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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRY RAYMOND DREYER,

Defendant and Appellant.

D068427

(Super. Ct. No. SCD2558448)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Randall D. Einhorn, Deputy Attorney General and Peter Quon, Jr., Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Harry Raymond Dreyer of possession of cocaine for purpose of sale, possession of cocaine or methamphetamine while armed with a firearm, and

possession of methamphetamine. The jury also found true allegations that Dreyer was personally armed with a firearm when he possessed cocaine for sale. Dreyer appeals, contending: (1) the court erred in not instructing on the lesser included offense of simple possession of cocaine; (2) there was insufficient evidence to support his conviction of possession of cocaine for sale; (3) there was insufficient evidence that he was "armed" to support his conviction of possession of cocaine or methamphetamine while armed and the true finding on his possession for sale count; and (4) the simple possession count should be reduced to a misdemeanor pursuant to Proposition 47. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

In September 2014, at about 7:30 a.m., law enforcement officers entered a residence under construction and found Dreyer, who had been hired to remodel the house, in a locked bedroom. Dreyer was lying in bed naked, partially covered with a sheet.

At the foot of the bed, officers found a large foot locker. The foot locker was locked with two padlocks and a separate key entry. Dreyer told officers that the keys to the foot locker were in the bedroom. Officers found a set of keys in the bedroom, used the keys to open the foot locker and found a holstered 45-caliber gun, a replica handgun and a small locked safe. The 45-caliber gun contained a loaded magazine and was operable.

Officers unlocked the safe and found around 90 to 94 small plastic baggies (1" by 1"), some prescription bottles containing narcotics and a cigarette case holding a small

plastic bag with a shard of methamphetamine in it. The safe also contained a rolled up dollar bill, some rolling paper, a razor blade, three small digital scales, a couple of boxes full of scales and a black spoon with cocaine powder residue on it. The three digital scales were all operable and contained white residue. In addition, the safe held 16 sandwich-size Ziploc baggies, at least two of which contained white residue. Officers also found paperwork with Dreyer's name on it in the safe.

One of the officers asked Dreyer for identification and Dreyer said it was in his wallet. Officers found Dreyer's wallet near a pair of black cargo shorts on the bed. When officers searched the pockets of the shorts, they found a plastic bag containing 5.42 grams of cocaine. An officer asked Dreyer if the black cargo shorts were his and Dreyer said everything in the bedroom was his.

An officer searched the bedroom closet and found two small, prescription-size bottles. One bottle was sitting on a tile, and white powdery substance fell on the officer when he pulled the tile down from the closet shelf. The other bottle was labelled with the name of "Richard Newton," one of Dreyer's employees, and contained hydrocodone.

The investigating detective found a cell phone near Dreyer's bed (Dreyer's phone). Officers searched the entire house and discovered another 45-caliber handgun and a box of various types of ammunition, including 45-caliber rounds, in the second bedroom. Officers also found one of Dreyer's employees, Chris Shearer, and his girlfriend at the house in a bathroom.

At trial, the prosecution presented evidence of the contents of Dreyer's phone, including a text message correspondence with a phone number ending in "5043" that began two days before Dreyer's arrest. The series of messages were as follows:

Dreyer's phone: "How much" then "You want?"

Response: "I only wanted a ball or a quad."

Dreyer's phone: "I'm picking it up now"

Response: "I can't afford both unless I got a front" and then "200 ball?"

Dreyer's phone: "Could only get 6 G's for now. Not selling because more should be in later this week."

Dreyer's phone did not contain any text messages to the 5043 number saying "who is this," "why are you texting me" or anything of that nature.

The assigned investigator in Dreyer's case, a narcotics detective, testified as the prosecution's narcotics expert. The detective explained the term "ball" was street slang for one-eighth of an ounce (about 3.75 grams) of a controlled substance, and a "quad" was the equivalent of two "balls." The term "200 ball" referred to \$200 dollars for an eighth of an ounce of cocaine, the then current price per ball. The detective opined that "6 G's" meant the sender could only get 6 grams of a controlled substance.

The detective further opined that the 5.42 grams of cocaine found in the cargo shorts could be broken down into about 50 single doses at \$10 per dose, or sold in larger increments, and had a then current value of over \$380. He also testified that the powdery substance found on a tile in the bedroom closet had tested positive for cocaine and

methamphetamine. In addition, according to the detective, the 0.31 grams of methamphetamine found in the safe was a usable amount, about \$30 worth.

Based on his training and experience, the detective described the functions of the various paraphernalia found in the foot locker: the spoon was generally used to scoop out drugs from a bag onto a scale or into a smaller bag for packaging; the rolled up dollar bill was a "tooter" used to snort drugs and the razor blade was typically used to chop up chunks of drugs into powder for snorting. The detective opined that the cocaine and methamphetamine were possessed for sale because of the totality of the evidence: three scales with residue, the spoon containing cocaine residue, the large number of 1" by 1" baggies that could be used for packaging narcotics, \$30 worth of methamphetamine, over \$380 worth of cocaine and Dreyer's drug-related text messages. The detective further testified that the drugs could be possessed for both personal use and sale, because many dealers are also users.

Defense Evidence

Dreyer testified in his own defense. He stated that Newton and Shearer worked for him and were living at the house to prevent people from breaking in during the remodel, and Shearer's girlfriend had also been living there for the past few weeks. The house was not Dreyer's primary residence, but he stayed there a few times a week because he worked long hours. Dreyer admitted that the keys found on the bed were his. He described the foot locker at the foot of the bed as "the job lock box," used by everyone on the job to store tools and other valuables, and testified that Newton and Shearer also had keys to it. Dreyer denied knowing anything about the small safe and the loaded gun

found in the foot locker. He could not explain how his paperwork got into the safe or why the safe key was among his keys. The defense presented evidence that the loaded gun was registered to the recently deceased father of Shearer's girlfriend.

Dreyer admitted he owned the cell phone and used it daily, but claimed all of his "workers" also used it. He testified that the 5043 number belonged to Shearer's adult daughter, and he had not had any text message communications with her. Dreyer further testified that the black cargo shorts were not his and he had not told any officer they belonged to him. Instead, he claimed to have worn a pair of jean shorts that he had left near the bed, but could not identify the shorts in photographs taken of the bedroom. Dreyer testified that he did not "do drugs at all," and that he had fired an employee because he "caught him smoking dope."

Verdict and Sentence

The jury returned a verdict finding Dreyer guilty of: possession of cocaine for sale; possession of a firearm while in possession of cocaine or methamphetamine; and possession of methamphetamine. The jury further found true that Dreyer was personally armed with a firearm when he possessed cocaine for sale. The jury acquitted Dreyer of possession of hydrocodone. The trial court sentenced Dreyer to a total term of 240 days in county jail, but suspended the sentence pending Dreyer's successful completion of three years of probation.

Dreyer timely appealed.

DISCUSSION

I. *Failure to Instruct with Lesser Included Offenses*

Dreyer contends the trial court erred in failing to instruct the jury, sua sponte, on simple possession as a lesser included offense of possession of cocaine for sale.

A. Legal Standard

On appeal, we independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Booker* (2011) 51 Cal.4th 141, 181.) A criminal "defendant has a constitutional right to have the jury determine every material issue presented by the evidence," which includes an obligation to give instructions on lesser included offenses when there is evidence that indicates the defendant is guilty of the lesser offense but not of the greater. (*People v. Valdez* (2004) 32 Cal.4th 73, 115 (*Valdez*)). The obligation to instruct on the lesser offenses exists even when a defendant fails to request, or expressly objects to, the instruction as part of his trial strategy. (*Ibid.*)

The mere existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense. (*Valdez, supra*, 32 Cal.4th at p. 116.) Instead, a defendant must establish the existence of substantial evidence that would allow a reasonable jury to find that the defendant is guilty only of the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162, (*Breverman*)). In determining whether evidence is substantial, a court considers only its bare legal sufficiency and does not weigh the evidence or evaluate the credibility of witnesses. (*Id.* at pp. 162, 177.)

Because a defendant must first possess drugs to be convicted of possession of drugs for sale, simple possession is a lesser included offense of possession of drugs for sale. (*People v. Saldana* (1984) 157 Cal.App.3d 443, 456-457 (*Saldana*)). In *Saldana*, the court held that instruction regarding simple possession should have been given when the evidence established the following: 18 balloons of heroin were found in the headboard of a bed in defendant's bedroom, defendant did not use heroin, but his brother (who was found in the basement) was a known user and seller of heroin, some of the balloons were cut open, suggesting the heroin was for his brother's personal use and the defendant may have been holding the drugs for his brother. (*Saldana, supra*, at pp. 455, 457.) Likewise, in *People v. Walker* (2015) 237 Cal.App.4th 111 (*Walker*), the court found substantial evidence to support simple possession of marijuana, rather than possession for sale, when no sales were observed, no scales or documents were found to indicate sales activity, defendant possessed a medical marijuana card and claimed the marijuana was for his own personal use, and the other evidence did not compel the conclusion of his intent to sell. (*Id.* at p. 117.) In contrast, no instruction regarding simple possession was required on a possession of sale of PCP charge when a large amount of liquid PCP was found, enough to dip thousands of PCP cigarettes, expert opinion was presented that the PCP was possessed for sale and the evidence was not contradicted. (*People v. Goodall* (1982) 131 Cal.App.3d 129, 145.)

Even if a court errs in failing to instruct on a lesser included offense, in a noncapital case we apply the standard established in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) to determine whether the error resulted in a miscarriage of justice requiring

reversal. (*Breverman, supra*, 19 Cal.4th at p. 178.) Under the *Watson* standard, an error is reversible only when there is a reasonable probability that the appellant would have received a more favorable result had the instruction been given. (*Breverman, supra*, at p. 178; *Watson, supra*, at p. 836.) In applying the *Watson* standard, we focus on what a jury is likely to have done absent the error, and may consider the relative strength of the evidence in support of the judgment compared to the relative weakness of the evidence in support of a different outcome. (*Breverman, supra*, at p. 177.)

B. Analysis

Applying relevant law, if Dreyer had presented substantial evidence that he was guilty of simple possession of cocaine, but not possession for sale, the court should have instructed on the lesser offense sua sponte. Dreyer asserts there is substantial evidence of his simple possession: items found in the footlocker were consistent with personal drug use, the quantity of cocaine was consistent with personal use, the text messages indicated Dreyer did not want to sell his cocaine, and approximately .05 grams of cocaine was missing from the six grams Dreyer had purchased the day before, suggesting he had used it.

Applying the applicable standard described by the California Supreme Court in *Breverman* and *Valdez*, we conclude the court did not err in failing to instruct the jury on the lesser included offense of simple possession because there was no substantial evidence in the record that a reasonable jury could find persuasive that Dreyer possessed the cocaine solely for some purpose other than to sell it. (*Breverman, supra*, 19 Cal.4th at pp. 162, 177; *Valdez, supra*, 32 Cal.4th at p. 116.) Unlike the evidence in *Walker* and

Saldana, here Dreyer did not contend he possessed the cocaine for his personal use and the evidence did not suggest he was holding it for someone else. To the contrary, Dreyer denied using drugs. Even though a "tooter" was found among the scales and baggies in the footlocker, no evidence was presented that it was kept for Dreyer's personal use rather than for the use of his customers. Dreyer possessed enough cocaine to provide 50 individual doses, he planned to obtain more within the week and no evidence was presented that such quantity was consistent with personal use. Our conclusion is further supported by the evidence found in the foot locker: multiple operable scales with white residue on them, a razor, spoon with cocaine residue and close to 100 small plastic baggies. Contrary to Dreyer's contention on appeal that the items found in the foot locker are consistent with personal use, the presence of three operable sets of scales and close to 100 tiny baggies cannot rationally be viewed as accessories for personal use.

Dreyer contends evidence that .05 grams of the cocaine was missing from the six grams he had recently purchased and of his text message stating that he did not plan to sell a "ball" (or 3.75 grams) of cocaine to a specific customer until he made his next purchase is substantial evidence that he intended to keep the cocaine for his personal use. However, such statement is not substantial evidence that Dreyer intended to keep all of the cocaine for his personal use rather than sell at least some of it to a different customer or to multiple customers in smaller doses. For a reasonable jury to find simple possession under these facts, it would have to inexplicably reject the prosecution evidence supporting the greater charge. (*Walker, supra*, 237 Cal.App.4th at p. 117.)

Moreover, even assuming error in this case, we conclude that the failure to instruct on simple possession does not require reversal. As previously noted, an error in failing to instruct on a lesser included offense requires reversal only if it is reasonably probable that the defendant would have obtained a more favorable result if the error had not occurred. (*Breverman, supra*, 19 Cal.4th at p. 178.) Consequently, to find the error prejudicial, the entire record must show that, if given the choice between the lesser and the greater offenses, it is reasonably probable the jury would have convicted only of the lesser. (*Id.* at p. 178, fn. 25.)

Given the facts of the case, as discussed above, there is no such reasonable probability here. As noted, Dreyer testified that he was not a drug user. Dreyer's defense was not based on the theory that he possessed the cocaine only for personal use and his counsel did not make such an argument to the jury. In fact, Dreyer's counsel did not even mention the text message now designated critical to his appeal, as Dreyer denied ever sending or seeing it. Dreyer possessed close to six grams of cocaine, which could be divided into a substantial number of saleable doses. Even if the jury viewed the text message to suggest that Dreyer planned to keep a significant portion of the cocaine exclusively for his personal use, Dreyer's possession of more than one type of drug, three functional scales and multiple small baggies, his own testimony that he did not use drugs and the narcotics investigator's expert opinion that Dreyer possessed the cocaine for purposes of sale established that any error in omitting the simple possession instruction was harmless.

II. *Sufficiency of Evidence*

A. Legal Standard

When a criminal defendant challenges the sufficiency of the evidence, we review the entire record in the light most favorable to the prosecution to determine whether it discloses "evidence which is reasonable, credible, and of solid value," from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

People v. Casares (2016) 62 Cal.4th 808, 823, *reh'g denied* (Apr. 20, 2016.) We do not weigh the evidence, resolve conflicting inferences or determine whether the prosecution has established its case beyond a reasonable doubt. (*Ibid.*) Even if the evidence is subject to conflicting interpretations, we will not reverse the judgment if the jury's findings are reasonable. (*Id.* at pp. 823-824.) The same standard of review applies when the prosecutor's case relies primarily on circumstantial evidence. (*Id.* at p. 823.)

B. Possession for Sale

Dreyer contends there was insufficient evidence to support his conviction for possession of cocaine with the intent to sell it. We find ample evidence to establish Dryer's possession of cocaine with the intent to sell.

To convict a defendant of possession for sale of cocaine (under Health & Saf. Code, § 11351) the prosecution must prove that the defendant: (1) "exercised dominion and control over" the cocaine; (2) knew he possessed it; (3) knew the cocaine was a controlled substance; (4) possessed a sufficient amount of cocaine to be sold or used as a controlled substance; and (5) had the specific intent to sell it. (*People v. Parra* (1999) 70 Cal.App.4th 222, 225-226.) Dominion and control is readily found when the controlled

substance is discovered in a place such as defendant's residence, vehicle or among his personal effects. (*People v. Busch* (2010) 187 Cal.App.4th 150, 162.) For example, there was overwhelming evidence of defendant's drug possession when the drugs were found, in close proximity to his personal possessions, in the bedroom of a house where he had been staying. (*People v. Williams* (2009) 170 Cal.App.4th 587, 613.) Likewise, a court concluded there was sufficient evidence to support defendant's conviction for possession when a controlled substance was found near the bed on which defendant had been lying. (*People v. Glass* (1975) 44 Cal.App.3d 772, 775-776.)

All elements of a possession with intent to sell may be proven by circumstantial evidence. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) In addition, courts have upheld convictions of possession for purpose of sale in reliance on the opinion of experienced officers that a defendant held the controlled substances with the intent to sell based on evidence of the substance's quantity, packaging and normal levels of individual use. (*Id.* at pp. 374-375.)

In this case, the evidence presented to the jury was more than sufficient to sustain Dryer's conviction of possession of cocaine for sale. A significant amount of cocaine (approximately 50 individual doses) was found in the pocket of Dreyer's shorts in a locked bedroom. Three functional scales, close to 100 small baggies and other drug-related paraphernalia were found in Dreyer's locked trunk. Dreyer's cell phone contained messages regarding drug sales. In addition, Dreyer testified that he did not use drugs. Under these facts, a reasonable jury could conclude that Dreyer possessed the drugs in order to sell them.

Dreyer argues no reasonable juror could find that he possessed the cocaine for sale because of his text message stating that he was waiting to buy more drugs before selling what he had. However, the person he was communicating with wanted to purchase at least a "ball" (3.75 grams), which was more than half of Dreyer's available stock. Contrary to Dreyer's argument, his refusal to sell the majority of his drug cache to a particular buyer is not compelling evidence that he was not planning to sell the cocaine: a reasonable jury could have inferred from the presence of tiny baggies found with the scales that Dreyer was preparing to sell multiple smaller doses.

Moreover, the text message communications establish that Dreyer was involved in buying and selling cocaine. As opined by the narcotics expert, those messages, along with the quantity of drugs and drug paraphernalia establish that Dreyer possessed cocaine with the intent to sell, even if he also planned to keep some portion of it for his personal use. From this evidence, a reasonable jury could have concluded that Dreyer possessed cocaine for purposes of sale.

C. Armed with a Firearm

Dreyer further contends there was insufficient evidence that he was personally armed with a firearm under Penal Code section 12022, subdivision (c), in connection with his possession of cocaine for sale or in possession of a firearm while in possession of cocaine or methamphetamine under Health and Safety Code section 11370.1, subdivision (a), because the firearm in question was in a locked container and therefore was not "readily available" for Dreyer's immediate use. We disagree.

1. Penal Code section 12022

Penal Code section 12022, subdivision (c), imposes a sentence enhancement on anyone "personally armed with a firearm in the commission" of certain felonies, including violation of Health and Safety Code section 11351 (possession of cocaine for sale). It is well settled that a defendant is "armed" under Penal Code section 12022 if the defendant has the weapon available for either offensive or defensive use. (*People v. Singh* (2004) 119 Cal.App.4th 905, 912.) To be "armed" within the meaning of Penal Code section 12022, subdivision (c), a defendant need not have the firearm on his person. (*People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, 1472.)

The California Supreme Court addressed the question of whether a defendant was armed in connection with his possession of drugs for sale in *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*). In *Bland*, the police had found drugs in a bedroom closet and unloaded firearms, including a semiautomatic rifle, under the bed in the same room. (*Id.* at p. 995.) The defendant was not in the room, but the court reasoned that because possessory drug offenses are continuing crimes, the drugs need not be in a defendant's immediate physical presence. (*Ibid.*) The court concluded it was reasonable for the jury to infer from the close proximity between the drugs and the rifle that the defendant had the rifle available for use at some point during his drug crime. (*Id.* at pp. 1003-1004; see also *People v. Bradford* (1995) 38 Cal.App.4th 1733, 1737, 1739 (*Bradford*) [sufficient evidence to apply firearm enhancement when defendant maintained loaded shotguns in a cabin within a "compound" where marijuana was grown]; *People v. Delgadillo* (2005) 132 Cal.App.4th 1570, 1572-1573, 1575 (*Delgadillo*) [sufficient evidence to apply

firearm enhancement when guns were found in defendant's bedroom and drug manufacturing equipment and ingredients were found in the trunk of his car and in the locked bed of his truck parked nearby]; *People v. Pitto* (2008) 43 Cal.4th 228, 232-233, 240 (*Pitto*) [sufficient evidence to apply firearm enhancement when a revolver and ammunition was found in defendant's van in a zippered pouch inside a cardboard box about a foot away from a bag of methamphetamine]; cf. *People v. Jackson* (1995) 32 Cal.App.4th 411, 422 (*Jackson*) [insufficient evidence to apply firearm enhancement when defendant's gun was in his car, which was parked two blocks away during one rape and parked some indeterminate distance from a motel room during the second rape].)

2. Health and Safety Code section 11370.1

Health and Safety Code section 11370.1, subdivision (a), establishes that possession of certain controlled substances "while armed with a loaded, operable firearm" constitutes a felony, and defines "armed with" to mean "having available for immediate offensive or defensive use." To be "armed" within the meaning of Health and Safety Code section 11370.1, a defendant need not have the firearm on his person. (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 990.)

For example, in *Martinez*, the appellate court concluded defendant had a firearm available for immediate use, within the meaning of Health and Safety Code section 11370.1 (in connection with possession of heroin), even though officers found defendant and the heroin in the kitchen, one gun in a bedroom and another gun in a closet. (*Id.* at pp. 993, 995.) Similarly, in *People v. Molina* (1994) 25 Cal.App.4th 1038 (*Molina*), the appellate court upheld Molina's conviction for violating Health and Safety Code section

11370.1 when officers found Molina in the driver's seat of his truck, with cocaine, methamphetamine and a loaded gun in a duffle bag full of clothing behind the back seat. (*Id.* at pp. 1043–1044.) Also, in *People v. Vang* (2010) 184 Cal.App.4th 912, 914 (*Vang*), a defendant was convicted of violating Health and Safety Code section 11370.1 when drugs and drug paraphernalia were found in various closets around his house and a loaded revolver was found in his locked bedroom.

3. Analysis

We disagree with Dreyer's argument that because the firearm was in a triple-locked foot locker, there was insufficient evidence to support a finding that he was "armed" under Penal Code section 12022, subdivision (c), and Health and Safety Code section 11370.1, subdivision (a). As summarized above, neither provision requires a defendant to be personally armed: rather, under Penal Code section 12022, the weapon must be available for use during some point during the drug offense (*Bland, supra*, 10 Cal.4th at pp. 1003-1004) and under Health and Safety Code section 11370.1, it must be available for immediate use (Health & Saf. Code, § 11370.1, subd. (a)). Cases construing these requirements have not interpreted them to require that a defendant have unhindered access to a weapon within arm's reach. For example, Penal Code section 12022 was held to apply in *Bradford*, in which guns were found in defendant's house, but the drugs were grown in the surrounding compound; in *Delgadillo*, in which guns were found in defendant's house, but drug manufacturing equipment was outside in defendant's vehicles; and in *Pitto*, in which the unloaded gun and ammunition were located in a zippered pouch inside a cardboard box. (*Bradford, supra*, 38 Cal.App.4th at pp. 1733,

1737, 1739; *Delgadillo, supra*, 132 Cal.App.4th at pp. 1572-1573, 1575; *Pitto, supra*, 43 Cal.4th at pp. 232-233, 240.) Similarly, Health and Safety Code section 11370.1 was held to apply in *Martinez*, in which drugs were in the kitchen, but the guns were elsewhere in the house; in *Molina* in which the gun was in a duffel bag stuffed with clothes, behind the back passenger seat of a truck cab, but defendant was in the front seat; and in *Vang*, in which the gun was in a locked bedroom while drugs were in various other locations in the house. (*Martinez, supra*, 225 Cal.App.4th at pp. 993, 995; *Molina, supra*, 25 Cal.App.4th at pp. 1043–1044; *Vang, supra*, 184 Cal.App.4th at p. 914.)

Dreyer argues that because of the triple locks, his case is more analogous to that of *Jackson*, in which the court concluded that Penal Code section 12022 did not apply. (*Jackson, supra*, 32 Cal.App.4th at p. 442.) However, *Jackson* is readily distinguishable, as it involved a rape and it would not be reasonable for a jury to infer that defendant could leave the victim, run to his car two blocks away, grab the gun and bring it back to have it available for use in his commission of the crime.

In this case, the offense involved drug possession and possession for sale, which are continuing crimes. (*Bland, supra*, 10 Cal.4th at p. 995.) The loaded firearm was contained in a foot locker with the drug paraphernalia, and the cocaine and keys to the foot locker were located a few feet away in the same room. Although it would have taken Dreyer some amount of time to unlock the three locks on the foot locker with his keys, such minor impediment to accessing the gun is not dissimilar to impediments existing in other cases in which defendants were found to be armed, in which they would have to move through the house, go through a locked door or rummage through a duffel

bag to locate the weapon. Furthermore, as the tools Dreyer needed to prepare the cocaine for sale were located in the same foot locker as the loaded gun, a reasonable jury could infer that he would have had the gun available at some point during his possession for sale crime. (See *id.* at pp. 1003-1004.) Likewise, for possession of a firearm while in possession of cocaine *or* methamphetamine, because the methamphetamine was stored in the same foot locker as the firearm, such firearm would necessarily be immediately available for use whenever Dreyer accessed the methamphetamine. Accordingly, there is ample evidence from which to conclude that Dreyer was personally armed with a firearm in connection with his drug crimes.

D. *Reduction of Simple Possession Count to Misdemeanor*

Finally, Dreyer contends that Proposition 47 requires this court to reduce his conviction for possession of methamphetamine to a misdemeanor, because he was convicted and sentenced after Proposition 47 became effective. However, Dreyer did not raise this issue in the trial court at his sentencing hearing.

"As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal.' " (*People v. Smith* (2001) 24 Cal.4th 849, 852.) This waiver rule has been applied to claims of sentencing errors. (*Ibid.*) However, the California Supreme Court has created a narrow exception to the waiver rule for "unauthorized sentences" or "sentences entered in excess of jurisdiction," which are to be reviewed regardless of the lack of prior objection. (*Ibid.*) In such cases, the sentencing errors raise pure questions of law which may be resolved without reference to factual findings in the record or remand to the trial court for additional findings. (*Ibid.*)

Dreyer contends we should modify the classification of his conviction for possession of methamphetamine on appeal because the offense is eligible for reduction to a misdemeanor by operation of law, and there are no facts to prove. However, under the plain language of the statute addressing the offense of possession of methamphetamine and the applicable penalties (as amended by Proposition 47), a defendant's prior conviction of certain offenses disqualifies him from mandatory misdemeanor sentencing. (Health & Saf. Code, § 11377, subd. (a).) If any of the disqualifying prior convictions apply, the trial court has discretion to treat the offense as a felony, and sentence accordingly under Penal Code section 1170, subdivision (h). (Health & Saf. Code, § 11377, subd. (a).) Consequently, the classification of the offense and nature of the sentence imposed depend upon the trial court's analysis of a defendant's prior conviction report.

Here, because Dreyer failed to raise the issue below, we decline to make a determination for the first time on appeal regarding the significance of his prior conviction record. In any case, it appears the term of Dreyer's sentence (240 days, suspended pending completion of three years of probation) was based solely upon his felony conviction for possession of cocaine for sale with the firearm enhancement, therefore our decision regarding reclassification of his conviction for possession of methamphetamine has no immediate impact on his sentence term. Moreover, under the plain language of Penal Code section 1170.18, subdivision (a), Dreyer is now a "person currently serving a sentence for a conviction" who would have been guilty of a misdemeanor if the Act had "been in effect at the time of the offense," and is eligible to

petition the trial court for resentencing on the simple possession count, therefore he is not left without recourse.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

AARON, J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.