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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.

GUTHRIE LEE DANOWSKI,

Defendant and Appellant.

G050276

(Super. Ct. No. BLF1100208)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,  
Charles E. Stafford, Jr., Judge. Affirmed as modified.

Patricia A. Scott, 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, Peter Quon, Jr., and  
Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury found defendant guilty of conspiracy to bring a controlled substance into a state prison. (Pen. Code, §§ 182, subd. (a)(1), 4573.) In a bifurcated bench trial, the court found it to be true that defendant had suffered five prior strike convictions. The court sentenced defendant to 25 years to life in state prison pursuant to the “Three Strikes” Law. The court also imposed, but stayed, 5 five-year enhancements for the prior serious felony convictions. Defendant raised two issues on appeal, only one of which is contested.

The first issue, which is live, is whether the court prejudicially erred by failing to instruct the jury that accomplice testimony must be corroborated and treated with caution. The People concede the error, but argue it was not prejudicial because there was adequate corroboration. We agree with the People and affirm the conviction.

The second issue, which the People concede, is whether the court imposed the five-year enhancements in error. We agree with the parties that those enhancements were erroneous and we will strike them.

The People also note, and defendant agrees, that the abstract of judgment contains a clerical error: it recites that defendant was convicted by the court, not a jury. We will order the abstract of judgment corrected.

## FACTS

At the time of the relevant events, defendant was a prisoner at Ironwood State Prison. Ray Anthony Carmona was a fellow inmate. Carmona testified for the People under a grant of immunity. Carmona testified that he became acquainted with defendant because he was told defendant could smuggle narcotics into the prison. According to Carmona, it was common knowledge among the inmates that defendant’s sister acted as a “mule” by smuggling narcotics into the prison. Carmona asked defendant to bring in 24 grams of heroin. Defendant agreed on the condition that he

could keep 10 of the 24 grams. The plan was for Carmona's brother, Angel, to deliver the drugs to defendant's sister, who in turn would deliver the drugs to defendant. Pursuant to the plan, Carmona sent \$800 to Angel and called him with instructions to mail the drugs to defendant's sister.

Defendant's sister also testified for the People. On two prior occasions she had smuggled contraband into the prison for defendant. On both occasions she received, through the mail, an unidentified substance contained in a balloon. She would insert the balloon into her vagina to sneak it into the prison. Once inside, she would visit the restroom to remove it and ultimately pass it to defendant. Prior to the instant case, she had not been caught. Sometime in August 2011 she spoke with defendant about smuggling drugs into the prison, which they referred to as a "present" or a "gift." The plan was to have the drugs mailed to her. She spoke with Angel on the phone who informed her that he was sending her a "present" to be taken to defendant in prison.

On August 21, 2011, defendant arranged for a ride to take his sister to the prison. Once she arrived, while sitting in the visitor waiting area, the police apprehended defendant's sister. The sergeant in charge asked her if she had any drugs on her. "[S]cared to death," she responded, "I don't know." "No. I didn't do it. I didn't do it." Confronted with her denial, the sergeant then produced a search warrant and said he would take her to a local hospital for an X-ray. Prior to having the X-ray taken, however, defendant's sister removed the balloon from her vagina and turned it over to the police. The balloon contained 24.36 grams of heroin.

Correctional Officer Andrew Wright also testified for the People. He was an officer in the investigative services unit of the prison who monitored telephone calls to determine if someone was planning to smuggle drugs into the prison. In August 2011 he monitored suspicious phone calls between Carmona and his brother Angel, discussing large amounts of money, packages being sent and received, and the quality of certain

drugs received. He also overheard a conversation in which defendant was speaking with his sister about a package Angel was to deliver.

That conversation was played for the jury. In the recording, defendant asked his sister if she had heard from Angel. Defendant encouraged his sister to get a ride to the prison from “Vee” the next day. He stated, “I know sometimes . . . my business . . . and that other stuff is a headache but I appreciate you taking care of this for me . . . .” He asked her, “[W]as it your decision or was it Angel’s decision to put uh send that through the mail?” She responded that it was Angel’s decision. Later defendant expressed his preference for delivering “stuff” with the van rather than through the mail because the mail took too long.

Defendant testified on his own behalf and generally denied discussing the transportation of drugs into prison, stating that the arrangement with Angel was solely to bring his sister for a visit. He claimed he told his sister to testify as she did so that she could get a better deal. He claimed that the discussion about transporting stuff was in regards to transporting flowers for the flower shop his sister worked at. With regard to the fact that his sister had drugs on her person, defendant speculated that she did it for the ride to the prison.

## DISCUSSION

The single contested issue on appeal is whether the court prejudicially erred by failing to instruct the jury that accomplice testimony must be corroborated and treated cautiously.

Penal Code section 1111 states, “A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.”

Our high court has explained that “experience has shown that the evidence of an accomplice should be viewed with care, caution and suspicion because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity.” (*People v. Wallin* (1948) 32 Cal.2d 803, 808.) “In addition, an accomplice may try to shift blame to the defendant in an effort to minimize his or her own culpability.” (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) Moreover, as a result of having inside knowledge of the crime, “accomplice testimony is frequently cloaked with a plausibility which may interfere with the jury’s ability to evaluate its credibility. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967.) “When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices.” (*People v. Frye* (1998) 18 Cal.4th 894, 965-966, disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

It is undisputed that the court failed to instruct the jury with CALCRIM No. 335 (accomplice testimony must be corroborated) or anything like it. The question is whether the error results in reversal.

“A trial court’s failure to instruct on accomplice liability under [Penal Code] section 1111 is harmless if there is ‘sufficient corroborating evidence in the record.’ [Citation.] To corroborate the testimony of an accomplice, the prosecution must present ‘independent evidence,’ that is, evidence that ‘tends to connect the defendant with the crime charged’ without aid or assistance from the accomplice’s testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime.” (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.) “Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Thus the issue in this case is whether there was sufficient corroboration in the record to render the court’s error harmless.

We conclude there is. We begin with the obvious fact that defendant's sister carried heroin concealed in her vagina when she arrived at the prison to visit defendant. To that we add defendant's cryptic conversation with his sister in which the two explicitly referenced Angel mailing a package to defendant's sister, his sister getting a ride from "Vee" to the prison, and defendant's preference for van delivery rather than mail delivery of "stuff." And we conclude with Officer Wright's testimony about conversations Carmona had with his brother Angel about exchanging large amounts of money, packages being sent and received, and the quality of certain drugs received. What emerges is a picture of defendant involved in a conspiracy to smuggle drugs into the prison through Angel and his sister. The independent evidence, standing alone, may not be sufficient for a conviction. But the corroboration need only be slight. This evidence meets that standard. Accordingly, we hold the court's error was harmless.

Next defendant claims the court erred by imposing and staying, in addition to 25-years-to-life under the Three Strikes Law, five 5-year enhancements based on prior serious felony convictions. The People concede this was error. None of the five-year enhancements were alleged. And defendant's current offense was not a serious felony as required by Penal Code section 667, subdivision (a). We will order the five enhancements to be stricken.

The People also point out, and defendant concurs, that the abstract of judgment erroneously recites that defendant was convicted by the court, when, in fact, he was convicted by a jury. We will order the abstract of judgment to be amended.

## DISPOSITION

The judgment is modified by striking the five 5-year enhancements imposed and stayed pursuant to section 667, subdivision (a). The trial court is directed to amend the abstract of judgment to omit the stricken enhancements (which are erroneously listed as coming under § 667, subd. (e)(2)(A)). The trial court is also directed to amend the abstract of judgment to indicate that defendant was convicted by a jury, not by the court. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.