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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.

MARK ANTHONY MILLER,

Defendant and Appellant.

E054592

(Super.Ct.No. SWF029553)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed with directions.

John F. Schuck, 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, Steve Oetting and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Mark Anthony Miller, of possessing methamphetamine for sale (Health & Saf. Code, § 11378) and the misdemeanor of

possessing paraphernalia for the consumption of a controlled substance (Health & Saf. Code, § 11364). In bifurcated proceedings, the trial court found true allegations that defendant had suffered three strike priors. However, the trial court subsequently dismissed two of those findings. Defendant was sentenced to prison for four years and appeals asking this court to review an in camera proceeding concerning the disclosure of the identity of a confidential informant. He also asserts that the trial court erred in excluding a statement he made. Finally, he contends that he is entitled, under equal protection principles, to presentence custody credits by the retroactive application of a version of Penal Code section 4019 not in effect at the time he committed his crimes, or at the time he served that presentence custody or at the time he was sentenced. We review the in camera proceedings and conclude that the trial court did not err in refusing to disclose the identity of the confidential information. We reject defendant's two remaining contentions and affirm, while directing the trial court to make some clarifying additions to the abstract of judgment and a minute order.

FACTS

On May 21, 2009, police officers entered a home in San Jacinto, pursuant to a search warrant. Defendant and his wife were inside. Defendant ran at the entering officers, saying, "What the fuck are you doing here? Get out of my house." In a safe in a laundry room adjacent to the master bedroom were documents in defendant's name. Mail addressed to defendant at the address of the home was also found in the home—one in the master bedroom. There were pipes used to smoke methamphetamine in the master bedroom. In a box in the master bedroom, which sat atop a mirror with residue on it were

scales and a tin containing a substance used to cut methamphetamine. In a tin on the dresser was 2.44 grams of methamphetamine. In defendant's front pant pocket was a tin containing 3.04 grams of methamphetamine. Fifty feet from the back of the house was a shed in which a black film canister was found which contained shards of methamphetamine, weighing 7.3 grams. In a bowl on the back patio were razor blades and one inch by one inch baggies attached to each other. Defendant said he lived at the house, he knew about the methamphetamine at the house and he used methamphetamine with his friends inside the house. Defendant also admitted possessing some of the methamphetamine, but not all of it. He said the methamphetamine which the searching officer had placed on the bed was his. In the opinion of the prosecution's expert, the drug was possessed for sale.

Defendant's wife testified for the defense, offering an improbable story (in light of defendant's admissions) that a lady whose car had broken down outside their home was living with her boyfriend in the master bedroom (while the wife and defendant occupied the remaining bedroom) and defendant and she had no knowledge of the goings-on inside the bedroom and did not go in there. However, pictures of defendant and his minor daughter and a certificate issued to him hung on the wall of the master bedroom. According to the searching officer, the second bedroom appeared to be unused. The wife denied knowledge of any methamphetamine in the house, on defendant's person or in the shed. She also claimed to be unaware that drugs were being used in the home and she did not know anything about the baggies.

1. *Review of In Camera Proceeding*

Before trial, defendant moved to have the identity of a confidential informant disclosed. In his moving papers, defendant asserted that between May 11 and May 19, 2009, a confidential informant contacted a police officer and said that a male by the name of “Mark” (defendant’s first name) sold methamphetamine and was one of the main suppliers in San Jacinto. While under police surveillance, the informant went to “Mark’s residence” and was contacted by a man named “Joe” as he approached the house. The informant told “Joe” that he wanted to buy \$20 worth of methamphetamine from “Mark.” “Joe” told the informant to go to a nearby motel and wait and he would get the methamphetamine from “Mark’s” house. The police saw “Joe” enter the house and exit shortly thereafter. “Joe” got into a car, drove around the corner, contacted the informant and told the informant that “Mark” was weighing the methamphetamine. “Joe” returned to “Mark’s” house, then returned to the informant where police observed a hand-to-hand exchange between “Joe” and the informant. The informant then gave the police a package containing a useable amount of methamphetamine. On May 21, 2009¹ “Mark’s” house (which is also referred to in defendant’s moving papers as his house) was searched pursuant to a warrant. In the master bedroom, the police found methamphetamine and a scale. Defendant had methamphetamine in his pocket. There was also methamphetamine in a tool shed in the back yard, but defendant claimed it was not his.

¹ In his moving papers, defendant alleged that this occurred on May 19, but the People corrected this in their moving papers.

In their opposition to defendant's motion, the People pointed out that defendant was being prosecuted for the methamphetamine he possessed on May 21, which had nothing to do with the information and activities of the informant except that the latter was part of the probable cause for which the search warrant of defendant's home had been issued. The People added that a cutting agent was also found at defendant's home during the execution of the search warrant. The People asserted that if the trial court found that defendant had made a prima facie showing to justify an in camera examination of the evidence the informant had regarding defendant's guilt of the charged offenses, disclosure of the identity of the informant would not be justified because that evidence would be inculpatory.

The trial court ordered that an in camera examination of that evidence take place, concluding that defendant had met his prima facie threshold, without further elaboration.

At the in camera hearing, defense counsel and the defendant were excluded. At the conclusion of the hearing, the trial court determined that it would not order that the identity of the informant be disclosed to the defense. We have examined the transcript of that hearing and conclude, de novo, that the trial court did not err and that it did not abuse its discretion² in refusing to order that the identity of the informant be disclosed. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1245, 1246 [overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835].)

² The People point out that the standard of review is unsettled.

2. *Exclusion of Evidence*

Before trial began, the People sought exclusion of any statements defendant made to the police which would be introduced by the defense. The parties did not specify below the precise content or context of such statement(s), with the exception that defendant sought admission of his “denial of sale.” Moreover, defense counsel implied, during his argument to the court, that these statements had been made during the same conversation defendant had with the police during which he made the statements that the prosecution introduced at trial.³ Defendant argued below that his “denial of sale” statement should be admitted to give completeness to his statements introduced into evidence by the prosecution at trial, which were that he lived in the house, he knew about the methamphetamine in the house and he and his friends used methamphetamine in the house.⁴ Although defendant did not cite the specific Evidence Code section dealing with this concept, it is 356, which provides, “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be

³ Because of this, and the fact that the prosecutor below did not challenge it, we reject the People’s effort to now assert that there was no evidence that the statement at issue was part of the same conversation during which the admitted statements were made.

⁴ Ironically, it was defense counsel, and not the prosecutor, who introduced into evidence, during cross-examination of the officer, defendant’s statement to the officer “admit[ing] to possessing some of the methamphetamine although not all of it” It was during this same examination at trial by defense counsel that the officer testified that during the preliminary hearing, he had testified that defendant had motioned towards the methamphetamine that had been found in the master bedroom and said, “That’s mine.” *Because the prosecution did not introduce either of these statements, Evidence Code section 356 cannot be used as the basis for introducing defendant’s “denial of sale” statement to explain them.*

inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, a declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

The trial court ruled that defendant’s self serving statements were inadmissible hearsay, no statement made by defendant could be introduced by the defense and the probative value of the statements were outweighed by their prejudicial effect.

Defendant here contends that the trial court abused its discretion (*People v. Pride* (1992) 3 Cal.4th 195, 235) in excluding his “denial of sale” statement. In support of his position, defendant quotes *People v. Arias* (1996) 13 Cal.4th 92, 156, which states, “The purpose of . . . section [356] is to prevent the use of selected aspects of a conversation . . . [or] declaration . . . so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party’s oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which ‘have some bearing upon, or connection with, the admission . . . in evidence.’ [Citations.]”

Where the statement at issue is not necessary to make the admitted statement understood, admission under Evidence Code section 356 is not appropriate. (*People v. Johnson* (2010) 183 Cal.App.4th 253, 288.) If the admitted statements were complete and understandable on their own, Evidence Code section 356 does not provide the basis for admitting other statements. (*People v. Zapien* (1993) 4 Cal.4th 929, 959.) Omission of the statement at issue must cause the admitted statements to be misleading. (*People v.*

Parrish (2007) 152 Cal.App.4th 263, 273.) The proponent of the statement, in this case, defendant, has the burden of establishing that its admission is necessary to understand the admitted statements. (*People v. Von Villas* (1992) 10 Cal.App.4th 201, 272.) Statements admissible under Evidence Code section 356 may yet be excluded under Evidence Code section 352. (See *Von Villas*; *People v. Samuels* (2005) 36 Cal.4th 96, 130.)

Defendant’s “denial of sale” statement did not give meaning to his statements that he lived at the house, he knew about the methamphetamine in the house and he and his friends used methamphetamine in the house, nor did exclusion of the former cause the latter to be misleading. The former were complete and understandable on their own. Additionally, the trial court concluded that admission of the former was barred by Evidence Code section 352. Defendant does not even address this ruling. The same reason we impute to the trial court for excluding the statement under Evidence Code section 352, i.e., that it was self-serving and, therefore, unreliable, provides the basis for our additional conclusion that even if the trial court erred in excluding the statement, reversal is not required, as it is not reasonably probable defendant would have enjoyed a better outcome had it been admitted. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Finally, defendant’s current claims that exclusion of his statement violated due process and his right to a fair trial were waived by his failure to assert them below. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166.)⁵

⁵ We do not consider the assertion of defense counsel below, in the context of the argument about the applicability of Evidence Code section 356, that “it is manifestly
[footnote continued on next page]

3. *Custody Credits*

Defendant committed his crimes when the pre-January 25, 2010 version of Penal Code section 4019, which allowed two credits for every four days of presentence custody, was in effect. (Former Pen. Code, § 4019, subs. (b) & (c).) When defendant was sentenced, on September 16, 2011, the September 28, 2010 version of Penal Code section 4019, which had identical calculations for credit, was in effect, however, that version applied only to crimes that were committed on or after September 28, 2010. (Former Pen. Code, § 4019, subd. (g).) Therefore, the January 25, 2010-September 27, 2011 version of Penal Code section 4019 applied. It provided, in pertinent part, that those who had suffered prior convictions for serious or violent felonies would receive two credits for every four days of presentence time served. (Former Pen. Code, § 4019, subs. (b)(2), (c)(2) & (f).) Accordingly, defendant was credited 16 days for the 33 days he spent in custody, which he completed on December 21, 2009. The version of Penal Code section 4019 that became effective October 1, 2011, provides for two days of credit for every two days of custody. (Pen. Code, § 4019, subs. (b) & (c).) However, it expressly states that this provision applies only to defendants who committed their crime on or after October 1, 2011 and any days earned prior to October 1, 2011 are to be

[footnote continued from previous page]

unfair to allow parts of a statement to come in that help . . . the People and leave out those that assist the defense” to be a sufficient invocation of either constitutional right.

calculated according to the prior law. (Pen. Code, § 4019, subd. (g).)⁶ Defendant here claims that equal protection principles entitle him to the benefit of the October 1, 2011 version of Penal Code section 4019. Based on the California Supreme Court’s holding in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), we disagree.

In *Brown*, the defendant committed his crime, served local time and was sentenced while the pre-January 25, 2010 version of Penal Code section 4019 was in effect. (*Brown, supra*, 54 Cal 4th at p. 318.) As is pertinent here, the defendant argued that equal protection principles required that the more generous provisions of the January 25, 2010 version of Penal Code section 4019 should be retroactively applied to him. The California Supreme Court rejected his contention, saying, “[T]he *method* by which the Legislature [in amending Penal Code section 4019 in January 2010 to provide for more generous credits] . . . was not to grant early release or credits regardless of conduct, . . . , but rather to increase the existing incentives for good conduct by offering well behaved prisoners the prospect of an even earlier release from custody. Defendant suggests the Legislature might have intended [the January 25, 2010 version of Penal Code] section 4019 to offer bonuses for past good behavior as well as incentives for future good behavior. Such an interpretation of the statute, however, finds no clear support in the

⁶ Effective September 28, 2010, Penal Code section 2933 was amended to add a provision for awarding one day credit for every day from the time of arrest until the time in-prison credits under Penal Code section 2933 begin, “notwithstanding” the provisions of Penal Code section 4019. (Former Pen. Code, § 2933, subd. (e)(1).) However, it did not apply to, inter alia, those who had suffered a serious or violent prior conviction. (Former Pen. Code, § 2933, subd. (e)(3).) Those individuals remained subject to the provisions of 4019. These provisions were dropped from the October 1, 2011 version of Penal Code section 2933. (Pen. Code, § 2933, subd. (e).)

statute’s language or legislative history.^[7] . . . [¶] . . . Credits . . . are *earned* day by day over the course of a defendant’s confinement as a predefined, expected reward for specified good behavior.” (*Brown, supra*, 54 Cal.4th at p. 322.) “The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] “This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” [Citation.] [¶] As we have already explained, the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows. On this point we find the decision in [*People v.*] *Strick* [(1983)] . . . 148 Cal.App.3d. 906 [*Strick*], persuasive. In that case, as noted [citation], the Court of Appeal rejected the claim that an expressly prospective law increasing conduct credits violated equal

⁷ In his reply brief, defendant asserts that the purpose of the October 1, 2011 version of Penal Code section 4019 was to reduce overcrowding in California’s prisons and reduce state corrections costs. Assuming, for the sake of argument, that this is true, we see no difference between this and the purpose of the January 25, 2010 version of Penal Code section 4019, which was to alleviate budgetary concerns. Moreover, as in *Brown*, defendant points to no statement in the October 1, 2011 version of Penal Code section 4019 or in its legislative history suggesting that the Legislature may have intended to offer bonuses for past good behavior.

protection unless applied retroactively to prisoners who had previously earned conduct credits at a lower rate. ‘The obvious purpose of the new section,’ the court reasoned, ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’ [Citation.] ‘Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ [Citation.] [¶] Defendant and amicus curiae contend this court’s decision in *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) . . . , implicitly rejected the conclusion the Court of Appeal would later reach in *Strick* . . . , that prisoners serving time before and after a conduct credit statute that takes effect are not similarly situated. We disagree. [¶] The defendant in *Sage* . . . , a case decided three years before *Strick* . . . , has been committed to the state hospital under the mentally disordered sex offender law [citation] and, after being found not amenable to treatment, sentenced to state prison for a felony. The question before the court was whether the defendant was entitled to conduct credit for the time he had spent in county jail before being sentenced. The version of section 4019 then in effect (§ 4019, as amended by Stats. 1978, ch. 1218, § 1, p. 3941) authorized presentence conduct credit for misdemeanants who later served their sentences in county jail but not for felons who were eventually sentenced to state prison. Finding no ‘rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons’ [citation], the court held the statute’s unequal treatment of felons and

misdemeanants for this purpose violated equal protection. (*Ibid.*) ¶ To be sure, one practical effect of *Sage* . . . , was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them. But amicus curiae reads too much into *Sage* by suggesting the opinion thereby implicitly foreclosed that prisoners serving time before and after incentives are announced are not similarly situated. The unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion (See *Sage, supra*, at p. 510 (conc. & dis. opn. of Clark, J.)) went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds. ¶ Defendant and amicus curiae also contend the present case is controlled by *In re Kapperman* [(1974)] . . . 11 Cal.3d 542, in which this court concluded that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison. We disagree. Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated. ¶ For these reasons, we concluded that equal protection does not require [the January 25,

2010 version of Penal Code, section 4019] to be applied retroactively.” (*Id.* at pp. 328-330.)

DISPOSITION

The trial court is directed to add the words “for sale” to the description of the crime on the abstract of judgment and to make clear in its minutes of September 16, 2011 that it dismissed only the first and second of defendant’s three strike priors. In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

RICHLI

J.

KING

J.