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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC THOMAS ANTE,

Defendant and Appellant.

F062620

(Super. Ct. No. BF134490A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin and Lee P. Felice, Judges.

Jan B. Norman, 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, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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**STATEMENT OF THE CASE**

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\* Before Cornell, Acting P.J., Poochigian, J. and Franson, J.

On December 15, 2010, the Kern County District Attorney filed an information charging appellant, Eric Thomas Ante, with possession of a controlled substance, methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a); and possession of paraphernalia used for unlawfully injecting or smoking a controlled substance, in violation of Health and Safety Code section 11364.

Prior to trial, the defense moved, under Evidence Code section 402, to exclude the statements made by appellant to a law enforcement officer on *Miranda*<sup>1</sup> grounds, but the motion was denied.

A jury trial commenced on May 17 and concluded on May 18, 2011. The jury found appellant guilty of both counts. On June 1, 2011, appellant was placed on probation for three years pursuant to Penal Code section 1210.1. The court also imposed various fines and fees. On motion by the prosecution, the trial court dismissed count 2.

On appeal, appellant contends that the trial court erred when it denied his *Miranda* motion and when it failed to give a unanimity instruction. We disagree and affirm.

### **STATEMENT OF FACTS**

#### **Prosecution Case**

On November 2, 2010, at approximately 4:00 p.m., Bakersfield Police Officer Michael Allred (Allred) and four other uniformed law enforcement officers conducted a search of the apartment shared by appellant, his two children, his girlfriend and her two children.

Upon entering the master bathroom, Allred found a spoon on the sink counter, which appeared to be holding a usable amount of methamphetamine. He then discovered two syringes in the medicine cabinet and a black cloth-type zipper pouch in a drawer to the left of the sink. In the pouch, Allred found a small plastic baggie that appeared to

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

contain methamphetamine in powder form. Based upon his experience and training, Allred opined that the spoon was used to convert the methamphetamine from powder form to liquid solution, and that the syringes were used to inject the liquid methamphetamine. Allred also stated his belief that both the spoon and plastic bag contained usable amounts of methamphetamine.

After collecting the spoon, syringes, and small plastic baggie, Allred spoke with appellant in the driveway adjacent to the apartment. Allred described to appellant the items he had found in the bathroom, and appellant admitted that the items were his. Additionally, appellant stated that the baggie of methamphetamine was “old” and that he had forgotten he had it. Appellant did not say anything about the syringes being used for medical purposes, but did tell Allred that he had “been clean” for a while before recently relapsing into drug use. Allred then placed appellant under arrest.

#### Defense Case

Appellant testified that during his conversation with Allred, he was asked if the “stuff” found in his bathroom was his, but Allred did not specify what exactly the “stuff” was. In response to the question, appellant asked if Allred was referring to the marijuana appellant had left on the bathroom counter. After further questioning, appellant admitted that the syringes were his.

Appellant claimed he had no knowledge of the spoon or the black zipper pouch found in his bathroom. When Allred asked appellant about the methamphetamine found in the bathroom, he told Allred that it must have been old because he could not remember it being there. Appellant did tell Allred that he had a drug problem in the past and recently relapsed, but stated that he was referring to using marijuana, not methamphetamine.

Appellant had a prescription for syringes used to inject his diabetic son with insulin, but failed to mention this to Allred because he was frightened at the time of the conversation. Specifically, appellant testified that his fear was caused by the number of

police officers present and his previous criminal record, consisting of three prior convictions. Appellant claimed that Allred threatened to arrest his girlfriend, at which point appellant told him that everything he found was his. Appellant testified that he was still uncertain about how those items got into his bathroom, but took responsibility for ownership of them so that his girlfriend would be able to stay at home and take care of the children.

#### Prosecution Rebuttal Case

On rebuttal, Allred testified that he did not find any marijuana in appellant's bathroom, that appellant did not mention that his son used insulin, and that he did not threaten to arrest Solis.

### **DISCUSSION**

#### **I.**

Appellant asserts that the trial court erred in denying his motion to exclude his statements to Allred because he was in "custody" when those statements were made and was not read his *Miranda* rights. However, appellant's argument fails because he was not subject to custodial interrogation when he made self-incriminating statements to Allred. Thus, the trial court properly denied appellant's motion.

#### Motion in Limine Hearing

Prior to trial, appellant moved to exclude his pretrial statements to Allred because he was subject to custodial interrogation in violation of *Miranda*. At the Evidence Code section 402 hearing on the admissibility of the statements, the following was adduced.

On November 2, 2010, at 4:00 p.m., Allred and four other officers arrived at appellant's apartment, which he shared with his girlfriend, and received permission to search. During the 20-minute search, officers discovered, in the master bathroom, a couple of syringes, a spoon with a small quantity of methamphetamine on it in, and a black zipper pouch which contained a small bag of suspected methamphetamine in it.

After locating these items, Allred spoke to appellant outside the apartment, on the driveway. Allred spoke to appellant, who was not placed under formal arrest at this point, in a nonthreatening manner and informed him of the items he had found. After describing the items to appellant and describing where the items were found, appellant admitted that the items were his. According to Allred, “Right after I described what I had found, he basically stated that they were his, on his own, without me asking him anything.” Appellant told Allred that he believed the methamphetamine was old and had been there for awhile and that he had forgotten he had it. After this “brief discussion,” Allred placed appellant under arrest.

Allred acknowledged that appellant was not free to leave the apartment during the search, nor was he free to leave while he was speaking to him outside on the driveway.

After argument by counsel, the trial court found that there was “not an interrogation,” and denied the motion.

#### Applicable Legal Principles

To invoke the protections of *Miranda*, a suspect must be subjected to a “custodial interrogation,” i.e., he or she must be “taken into custody or otherwise deprived of his freedom of action in any significant way.” (*Miranda, supra*, 384 U.S. at p. 444.) “[T]he ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” (*California v. Beheler* (1983) 463 U.S. 1121, 1125, quoting *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Where no formal arrest has taken place, the pertinent question is “how a reasonable man in the suspect’s position would have understood his situation.” (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.)

The second component of custodial interrogation is obviously interrogation. Interrogation is defined as express questioning or its “functional equivalent,” i.e., by words or actions on the part of police that they should know are “reasonably likely to elicit an incriminating response.” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 303;

*People v. Mickey* (1991) 54 Cal.3d 612, 648.) Spontaneous statements are not the product of interrogation and therefore are not violative of *Miranda*. (*People v. Mickey, supra*, at p. 648.)

Here, Allred testified that appellant was not free to leave when he was out on the driveway with him. He was therefore in custody at the time. But, we agree with the trial court that no interrogation occurred. *People v. Haley* (2004) 34 Cal.4th 283 (*Haley*) is instructive. In *Haley*, a detective said to the defendant, a murder suspect, “[W]e know that you did kill [the victim],” after telling him that his fingerprints were found at the crime scene; the defendant replied, “You’re right. I did it.” (*Id.* at pp. 296, 300.) In this case the Supreme Court held that the defendant’s statements were not a result of an interrogation within the meaning of *Miranda* because the detective did not phrase his statement as a question, and the statement did not necessarily call for an incriminating response. (*Id.* at p. 302.) The court reasoned that “[a] brief statement informing an in-custody defendant about the evidence that is against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response.” (*Ibid.*)

The ruling in *Haley* contradicts appellant’s assertion that the trial court should have excluded his statements to Allred. Under *Haley*, even if appellant was in custody when the statements were made to Allred, the statements are admissible because they were not the product of interrogation. (*Haley, supra*, 34 Cal.4th at p. 295.) Similar to the detective in *Haley*, Allred did not phrase his statement to appellant as a question. Furthermore, Allred’s statement was even less likely to elicit an incriminating response than the detective’s in *Haley*. In *Haley*, the detective told the defendant that he “knew” the defendant killed the victim (*id.* at p. 290), while Allred expressed no belief as to the appellant’s guilt or innocence. Thus, under these circumstances, appellant’s self-incriminating statements were not the product of an interrogation.

In sum, the self-incriminating statements made by appellant to Allred were unsolicited voluntary admissions that were not the product of a custodial interrogation. Therefore, Allred did not have a duty to read appellant his *Miranda* rights prior to showing him the objects he found, and the trial court properly denied appellant's motion to exclude his statements.

## II.

Appellant claims the trial court erred in failing to give a unanimity instruction because the jury was given evidence of two separate items containing different amounts of methamphetamine upon which they could have convicted appellant. Notwithstanding this argument, no unanimity instruction was required in this scenario, and further, any error in failing to instruct the jury on unanimity was harmless.

### Applicable Legal Principles

Under California law, a unanimity instruction must be given sua sponte by the trial court when more than one act could support a single charged offense, and the prosecution does not rely on any single act. (*People v. Flores* (2007) 157 Cal.App.4th 216, 222.) A unanimity instruction is designed to prevent a defendant from being convicted when the jury does not agree that the defendant committed any single offense. (*Ibid.*) The trial court has a duty to give a unanimity instruction whenever the circumstances of the case make it appropriate. (*People v. Carrera* (1989) 49 Cal.3d 291, 311 fn. 8.)

In a prosecution for possession of narcotics, a unanimity instruction is required “where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant ....” (*People v. King* (1991) 231 Cal.App.3d 493, 501 (*King*).) Among the factors to be considered in determining when a unanimity instruction is necessary are whether the defendant raised separate defenses to separate narcotic items and whether there is conflicting evidence over

ownership of such items. (See *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1070-1071 (*Castaneda*).

In *King*, for example, the defendant was convicted of possession for sale where methamphetamine was found in two different locations of defendant's home; in a purse found in the living room, and inside a decorative statue in the kitchen. (*King, supra*, 231 Cal.App.3d at pp. 497-498.) The evidence showed that the purse was the property of someone else, the home had multiple occupants, and the defendant's boyfriend testified that some of the drugs belonged to him. (*Id.* at pp. 497-500.) Because the two units of methamphetamine were in separate parts of the house and there was evidence that could lead a reasonable jury to believe that it was possessed by another person, the court in *King* concluded that a unanimity instruction was required. (*Id.* at pp. 501-502.)

Similarly, in *Castaneda*, the court concluded that a unanimity instruction was required where the defendant's conviction for possession of heroin could have been based upon either constructive possession of heroin found on his television set or actual possession of heroin found in his pocket at the sheriff's station. (*Castaneda, supra*, 55 Cal.App.4th at pp. 1070-1071.) The court held that these acts of possession were distinct, and pointed out that the defendant provided separate defenses to each act: (1) that the heroin found on the television was his son's, and (2) that the heroin found in his pocket was planted or otherwise fabricated. (*Id.* at p. 1071.) Thus, the court concluded that, under those circumstances, the trial court had a sua sponte duty to give the jury a unanimity instruction on which act or acts constituted the offense of possession. (*Ibid.*)

This case is distinguishable from *King* and *Castaneda*. Unlike *King* and *Castaneda*, the two items containing methamphetamine in this case were not reasonably distinguishable by separation of either time or space. Conversely, the items were found during the same search, at the same time, and only inches apart -- the spoon on the counter, and the baggie in a drawer adjacent to the counter. Additionally, in contrast to *King* and *Castaneda*, there was no evidence indicating that a reasonable jury could find

that the two items containing methamphetamine belonged to someone other than appellant. While the evidence showed that appellant lived there with his girlfriend, there is no evidence tending to show that she or anyone else possessed the spoon or baggie. Further, appellant presented the same defense for the spoon and the baggie -- that he did not know of their presence in the bathroom, so they must have been old. Because the two items containing methamphetamine were not reasonably distinguishable by separation of time or space, and there was no conflicting evidence of ownership or varying defenses offered for the items, the trial court was not required to give a unanimity instruction.

Appellant argues that the trial court's failure to give a unanimity instruction was not harmless beyond a reasonable doubt. We disagree.

There is a split among the Courts of Appeal as to the standard for harmless error when a trial court erroneously fails to give a unanimity instruction. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 [collecting cases].) Some courts have applied the state law standard of harmless error, which asks 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. Watson* (1956) 46 Cal.2d 818, 836.) Courts using this standard reason that there is no federal constitutional right to a unanimous jury verdict. (See, e.g., *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [holding that the test as enunciated in *People v. Watson, supra*, 46 Cal.2d 818, provides the correct standard for reviewing prejudice when the trial court fails to give a unanimity instruction].) Other courts, including this Court, apply the more stringent federal law standard, which provides that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24; See, e.g., *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218; *People v. Metheney* (1984) 154 Cal.App.3d 555, 563, fn. 5)

Even if we assume that a unanimity instruction should have been given, and apply the stricter federal law standard, the error was still not prejudicial. Specifically, under

this standard, failure to give a unanimity instruction is harmless “[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and [therefore,] the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any ....” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.) For example, in a case where the defendant offered the same defense to all criminal charges against him, and “the jury’s verdict implies that it did not believe the only defense offered,” the failure to give a unanimity instruction is harmless error. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283.) Failure to give a unanimity instruction is also considered harmless “if the record indicate[s] the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of *any* of the various offenses shown by the evidence ....” (*People v. Jones* (1990) 51 Cal.3d 294, 307.)

Here, appellant argued that the methamphetamine was not his because he did not know that it was in the bathroom. Appellant made this assertion with knowledge that two different items containing methamphetamine were found very close to each other in the bathroom, and did not distinguish between the two items. Despite this defense, the jury found appellant guilty of possession of methamphetamine. Because both units were close together and the appellant’s defense was the same for both units, the verdict implies that the jury did not believe that appellant did not know that there was methamphetamine in his bathroom. Thus, since the jury rejected the only defense appellant offered for possession of two units of methamphetamine in close proximity, the trial court’s failure to give the unanimity instruction was harmless beyond a reasonable doubt.

### **DISPOSITION**

The judgment is affirmed.