Court of Appeal, Fourth District, Division 2, California.
The PEOPLE, Plaintiff and Respondent,
v.
Francisco Manuel MUNOZ, Defendant and Appellant.
E029685.
(Super.Ct.No. INF 028566).
No. E029685.

Sept. 12, 2002.

Defendant was convicted in the Superior Court, Riverside County, No. INF 028566, James S. Hawkins, J., of possessing methamphetamine for sale and possessing methamphetamine. Defendant appealed. The Court of Appeal, Gaut, J., held that: (1) sufficient evidence was not established to show that police officers deliberately targeted defendant for a "supply and buy" sting operation in retaliation for complaints defendant made against officer, and thus evidence of any alleged entrapment was not admissible; (2) four-year sentence enhancement was properly imposed on defendant for possessing a firearm during commission of drug offenses; and (3) trial court did not abuse its discretion in ordering that defendant serve conviction for possessing methamphetamine concurrently with conviction for possessing methamphetamine for sale.

Affirmed.

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Edward J. Horowitz; Law Office of Bruce Adelstein and Bruce Adelstein for Defendant and Appellant.
Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor and Melissa A. Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

GAUT, J.

1. *Introduction*

***1** Defendant Francisco Manuel Munoz appeals from a judgment convicting him of possessing methamphetamine for personal use and sale. On appeal, defendant claims that the trial court erred in precluding him from presenting his entrapment defense to the jury. Defendant also claims the court erred in imposing a firearm possession enhancement and sentencing him to consecutive terms for his drug possession offenses.

We conclude that the court properly excluded defendant's evidence because it was not relevant to prove the defense of entrapment under the objective standard. We also conclude that the court properly exercised its sentencing discretion. Accordingly, we affirm defendant's convictions.

2. *Factual and Procedural History*

In 1997, defendant owned and operated Frank's Auto Body Shop in Indio. In the fall of 1997, Jose Rivera hired defendant to repair his vehicles. According to defendant, Rivera initially introduced him to methamphetamine and then began to supply him with the drug on a regular basis.

After receiving an anonymous tip that defendant was building hidden compartments in vehicles for smuggling drugs, Officer Santiago Agcaoili, as part of the Coachella Valley Narcotics Task Force (task force) initiated an investigation into defendant's auto repair shop. In November 1997, two informants, pretending to be customers, hired defendant to construct panels for their van, thereby creating hidden compartments. Although defendant thought the compartments might be illegal, he did the work because he needed the money. The informants paid defendant more than the fair market value for the work.

While defendant worked on the van, the informants twice asked defendant if he could get drugs for them. Defendant eventually asked his supplier. Once Rivera agreed, defendant arranged for an initial sale of a one-ounce sample and then a subsequent sale of three pounds of methamphetamine. After paying defendant $150 for the first transaction, the informants agreed to pay defendant $600 for arranging the second transaction.

On the morning of December 23, 1997, during the second transaction, the informants confirmed the presence of the drugs, gave defendant his $600 fee, and then told defendant that they would return with the money for the drugs. Moments later, Detective Twiss and several other members of the task force executed a search warrant on defendant's shop.

After apprehending defendant, the officers found about 16 grams of methamphetamine wrapped in foil in defendant's jacket pocket. According to the officers, that quantity of methamphetamine was sufficient for sale or for personal use over an extended period of time.

Inside a compartment of the RV parked on defendant's property, the officers found three bags containing a total of about three pounds, or over a kilogram, of methamphetamine. The only purpose for such a quantity of methamphetamine was to engage in sales.

During a second search of the defendant's shop, the officers retrieved a loaded, black, semiautomatic firearm. The criminalist's analysis of the firearm revealed that it was inoperable in its current condition. After some manipulation and reconfiguration, the criminalist was able to operate the weapon as a single-shot pistol, rather than as a semiautomatic firearm.

***2** During a police interview, defendant admitted that the methamphetamine found in his pocket was for his personal use. As to the methamphetamine found in the RV, defendant denied placing it in the RV, but admitted to participating in the transaction as the middleman. A middleman usually brokers deals for large quantities of drugs.

On July 7, 2000, the Riverside County District Attorney filed a first amended information

charging defendant with two counts of possessing methamphetamine for sale [FN1] and two counts of possessing methamphetamine while being armed with a loaded, operable firearm.[FN2] The district attorney also charged defendant with the following enhancements: being personally armed with a firearm; [FN3] possessing for sale a substance containing 28.5 grams or more of methamphetamine; [FN4] and possessing for sale a substance containing over one kilogram of methamphetamine.[FN5] During the trial, the trial court, on the People's motion, dismissed the two counts of possessing methamphetamine while being armed with a loaded, operable firearm.

FN1. Health and Safety Code section 11378.

FN2. Health and Safety Code section 11370.1.

FN3. Penal Code section 12022, subdivision (c).

FN4. Penal Code section 1203.073, subdivision (b)(2).

FN5. Health and Safety Code section 11370.4, subdivision (b)(1).

On November 27, 2000, the trial court conducted a hearing under Evidence Code section 402 on defendant's evidence of entrapment. After hearing defendant's evidence, the trial court found that defendant failed to produce sufficient evidence to allow him to present his defense to the jury. The court therefore excluded defendant's evidence of entrapment. After the court's ruling, defendant waived his right to a jury trial and the court presided over the remainder of the trial without a jury.

At the close of trial, the court found defendant guilty of one count of possessing methamphetamine for sale [FN6] and one count of the lesser-included offense of possessing methamphetamine.[FN7] The court also found true all the enhancement allegations. The court later sentenced defendant to a total prison term of nine years eight months.

FN6. Health and Safety Code section 11378.

FN7. Health and Safety Code section 11377, subdivision (a).

3. *Entrapment*

At the evidentiary hearing on entrapment, after argument from both parties, the court decided to exclude defendant's evidence. The court essentially found that, based on defendant's evidence, no reasonable jury could find that the officers' conduct caused defendant to commit the crimes. After the court's ruling, defendant waived his right to a jury trial and the parties stipulated that the evidence presented during the evidentiary hearing that survived the court's ruling would constitute defendant's case-in-chief.

On appeal, defendant claims that the trial court erred in refusing to allow him to present his entrapment defense. Defendant begins his argument by stating that the court has a duty to instruct the jury on the entrapment defense if supported by substantial evidence. Defendant, however, waived his right to a jury after the court's ruling on the entrapment evidence and, therefore, cannot complain of any instructional error.

In attempting to frame the issue, the People fare no better. Although the People note that this case does not involve an issue of instructional error, the People nevertheless state that an instruction is appropriate if substantial evidence supports it. Additionally, in citing other cases evaluating the sufficiency of the evidence presented at trial,[FN8] the People suggest that a defense must be rejected if the defendant fails to satisfy his burden of proving his defense.

FN8. *People v. Reed* (1996) 53 Cal.App.4th 389, 61 Cal.Rptr.2d 658; *People v. Moran* (1970) 1 Cal.3d 755, 83 Cal.Rptr. 411, 463 P.2d 763.

***3** In essence, the issue in this case is simply whether the trial court erred in excluding defendant's evidence of entrapment. Generally, a trial court may exclude all irrelevant evidence.[FN9] Evidence that has no tendency to prove or disprove any material fact, but simply leads to speculative inferences is irrelevant evidence.[FN10] A trial court exercises broad discretion in determining the relevance of evidence and its ruling will be upheld on appeal absent a showing of an abuse of discretion.[FN11] Although we acknowledge that a criminal defendant has a constitutional right to present a defense, the application of these basic evidentiary rules generally does not infringe upon a defendant's constitutional right.[FN12] Furthermore, while it may be the province of the jury to determine the factual question of whether defendant was entrapped,[FN13] it remains the province of the court to determine the admissibility of evidence-even evidence of a defendant's sole defense. [FN14]

FN9. Evidence Code sections 350, 351.

FN10. Evidence Code section 210; *People v. Kraft* (2000) 23 Cal.4th 978, 1034, 1035, 99 Cal.Rptr.2d 1, 5 P.3d 68.

FN11. *People v. Scheid* (1997) 16 Cal.4th 1, 14, 65 Cal.Rptr.2d 348, 939 P.2d 748; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32, 44 Cal.Rptr.2d 796.

FN12. See *People v. Hillhouse* (2002) 27 Cal.4th 469, 496, 117 Cal.Rptr.2d 45, 40 P.3d 754, citing *People v. Phillips* (2000) 22 Cal.4th 226, 238, 92 Cal.Rptr.2d 58, 991 P.2d 145.

FN13. *People v. Barraza* (1979) 23 Cal.3d 675, 691, footnote 6, 153 Cal.Rptr. 459, 591 P.2d 947; *People v. Lee* (1990) 219 Cal.App.3d 829, 836, 268 Cal.Rptr. 595; *People v. Bottger* (1983) 142 Cal.App.3d 974, 985, 191 Cal.Rptr. 408.

FN14. See *People v. Dyer* (1988) 45 Cal.3d 26, 48, 246 Cal.Rptr. 209, 753 P.2d 1.

California's test for entrapment is an objective one.[FN15] We must ask whether the evidence was relevant to show that the law enforcement officer's conduct was likely to induce a normally law-abiding person to commit the offense.[FN16] "For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect-for example, a decoy program-is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling importuning, or other affirmative acts likely to induce a normally law-abiding person to commit a crime." [FN17]

FN15. *People v. Watson* (2000) 22 Cal.4th 220, 223, 91 Cal.Rptr.2d 822, 990 P.2d 1031; *People v. Barraza, supra,* 23 Cal.3d at page 690, 153 Cal.Rptr. 459, 591 P.2d 947.

FN16. See *People v. Barraza, supra,* 23 Cal.3d at pages 689-690, 153 Cal.Rptr. 459, 591 P.2d 947.

FN17. *People v. Barraza, supra,* 23 Cal.3d at page 690, 153 Cal.Rptr. 459, 591 P.2d 947.

In applying this test, the California Supreme Court provided two guiding principles: "First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of such conduct would be an appeal by the police that would induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement." [FN18]

FN18. *People v. Barraza, supra,* 23 Cal.3d at page 690, 153 Cal.Rptr. 459, 591 P.2d 947, footnote omitted.

[1] In this case, defendant's theory of entrapment was that law enforcement agents, either coincidentally or deliberately, conducted a "supply and buy" sting operation. Defendant argued that, either two different law enforcement agencies conducted simultaneous undercover operations, one using the supplier and the other using the buyers, or, Officer Agcaoili deliberately targeted defendant by using both Rivera and the other informants. Defendant's trial attorney suggested that Officer Agcaoili was retaliating against defendant for making complaints against him individually and the Coachella Police Department as a whole.

***4** Defendant pointed to evidence to support his "supply and buy" theory. Most of defendant's evidence, however, only established speculative inferences. During his police interview,

defendant stated that he had voiced criticisms against the Coachella Police Department. He also had accused Officer Agcaoili of committing misconduct. During his trial testimony, defendant also stated that, although the task force usually assigned primary responsibility for a case to the officer from the city where the alleged conduct occurred, Officer Agcaoili, a Coachella police officer, took charge of the case involving defendant's business, which was located in Indio. In regards to the investigation, defendant noted that the officers admitted that it was possible for different law enforcement officers to be unaware of the identity of the informants used by other officers.

Defendant's evidence does not lead to the conclusion that Officer Agcaoili retaliated against defendant by initiating an unfounded investigation. Defendant assumes that Officer Agcaoili knew about his complaints, harbored an improper motive in taking on the investigation, and then hired Rivera to deceive defendant into taking drugs and brokering drug sales. Not only are defendant's assumptions pure speculation, the evidence fails to support that Officer Agcaoili or any other officer used Rivera as a paid informant. On the contrary, the evidence indicated that there was only one investigation involving the two buyer informants. While defendant suggests the possibility that one of the officers used an informant without the knowledge of the other officers, such speculation does not provide evidence that Rivera was indeed another paid informant.

Defendant's theory relies largely on his own testimony, which, in addition to being contrary to the prosecution's evidence, fails to establish that Rivera was anything other than a simple drug dealer. While defendant testified that Rivera introduced him to methamphetamine weeks before the two informants entered his shop, Officer Agcaoili stated that the police suspected that defendant used methamphetamine months before his meeting with the two informants. Also, although defendant believed that Rivera recognized the two informants, he stated that Rivera denied the acquaintance. Even if the men were acquainted, they could have recognized each other from a previous drug-related encounter. Also, despite defendant's alleged suspicions, he continued to negotiate with the two informants. Defendant suggested that, although Rivera brought him the drugs on the morning that the transaction was to take place, the police deliberately allowed Rivera's escape. Defendant also suggested that, in failing to use recording devices, the officers deliberately concealed the nature of the final transaction, and specifically, his minimal participation and responsibility in the sale. Such conclusions are simply defendant's assumptions based on his version of the facts.

***5** Defendant's own evidence, however, undermined his conclusions. The record indicated that Rivera used drugs. Defendant testified that, at one point, he and the two informants found Rivera alone in the paint room injecting himself with drugs. Defendant also testified that, during the transaction, Rivera advised defendant to leave because he believed that they were being set up. After hearing defendant's testimony, the court observed: "... the conduct of [ ] Rivera, if it's-if it's believed, is nothing more than a common street pusher's tactic to addict someone by giving out free samples, befriending them, and then turning them into a customer and having that person find other customers to support their habit. That's what-that's what your client's testimony established, not that he was-this was a supply and buy." The court did not abuse its discretion in finding that defendant had failed to provide evidence to substantiate his theory.

Moreover, defendant failed to present evidence relevant to the issue of entrapment, namely, evidence tending to show that the officers' conduct produced in him a motive other than ordinary criminal intent, or that the officers offered him usually attractive inducements.[FN19] Even if Rivera was a police informant, there is no evidence to show that Rivera subjected defendant to unusual inducements to cause him to use and sell drugs. Regardless of the stresses in one's life, a normally law-abiding person does not use drugs and does not accept the opportunity to sell drugs.[FN20]

FN19. See *People v. Barraza, supra,* 23 Cal.3d at page 690, 153 Cal.Rptr. 459, 591 P.2d 947, footnote omitted.

FN20. *People v. Mendoza* (1992) 8 Cal.App.4th 504, 513, 10 Cal.Rptr.2d 312.

Defendant also points to irrelevant evidence concerning his own character and history. In applying the objective test of entrapment, a defendant's character, predisposition, and subjective intent are irrelevant.[FN21] Defendant's clean record and solid family and work history, therefore, has no bearing on whether the law enforcement officers engaged in inappropriate conduct.

FN21. *People v. Barraza, supra,* 23 Cal.3d at pages 690-691, 153 Cal.Rptr. 459, 591 P.2d 947.

The record fails to show that the officers acted inappropriately. Defendant admitted that he was not forced to arrange the drug sale. Officer Agcaoili testified that the informants did not threaten defendant or make him any promises.

Rather, the evidence conclusively indicated that defendant agreed to participate in the transaction because of the money-a common criminal objective. During the police interview, defendant admitted that he did it for the money. Specifically, he said, “Business is slow, there's no money, so I thought I could make some quick money....”

Additionally, despite defendant's argument that the informants overcompensated him for working on their vehicle, defendant admitted that they did not offer him an excessive amount for arranging the drug sale. He was offered $600 to arrange the sale of drugs that could have been sold for $16,500 to $36,000.

In short, defendant failed to present relevant evidence to show that the officers engaged in conduct that would have caused a normally law-abiding citizen to violate the law. We conclude, therefore, that the court did not abuse its discretion in excluding defendant's entrapment evidence.

4. *Firearm Enhancement*

***6** [2] Defendant next argues that the court erred in imposing a four-year sentence enhancement under Penal Code section 12022, subdivision (c), because he was armed with an inoperable firearm.

In particular, defendant notes that, in Penal Code section 12001, subdivision (c), while the Legislature defined "firearm" to include "frame or receiver of the weapon" for purposes of certain enhancement provisions, not including Penal Code section 12022.[FN22] Regardless of whether this broad definition applies to Penal Code section 12022, nothing in Penal Code section 12001, subdivision (c), requires that the word "firearm," as used in other enhancement provisions, refers only to an operable firearm.[FN23]

FN22. Penal Code section 12001, subdivision (c).

FN23. See *People v. Nelums* (1982) 31 Cal.3d 355, 358-359, 182 Cal.Rptr. 515, 644 P.2d 201.

On the contrary, courts have upheld the application of enhancement provisions similar to the one involved in this case even when the firearm was inoperable or unloaded.[FN24] Even an inoperable gun, which may be displayed during the commission of the offense, may provoke a violent reaction.[FN25] "... Legislature reasonably could have sought to discourage persons from arming themselves with an inoperable firearm, whether or not concealed, because of the potential for harm in the event that the firearm is ultimately displayed and used." [FN26] Therefore, regardless of whether defendant actually displayed the inoperable weapon, he was armed with a firearm within the meaning of Penal Code section 12022, subdivision (c).

FN24. See, e.g., *People v. Bland* (1995) 10 Cal.4th 991, 1005, 43 Cal.Rptr.2d 77, 898 P.2d 391 (unloaded firearm in violation of Penal Code section 12022, subdivision (a)); *People v. Nelums, supra,* 31 Cal.3d at page 360, 182 Cal.Rptr. 515, 644 P.2d 201 (unloaded firearm in violation of Penal Code section 12022, subdivision (a)); *In re Arturo H.* (1996) 42 Cal.App.4th 1694, 1701, 51 Cal.Rptr.2d 5 (inoperable pellet gun in violation of Welfare and Institutions Code section 626.10); *People v. Steele* (1991) 235 Cal.App.3d 788, 795, 286 Cal.Rptr. 887 (unloaded firearm in violation of Penal Code section 12022.3); *People v. Jackson* (1979) 92 Cal.App.3d 899, 903, 155 Cal.Rptr. 305 (inoperable firearm in violation of section 12022.5).

FN25. *People v. Bland, supra,* 10 Cal.4th at page 1005, 43 Cal.Rptr.2d 77, 898 P.2d 391, quoting *People v. Nelums, supra,* 31 Cal.3d at page 360, 182 Cal.Rptr. 515, 644 P.2d 201.

FN26. *People v. Nelums, supra,* 31 Cal.3d at page 360, 182 Cal.Rptr. 515, 644 P.2d 201.

Defendant nevertheless contends that there was no potential of harm in his case because his drug possession offense did not involve anyone other than himself. However, Penal Code section 12022, subdivision (c), specifically lists a violation of Penal Code section 11378 as a qualifying

offense. The provision does not condition application upon whether there were other persons present during the commission of the offense.

Even so, has defendant forgotten the facts of his case? Defendant's case involved a volatile drug transaction with multiple participants. The presence of the gun created a greater risk of danger to everyone at the scene, including the police informants, defendant's employee, and the police officers waiting outside to conduct the search.

In his reply brief, defendant also argues for the first time that there was no facilitative nexus between the firearm and the drugs.[FN27] Defendant's argument is both untimely and without merit.[FN28] The record reveals that, while the gun remained in the office, the informants confirmed the presence of the drugs nearby and, at one point, defendant even entered the office with the smaller quantity of methamphetamine in his pocket. Although the officers ultimately found the larger quantity of methamphetamine in the trailer, the evidence indicates that defendant had the weapon available for use during his possession of the drugs.[FN29]

FN27. *People v. Bland, supra,* 10 Cal.4th at page 1002, 43 Cal.Rptr.2d 77, 898 P.2d 391.

FN28. See *People v. Smithey* (1999) 20 Cal.4th 936, 1017, footnote 26, 86 Cal.Rptr.2d 243, 978 P.2d 1171.

FN29. *People v. Bland, supra,* 10 Cal.4th at page 1001, 43 Cal.Rptr.2d 77, 898 P.2d 391.

We conclude that the trial court did not err in imposing the four-year enhancement under Penal Code section 12022, subdivision (c).

5. *Consecutive Sentences*

***7** In his final argument, defendant claims the trial court erred in imposing a consecutive sentence for the methamphetamine found on his person.

The People respond that, in failing to object to the court's sentencing decision, defendant has waived his right to raise this issue on appeal. Although we agree that defendant has failed to preserve this issue for appeal, [FN30] his argument also lacks substantive merit.

FN30. *People v. Scott* (1994) 9 Cal.4th 331, 353, 36 Cal.Rptr.2d 627, 885 P.2d 1040.

Subdivision (a) of Penal Code section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Probate Code section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective.[FN31] "... [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" [FN32] Whether a defendant held multiple criminal objectives is a factual question for the trial court, whose finding will be upheld on appeal if supported by any substantial evidence.[FN33]

FN31. *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, 23 Cal.Rptr.2d 144, 858 P.2d 611, citing *Neal v. State of California* (1960) 55 Cal.2d 11 [9 Cal.Rptr. 607, 357 P.2d 839]; see also *People v. Perez* (1979) 23 Cal.3d 545, 551, 153 Cal.Rptr. 40, 591 P.2d 63.

FN32. *People v. Harrison* (1989) 48 Cal.3d 321, 335, 256 Cal.Rptr. 401, 768 P.2d 1078.

FN33. *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466, 83 Cal.Rptr.2d 307; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299, 36 Cal.Rptr.2d 646.

[3] Here, substantial evidence supported the court's implied finding that defendant possessed the smaller quantity for the purpose of personal use and the larger quantity for the purpose of facilitating the sale. During his interview with the police, defendant admitted that the methamphetamine found in his pocket was for his personal use. Defendant also explained that he had arranged the sale of the three-pound quantity of methamphetamine found in the RV. Defendant received $600 for his role in the transaction. The drugs found on his person and in the RV, therefore, were possessed for two independent criminal objectives.

We conclude that the court did not err in imposing consecutive sentences.

6. *Disposition*

We affirm the judgment.

We concur: RAMIREZ, P. J., and WARD, J.