; see *People v. Lewis* (2001) 25 Cal.4th 610, 646.) In *Wright*, a jury convicted the defendant on both possession for sale and transportation counts relating to more than a pound of marijuana found in his truck. (*Wright*, at pp. 86, 89.) The Court of Appeal reversed the conviction, finding prejudicial error in the trial court's failure to instruct on the Compassionate Use Act of 1996 defense on the possession for sale and transportation charges. (*Wright*, at p. 89; § 11362.765.) The Supreme Court reversed. (*Wright*, at p. 100.) Applying the above test, the court found "the jury had the option of convicting defendant for simple possession had it been convinced by his claim that the marijuana found in his possession was for his personal medical use" and instead "found beyond a reasonable doubt that he possessed the drug with the specific intent to sell it." (*Id.* at p. 99.) Under such circumstances, " 'the jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction' [citation] in a manner adverse to defendant." (*Ibid.*) The court therefore held "the instructional error was harmless under any standard of prejudice." (*Ibid.*)

### C. Analysis

Alsaedi contends that his transportation for sale conviction (count 4) must be reversed as a result of instructional error. He asserts that the court's instruction with CALCRIM No. 2300 and CALCRIM No. 252, and the language of the jury verdict form

were all erroneous in failing to state that transportation for sale requires a specific intent to sell. We agree there was instructional error in characterizing transportation for sale as a general intent crime in CALCRIM No. 252, and assuming, without deciding, that CALCRIM No. 2300 was also erroneous in not referencing specific intent to sell, we find no prejudicial error.

*Wright* controls here. Although the jury was not informed that specific intent to sell was required for a transportation for sale charge, any such omission could not have prejudicially affected their verdict because " 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' " (*People v. Wright, supra*, 40 Cal.4th at p. 98.) The jury convicted Alsaedi of possession of methamphetamine for sale (count 5) based on the methamphetamine found in the truck Alsaedi was traveling in—the very same methamphetamine upon which his transportation for sale (count 4) conviction was based. Alsaedi does not contend, nor could he, that the court did not properly instruct the jury on specific intent to sell in connection with the possession for sale count. In considering count 5, the jury was required to determine whether Alsaedi possessed the methamphetamine in the truck with the specific intent to sell it and found that he did. Otherwise, he could not have been convicted of possession for sale of the methamphetamine. In short, the factual question posed by the instructional error was necessarily adversely resolved to defendant based on proper instructions. Additionally, as outlined above, the evidence establishing Alsaedi intended to sell all of the drugs in his possession was overwhelming.

Under these circumstances, there was no "omission of the intent requirement" as Alsaedi asserts and any instructional error was harmless under any standard of prejudice.

## II. *Status Enhancements on Counts 2, 3 and 5 Must Be Stricken*

Section 11370.2, subdivision (a), requires a three-year sentence enhancement for any defendant convicted of sections 11351, 11351.5, or 11352 for each prior specified drug-related conviction. Section 11370.2, subdivision (c), requires a three-year sentence enhancement for any defendant convicted of section 11378 or 11379 (with respect to certain controlled substances, including methamphetamine) for each prior specified drug-related conviction.

After Alsaedi's conviction, he admitted the truth of allegations regarding two prior drug convictions requiring enhancements under section 11370.2. The court sentenced Alsaedi to an aggregate 18-year term for counts 1 through 4. Among other enhancements, the court applied two consecutive three-year terms for the two prior convictions (§ 11370.2, subd. (a)) to count 1 (possession for sale of morphine) and two consecutive three-year terms (§ 11370.2, subd. (c)) to count 4 (transportation for sale of methamphetamine). Pursuant to Penal Code section 654, the court stayed sentencing for count 5, including enhancements under section 11370.2, subdivision (c), and also stayed identical enhancements on count 3 (§ 11370.2 subd. (c)) and the enhancements under section 11370.2, subdivision (a) for count 2.

Alsaedi asserts, and the People concede, that the trial court should have stricken, not stayed, the prior drug conviction enhancements under section 11370.2 for counts 2, 3 and 5. We agree. Section 11370.2 enhancements are each added only one time to

determine the defendant's aggregate sentence for all counts. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 542.) Because the trial court added the required enhancements under section 11370.2 subdivisions (a) and (c) when it sentenced Alsaedi to the 18-year aggregate term, identical enhancements for the other counts should have been stricken, not stayed. (*Tillotson, supra*, at p. 542; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164.)

Accordingly, the two section 11370.2 subdivision (a) enhancements for count 2 and the two section 11370.2 subdivision (c) enhancements for counts 3 and 5 shall be stricken from the judgment.

#### DISPOSITION

The judgment is affirmed as modified. The superior court is directed to prepare an amended abstract of judgment reflecting the modifications noted above, and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.