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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DEOTIS LEE THOMPSON,

Defendant and Appellant.

H036656

(Santa Clara County

Super. Ct. No. CC785394)

Defendant Deotis Lee Thompson appeals from a judgment of conviction entered after a jury found him guilty of two counts of possession for sale of cocaine base (Health & Saf. Code, § 11351.5 - counts one, three) and one count of transporting cocaine base (Health & Saf. Code, § 11352, subd. (a) - count two). Defendant admitted the allegations that he had previously committed a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), had served a prior prison term (Pen. Code, § 667.5, subd. (b)), had a prior conviction for trafficking in a controlled substance (Health & Saf. Code, §§ 11370.2, 11370, subds. (a), (c)), and was out on bail when he committed two of the charged offenses (Pen. Code, § 12022.1). The trial court sentenced defendant to a term of 10 years and eight months in state prison. On appeal, defendant contends that the trial court erred when it: (1) denied his motion to suppress evidence; (2) denied his motion to disclose the confidential informant; (3) admitted evidence of his prior drug sales; and (4) imposed attorney's fees without holding a hearing to determine his ability to pay.

Defendant also contends that his trial counsel rendered ineffective assistance. We conclude that the matter must be remanded for a hearing on defendant's ability to pay attorney's fees. Accordingly, the judgment is reversed.

I. Statement of Facts

A. October 2007 Incident (Counts One and Two)

On October 29, 2007, Officer Michael O'Neil monitored a telephone call in which defendant agreed to sell narcotics at an apartment complex on McGuinness Street. Undercover officers then observed defendant driving his car and engaging in counter surveillance techniques used by drug traffickers, that is, circling the block and pulling over abruptly to evade law enforcement. After defendant pulled into the parking lot of the apartment complex on McGuinness Street, officers initiated a traffic stop. Defendant's girlfriend, Crystal Gates, was a passenger in the car.

Officers searched defendant's car and found a plastic baggie under the center console. The baggie contained over 21 grams of cocaine, which was packaged in a manner that would allow the cocaine to "easily break off [into] little piece[s] to sell." The car was registered to defendant. Officers also found some paperwork with defendant's name on it that matched the address on the car registration. Defendant had two cell phones and \$151 in cash. Gates also had a cell phone. No drugs were found on either defendant or Gates.

Officer O'Neil testified as an expert in the recognition of cocaine base, the possession for sale of cocaine base, and the recognition of the symptoms of someone under the influence of a stimulant. In his opinion, defendant was not under the influence of drugs when he was arrested. He also opined that the amount of drugs recovered in defendant's vehicle indicated that the drugs were possessed for sale because "[n]o street user has that quantity."

Bruce Wiley, an investigator for the Santa Clara County District Attorney's Office, testified that Gates was subpoenaed to testify in this case. He spoke to her and offered to provide transportation to court. Despite repeated attempts, Wiley was unable to recontact her and ensure that she came to court.

B. January 2008 Incident (Count Three)

On January 2, 2008, Officers Brian Winco and Matt Delorenzo observed defendant and another man standing in front of an apartment building at 460 South Fourth Street in San Jose. The building was in "a high crime area" where robberies and drug dealing frequently occurred. Officers Winco and Delorenzo approached the men and engaged them in conversation. When Officer Dillon arrived, he informed the other officers that defendant lived in apartment 13. Since defendant did not have a key to apartment 13 on his person, the officers obtained a key from the apartment manager and searched the apartment.

There was little furniture in the apartment. Officers found a police scanner on a table in the bedroom. The scanner was tuned to the channel that the San Jose Police Department used in that area. There was also a futon and a television on top of a stand. In the bedroom closet, officers found a box for Nike Air Jordan shoes, size 10, which matched the shoes that defendant was wearing at the time of his arrest. There was a large plastic baggie containing several individually-wrapped rocks of crack cocaine inside the shoe box. Officers also found a box for a Nextel cell phone in the closet, which matched the serial number and the brand of cell phone that defendant had on his person. In the kitchen, the officers found a sales receipt dated October 10, 2007, that listed defendant's name and the apartment as his address. When Officer Dillon confronted defendant with the items found in the apartment, defendant put his head down and said, "I know. It's bad for me."

Officer Keith Neumer testified as an expert in the possession of cocaine and the possession of cocaine for sale. In responding to a hypothetical question based on facts similar to those in the present case, Officer Neumer opined that the drugs would be possessed “solely for the purpose of sales.”

Lazaro and Erica Loera were the apartment managers of 460 South Fourth Street. Mr. Loera testified that defendant lived in apartment 13, and that he had observed him once conduct a drug deal by “just handing some little package to somebody and receiving money.” Mrs. Loera testified that she did not remember if defendant lived in apartment 13 in January 2008. However, she also testified that he moved out approximately a week after the police were there and he had not moved out when she gave the police the keys to the apartment.

James Pusateri owned the apartment building in which defendant lived. According to Pusateri, defendant “was living there, but he was in the process of moving out” when the police searched apartment 13. Pusateri also owned the Clifton Apartments in San Jose. Pusateri had a rental contract with defendant that indicated that he moved into the Clifton Apartments on May 1, 2008. However, he conceded that the signature page was dated May 9, 2009, and thus the dates on the rental contract may have been inaccurate. When called as a witness for the defense, Pusateri acknowledged that defendant had a rental contract for the Clifton Apartments that began on January 1, 2008, and that it was not unusual for defendant’s friends to take over his apartments when he moved out.

II. Discussion

A. Motions to Suppress Evidence

Defendant contends that the trial court erred in denying his motion to suppress evidence arising out of his arrest in January 2008. He contends that defendant had a reasonable expectation of privacy in the apartment that the police officers searched and

that the prosecution failed to establish that he had consented to the search of the apartment. We conclude that the trial court properly denied the motion to suppress evidence.

1. Factual Background¹

At approximately 2:15 p.m. on January 2, 2008, Officer Brian Winco observed defendant and another man loitering in front of an apartment complex which was known for drug dealing. He and another officer approached the men on foot and engaged them in conversation. The men spoke to the officers “freely” and did not attempt to walk away. After defendant provided his name to the officers, they conducted a records check and determined that there were outstanding warrants for his arrest.

Defendant told Officer Winco that he had lived in the apartment complex and that he was waiting for his friend who had taken over apartment 13 to return so that he could retrieve some of his property. Defendant said that he no longer lived in this apartment, did not have a key, and had no way of getting into the apartment. Defendant never said that he was currently living in apartment 13.

While Officer Winco was talking with defendant, Officer Dillon arrived. Officer Dillon was familiar with the area and had previously been in contact with the property owner and the property manager regarding narcotic activity at the apartment complex. Officer Dillon had also received information from other officers regarding defendant’s pending drug charges. Based on his prior contact with defendant in December 2007, Officer Dillon knew that defendant lived in apartment 13. When Officer Dillon told defendant that he knew that he lived there, defendant nodded his head.

Officer Dillon also told defendant that he believed defendant was on a supervised-own recognizance release program (SORP), and depending on the SORP conditions, the officers could search his apartment. Defendant appeared confused, and stated that he was

¹ This factual summary is based on the testimony at the hearing on defendant’s motion to suppress evidence.

out on bail. Officer Dillon tried to explain SORP, but “kind of let that go due to the fact he didn’t understand what [he] was talking about.” Later in the conversation, defendant stated that he had not been using narcotics. At that point Officer Dillon asked, “Since you have nothing to hide, would you agree to search your apartment or check your apartment?” Defendant replied, “Yeah, but I don’t have a key” or “I don’t have a key, so I can’t.” Defendant was not handcuffed when he gave his consent. Officer Dillon then took defendant’s key, but it did not open apartment 13.

Officer Winco contacted the apartment manager, who stated that defendant had lived in apartment 13 for eight to nine months, that he was supposed to be out of the apartment by January 1, and that there was no one currently living in this apartment. The apartment manager then gave the officers a key to the apartment.

Apartment 13 was on the second or third floor of the building, and the officers detained defendant on the ground floor. After getting the key from the property manager, Officer Dillon walked to the landing and, in defendant’s view and hearing, let Officer Delorenzo know that he had the key. Defendant did not withdraw his consent.

When the officers entered the apartment, there was a couch, dishes and a police scanner that was turned on, but no television or clothing. Officer Winco described the apartment as a “crash pad,” “[a] place where people can sit down, they could possibly even sleep, but don’t stay there for any long period of time as their primary residence.” Officer Winco found a plastic baggie containing 22 individually-wrapped bindles of cocaine base in a shoe box on a shelf in the bedroom closet. Officer Winco also found a receipt in the kitchen that listed defendant’s name and the apartment as his address.

Defendant testified that he was in the process of moving out of the apartment in January 2008. He was in handcuffs when Officer Dillon arrived. Officer Dillon told him that he knew defendant was either out on “O.R.” or bail on a prior case and that he was certain that defendant was on SORP. At that time, defendant did not know what SORP was. Officer Dillon told him that he could be in violation of his release if he did not let

him search the apartment. Defendant never consented to a search of his apartment. He told the officers that if he was on SORP then they could search the apartment.

Following argument, the trial court denied the motion to suppress evidence. The trial court found that defendant did not have a privacy interest in the apartment, noting that he had moved out of the apartment, he did not have a key to the apartment, the manager confirmed that defendant was to have moved out, and the manager opened the apartment with her key. The trial court also found that even if defendant did have standing to bring the suppression motion, the testimony of Officers Winco and Dillon was credible and defendant consented to the search of the apartment.

2. Standard of Review

“‘The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]’” (*People v. Weaver* (2001) 26 Cal.4th 876, 924, quoting *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

3. Reasonable Expectation of Privacy

“‘[T]he Fourth Amendment protects people, not places.’ [Citation.] A Fourth Amendment claim “‘may not be vicariously asserted.” [Citations.]’ [Citation.] ‘[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable.’ [Citation.] The defendant thus bears the burden ‘of establishing a legitimate expectation of privacy in the place searched or the thing seized. [Citations.]’ [Citations.]” (*People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1196.)

Here, defendant told Officer Winco that he did not live in the apartment complex, and the apartment manager confirmed that defendant no longer lived in apartment 13.

Some of defendant's possessions remained in the apartment, but he no longer had a key to it. Though defendant testified that he was in the process of moving out of the apartment, the trial court implicitly found his testimony not credible. Under these circumstances, defendant did not carry his burden to establish that he had a reasonable expectation of privacy in apartment 13.

Relying on *People v. Dees* (1990) 221 Cal.App.3d 588 (*Dees*), defendant contends that the prosecution cannot argue that his "ownership of the seized evidence as indicative of his guilt, while at the same time relying on lack of possessory interest in the apartment to defeat his Fourth Amendment claim."

In *Dees*, the prosecutor presented evidence at the preliminary hearing that when the police officer asked the defendant if a nearby Cadillac belonged to him, the defendant stated that it did. (*Dees, supra*, 221 Cal.App.3d at p. 591.) Though the defendant, who appeared under the influence of drugs, indicated that the police could not search his car, the officer searched the car and found a bag containing scales and several bags of methamphetamine. (*Ibid.*) The defendant's wife testified that he owned several vehicles, but not a Cadillac. (*Id.* at p. 592.) Another witness, who had known the defendant for two weeks, testified that he never saw defendant driving or near a Cadillac. (*Ibid.*) Based on the facts adduced at the preliminary hearing, the defendant brought a motion to suppress evidence. (*Id.* at p. 590.) The trial court denied the motion on the ground that the defendant did not have "standing" to bring the motion. (*Id.* at p. 593.)

Dees reversed the judgment, reasoning that "there was no separate suppression hearing below. The suppression motion was submitted on the basis of the preliminary hearing transcript, the defense arguing 'standing' at the oral hearing on the basis of [the defendant's] statements to the officers prior to the search. The posture of the suppression motion, decided on the basis of facts adduced at the preliminary hearing which the magistrate deemed sufficient to hold [the defendant] to answer, points to a fundamental problem infecting the lower court's decision: the same facts which connected [the

defendant] to the crimes of possessing drugs and paraphernalia, and which the magistrate would have to accept to find sufficient cause to believe [the defendant] was guilty of the offenses, were rejected by the lower court to prove standing. . . . [¶] Given these circumstances, we conclude the People are estopped to argue that [the defendant] did not carry his burden to prove standing.” (*Dees, supra*, 221 Cal.App.3d at pp. 597-598.)

Dees is distinguishable from the present case. Here, defendant did not base his suppression motion on the preliminary hearing transcript and thus he does not argue that the prosecution took inconsistent positions at the suppression hearing. While the prosecution took the position at trial that defendant still had a possessory interest in apartment, we note that additional evidence was presented at trial.² Thus, the prosecution was not estopped to argue at the hearing on the motion to suppress evidence that defendant lacked a reasonable expectation of privacy in apartment 13.

4. Consent

Even assuming that defendant had a reasonable expectation of privacy in apartment 13, we conclude that he voluntarily consented to the search.

The federal and state Constitutions prohibit unreasonable searches and seizures by the government. (U.S. Const., 4th & 14th Amends.; Cal. Const., art. 1, § 13.) A warrantless entry into a home is presumptively unreasonable. (*Payton v. New York* (1980) 445 U.S. 573, 587.) When there is a warrantless search of a home, the prosecution bears the burden of establishing that the search “was justified by some exception to the warrant requirement.” (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) Consent “constitutes such an exception.” (*People v. James* (1977) 19 Cal.3d 99, 106, disapproved on another ground in *People v. Haskett* (1982) 30 Cal.3d 841, 857, fn.6.) “The prosecution bears the burden of showing that the consent to a search is voluntary

² Mrs. Loera testified at trial that defendant moved out of apartment 13 approximately one week after the police were there and he had not moved out when she gave the officers the key to the apartment.

and unaffected by duress or coercion. [Citations.] In every case, the voluntariness of a consent is a factual question to be decided in light of all the circumstances. [Citation.]” (*People v. Aguilar* (1996) 48 Cal.App.4th 632, 639.)

Here, Officer Dillon asked defendant if he could search apartment 13. The officer also specified the area that he wanted to search, that is, “any place that you’d be able to hide or contain narcotics.” Defendant replied, “Yeah, but I don’t have the key.” Defendant’s statement indicated that the officers could search the apartment but he did not have the means to allow them to enter. After obtaining a key from the property manager, Officer Dillon walked to the landing and, in defendant’s view and hearing, stated that he had obtained the key. Defendant did not withdraw his consent. Thus, there was substantial evidence that defendant consented to the search of apartment 13.

Defendant contends, however, that his consent was involuntary because “officers said or implied that, even though they were asking for permission, they had a legal right to search based on [his] ‘SORP’ release conditions on another case.” However, the record does not support this contention. Officer Dillon initially told defendant that he “believed he was out on SORP” and that his apartment could be subject to search if that was a condition of his release. When defendant appeared confused, the officer tried to explain what SORP was and that a search condition “would be dependent upon his paperwork.” Since defendant never understood what SORP was, Officer Dillon “let that [issue] go.” Officer Dillon also “explained to [defendant] that because he was not out on SORP, that it didn’t give [them] the right to search.” He then asked for defendant’s consent “a few minutes later.” Thus, the record establishes that defendant was informed that the officers could not search the apartment based on conditions imposed under SORP.

Defendant next contends that his “consent was invalid because of Officer Dillon’s coercive representation that a failure to consent could result in [his] re-arrest on his other case which, in fact, was a legally incorrect claim since [he] was out on bail, not a

supervised release.” Defendant relies on his own testimony to support this contention. However, the trial court implicitly found defendant’s testimony was not credible.

Relying on *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717 (*Crofoot*), defendant also argues that his “consent should be deemed involuntary because it was the result of Officer Dillon’s threat that by refusing to allow a search, [he] would be incriminating himself.” Officer Dillon asked, “Since you have nothing to hide, would you agree to search your apartment or check your apartment?”

In *Crofoot*, a police officer detained the defendant and his codefendant because the defendant’s jacket pockets were bulging and the codefendant’s backpack and vest had bulging pockets. (*Crofoot, supra*, 121 Cal.App.3d at p. 720.) When the officer asked the codefendant whether he could search his backpack, the codefendant asked, “why?” (*Id.* at p. 721.) The officer responded that there had been “a lot of burglaries in that area that they were coming from.” (*Ibid.*) The codefendant then asked whether the officer had a search warrant, and the officer replied that he did not. (*Ibid.*) At that point, the officer stated that the codefendant “shouldn’t have any objections to [his] looking in the backpack if he weren’t doing anything” and he “asked what his objection was to [his] looking in the backpack.” (*Ibid.*) After the officer reached into the pockets of the backpack, the codefendant requested that the officer leave them alone. (*Id.* at p. 722.) However, the officer continued to search the backpack and the search revealed stolen property. (*Ibid.*)

The Court of Appeal observed that though the codefendant objected to the search of his backpack, the “officer nevertheless pressed further with ‘I told him that he shouldn’t have any objections to my looking in the backpack if he weren’t doing anything. And I asked what his objection was to my looking in the backpack.’” (*Crofoot, supra*, 121 Cal.App.3d at p. 722.) The court concluded that this statement rendered “whatever consent was obtained was in fact ‘no more than acquiescence to a claim of lawful authority,’ that is, the defendant realized that a penalty attached to the

exercise of his Fourth Amendment right to refuse consent to an illegal search.” (*Id.* at p. 725.) Thus, the Court of Appeal held that the consent was involuntary. (*Id.* at p. 726.)

Here, in contrast to *Crofoot*, defendant never expressed an unwillingness to permit a search of the apartment. Moreover, the officer’s statement in *Crofoot* differed significantly from that of Officer Dillon. In *Crofoot*, officer’s statement was a “threat that by exercising his right to refuse the search [the codefendant] would be incriminating himself or admitting participation in illegal activity (that is, that he had been ‘doing something’).” (*Crofoot, supra*, 121 Cal.App.3d at p. 725.) In the present case, when the defendant stated that he had not been doing narcotics, Officer Dillon stated, “Since you have nothing to hide, would you agree to search your apartment or check your apartment?” Since this request proceeded from the assumption that defendant had not committed a crime, Officer Dillon did not inform defendant that the exercise of his Fourth Amendment rights would be an admission of wrongdoing. Thus, the officer’s question did not render defendant’s consent involuntary.

In sum, there was substantial evidence to support the trial court’s finding that defendant voluntarily consented to the search of the apartment. Since the officers’ search did not violate the Fourth Amendment under the totality of the circumstances, the trial court properly denied the motion to suppress evidence.

B. Motion to Disclose the Confidential Informant’s Identity

Defendant requests that this court review the transcript of the in camera proceedings to determine whether the trial court erred in denying the motion for disclosure of the confidential informant and the motion to suppress evidence arising out of his arrest on October 2007.

Defendant filed a motion to suppress evidence obtained during his October 2007 arrest. In opposing the motion, the prosecution stated that probable cause for arrest was provided by a confidential informant and that the identity of the confidential informant

was privileged under Evidence Code section 1042, subdivisions (c) and (d). Defendant then filed a motion for disclosure of the identity of the confidential informant.

A hearing was held on defendant's motion to suppress evidence and motion to disclose the confidential informant. Officer O'Neil testified that he arrested defendant on October 27, 2007, for possession for sale of cocaine base, transportation of cocaine, and conspiracy to commit a crime. Before the arrest, an informant had told him that defendant was selling drugs in San Jose. The informant had provided this type of information to Officer O'Neil on five to 10 prior occasions and on each occasion the information led to arrests relating to drugs. The informant had a criminal history relating to drug use and was paid less than \$150 per case in which he provided information. On the day that defendant was arrested, the informant told Officer O'Neil that defendant "was currently in possession for sales of controlled substances." Based on this information, the officer began monitoring defendant as he drove his car. Defendant drove in a way that the officer believed was for the purpose of counter surveillance, and he was eventually detained. When the officer was asked on cross-examination how he knew defendant's specific location, he invoked the privilege of nondisclosure under Evidence Code sections 1040 and 1042.

Following an in camera hearing, the trial court denied defendant's motion for disclosure of the confidential informant, stating that "nondisclosure of the identity of the confidential informant will not deprive the defendant of a fair trial. [¶] And that the court finds that the confidential informant is not a material witness on the issue of guilt or innocence."

Defendant brought his motion to disclose the confidential informant's identity to ascertain whether the officer's determination of probable cause was properly based on information received from the informant. He requests that this court review the sealed transcript of the in camera hearing to determine the propriety of the trial court's ruling.

Under Evidence Code section 1042, subdivision (c), when the prosecution relies on information from a confidential informant to establish probable cause, the trial court shall decide whether the information was reliable. If the trial court finds that the information was reliable, the prosecution is not required to reveal the informant's identity. (Evid. Code, § 1042, subd. (c).)³

Our review of the record shows that the trial court did not err in concluding that the informant was reliable and that the officer had probable cause to arrest defendant. Accordingly, the trial court properly denied the motion to suppress evidence.

Defendant also requests that this court review the record to determine whether there was a reasonable possibility that nondisclosure of the confidential informant's identity deprived defendant of a fair trial.

“[T]he prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges against defendant. [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.]” (*People v. Lawley* (2002) 27 Cal.4th 102, 159 (*Lawley*)). “If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence of a charge or information which rises from the arrest. Thus, “when the informer is shown to have been neither a participant in nor a non-participant eyewitness

³ Evidence Code section 1042, subdivision (c) states: “Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure.”

to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility.” [Citation.]” (*In re Benny S.* (1991) 230 Cal.App.3d 102, 108.) The standard of review applicable to a trial court’s ruling concerning the disclosure of the identity of a confidential informant is unsettled. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1245-1246 (*Gordon*), overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Courts of Appeal have applied both the de novo and abuse of discretion standards. (*Gordon*, at p. 1246.)

After a careful review of the sealed transcript of the in camera hearing, we conclude that the confidential informant was not a material witness since he was neither a participant in nor an eyewitness to the charged offenses. Thus, the trial court properly denied defendant’s motion to disclose the identity of the confidential informant.

C. Admissibility of Evidence of Prior Drug Conviction

Defendant argues that the trial court abused its discretion under Evidence Code section 352 and violated his due process right to a fair trial by admitting evidence of his prior conviction for drug sales.

Prior to trial, the prosecution brought a motion under Evidence Code section 1101 to admit defendant’s convictions in Nevada for trafficking cocaine, sale of cocaine, and possession for sale of cocaine. Defendant filed a motion to exclude any references to his criminal history. At the hearing on the motions, the prosecutor argued that this evidence was relevant to prove that defendant knew the substance that he was accused of possessing in the charged offenses was cocaine and that he did not possess the cocaine for personal use but to sell. The prosecutor also stated that she intended to introduce a certified copy of the prior convictions and would not present the facts of these convictions. Defendant argued that this evidence was unduly prejudicial and should be excluded under Evidence Code section 352. The trial court ruled that evidence of

defendant's prior Nevada convictions was admissible to prove the elements of knowledge and intent.

At trial, exhibit 25 was admitted into evidence. Exhibit 25 consists of certified copies of the information and the abstract of judgment of defendant's prior convictions. According to the abstract of judgment, defendant was convicted of trafficking in a controlled substance, as charged in count one of the information, unlawful sale of a controlled substance, as charged in count two of the information, and possession of a controlled substance for sale, as charged in count three of the information. The information specified that the controlled substance in each count was cocaine.

“Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of [Evidence Code] section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.’ [Citation.] ‘Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.]’” (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*)). Thus, “[i]n prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under Evidence Code section 1101, subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs. [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 607 (*Williams*)). “The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value

of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, “[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.”

[Citation.]’ [Citation.] ““We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.” [Citation.]’ [Citation.]” (*Fuiava, supra*, 53 Cal.4th at pp. 667-668.)

In the present case, the prior crimes evidence was relevant to show intent. “To be admissible to show intent, ‘the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.’” (*People v. Cole* (2004) 33 Cal.4th 1158, 1194, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 121.) Defendant was charged with two counts of possession of cocaine base for sale. The crime of possession for sale of a controlled substance requires the prosecution to prove that a defendant knowingly possessed a usable amount of a controlled substance with the intent to sell it. (Health & Saf. Code, § 11351; CALCRIM No. 2303.) Thus, the prosecution was required to prove that “when the defendant possessed the controlled substance, he intended to sell it.” Evidence of defendant’s prior convictions for sale of cocaine tended to prove that defendant intended to sell the cocaine base found in his apartment and in his car.

Evidence of defendant’s prior convictions was also relevant to show knowledge. The crime of possession for sale of a controlled substance required the prosecution to prove that defendant “knew of the [cocaine base’s] nature or character as a controlled substance.” (CALCRIM No. 2302.) Defendant was also charged with transportation of cocaine which required the prosecutor to prove the same element. (CALCRIM No. 2300.) Evidence that defendant had prior convictions for sale of cocaine tended to prove that he was aware that cocaine base in his possession was a controlled substance. (*Williams, supra*, 170 Cal.App.4th at p. 607.)

We also find no abuse of discretion in the trial court's decision to admit the evidence on the basis that its probative value substantially outweighed its prejudicial effect. That defendant previously committed nonviolent drug offenses was no more inflammatory than the charged offenses. Moreover, the jury was not informed of any potentially damaging facts underlying the prior convictions. Thus, we cannot conclude, as a matter of law, that the trial court abused its discretion by admitting evidence of defendant's prior convictions. (*Fuiava, supra*, 53 Cal.4th at pp. 667-668.)

Defendant argues, however, that evidence of his prior convictions "lacked probative value of any kind with respect to the issues of knowledge and intent." Defendant claims that "the evidence presented by the prosecution was merely the certified copy of the Nevada County conviction which referred generically to 'a controlled substance,' and was otherwise devoid of any details regarding the circumstances of the prior crime or the nature of the illegal substance." Exhibit 25, which was admitted into evidence at trial, refutes this claim. Exhibit 25 consists of certified copies of the information and the abstract of judgment of defendant's prior convictions in Nevada. The abstract of judgment states that defendant was convicted of trafficking in a controlled substance, unlawful sale of a controlled substance, and possession of a controlled substance for sale, as charged in counts one, two, and three of the information. The information specifies that the controlled substance in each count was cocaine. Thus, there was evidence that the controlled substance in the prior convictions involved cocaine.

Relying on *People v. Lopez* (2011) 198 Cal.App.4th 698, defendant argues that evidence of the prior convictions "was not admissible to prove his knowledge and intent because those facts were not actually in dispute." In *Lopez*, the defendant was charged with and convicted of residential burglary, and the trial court admitted evidence of a prior car burglary and car theft. (*Id.* at p. 714.) In concluding that the trial court abused its discretion, this court reasoned that "[e]vidence regarding the Mendicino burglary showed

that someone entered the kitchen of the Mendicino residence and took two purses. Assuming [the defendant] committed the alleged conduct, his intent in so doing could not reasonably be disputed—there could be no innocent explanation for that act. Thus, the prejudicial effect of admitting evidence of a prior car burglary and prior car theft outweighed the probative value of the evidence to prove intent as to the Mendicino burglary charge. [Citation.] [¶] Simply put, evidence of uncharged acts cannot be used to prove something that other evidence showed was beyond dispute.” (*Id.* at p. 715.)

In contrast to *Lopez*, however, defendant’s intent was not “beyond dispute.” (*Lopez, supra*, 198 Cal.App.4th at p. 715.) As to counts one and two, the evidence established that defendant was driving a vehicle in which there was at least 21 grams of cocaine. As to count three, the evidence established that defendant possessed several rocks of crack cocaine that were individually wrapped. Though the amounts of the cocaine were significant, a jury might have believed that defendant possessed the cocaine for personal use. The jury might also have concluded that the prosecution had failed to prove the knowledge element of the charged offenses. Since “the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the offense” (*Estelle v. McGuire* (1991) 502 U.S. 62, 69), the prior convictions had some probative value as to intent and knowledge.

Even assuming that it was error to admit evidence of the prior convictions, we find no prejudice. Here, the trial court instructed the jury that it was not required to consider this evidence, and if it decided to do so, it could only consider it for the “limited purpose” of determining whether defendant acted with the requisite intent and knowledge. The jury was also instructed: “Do not consider this evidence for any other purpose except for the limited purpose of intent and knowledge. [¶] Do not conclude from this offense that the defendant has a bad character or is disposed to commit crime.” Since we must presume that the jury followed the trial court’s instructions (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005), it is not reasonably probable that exclusion of the evidence would

have led to a different result. (See *People v. Welch* (1999) 20 Cal.4th 701, 749-750 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 to an alleged error under Evidence Code section 1101].)

We also reject defendant's contention that he was deprived of due process by the admission of the prior conviction evidence. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.) "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Here, the jury could have properly drawn inferences from the evidence as to defendant's intent and knowledge. Accordingly, the trial was not fundamentally unfair.

D. Ineffective Assistance of Counsel

Defendant contends that his trial counsel rendered ineffective assistance by failing to (1) impeach Officer O'Neil with a prior inconsistent statement, (2) renew the motion to disclose the confidential informant, (3) object to the use of testimony that defendant had engaged in a previous drug sale, and (4) object to prosecutorial misconduct.

1. Legal Principles

"To prevail on a claim of ineffective assistance of counsel, a defendant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.'" [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.

[Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

2. Failure to Impeach Officer O’Neil and Renew the Disclosure Motion

Defendant contends that trial counsel rendered ineffective assistance by failing to impeach Officer O’Neil at trial with his prior inconsistent statement at a pretrial hearing. Defendant also contends that Officer O’Neil’s testimony showed that the confidential informant could have been a material witness, and thus trial counsel was also ineffective for failing to renew her motion to disclose the informant’s identity.

At the pretrial hearing, Officer O’Neil testified that the informant told him “[t]hat the defendant was currently in possession for sales of controlled substances.” During the prosecution’s case-in-chief, Officer O’Neil testified that he observed defendant “conducting counter surveillance,” and he directed another officer to arrest him. On cross-examination, trial counsel asked the officer if he had seen defendant commit any traffic violations prior to his arrest. Officer O’Neil responded, “No. I knew that he had committed a felony already, so I wasn’t worried about traffic violations since we already had probable cause to arrest him,” and he identified the felony as attempted sale of cocaine. When trial counsel asked if “that was based on him driving and pulling curbside,” the officer replied, “No. That was based on me monitoring a monitored phone call with him agreeing to sell narcotics at that specific location at that specific time.” Trial counsel then stated, “And I’m going to leave that for a moment.” During closing

argument, the prosecutor referred repeatedly to the telephone call monitored by Officer O'Neil.

Here, the officer testified prior to trial that the informant told him that defendant was currently in possession of drugs for sale, and he testified at trial that he had monitored a call in which defendant agreed to sell cocaine base. Since the officer's trial testimony was not necessarily inconsistent with that at the pretrial hearing, trial counsel could have reasonably concluded that both statements were accurate, and that further questioning would have had little effect on the officer's credibility. More importantly, had trial counsel questioned Officer O'Neil about his prior testimony, the jury would have learned that a confidential informant had described defendant as a drug dealer in possession of narcotics. This testimony, which was corroborated by the fact that defendant was found with cocaine base, would have provided the jury with further evidence of defendant's guilt. Since trial counsel may have had a reasonable tactical reason for not questioning Officer O'Neil about his prior statement, her performance was not deficient.

Defendant also argues that trial counsel rendered ineffective assistance for failing to renew the motion for disclosure of the confidential informant. Relying primarily on *Roviaro v. United States* (1957) 353 U.S. 53 (*Roviaro*), defendant claims that "Officer O'Neil[]'s trial testimony established that the confidential informant was potentially a material witness and disclosure was necessary to a fair trial."

Roviaro, supra, 353 U.S. 53 considered the circumstances in which the prosecution must disclose the identity of a confidential informant. In *Roviaro*, police officers searched the confidential informant and his car and found no drugs. (*Id.* at p. 56.) An officer hid in the informant's trunk, and the informant then drove to a location at which the defendant arrived in about an hour. (*Id.* at pp. 56-57.) After the defendant entered the informant's car, the informant drove in a circuitous route to another location. (*Id.* at p. 57.) They were followed by a car driven by a police officer. (*Ibid.*) The officer

observed that when the informant's car stopped, the defendant exited the vehicle, walked to a nearby tree, picked up a package, returned to the informant's car, made a motion as if placing the package in the car, waved to the informant, and walked away. (*Ibid.*) The officer recovered a package, which contained an opium derivative, from the informant's car. (*Id.* at pp. 57-58.) Meanwhile, the officer in the trunk had overheard the defendant direct the informant where to drive, how to drive "so as to lose a 'tail,'" ask how much the informant owed him, and told him that he had brought "three pieces this time." (*Id.* at p. 57.) After the car stopped, the officer heard the defendant say, "Here it is." (*Ibid.*) When the defendant was confronted with the informant later at the police station, the informant said that he did not know the defendant and had never seen him before. (*Id.* at p. 58.)

Roviaro stated: "[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (*Roviaro, supra*, 353 U.S. at p. 62.) *Roviaro* held that the disclosure of the confidential informant's identity in that case was required because the informant had helped set up and had participated in the drug transaction which was the basis of a charge, the informant was the sole witness other than the defendant, and his testimony "might have disclosed an entrapment." (*Id.* at pp. 62-65.)

The parties assume that the confidential informant arranged to buy cocaine from the defendant at the specified location in the monitored call. However, in contrast to *Rovario*, the confidential informant did not participate in the charged offenses. Thus, *Rovario* does not support defendant's position.

Noting that his defense was that Gates possessed the cocaine found in his car, defendant claims that disclosure of the confidential informant's identity would have revealed how Officer O'Neil "knew that it was [defendant's] voice that he was hearing, whether there were any grounds to investigate an entrapment defense, whether O'Neil[]'s description of the conversation was accurate, and other critical details necessary to present an adequate defense."

We fail to see how disclosure of the informant's identity would have revealed how the officer knew it was defendant's voice on the monitored call. Trial counsel could have simply asked the officer how he knew it was defendant's voice. However, trial counsel might have been concerned that this line of questioning would have led to damaging evidence against defendant, such as the officer's other interactions with him.

Regarding a potential entrapment defense, we note that "[i]n California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. [Citation.] '[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.' [Citation.]" (*People v. Watson* (2000) 22 Cal.4th 220, 223.) Here, defendant denied that the drugs were his, and thus this defense was inconsistent with an entrapment defense. More importantly, defendant has made no showing that anyone engaged in overbearing conduct that induced him to drive to the location where he was found with a large quantity of cocaine base.

Defendant's argument that the confidential informant might have challenged the accuracy of the officer's testimony as to the contents of the monitored call is not

persuasive. Even assuming competent counsel would have renewed the motion, the outcome of the trial would not have been affected. The record establishes that the informant reported that defendant was currently selling drugs on the day of his arrest, and defendant was found with cocaine base in his car at the time and place that the informant had predicted. Since the record does not disclose “a reasonable possibility that [the confidential informant] could give evidence on the issue of guilt that might exonerate the defendant [citation]” (*People v. Lawley* (2002) 27 Cal.4th 102, 159), defendant has failed to show a reasonable probability that the result of the trial would have been different if trial counsel had renewed the disclosure motion. (*Mendoza Tello, supra*, 15 Cal.4th at p. 266.)

Defendant’s reliance on *People v. Lee* (1985) 164 Cal.App.3d 830 (*Lee*) and *People v. Viramontes* (1978) 85 Cal.App.3d 585 (*Viramontes*) is misplaced.

In *Lee, supra*, 164 Cal.App.3d 830, the affidavit in support of the application for a search warrant stated that the confidential informant had visited the residence of a person that he knew as “‘Ann’” and observed “‘Ann’” in possession of and selling drugs on multiple occasions. (*Id.* at p. 837.) When the police executed the warrant, they found the defendant trying to flush three PCP-laced cigarettes down the toilet and over eight baggies containing six grams of PCP hidden in a couch. (*Id.* at p. 834.) The defendant was charged with possession of PCP for sale. (*Id.* at p. 833.) Following an in camera hearing, the trial court denied the defendant’s motion to disclose the identity of the confidential informant. (*Id.* at p. 834.) At trial, the defendant asserted that the cigarettes were hers, but the PCP found in the couch was not. (*Ibid.*) *Lee* held that the confidential informant was a material witness because “only the informant could testify as to whether defendant personally had been selling PCP, whether she or another or others exercised dominion and control over the drugs and the nature and extent of the informant’s personal knowledge of these matters.” (*Id.* at p. 840.)

The present case is factually distinguishable from *Lee*. Here, defendant was not claiming that he possessed some of the cocaine base for personal use and the rest belonged to another individual. While defendant tried to suggest that Gates exercised dominion and control over the drugs, there is nothing in the record to indicate that the confidential informant would have provided evidence favorable to defendant on this issue.

In *Viramontes*, *supra*, 85 Cal.App.3d 585, the defendant had provided a Pico Rivera address to his parole agent. (*Id.* at p. 588.) Shortly thereafter, an informant told a deputy sheriff that the defendant had moved to Montebello, he had personally seen him inside the residence, and the defendant would meet potential buyers of heroin near his residence. (*Ibid.*) The parole agent and deputy sheriffs went to the Montebello address, found defendant, who was under the influence of an opiate, and conducted a search, which resulted in the seizure of a significant quantity of heroin. (*Id.* at pp. 588-589.) At the hearing on the motion to disclose the identity of the confidential informant, two defense witnesses testified that the defendant lived in Pico Rivera. (*Id.* at p. 589.) The trial court found that the informant was a material witness. (*Id.* at p. 590.) When the deputy sheriff refused to disclose the informant's identity, the trial court dismissed the case. (*Ibid.*) *Viramontes* affirmed the judgment, reasoning that the prosecution had little evidence that defendant resided at the Montebello address and "[t]he informant, who claimed to have personal knowledge concerning the location, might possibly have been able to testify that he had seen other people at that address who manifested occupant status or exercised control over the contraband." (*Id.* at p. 592.) *Viramontes* also pointed out that "[t]he evidence supporting the materiality of the informant's testimony was not strong," but the prosecution had failed to request an in camera hearing and thus could not complain that the record was uncertain. (*Id.* at p. 593.)

In contrast to *Viramontes*, here, it was undisputed in the present case that the cocaine base was found in a vehicle owned by defendant. Moreover, an in camera

hearing was held, and the confidential informant would have provided no further evidence on this issue.

In sum, we conclude that trial counsel did not render ineffective assistance by failing to impeach Officer O'Neil or by failing to renew the motion to disclose the identity of the confidential informant.

Defendant also contends that trial counsel rendered ineffective assistance when she failed to object to and limit the use of testimony that defendant had engaged in a previous drug sale.

The prosecutor asked Mr. Loera if he had ever seen defendant "doing drug deals." He replied, "[o]nly once," and he saw defendant "[j]ust handing some little package to somebody and receiving money." During cross-examination, the following exchange occurred: "[Trial Counsel]: Okay. And when you say that you saw him selling drugs in the hallway, did you actually see an actual drug? [¶] [Mr. Loera]: Yes. No, I didn't see no drug, but I seen the way they do the exchange. I mean, because I used to live in L.A. and I used to see a bunch of that, so I know what -- how they -- and watching too much T.V. [¶] Q. But did you see an actual drug? [¶] A. No, no. [¶] Q. Okay. And did you see actual dollar bills being exchanged? [¶] A. No. The only thing just sort of like a handshake. But deep in the corner. [¶] Q. Okay. But you didn't see a drug? [¶] A. No, no, no. [¶] Q. And you didn't see any bills? [¶] A. No. [¶] Q. Okay. And did you ever report this activity to Mr. Pusateri? [¶] A. No." On redirect examination, the prosecutor returned to the issue of the drug transaction. "[Prosecutor]: And you also mentioned that you saw a drug deal once. [¶] [Mr. Loera]: Yes, I did. [¶] . . . [¶] Q: Can you describe exactly what you saw when you observed this transaction? [¶] A. Basically I just happened to pass by and I just seen like a handshake, but I didn't see nothing, money or anything. But I just seen like a handshake. [¶] Q. Did you notice anything about the person that was meeting Mr. Thompson? [¶] A. No. [¶] Q. And you mentioned that you have seen drug deals before. [¶] A. Yes, I did. [¶] . . . [¶] Q.

So what you observed Mr. Thompson doing appeared in the same manner to things you have seen in the past? [¶] A. Yes.”

As previously stated, evidence of uncharged acts is inadmissible to prove the defendant’s bad character. (Evid. Code, § 1101, subd. (a).) However, such evidence is admissible to prove intent and knowledge (Evid. Code, § 1101, subd. (b)) when its probative value is not outweighed by its prejudicial effect (Evid. Code, § 352). Evidence of a prior drug sale was relevant to show defendant was familiar with narcotics (knowledge) and possessed the cocaine base for sale (intent). (See *Williams, supra*, 170 Cal.App.4th at p. 607.) Here, had counsel objected to the evidence of the prior drug transaction, the trial court may well have determined that it was admissible. However, trial counsel may have made a reasonable tactical decision to emphasize that the witness did not see either drugs or money and was merely speculating that he had seen a drug transaction. Under these circumstances, we cannot conclude that counsel rendered ineffective assistance.

People v. Guizar (1986) 180 Cal.App.3d 487 does not persuade us otherwise. In *Guizar*, the defendant was on trial for murder and trial counsel did not object to the admission of evidence of a taped statement that the defendant had committed other murders in the past. (*Id.* at p. 491.) The Court of Appeal held that since the evidence had little, if any probative value and was highly prejudicial, trial counsel’s failure to object constituted ineffective assistance. (*Id.* at pp. 491-492.) In contrast to *Guizar*, here, as previously stated, the record establishes a reasonable tactical decision for trial counsel’s failure to object to evidence of a possible drug transaction.

Defendant also contends that trial counsel was ineffective for failing to object to the prosecutor’s improper argument that his prior convictions showed a propensity to commit the charged offenses.

“Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide.” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179.)

During argument, the prosecutor made several references to defendant’s prior Nevada convictions, including the following: “How else do we know that the defendant knew of the presence of two large rocks of cocaine base in his car? *The prior conviction*. You will get an instruction that allows you to consider the prior conviction for two ways. Knowledge and intent. *The prior conviction*, the fact that he was convicted of sales, trafficking, and possession for sale of cocaine base once before gives him the knowledge.” (Italics added.) “How do we know the defendant knew that the rocks that were in his car were cocaine base? Well, *the prior conviction*.” (Italics added.) So how do we know he knew of the presence? Well, *the prior conviction* that is here from Nevada from a jury trial he went through in Nevada where he was convicted of possession for sale, sales and trafficking, give you circumstantial evidence that he knew of the presence.” (Italics added.) “The *prior conviction* and the ’07 case tell you that he knows what crack is. [¶] Now, the last element I must prove to you is that in the January 2nd case when the defendant possessed these 21 individually packaged baggies of cocaine base he intended to possess them for sale. [¶] How do we know this? *Prior conviction*.” (Italics added.) Given that the trial court properly admitted evidence of the prior convictions, trial counsel was not ineffective for failing to object to these portions of the prosecutor’s argument.

However, the prosecutor made several subsequent references to defendant’s prior convictions without referring to the limited purpose for which the jury could consider this evidence. Later in her argument, the prosecutor stated: “Your job is to determine what’s the truth. [¶] . . . And the truth is that the defendant in November of 2001 *committed the same type of crime, possession for sale of cocaine base, sale of cocaine base, and trafficking cocaine base*. And the truth is that six years later, because the first incident

happened in '07, he committed the same act, possession for sale.” (Italics added.) “[I]f you haven’t listened to anything else, this is the most important aspect of this trial, *the most important pieces of evidence: the defendant’s prior conviction* and that monitored phone call that Officer O’Neil testified to.” (Italics added.) “The *prior conviction* tells you the defendant is guilty. The evidence overwhelmingly supports his guilt. Now, those two pieces of evidence alone would be enough to have an abiding conviction.” (Italics added.) “Are we to believe [Gates] is this criminal mastermind who did this without him seeing it and she just happens to pick somebody *who has a prior conviction* six years before?” (Italics added.) “Ladies and gentlemen, you have to ask yourselves what has to be true *for the defendant to be not guilty*. What has to be true in this case. . . . And the defendant happened to *just not commit these prior convictions?*” (Italics added.) “Ladies and gentlemen, that’s not what’s going on here. This defendant committed the crimes he is charged with. *This is not the first time he has been charged with these crimes. It’s not the first time he began selling drugs.* The evidence is overwhelming.” (Italics added.) By failing to object to the prosecutor’s argument that defendant was guilty of the charged offenses because he had previously committed the same offenses, trial counsel failed to render competent assistance.

The error, however, was not prejudicial. The trial court properly instructed the jury that it could not “consider this evidence [of uncharged offenses] for any other purpose except for the limited purpose of intent and knowledge. [¶] Do not conclude from [the uncharged offenses] that the defendant has a bad character or is disposed to commit crime.” The trial court also instructed the jury that “[n]othing that the attorneys say is evidence. [¶] In their opening statements and closing arguments, the attorneys will discuss the case but the remarks are not evidence.” It is presumed that “the jury treated the court’s instructions as statements of law, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” (*People v. Morales* (2001) 25 Cal.4th 34, 47, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 70.) Since defendant has not

shown that there was a reasonable probability that the result of the trial would have been different if counsel had objected to the improper argument, we reject defendant's claim of ineffective assistance.

Defendant next contends that trial counsel was ineffective for failing to object to the prosecutor's argument in which she expressed a personal belief in the strength of the evidence against him and "implied to the jury that the prosecutor had personal knowledge of facts which were not available to the jury." We disagree.

In closing argument, the prosecutor stated: "Now, at the beginning of this trial, I told you that this was a case about a man who was not willing to take responsibility for his actions. I told you this was a case about a man who makes a living selling crack cocaine on the streets. ¶¶ *As I stand here at the close of evidence, I'm confident that all of that is true. I'm confident that when you evaluate the evidence, it is clear that the two amounts of narcotics in this case, the cocaine base, was possessed for sale and transported in the earlier incident. And I'm confident that deep down inside the defendant knows that it's true.*" (Italics added.)

"It is misconduct for a prosecutor to express a personal belief in the merits of a case, rather than a belief based upon the evidence at trial. [Citations.]" (*People v. Johnson* (1981) 121 Cal.App.3d 94, 102.) Similarly, "[t]he prosecutor is generally precluded from vouching for the credibility of her witnesses, or referring to evidence outside the record to bolster their credibility or attack that of the defendant. [Citations.]" (*People v. Anderson* (1990) 52 Cal.3d 453, 479.) However, when the prosecutor relies on the evidence presented at trial and the inferences to be drawn from this evidence, and does not imply any personal knowledge or belief based on facts outside the record, the prosecutor has not engaged in improper "vouching.'" (*People v. Medina* (1995) 11 Cal.4th 694, 757 (*Medina*).)

In *People v. Farnum* (2002) 28 Cal.4th 107, the prosecutor argued in the first person, stating "*I think* the reasonable inferences are from all of the evidence that [the

defendant ransacked the victim's room],” and “I saw [other evidence] and this looked real significant to me.” (*Id.* at p. 170.) The prosecutor also asserted that the prosecution witnesses were “the ones that know what’s going on. [¶] . . . And you know it’s true, too.” (*Ibid.*) Our Supreme Court rejected the defendant’s argument that these statements constituted improper vouching, and held that the “prosecutor’s statements constituted proper comments on the evidence, not attempts to vouch personally for the credibility of these witnesses. [Citation.] Read in context, the challenged comments urged the jury to credit the witnesses’ testimony based on matters within the record, not matters within the prosecutor’s own personal knowledge.” (*Ibid.*)

Similarly, here, the prosecutor did not refer to or imply reliance on facts outside the record. She expressed her belief, “as [she stood] at the close of evidence,” that the evidence showed defendant’s guilt. Since this statement was proper, trial counsel had no grounds on which to object. (See *People v. Gurule* (2002) 28 Cal.4th 557, 658 [prosecutor’s statement, “I believe you may find the [absence of mitigating factors] supports the conclusions of the People of the State of California that this was simply an aggravated crime of murder” was not “a type of misconduct akin to a prosecutor improperly vouching for the credibility of a witness.”].)

Defendant also argues that there was no direct evidence that he made “his living selling crack cocaine on the streets,” and this statement, “combined with the prosecutor’s use of the ‘I’m confident’ language, implied to the jury that the prosecutor had personal knowledge of facts which were not available to the jury.” There is no merit to this argument. The prosecutor presented extensive evidence to prove that defendant sold, possessed, and transported cocaine base. Her statement that he made his living selling cocaine on the streets was a reasonable inference to be derived from the evidence. (See *Medina, supra*, 11 Cal.4th at p. 757.) Thus, trial counsel did not render ineffective assistance by failing to object to this portion of the prosecutor’s argument.

E. Cumulative Error

Defendant argues that the cumulative effect of the errors deprived him of the right to a fair trial. Since we have found no error, we reject defendant's argument. (*People v. Lee* (2011) 51 Cal.4th 620, 657.)

F. Attorney's Fees

Defendant argues that the trial court erred by imposing attorney's fees without holding a hearing on his ability to pay.

Penal Code section 987.8, subdivision (b) provides in relevant part: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof."

"'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her." (Pen. Code, § 987.8, subd. (g)(2).) The trial court shall consider, but not be limited to, "[t]he defendant's present financial position, . . . [t]he defendant's reasonably discernible future financial position. . . . Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense[,] and "[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (Pen. Code, § 987.8, subd. (g)(2).)

Here, the trial court imposed attorney's fees without holding a hearing or making any findings on defendant's ability to pay. Citing *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537, the People argue that "when the trial court makes no express finding of a state prisoner's ability to pay but imposes attorney fees nonetheless, the court

is implied to have found unusual circumstances show the prisoner was able to pay the fees,” and that if substantial evidence supports the court’s implied finding, the attorney fees order will be upheld.

However, the record does not support the implied finding of unusual circumstances or an ability to pay. Defendant was remanded into custody on September 24, 2010. The probation report states that he was earning \$3,000 a month as a delivery driver and paying \$1,000 a month in rent prior to that time.⁴ In 2007, he purchased a vehicle for \$3,000 or \$4,000 in cash installments. He provided no financial support for his children. There is no indication in the record whether he had savings or any debts. At the sentencing hearing in February 2011, the trial court imposed attorney’s fees of \$750 as well as various fines, fees, and assessments in the amount of \$5,769.75.⁵ Thus, there is insufficient evidence to support the requisite findings.

In *People v. Flores* (2003) 30 Cal.4th 1059, the record did not establish that the defendant was able to pay \$5,000 in attorney’s fees. The defendant was employed, possessed jewelry worth \$1,500, and had child support obligations. (*Id.* at p. 1068.) The

⁴ Noting that the cocaine base seized from defendant’s car had a street value of \$2,300 and defendant made his rent and car payments in cash, the People argue that this court should “assume” that defendant had received “additional, possibly significant, income from drug sales.” While defendant may very well have received income from drug sales, there is nothing in the record to indicate that he did or the amount of such income.

⁵ The trial court imposed a restitution fine of \$4,000 (Pen. Code, § 1202.4, subd. (b)), a court security fee of \$90 (Pen. Code, § 1465.8), a criminal conviction assessment of \$90 (Gov. Code, § 70373), a criminal justice administration fee of \$129.75 (Gov. Code, § 29550 et seq.), a criminal laboratory analysis fee of \$100 plus a penalty assessment of \$265 (Health & Saf. Code, § 11372.5), and a drug program fee of \$300 plus a penalty assessment of \$795 (Health & Saf. Code, § 11372.7).

We also note that the abstract of judgment and the minute order state that the restitution fine was \$3,200. However, the trial court orally imposed a restitution fine of \$4,000. When the trial court’s oral pronouncement of judgment conflicts with the clerk’s minutes or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, the minute order and the abstract of judgment must be corrected to reflect a restitution fine of \$4,000.

California Supreme Court concluded: “Defendant may not be able to pay the \$5,000 ordered by the trial court, but he may be able to pay something, and if he can, he is obligated by the statute to do so. In any event, as the Court of Appeal observed, whether defendant’s financial circumstances are unusual for someone sentenced to prison is not the issue on appeal, and rather than speculate about it, we affirm the Court of Appeal’s remand order so that the trial court may, after having conducted a hearing into the question, make an informed decision.” (*Id.* at pp. 1068-1069.) Accordingly, we will remand the matter for notice and a hearing under Penal Code section 987.8, subdivision (b).

III. Disposition

The judgment is reversed, and the matter is remanded with directions to the trial court to hold a hearing to determine whether defendant has the ability to pay attorney’s fees. If the court concludes that he does not have the ability to pay, it shall strike the attorney’s fees order and reinstate the judgment. The trial court is also directed to correct the minute order and abstract of judgment to reflect that the restitution fund fine pursuant to Penal Code section 1202.4, subdivision (b) is \$4,000.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.