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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN RANDALL HENSLEE, Defendant and Appellant.	D073777 (Super. Ct. No. SCD274225)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

John E. Edwards, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Steven Randall Henslee was charged with transporting nearly 30 pounds of methamphetamine and cocaine across the U.S./Mexican border by car through the Otay Mesa port of entry. A jury found him guilty of transporting cocaine (Health & Saf. Code, § 11352, subd. (a); count 1), possessing cocaine for sale (Health & Saf. Code, § 11351; count 2), transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)); count 3), and possessing methamphetamine for sale (Health & Saf. Code, § 11378; count 4). The jury also found true weight enhancements alleged as to all four counts (Health & Saf. Code, §§ 11370.4, subd. (b)(2), 11351, 11352, subd. (a), 11378). A codefendant, Jose Mena, was named in counts 3 and 4.

The trial court denied probation and sentenced Henslee to three years on count 3, plus five years for the weight enhancement, for a total term of eight years in prison. The court imposed concurrent sentences of four years on count 1 and three years on count 2, striking the enhancements associated with those two counts pursuant to Health and Safety Code section 11370.4, subdivision (a)(2). The court stayed the sentence on count 4 pursuant to Penal Code section 654. Following the imposition of sentence, the court suspended the last three years of Henslee's custodial sentence and imposed a five year term of mandatory supervision pursuant to Penal Code section 1170, subdivision (h)(5)(B). Thus, Henslee was sentenced to a total prison term of eight years, with three years suspended.

On appeal, Henslee contends that: (1) the trial court abused its discretion when it admitted evidence of text and voice messages between Henslee and an associate about Henslee procuring firearms for the associate; (2) the court abused its discretion when it admitted rebuttal evidence that Henslee had refused to give his consent to a search of his cell phone and, specifically, that Henslee had replied "fuck no" immediately after the arresting agent asked Henslee whether he would consent to a search of his cell phone; (3) the cumulative effect of the first two errors requires reversal; and (4) the court's sentencing him for both transporting methamphetamine (count 3) and transporting cocaine (count 1) violated Penal Code section 654.

We conclude that the trial court did not abuse its discretion in allowing the prosecutor to introduce text and voice messages between Henslee and his associate as impeachment evidence after Henslee testified on direct examination at trial. The text and voice messages were also properly admitted to show that Henslee needed money and thus had a financial motive to commit the crimes. Even if the trial court did err in admitting the text and voice messages (and failing to provide a limiting instruction about how the jury could use the evidence), any error was harmless because Henslee would not have secured a more favorable verdict. We further conclude that the trial court did not abuse its discretion in allowing the prosecutor to introduce rebuttal evidence that, when asked whether he would consent to a search of his cell phone after he was placed under arrest, Henslee immediately refused. Further, even if the trial court did err in allowing the prosecutor to introduce the rebuttal evidence, this evidence was not unduly prejudicial to Henslee because the evidence of his guilt was overwhelming and the rebuttal evidence

was of limited evidentiary value. There is thus no cumulative error on which to base a reversal of the judgment. Finally, we conclude that the trial court did not err in sentencing Henslee on both transportation counts. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

During the late morning hours of October 25, 2017, Henslee drove his four-door Lexus sedan across the Mexican border into the United States while transporting large quantities of methamphetamine and cocaine concealed in the back seat and trunk area of his car. The jury heard testimony from several prosecution witnesses, including law enforcement officers from the U.S. Department of Homeland Security, U.S. Customs and Border Protection, and the San Diego County Sheriff's Department. The prosecutor also called an expert on drug smuggling operations across the U.S./Mexico border and one of Henslee's long-term clients from his koi pond maintenance business to testify at trial. Henslee testified in his own defense, which prompted the prosecutor to call the arresting agent as a rebuttal witness to testify about Henslee's reaction when asked whether he would consent to a search of his cell phone. Henslee's defense at trial was that he was a "blind mule" or "unknowing courier," i.e., he had no knowledge of the drugs that were found in his car by law enforcement officers.

A. *The Prosecution Case*

Henslee drove his white Lexus sedan from Mexico to the Otay Mesa port of entry. U.S. Customs and Border Protection Officer Arthur Moir swiped Henslee's passport

when Henslee arrived at the primary inspection booth, which immediately prompted an alert from the National Crime Information Center database. In accordance with port policy, the officer referred Henslee to secondary inspection. Before Henslee drove his car to the secondary inspection area, the officer asked him what he was bringing from Mexico and where he was going, to which Henslee responded that he was not bringing anything from Mexico and that he was going to Poway.

At secondary inspection, U.S. Customs and Border Protection Officer Carolina Juarez scanned Henslee's car with an X-ray machine and detected anomalies in the back seat. She requested a physical inspection of the area that she had just scanned, but saw that the officers were having a hard time locating the anomaly. Officer Juarez stepped out of the X-ray booth and helped the officers physically inspect the area where she had detected the anomaly. She ultimately found two packages "coming out of" the back seat of Henslee's car into the trunk area. Henslee was still sitting in the driver's seat when Officer Juarez discovered the packages.

Officer Juarez pulled out one of the packages, showed it to the other officer who was conducting the secondary inspection, and told the officer to secure Henslee. The crystalline substance in the package looked like methamphetamine. Officer Juarez placed the package back into the trunk. Henslee was removed from the car and taken to a secure area where he could not see the car. Officer Juarez moved Henslee's car to an area where the substance in one of the packages could be tested by U.S. Customs and Border Protection Officer Katheryn Gomez.

Officer Gomez had to unlock a center console and pull the latch down to access the drugs. After the substance tested positive for cocaine, she sealed the package with red evidence tape and put it back where she had found it in the Lexus. She gave U.S. Department of Homeland Security Special Agent Nathaniel Fountain the car keys and told him that everything in the car was exactly the way that it had been before the inspection. After Henslee's car was moved back to its original spot in secondary inspection, he was told that he was free to go. The officers did not inform Henslee that they had discovered packages or drugs in his car.

A large number of law enforcement officers from the U.S. Department of Homeland Security, U.S. Customs and Border Protection, and the San Diego County Sheriff's Department had been present at the port of entry to conduct a "cold convoy" that morning. Sixteen agents were on standby at the port waiting for a person to come through with a "loaded vehicle." The purpose of the convoy was to follow the driver of a car in which drugs were found to see who the driver ultimately made contact with, in an attempt to find someone further up the chain of the drug trafficking organization. The agents followed Henslee by car and helicopter as he left the port of entry. The helicopter recorded aerial footage of Henslee's car as he drove on several freeways, into downtown San Diego, and on back streets to a house located in Point Loma. Henslee arrived at the house at approximately 11:58 a.m. and stayed there for about 45 minutes. Agents watched as he parked his car across the street from the house, opened his trunk for about a minute, spoke with a landscaper who was standing in front of the house, closed his trunk, and walked down the driveway toward the back of the house.

Marcy K., the owner of the Point Loma residence, testified that she had hired Henslee in 2002 to clean and maintain her koi pond on a weekly basis. Henslee did not have a regular time when he came to her house. He usually arrived during the late morning or early afternoon on Wednesdays, but sometimes came on Thursdays or Fridays, or on another day of the week if she had an emergency. Henslee usually drove his green truck, but also had a white car. He normally parked near the dumpster gate located north of her main driveway because he had a key to the gate for easier access to the pond. Marcy paid Henslee $1,200 per month to maintain her koi pond. She paid California Aquatics only $375 per month for the same service after Henslee's arrest.

U.S. Border Patrol Agent Daniel Brightman was part of the convoy that followed Henslee's car from the Otay Mesa port of entry to the Point Loma residence. His role was to conduct undercover street surveillance of Henslee while wearing plain street clothes. Agent Brightman testified that Henslee's codefendant, Jose Mena, arrived in a red Infinity and parked across the street from Henslee's Lexus about 20 minutes after Henslee had entered the back of the house. Mena sat in his car for about 15 minutes before getting out of his car. When Mena got out of his car, he took a large plastic bin from his car and carried it over to Henslee's car.

Mena had a key fob in his pocket that allowed him to access Henslee's car. He entered the rear door on the passenger side of Henslee's car with the plastic bin in hand and began "digging inside of the center console area of the car." Mena then walked back across the street to his Infinity and placed the plastic bin in the back seat of his car. He left about 15 minutes later at a "high rate of speed." Law enforcement officers followed

Mena and executed a traffic stop down the street from the house where Henslee was working. Mena appeared nervous and was shaking while answering the deputy's questions. The plastic bin was found in the back seat of Mena's car. The bin contained a package of methamphetamine.

Henslee left the Point Loma residence about five to seven minutes after Mena had departed. Law enforcement officers watched as Henslee carried several items bundled inside a towel and accessed his trunk for a couple of minutes. He held one of the remaining packages of narcotics in his hand before tossing it back into the trunk. Unaware of Mena's arrest, Henslee drove to, and stopped at another address in Poway for a short period of time before meeting his parents at a restaurant in the 4-S Ranch area of Poway.

San Diego County Sheriff's Department Detective Robert Forbes watched as Henslee parked near the restaurant, got out of his car, and opened the trunk. Henslee leaned into the trunk and reached toward the area of the back seat. He then stood up holding a plastic bag that contained a white substance. After 10 or 15 seconds, he tossed the plastic bag back inside the trunk, closed the trunk, and went inside the restaurant. About an hour later, law enforcement officers approached Henslee inside the restaurant. They identified themselves and asked Henslee if he would come outside and talk to them. After consenting to a search of his car, Henslee opened the trunk and immediately started moving things around until one of the agents told him to stop. Henslee was placed under arrest after the agents saw the drugs in his trunk. The drugs later tested positive for cocaine and methamphetamine. There was padding behind the rear seat of Henslee's car

where an area had been "hollowed out" to hold drugs. A LoJack GPS tracking device was also found in Henslee's car. The device was located underneath the carpet on the passenger side of his car.

The prosecutor called as a witness at trial an expert on drug smuggling operations across the U.S./Mexico border. U.S. Department of Homeland Security Special Agent Kenneth Krause testified that drug trafficking organizations are very risk averse, and that it is common for many of the people who are involved in the chain not to know or communicate with one another. An individual who acts as the courier for the drug trafficking organization is a trusted person because that reduces risk and safeguards the drugs, which represent money for the organization. Agent Krause testified that drug smugglers are paid between $5,000 and $7,000 each time they cross the border with "hard narcotics." An "unknown courier" or "blind mule" is a person who "is smuggling drugs" but "absolutely does not know" that he is doing so. Although Agent Krause had not encountered any cases involving a blind mule during his 25 years as a special agent, he had conducted interviews with a large number of people who had claimed to be blind mules after they were arrested. He also testified that his sources of information, which included "cell leaders" and "group leaders" of drug trafficking organizations, had confirmed that they would never use a blind mule to smuggle drugs.

Based on this experience, Agent Krause opined that a drug trafficking organization would not use a blind mule to transport high value narcotics such as cocaine and methamphetamine. A blind mule would be used only for extremely low value narcotics, such as marijuana, and the compartment containing the narcotics would be affixed to the

outside of the car with something such as a magnet so that the compartment is easily accessible from the outside of the vehicle. The blind mule or unknowing courier would also have a consistent driving pattern across the border. Given the fact that the drugs were stored in a specially constructed compartment located inside of Henslee's car, were accessible only to someone who had a key, and were valued at between $700,000 and $1.45 million, the expert opined that Henslee was "absolutely not" a blind mule.

Agent Krause also testified that Henslee had crossed the border about 50 times in 2017. Henslee crossed exclusively through the San Ysidro port of entry during the months of January 2017 through August 2017, but crossed through the Otay Mesa port of entry for the first time in September 2017. He then crossed exclusively through the Otay Mesa port of entry during the two months prior to the date of his arrest, with the exception of one day. Based on Agent Krause's experience with drug smuggling operations, this was a significant change of behavior, because narcotics groups are "particular" about the port of entry where they want their drugs smuggled. Agent Krause ultimately opined that Henslee's change to the Otay Mesa port of entry, his multiple border crossings, and the lack of consistent pattern in his crossing the border made it unlikely that he was a blind mule.

B. *The Defense Case*

Henslee testified in his own defense at trial. He said that he had moved from San Diego to Rosarito Beach, Mexico two years earlier to relax and reduce the amount of stress in his life. He moved into a large apartment complex that had four towers, each of which had 15 stories. He met Juan, a Mexican citizen, over a year ago in the apartment

complex where they both lived. Henslee lived in Tower One and Juan lived in Tower Two. Their two towers shared a parking structure.

Henslee testified that Juan was a "rodeo guy" from a rural area who rode horses. The pair exchanged cell phone numbers and Henslee entered Juan in his cell phone contacts as "Juan Tower Two." Henslee and Juan would "hang out, have drinks," and watch and attend sporting events together. Juan was part of Henslee's "regular group of friends" who all lived either in the same complex or in Rosarito or Tijuana. Juan and Henslee called each other and frequently sent text messages as a group. Henslee had two San Diego telephone numbers and cell phones with an 858 area code. Although Henslee generally used one of the cell phones for "personal matters" and the other as a "business phone," the two things overlapped on both cell phones.

On one occasion, Henslee took an unsealed "package of paperwork" across the U.S./Mexico border for Juan, and delivered the package to Juan's friend (or girlfriend) Jessica in San Diego. When asked whether he was "ever afraid that someone like Juan" might give him drugs to take across the border, Henslee responded "absolutely not," and testified that the thought had never entered his mind. Henslee had loaned his Lexus to Juan when Juan's car was "broken down" or "in the shop," or if Juan "needed a car." Henslee did not "think it [*sic*] about" or give "a second thought" to loaning Juan his car, and believed that Juan would have done the same for him. Henslee gave Juan a key fob to open his car when he loaned it to him, but always got it back. In response to a question posed by his counsel about whether he had a financial motive to transport drugs, Henslee had testified that "there was no reason to be a drug smuggler ever." Henslee had loaned

Juan his pickup truck at least six times. Juan borrowed Henslee's vehicles for anywhere from a few hours to three quarters of a day, but never for more than a day, and always returned them to Henslee afterward. The last time Juan borrowed Henslee's car was four weeks prior to Henslee's arrest.

Henslee testified that he still operated his koi pond maintenance business in San Diego County, and drove across the border to work for three regular clients, or to conduct consultations. He typically drove to the United States on Wednesdays after checking the amount of time that it would take to cross the border on a U.S. Border Patrol application on his cell phone. There was a lot of variation in terms of the times of the week when he would cross. He used both the San Ysidro and Otay Mesa border crossings. He was sent to secondary inspection every time he crossed the border due to a protective order related to a misdemeanor domestic violence conviction that he had incurred.

Henslee testified that when he arrived at the Point Loma residence, he saw a brown package wrapped in plastic with evidence tape on it inside his trunk. He did not recognize the package. The words on the evidence tape were "do not tamper" or "do not damage." He looked at the package briefly and then tossed it back in the trunk before going to do his job. He thought the package was something that had been damaged or broken from his car during the secondary inspection. The package came back into his mind later, so he went back into his trunk again before entering the restaurant to have lunch with his parents. He pulled the package out, held it up to the light, and tried to figure out what it was. He thought it was a desiccant—a drying agent that acted like a

moisture barrier in between the back seat and the trunk. After examining the package, he tossed it back into his car, closed the trunk, and entered the restaurant.

Henslee followed the agents into the parking lot after they approached him and spoke with him inside the restaurant. He testified that he had cooperated with the agents in any way that they asked him to, and that he had given them consent to open the trunk of his car. He was confused about why they were searching his car again since they had already done so at the border. He had never seen, talked about, or used methamphetamine or cocaine, and did not think that the package that the agents were holding up contained drugs. He was arrested and placed in the sheriff's deputy's car. At the substation, Henslee was interviewed by the agents and "answered all [of] their questions." He told the agents that he "absolutely" "did not" know anything about the drugs that were in his car. At trial, he testified that he was "upset" and "confused," and did not "understand how [the drugs] could have gotten there."

Although there was a lien on his car, Henslee testified that he was "up-to-date on [his] payments up until [his] arrest." He said that he was not aware that his car was equipped with a GPS tracking device. About a month and a half to two months into his detention, Henslee consented to the prosecutor downloading the contents from his two cell phones, which had been impounded. He signed a consent form so that the agents could look through his phones. At trial, he responded in the affirmative when asked whether he had been "surprised to find out" Juan was "implicated in putting the drug in [his] car." Henslee was "surprised" to learn that Juan "had communicated with" Mena, and to see video of Mena driving up in his red Infinity and entering Henslee's car.

On cross-examination, Henslee confirmed that he had received the Lexus as a gift from his parents and did not owe them any money for it. He had obtained a title loan on the car with a company called Loan Mart because he needed money. He testified that, although he had failed to make a payment in April of the prior year, he had "always made the payments current." He did not have a valid registration for the car on the date of his arrest.

The prosecutor proceeded to ask Henslee clarifying questions about his consent to a search of his cell phone. The prosecutor first asked Henslee to confirm his testimony that he had given agents consent to search his cell phone during the course of the investigation. Henslee responded in the affirmative. Henslee then acknowledged that he had not initially consented to a search of his cell phone. However, when asked whether he had in fact "immediately" declined to consent to a search of his cell phone after his arrest, Henslee responded: "No, not immediately. [The agents] left me to think about it for a period of time." The prosecutor then asked him a second time whether he had "immediately refused" consent to a search of his phone, to which Henslee responded: "No. Not to my recollection. No. It wasn't until later in the cell when I refused." His testimony was, in essence, that he had refused to give his consent later, during an interview that took place while he was being detained in a cell at the substation.

Henslee also testified that he had two different phone numbers in his cell phone saved under "Juan Tower Two." Both of Juan's numbers were also saved in the WhatsApp messaging application on his cell phone. He had exchanged text and voice messages with Juan via WhatsApp in which they discussed firearms. At first, Henslee

testified that he did not remember the specific conversations or terminology that appeared in the text and voice messages between him and Juan (including messages with references to "nines," "toys," and "glocks"), but eventually admitted that the conversations involved handguns and other firearms, after the prosecutor confronted him with the messages. A series of voice messages were then played for the jury. Henslee later testified that he was not a licensed firearms dealer.

On redirect examination, Henslee testified that he and Juan had talked about firearms, and that Henslee had been a member of a firearms club on Facebook for years. His sister had been murdered decades ago, and he and his family members had owned firearms over a long period of time. Henslee had not owned a firearm in many years because the domestic violence protective order against him prohibited him from doing so. Henslee had not purchased or transferred any firearms or firearm parts for Juan. The text messages were "just talk," or "guy talk." In response to his defense counsel's questions, Henslee testified that Juan "obviously had an interest in firearms" given that he was "involved in rodeo" and came from a "rural area." Henslee stated that Juan's interest in firearms had not caused Henslee to "think [Juan] was a drug smuggler," but instead, "just somebody who had common interests."

C. *Rebuttal*

After a sidebar discussion, the prosecutor called the arresting agent, U.S. Department of Homeland Security Special Agent Matthew Dempsey, in rebuttal. Agent Dempsey testified that Henslee had immediately responded "fuck no" when Agent Dempsey asked Henslee whether he would consent to a search of Henslee's cell phone.

III.

DISCUSSION

Henslee contends that: (1) the trial court abused its discretion when it admitted evidence of text and voice messages between Henslee and Juan about Henslee procuring firearms for Juan; (2) the court abused its discretion when it admitted rebuttal evidence that Henslee had refused to give his consent to a search of his cell phone and, specifically, that Henslee had replied "fuck no" immediately after the arresting agent asked Henslee whether he would consent to a search of his cell phone; (3) the cumulative effect of the first two errors requires reversal; and (4) the court's sentencing him for both transporting methamphetamine (count 3) and transporting cocaine (count 1) violated Penal Code section 654. We reject these contentions and affirm the judgment.

A. *Admission of Text and Voice Messages*

Henslee contends that the trial court abused its discretion when it admitted prejudicial evidence of text and voice messages exchanged between him and Juan related to Henslee procuring firearms for Juan. Henslee claims that this evidence was inadmissible because it did not directly impeach his testimony, given that he did not testify as to Juan's character or honesty, nor say that he and Juan had not discussed other subjects such as guns. Henslee also claims that this evidence was too attenuated to show that he needed money and thus had a financial motive to commit the charged crimes. We disagree.

Henslee also raises an instructional claim, arguing that the trial court had a sua sponte duty to instruct the jury that it could consider the evidence only for a limited

purpose. Because his defense counsel never requested any limiting instructions, Henslee contends that this court may address the issue on its own because the error affected his substantial rights, or find that his defense counsel was ineffective for not raising the issue at trial. Henslee also contends that these errors were prejudicial.

We conclude that Henslee failed to preserve these contentions because he did not request a limiting instruction in the trial court. On the merits, we conclude that the trial court did not have a sua sponte duty to give a limiting instruction and that Henslee's counsel's failure to request a limiting instruction did not constitute ineffective assistance. Finally, even if the trial court did err in admitting the text and voice messages and failing to provide a limiting instruction about how the jury could use the evidence, we conclude that any error was harmless because Henslee would not have secured a more favorable verdict if the evidence had not been admitted, or if the court had given a limiting instruction.

1. *Legal Principles*

Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, the trial court may exclude relevant evidence if the risk of undue prejudice, undue consumption of time, confusion of the issues, or misleading the jury substantially outweighs its probative value. (Evid. Code, § 352; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

We review for an abuse of discretion the trial court's determinations regarding the admissibility of evidence, including whether such evidence is overly prejudicial pursuant

to Evidence Code[1] section 352. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [concluding probative value of redacted version of spontaneous written confession outweighed any potential prejudice]; see also *People v. Harris* (2005) 37 Cal.4th 310, 337.) "A proper exercise of discretion is ' "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' [Citation.] Exercises of discretion must be ' "grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." ' [Citation.] Thus, although the abuse of discretion standard is deferential, 'it is not empty.' [Citation.] The standard 'asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts. [Citation.]' " (*People v. Diaz* (2014) 227 Cal.App.4th 362, 377.)

2. *Analysis*

a. *Abuse of Discretion*

We conclude that the trial court did not abuse its discretion in allowing the prosecutor to introduce the text and voice messages exchanged between Henslee and Juan as impeachment evidence following Henslee's misleading testimony about the nature of his relationship and communications with Juan. The evidence was also probative to show

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1 All further undesignated statutory references are to the Evidence Code unless otherwise noted.

that Henslee needed money and thus had a financial motive to commit the charged crimes.

The trial court conducted a thorough section 352 analysis in considering whether to admit the text and voice messages related to the firearms, both before and after Henslee testified at trial. The trial court properly determined that Henslee opened the door to the admission of the messages as impeachment evidence when he testified on direct examination that he had interacted with Juan only as a social friend. Henslee also testified that the thought of Juan giving him drugs to smuggle across the border had never entered his mind. The prosecutor's rebuttal evidence was therefore relevant and admissible to impeach Henslee's testimony that his relationship with Juan was purely social, and that he had no reason to suspect Juan of being a drug smuggler. (*People v. Nunez* (2013) 57 Cal.4th 1, 26-29 [concluding that rebuttal evidence that defendant offered a bribe in exchange for witness testimony did not violate section 352 because the evidence was introduced to impeach the defendant's credibility after he denied offering anyone money to testify].). Based on this record, we conclude that the trial court did not abuse its discretion when it allowed the prosecutor to introduce the text and voice messages as impeachment evidence following Henslee's misleading testimony about the nature of his relationship and communications with Juan.

The text and voice messages were also probative to show that Henslee needed money and thus had a financial motive to commit the charged crimes. Henslee's direct testimony implied that he was not in financial trouble and that he had no financial motive to transport drugs. The text and voice messages showed that in fact, there was an

"economic relationship" between Juan and Henslee, which involved money being exchanged for goods. The trial court stated that Henslee could not "sail under a false flag" when "clearly, this gun business show[ed] a need for money," and involved "not a single gun," but "numerous guns." The court further indicated that it had given a lot of thought to the section 352 issue presented by the messages because they were related to guns, but did not think that admitting the evidence would be more prejudicial than probative. We agree. Based on this record, we conclude that the trial court did not abuse its discretion when it allowed the prosecutor to introduce the text and voice messages to impeach Henslee's earlier testimony about the nature of his relationship and communications with Juan, and to show that he needed money and thus had a financial motive to commit the charged crimes.[2]

b. *Instructional Claims*

Henslee next contends that the trial court erred in failing to instruct the jury on the limited permissible use of the text and voice messages. Specifically, Henslee claims that the court had a sua sponte duty to instruct the jury with CALCRIM 375 because the court "reversed itself" when it decided that the prosecution would be permitted to introduce the

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[2] As the respondent notes, it is unclear from the record which theory the trial court ultimately used to admit the text and voice messages before it made its final ruling. The court reasoned that the evidence could be admitted to: (1) impeach Henslee about the nature of his relationship and communications with Juan; (2) show that Henslee needed money and thus had a financial motive to commit the charged crime; and (3) impeach Henslee with prior conduct that involved moral turpitude. Having decided that the trial court did not abuse its discretion in determining that the evidence was admissible to impeach Henslee's misleading testimony that Juan was just a social friend, we need not address the other theories.

text and voice messages after Henslee had testified on direct examination at trial. Although his defense counsel never requested any limiting instructions, Henslee claims that this court may nevertheless address the issue because the error affected his substantial rights. In the alternative, Henslee argues that his defense counsel was ineffective for not raising the issue at trial. We conclude that Henslee failed to preserve these contentions because he did not request a limiting instruction in the trial court. On the merits, we conclude that the trial court did not have a sua sponte duty to give a limiting instruction and that Henslee's counsel's failure to request a limiting instruction did not constitute ineffective assistance.[3]

1) *Sua Sponte Duty*

The trial court "shall [instruct the jury] on any points of law pertinent to the issue, if requested by either party . . . ." (Pen. Code, § 1093, subd. (f).) However, trial courts have no general duty to instruct sua sponte on the limited admissibility of evidence. (*People v. Hinton* (2006) 37 Cal.4th 839, 875.) CALCRIM 375 specifically addresses uncharged offenses and instructs the jury that it may disregard evidence if the prosecutor

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[3] Henslee's failure to request a limiting instruction does not preclude our review for constitutional error. (See Penal Code § 1259 ["The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; see also *People v. Williams* (2017) 7 Cal.App.5th 644, 675, 678 [finding that the appellate court "retain[ed] discretion to review claims affecting [the defendant's] substantial rights" after the defendant failed to object during the prosecutor's closing argument about the defendant's uncharged robberies]; see also *People v. Flood* (1998) 18 Cal.4th 470, 535, fn. 7 [defendant's failure to object to a peace officer instruction did not preclude appellate court's review for constitutional error].)

fails to prove by a preponderance of the evidence that the uncharged offense occurred. CALCRIM 375 further instructs that the jury may use this evidence only for the limited purpose of deciding whether a defendant had the requisite intent to commit the charged offense.[4]

Henslee's reliance on the narrow exception recognized in *People v. Collie* (1981) 30 Cal.3d 43 (*Collie*) is misplaced. The *Collie* court emphasized the truly exceptional circumstances that must be present before such a sua sponte obligation could arise: "Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony sua sponte to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony. There may be an occasional extraordinary case in which unprotected evidence of past offenses is a dominant part of the evidence against the accused, and is *both* highly prejudicial and minimally relevant to any legitimate purpose.

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4 CALCRIM 375 (Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan) provides in pertinent part: "The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant [insert description of alleged conduct admitted under Evid. Code, § 1101(b)]. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely."

In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence." (*Id.* at p. 64, italics added.)

In stark contrast to the hypothetical extraordinary situation discussed in *Collie*, *supra*, 30 Cal.3d 43, in the case at bar, the nature of the relationship and communications between Henslee and Juan was relevant to the issue of whether Henslee was in fact a blind mule who did not know or suspect that Juan was involved in drug smuggling. Henslee testified that his relationship and communications with Juan were purely social in nature. Evidence related to Henslee's economic relationship with Juan and their exchanges involving Henslee procuring illegal firearms for Juan was therefore central to the case and, while highly probative to the issue of whether Henslee was an unknowing courier of Juan's drugs, was not unduly prejudicial. The use of the text and voice messages to impeach Henslee about the nature of his relationship and communications with Juan, and to show that he needed money and thus had a financial motive to commit the crime, presented none of the extreme risks of improper use of "predisposition evidence" that would warrant a departure from the general rule recognized in *Collie*.

We therefore conclude that the trial court did not have a sua sponte duty to provide a limiting instruction regarding the purposes for which the jury could consider the text and voice messages exchanged between Henslee and Juan.[5]

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[5] Henslee also cites to CALCRIM 316 (Additional Instructions on Witness Credibility—Other Conduct) at various points throughout his opening brief. CALCRIM

2) *Ineffective Assistance of Counsel*

To establish ineffective assistance of counsel, a defendant must show not only that counsel's performance was deficient and fell below an objective standard of reasonableness, but also that it is reasonably probable that a more favorable result would have been reached absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).) Without a showing of prejudice, a claim of ineffective assistance fails and inquiry into the adequacy of counsel's performance is unnecessary. (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner [the defendant asserts counsel should have acted], defendant must show that there was ' " 'no conceivable tactical purpose' " for counsel's act or omission.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 675.)

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316 provides in pertinent part: "If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." Unlike CALCRIM 375, CALCRIM 316 was never addressed by the trial court. To the extent that Henslee argues that the trial court erred in failing to instruct the jury with CALCRIM 316, we similarly conclude that the court did not have a sua sponte duty to provide this limiting instruction.

The record does not support a finding that Henslee's counsel's performance at trial was deficient. Henslee's counsel objected to the admission of the text and voice messages at every stage of the proceedings. During pretrial motions in limine, defense counsel argued that the messages were "too vague" and were "more along the lines of information" than "actually purchasing firearms." He also argued that there was "no documentary evidence" to support that Henslee was actually talking about purchasing guns, or that he had purchased, was paid for, or was in possession of firearms at any time. Defense counsel later submitted on the issue when it appeared that the trial court was going to rule in Henslee's favor. When the issue came up again after Henslee had testified on direct examination, defense counsel tried to persuade the court that the probative value of the messages was outweighed by the undue prejudice that their admission would pose to Henslee. He also requested that the court declare a mistrial. Defense counsel objected to the prejudicial nature of the evidence again at the close of evidence.

After considering the section 352 issue, the trial court admitted the evidence as impeachment testimony, and noted that Henslee could "give whatever explanation he wants, including no explanation" at all. Rather than requesting a limiting instruction, defense counsel focused his efforts on bolstering Henslee's credibility and characterized the messages as "just talk," or "guy talk" between Henslee and Juan. We cannot conclude that this was an unreasonable decision. " 'A reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide.' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053

(*Hernandez*) [finding that defense counsel might reasonably have concluded it best if the court did not explain how the admitted gang evidence could be used because no one suggested the evidence could be used to show defendants were bad persons].) Here, as in *Hernandez*, no one suggested that the text and voice messages could be used to show that Henslee was a bad person. After Henslee was impeached with the text and voice messages, defense counsel asked him questions on redirect examination about his Facebook firearms club, emphasizing the fact that Henslee and his family members had owned firearms in the past due to his sister's murder. This line of questioning also allowed Henslee to testify that he had not owned a firearm in many years, and that he had not purchased or transferred any firearms for Juan. Defense counsel's decision to pursue this line of questioning rather than request a limiting instruction should be given great deference. We see no reason to second-guess counsel's decision. We therefore reject Henslee's claim of ineffective assistance of counsel.

c. *Harmless Error*

Even assuming that the trial court did err in admitting the text and voice messages and failing to give a limiting instruction, any error was harmless because it is not reasonably probable that Henslee would have obtained a more favorable result if the evidence had not been admitted, or if the court had instructed the jury regarding the limited use of the evidence at issue, as Henslee suggests on appeal. (*People v. Watson*

(1956) 46 Cal.2d 818, 837 (*Watson*).)[6] The text and voice messages were admitted to impeach Henslee following his misleading testimony about the nature of his relationship and communications with Juan. "It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. (§§ 353, subd. (b), 354.) '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1001, quoting *Watson*, *supra*, 46 Cal.2d at p. 836.) We conclude that there was no such miscarriage of justice here.

Henslee's theory at trial was that he was a "blind mule" who had unwittingly transported drugs that were concealed in his car across the U.S./Mexico border. Even if the text and voice messages had been excluded, it is not reasonably probable that the jury would have accepted Henslee's "blind mule" defense. Nor is it reasonably probable that the jury would have accepted Henslee's defense if the jury had been given a limiting

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6 With respect to the proper standard for assessing prejudice in this circumstance, Henslee argues that the federal constitutional standard should apply because the error is of constitutional dimension. Specifically, Henslee contends that the trial court's failure to provide the limiting instructions, in combination with other errors, rendered his trial fundamentally unfair in violation of his due process rights. Although we are not persuaded by Henslee's argument, since it would appear that any presumed error would be one implicating state evidentiary rules and not the federal Constitution, it is of no consequence because we would reach the same conclusion even applying the more rigorous "harmless beyond a reasonable doubt" standard as set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

instruction about how to use the evidence related to the text and voice messages because the evidence of Henslee's guilt was overwhelming. Further, the jury was instructed not to let bias, sympathy, prejudice or public opinion influence their decision, a point that the prosecutor reiterated in his closing argument. Accordingly, we conclude that a limiting instruction would not have significantly aided Henslee under these facts, or weakened the strength of the evidence of guilt that the jury properly could have considered.

B. *Admission of Rebuttal Testimony Regarding Whether Henslee Consented to a Search of His Cell Phone*

Henslee contends that the trial court abused its discretion when it admitted rebuttal evidence that he replied "fuck no" immediately after the arresting agent asked whether Henslee would consent to a search of his cell phone. Henslee claims that the prosecutor used the evidence to demonstrate Henslee's lack of cooperation and his consciousness of guilt. We conclude that the trial court did not abuse its discretion in allowing the prosecutor to introduce the rebuttal testimony to impeach Henslee after he testified on cross-examination that he had not immediately refused to consent to a search of his cell phone.[7]

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[7] At trial, the parties stipulated that a computer forensic agent from the U.S. Department of Homeland Security downloaded the contents of two Samsung Galaxy S-7 phones that were found in Henslee's possession. However, it is unclear from the record which of these two cell phones the arresting agent asked Henslee to give consent to search. We would reach the same conclusion with respect to either cell phone, given Henslee's earlier testimony that he conducted both personal and business matters on both cell phones.

1. *Legal Principles*

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable.' " (*Mincey v. Arizona* (1978) 437 U.S. 385, 390.) In general, admission of evidence of a defendant's refusal to consent to a warrantless search is inadmissible because such evidence violates "the privilege to be free from comment upon the assertion of a constitutional right." (See *People v. Wood* (2002) 103 Cal.App.4th 803, 808-810 (*Wood*) [error for officer to testify that defendant responded to a request for a warrantless search by stating, "You know better than that. You're not coming on my property"].) However, evidence that defendant invoked a constitutional right may be admitted as rebuttal to contradict a defendant's testimony. (See *Harris v. New York* (1971) 401 U.S. 222, 224-226; see also *Wood*, at p. 810.)

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) " '[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.' " (*Ibid*.)

2. *Analysis*

a. *Abuse of Discretion*

We conclude that the trial court did not abuse its discretion in allowing the prosecutor to present rebuttal evidence related to Henslee's immediate refusal to consent to a search of his cell phone. Henslee's defense counsel was the first to bring up the issue of Henslee's consent during the prosecution's case-in-chief. During defense counsel's recross-examination of the prosecutor's case agent, the following exchange took place:

"Q: [Henslee's] phones, there were two phones with my client when he was arrested, right?

"A: That is correct.

"Q: And those were put into evidence essentially, correct?

"A: That is correct.

"Q: At the time of his arrest?

"A: Yes.

"Q: Now, my client signed a consent form to download and search both of those phones, right?

"A: That's correct.

"Q: And that was, what, about a month ago?

"A: Yes

"Q: So about maybe three months after he was arrested, correct?

"A: Yes."

On direct examination, Henslee expanded on the issue of his having consented to a search of his cell phone:

"Q: At some point maybe a month and a half, two months ago, you consented to the prosecution downloading those phones, right?

"A: That is correct.

"Q: You said take a look at my phones, and you signed a consent form to have those phones looked at, right?

"A: Yes, I did.

"Q: By Homeland Security?

"A: Correct

"Q: And they did look at them, right?

"A: Yes, they did."

During cross-examination, Henslee testified that he had not immediately refused the arresting agent's request for consent to search his cell phone at the time of his arrest:

"Q: You mentioned that you gave consent to search your cell phone during this investigation, correct?

"A: I did.

"Q: That wasn't your initial response though, was it?

"A: It was not.

"Q: In fact, the agent asked you to give consent to search your phone, you said, "I decline," immediately, right?

"A: No, not immediately. They left me to think about it for a period of time in the cell.

"Q: During your interview you immediately refused—during your interview with agents they asked you to search your phone, right? Whether you would consent to letting them search your phone; is that correct?

"A: During the interview.

"Q: Yes.

"A: Yes.

"Q: And you immediately refused, didn't you?

"A: Not to my recollection, no. It wasn't until later in the cell when I refused."

On this record, we conclude that Henslee's testimony pertaining to his consent to a search of his cell phone left the misimpression that he had not immediately refused to consent, thereby opening the door to the introduction of evidence related to his immediate refusal to consent, together with the context and language of his refusal, to impeach his account of the response that he claimed to have given to the arresting agent. The arresting agent's rebuttal testimony contradicted Henslee's earlier testimony that he had not refused (or that his recollection was that he had not refused) to consent to a search of his cell phone until later when he was detained in a cell. The evidence was thus properly admissible during Henslee's cross-examination, as well as during the prosecution's rebuttal case following Henslee's testimony at trial. (See *Wood*, *supra*, 103 Cal.App.4th at pp. 804, 809-810 [concluding that, when the defendant chose to testify and deny that he owned property where an abused horse was located, constitutional constraints did not shield him from cross-examination as to his

earlier statement refusing to admit the animal control officer onto "his" property].) We therefore conclude that the court did not abuse its discretion when it allowed the prosecutor to introduce the rebuttal testimony.

b. *Ineffective Assistance of Counsel*

We see no deficiency in defense counsel's performance for failing to object to the rebuttal evidence. Although testimony from a law enforcement officer that a defendant refused to consent to a search is generally inadmissible, Henslee's trial counsel had a conceivable tactical reason for failing to object when the prosecutor elicited testimony from the arresting agent that Henslee had "immediately" refused to consent to a search of his cell phone. (*People v. Salcido* (2008) 44 Cal.4th 93, 172 [" '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' ") By that point, the jury had already heard testimony during Henslee's cross-examination that Henslee had initially refused to consent to a search of his cell phone. The jury had also heard that Henslee had ultimately consented to a search of his cell phone two months after his arrest. Any objection to the rebuttal evidence by defense counsel would have thus been overruled by the trial court. As a result, defense counsel decided that bolstering Henslee's credibility by emphasizing his cooperation with the law enforcement officers would be viewed more favorably by the jury than objecting to evidence of Henslee's "immediate" refusal to consent to a search (as opposed to "later" during an interview at the substation). We cannot conclude that this was an unreasonable decision.

Throughout the defense case-in-chief, Henslee testified that he had fully cooperated with law enforcement officers from the moment they approached him at the restaurant, and repeatedly mentioned that he had consented to a search of his cell phone a few months after his arrest. Henslee's defense counsel continued with that theme during the cross-examination of the arresting agent by attempting to demonstrate that Henslee had been forthcoming with law enforcement officers throughout the course of their investigation. We therefore cannot conclude that it is reasonably probable that Henslee would have obtained a more favorable result if defense counsel had objected to the rebuttal evidence. (*Strickland*, *supra*, 466 U.S. at pp. 687-688.) We thus reject Henslee's claim of ineffective assistance of counsel on this issue.

c. *Harmless Error*

The erroneous admission of Henslee's refusal to consent to a warrantless search of his cell phone is subject to a federal harmless-error analysis under *Chapman.* (See *Wood*, *supra*, 103 Cal.App.4th at p. 810 [applying *Chapman*, *supra*, 386 U.S. 18].) Even assuming that the trial court did err in admitting the rebuttal evidence, we conclude that any error was harmless beyond a reasonable doubt because the evidence was of limited evidentiary value given that the jury heard evidence that Henslee ultimately consented to a search of his cell phone two months later, and that he otherwise was cooperative with the law enforcement officers.

We are not persuaded by Henslee's argument that he was prejudiced because the evidence of his refusal to consent to a search of his cell phone was the last evidence that the jury heard, or because the prosecutor highlighted the evidence during his closing and

rebuttal arguments. Not only would it have been improper for the prosecutor to present the evidence during its case-in-chief, the evidence could not have been introduced until after Henslee provided the misleading testimony about his consent on direct and cross-examination. (See *Wood*, *supra*, 103 Cal.App.4th at p. 810 [finding harmless error because evidence of defendant's refusal to allow the animal control officer to enter the defendant's property would have been properly admissible during cross-examination of defendant or as rebuttal evidence following defendant's contradictory testimony].). Accordingly, excluding the rebuttal testimony would not have significantly aided Henslee or weakened the strength of the evidence of guilt that the jury could have properly considered in his case.

C. *Cumulative Error*

Henslee contends that the cumulative effect of the first two errors involving the admission of the text and voice messages related to the firearms, and his immediate response of "fuck no" when the arresting agent asked for consent to search his cell phone, requires reversal. Because we have concluded that neither claim merits reversal when considered separately, it follows that any cumulative effect of the claimed errors "does not warrant reversal of the judgment." (*People v. Jablonski* (2006) 37 Cal.4th 774, 825.)

D. *Penal Code section 654*

Henslee contends that his conviction for transporting cocaine (count 1) was based on the same act as his conviction for transporting methamphetamine (count three). Accordingly, he claims that the concurrent sentence that the court imposed for transporting cocaine (count 1) should have been stayed under Penal Code section 654.

We conclude that there was evidence that Henslee planned to engage in multiple drug transactions involving two different types of drugs. Separate sentences for the crimes of transporting cocaine and transporting methamphetamine were therefore proper.

Penal Code section 654, subdivision (a) states that an "act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute aims " 'to insure that a defendant's punishment will be commensurate with his culpability.' " (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) As a general rule, "[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones* (2012) 54 Cal.4th 350, 358 (*Jones*); see also *People v. Mesa* (2012) 54 Cal.4th 191, 199.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331; see *Jones*, *supra*, 54 Cal.4th at p. 372 (conc. opn. of Liu, J.).) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives, which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise

indivisible course of conduct." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1112 (*DeVaughn*).)

If Penal Code section 654 applies, "the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*People v. Correa* (2012) 54 Cal.4th 331, 337.) Whether Penal Code section 654 applies is a question of fact reviewed for substantial evidence; the trial court has "broad latitude" in making its determination. (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 611; *DeVaughn*, *supra*, 227 Cal.App.4th at p. 1113.) If no such evidence exists, a sentence is unauthorized and must be corrected on appeal even if no objection was raised below. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) We conclude that there is substantial evidence to support the finding that Henslee had separate objectives and intents in transporting the cocaine and methamphetamine.

The trial court found that count 3 (transporting methamphetamine) was the principal term for Henslee's sentence because it carried the highest punishment after an additional five-year sentence was applied for the weight enhancement. The trial court then made the following ruling regarding the application of Penal Code section 654:

> "[W]e have this whole issue of 654. I think Counts 3 and 4, 654 applies and I gave you that *Buchanan* case on that. And for the record, that's *People* [*v.*] *Buchanan*, 2016, 238 Cal.App.4th 603.[8] And then Counts 1 and 2 I don't think are barred by 654 and although certainly a Court can disagree, there are about three cases that are sort of important.
>
> "I'll summarize on *People* [*v.*] *Chung*, C-h-u-n-g, 2015, 237 Cal.App.4th 462. I think these are separate drugs and there were separate customers for

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8 The correct citation is 248 Cal.App.4th 603.

> them illustrated by the fact that Mena picked up only the methamphetamine. And so when Mr. Henslee was arrested, they still had the cocaine. Obviously that was waiting for a different customer.
>
> "My plan, I think, would be to probably run Counts 1 and 2 concurrently with Counts 3 and 4. And I looked up some rules on that, and Rule 4.425, the crimes are not predominantly independent of each other. It's really one act of bringing these drugs across the border although they are different drugs. It was not committed at different times and places."

Whether a defendant's acts constitute an indivisible course of conduct based on the defendant's intent and objective is primarily a factual determination that is made by the trial court. The "trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld . . . if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512 (*Blake*).) On appeal, we view the evidence most favorably to the court's sentencing decision and presume in support of the order the existence of every fact the court could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698).

In *Blake*, the defendant was convicted of multiple offenses, including transportation of methamphetamine and transportation of marijuana. (*Blake*, *supra*, 68 Cal.App.4th 509.) On appeal, Blake argued, as Henslee does here, that the trial court violated Penal Code section 654 when it sentenced him for both transportation convictions because he transported both drugs in the car at the same time. (*Id.* at p. 511.) During a search of Blake's car, an officer found numerous items of contraband and evidence indicating that Blake was involved in the sale of illicit drugs, including a jar containing methamphetamine in the left fender well of the car, and a "PVC" pipe containing marijuana in a separate hidden compartment of the car. (*Id.*) The court

contrasted Blake's case with *In re Adams* (1975) 14 Cal.3d 629 (*Adams*), finding that there was no indication that Blake had transported the methamphetamine and marijuana with the intent to deliver them to one person. (*Blake*, *supra*, 68 Cal. App.4th at pp. 511-512.) Rather, the record supported an inference that Blake intended multiple sales to different customers: "(1) the marijuana and methamphetamine were stored in separate containers in different concealed compartments of the car; (2) the marijuana was packaged in a manner consistent with multiple, individual sales; (3) the amounts of marijuana and methamphetamine were consistent with delivery to more than one individual; (4) the difference between the drugs suggests they were 'directed at different buyers' [Citation]; and (5) the presence of a 'pay-owe' sheet with multiple entries, a police scanner, baby wipes, and scale indicates defendant was engaged in an elaborate drug trafficking operation involving multiple sales to different individuals, rather than one single delivery." (*Id.* at p. 512.) The court held that this evidence supported a reasonable inference that Blake had separate objectives in transporting the methamphetamine and marijuana in that he intended to sell the drugs to different customers. (*Id.* at p. 511.)

Here, as in *Blake*, the methamphetamine and cocaine found in Henslee's car were packaged separately and in amounts that were consistent with delivery to more than one individual. The drugs were packaged in vacuum-sealed bags, had letters written on them to indicate where the drugs were going or who they were going to, and were valued at between $700,000 to $1.45 million. Mena transferred seven methamphetamine bags that weighed a total of 6.962 kilograms (15.32 pounds) from Henslee's Lexus to his Infinity, and left the remainder in Henslee's car. Henslee had four bags of cocaine weighing a

total of 4.003 kilograms (8.8 pounds) and two bags of methamphetamine weighing a total of 1.989 kilograms (4.38 pounds) in his car when he was arrested. The difference between the two types of drugs further suggests that they were intended to be delivered to different buyers. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1297.)

We are not persuaded by Henslee's reliance on *Adams*, *supra*, 14 Cal.3d 629. In that case, Adams transported five different controlled substances that he intended to deliver to one specific individual in a single transaction. (*Id*. at p. 632.) The California Supreme Court held that Adams could be punished only once for transporting the controlled substances because the simultaneous transportation of multiple substances was motivated by a single objective. (*Id*. at p. 635.) The court, however, distinguished the facts before it from cases involving possession of multiple substances and declined to disapprove cases holding that multiple punishments may be imposed for possession of multiple substances. (*Ibid*.) The Supreme Court stated: "[I]f the evidence discloses that a defendant entertained 'multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citations.]" (*Id.* at p. 634.) That is the case here. The quality, value, quantity, and packaging of the drugs found in Henslee's and Mena's cars supports the trial court's finding that the drugs were not intended for any one person. (See *Blake*, *supra*, 68 Cal.App.4th at p. 512.) Thus, it was reasonable for the trial court to find that Henslee had separate objectives in transporting the methamphetamine and cocaine in that he intended to deliver the drugs to different

customers. We therefore conclude that Penal Code section 654 does not preclude Henslee's conviction and sentence for both of the transportation offenses.

IV.

DISPOSITION

The judgment is affirmed.

AARON, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.