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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO MARTINEZ, Defendant and Appellant.	B195582 (Los Angeles County Super. Ct. No. PA056230)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Guillermo Martinez appeals from the judgment entered following a jury trial that resulted in his conviction of possession of heroin for sale. He contends: (1) the trial court erred in admitting evidence of uncharged crimes; (2) the unanimity instruction was improper; (3) even if individually harmless, these errors were cumulatively prejudicial; (4) imposition of the upper term violated the principals set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). We affirm.

PROCEDURAL BACKGROUND

Defendant and Manuel Martinez were jointly charged by information with possession of heroin for sale on July 13, 2006 (Health & Saf. Code, § 11351); as to defendant, it was further alleged that he had suffered a prior drug related conviction (Health & Saf. Code, § 11370.2, subd. (a)).[1] The jury found defendant guilty of possession for sale and in a bifurcated proceeding the trial court found true the prior conviction allegation. Defendant was sentenced to a total of seven years in prison comprised of the four year high term on the substantive offense plus a consecutive three years for the prior conviction enhancement.

Appellant filed a timely notice of appeal.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that on July 13, 2006, Los Angeles Police Officer Brandy Arzate and her partner, Ammon Williams, were in plain clothes and

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[1] Defendant and codefendant Manuel Martinez are not related. To avoid confusion, we refer to defendant as "defendant" and to Manuel Martinez as "Martinez." In addition to the joint charge, Martinez was also charged with possession for sale of cocaine, transportation or sale of heroin, and transportation or sale of cocaine. Although another codefendant, Daniel Olivas, was at one point joined for purposes of trial, only defendant and Martinez ultimately were tried together. But before the jury delivered their verdicts, they were informed that Martinez was "no longer part of this case."

driving an unmarked car while on a narcotics enforcement detail in North Hollywood. At about 4:15 p.m., they were driving on Strathern when they noticed defendant sitting in the driver's seat of a Honda parked on Strathern, under the 170 Freeway overpass. Suspecting defendant may be engaged in illegal drug activity, the officers called for backup from Officer Anthony Manente. Arzate and Williams initiated surveillance of defendant by parking about 75 feet behind the Honda. About two minutes later, Arzate saw an SUV park about a car length behind the Honda; the driver of the SUV get out of that vehicle and into the passenger seat of the Honda; 20 or 30 seconds later, this man returned to the SUV and drove away. A few minutes later, defendant drove away. Meanwhile, Manente had arrived at the location in time to see a man exit the Honda, enter the SUV and drive away.

Confident they had witnessed a "call and deliver" narcotics transaction, the officers continued surveillance of defendant as he drove the Honda along surface streets to a nearby residential neighborhood.[2] During the five-minute drive, Arzate observed defendant talking on a cell phone. Eventually, defendant parked on Arleta Avenue near Carl Street. Williams parked across the street and Manente parked on the same side of the street as defendant. A fourth officer, Detective Romero, arrived and also parked nearby.

The officers observed defendant sit in the car for about five minutes, then get out and stand on the sidewalk looking up and down the street. About five minutes later, a Nissan driven by Olivas and in which codefendant Martinez was seated in the front passenger seat arrived and parked about a car length behind defendant's Honda. Defendant got into the back seat of the Nissan, behind Martinez. From his vantage point, Manente saw Martinez retrieve a small item from the sunglass compartment of the Nissan

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[2] Arzate explained that a "call and deliver" transaction entailed a buyer calling or paging a dealer, arranging a time and place to meet and the transaction occurring at that set time and place. Arzate elected to follow defendant and not the SUV because, in her experience, it is usually the buyer who gets into the dealer's vehicle. Arzate also requested reinforcements to follow the SUV.

and hand it to defendant. All of the officers were in radio contact, and Manente communicated his observance to them.

Arzate and Williams approached the Nissan from one direction while Manente came from a different direction. As she approached the driver's side window, Arzate saw defendant hand an undetermined amount of U.S. currency to Olivas. The officers identified themselves, and Arzate ordered the suspects out of the Nissan. As Olivas got out of the car, Arzate noticed he was still holding the money defendant had handed to him; when Olivas dropped this money, some landed on the driver's seat and some on the street; when the money was collected, it was later determined to be $718.

Meanwhile, as Manente approached the Nissan, he saw defendant open the back door and toss out something that landed four feet away. Manente immediately picked up the object, which was later determined to be 25.21 grams of heroin. Arzate testified that 25 grams of heroin is known as a "Mexican ounce" and sells for between $700 and $1,000.

Defendant, Olivas, and Martinez were arrested and searched; defendant had $422 in his possession, Martinez had $63, and Olivas had $140.

Arzate found a golf ball sized plastic bindle resembling heroin in the sunglass compartment of the Nissan. Underneath the dashboard, she found a black zippered pouch containing 25 foil-wrapped bindles containing a dark substance resembling heroin, and 11 plastic-wrapped bindles containing a substance resembling cocaine. Arzate also found two cell phones in the center console of the Nissan. Both phones rang continuously from the time they were seized.

When he searched the Honda, which was registered to defendant, Williams found a cell phone on the front passenger seat. In the trunk, Williams found a digital scale, a box of aluminum foil, and a box of plastic sandwich bags. While the suspects were being transported to the police station, one of the cell phones found in the Nissan rang a number of times. At the police station, the cell phone screen indicated 57 missed calls.

Arzate opined that the heroin defendant tossed from the car (Peo. Exh. 1), the heroin found in the Nissan's sunglass compartment (Peo. Exhs. 3, 4), and the heroin and

cocaine found in the black pouch underneath the Nissan's dashboard (Peo. Exhs. 8, 9, 11), had been possessed for sale. This opinion was based on various factors including the quantity of the substance, the cell phones, digital scale, packaging materials, the behavior of defendant, Martinez and Olivas, and the absence of any paraphernalia indicating use.

DISCUSSION

A. *Evidence of Uncharged Crimes Was Admissible*

Defendant contends the trial court erred in admitting evidence of the circumstances of his June 2004 arrest on drug related charges and of codefendant Martinez's February 2006 arrest on drug related charges. He argues that the prior incidents were too dissimilar from the charged offense for evidence of the prior incidents to be admissible under Evidence Code section 1101; even if admissible, defendant maintains, the evidence was unduly prejudicial under Evidence Code section 352. We disagree.

1. **The legal framework**

Evidence of crimes committed by a defendant other than those charged is inadmissible to prove criminal disposition or poor character. (Evid. Code § 1101, subd. (a).) But such evidence is admissible to prove, among other things, the existence of a common design or plan or the perpetrator's intent in the commission of the charged offense. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123 (*Lenart*); Evid. Code, § 1101, subd. (b).) It is also admissible to prove knowledge of the narcotic character of the substance involved, unless the defendant stipulates to such knowledge. (*People v. Perez* (1974) 42 Cal.App.3d 760, 766; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.)

Nevertheless, such evidence is admissible " 'only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.' " (*Lenart*, *supra*, 32 Cal.4th at p. 1123.) Depending on the issue to which the evidence is relevant, a greater or lesser degree of similarity between the

charged offense and the uncharged offense is required. The least degree of similarity is required to establish relevance to prove intent. (*Ibid*.) "To satisfy this theory of relevance, charged and uncharged crimes need only be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15 (*Demetrulias*), internal quotations and citations omitted; *People v. Lewis* (2001) 25 Cal.4th 610, 637.)

Even if relevant, "[e]vidence of an uncharged crime may be admitted only if its substantial probative value is not outweighed by a danger of undue prejudice, of confusion of the issues, or of misleading the jury. 'On appeal, a trial court's resolution of these issues is reviewed for abuse of discretion. [Citation.] A court abuses its discretion when its ruling "falls outside the bounds of reason." ' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 122.)

2. **The People's motion, the evidence and limiting instructions**

Here, the People filed a written motion in limine to introduce evidence of the circumstances surrounding (1) defendant's June 7, 2004 arrest on drug related charges and (2) codefendant Martinez's February 28, 2006 arrest on drug related charges. The theory of admissibility was that the circumstances of these uncharged offenses were so similar to those of the charged offenses that the uncharged offenses were probative of knowledge and intent under Evidence Code section 1101, subdivision (b). Over defense objection, the trial court concluded that the evidence was relevant to both knowledge of the controlled substance and intent to sell and that it was substantially more probative than prejudicial under Evidence Code section 352.[3]

Based on this ruling, the prosecutor introduced the testimony of three officers involved in an undercover investigation that resulted in defendant's arrest for possession of heroin on June 8, 2004. Officer Jason Wagner testified that he used his cell phone to

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[3] The trial court also found the evidence relevant to prove a common plan or scheme, but later limited admissibility to prove intent and knowledge.

arrange a meeting with a man who agreed sell Wagner heroin; the man said he would be driving a Chevy Lumina; at the agreed upon time and place for the meeting, defendant drove up in a Chevy Lumina; when Wagner and his backup team approached defendant, defendant put something in his mouth and swallowed; defendant was transported to a hospital. Arzate, a member of Wagner's backup team, testified that she was with defendant at the hospital when doctors gave him something to make him vomit; Arzate and another officer retrieved two heroin filled balloons from the vomit. Meanwhile, Wagner retrieved a cell phone from the Chevy Lumina defendant had been driving; Wagner determined that this cell phone carried the telephone number Wagner had called to set up the meeting. Officer Timothy Grabe testified that, when the cell phone retrieved from the Chevy Lumina later rang, Grabe answered it; the caller asked to purchase heroin; Grabe agreed to sell the man heroin and a meeting time and place was arranged; at that time and place a man who matched the description the caller gave of himself arrived and was sold "faux" narcotics.

The evidence of codefendant Martinez's February 2006 arrest consisted of Grabe's and Wagner's testimony that on that date they encountered Martinez; a search of Martinez recovered a cell phone, car keys, and $810 in cash; the officers used the keys to open Martinez's car; Martinez directed the officers to a black pouch that contained bindles of cocaine and heroin. Wagner testified that this incident had nothing to do with defendant.

The trial court instructed the jury that they could consider evidence of uncharged offenses "only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. . . . [¶] . . . [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not: [¶] A defendant acted with the intent to sell the controlled substance as charged in counts 1 and 2 in this case; or [¶] A defendant knew of the controlled substance's nature when he allegedly acted in this case. [¶] . . . [¶] Do not consider this evidence for any other

purpose. [¶] Do not conclude from this evidence that a defendant has a bad character or is disposed to commit crime."

3. **Analysis**

We conclude that the trial court did not abuse its discretion in admitting this evidence. First, since defendant did not stipulate that he knew the substance at issue was heroin, his knowledge was a disputed issue. (See *People v. Thornton* (2000) 85 Cal.App.4th 44, 48.) Second, defendant expressly put into issue the element of intent by arguing that he was a heroin user, not a dealer. The June 2004 incident was sufficiently similar to the charged offense to make it probative of both defendant's intent – possession for sale and not personal use – and his knowledge of the narcotic character of the substance. The events are similar in that both had the hallmarks of a "call and deliver" transaction – most notably, the use of a cell phone to arrange the time and place of the transaction. Both incidents involved heroin. Finally in both incidents defendant attempted to dispose of the contraband when confronted by police.

As in *Demetrulias*, the jury in this case could rationally find it unlikely that defendant had the extremely bad luck to twice be found in possession of a substantial quantity of heroin and a cell phone that was being called by persons trying to purchase heroin when the heroin was only for his own use. A more likely inference is that defendant intended to sell the heroin. The evidence was also relevant to prove defendant's knowledge of the substance. For these reasons, the evidence was admissible on the issues of intent and knowledge under Evidence Code section 1101, subdivision (b).

Moreover, the evidence was not more prejudicial than probative. It was strongly probative of both whether defendant had the intent to sell, rather than merely possess the drugs for his own use, and whether he had knowledge of the narcotic nature of the substance. The trial court corrected any prejudicial effect by its instruction admonishing the jury not to use the evidence to show disposition to commit crimes. Accordingly, we find no error in the trial court's admission of this evidence.

Finally, we are not persuaded otherwise by defendant's argument that the evidence was prejudicially cumulative because multiple officers testified. Each officer testified to the particular aspect of the incident as to which that officer had personal knowledge. Thus, the evidence was not cumulative.

As for the February 2006 incident involving codefendant Martinez, defendant has not shown that the evidence was inadmissible against Martinez on the issues of knowledge and intent. The prosecution's theory was that defendant was an aider and abettor, nor has he shown how admission of this evidence was prejudicial to him, especially in light of Officer Wagner's testimony that this incident did not involve defendant at all.

B. *The Trial Court Properly Gave a Unanimity Instruction*

Defendant contends the trial court erred in giving a unanimity instruction.[4] He argues that, because there was no evidence that defendant committed any illegal act other than possessing the heroin that he tossed from the Nissan on July 13, 2006, the instruction allowed the jury to improperly convict defendant based on evidence of the uncharged June 2004 incident. The People counter that the other act necessitating this instruction was the "call and deliver" transaction with the driver of the SUV occurring just before the incident in the Nissan. We agree with the People.

"[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where

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4 The challenged instruction was: "The defendant is charged with possession for sale of a controlled substance in count 1. Also, defendant Manuel Martinez is charged in count 3 with the sale or transportation of heroin. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find a defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts, and you all agree on which act he committed."

no election is made, the court has a duty to instruct sua sponte on the unanimity requirement. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

Here, during a discussion of jury instructions, the following colloquy occurred: "[DEFENSE COUNSEL]: . . . I believe the unanimity instruction will be confusing to the jury in that there is 1101(b) evidence presented, and that I think the jury may believe that they have a right to agree that my client was guilty of the 2004 incident and convict based on that. [¶] THE COURT: The unanimity instruction specifies by number and by the count that it's related to, separate and apart from the 1101(b) evidence. The 1101(b) evidence has its own separate instruction. [¶] [DEFENSE COUNSEL]: I would ask the court to add something to the [unanimity] instruction saying that it excludes the 1101(b) or the 2004 incident. It doesn't apply. [¶] THE COURT: There is no need."

Accordingly, the trial court instructed: "The defendant is charged with possession for sale of a controlled substance in count 1. Also, defendant Manuel Martinez is charged in count 3 with the sale or transportation of heroin. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find a defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts, and you all agree on which act he committed."

The prosecutor did not explain in her closing argument how the instruction applied to defendant.[5] But at trial, Arzate had opined that "a call and deliver transaction possibly occurred between [defendant] and the burgundy SUV, as well as a narcotic transaction I believe was occurring between [defendant] and the two gentlemen in the gray Nissan, Manuel Martinez and Daniel Olivas." Although the incident with the driver of the SUV

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[5] Regarding codefendant Martinez, the prosecutor explained that, as to the charge of sale or transportation of heroin (count 3), the jurors "need to be unanimous that [codefendant Martinez] either sold the heroin or transported the heroin, or both. Either one will do. You just have to be unanimous on it. You don't have to tell us whether it's one or both. But amongst yourselves we trust you will be unanimous, again, as to the heroin, that he either sold or transported or both."

was not the theory of the prosecution's case against defendant, some jurors may have concluded, based on Arzate's opinion, the fact that the incident had all the hallmarks of a "call and deliver" transaction, and the fact that defendant was purchasing such a large amount of heroin a few minutes later, that defendant's criminal act was possession of heroin which he sold to the driver of the SUV. To assure that the jurors unanimously agreed on the same criminal act, the trial court properly gave the unanimity instruction.

Even assuming it was error to give the unanimity instruction, the jury was properly instructed on the limited purpose for which they could consider evidence of the June 2004 incident. We assume the jurors understood and followed this instruction. (*People v. Holt* (1997) 15 Cal.4th 619.)

C. *Cumulative Error*

Since we have found no merit to either claim of error advanced by defendant, his claim of cumulative error necessarily fails.

D. *Apprendi/Cunningham*

Also without merit is defendant's contention that the trial court's imposition of the high term violated the principles set forth in the line of cases commencing with *Apprendi*, *supra*, 530 U.S. at page 490 and culminating with *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856, 868] (*Cunningham*).

Here, the trial court selected the high term based on the circumstances that (1) defendant was on probation at the time of the current offense and (2) his prior performance on probation was unsatisfactory. Both circumstances are related to defendant's recidivism and rendered him eligible for the high term under *People v. Black* (2007) 41 Cal.4th 799. Therefore, defendant "was not legally entitled to the middle term, and his Sixth Amendment right to jury trial was not violated by imposition of the upper term sentence . . . ." (*Id.* at p. 820.)

DISPOSITION

The judgment is affirmed.

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RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.