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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELE RENE RUMGAY,

Defendant and Appellant.

G044924

(Super. Ct. No. 08HF0491)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Michele Rene Rumgay on appeal. Counsel filed a brief that set forth the facts of the case. Counsel did not argue against his client but advised the court no issues were found to argue on her behalf. Rumgay was given 30 days to file written argument on her own behalf. That period has passed, and we have received no communication from her.

Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), to assist the court in conducting its independent review counsel provided the court with information as to issues that might arguably support an appeal. Counsel listed as possible but not arguable issues: (1) whether the trial court properly denied the motion to suppress; (2) whether the court erred in instructing the jury with CALCRIM No. 362; (3) whether the court erred in allowing Rumgay to be impeached with her two prior convictions; and (4) whether the expert invaded the jury's province in offering opinions on the ultimate issues in the case.

We have reviewed the information provided by counsel and have independently examined the record. We found no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) We affirm the judgment.

FACTS

In February 2008, Costa Mesa Sergeant Brent McKinley was assigned as a detective to the special enforcement detail (SED). McKinley received information Rumgay was selling methamphetamine from her home. On the afternoon of February 5, McKinley began a surveillance of Rumgay's home. At approximately 4:30 p.m., McKinley observed a vehicle enter the driveway of the residence and a male Hispanic adult exit the vehicle. Within a few minutes the individual was seen returning to the vehicle and leaving the location. McKinley conducted a traffic stop on the vehicle. The male Hispanic was identified as Jose Vargas. A search of the vehicle revealed two pay/owe sheets. On the bottom of one of the pay/owe sheets was written "Michel."

A pay/owe sheet is a record of money paid and owed in connection with narcotic sales. A canine searched the vehicle for narcotics. The canine alerted in the trunk area of the vehicle but nothing was recovered in the trunk. McKinley found \$500 in cash on Vargas's person. A criminal background check of Vargas revealed he had previously been convicted of transportation and possession of methamphetamine.

The following day Rungay was observed to be sitting in her car for a prolonged period of time in a Ralph's supermarket parking lot. As Rungay sat in her car, McKinley saw a security guard approach the car on the driver's side and speak with Rungay. Some type of hand-to-hand transaction occurred. Based on this and other suspicious observations made during the surveillance, McKinley requested a marked patrol car make a car stop on the gold Mercedes Rungay was driving when she drove away.

Officer Billy Fair heard the request over his radio and based on that information was on the lookout for the described vehicle. Later, he observed a gold Mercedes driving at a rate of speed higher than the rest of the traffic. Fair initiated a traffic stop. Prior to stopping the vehicle, Fair noticed the driver motioning toward the center console of the vehicle. Prior to initiating contact with the driver, Fair activated a recording device on his belt. Fair described the driver, Rungay, as talkative and nervous. He observed Rungay had scabs on her face, was missing teeth, and appeared generally unkempt. Believing Rungay's actions and appearance to be symptomatic of stimulant-type narcotic use, Fair asked Rungay if she had been drinking or had taken any drugs. Rungay denied having ingested alcohol or drugs.

McKinley, a narcotics expert, responded to the scene of the car stop and conducted a sobriety test. He concluded Rungay was under the influence of a stimulant-type drug. Based on this evaluation, McKinley concluded Rungay could not safely operate a motor vehicle and he arrested her. When McKinley asked her if she had

ever been arrested, Rumgay denied ever being arrested as an adult. A subsequent record check revealed Rumgay had a prior arrest for sales of illegal drugs as an adult.

A search of Rumgay's vehicle yielded six baggies of an off-white, crystal-like substance believed to be methamphetamine. The total weight of the six baggies was later determined to be approximately 11.5 grams. Also recovered was a small gram scale having the same off-white, crystal-like substance on it. The off-white substance on the scale tested positive for methamphetamine. During the search a cellular telephone was located near the gear-shift area, and \$211 was found in Rumgay's wallet. A blood sample was drawn from Rumgay.

An information charged Rumgay with transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)) (count 1), possession for sale of a controlled substance (Health & Saf. Code, § 11378) (count 2), misdemeanor under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)) (count 3), and misdemeanor driving under the influence (Health & Saf. Code, § 23152, subd. (a)) (count 4). The information alleged Rumgay was previously convicted of violating Health and Safety Code section 11379, subdivision (a), as to count 1 (Health & Saf. Code, § 11370, subd. (c)). As to counts 1 and 2, the information also alleged she had suffered two prior Health and Safety Code convictions (Health & Saf. Code, § 11370.2, subd. (c)).

Rumgay filed a motion to suppress evidence claiming she was subjected to an unlawful and prolonged detention. After a hearing on the motion, the trial court denied the suppression motion.

At trial, McKinley testified that in his expert opinion Rumgay was under the influence of "a central nervous system stimulant-type drug." He also opined Rumgay possessed a useable quantity of methamphetamine and she possessed the methamphetamine for the purpose of sale. Subsequent forensic testing evidence was introduced that established the substance in the baggies was methamphetamine and

amphetamine and that the blood sample drawn from Rungay tested positive for methamphetamine and amphetamine.

Fair admitted telling Rungay that her driving looked “okay.” He also acknowledged he made contradictory statements about Rungay’s demeanor to “downplay” the situation.

As to why she had been in the Ralph’s parking lot for such a long period of time, Rungay testified she was there to pick up her son from school. They had arranged he would walk from the school and meet her in the parking lot. When she arrived at the parking lot and did not see her son, she became concerned and asked the security guard if he had seen her son. She explained her cell phone was dead and at one point she asked the security guard if she could use his phone to locate her son. Rungay explained she used her debit card at Ralph’s and that was the source of the money later found in her wallet.

Rungay had no explanation for the methamphetamine or scales that were found in her car, but testified she was “pretty sure” McKinley had planted the items. She disputed the police’s version of the car stop and insisted McKinley only performed the sobriety tests after requesting her cooperation in apprehending someone who he believed was dropping off large quantities of methamphetamine to her house. Rungay insisted the search of her car was done without her consent and the blood sample was drawn forcibly and in a very painful manner. The prosecution was permitted to impeach Rungay with two prior felony convictions. The nature of the convictions, violations of Health and Safety Code sections 11379, subdivision (a) (sale of a controlled substance), and 11378 (possession of a controlled substance for sale) were not disclosed to the jury.

Rungay called as a witness Christopher Flynn, who was working as a security guard at the Ralph’s parking lot on February 6. Flynn testified he had never used methamphetamine or any other drugs. Flynn denied being involved in any hand-to-hand transaction for the purchase of methamphetamine. He did confirm that on occasion

someone would ask to use his cell phone to call a child or call home, but he had no specific recollection of Rumgay asking to use his phone or contacting him about a child.

The trial court instructed the jury pursuant to CALCRIM No. 362 as follows: “If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show she was aware of her guilt of the crime and you may consider it in determining her guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.”

A jury found Rumgay guilty of all counts. The court further found two alleged prior convictions to be true. The trial court sentenced Rumgay to a total prison term of four years.

DISCUSSION

Pursuant to *Anders*, appellate counsel invited this court’s attention to four issues to assist this court in its independent review. Those issues are: (1) whether the trial court properly denied the motion to suppress; (2) whether the court erred in instructing the jury with CALCRIM No. 362; (3) whether the court erred in allowing Rumgay to be impeached with her two prior convictions; and (4) whether the expert invaded the jury’s province in offering opinions on the ultimate issues in the case. We will address each issue in turn.

Motion to Suppress

When reviewing a trial court ruling denying a motion to suppress evidence, “we uphold the trial court’s factual findings if they are supported by substantial evidence, but independently review its determination that the search did not violate the Fourth Amendment.” (*People v. Rogers* (2009) 46 Cal.4th 1136, 1157.)

An investigatory detention of an individual in a vehicle is permissible under the Fourth Amendment if supported by reasonable suspicion the individual has violated

the law. (*Ornelas v. United States* (1996) 517 U.S. 690, 693.) While reasonable suspicion can arise from less information than required for probable cause, “the officer’s suspicion must be supported by some specific, articulable facts that are ‘reasonably “consistent with criminal activity.’”” (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.)

The information from the informant, the observations made by McKinley at Rumgay’s residence, the search of Vargas’s vehicle, and McKinley’s observations of Rumgay at the Ralph’s parking lot supported more than ample reasonable suspicion to justify the stop of Rumgay’s vehicle.

The California Supreme Court discussed the permissible scope of a traffic stop in *People v. McGaughran* (1979) 25 Cal.3d 577. An investigatory stop exceeds constitutional limits when it extends beyond what is reasonably necessary under the circumstances to effectuate the stop’s purpose. However, circumstances that develop during a detention may provide reasonable suspicion to prolong the detention. (*People v. Warren* (1984) 152 Cal.App.3d 991, 995-997; *People v. Suennen* (1980) 114 Cal.App.3d 192, 200-201 [if additional cause to detain develops after initial stop, additional time to investigate allowed].) The facts here do not support a finding the detention was prolonged.

A vehicle search incident to a recent occupant’s arrest is permissible if it is reasonable to believe evidence relevant to the offense of arrest might be found in the vehicle. (*Arizona v. Gant* (2009) 556 U.S. 332, 343.) According to *Gant*, “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ [Citation.]” (*Ibid.*) The same circumstances that justified the initial stop, coupled with the observations of Rumgay after the stop, provide an adequate reasonable basis to believe the vehicle contained relevant evidence. The trial court properly denied the suppression motion.

CALCRIM No. 362-“Consciousness of Guilt: False Statements”

Consciousness of guilt may be inferred from “any false or misleading statements [the defendant] may make to the arresting officers or others with relation to material facts, for the purpose of misleading, or warding off suspicion” (*People v. Fritz* (2007) 153 Cal.App.4th 949, 959, italics omitted.) A consciousness of guilt instruction is proper if “some evidence in the record . . . w[ould] sufficiently support the suggested inference.” (*People v. Hannon* (1977) 19 Cal.3d 588, 597, disapproved on another ground in *People v. Marinez* (2000) 22 Cal.4th 750, 762-763.) When asked by McKinley if she had ever been arrested, Rungay falsely stated she had never been arrested as an adult. Given Rungay’s false statement, CALCRIM No. 362 was proper.

Impeachment with Prior Convictions

A court must consider four factors before admitting evidence of a prior felony conviction for impeachment: “(1) whether the prior conviction reflects adversely on an individual’s honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.] These factors need not be rigidly followed. [Citation.]” (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Possession of drugs for sale is a crime of moral turpitude and thus was relevant to Rungay’s truthfulness. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) There is no steadfast rule regarding the precise number of prior convictions that may be admitted in a particular case. “[W]hether or not more than one prior felony should be admitted is simply one of the factors which must be weighed against the danger of prejudice. [Citation.]” (*People v. Dillingham* (1986) 186 Cal.App.3d 688, 695.) We conclude the court did not err in allowing impeachment with the two felony convictions.

Expert Witness Testimony

“The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is . . . sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 280.) An expert may give an opinion that, based on various factors, drugs were possessed for the purpose of sales. (*People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378.) None of the opinions offered by McKinley were improper as they did not invade the province of the jury in deciding the ultimate issues of fact in the case.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.