Filed 8/29/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RICHIE QUANG LE,<br><br>Defendant and Appellant. | B224042<br><br>(Los Angeles County<br>Super. Ct. No. GA074027) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Reversed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Richie Quang Le of one count of transportation for sale and one count of possession for sale of a controlled substance in violation of Health and Safety Code sections 11379, subdivision (a) and 11378,[1] respectively (counts 1, 2). The jury found that the crimes were committed for the benefit of a criminal street gang within the meaning of Penal Code section186.22, subdivision (b)(1)(A).

The trial court sentenced appellant to a total of seven years in state prison and stayed the sentence in count 2 pursuant to Penal Code section 654. The trial court suspended execution of sentence and placed appellant on formal probation for three years on terms and conditions of probation, including the term that he serve one year in county jail.

Appellant appeals on the grounds that: (1) the convictions in counts 1 and 2 must be reversed for insufficiency of the evidence because the prosecution failed to prove that MDMA is a controlled substance and that appellant knew it to be a controlled substance; (2) the true findings on the gang allegations in counts 1 and 2 must be reversed for insufficiency of the evidence; and (3) one of appellant's probation conditions is unconstitutionally overbroad.

## FACTS

### Evidence

Deputy Sheriff Thomas Yu and his partner, Deputy Michael Smith, were on patrol on June 27, 2008, at about 4:00 a.m. when they saw a black Lexus with no rear license plate. They conducted a traffic stop of the car while it was parked in a gas station. As Deputy Smith made contact with the passenger, Khanah Nguyen, Deputy Yu approached the driver of the car, later identified as appellant. Appellant had already exited the car, and Deputy Yu asked him if he had a California driver's license. Appellant handed over a California identification card. Deputy Yu also asked for proof of insurance and

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

registration for the car, but appellant did not provide it. Deputy Yu checked the data system in the patrol car and ascertained that appellant's license was suspended. The Lexus was registered to Charles Le, who appellant claimed was his uncle.

Deputy Yu decided to impound the Lexus because neither appellant nor the passenger could drive it, and the deputies wished to avoid liability for the car. Deputy Smith conducted an inventory search of the car and found a backpack in the rear seat. He handed it to Deputy Yu, who opened it. Inside was a large Ziploc baggie containing 407 orange Ecstasy pills. The parties stipulated that two of the pills were tested and found to contain 3, 4-methylenedioxymethamphetamine, also known as "MDMA." The pills were booked into evidence.

Deputy Susana Rodriguez was working as a Temple Station narcotics detective on the night of the traffic stop, and she interviewed appellant. When Deputy Rodriguez asked appellant if the backpack in the car belonged to him, appellant replied, "I guess." Appellant then admitted that all the items in the car belonged to him. Appellant stated he did not want to talk about the pills.

Deputy Yu had expertise in the possession and packaging of drugs for sales and had testified as a drug sales expert more than 25 times. Approximately 50 of his cases had involved Ecstasy, which was also known as methylenedioxymethamphetamine, or MDMA. Deputy Yu found a large amount of money in appellant's pocket. It was later determined that the money totaled $6,123.60, in the following denominations: 3 one-dollar bills, 36 five-dollar bills, 44 ten-dollar bills, 170 twenty-dollar bills, and 21 one hundred-dollar bills. Deputy Yu stated that a large amount of cash in these denominations was consistent with the purchase of half of a "boat" of Ecstasy, or 500 pills. It was also consistent with the possession of money used to make change by someone transporting or selling narcotics. Deputy Yu believed that the packaging of the pills in a single large baggie was consistent with a wholesale purchase. It indicated that the person possessing the pills was transporting them to sell to individuals. A quantity of

407 pills was too large for personal use. When given a hypothetical based on the facts of this case, Deputy Yu was of the opinion that the pills were possessed for sale.

The prosecution also presented expert testimony of a detective relating to the gang allegations. The defense presented contrary evidence.

## DISCUSSION

### Sufficiency of the Evidence That MDMA Is a Controlled Substance

#### *A. Appellant's Argument*

Appellant asserts that there was no evidence that Ecstasy, methylenedioxymethamphetamine, or MDMA, is a controlled substance, a controlled-substance analog, or that it contained amphetamine or methamphetamine. There was only the trial court's conclusion that it appeared to be an amphetamine, and no doctrine exists that allows a trial court to conclude that one chemical compound necessarily contains another chemical compound merely because their names are similar. Due to the lack of evidence that MDMA is a controlled substance, the convictions must be reversed.

#### *B. Proceedings Below*

Deputy Yu testified that the backpack contained a large Ziploc baggie, and he stated that the baggie contained several hundred Ecstasy pills. At that point, the prosecutor and defense counsel entered into a stipulation that "Sam Le, a supervisor criminalist for the Los Angeles County Sheriff's Department Scientific Services Bureau on June 27th, 2008 tested an item found under file number 408095400522184 with a lab receipt number K012905, subject Richie Le, and found the item submitted under that lab receipt number and formed the following opinion that it contained one container enclosed a total of approximately 407 tablets, two were tested and found to contain 3, 4-methylenedioxymethamphetamine also known as MDMA." The parties agreed that the "lab receipt report" would be entered into evidence and marked as People's exhibit No. 6.

During a recess in the middle of Deputy Yu's testimony, defense counsel told the court, "Even though there was a [Penal Code section] 1538 and a [Penal Code section] 995, I want to make sure the record is clear, that any stipulation that I am entering into

with regard to items of evidence seized or discovery discovered as a result of the seizure on the date of the arrest, are reserved." The prosecution rested at the conclusion of Deputy Yu's testimony, and the defense then presented its sole witness and rested.

On the following day, the trial court and the parties discussed the jury instructions. Prior to argument, the trial court asked if there was anything else, and defense counsel told the trial court that it had two motions under Penal Code section 1118.1. Defense counsel first argued that the gang allegations should be stricken, and the motion was denied. Defense counsel then stated, "In doing my due diligence, I went through the Health and Safety Code, and all of those various schedules and so on, and found that MDMA is not one of the controlled substances listed in 11378 or 11379, and so searching further, I found—I found *People v. Silver* [(1991) 230 Cal.App.3d 389], which is a 1991 case, and in that case, the defendant was found in possession of MDMA, and they put on expert testimony on the issue of whether or not MDMA is an analog or substantially similar to substances listed in 11378 and 11379, and the court held, based upon the testimony given by the respective experts—both the prosecution and the defense put on experts—the defense expert said that, molecularly, it is not substantially similar, that only half of the molecules in one exist in the other, and, therefore, are not molecularly substantially similar. The court disagreed, your Honor, and found that the section which is Health and Safety Code section 11401 is not unconstitutionally vague. . . . I looked at the cases that cited *People v. Silver*, and in all of those cases, argument was made and evidence was presented with regard to MDMA being an analog of the other controlled substances listed in 11378, 11379. In all of the cases, there was expert testimony, and I believe that because there is no evidence that . . . MDMA is . . . an analog of the listed controlled substances, that, as a matter of law, there is failure of proof of an essential element and that the court must dismiss counts 1 and 2 by virtue of the failure of evidence upon which the jury can find that MDMA is substantially similar to those controlled substances listed in 11378 and 11379."

The trial court initially gave the prosecutor an opportunity to respond, but when the prosecutor did not appear ready to do so, the trial court stated, "Okay. Well, you don't need to respond. So it says in here—it says, 'Any material, compound mixture or preparation which contains any quantity of hallucinogenic substances.' The court's ruling is that I'm going to deny your motion. It appears to me from the way the schedule, 11054, subdivision (d) is worded, that it would include—because it says, . . . in the material compound, mixture or preparation which contains any quantity of the following hallucinogenic substances or contains any of its salts, isomers, et cetera, . . . falls under that section, and just based upon what appears to be the fact that it's an amphetamine, and that part, at least, was stipulated to that if part of it was an amphetamine that I'm going to deny your request, and I will certainly indicate to you that you would have a right to appeal that ruling, should he be found guilty." The trial court also denied defense counsel's additional jury instructions, which counsel stated were those read in *People v. Silver*, *supr*a, 230 Cal.App.3d 389.

***C. Relevant Authority***

"The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) "[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*Id*. at p. 1139.)

***D. Analysis***

Appellant was convicted of violating section 11378, which prohibits the possession for sale of "any controlled substance." Section 11378 refers to other statutes

to define what is a controlled substance.[2] Appellant was also convicted of transportation for sale of "any controlled substance" in violation of section 11379, which refers to many of the same statutes as section 11378 to define the controlled substances to which it applies. The controlled substance named in the information for both counts was "methylenedioxymethamphetamines."[3] None of the statutes to which sections 11378 and 1379 refer lists 3, 4-methylenedioxymethamphetamine, or MDMA, as a controlled substance.

The prosecutor's proof that the pills found in appellant's possession contained a controlled substance consisted only of the above-noted stipulation that some of the pills were tested and found to contain "3, 4-methylenedioxymethamphetamine also known as MDMA." The prosecutor did not present any evidence that MDMA was listed as a controlled substance or that it was a controlled substance analog, which is a substance that is treated the same as the controlled substance listed in section 11054 or 11055 of which it is an analog.[4] (§ 11401, subd. (a).) The prosecutor did not present any evidence regarding the effects of ingesting MDMA. Defense counsel's well-timed realization that

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2 Section 11007 provides: "'Controlled substance,' unless otherwise specified, means a drug, substance, or immediate precursor which is listed in any schedule in Section 11054, 11055, 11056, 11057, or 11058."

3 The verdict forms did not specify the controlled substance. The jury instructions told the jury that the People had to prove in both counts 1 and 2, inter alia, that the "defendant transported a controlled substance," that he knew of its nature, and that the "controlled substance was methylenedioxymethamphetamine (MDMA)."

4 Section 11401, subdivision (b) provides: "Except as provided in subdivision (c), the term 'controlled substance analog' means either of the following: [¶] (1) A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055. [¶] (2) A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance classified in Section 11054 or 11055."

MDMA was not among the listed controlled substances clearly caught the prosecutor and the trial court by surprise. The trial court mistakenly relied on the language of section 11054, subdivision (d) and on the court's recollection of the stipulation to find that the trial could go forward with the state of the evidence as it lay at that point.

As appellant points out, there is no doctrine that permits a trial court (or the trier of fact) to conclude that 3, 4-methylenedioxymethamphetamine contains amphetamine merely because their names are similar. In the absence of a stipulation, the prosecution must offer an expert who testifies that the language of a controlled substance statute or the analog statute has been satisfied. In other words, the expert must testify either that the substance qualifies chemically as a statutorily defined controlled substance, or the expert must testify that the substance is substantially similar to a controlled substance in chemical structure or intended effect on the central nervous system.

In light of the fact that the prosecutor did not present evidence (e.g., expert witness or stipulation) showing that "3, 4-methylenedioxymethamphetamine" contains amphetamine or methamphetamine, is a controlled substance or an analog of one, the convictions and the concomitant gang allegations in this case must be reversed. Because the prosecution failed to present sufficient evidence, the prohibition against double jeopardy precludes retrial on remand. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) In light of the reversal and our conclusion that appellant may not be retried, we need not discuss appellant's remaining issues.

**DISPOSITION**

The judgment is reversed. Retrial is barred.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.