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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.

EDIBERTO AMAYA,

Defendant and Appellant.

E054885

(Super.Ct.No. RIF123518)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge.  
(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.  
VI, § 6 of the Cal. Const.) Affirmed with directions.

David Andreasen, 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 M. Wood, Kathryn Kirschbaum, and Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

## I

### INTRODUCTION

Defendant Ediberto Amaya was caught driving a car with a concealed compartment carrying methamphetamine with a potential street value of \$500,000. A jury convicted defendant of three offenses: sales of a controlled substance (Health & Saf. Code, § 11379); possession of a controlled substance for sale (Health & Saf. Code, § 11378); and possession of a false compartment for drugs. (Health & Saf. Code, § 11366.8.) Defendant pled guilty to count 4 for failure to appear. (Pen. Code, § 1320, subd. (b).) The court sentenced defendant to a total prison term of four years eight months. Defendant is also subject to an immigration and customs hold.

Defendant's appeal challenges his conviction on count 2, possession for sale, for which he received a stayed sentence of three years, and argues his eight-month sentence on count 3 should also be stayed. At trial, defendant testified he did not know drugs were in the car. His primary theory on appeal is that he was not personally selling methamphetamine but, instead, was transporting it on behalf of other people. We agree the eight-month sentence on count 3 should be stayed under Penal Code section 654. Otherwise, we affirm the judgment.

## II

### FACTUAL BACKGROUND

#### *A. The Prosecution Case*

At 7:30 p.m., on May 9, 2005, Riverside Police Officer Richard Glover was on patrol when he observed a car with tinted windows, driving below the speed limit and

more slowly than other cars. Officer Glover also saw the driver throw a cigarette out of the car window.

Officer Glover effected a traffic stop. As he approached the car, he saw defendant manipulate something in the back seat of the car. Defendant appeared extremely nervous and could not control his hands. He would not make eye contact with the officer and seemed to be tripping over his words. Defendant gave a false name and could not provide any identification. Defendant also stated the car belonged to Elizabeth Acevedo, who lived in Riverside, but the car was actually registered in San Jacinto.

Officer Glover conducted a search of the car and noticed that the rear passenger seat appeared to be slightly elevated. Defendant could not explain the reason for the elevation. Officer Glover saw what appeared to be a compartment underneath the seat, which defendant said must be part of the gas tank. Officer Glover knocked outside the gas tank and noticed that it sounded hollow, even though the gas gauge indicated it was half full. Inside the concealed compartment were three packages containing a substance later determined to be more than two pounds of methamphetamine and worth about \$500,000. When defendant was arrested, he had two cell phones and \$1,272 on his person.

#### *B. Expert Evidence*

A sheriff's investigator, Marc Bender, testified as an expert that the methamphetamine seized from appellant was extremely high grade. Bender also testified about the overall structure of drug cartels and the different roles played by various members of a typical drug organization. According to Bender, drug smugglers transport

10 to 40 pounds of drugs over the United States/Mexico border to “stash houses.” The drugs are then split into one- or two-pound packages and delivered to distributors. Each person down the distribution chain breaks the drugs into smaller amounts to sell, each time doubling the amount of money paid for the drugs.

Investigator Bender stated that a person responsible for the two pounds of methamphetamine in this case would be about four levels from the top of the drug organization, or about “halfway up the pyramid.” He stated that drugs are either possessed for personal use or for sales, and that, based on quantity, the amount possessed by defendant could not be possessed for personal use.

Presented with a hypothetical set of facts mirroring those in this case, Bender stated that someone in defendant’s position would know about the drugs in the hidden compartment, because the person above defendant in the drug organization would have to trust the person transporting the drugs to the next person down the chain.

### *C. The Defense*

Defendant testified that, on May 9, 2005, he attended a party in Hemet. He had gotten a ride there because his license was suspended after a DUI conviction. After the party, he wanted to go home to Riverside, so someone at the party, whom he did not know, allowed him to borrow a car.

Defendant denied knowing there were drugs or a hidden compartment in the car. Defendant denied reaching toward the back compartment as the officer was approaching, exhibiting signs of nervousness, avoiding eye contact, or telling the officers whose car it was. Defendant claimed the money he had was from a “pyramid” in which 10 people put

in \$100 a week, and received \$1,000 every tenth week.

Defendant's friend, Manual Ochoa, testified that he, too, was at the party on May 9, 2005, and he saw someone loan defendant his car for the night. He described defendant as not being the kind of person who would sell or transport methamphetamine.

### III

#### SUFFICIENT EVIDENCE OF POSSESSION FOR SALE

Defendant first contends there was not substantial evidence he intended to sell the methamphetamine he was transporting in the hidden compartment. Defendant claims that, because the jury was instructed that appellant had to have the "intent to sell" the drugs, his conviction on count 2 for possession for sale can only stand if there was substantial evidence of his intent to sell the drugs, not evidence that someone else intended to sell the drugs. Essentially, defendant contends he was only transporting drugs, and no evidence could allow the jury to conclude otherwise. We conclude there was ample evidence of defendant's intent to sell based on the quantity of drugs and the other circumstances, especially the testimony from Bender that defendant may have planned to sell the drugs to a distributor or to distribute it individually himself.

On appeal, the appellate court reviews the entire record to determine whether substantial evidence supports the verdict. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The appellate court presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. In applying this standard, the reviewing court must affirm the judgment unless under "no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745,

755.) The same standard applies when a conviction rests primarily on circumstantial evidence. (*People v. Kraft* (2000) 23 Ca1.4th 978, 1053.)

Despite defendant's claims to the contrary, the jury was presented with ample evidence of appellant's intent to sell the methamphetamine he was transporting. First and most significant, defendant was transporting over two pounds of high grade methamphetamine. In *People v. Grant* (1969) 1 Cal.App.3d 563, 570, the court held that possession of a large quantity of a controlled substance constitutes circumstantial evidence of possession for sale in violation of Health and Safety Code section 11378. Investigator Bender asserted that one individual could not personally use that quantity of drugs in the course of a lifetime. Defendant also had over \$1,000 cash on his person and two cell phones when he was arrested. Circumstantial evidence allowed a reasonable jury to find that defendant intended to sell the drugs he was transporting.

Defendant's argument appears to depend on his version of Bender's testimony, which actually supports defendant's conviction. (See *People v. Harris* (2000) 83 Cal.App.4th 371, 374-375; *People v. Newman* (1971) 5 Cal.3d 48, 53 [experienced officers may give their opinion that drugs are held for purposes of sale based upon matters as the quantity, packaging, and normal use of an individual].) Bender testified that the only reason to possess drugs is to use or sell them, and the amount possessed by defendant was not possessed for personal use. Additionally, when explaining the structure of Mexican drug cartels, Bender initially described defendant as a high level dealer. If someone is responsible for two pounds of methamphetamine, Bender concluded, "He's about . . . probably about four levels from the top. He's about halfway

up the pyramid. He's . . . when you get into multiple pound dealers, that's considered some pretty heavy weight." Bender explained that a person in defendant's position could sell the methamphetamine he was transporting for \$15,000 a pound to the next person in the distribution chain. Thus, the jury could conclude defendant intended to sell the methamphetamine he was transporting to the distributor below him. The prosecutor specifically asked Bender: "[I]t's [\$]15,000 from this person selling on to the next individual down the road, correct, in the chain?" and Bender answered, "Right. Right."

Alternatively, the jury could have concluded from Bender's description of the drug cartel that defendant had purchased the methamphetamine from the person above him in the chain and planned to break the drugs into smaller amounts to sell, thereby doubling his money. Speaking generally of the drug organization, Bender testified a distributor "may get 2 pounds. Then that guy breaks it down into half pounds or quarter pounds. He sells that, and he doubles his money." Defendant had more than two pounds of methamphetamine in his car when he was pulled over. Defendant may have been en route to his house or another location, where he planned to dilute the drugs with a cutting agent, repackage it, and sell it in smaller increments.

Based on a hypothetical set of facts, Bender also described defendant's role in the drug cartel as delivering to various distributors. But, to the extent defendant was merely a courier and not a seller, the jury could have rejected this opinion and concluded that defendant had the intent to sell. The jury was properly instructed that it was not required to accept any expert opinion as either true or accurate.

Contrary to defendant's position that Bender testified unequivocally that defendant

was transporting but not selling drugs, Bender's testimony was susceptible to different interpretations. The jury may have determined that defendant was planning to sell the methamphetamine and double his money. The fact that the jury was instructed it had to find defendant had the intent to sell, and found him guilty, indicates the jury found the circumstantial evidence of defendant's intent to sell to be persuasive, and rejected the theory that defendant was only delivering the drugs. We conclude there was ample evidence to support defendant's conviction on count 2 for possession of methamphetamine for sale.

#### IV

#### INSTRUCTION ON THE MEANING OF "INTENT TO SELL"

In the alternative, defendant argues that the trial court had a duty to instruct, *sua sponte*, regarding specific intent as it related to defendant's possession of drugs which he did not personally intend to sell. Defendant maintains the trial court needed to inform the jury that defendant could be convicted if he possessed the drugs with the intent that someone else sell them, but not if he acted only with the knowledge they would be sold.

Here, the objection was not raised below. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) Instead, the jury was properly instructed, in accordance with the statute and based on CALCRIM No. 2302, that defendant must have had the intent to sell the drugs at the time he possessed them. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) Notwithstanding that this issue was waived below, defendant's proposed instruction was not warranted and there could be no error in not giving the proposed instruction.

Before closing arguments, the trial court and both counsel discussed the jury instructions. With respect to count 2, the trial court read the text of CALCRIM No. 2302:

“To prove the defendant is guilty of this crime, the People must prove:

“One, the defendant unlawfully possessed a controlled substance;

“Two, the defendant knew of its presence;

“Three, the defendant knew of the substance’s nature or character as a controlled substance;

“Four, when the defendant possessed the controlled substance, he intended to sell it;

“Five, the controlled substance was methamphetamine;

“And six, the controlled substance was in a usable amount.

“Selling for the purpose of this instruction means exchanging for money, services, or anything of value.”

Defense counsel stated that, based on his trial strategy, he was not requesting instruction on the lesser included offense of simple possession. Defense counsel did not request any further instruction with respect to the “intent to sell” element. The jury was instructed that “[w]ords and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.”

Defendant contends the court should have independently instructed the jury that defendant must have intended for someone else to sell the drugs rather than simply knowing the drugs would be sold. “The meaning of instructions is tested by ‘whether there is a “reasonable likelihood” that the jury misconstrued or misapplied the law in light

of the instructions given, the entire record of trial, and the arguments of counsel.’ [Citation].” (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) If the meaning of the instructions, as communicated to the jury, was unobjectionable, the instructions cannot be deemed erroneous. (*People v. Benson* (1990) 52 Cal.3d 754, 801.)

There is no reasonable likelihood the jury misconstrued or misapplied the law. The jurors were instructed that, to convict defendant, they needed to find that he had the intent to sell the drugs. The fact that they did convict him means they found that he intended to sell drugs.

Furthermore, the trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047-1050.) Review of the adequacy of instructions is based on whether the trial court fully and fairly instructed on the applicable law, and instructions should be interpreted so as to support the judgment, rather than defeat it, if they are reasonably susceptible to such interpretation. (*People v. Riley* (2010) 185 Cal.App.4th 754, 767.) There was no need for the trial court to instruct on whether defendant intended the next distributor to sell the drugs or instead only acted with the knowledge that they would be sold because that issue was not closely and openly connected to the facts as they were presented to the jury.

The prosecutor’s central argument was defendant personally intended to sell the drugs. Defense counsel argued defendant had no knowledge whatsoever that drugs were in the vehicle. The idea that defendant could be convicted if he possessed one intent, but

not if he possessed the other, was never put before the jury by either party. The trial court did not need to instruct the jury independently on this novel theory. Even if the prosecutor or the court had suggested such an instruction, it is highly likely defense counsel would have rejected it based on the defense theory that defendant lacked any knowledge whatsoever—just as defense counsel rejected any instructions of lesser included offenses.

The trial court did not commit any error instructing the jury. We reject this claim on appeal.

## V

### PENAL CODE SECTION 654 STAY

Finally, defendant contends his sentence on count 3, Health and Safety Code section 11366.8, subdivision (a), must be stayed pursuant to Penal Code section 654<sup>1</sup> because his only objective in having the false compartment was to facilitate the transportation of the methamphetamine. “Whether [Penal Code] section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] [The appellate court should] review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the

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<sup>1</sup> Penal Code section 654 provides, in part: “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.” (Pen. Code, § 654, subd. (a).)

evidence. [Citation.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) A trial court’s findings may be either express or implied from the court’s ruling. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.) In the absence of any reference to Penal Code section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. (See *ibid.*; *People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

At sentencing, the trial court deemed count 1, the transportation charge, to be the principal count—and stayed defendant’s sentence for possession for sale pursuant to Penal Code section 654—but sentenced defendant to a consecutive eight-month term for using a false compartment. The probation report does not address the applicability of Penal Code section 654, and neither party addressed the issue at sentencing.

While Penal Code section 654 literally applies only to multiple statutory violations arising out of the same act or omission, its protection has been extended to cases in which there are several offenses committed during ““a course of conduct deemed to be indivisible in time.”” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) For Penal Code section 654 purposes, the divisibility of a course of conduct depends upon the intent and objective of the defendant. (*In re Adams* (1975) 14 Cal.3d 629, 634.) The principal inquiry is whether the defendant’s criminal intent and objective were single or multiple, and each case must be determined on its own facts. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) In *People v. Jones* (2012) 54 Cal.4th 350, the California Supreme Court recently held that a defendant could not be punished for three crimes based on a single act of possessing a gun.

In this case, the People argue that, where evidence indicates that a defendant intends to sell his current inventory of drugs and also demonstrates a means of selling future inventory on an ongoing basis, Penal Code section 654 does not require the court to stay the sentence for either offense. (See *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1604.) In *Moseley*, the defendant was convicted of possession of methamphetamine for sale, possession of marijuana, and opening or maintaining a place for selling, giving away, or using a controlled substance. (*Id.* at p. 1599.) On appeal, the defendant argued his sentence for opening or maintaining a place for selling, giving away, or using a controlled substance should have been stayed pursuant to Penal Code section 654 because it and the charge for possession of methamphetamine for sale arose from a single criminal objective. (*Moseley*, at p. 1600.) The reviewing court disagreed, reasoning that substantial evidence supported the trial court's implicit finding that, with respect to the possession for sales charge, the defendant's intent was to sell the specific drugs he had on his person at that time but, with respect to the opening or maintaining a place to sell, give away, or use a controlled substance charge, the intent was to maintain a means of selling additional or future inventory of drugs. (*Id.* at p. 1604.)

Here, defendant's intent was to transport and sell two pounds of methamphetamine. But, the evidence at trial supports what the trial court impliedly found: defendant's intent in using the false compartment was to have a means of transporting and selling not only the current load of methamphetamine, but future amounts as well. On the one hand, Investigator Bender testified that appellant was likely highly placed in the Mexican drug organization and would have earned the trust of those

above him. The evidence showed that the hidden compartment was permanently installed and a complicated device that required the car key to be positioned in a specific manner in order to operate. On the other hand, what the evidence did not show is that defendant owned the car, had used the car for drug transactions in the past, or had any plans to use the car for future drug transactions. As such, there was not substantial evidence that, by possessing the false compartment for drugs, defendant intended to transport not only these drugs, but future drugs as well.

The trial court could not plausibly identify multiple criminal objectives. (*People v. Jones, supra*, 54 Cal.4th at p. 359; *People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) For these reasons, substantial evidence supports the trial court’s finding, and defendant’s consecutive sentence on count 3 should be upheld.

VI

DISPOSITION

We reject defendant’s challenges to count 2. Defendant’s eight-month sentence on count 3 should be stayed and the abstract of judgment corrected. A copy of the corrected abstract of judgment is to be forwarded to the Department of Corrections and Rehabilitation. We affirm the judgment.

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CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

KING  
J.