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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.

MARIA KARINA ISLAS,

Defendant and Appellant.

G046039

(Super. Ct. No. 10NF0873)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Alan S. Yockelson, 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, William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Maria Karina Islas appeals her conviction on three counts relating to drug possession. She argues the trial court abused its discretion by allowing a police officer to offer his opinion on whether the drugs were possessed for sale. She also claims a lack of substantial evidence to support possession for sale, and erroneous jury instructions and prosecutorial misconduct on aiding and abetting. We find her arguments lack merit and therefore affirm.

I

FACTS

On the evening of March 11, 2010, narcotics officers from the Garden Grove Police Department knocked and demanded entry to defendant's apartment. Through an opening in one of the window coverings, Sergeant Thomas Dare saw two people move toward the door, then walk away. Believing the officers' positions were compromised, he ordered a forced entry.

When the officers entered the apartment, they saw defendant and codefendant Jesus Barrera standing in the living room. One of the officers saw a glass pipe used for smoking methamphetamine lying on the arm of the sofa, one or two feet away from defendant and Barrera. They were arrested for possession of the pipe.

During a subsequent search of the apartment, Officer Richard Burillo found two pieces of paper with lists of names and dollar amounts on them ("pay-owe sheets"). These sheets included the Spanish word "deben" which means "to owe." Sergeant Douglas Pluard also found a bag on a shelf containing what was later determined to be one pound of marijuana and a separate bag containing 5.9 grams of methamphetamine. On a desk, Pluard found an envelope containing eight bindles of methamphetamine totaling 4.4 grams in weight, and a sandwich bag containing marijuana. The envelope containing the methamphetamine had numbers, such as .4 and .8, written on the outside. Pluard also found a stack of plastic circles cut from the bottom of grocery bags and two cell phones.

When defendant was booked, she gave the apartment's address as her residence, stated that she was self-employed as a laborer, and was married. Berrera also gave the apartment as his address and stated he was married.

Defendant was charged with one count of felony possession of methamphetamine for sale in violation of Health and Safety Code¹ section 11378 (count one); felony possession of marijuana for sale in violation of section 11359 (count two), and one count of misdemeanor possession of controlled substance paraphernalia in violation of section 11364 (count three).

At the conclusion of trial, defendant was found guilty on all three counts. She was sentenced to formal probation for three years, including 120 days in jail. In addition to credit, her jail time was stayed and she was granted a waiver to apply for home confinement. She was also ordered to pay various fines and fees. She now appeals.

II

DISCUSSION

Expert Testimony

Defendant argues the trial court abused its discretion and violated her constitutional rights by allowing Pluard to testify as to his opinion that the drugs were possessed for sale. Pluard testified as an expert witness for the prosecution. He explained what investigators look for in a possession for sale case, including the quantity of drugs, packaging, the presence of pay-owe sheets, scales and cell phones. When given a hypothetical mirroring the facts of this case, Pluard opined that the drugs would be possessed for the purpose of sale. He based his opinion on the overall amounts of the methamphetamine and marijuana found, the prepackaged bindles, stack of plastic circles for packaging, and the pay-owe sheets. Prior to trial, defense counsel objected to

¹ Unless otherwise indicated, subsequent statutory references are to the Health and Safety Code.

Pluard’s testimony on two points: one, that an expert’s testimony on the defendant’s state of mind based on a hypothetical was improper, and two, that offering an opinion on the ultimate issue was not helpful to the trier of fact under Evidence Code section 801.

“A witness is qualified to testify as an expert if the witness has special knowledge, skill, experience, or education pertaining to the matter on which the testimony is offered. [Citation.] In reviewing a trial court’s ruling allowing expert testimony, we ask whether the ruling was an abuse of discretion. [Citations.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 177.)

“Generally, an expert may render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.] [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*)). “Use of hypothetical questions is subject to an important requirement. ‘Such a hypothetical question must be rooted in facts shown by the evidence’ [Citations.]” (*Ibid.*) That requirement was followed here — the hypothetical closely tracked the facts of this case supported by the evidence.

Defendant objects to the fact that Pluard was both the lead investigator and an expert witness. She cites no cases, however, where a detective at the scene was summarily disqualified from serving as an expert, and we see no principled reason why that should be the case. Under Evidence Code section 801, subdivision (b), an expert’s opinion may be based on facts that were perceived by or known to the witness. There is no mischief borne if Pluard’s answer to the hypothetical was based both on what he observed at the scene as well as his experience and training.

With regard to whether Pluard’s testimony was helpful to the jury, defendant argues that allowing Pluard to answer the hypothetical “crossed the line.” We disagree. His testimony as a whole was helpful, because the average juror would probably not understand the significance of, for example, the presence of the pay-owe sheets or the plastic circles cut from grocery bags. Because the hypothetical was

otherwise proper, allowing it to be a part of Pluard’s testimony was not an abuse of discretion.

We also disagree that Pluard told the jury how to decide the case. The jury was properly instructed regarding the role of an expert. “[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided.” (*Vang, supra*, 52 Cal.4th at p. 1049.) In sum, we find no abuse of discretion in permitting Pluard’s expert testimony or in allowing him to answer the hypothetical.

Substantial Evidence

Defendant next claims there was not substantial evidence that she was ever in actual or constructive possession of the drugs found in her apartment. When a defendant calls into question the sufficiency of the evidence, our review is a very limited one. “““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”” [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We presume the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Further, before we reverse a judgment for insufficiency of evidence, it must be clear there is no hypothesis under which we could find sufficient evidence. (*People v. Rehmyer* (1993) 19 Cal.App.4th 1758, 1765.) “In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination

depends. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 403.) This standard applies even “when the conviction rests primarily on circumstantial evidence.” (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.)

““Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. [Citation.]’ [Citations.]’ [Citation.]” (*In re Z.A.* (2012) 207 Cal.App.4th 1401, 1427.) “It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. [Citation.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another. [Citation.]’ [Citation.]” (*Ibid.*)

“For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance.” (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535; see also *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.) Places where a defendant has been found to be in dominion or control over drugs, either alone or with another person, include the defendant’s residence. (*People v. Bagley* (1955) 133 Cal.App.2d 481, 484-485; see also *People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.)

Here, the drugs were found in an apartment, the address of which defendant provided to police as her residence. She and Berrera were the only two people present on the night when the police arrived. Defendant had access to the drugs in the apartment, as they were in plain view and could be seen by anyone in the living room. Taken as a whole, there was more than enough circumstantial evidence for the jury to conclude that defendant constructively possessed the drugs found there. We find no error.

Aiding and Abetting

Defendant next argues the trial court erred by instructing the jury on aiding and abetting (CALCRIM Nos. 400 and 401) because the evidence was insufficient as a matter of law to satisfy the required elements. She also contends the prosecutor committed misconduct by arguing that defendant could have aided and abetted Berrera, or in the alternative, a third party such as Berrera's sister or father.

With respect to the jury instructions, during a conference with the court, defense counsel objected to instructions on aiding and abetting. The prosecutor stated the instructions were requested because both defendant and Berrera stated they lived in the apartment, and both stated they were married. Therefore, there was sufficient evidence that both defendants possessed the drugs with the intent to sell, or alternatively, that one of them did while the other aided and abetted. Defense counsel argued that while there was evidence both defendants lived in the apartment and were married, there was no evidence they were married to each other. The trial court ultimately overruled, finding there was some circumstantial evidence to support the instruction.

“Even absent a request, the trial court must instruct on the general principles of law applicable to the case. [Citation.] . . . The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is ‘substantial’ only if a reasonable jury could find it persuasive. [Citation.]” (*People v. Young, supra*, 34 Cal.4th at p. 1200.) “[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.” (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Throughout the trial, defense counsel denied that defendant possessed or had knowledge of the drugs. Counsel pointed out that the evidence was not sent to the lab for DNA testing, creating an implication that someone else possessed the drugs. Counsel also questioned Pluard as to whether others might have been living in the apartment, an issue the police had not investigated. Pluard also testified that in his experience, drug sellers would often work together with another trusted person, such as a family member. Given these facts, there was sufficient circumstantial evidence to support a jury instruction for aiding and abetting.

We must reject defendant's arguments that she might have been found guilty based solely on her presence. The jury was instructed that mere presence was insufficient to find a person guilty as an aider and abettor. Absent some indication in the record, we presume the jury followed the court's instructions and that its verdict reflects the limitations the instructions imposed. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

Finally, to the extent it is not waived for failure to raise it below, we disagree that the prosecutor committed misconduct. She claims the prosecutor portrayed the theory of aiding and abetting as a "catch-all by which the jury could arrive at a conviction regardless of any doubts. She first reassured the jury that the defendants were guilty as direct possessors before proposing their guilt by means of a hypothetical third party."

In the section of argument defendant now objects to, the prosecutor first discussed the concept of aiding and abetting. She then returned to a theory of direct liability before stating: "Well, let's say that again. If we were to violate our oath and we were to speculate and go with speculation and try to look at some evidence that's not before you because you don't have any other evidence before you other than that, and you were to say that maybe someone else was in there, I mean, we heard evidence that maybe defendant's dad has that same address, that maybe that's his methamphetamine.

Maybe that's his marijuana. [¶] There was some other evidence that was brought out that there was a suitcase that had mail for Maria Serraras who we saw. Maybe that's hers. There is no credible evidence for you to believe that. But let's say that you were to take it to that extent and to start speculating on that kind of thing. They would still, under the law of aiding and abetting, even if you were to take it to that extreme, be guilty, because someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does, in fact, aid, facilitate, promote or encourage or instigate the perpetrator's commission of the crime. [¶] If they were allowing the father [or] sister to use their house in order to store these drugs, in order to package these drugs, and do these drug transactions, they are facilitating [¶] . . . [¶] And they would still be guilty. Even if they were to take it to that level of speculation."

During rebuttal, the prosecutor again suggested defendant and Berrera might have aided and abetted a third person, which would explain the absence of a scale in the apartment, pointing out that one doesn't "eyeball .4 and .08" weights that were found on the packages. The prosecutor made additional, similar suggestions during argument.

A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Hill, supra*, 17 Cal.4th at p. 819.) Misconduct by a prosecutor that does not render a criminal trial fundamentally unfair is error under state law "if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

The prosecutor's conduct here does not rise to such a level. While it was inartful, the prosecutor appeared to be suggesting that while she did not believe the evidence that the drugs did not belong to defendant and Berrera, but some third person, there was evidence from which the jury could reach such a conclusion if they so chose.

By referring to “speculation” she appeared to be referring to her belief that such was not the case — the drugs belonged to defendant and Berrera. While the prosecutor’s argument could have been more clearly set forth, it was not misconduct. She was asking the jury to draw inferences, however thin, from the evidence before it, and the law gives her the latitude to do so. (*People v. Young, supra*, 34 Cal.4th at p. 1197.)

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.