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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALANIZ GARIBAY,

Defendant and Appellant.

F061887

(Super. Ct. No. BF134200A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David R. Rhodes and Michael Dolidia, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Kane, J., and Detjen, J.

On November 5, 2010, the Kern County District Attorney charged appellant, Jesus Alaniz Garibay, with transportation, sale or furnishing cocaine (count 1/Health & Saf. Code, § 11352, subd. (a)),<sup>1</sup> possession for sale of cocaine (count 2/§ 11351), and possession of cocaine (count 3/§ 11350, subd. (a)), a lesser included offense of the possession for sale charged in count 2.

On January 12, 2011, a jury convicted Garibay on count 1.

On February 10, 2011, the court sentenced Garibay to the middle term of four years.

On appeal, Garibay contends the court committed instructional error. We affirm.

## **FACTS**

### ***The Trial Evidence***

At Garibay's trial, Kern County Sheriff's Deputy Tae Park testified that on June 10, 2010, at approximately 11:45 p.m., he was on patrol in Delano when he stopped a pickup truck in which four people, including Garibay, were riding. Garibay was seated on a bench seat next to the passenger's door. An unidentified woman was driving, a second unidentified woman sat next to her, and Roberto Zamora, the registered owner of the truck, sat between the second woman and Garibay. Deputy Park had the four occupants exit the truck and searched it. Under the bench seat where Zamora was sitting, Park found a white plastic baggie, tied in a knot at the top, containing four individual bindles of cocaine that were each twisted and tied with a rubber band at the top. Deputy Park continued searching the truck and found a plastic baggie containing cocaine in the glove compartment.<sup>2</sup>

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

<sup>2</sup> Criminalist Apryl Brown testified that the four bindles found in a plastic baggie weighed 1.91 grams, including packaging. The white powder contained in two of these

During a search of Garibay, Deputy Park found 21 blue rubber bands in Garibay's front coin pocket that were identical to the ones that were used to tie the bindles of cocaine. In Garibay's front pocket, Park found a total of \$120 consisting of five \$20 bills, one \$10 bill, one \$5 bill, and five \$1 bills.

Kern County Sheriff's Deputy Enrique Bravo testified that after he arrived on the scene, Garibay and Zamora were placed in the back of his patrol car where Bravo had placed and activated a digital recorder. A transcript of the conversation was submitted into evidence. In the recorded conversation, Zamora complained several times that someone snitched on them. When Zamora stated that the deputies already knew that Garibay "sold there," Garibay did not deny selling drugs. Instead, he replied, "No. It's not here. (unintelligible) I was very comfortable there, Roberto. If I hadn't left nothing like this would've happened. I was comfortable there. Nobody knows anything there. *I only had three fucking twenties.*<sup>[3]</sup> *The one I gave you and I only had two left.* That's all I had. I didn't have anymore. That's what we were using there."<sup>4</sup> (Italics added.) Garibay reiterated several times that he had been in possession of three 20's; that he gave one 20 to Zamora, kept two 20's, and threw his two 20's by one of the truck tires after it was stopped.<sup>5</sup> When Zamora asked Garibay if the deputies found any money on him,

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bindles weighed 0.70 grams and contained cocaine. The white powder found in the baggie in the glove compartment weighed 18 milligrams and also contained cocaine.

<sup>3</sup> In the interests of brevity and clarity, the terms "twenty" and "twenties" will be referred to as "20" and "20's", respectively.

<sup>4</sup> Bravo testified as an expert that a "20" refers to 0.2 grams of methamphetamine, cocaine, or crack cocaine and that the cocaine found in the truck was possessed for sale and distribution.

<sup>5</sup> For example, at another point in the conversation, Garibay stated, "But this was from when we got out fast. It was a fast job. For you it is nothing. (unintelligible) it was just the [20] that I gave you and the two that I have. *That's all they got. That's all. There's no more. There's just three fucking [20's]. The one that I gave you. I don't know what you did with it. And the, and the fucking*

Garibay replied that they found about \$100 or \$140 on him. He did not, however, describe these amounts in terms of 20's.<sup>6</sup> Zamora also told Garibay three times that he should have placed "it" or "them" in his "balls" because the deputies would not have searched him there. Neither Garibay nor Zamora, however, mentioned anything during the recorded conversation about Garibay lending Zamora money.

Garibay testified that he was in the truck because Zamora had asked to borrow \$60 to buy beer to "party" with the two women in the truck and Zamora asked Garibay to accompany him to the store. Garibay denied having any drugs when he entered the truck or giving or selling any drugs to Zamora or the women. He also denied putting any baggies of cocaine in the glove compartment or under the seat and he did not know how they got there. Garibay further testified that Deputy Park found the rubber bands under the seat where Zamora was sitting, not on Garibay. The money found on him was from a check for \$463 he received on June 6 or 7, 2010, and cashed on June 8, 2010. Garibay claimed that during the recorded conversation when they referred to 20's, they were talking about \$20 bills, not drugs.

### *Jury Deliberations*

On January 10, 2011, the jury deliberated from 4:31 p.m. to 4:45 p.m.

On January 11, 2011, after one juror was replaced, the jury began their deliberations anew at 10:13 a.m. and continued through 4:30 p.m. with a lunch break of

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*two that I had and I threw them on the tire. They're right there. They're not in the truck. They are there on the tire. When I got off both of them are down there. No both of them are on the tire. Those, those, the two that I had are on the tire. They're right there and they haven't even looked there. Hopefully they're not.*" (Italics added.)

<sup>6</sup> When Zamora asked Garibay how much money the deputies "[got] on him," Garibay replied: "Like about fucking... I had just cashed the check. I have the pay stubs. About 100 dollars. That's how much I had, about 140. I don't have any more."

an hour and a half and two short breaks to address notes by the jury. One of the notes asked the court for “[t]he extended, legal definition of intent.”

On January 12, 2011, the jury began deliberating at 9:00 a.m. At 10:21 a.m., the jury was called into the courtroom in response to a jury note stating that they were unable to reach a verdict on count 2. The foreman then advised the court, in pertinent part, that they had reached a guilty verdict on count 1, but were unable to reach a verdict on count 2. After declaring a mistrial as to count 2, the court took the jury’s guilty verdict on count 1.

### **DISCUSSION**

During closing arguments, the prosecutor argued that Garibay violated section 11352, by transporting the cocaine found in the truck in which he was a passenger and/or by selling or furnishing cocaine to Zamora. Garibay contends that because at least two acts were alleged to have been the basis for finding him guilty of violating section 11352, the court prejudicially erred by its failure to charge the jury with a unanimity instruction. Garibay concedes that a unanimity instruction is not required when the same defenses are offered to the various acts constituting the charged crime. He claims, however, that he proffered different defenses to each charge, i.e., his defense to the transporting cocaine charge was that he was unaware of the presence of the cocaine in the truck whereas his defense to selling or furnishing cocaine was that the reference to 20’s in the recorded conversation was actually a reference to \$20 bills. We will find that the court was not required to charge the jury with a unanimity instruction because Garibay proffered the same defenses to the acts that were alleged to have violated section 11352 and, in any event, the failure to do so was harmless.

“In a criminal case, a jury verdict must be unanimous. [Citations.] The court here so instructed the jury. (See CALJIC No. 17.50.) Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the

evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]

“This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.] For example, in *People v. Diedrich* [(1982)] 31 Cal.3d 263, the defendant was convicted of a single count of bribery, but the evidence showed two discrete bribes. We found the absence of a unanimity instruction reversible error because without it, some of the jurors may have believed the defendant guilty of one of the acts of bribery while other jurors believed him guilty of the other, resulting in no unanimous verdict that he was guilty of any specific bribe. [Citation.] ‘The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.’ [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

“There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation] or ‘when the statute contemplates a continuous course of conduct or a series of acts over a period of time.’ [Citation.] *There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime.* [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679, italics added.)

One of Garibay’s defenses to the allegations that he transported cocaine or that he sold or furnished cocaine to Zamora was simply a general denial that he committed these acts because he did not possess any drugs on the day in question. Further, in the recorded conversation, Garibay stated that he had two 20’s left after *he gave one to Zamora* and he threw his 20’s by one of the truck tires after it was stopped. These statements amounted to admissions by Garibay that he furnished Zamora with a 20 and that he transported two 20’s with him on the truck prior to throwing them by one of the truck’s tires after it was stopped. Thus, his claim that 20’s referred to \$20 bills was a defense to the allegation

that he transported cocaine and the allegation that he sold or furnished cocaine to Zamora.

Moreover, “[t]ransportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) Thus, Garibay’s denial of knowledge of the presence of the cocaine in the truck was merely a general denial of one of the elements of transportation which was encompassed in his general denial that he transported, sold or furnished cocaine because he did not possess any drugs prior to his arrest. Accordingly, we conclude that the court was not required to charge the jury with a unanimity instruction.

Nevertheless, even if we concluded that the court erred by its failure to charge the jury with a unanimity instruction, we would find the error harmless. “There is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction. Some cases hold that the prejudice must be deemed harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24 .... Other cases hold that the test is as enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836 ..., which is whether ‘it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’” (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562.)

Assuming, arguendo, that the *Chapman* standard applies, no prejudice resulted because the record refutes the centerpiece of Garibay’s defense, that he and Zamora were referring to \$20 bills when they spoke of 20’s. As noted earlier, during the recorded conversation, Garibay admitted furnishing Zamora with a 20 and transporting two 20’s in the truck prior to allegedly throwing them by one of the truck’s tires. Garibay’s explanation for his use of the term 20’s was that he lent Zamora \$60 and that the term “20’s” referred to \$20 bills. However, during the recorded conversation, Garibay and

Zamora did not discuss anything about Garibay lending money to Zamora and the single 20 Garibay admitted giving to Zamora in that conversation was inconsistent with his testimony that he lent Zamora \$60. Further, numerous statements from the recorded conversation make sense only if the term “20’s” referred to cocaine, not \$20 bills, including Garibay’s statement that he threw two 20’s by one of the truck’s tires. Additionally, when Zamora asked Garibay how much money the deputies found on him, Garibay did not quantify the amount in terms of 20’s and instead stated that they had found about \$100 or \$140 on him. There was also no apparent reason for Garibay to attempt to hide 20’s where the deputies would not search if the term 20’s simply referred to \$20 bills.

Moreover, the recorded conversation was laden with apparent references to drugs and drug dealing including several references to someone having snitched on them, Zamora’s statement that the deputies already knew that Garibay “sold” at the bar, which Garibay did not deny, and Zamora’s statements that he should have placed “them” or “it” in his balls because the deputies would not have searched him there.

Nevertheless, Garibay contends that the split verdict shows that the jury did not accept the prosecutor’s case wholesale and that the length of the deliberations shows that it was a close case. Garibay is wrong.

The jury’s inability to reach a verdict on the possession for sale count indicates, at most, that the jury had trouble concluding that Garibay possessed cocaine with the intent to sell, as demonstrated by the jury’s request for an “extended, legal definition of intent.” Further, the jury deliberated only about six hours over two days and even if the deliberations can be viewed as lengthy, the length of the deliberations is clearly attributable to the jury’s inability to reach a verdict on the possession for sale count. In contrast, nothing in the record indicates that the jury had any difficulty finding that Garibay sold, furnished and/or transported cocaine within the meaning of section 11352.

Accordingly, we conclude that the failure to charge the jury with a unanimity instruction was harmless beyond a reasonable doubt.

**DISPOSITION**

The judgment is affirmed.