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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.

JOE JOHN ESPARZA

Defendant and Appellant.

E056278

(Super.Ct.No. BAF1100248)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed in part and reversed in part with directions.

Athena Shudde, 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, and Melissa Mandel and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant and appellant Joe John Esparza guilty of multiple counts, including assault with a firearm, second degree robbery, and possession of methamphetamine (counts 14, 15, 18, 29-32, 35, & 37). In a bifurcated trial, the court made true findings as to certain sentence enhancement allegations. Defendant was sentenced to 21 years 4 months in prison.

On appeal, defendant argues there was insufficient evidence to support his conviction of possession of methamphetamine (count 37). He contends there is no evidence to support any of the elements of possession of methamphetamine in that the baggie containing the drug was found on the ground in a parking lot 5 to 10 feet from where defendant and his accomplices were arrested.

He further argues that the minute order as to the sentence on count 29 should be corrected to properly reflect the court's oral pronouncement of judgment.

The People concede both points. We agree with the parties on both arguments. We reverse the conviction for possession of methamphetamine and vacate the sentence. The convictions on all other counts are affirmed. We will also direct the trial court to make a new minute order to properly reflect the court's oral pronouncement of judgment as to count 29.

II. FACTUAL SUMMARY

On April 22, 2011, defendant was involved in an early morning armed robbery of a convenience store in Cabazon. As Margaret Vaughn, an employee of the store, was

leaving the store around 6:15 a.m., a man wearing a mask entered the store with a shotgun held to his side. The masked man jumped over the counter, shoved the shotgun into store clerk Debra Law's stomach, and demanded money.

As Vaughn attempted to call 911, she was approached by another man in light jeans, a black hoodie, and a bandanna covering his face. The man ran up to her, grabbed her, threatened her safety, and took her telephone. The hooded man ran back to a beige Honda Accord, where a third man waited in the driver's seat.

The masked man came out of the store minutes later with a store bag full of money. The masked man got into the beige Honda and all three drove away.

Law immediately called 911. Vaughn reentered the store and was able to give a partial license plate number and provided a description of the car. A police broadcast was sent to patrol units in the area informing officers of the robbery and to be on the lookout for three suspects and a champagne or gold Honda Accord.

Around 8:00 a.m., David Abasta, an off-duty sheriff's deputy, observed the Honda in a diner parking lot in Cabazon. The deputy watched the three men and the car while waiting for backup to arrive. He observed all three men exit the car and saw at least one of them change clothing.

When uniformed officers arrived, the three men were detained and searched. A search of the Honda revealed gloves, cigarettes, a bag from the convenience store, a balaclava, a number of sweatshirts, and two cell phones, including one belonging to

Vaughn. Money was found on the men and a loaded shotgun was found in the engine compartment.

Approximately 5 to 10 feet from the car a sheriff's deputy found a baggie containing a white crystalline substance. The baggie was later found to contain 0.19 grams of methamphetamine.

III. ANALYSIS

A. *Insufficient Evidence to Support Defendant's Methamphetamine Conviction*

Defendant argues there was insufficient evidence to support the methamphetamine conviction under Health and Safety Code section 11377, subdivision (a). He specifically argues there was no evidence to support the elements of dominion and control, possession, or knowledge of the character of the methamphetamine necessary for a conviction of that offense. We agree.

When reviewing an insufficiency of the evidence claim, the appellate court must decide “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Unlawful possession of methamphetamine requires proof that the accused: (1) possessed, exercised control over, or had the right to control an amount of methamphetamine; (2) knew of its presence; (3) knew of its nature as a controlled substance; and (4) possessed a usable quantity of methamphetamine. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175.)

“It is well settled, of course, that in a prosecution for unlawful possession of narcotics, it is incumbent upon the prosecution to present evidence from which the trier of the facts reasonably may infer and find that the accused had dominion and control over the contraband Mere proof of opportunity of access to a place where narcotics are found will not support a finding of unlaw[ful] possession. [Citation.]’ [Citation.]”
(*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.)

In this case, Officer Abasta recognized the gold Honda Accord from a police broadcast as the car used in the convenience store robbery. He called for backup and kept an eye on defendant and his cohorts until backup arrived. Officer Abasta was approximately 100 feet from the car while waiting for backup. He watched the three men get out of the car at different times and saw one take a sweatshirt off. The officer stated that the men were never more than three to five feet from the car.

When backup arrived, the men were detained and the car and surrounding area were searched. The baggie containing the methamphetamine was found on the ground about 5 to 10 feet from defendant and his accomplices. However, there was no evidence that defendant or his accomplices either threw or dropped the baggie on the ground.

Defendant never discussed the baggie with the officers, and there was no evidence that defendant was under the influence of methamphetamine or possessed drug paraphernalia. Defendant was not agitated, and did not seem to notice the baggie on the ground because he never made a movement toward or away from it.

The People agree that the methamphetamine conviction was based solely on defendant's close proximity to the baggie and that such evidence is insufficient to support the conviction for possession. As they recognize, "[m]ere presence . . . is not sufficient to justify a finding of guilt." (*People v. Foster* (1953) 115 Cal.App.2d 866, 868.) For these reasons, the conviction on count 37 for possession of a controlled substance is reversed and the sentence vacated.

B. *Correction of the Minute Order*

Defendant contends the minute order does not properly reflect the trial court's oral pronouncement of judgment as to count 29. We agree.

If there is a discrepancy between the oral pronouncement and the minute order, the oral pronouncement controls and the appellate court can correct the error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

Under count 29, defendant was convicted of conspiracy to commit robbery under Penal Code section 182, subdivision (a)(1).¹ The crime is punishable by two, three, or five years in prison. (§§ 182, subd. (a), 213, subd. (a)(2).) Because the court found true a prior strike allegation, the sentence must be doubled. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) Under section 654, the sentence may be imposed and stayed.

Here, the court pronounced defendant's sentence on count 29 by stating: "[O]ne-third doubled of six years, stayed pursuant to [section] 654." Although the statement is not perfectly clear, both defendant and the People interpret it to mean that defendant was

¹ All further statutory references are to the Penal Code unless otherwise indicated.

sentenced to a six-year term on count 29 (which was stayed under § 654). This is consistent with the selection of the middle term of three years, doubled under the “Three Strikes” law for a total of six years.²

The court’s minute order regarding sentencing states that the sentence is: “1/3 the MID term of 10 years for a total of 6 years and 0 months.” There are several problems with this statement. First, the middle term for the conspiracy to commit robbery under count 29 is three years, not 10 years. Second, using one-third of the middle term is inappropriate because the sentence was stayed under section 654. (See § 1170.1, subd. (a).) Third, one-third of 10 years does not equal six years. Most importantly, however, the statement is not consistent with the oral pronouncement of the sentence, which imposed a six-year term based on a doubling of the middle term of three years.

The People join in defendant’s request to correct the error. We agree with the parties and will direct the court to issue a new minute order as set forth below.

IV. DISPOSITION

The judgment is affirmed in part and reversed in part. Count 37 is reversed and the sentence on that count is vacated. Following remand, the trial court shall issue a new minute order stating that the sentence on count 29 shall be six years (double the middle term of three years) and stayed under section 654. The court shall prepare an amended

² The court’s reference to “one-third” suggests it used one-third of the middle term of three years to calculate the sentence. Using one-third of the middle term would be appropriate, however, only if the court was imposing a consecutive sentence not stayed by section 654. (See § 1170.1, subd. (a).) The court’s reference to “one-third” thus appears to be either a mistake or a mistranscription.

abstract of judgment to reflect the reversal of the conviction on count 37 and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

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KING
J.

We concur:

RICHLI
Acting P. J.

MILLER
J.