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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. LARRY D. ALEXANDER, Defendant and Appellant.	C041257 (Super. Ct. No. SF082949A)

Defendant Larry Alexander was convicted of transporting cocaine and possessing cocaine base for sale. He admitted two prior serious felony convictions within the meaning of the Three Strikes Law (Pen. Code, §§ 667, subd. (d) and 1170.12, subd. (b)) and was sentenced to 25 years to life in state prison.

On appeal he argues the trial court erred in: (1) denying his motion to discover the personnel files of the officers

involved in his arrest; (2) denying his motion to suppress evidence; (3) preventing cross examination; (4) denying his motions to discharge his court appointed attorney; and (5) denying his motion to strike one or both of his prior felony conviction allegations. He also asserts there was insufficient evidence to convict him of possession of cocaine with the intent to sell it.

We find no merit in defendant's arguments and shall affirm the judgment with directions to correct the abstract of judgment to conform to the trial court's order to stay the possession with intent to sell conviction (count 2) pursuant to Penal Code section 654.

FACTUAL AND PROCEDURAL BACKGROUND

The Stockton Police Department received several complaints that apartment 280 in the Delta Gateway Apartments was receiving short stay traffic. Based on this information narcotics officers Jimmy Fritts and Mike Dixon went to the apartment complex in plain clothes and an unmarked police van. They parked inside the complex and observed apartment 280 from inside the van. Narcotics detectives Jose Martinez and Scott Votino were waiting outside the apartment complex in plain clothes and an unmarked car.

As officers Fritts and Dixon watched, Ronzetta Brown exited apartment 280 onto the landing and looked northbound toward the entrance to the complex. She walked back in the apartment, then came out with a portable phone. She continued to look toward

the entrance to the complex as she spoke on the phone. Seconds later a car came through the main entrance and parked in a stall directly in front of apartment 280.

A man later identified as defendant got out of the car and went upstairs to speak with Brown. They spoke briefly outside then walked inside the apartment. Less than 30 seconds later defendant came out, went down the stairs to the car and opened the gas tank cover. Fritts and Dixon observed defendant take a clear plastic baggie from the gas tank area and could see more plastic tucked inside the gas tank cover.

Defendant closed the plastic baggie into his fist and went back up to apartment 280. He was there a minute before he came back out and went to his car. Officer Fritts contacted officers Martinez and Votino by radio, gave them a description of the defendant and his car, and told them to have a marked unit stop defendant's car after it left the complex.

After defendant left, Brown came out of her apartment and went to apartment 188. She had one hand clenched into a fist. She went inside briefly, then came back out and returned to apartment 280. Officers Fritts and Dixon searched apartment 280, but found no drugs.

After Fritts contacted officers Martinez and Votino by radio, they contacted dispatch and asked for a marked patrol car and uniformed officer to respond to the area to stop defendant. Officers Miles and Wentland were the uniformed officers dispatched to the area. Officers Martinez and Votino observed

officer Miles stop defendant's car after it left the apartment complex. While Officer Miles had defendant sitting in the back of the patrol car, Officer Votino opened the gas tank on defendant's car. Officers Martinez and Votino both observed plastic bags containing an off-white rock-like substance that was later determined to be cocaine. The amount of cocaine recovered was 18.62 grams.

Officer Votino searched defendant and retrieved a pager and cell phone from his pockets.

Defendant was charged with transporting cocaine and possessing cocaine base for sale. (Health & Saf. Code, §§ 11352, 11351.5.) The information alleged defendant had suffered two prior serious felony convictions within the meaning of the Three Strikes Law. (Pen. Code, §§ 667, subd. (d) and 1170.12, subd. (b).)[1]

Defendant moved to suppress, inter alia, the observations of the law enforcement officers, any statements he made to the officers, the cocaine, and his cell phone and pager on the grounds the officers did not have probable cause to search him. The trial court found there was probable cause and denied the motion.

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[1] References to a section are to the Penal Code.

Defendant also brought a *Pitchess*[2] motion to discover certain personnel files of all of the officers involved in the stake-out and arrest. The motion was denied.

The jury found defendant guilty on both counts. Defendant admitted the truth of the prior conviction allegations.

The trial court sentenced defendant to 25 years to life on count 1, and imposed a consecutive one year and four months sentence on count 2, which was stayed pursuant to section 654.

DISCUSSION

I
Pitchess Motion

Defendant made a motion to discover the personnel records of officers Votino, Martinez, Fritts, Miles, Dixon, and Wentland relating to "acts, statements, or any other type of behavior demonstrating untruthfulness, propensity for fabrication and planting evidence."

The declaration of defendant's counsel in support of the motion asserted on information and belief "that Mr. ALEXANDER did not take any narcotics out of his gas tank and did not have two additional bags containing cocaine base stuffed beside[] the gas intake area." The declaration also alleged on information and belief defendant did not "possess, sell, transport or possess for sale any rock cocaine" on the date of the offense and that "Officers Fritts and Dixon fabricated their

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

observations" and that "Officers Fritts, Dixon, Martinez, Votino, Miles and Wentland fabricated their claims that they found two plastic bags containing cocaine base stuffed beside the gas intake area." The declaration asserted the officers either fabricated finding any cocaine or planted the cocaine.

Both the district attorney and city attorney representing the City of Stockton filed oppositions to the motion. Defendant objected to the opposition of the district attorney on the grounds the district attorney had no standing to represent a third party in discovery proceedings. However, the trial court heard argument from both the district attorney and the city attorney.

The district attorney argued the declaration supporting the motion was inadequate because it merely stated conclusions without giving the source of the facts on which the conclusions were based. The district attorney also argued the version of events stated in the declaration was not credible. The city attorney incorporated the arguments of the district attorney and submitted the matter.

After the motion was argued, the trial court ruled with the exception of officers Fritts and Dixon there were no credibility issues and denied the motion as to the other four officers. With regard to officers Fritts and Dixon, the trial court stated there was "some color" to an argument for discovery of their records, but found defendant had not made the required threshold

showing because the declaration was nothing more than a disagreement with the officers' version of events.

a. Standing to Oppose Pitchess Motion.

Defendant argues the trial court erred when it allowed the district attorney to oppose the *Pitchess* motion. We agree. However, we find the error harmless in this case.

In the recent Supreme Court case, *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045, the court held a district attorney has no standing to be heard on a *Pitchess* motion. Nevertheless, any error here was harmless beyond a reasonable doubt. If the custodian of the records being sought raises an objection to the disclosure, as the City of Stockton did in this case, the defendant must make "a plausible justification" for the necessity of the records. (*Ibid.*) As we explain, *post*, defendant did not make such a showing in this case.

b. Inadequate Showing of Good Cause.

Pitchess, *supra*, established the right of a criminal defendant to discover the personnel records of peace officers, subject to certain limitations. The holding in *Pitchess* was later codified. In particular Evidence Code sections 1043 and 1045 set forth a two-step process for obtaining discovery of peace officer personnel records.

First, the defendant must file a written motion and give notice to the agency holding the records. The motion must describe the type of records sought and contain a declaration showing "good cause" for the discovery and setting forth the

materiality of the records to the pending litigation.[3] (Evid. Code, § 1043.) Second, if the court finds the showing of good cause has been made, it reviews the records to determine whether any are relevant. (Evid. Code, § 1045.)

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[3] The full text of Evidence Code section 1043 reads as follows:

"(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

(b) The motion shall include all of the following:

(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

(2) A description of the type of records or information sought.

(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

A showing of "good cause" requires a defendant to set forth a "specific factual scenario" that establishes a "plausible factual foundation" for the allegations of misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.) The "good cause" requirement is a "relatively low threshold for discovery", that is offset by the protective provisions of Evidence Code section 1045 excluding certain records from disclosure and establishing a procedure for in camera inspection prior to disclosure. (*City of Santa Cruz v. Municipal Court, supra*, at p. 83.)

Whether the defendant's threshold showing is sufficient is addressed solely to the discretion of the trial court. (*People v. Breaux* (1991) 1 Cal.4th 281, 311-312; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.) We conclude the trial court did not abuse its discretion in finding defendant failed to meet the threshold showing.

The factual scenario proposed by defendant's motion was that officers Dixon and Fritts lied about seeing defendant retrieve drugs from his gas tank, and all the officers lied about recovering drugs from around the gas tank of his car. Alternatively, he asserted "they planted the cocaine base in the gas tank area."

Defendant's factual scenario as set forth in the declaration supporting the motion is sufficiently specific as it relates to the allegation of fabricating evidence, but not as it

relates to the allegation of planting evidence. Defendant does not specify when or who planted the evidence, only that the evidence was planted.

Whether or not the factual scenario was sufficiently specific, the trial court did not abuse its discretion in finding the scenario was not plausible. Defendant's factual scenario is based on the premise that no less than six officers conspired to falsify police reports in order to arrest him. Only four of these officers were narcotics officers. The other two were dispatched after the operation was underway. There is no allegation in the declaration that any of the officers knew defendant or had any kind of score to settle with him. The officers testified they were on a stakeout of Brown's apartment. Therefore, when the operation began they had no idea defendant would become involved.

The scenario involving planting evidence is even less plausible. The officers who recovered the cocaine were not the same officers as those who first observed it in defendant's car. It is unlikely officers Fritts and Dixon would have had time to plant evidence since defendant was only inside the apartment a minute or two.

The trial court was required to determine the plausibility of defendant's proposed factual scenario. Because the only basis for the scenario was defendant's denial of the allegations, the defendant's scenario was contradicted by the proposed testimony of six officers, and the factual scenario was

inherently unlikely, we cannot say the trial court abused its discretion in deciding there was no plausible factual foundation to support a finding of good cause.

II
Probable Cause

Defendant made a pre-trial motion pursuant to section 1538.5 to suppress evidence obtained as the result of the search on the grounds there was no search warrant and there was insufficient evidence for probable cause.

Officer Fritts testified at the hearing on defendant's motion. He testified on the day in question he was observing apartment 280 because of complaints of short stay traffic related to suspected drug activity in that apartment. He had information that the tenant of that apartment, Ronzetta Brown, might be involved.

As he was watching apartment 280, Brown came out of the apartment and spoke on a portable phone to someone as she looked towards the entrance to the apartment complex. A brown Oldsmobile came through the entryway and parked directly in front of Brown's apartment. When the vehicle arrived, Brown put down the phone. Defendant was later determined to be the driver of the car. He was its sole occupant.

Defendant went over to Brown, then the two of them went inside her apartment. Ten to twenty seconds later defendant came out by himself, walked to his car, and opened the gas cover. Fritts observed a bunch of clear plastic stuffed inside the gas cover. Defendant reached in and removed a plastic

bindle that appeared to have a solid object the size of a large marble inside.

Defendant closed the gas cover and closed the bindle into his fist. There was still more plastic inside the gas tank area. At this point Fritts radioed officers Martinez and Votino to have defendant's vehicle stopped when it left the complex. Defendant returned to Brown's apartment, then came back out, returned to his car and left. Fritts contacted the other officers again to give them a description of defendant and his car. Defendant was stopped within a minute or two of leaving the complex. Fritts was informed defendant had been stopped around the time Brown was walking across to apartment 188.

If probable cause exists, law enforcement officers may search an automobile even without a warrant. (*People v. Banks* (1990) 217 Cal.App.3d 1358, 1362; (*United States v. Ross* (1982) 456 U.S. 798, 823 [72 L.Ed.2d 572, 592-593].) The test for determining whether probable cause exists is whether "'given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.' (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [76 L.Ed.2d 527, 548, 103 S.Ct. 2317].)" (*People v. Banks, supra*, at p. 1363.)

In this case the officers were watching Brown's apartment because they received a tip the apartment was being used for drug trafficking. Defendant met with Brown briefly, then retrieved what appeared to the officers to be a bindle of

narcotics from his gas tank area. They saw what appeared to be more drugs stashed around the gas intake area. Given these circumstances there was a fair probability a search of defendant's car would produce the observed contraband. These circumstances were sufficient to establish probable cause.

People v. Huntsman (1984) 152 Cal.App.3d 1073, cited by defendant, is to be distinguished from the present case. In *People v. Huntsman*, *supra*, officers observed two men behind a vehicle in a parking lot located in a high-prostitution area. One of the men was holding a large Zip-Lock bag, but the officers were unable to see whether the bag contained anything. One of the men was looking around, and when the officer's unmarked vehicle approached, the men slammed the trunk lid closed and walked away. (*Id.* at p. 1079.) This court observed that "the officer simply observed defendant holding an eight-by-eleven-inch plastic bag; no more, no less." (*Id.* at p. 1083.) We noted such bags could be used to hold a variety of legitimate objects.

Here, unlike *People v. Huntsman*, the officers were able to see that the plastic bag defendant retrieved contained a substance that appeared to be contraband. Defendant was in contact with a person the officers were watching for suspected drug trafficking. Additionally, defendant retrieved the bag from around his gas tank, which, unlike the trunk, is a highly suspicious area to be used for transport. Defendant took the plastic bag concealed in his closed fist into the apartment the

officers were surveilling. Shortly thereafter, Brown left the apartment to go to another apartment, apparently concealing something in her closed fist as had defendant in bringing a plastic bag to her. These factors present circumstances far more incriminating than those in *People v. Huntsman*.

III

Right to Confront Witnesses

Officer Fritts wrote a letter that was published in the Stockton Record. In the letter, he criticized the district attorney's office for offering plea bargains in drug cases in order to improve its conviction ratio.

On cross-examination defendant's attorney questioned Fritts without objection about his motivation for writing the letter. Later on re-cross, defendant's attorney asked Fritts if he had planted evidence in the past. He responded he had never planted evidence. Counsel asked if he would admit to planting evidence if he had. The trial court sustained the prosecution's objection to the question.

Defendant's attorney asked officer Dixon if he had read the letter Fritts wrote. Dixon replied he had not read the letter. Dixon was then asked if Fritts had ever discussed with Dixon his frustrations with the district attorney's office. The trial court sustained the prosecution's objection to this question. Later on re-cross, defendant's counsel asked what Dixon would have done if he had seen Fritts plant drugs in defendant's gas tank. Dixon stated he would have arrested Fritts.

Defendant now argues he was precluded from inquiring into Fritts's credibility and from demonstrating Fritts could have fabricated testimony and planted evidence. He claims this violated his Sixth Amendment right to confront and cross-examine witnesses. We disagree.

> "'[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."' [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment." (*People v. Frye* (1998) 18 Cal.4th 894, 946.)

The trial court did not violate defendant's Sixth Amendment rights here because the cross-examination was not otherwise appropriate and because he has failed to show the cross-examination would have produced a significant difference in the impression of Fritts's credibility.

Defendant's question to Fritts about whether he would admit to falsifying evidence if he had done so was improper because it assumed facts not in evidence and was argumentative. (Evid. Code, §§ 403, 765.) Although the question to officer Dixon may have been admissible as it related to Fritts's credibility, there was no showing the questioning would have produced evidence probative of Fritts's credibility. The question asked related to Fritts's expressed frustrations with the district attorney's office, not with any statements Fritts had ever made about planting evidence. Defendant's counsel was not precluded from questioning Dixon about whether he had ever seen Fritts plant evidence or talk about planting evidence.

Defendant's counsel was able to plant the seed of doubt with the jury that Fritts was frustrated with the district attorney's handling of narcotics cases and might have planted evidence in this case. It is unlikely the prohibited cross-examination would have produced a different impression of Fritts's credibility.

IV
Marsden Motion

Defendant raised four *Marsden*[4] motions to discharge his court appointed attorney.

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[4] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

a. First Marsden Motion.

In the first motion defendant complained because his attorney had advised him to accept the plea bargain being offered by the district attorney, had not communicated with him, had a conflict of interest, and was not "adequate counsel[.]" The trial court asked what the conflict involved, and defendant replied it was telling his family he would get 25 to life if he went to trial. Defendant claimed he wrote his counsel several letters and had not heard from her.

The trial court questioned defendant's counsel. She acknowledged she told defendant's mother there was an offer of eight years imprisonment and that his exposure was 25 years to life if he went to trial. She told defendant he had no real defense if they were unable to win a suppression motion, and that he would likely be convicted and receive 25 to life unless she could get the court to strike one of his prior felony convictions.

Defense counsel stated defendant had not written her any letters, and that she was not aware he wanted her to come visit him. She stated she had filed a suppression motion and was not aware there was anything further they needed to discuss.

The trial court found counsel's representation adequate and denied the motion.

b. Second Marsden Motion.

At the second *Marsden* motion defendant claimed counsel was not communicating with him, was not filing motions that needed

to be filed, and had not asked the district attorney to give him a "proper deal[.]" He claimed he wanted her to file a *Pitchess* motion and a *Faretta* motion.[5] He said, "I even asked people that some of the inmates they was telling me about her, they say, 'If you go to trial with her, you're going to lose.'" Defendant stated his complaints were the motions and the conflict of interest, explaining that "[w]e always arguing." Defendant said he thought he had raised enough issues to get a new lawyer because, "I got rid of lawyers before and I only had one excuse . . . ."

The trial court asked for comments from defendant's attorney. She stated the suppression motion had been denied, and that after the denial she spoke to defendant to see what he wanted to do. He told her he was now willing to take the offer of eight years, and she communicated that to the district attorney. However, defendant later decided he did not want to take the eight year deal.

She did not think defendant actually wanted a *Faretta* motion. She believed he wanted some type of motion that would relieve the public defender's office. She told him she was not aware there was such a motion.

Counsel admitted she had not seen defendant for two weeks. She said their relationship had been contentious and she did not see him because he told her they had nothing to talk about. She

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[5] *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].

stated she agreed with defendant that if the case went to trial a *Pitchess* motion should be filed because of information defendant recently gave her.

The trial court told defendant he did not see any conflict of interest, merely a conflict of personality. The trial court observed defendant was a "fairly contentious person." The trial court stated, "[n]obody is going to get along with you. There isn't anybody that's going to satisfy you, as far as I can tell."

The court explained to defendant that a *Faretta* motion was a motion to represent himself, not to get rid of every public defender. Defendant confirmed he did not want to bring a *Faretta* motion.

The trial court denied the motion.

c. Third Marsden Motion.

Defendant brought a third *Marsden* motion, complaining his attorney did not do anything on time, had failed to prepare and file motions, specifically a section 995 motion, and had failed to present evidence critical to his defense.

Defendant stated he wanted to present evidence officer Fritts had been held in contempt of court for perjury. Defendant stated he had heard about Fritts from an inmate. The trial court told defendant the information he had was incorrect. The court stated that if Fritts had been held in contempt for perjury, the court would have known about it and officer Fritts

would not be an officer anymore. Defendant admitted his attorney was now visiting him.

Defendant's counsel stated she had not filed a 995 motion. She felt there was probable cause presented at the preliminary hearing, and saw no legitimate issues for a 995 motion. She stated she had filed the *Pitchess* motion and it had been denied. She was planning to file a writ, but told defendant it was unlikely to be successful.

The trial court denied the third *Marsden* motion.

d. Fourth Marsden Motion.

In his fourth *Marsden* motion, defendant challenged his attorney's decision not to call Ronzetta Brown as a witness. The attorney believed Brown's harmful testimony would outweigh her beneficial testimony. The trial court denied the fourth *Pitchess* motion.

A defendant is entitled to discharge his or her attorney and have a new one appointed upon a showing that the attorney is not providing adequate representation or that the defendant cannot receive effective representation because of an irreconcilable conflict. (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) Defendant does not argue the trial court erred because his attorney was not providing adequate representation. Instead, he argues there was an irreconcilable conflict, and the trial court erred because it did not further explore this in the hearings.

We review the trial court's ruling under the deferential abuse of discretion standard. (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.)

Defendant argues without support that the trial court should have "inquired further about whether the relationship was impaired to a degree that the Sixth Amendment right was being violated." We disagree.

Defendant never told the trial court his relationship with his attorney had deteriorated to such a point she was unable to effectively represent him. The questions the trial court asked defendant and his counsel satisfied the court that defendant's counsel was adequately representing him. While the trial court must inquire into the reasons for defendant's complaints, allow defendant an opportunity to state the specific instances of inadequacy, and even question the attorney in some circumstances, the trial court is not required to "catechize" a defendant who had inadequately supported the reasons he is dissatisfied. (*People v. Hill* (1983) 148 Cal.App.3d 744, 753; *People v. Culton* (1979) 92 Cal.App.3d 113, 116-117.)

Even if defendant and his counsel had a contentious relationship, there is no indication from the record that their relationship affected counsel's representation. Nor do we find the number of motions filed by defendant any indication his trial counsel could not effectively represent him. Instead, the picture that emerges from the record is defendant decided, based on his conversations with other inmates, he would lose his case

if his attorney continued to represent him. His repeated attempts to discharge his attorney were merely an attempt to get someone he thought would be better. They were not an indication the relationship was so contentious the attorney could not effectively represent him. Accordingly, the trial court did not err in denying the *Marsden* motions.

V

Sufficiency of the Evidence

Defendant argues there was insufficient evidence to support his conviction of possession with intent to sell because the only evidence defendant intended to sell the cocaine was officer Fritts's expert opinion defendant possessed the drug for sale.

It is well settled that our role is not to reweigh the evidence upon a claim of insufficiency, but simply to determine whether the record discloses substantial evidence to support an inference of guilt. (*People v. Perry* (1972) 7 Cal.3d 756, 785, overruled in part on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 21; *People v. Johnson* (1980) 26 Cal.3d 557, 575-579.)

In this case the evidence was clearly sufficient to support a finding by the jury that defendant possessed the cocaine for sale. Defendant was observed going to an apartment the police suspected was being used for drug trafficking. After meeting briefly with the tenant of the apartment (Brown), defendant went directly to his vehicle where he had stored multiple bags of cocaine, removed at least one bag from his gas tank, and appeared to take it back, concealed in his closed fist, to the apartment. After he left, Brown appeared to take the cocaine,

concealed in her closed fist, to another apartment from which she returned without the cocaine. These actions are consistent with a sales transaction between defendant and Brown.

Additionally, officer Fritts testified the amount of cocaine indicated it was for sale. He stated a usable amount of cocaine is .05 grams, which is the amount someone would normally smoke, although he had seen people smoke .10 grams. He testified it would be highly uncommon to find a user carrying the amount of cocaine defendant had. By defendant's own testimony, he did not use cocaine.

The evidence was sufficient to support the jury's finding of possession of cocaine for sale.

VI

Romero Motion

Defendant made a motion to strike one or both of his prior felony conviction allegations pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The grounds articulated for the motion were that the current offenses were "relatively minor" in comparison to his prior robbery convictions, and that he had support from the community.

The trial court articulated several reasons for denying the motion. The court stated the present offense, while not serious and violent in terms of the Three Strikes Law, was nevertheless a serious offense. Secondly, the court stated defendant's criminal history was both serious and recent. The court cited the fact that defendant had not been able to stay out of "legal difficulties" as a "big, big factor[.]"

Next, the court found defendant's record did not look favorable in terms of his background and likelihood of staying out of trouble in the future. By way of explanation, the court noted that defendant's testimony itself was damning on this subject. Defendant told the jury he had lost $2,000 gambling and made money by loan sharking. The jury did not believe defendant's story that the drugs had been planted, and defendant's testimony led the court to believe defendant had not learned any lessons. The court indicated it had warned defendant of the serious nature of the charges he was facing and urged him to make an appropriate choice, presumably with respect to the plea offer.

The trial court acknowledged that defendant's family was supportive, but did not feel defendant fell outside the spirit of the Three Strikes Law. Accordingly, the trial court declined to exercise its discretion to strike one of the prior felony conviction allegations.

Defendant argues the trial court refused to exercise its discretion to strike one or both of the prior felony convictions because it improperly relied on defendant's personality traits and his decision to exercise his constitutional right to trial in making its determination. Defendant claims the trial court "viewed him as stubborn, willful, and having made stupid decisions." Defendant argues these were improper grounds on which to base a sentencing decision.

A review of the entire transcript of the sentencing hearing reveals the trial court's decision was properly grounded. As noted above, the trial court properly considered the nature and circumstances of the current and prior felonies, as well as defendant's character and prospects. These are proper considerations in a trial court's determination. (*People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) There was no abuse of discretion.

VII
Correction of Abstract

Defendant correctly points out that the abstract of judgment does not reflect the trial court's order that count 2 be stayed pursuant to section 654. We shall order the abstract be corrected.

DISPOSITION

The abstract of judgment is ordered corrected to reflect count 2 is stayed pursuant to section 654. The clerk of the superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections. The judgment is affirmed in all other respects.

BLEASE, Acting P. J.

We concur:

SIMS, J.

NICHOLSON, J.