

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DALE CHAPMAN,

Defendant and Appellant.

E053749

(Super.Ct.No. FBA700191)

OPINION

APPEAL from the Superior Court of San Bernardino County. John B. Gibson,
Judge. Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, William H. Wood, Jennifer A.
Jadovitz, and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

During a traffic stop, defendant Larry Dale Chapman was caught with 143.5 grams of methamphetamine hidden in his car. A jury convicted defendant of two crimes: possession for sale of a controlled substance (Health & Saf. Code, § 11378) and transportation of a controlled substance. (Health & Saf. Code, § 11379, subd. (a).) Defendant admitted two prior drug offense convictions (Health & Saf. Code, §§ 11370.2, subd. (c), 11378) and four prior prison terms. (Pen. Code, § 667.5, subd. (b).) The court sentenced defendant to 14 years in prison.

On appeal, defendant contends his Sixth Amendment right to counsel was violated because the court denied defendant's request to appoint private counsel. Defendant asserts various instructional and evidentiary errors related to his chief defense, which is that "[defendant] was entrapped by the woman he loved, who was acting as an agent of the officer who detained and searched him." The record, however, does not offer sufficient evidence to support these contentions, which defendant attributes to the court's "errors, myopic rulings, and prosecutorial misconduct." We reject defendant's claims of error and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Motion to Suppress

In October 2007, Deputy Sheriff Alejandro Ramos testified that, on May 9, 2007,

he was on night patrol in the San Bernardino County desert community of Trona¹ when he conducted a traffic stop of a red two-door Nissan because it violated Vehicle Code section 24601, which requires a properly illuminated rear license plate. The illumination was too dim to read the plate at 50 feet. Defendant, the driver, admitted he was on parole. The deputy conducted a parole search of defendant and the vehicle. Concealed behind the right headlamp was a cloth bag containing individual bags of methamphetamine.

A defense witness testified that he inspected the Nissan after it was impounded and the rear license plate was properly illuminated. Defendant denied that he had admitted being on parole when he was stopped by Deputy Ramos.

In support of his motion to suppress, defendant argued the deputy was dissembling when Ramos stated the reason for stopping defendant was a dim license plate light and that defendant had “gratuitously volunteered” being on parole. Therefore, the deputy had no grounds to search defendant’s vehicle and seize the hidden methamphetamine. The prosecution argued that the deputy’s testimony about the reason for the stop and defendant’s admission about parole was credible and sufficient to allow the court to deny the motion to suppress. The court found by a preponderance of the evidence that Ramos’s testimony was more probable than defendant’s evidence. The court denied the motion to suppress.

¹ We take judicial notice that Trona is a remote unincorporated community of fewer than 2,800 inhabitants.

B. Pretrial Proceedings from November 2007 to May 2011

Defendant refused the prosecution's offer of a plea bargain for a three-year prison sentence. Between November 2007 and May 2011, the trial date was continued numerous times.

On March 15, 2011, the court denied defendant's *Marsden*² motion. The trial began in May 2011.

C. Prosecution's Evidence

At trial, Deputy Ramos testified again that he was on night patrol in Trona on May 9, 2007. At 1:00 a.m., he waited at a stop sign and yielded to a red Nissan, driven by defendant and travelling north. Deputy Ramos stopped the vehicle because he could not read the license plate and conducted a parole search. Hidden behind the right headlight, he discovered a canvas bag containing five baggies, each containing about 28 grams of a white substance, later identified as methamphetamine and worth at least \$4,500. Inside a door panel, the deputy found a glass pipe commonly used to smoke methamphetamine. Defendant had about \$990 on his person. Heavy methamphetamine users use one or two grams a day. Deputy Ramos's expert opinion was that defendant possessed the large quantity of drugs for sale. The type and amount of cash held by defendant also signified he was involved in drug sales. Defendant was 52 years old and a resident of the City of Ontario.

² *People v. Marsden* (1970) 2 Cal.3d 118.

During cross-examination, Deputy Ramos disclosed that he also found an envelope addressed to Michelle Corey³ in Trona. Deputy Ramos was acquainted with Corey from past contacts. He did not collect the envelope or book it as evidence. The trial court refused to allow any additional questions in this subject area.

D. Defendant's Testimony

Defendant testified that, on May 8, 2007, he received 22 phone calls from Corey, his fiancée, asking him to purchase drugs for her. He claimed he had obtained the drugs under duress. The court would not permit defendant to testify about what his fiancée had purportedly told him.

Defendant drove three hours from Ontario to Trona to deliver the drugs—which he had hidden in the vehicle in a secret compartment known only to himself and another person. All the vehicle's lights were working before he started his trip. In Trona, Deputy Ramos followed defendant and stopped him near Corey's house. Deputy Ramos announced he was conducting a parole search and he found the drugs immediately. Defendant had the large sum of money because he had just come from a casino.

Defendant did not work because he was a disabled Vietnam veteran. He had prior convictions for possession and sale of methamphetamine.

III

SIXTH AMENDMENT RIGHT TO COUNSEL

After the court denied defendant's *Marsden* motion, defendant told the court at a

³ Corey had died in December 2007, before the 2011 trial.

hearing on the readiness calendar on March 30, 2011, that he was retaining new counsel. On April 4, 2011, defendant's proposed new counsel, Gary Redinger, represented to the court that he could not be available for trial until May 20, 2011. The public defender, Edward Wilson, explained he might not be ready for trial until May 25, 2011. Due to the age of the case, the trial court denied defendant's motion for appointment of private counsel. Ultimately, the trial date was continued until the trial finally began on May 24, 2011. Defendant argues that, in hindsight, the trial court's refusal to appoint private counsel for defendant was arbitrary and violated his constitutional Sixth Amendment right to counsel. (*People v. Courts* (1985) 37 Cal.3d 784, 789-790.)

A request for private counsel should be accommodated to the extent it is consistent with effective judicial administration. (*People v. Courts, supra*, 37 Cal.3d at p. 790.) Here we conclude considerations of judicial efficiency justified the limitation of defendant's right to counsel. (*Ibid.*, citing *People v. Byoune* (1966) 65 Cal.2d 345, 348; *People v. Crovedi* (1966) 65 Cal.2d 199, 207.) "[E]ach case must be decided on its own facts." (*People v. Blake* (1980) 105 Cal.App.3d 619, 624.) The trial in this case had been repeatedly delayed for almost four years. Even though defendant had contacted private counsel, there could be no assurances defendant's proposed new lawyer would be ready for trial within a month or two; it is quite probable a new lawyer would seek additional time to prepare a defense. (*Courts*, at p. 790, citing *People v. Haskett* (1982) 30 Cal.3d 841, 852.) Defendant's request to have private counsel appointed threatened to delay the trial date even longer. Under these circumstances, the trial court did not abuse its discretion in denying defendant's request for substitution of counsel. (*Courts*, at p. 789.)

IV

ENTRAPMENT DEFENSE

Defendant maintains the trial court should have given an instruction sua sponte on the defense of entrapment because his fiancée, Corey, acting as a police agent, had badgered him into buying the drugs. (*People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Watson* (2000) 22 Cal.4th 220, 222-223; *Mathews v. United States* (1988) 485 U.S. 58.) We independently review the record for substantial evidence of instructional error. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.) Because defendant never asked the court to give an instruction about entrapment based on CALCRIM No. 3408, he has waived the issue on appeal: “[D]efendant’s failure to request a clarifying instruction waives that claim. [Citations.]” (*People v. Arias* (1996) 13 Cal.4th 92, 170-171.)

Notwithstanding waiver, we conclude the record did not support giving an instruction sua sponte on entrapment:

“In California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. [Citation.] “[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.” [Citation.]’ [Citations.]

“The *Barraza* [*People v. Barraza* (1979) 23 Cal.3d 675] court described two guiding principles. “First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established.” [Citation.]’ [Citation.] “Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement.” [Citation.]’ [Citation.]” (*People v. Federico* (2011) 191 Cal.App.4th 1418, 1422.)

In this case, no evidence showed that Corey acted as an agent of law enforcement. Sufficient evidence would require a showing that Corey acted “at the request, suggestion, or direction” of law enforcement. (See CALCRIM No. 3408.) Here, defendant claims he bought the drugs for Corey but there is no evidence she acted for Deputy Ramos. Even though defendant’s vehicle contained an envelope with Corey’s name and address on it, that information did not serve to show a connection with law enforcement. Defendant’s claim that Deputy Ramos was acquainted with Corey and waited to ambush defendant, while knowing exactly where to find drugs, also did not establish that Corey acted as an agent of Deputy Ramos. There simply was no substantial evidence of entrapment and the trial court correctly did not give an instruction. (*People v. Federico, supra*, 191 Cal.App.4th at p. 1424.)

DECEASED'S STATEMENTS

Defendant testified that he purchased the methamphetamine at the behest of his fiancée, Corey, who called him 22 times before he was arrested. Because Corey had died, the trial court refused to let defendant offer hearsay testimony about what Corey had said to him.

Under Evidence Code section 1230, “one of the statutory exceptions to the hearsay rule, a party may introduce in evidence, for the truth of the matter stated, an out-of-court statement by a declarant who is unavailable as a witness at trial if the statement, when made, was against the declarant’s penal, pecuniary, proprietary, or social interest. A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) To determine whether the declaration passes the required threshold of trustworthiness, a trial court ‘may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.’ (*Ibid.*) On appeal, the trial court’s determination on this issue is reviewed for abuse of discretion. (*Ibid.*)” (*People v. Cudjo* (1993) 6 Cal.4th 585, 606-607.)

Here, Corey was unavailable as a witness because she had died. (Evid. Code, § 240, subd. (a)(3).) A statement by Corey exhorting defendant to buy methamphetamine

for her may certainly have subjected Corey to a risk of criminal liability. Given the circumstances, however, of Corey's alleged statement, the trial court had the discretion to conclude that it was inadmissible because it was so obviously self-serving by defendant.

Nevertheless, defendant argues Corey's statements to defendant were admissible to show his state of mind as an element of the defense of entrapment. (*People v. Rodriguez* (1966) 243 Cal.App.2d 522, 525-526; *People v. Mendoza* (1992) 8 Cal.App.4th 504, 514.) One obstacle to that argument, as discussed above, is that no evidence showed that Corey acted as an agent—at the request, suggestion, or direction—of law enforcement. (See CALCRIM No. 3408.) Even taken altogether, defendant's evidence that Corey commanded him to buy drugs, that the license plate light was operating, and that Deputy Ramos found the drugs immediately, combined with the circumstantial evidence of the envelope addressed to Corey, failed to demonstrate a connection with law enforcement. Therefore, the subject evidence was irrelevant. Without substantial evidence of entrapment, the trial court did not abuse its discretion in prohibiting the hearsay testimony about Corey.

Even if the court erred in not allowing defendant to testify additionally about Corey's statements to him, any error was harmless because defendant explained through his testimony that Corey had asked him to buy the drugs. Any error was not prejudicial and it was not reasonably probable defendant would have obtained a more favorable result had the additional testimony been admitted. (*People v. Contreras* (1962) 201 Cal.App.2d 854, 857-858.)

VI

EVIDENCE ABOUT RAMOS

In numerous variations, defendant repeatedly argues he was prejudiced and denied due process because he could not present evidence at trial about the credibility of Deputy Ramos, particularly that Deputy Ramos knew defendant was transporting drugs and where the drugs were concealed in the car. As we discuss below, defendant's claims lack merit and, in any event, any error was harmless.

During the hearing on the motion to suppress, Deputy Ramos testified that he knew Corey because he had arrested her a year before and she was on probation. Deputy Ramos also testified he did not know defendant and he did not know that defendant was transporting drugs to Trona. Deputy Ramos expressly denied that he knew defendant or why he was in Trona. Deputy Ramos did not know about any person coming to town with drugs and he had not communicated with Corey before defendant's arrival in Trona.

During trial, defense counsel asked Deputy Ramos whether he had any information about someone transporting drugs before he stopped defendant. The court sustained the prosecutor's objection on the grounds of relevance and privilege. The issue was discussed again at more length when the prosecutor asked for an in camera hearing on the issue of privilege for official information and the identity of a confidential informer.⁴ (Evid. Code, §§ 915, 1040, 1041, and 1042.) The court reasoned that

⁴ If Corey, who is deceased, was the confidential informer, no privilege would apply.

defendant could not present an entrapment defense. Therefore, the question the defense posed to Deputy Ramos concerned irrelevant information that was not admissible. The prosecutor then withdrew her objections based on Evidence Code sections 1040, 1041, and 1042, stating there actually was no privileged information. Apparently the prosecutor had been following a strategy dictated by the district attorney for the protection of confidential informants.⁵

Many of defendant's appellate arguments are based on the prosecutor making and withdrawing these objections and defendant's speculation that information may have existed that impeached Deputy Ramos's credibility. We reject the People's argument about waiver because the foregoing demonstrates that defense counsel did address the issue of whether Deputy Ramos's proposed testimony was relevant to the issue of his credibility. On the other hand, we agree the trial court did not abuse its discretion in refusing to admit irrelevant evidence. (Evid. Code, §§ 210, 350, 351, and 352; *People v. Hamilton* (2009) 45 Cal.4th 863, 913; *People v. Eubanks* (2011) 53 Cal.4th 110, 144-145.)

The issue of confidential information was relevant to probable cause and the legitimacy of the search but not to the matters at trial. (*People v. Hunt* (1963) 216 Cal.App.2d 753, 756-757.) Furthermore, at the suppression hearing, Deputy Ramos repeatedly testified during cross-examination that he did not possess prior confidential

⁵ The record is complicated by earlier comments made by the prosecutor in which she suggested there could be confidential information – an informant, paperwork, or wiretap – which was privileged under the Evidence Code.

information. Almost certainly, Deputy Ramos would have given the same testimony at trial. In questioning Deputy Ramos, defendant would not have elicited any evidence to impeach Deputy Ramos or support defendant's speculative entrapment theory. For these reasons, it is not reasonably probable defendant would have received a more favorable result had the evidence been admitted. (*People v. Contreras, supra*, 201 Cal.App.3d at p. 858.) Furthermore, because the prosecutor withdrew her assertion of privilege for confidential information, the issue is also moot about whether the court should have conducted an in camera hearing.

In related arguments, defendant contends the prosecution committed *Brady*⁶ error and prosecutorial error by not disclosing material exculpatory evidence, bearing on the credibility of Deputy Ramos or supporting the entrapment defense. (*People v. Verdugo* (2010) 50 Cal.4th 263, 279-280; *People v. Hoyos* (2007) 41 Cal.4th 872, 923; *People v. Little* (1997) 59 Cal.App.4th 426, 433-434; Pen. Code, § 1054.1 [the reciprocal discovery statute.]) Ultimately, however, the prosecutor withdrew her claim that any privileged or confidential information existed in spite of her previous suggestion about the need to protect confidential information if it existed. Because there was no discoverable information, there was no *Brady* error and no violation by the prosecutor of Penal Code section 1054.1. For the same reasons, the court did not abuse its discretion in denying the motion for mistrial. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

⁶ *Brady v. Maryland* (1963) 373 U.S. 83.

VII

OTHER EVIDENCE

Defendant also maintains he should have been allowed to present four witnesses to impeach Deputy Ramos's testimony about the dim license plate light. Once again defendant links his argument to his untenable contention that Deputy Ramos stopped defendant on a pretext because Deputy Ramos already knew defendant was ferrying drugs. Once again we conclude that, in precluding this evidence, the trial court did not abuse its discretion in an arbitrary, capricious, or absurd manner resulting in a manifest miscarriage of justice. (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Defendant's final claim of error, new on appeal, involves the contents of the envelope addressed to Corey that was never located after Deputy Ramos saw it in defendant's car. Because defendant never offered to testify about a letter and did not explain its relevance or purpose at trial, he cannot raise this challenge on appeal. (*People v. Wallace, supra*, 44 Cal.4th at pp. 1059-1060, citing Evid. Code, § 354 and *People v. Morrison* (2004) 34 Cal.4th 698, 711.)

VIII

DISPOSITION

The trial court did not abuse its discretion in refusing to grant defendant's request to appoint private counsel. Defendant could not establish a cognizable entrapment defense, a weakness that undermines every other argument asserted on appeal. In the absence of error, there is no cumulative error denying defendant constitutional due process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303.)

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.