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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN WILBUR,

Defendant and Appellant.

A113381

(Alameda County
Super. Ct. No. H35143)

John Wilbur appeals his convictions by a jury for transportation of methamphetamine, possession of 28.5 grams or more of methamphetamine for sale, possession of a firearm by a felon, and possession of ammunition by a felon. Wilbur argues that (1) the court erred when it denied his motion for judgment of acquittal on the firearm and ammunition counts, (2) his counsel was ineffective, (3) his sentence to concurrent terms violated Penal Code section 654,¹ and (4) imposition of the upper term sentence for possession of methamphetamine violated his rights secured by the Sixth and Fourteenth Amendments because the sentence was based on factors not found by the jury. We remand for resentencing in accordance with *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*), and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2002, San Leandro Detective Jeff Tudor organized execution of a search warrant for defendant's person, vehicles, and residence. An officer stopped defendant's car, had defendant step out, and pulled up defendant's pant leg, when a "clear

¹ All further statutory references are to the Penal Code.

plastic baggie fell out to the ground.” As another officer picked up the baggie, defendant said, “ ‘[Y]ou guys got me, it was just a matter of time.’ ”

Detective Tudor then conducted a search of defendant’s residence, with the assistance of several other officers.² The house had four bedrooms, and mail and other personal effects were found that indicated defendant lived in the room off the garage. In defendant’s room, Tudor found 13.87 grams of methamphetamine, \$6,411 in cash, and a digital scale.³ Defendant’s room had one door that opened into the garage, and another door that led directly into the backyard. There were several freshly dug holes in the backyard. In two of the holes, police found plastic baggies of methamphetamine that weighed 102 grams and 85 grams. In another hole was a metal military style ammunition box containing four handguns. Three of them were loaded. It was not determined whether any of the weapons were registered.

There was a locked safe in the garage adjoining defendant’s room. Inside the safe, police found handgun ammunition compatible with the guns found in the backyard, six loaded handgun clips, a suspected pay-owe sheet, and vehicle registration cards and certificates of title to seven vehicles in defendant’s name.⁴ There were also several plastic bags in the garage that were covered in dirt and appeared similar to those containing the methamphetamine found in the backyard.

Defendant was charged with transportation of methamphetamine, possession for sale of 28.5 grams or more of methamphetamine, possession of a firearm by a

² When police arrived to conduct the search, two people identified as Rodney Cupp and Roxanne Johnson were inside.

³ A police scanner was also found in the living room.

⁴ The safe also contained an otherwise unidentified “very small piece of paper,” a handwritten note saying that Staley Field sold defendant a 1986 Jaguar, and a vehicle certificate of title bearing the name John Clark.

felon, and possession of ammunition by a felon.⁵ His motion to suppress evidence was denied.⁶ His motion for judgment of acquittal on the firearm and ammunition charges was also denied.

Defendant testified that he had lived at the San Leandro residence with Tim Hewitt and David Hawkins for approximately one year, but that he also stayed in Modesto, where he built motorcycles. He admitted that he lived in the room off the garage that the police suspected was his, and confirmed that its only means of entry or exit was through the garage or through the backyard. Defendant denied that he had ever seen the digital scale or the methamphetamine found in his room. He claimed the \$6,411 in cash was from a neighbor who gave him an advance to install a motorcycle motor.

Defendant acknowledged his access to the garage, but testified the safe belonged to Hewitt and that he did not know the combination. Defendant acknowledged the vehicle registration records in the safe were his, but denied having anything else in the safe and claimed he was unaware of its other contents. Hewitt testified that he had lived at the residence for three years before defendant moved in, that the safe in the garage belonged to him, not defendant, and he did not think defendant knew its combination. When asked about his possession of the methamphetamine and guns found in the backyard, Hewitt invoked the Fifth Amendment and refused to answer. Defendant testified that he had never seen anyone digging in the backyard, the baggies of methamphetamine and guns found in the backyard were not his, and he did not know they were there.

Defendant admitted that he was a convicted felon who could not lawfully possess weapons. Defendant denied possession of anything illegal when his car was stopped, and said he was rhetorically answering an officer's question with a question when he said, "You got me." He testified that Detective Tudor was biased against him because

⁵ The information also alleged a prior conviction for possession of a controlled substance for which defendant received probation.

⁶ The court granted defendant's motion to return three vehicles he argued were seized illegally.

defendant had an argument with one of Tudor's friends and because Tudor had a romantic interest in defendant's girlfriend.

The jury returned a verdict of guilty on all counts. Defendant was denied probation and sentenced to the upper term of three years for possession for sale of methamphetamine, a consecutive term of eight months for possession of a firearm, and concurrent terms of two years each for transportation of methamphetamine and possession of ammunition. He timely appealed.

DISCUSSION

A. Motion for Judgment of Acquittal

At the close of evidence, defendant moved for an acquittal pursuant to section 1118.1 on the counts charging possession of a firearm and possession of ammunition by a felon. Our job is to determine whether from the record, including reasonable inferences that may be drawn from the evidence, there is any substantial evidence to support each element of the charged offenses. (*People v. Lines* (1975) 13 Cal.3d 500, 505.) Specifically, defendant claims there was no evidence from which the jury could conclude that he knowingly possessed the guns and ammunition, or that he exercised dominion or control over them. Knowledge, and custody or control, are each elements of the charged offenses. (§§ 12021, subd. (a)(1), 12316, subd. (b)(1); *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922-923.) But the offenses may be proved by circumstantial evidence, and possession of the prohibited items need not be exclusively by the defendant. (*People v. Neese* (1969) 272 Cal.App.2d 235, 245.)

The trial court denied the motion for acquittal. The court reasoned that the jury could have determined the investigating officer was more credible than defendant. If it did, the investigating officer's testimony regarding execution of the search warrant, combined with the physical evidence retrieved from defendant's residence, was sufficient to allow the jury to draw inferences that fulfilled the knowledge and custody or control elements of the weapons and ammunition offenses. We agree.

Defendant possessed methamphetamine when he was pulled over by the police. Methamphetamine, a large amount of cash, and a digital scale were in defendant's room

that was located adjacent to the garage in a house he shared with two other people. There was one door to the room from the garage, and defendant's room had another door leading to the backyard. Methamphetamine was also found in fresh holes dug in the backyard and so was an ammunition box containing four handguns. Dirt-soiled plastic bags similar to the bags containing methamphetamine that were found in the yard were also found in the garage. There was a safe in the garage as well. It contained records pertaining to several vehicles registered to defendant, ammunition of a type and caliber that would fit the guns found in the yard, and a document described as a "pay-owe sheet" that is considered a method used to memorialize drug transactions.

The common thread that ties defendant to these items and serves to establish his knowledge, dominion and control over them is the methamphetamine. It was found on him, in his room and in holes in his backyard. The digital scale and considerable amount of cash found in his room also support an inference that defendant was dealing methamphetamine. As the means of concealment and location of the firearms were similar to defendant's hiding place for the methamphetamine, the jury could draw a permissible inference that the weapons belonged to him. That inference is supported by the compatible ammunition found in the safe in the garage, because although defendant denied the safe was his and his roommate claimed to own the safe, nothing was found in it that established it was used by any one other than defendant. The conclusion that the safe was under the dominion and control of defendant was bolstered by the pay-owe sheet found in the safe. The jury obviously did not believe defendant's testimony that inferred methamphetamine was planted on him by the police, or his innocent explanation for the cash found in his room and his denial of any knowledge of the guns and ammunition.

Considering " 'the evidence in a light most favorable to the judgment and presum[ing] the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment' " (*People v. Crittenden* (1994) 9 Cal.4th 83, 139),

there was substantial evidence to support the jury's conclusion that defendant was guilty of the weapon and ammunition offenses.⁷

Defendant argues that *People v. Showers* (1968) 68 Cal.2d 639 should govern our analysis. But *Showers* is a case where the circumstances showed contraband was abandoned in a public area, not deliberately hidden. (*Id.* at pp. 641-642, 644.) So, the circumstances in *Showers* did not allow for an inference that contraband was possessed by the defendant. This case is very different. Here, there is a chain of physical evidence that led to the discovery of weapons and ammunition in defendant's backyard.

B. *Ineffective Assistance of Counsel Claim*

Defendant's housemate, Timothy Hewitt, invoked the Fifth Amendment and refused to answer questions when he was asked about his possession of the firearms and methamphetamine found in the backyard. At defendant's sentencing hearing, his counsel presented a one-sentence sworn statement, purportedly from Hewitt that he owned the firearms found at the residence. Defendant now argues that his counsel was ineffective because he failed to move for a new trial on the basis of Hewitt's statement.

Defendant acknowledges that generally ineffective assistance of counsel claims are more appropriately brought in petitions for writ of habeas corpus, because the appellate record often sheds insufficient light on the reasons for counsel's conduct and the grounds underlying the claim. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Nevertheless, defendant contends the record is sufficient "because there can be no satisfactory explanation for counsel's failure not to move for a new trial based on newly discovered evidence." We disagree.

⁷ It is not determinative that other persons may also have had access to the backyard; that the record does not include evidence to establish legal ownership of the guns; that the jury requested that Detective Tudor be asked about the condition of the soil in the backyard, whether there was proof that the buried guns belonged to defendant, and whether any investigation was done to determine ownership of the safe; that the jury asked defendant how many average hours per day he and Hewitt were in the house in 2002, and sought to ask Hewitt about whether he stored items for defendant in his safe; or that a certificate of title was also found in the safe bearing the name of John Clark.

“ ‘A motion for new trial on the ground of newly discovered evidence is looked upon with disfavor. [Citation.] The granting or denial of such a motion is within the sound discretion of the trial court’ ” (*People v. Shoals* (1992) 8 Cal.App.4th 475, 485-486.) To prevail on such a motion, a defendant must show not only that the evidence is newly discovered, but “ ‘[t]hat it be such as to render a different result probable on a retrial of the cause’ ” (*People v. Martinez* (1984) 36 Cal.3d 816, 821.)

Moreover, “ ‘[i]t is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. [Citation.] The trial court [is] not bound to accept the statement of [the witness] as true. [Citation.] It [is] entitled to regard it with distrust and disfavor.’ ” (*People v. Shoals, supra*, 8 Cal.App.4th at p. 488.) Hewitt’s simple assertion contained considerably less detail than the posttrial statement found insufficient to warrant a new trial in *Shoals*. There, the posttrial statement was made by someone who was with the defendant in a motel room when he was arrested for possession of cocaine. (*Id.* at pp. 481-482.) She explained in her posttrial declaration that on advice of counsel she had earlier invoked her Fifth Amendment right against self-incrimination, that she had since been sentenced in her own case and was not going to appeal her conviction, that she told the probation officer who prepared the defendant’s presentence report that she and two others bought the cocaine for their personal use, that the defendant did not know about it, and that he was unaware that the cocaine was in the motel room. She also stated she would testify accordingly if a new trial was ordered. (*Id.* at pp. 484-485.)

Here, Hewitt’s posttrial statement consisted of a single sentence in which he claimed to own the firearms found at the residence. He said nothing about why he invoked the Fifth Amendment at trial, why he came forward at the time of sentencing, whether he told anyone else he owned the guns, or whether defendant was unaware the guns were in the backyard. Hewitt’s statement does not mention the methamphetamine buried in the backyard, and does not state whether Hewitt would continue to assert his Fifth Amendment privilege. Moreover, Hewitt’s statement contains no offer to testify if a new trial were to be ordered.

The record here does not explain why a new trial motion was not filed, or what additional information defense counsel may have had regarding Hewitt's affidavit or the circumstances underlying it. We cannot conclude that “ ‘ “there simply could be no satisfactory explanation” ’ ’ ” for counsel's failure to move for a new trial. (See *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) Nor can we conclude it is reasonably probable the jury would have reached a different verdict on retrial. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-690 [defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that he was prejudiced as a result].)

C. *Multiple Punishment Claims Under Section 654*

Defendant argues the court was wrong to conclude that “none of these four counts [on which defendant was convicted] are subject to restriction under Penal Code section 654.” We agree with the trial court.

Defendant contends his transportation and possession for sale of methamphetamine were part of an indivisible course of conduct with a single objective, for which he was improperly subjected to multiple punishment. But defendant's intent and objectives were factual questions for the trial court, and the court's findings are reviewed in the light most favorable to its decision. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) Here, the possession for sale count was based on the quantity of drugs found at defendant's residence, and the transportation count was based on the drugs found on defendant's person when he was stopped by police. Defendant cites no authority to support his conclusion that these offenses were necessarily committed with a single objective, and the evidence is sufficient to support the trial court.

Defendant also contends, based upon *People v. Lopez* (2004) 119 Cal.App.4th 132, that section 654 barred multiple punishment for his convictions for possession of a firearm and possession of ammunition. In that case, a loaded firearm was found in the defendant's pocket. (*Lopez, supra*, at pp. 135, 138.) The court there concluded: “While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. Where, as here, all of the

ammunition is loaded into the firearm, an ‘indivisible course of conduct’ is present and section 654 precludes multiple punishment.” (*Id.* at p. 138.)

Here, loaded handguns were discovered in defendant’s backyard, and separate ammunition and loaded handgun clips were found in the safe in the garage. *Lopez* does not preclude multiple punishment under these circumstances, nor does it support the suggestion in defendant’s reply brief that the People were required to show evidence of “a separate intent to fire and reload a gun,” or “that ammunition was purchased or acquired before or after the acquisition of [the] firearms.”

D. *Imposition of Upper Term Sentence*

Defendant argues that the upper term of imprisonment on his conviction for possession of methamphetamine violated his Sixth and Fourteenth Amendment rights because it was based on aggravating factors not found true by the jury beyond a reasonable doubt. (See *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

The trial court imposed the upper term “because [it found] that the crime displayed planning under [California Rules of Court] Rule 4.421(a)(8), and because it involved a large quantity of methamphetamine under Rule 4.421(a)(10).” The United States Supreme Court has since held that California’s determinate sentencing law violates a defendant’s right to a jury trial and proof beyond a reasonable doubt because trial judges may impose an upper term sentence upon finding aggravating factors by a preponderance of the evidence. (*Cunningham, supra*, 549 U.S. ___ [127 S.Ct. at p. 871].) Because the court here sentenced defendant in part based on factors not found by the jury beyond a reasonable doubt, we vacate the sentence and remand for resentencing in light of *Cunningham*.

DISPOSITION

The sentence is vacated and the case is remanded for resentencing in accordance with the requirements of *Cunningham, supra*, 549 U.S. ___ [127 S.Ct. 856]. The judgment is otherwise affirmed.

Siggins J.

We concur:

McGuinness, P.J.

Pollak, J.