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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JAY COLSELL,

Defendant and Appellant.

E051908

(Super.Ct.No. FVI900760)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata,  
Judge. Affirmed.

Kathleen Woods Novoa, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Alana Cohen  
Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Michael Jay Colsell was charged by information with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 1),<sup>1</sup> possession of methamphetamine for sale (§ 11378, count 2), transportation of marijuana (§ 11360, subd. (a), count 3), and possession of marijuana for sale (§ 11359, count 4). The information also alleged that defendant had two prior drug convictions within the meaning of section 11370.2, subdivision (c). A jury convicted defendant of counts 1 and 2, and found him guilty of the lesser included offense of simple possession of marijuana on counts 3 and 4. (§ 11357, subd. (a).) Defendant admitted his prior convictions. The trial court sentenced him to a total term of 10 years in state prison.

On appeal, defendant contends that: (1) one of the simple possession of marijuana convictions should be stricken; (2) his trial counsel was ineffective for failing to object to gang-related evidence, and defendant was denied his rights to a fair trial and due process as a result of the admission of such evidence; (3) his counsel was ineffective for failing to object to the admission of evidence about the sentence received by another narcotics trafficker, and defendant was denied his rights to a fair trial and due process as a result of such evidence; and (4) the abstract of judgment should be modified to correct certain errors. The People concede, and we agree, that one of the simple possession convictions should be stricken and that the abstract of judgment should be modified. In all other respects, we affirm.

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<sup>1</sup> All further statutory references will be to the Health & Safety Code, unless otherwise noted.

## FACTUAL BACKGROUND

On January 28, 2009, Deputy Jorge Lozano was conducting an undercover surveillance of the residence of Art Garcia. Garcia was the focus of a gang wiretap investigation. During a time period of approximately an hour and a half, Deputy Lozano observed six or seven cars arrive at the residence, stay for a short amount of time, and leave. He also observed five to six people walk to the rear of the residence on foot, stay for a few minutes, and leave. This activity was consistent with a house dealing narcotics. Garcia later left the residence, and Deputy Lozano followed him to Del Taco. Deputy Lozano parked his car close to Garcia's. Deputy Lozano went inside the Del Taco and got in line. He saw defendant come out of the restroom. Defendant got in line, locked eyes with Deputy Lozano, and then left the store. Deputy Lozano observed defendant contact Garcia, who was sitting in his parked car. Defendant talked to Garcia for a couple minutes. After a short conversation, defendant got in a blue van and drove away. Garcia drove off too. Deputy Lozano broadcast defendant's vehicle information to members of the surveillance team, and followed defendant's van.

Defendant and Garcia drove to an apartment complex on Navajo Road, where someone named "Pelon" or "Pamplona" lived. They went inside Pelon's apartment for five to 10 minutes, and then left in their respective cars.

Detective Marc Bracco, a member of the surveillance team, spotted defendant's car, followed him, and conducted a traffic stop. Detective Bracco got out of his car to approach defendant's car. When defendant attempted to get out of his car, Detective Bracco noticed a knife in defendant's back pocket and retrieved it. After checking defendant's registration,

Detective Bracco conducted a patdown search and found two baggies containing a white substance that Bracco believed was methamphetamine. He also found separate bundles of cash, folded in half and wrapped in rubber bands, in defendant's jacket pocket and pants pocket. Detective Bracco handcuffed defendant and searched his car. He found a black bag, which contained more baggies with possible methamphetamine, jewelry, baggies with marijuana, two digital scales, and about 20 empty baggies. The white substance later tested positive for methamphetamine. Defendant had approximately \$2,000 in cash and eight bags of methamphetamine, worth about \$2,500. Detective Bracco and another officer opined that the methamphetamine and marijuana were possessed for sale.

### ANALYSIS

#### I. One of the Possession of Marijuana Counts Should Be Stricken

Defendant was charged with one count of transportation of marijuana (§ 11360, subd. (a), count 3), and one count of possession of marijuana for sale (§ 11359, count 4). Both parties agree that the prosecution apparently charged these offenses in the alternative. The jury convicted defendant of the lesser included offense of simple possession of marijuana (§ 11357, subd. (a)) on both counts. Defendant now contends that one of those convictions should be stricken since there was only one possession, on one date, at one place. The People correctly concede.

Section 11357 defines a single offense. Defendant can be convicted of only one count of violating section 11357 for a single act. (See *People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073.) Since defendant possessed the marijuana on one occasion, he

may not be convicted of two counts of possession. Accordingly, one of the convictions for possession of marijuana must be stricken.

II. Defendant Has Failed to Establish That Trial Counsel Rendered Ineffective Assistance of Counsel (IAC) by Failing to Object to the Gang-related Evidence

Defendant asserts that there were numerous references to gangs, Garcia's gang status, and the Mexican Mafia throughout the trial, and that such evidence was erroneously admitted since it was irrelevant and prejudicial. His counsel failed to object to such evidence at trial. Recognizing that this claim has been forfeited by his counsel's failure to object, defendant claims that his counsel was ineffective. Additionally, he argues that he was deprived of his rights to due process and a fair trial as a result of the gang references. We agree that since counsel raised no objection to the introduction of the gang-related evidence, the issue is forfeited. (*People v. Kelly* (1992) 1 Cal.4th 495, 540 (*Kelly*)). As to defendant's IAC claim, we conclude that his counsel did not render ineffective assistance. We also reject defendant's constitutional claims.

A. *Relevant Background*

As defendant points out, many of the testifying officers referenced gangs and gang membership numerous times during the trial, even though this case did not involve a gang enhancement. The officers initially testified that they worked in the gang unit in January 2009. Defendant specifically points out that "the most extensive gang testimony was elicited by the prosecution from [Officer Kevin] Warner." Officer Warner testified that Garcia entered a plea agreement, which included a gang enhancement, and that he was sentenced to nine years in state prison. The prosecutor asked him general questions about

gang involvement in drug cases, and Warner explained that gangs usually funded their activities with proceeds from drug sales, and paid “taxes” to the Mexican Mafia. Officer Warner was later asked about Garcia’s gang affiliation. Officer Warner went into great detail about the nature of Garcia’s gang affiliation, as well as gangs in general. The prosecutor made numerous references to gangs in his closing argument.

*B. Defendant Has Failed to Establish Either Component of an IAC Claim*

In order to establish a claim of IAC, defendant must demonstrate, “(1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541 (*Dennis*)). Hence, an IAC claim has two components: deficient performance and prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) If defendant fails to establish either component, his claim fails.

Defendant argues that there could be no tactical reason for his trial counsel to fail to object to the admission of any gang evidence, since there was no evidence that defendant was affiliated with any gang and there were no gang allegations in the instant case. He contends that the gang evidence was irrelevant and prejudicial, and that no evidence of gangs should have been admitted for any purpose. Defendant further claims that the only apparent purpose for introducing such evidence “was to make [him] look bad, and to enflame [*sic*] the jury against him, hoping to prey on their fears and prejudices.”

At the outset, we note that failure to object to the admission of evidence rarely establishes ineffective assistance of counsel. (*Kelly, supra*, 1 Cal.4th at p. 540.) In any event, the gang evidence here was not irrelevant or prejudicial. In *People v. Sanchez* (1997) 58 Cal.App.4th 1435, the court explained that “[g]ang evidence should not be admitted at trial where its sole relevance is to show a *defendant’s* criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]” (*Id.* at p. 1449, italics added; see also, *People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) In the instant case, there was no gang evidence admitted to show defendant’s criminal disposition. The officers simply testified that they were working in the gang unit during January 2009. The rest of the evidence at issue had to do with gangs in general and Garcia’s gang affiliations. Furthermore, the gang evidence concerning Garcia was simply used to explain Garcia’s testimony. Garcia testified at trial that he did not know defendant, and that he had no recollection of selling drugs to defendant, or defendant selling anything to him. This testimony was contrary to Garcia’s earlier statements to the police describing the circumstances surrounding the drug deal with defendant on January 28, 2009. At trial, the prosecutor questioned Officer Warner on whether Garcia’s gang membership would affect how Garcia testified in court. Officer Warner essentially explained that Garcia would not identify anybody that he sold drugs to, on the stand, because it would put him in danger in prison for “ratting somebody out.” The gang evidence relating to Garcia was relevant to show that he was likely being untruthful in his testimony.

Moreover, none of the gang evidence defendant objects to now concerns *him*. The jury was informed that Garcia’s gang status had nothing to do with defendant or the drug

transaction. Thus, defendant's claims that the gang evidence was introduced to "make [him] look bad" and inflame the jury are meritless. The evidence was not prejudicial.

Defendant has also not shown prejudice from his counsel's failure to object. There was overwhelming evidence that defendant was guilty of transporting methamphetamine and possessing it for sale and of possessing marijuana. The police observed him meeting with a known drug dealer and driving to another location with him. Then, after an officer conducted a traffic stop, the officer searched defendant and found methamphetamine on him, as well as \$2,000 in cash. Inside his car, the police found methamphetamine worth about \$2,500, marijuana, digital scales, and empty baggies. This evidence clearly established defendant's guilt, and it is not reasonably probable that a more favorable determination would have been made even if counsel had objected to the gang-related evidence. (See *Dennis*, *supra*, 17 Cal.4th at pp. 540-541.)

As to defendant's constitutional claims, he contends he was denied his rights to a fair trial and due process as a result of the gang-related evidence. In support of this argument, he merely repeats his claim that the evidence was "specifically designed to inflame and prejudice the jury against [him]." We disagree and conclude that the gang-related evidence did not deprive him of a fair trial or due process. (See *ante*.)

III. Defendant Has Failed to Establish IAC with Regard to Counsel's Failure to Object to Evidence of Garcia's Sentence

Defendant asserts that the prosecution improperly introduced evidence that "the 'kingpin' or focus of the investigation," Garcia, was sentenced "to only nine years." Defendant claims that this evidence "let[] the jury know by inference that [defendant] would

receive something less than that,” since he was a lesser player in the drug operation.

Defendant argues that if the jury had not heard evidence of Garcia’s sentence and thereby deduced that he would receive a lesser sentence, the jury would have convicted him of the lesser included offense of simple possession of methamphetamine. Trial counsel never objected to the evidence of Garcia’s sentence. Again, recognizing that this claim has been forfeited by his counsel’s failure to object, defendant claims that his counsel was ineffective. Defendant also argues that he was deprived of his rights to due process and a fair trial as a result of the evidence of Garcia’s sentence. We agree that since counsel raised no objection to the evidence regarding the sentence Garcia received, the issue is forfeited. (*Kelly, supra*, 1 Cal.4th at p. 540.) We further conclude that his counsel did not render ineffective assistance, and we reject defendant’s constitutional claims.

*A. Relevant Background*

At trial, the prosecutor solicited testimony from Officer Warner that Garcia entered a plea agreement and received nine years in state prison. The prosecutor called Garcia to the stand and confirmed that he pled guilty to three counts of either transportation or possession for sale of methamphetamine. The prosecutor stated, “So three counts of that, with a gang enhancement, correct?” Garcia confirmed. The prosecutor added, “And nine years, including a strike. [¶] . . . [¶] Which makes it more serious?” Garcia again confirmed. The prosecutor proceeded to ask what would happen to him if anyone in prison found out he was testifying, and Garcia said that something would happen to him to “[g]et [him] off the yard.”

*B. Defendant Cannot Show That He Was Prejudiced by Counsel's Failure to Object*

As discussed previously (see *ante*, § II), the evidence against defendant was strong. The officer found methamphetamine on him, as well as \$2,000 in cash. Inside his car, the police found more methamphetamine, worth about \$2,500, digital scales, and empty baggies. Moreover, it is pure speculation that the jurors considered Garcia's sentence and deduced that defendant would receive less than nine years in prison, or that, absent knowledge of Garcia's sentence, they would have only convicted defendant of simple possession. We further note that, even though there were references to Garcia's sentence during the trial, the jury was instructed to "reach a verdict without any consideration of punishment." "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Defendant has failed to establish that he was prejudiced by the evidence of Garcia's sentence. Therefore, his IAC claim fails. (*Dennis, supra*, 17 Cal.4th at pp. 540-541.)

Furthermore, for the same reasons we conclude that defendant was not prejudiced by the evidence of Garcia's sentence, we conclude that the references to Garcia's sentence did not deprive defendant of a fair trial or due process.

IV. The Abstract of Judgment Should Be Corrected

Defendant points out that the abstract of judgment incorrectly reflects that he was convicted of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)) on count 3 and possession of marijuana for sale (Health & Saf. Code, § 11359) on count 4. The People correctly concede. Defendant was convicted of the lesser included offense of simple

possession of marijuana on counts 3 and 4. (Health & Saf. Code, § 11357, subd. (a).) At sentencing, the court referred to the “[t]wo misdemeanor counts” and stayed a six-month term on both charges, pursuant to Penal Section 654. We further note that one of the simple possession counts should be stricken. (See *ante*, § I.) The abstract of judgment should be modified to correct these errors.

DISPOSITION

The trial court is directed to strike defendant’s conviction on count 4. The superior court clerk is directed to correct the abstract of judgment to reflect that defendant was convicted of simple possession of marijuana on count 3 (Health & Saf. Code, § 11357, subd. (a)), and that the sentence on that count of six months was stayed pursuant to Penal Code section 654. The superior court clerk is further directed to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST  
Acting P. J.

We concur:

KING  
J.

CODRINGTON  
J.