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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.

IRAN KAWHAN ARMSTRONG,

Defendant and Appellant.

E058473

(Super.Ct.No. FVI1203363)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M.

Tomberlin, Judge. Reversed with directions.

Jessica C. Butterick, 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, Charles C. Ragland and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Iran Kawhan Armstrong guilty of possession of a controlled substance for sale (Health & Saf. Code, § 11378, count 1)

and offering to sell or transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a), count 2). At a bifurcated hearing, defendant admitted that he had two prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i))¹ and that he had served four prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court subsequently discovered that the jury foreman had signed both the guilty and not guilty verdict forms for count 2. The parties and the court resolved the verdict discrepancy, and the court sentenced defendant to three years on count 1, doubled pursuant to the prior strikes. On count 2, the court imposed a four-year term, but stayed it pursuant to section 654. The court imposed one-year terms on each of the prior prison enhancements, but stayed those terms. Defendant's total commitment was six years in state prison.

On appeal, defendant contends: (1) the court failed to properly instruct the jury that a defendant's unrecorded out-of-court statements should be viewed with caution; and (2) the court erroneously denied his *Marsden*² motion without a hearing. We reverse the judgment with directions.

FACTUAL BACKGROUND

On December 24, 2012, at approximately 7:00 p.m., Antonia Carmona was waiting for her grandmother to pick her up at a bus stop. Defendant approached her and asked if he could use her phone. Carmona said her phone did not work, and she

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

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

proceeded to walk to a nearby store to wait for her grandmother there. Defendant followed her and again asked to use her phone. Carmona refused again. Defendant asked her how old she was, and she said, "Old enough." He said he was old enough to be her father or grandfather. Defendant then pulled a baggie "with white stuff in it" out of his pocket and asked if she would be interested in buying it. Defendant said, "Would you like to buy some of this s---?" Carmona declined. As defendant was putting the baggie back in his pocket, he said, "I got that good stuff. It's coke." Carmona said, "No, thank you," and walked across the street to another store. She then called 911.

Officer William Underhill responded to the call that "a Black male adult was attempting to sell someone drugs." The officer drove to the area where the two stores were located. He noticed defendant, who matched the description of the suspect, walking in between two pillars near the stores. As Officer Underhill was passing by, he noticed that defendant tried to hide himself behind a pillar; then defendant poked his head around the corner, looking at him. Officer Underhill made a U-turn, got out of his patrol car, and approached defendant. Officer Underhill looked around the area and found a small plastic bag containing a white crystalline substance and a glass pipe in a planter that was within arm's reach of defendant. The glass pipe was one commonly used for smoking methamphetamine. Officer Underhill conducted a field test of the substance, and it tested positive for methamphetamine. Officer Underhill did not notice any indicia that it was possessed for sale (e.g., currency, pay-owe sheets,

a scale). He also did not notice any signs or symptoms of defendant being under the influence of drugs.

The white substance was later tested at the sheriff's department crime lab and was confirmed to be methamphetamine. The substance weighed .51 grams.

ANALYSIS

I. The Trial Court's Failure to Instruct the Jury to View Evidence of Defendant's Statement With Caution Was Harmless

Defendant argues that he was prejudiced by the court's failure to instruct sua sponte that evidence of his out-of-court statement to Carmona, when he offered to sell her drugs, was to be viewed with caution. He claims that his convictions must accordingly be reversed. The People concede that the court did not instruct the jury to view his statement with caution, but contend that the error was harmless. We agree with the People.

“When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution. [Citation.]” (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) However, as the Supreme Court explained in *People v. Beagle* (1972) 6 Cal.3d 441, superseded on other grounds as stated in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208-209, “[t]he omission . . . does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. [Citations.]” (*Beagle*, at pp. 455-456.) “In assessing potential prejudice, [the

Supreme Court] stressed that the primary purpose of the cautionary instruction ‘is to assist the jury in determining if the statement was in fact made.’ [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94 (*Stankewitz*).

Applying these principles to the case at hand, we conclude that there is no reasonable probability the jury would have reached a different result absent the error. The testimony concerning defendant’s statement to Carmona offering to sell her drugs was uncontradicted; defendant “adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported.” (*Stankewitz, supra*, 51 Cal.3d at p. 94.) Furthermore, “[t]here was no conflicting testimony concerning the precise words used, their context or their meaning.” (*Ibid.*) Carmona testified that when defendant pulled the baggie from his pocket, he asked, “Would you like to buy some of this s---?” When she declined, he put the baggie back in his pocket and said, “I got that good stuff. It’s coke.”

Defendant argues that the instructional error was prejudicial because there was “substantial conflict over the precise words [he] used and whether he actually made the statement.” He claims that there was confusion over whether Carmona said that defendant used the word “s---” or “coke.” However, Carmona made it clear, on cross-examination and redirect examination, that defendant used both terms.

Defendant further contends that the exact words defendant used were critical since the prosecution had to prove that he intended to sell Carmona methamphetamine in order to convict him. He claims that if he offered to sell her “coke,” the jury “may have been less likely to believe that he intended to sell her methamphetamine.” This

claim is meritless. The jury was instructed that, in order for defendant to be found guilty of possession for sale of methamphetamine in count 1, the People had to prove that: (1) he possessed a controlled substance; (2) he knew of its presence; (3) he knew of its nature as a controlled substance; (4) when he possessed the controlled substance, he intended to sell it; and (5) the controlled substance was methamphetamine. The evidence here supported all of these elements.

Defendant also argues that there were “good reasons to doubt whether [he] offered Carmona drugs at all.” He cites reasons such as, it was dark that night, he was old and drunk, he was hitting on Carmona and following her, he scared her, and she could not accurately describe the drugs, the quantity of the drugs, or the baggie. None of these factors have any bearing on whether or not defendant actually offered to sell Carmona drugs. Moreover, the issue defendant raises is whether Carmona was credible when she testified that defendant offered to sell her drugs. The jury was properly instructed on how to judge her credibility as a witness.

Defendant further contends that the instructional error was prejudicial because his out-of-court statement to Carmona was the People’s only evidence that he intended to sell methamphetamine. Furthermore, he asserts that the evidence of possession was “relatively weak,” the police did not investigate whether the drugs were for personal use, and the jury’s questions and lengthy deliberations indicate that the case was close. Defendant correctly points out that Carmona was the sole witness to his statements. The jury was instructed that “the testimony of only one witness can prove any fact,” and that, before it concluded the testimony of the one witness proved a fact, the jury

“should carefully review all the evidence.” This admonition adequately instructed the jury to accept Carmona’s testimony about defendant’s statement only after careful review.

Defendant further avers that the court’s failure to give the cautionary instruction denied him a fair trial. However, “[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution. [Citation.] Failure to give the cautionary instruction is not one of the ““very narrow[.]”” categories of error that make the trial fundamentally unfair. [Citation.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 393, superseded by statute on other grounds, as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.)

We conclude there is no reasonable probability the jury would have reached a different result if the court had instructed it to view the evidence of defendant’s statement offering to sell drugs with caution. (See *Stankewitz, supra*, 51 Cal.3d at p. 94.)

II. The Matter Should Be Remanded for a Hearing on Defendant’s *Marsden* Request

Defendant contends, and the People concede, that the trial court erred in denying his motion to replace appointed counsel on the basis of its untimeliness. Defendant asserts that his convictions should thus be reversed. The People assert that the matter should be remanded to the trial court with directions to reconsider defendant’s *Marsden* request. If the request is denied, it should reinstate the judgment; if the request is granted, it should set the matter for retrial. We agree with the People.

A. *Relevant Background*

On the second day of trial, after in limine motions, defense counsel advised the court that defendant wanted him to be fired and that the court should hold a *Marsden* hearing. The court confirmed with defendant that he wanted defense counsel removed and that he wanted another attorney. The court then stated: “Okay. Well, that’s untimely, and I’m not going to hear anything more about getting another attorney because you won’t be able to get another attorney to come in this morning and make an opening statement. I don’t have one for you. [¶] We’re going to go right into opening statement. You’ll be giving an opening statement in three minutes or you can waive opening statement. It’s totally up to you. But it’s untimely to have an attorney fired at this point in the proceedings.” Defendant attempted to tell the court what the problem was, but the court refused to listen to his reasons. Defendant clearly stated, “I want a new lawyer.” The court replied, “You’re not going to get a new lawyer.”

B. *The Court Erred in Finding Defendant’s Request Untimely and Failing to Conduct a Marsden Hearing*

“[A]t any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to our holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney. [Citation.] In turn, if the defendant makes a showing during a *Marsden* hearing that his right to counsel has been “‘substantially impaired’” [citation], substitute counsel must be appointed as attorney of record for all purposes [citation].” (*People v. Sanchez* (2011) 53 Cal.4th 80, 90, fn. omitted (*Sanchez*).)

In *People v. Minor* (1980) 104 Cal.App.3d 194 (*Minor*), the defendant appeared for arraignment and requested new counsel. (*Id.* at p. 197.) The court summarily denied the request. (*Ibid.*) On appeal, the defendant contended that it was a denial of due process for the court to reject the request without giving him an opportunity to state his reason for wanting the public defender relieved and another attorney appointed. (*Ibid.*) The court agreed and reversed the judgment. (*Ibid.*) In doing so, the court stated that the error was not harmless beyond a reasonable doubt since the record did “not exclude the possibility that there existed some legitimate complaint which, if *Marsden* standards had been met, would have been disclosed with the result that new counsel would have been appointed.” (*Id.* at p. 198.) The court observed that “when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made.” (*Id.* at p. 199.) The court concluded that the trial record was free of error and that the only “infirmity in the judgment” was the pretrial *Marsden* error. (*Id.* at p. 200.) The court thus reversed the judgment with directions for the trial court to conduct a full *Marsden* hearing. (*Ibid.*) The court stated that if the trial court determines that good cause for appointment of new counsel has been shown, the court must appoint new counsel and set the case for retrial. (*Ibid.*) However, if the court determines that good cause has not been shown, the court must reinstate the judgment. (*Ibid.*)

In *People v. Ivans* (1992) 2 Cal.App.4th 1654 [Fourth Dist., Div. Two] (*Ivans*), this court similarly held that when a request for new counsel comes after trial, and the trial court fails to conduct a proper *Marsden* hearing, “[t]he appropriate course of action is to remand to the trial court to allow it to fully inquire into appellant’s allegations concerning counsel’s performance. Following the inquiry, if the trial court determines that defendant has presented a colorable claim of ineffective assistance, then the court must appoint new counsel to fully investigate and present the motion for new trial. If, on the other hand, the inquiry does not disclose a colorable claim, the motion for new trial may be denied and the judgment reinstated. [Citation.]’ [Citation.]” (*Id.* at p. 1667.)

In the instant case, the court erred in finding defendant’s *Marsden* request untimely and in refusing him the opportunity to explain his grounds for being dissatisfied with his appointed counsel. (*Sanchez, supra*, 53 Cal.4th at p. 90.) Pursuant to the holdings in *Minor, supra*, 104 Cal.App.3d 194 and *Ivans, supra*, 2 Cal.App.4th 1654, we conclude that the appropriate remedy is to remand the matter to the trial court to conduct a *Marsden* hearing. If the court determines that good cause for appointment of new counsel has been shown, the court shall appoint new counsel and set the case for retrial. If good cause is not shown, then the court shall reinstate the judgment. (*Minor, supra*, 104 Cal.App.3d at p. 200.)

DISPOSITION

The judgment is reversed with directions for the trial court to conduct a hearing at which defendant shall have a full opportunity to state his reasons for desiring the

appointment of new counsel. The court shall determine the application for new counsel in light of *Marsden, supra*, 2 Cal.3d 118. If the court determines that good cause for appointment of new counsel has been shown, the court shall appoint new counsel and set the case for retrial. If the court determines that good cause has not been shown, it shall reinstate the judgment.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.