Filed 2/14/07 P. v. Castro CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO RAMOS CASTRO,

Defendant and Appellant.

F049552

(Super. Ct. No. BF111240A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Stanley Cross, Acting Assistant Attorney General, Louis M. Vasquez and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

STATEMENT OF THE CASE

On August 29, 2005, the Kern County District Attorney filed an information in superior court charging appellant Arturo Ramos Castro, his brother Alfredo Castro

(Alfredo), and one Alfredo Lepe (Lepe) with a variety of criminal offenses.[1] The district attorney charged appellant with the following offenses:

Counts I and III—conspiracy to sell methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379) with five overt acts as to count I and six overt acts as to count III; and

Counts II and IV—unlawful sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a)).

On August 30, 2005, appellant was arraigned, pleaded not guilty to the charges, and demanded a jury trial.[2]

On November 9, 2005, jury trial commenced.

On November 16, 2005, both sides rested and the jury returned verdicts of guilty on counts I-IV and found the overt acts alleged in the conspiracy counts to be true.

On December 16, 2006, appellant filed a mitigating sentencing letter.

On December 19, 2005, the court conducted a sentencing hearing, denied appellant probation, and sentenced him to a total term of five years in state prison. The court imposed the upper term of four years on count II and a consecutive middle term of one year on count IV. The court stayed upper terms of imprisonment on counts I and III (Pen. Code, § 654). The court awarded 289 days of custody credits, imposed a $200 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (Pen. Code, § 1202.45), and a $20 court

---

[1] Lepe pleaded guilty before trial. Alfredo was tried with appellant. Neither Lepe or Alfredo are parties to the instant appeal.

[2] On September 14, 2005, the district attorney filed a consolidated information against appellant, his brother, and Alfredo Lepe. On the same date, the district attorney dropped the motion to consolidate as to appellant. On November 9, 2005, the court granted the district attorney's motion to amend by interlineation a date set forth in count VII of the information. However, that count applied only to Alfredo Castro and Alfredo Lepe.

security fee (Pen. Code, § 1465.8). The court ordered appellant to provide samples of bodily fluids and prints (Pen. Code, § 296) and to register as a narcotics offender (Health & Saf. Code, § 11590).

On January 9, 2006, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Introduction

Eduardo Chavez, a special agent with the United States Drug Enforcement Administration (DEA), testified his agency conducted a sting operation in March and April 2005. The operation used an undercover informant by the name of Edgar Javier Rios (Rios). Rios had a 1989 conviction for the sale of cocaine, approached the agency, and claimed appellant was involved in drug sales. Rios agreed to become an informant in exchange for monetary compensation. During the course of the agency's investigation, Rios earned $6,950 for his services. The agency agreed to pay him $12 per day plus mileage and expenses for his testimony at trial.

Facts Underlying Counts I and II (March 31 Incident)

In 2004-2005, appellant ran an automobile repair shop and Rios met him when he took his car for service. Rios had a conversation with appellant and the latter said he could obtain drugs for Rios and provided Rios with a telephone number. Rios in turn gave the information to Agent Chavez. On March 31, 2005, Rios called appellant and discussed the purchase of a quarter pound of methamphetamine for $2,400. Rios put on a "wire," drove to the repair shop, and sought to speak with appellant. The latter arrived in a green minivan and made a telephone call to his supplier. A small black truck later arrived at the shop. Appellant spoke with the driver, one Gerardo Fuentes. Appellant then told Rios he would have to wait a little longer because Fuentes brought one-half pound of methamphetamine instead of one-quarter pound.

Rios left the shop to obtain money from DEA Agent Bob Beris at a prearranged location. Beris was the agent assigned to the case. Agent Beris gave Rios the sum of

$2,400 to purchase the drugs. When Rios returned to the shop, appellant said they needed to drive to appellant's home to complete the purchase. Rios then drove to appellant's home and waited with him there. Agent Beris eventually called Rios's cellular telephone and instructed him to leave because the agents were uncomfortable with the situation. Rios departed and left appellant at the house. Rios then met with Agent Beris for further instructions.

Rios later telephoned appellant at the direction of Agent Beris. Appellant told Rios he would give a $100 discount on the transaction because Rios had to wait to buy the methamphetamine. Appellant later telephoned Rios and arranged for the sale to take place at a Food Maxx parking lot in Bakersfield. Rios went to the Food Maxx and Alfredo Castro arrived in the parking lot in a green minivan. Alfredo parked next to Rios and asked whether the latter had the money. Rios showed Alfredo the money and the latter said the drug would be arriving soon.

While the two men waited in the parking lot, Alfredo told Rios he could get a better quality drug from a different source. Alfredo asked for Rios's telephone number and Rios provided it. Gerardo Fuentes eventually drove up in a small black pickup truck. Fuentes parked, got inside Rios's car, and gave Rios the controlled substance. A joint DEA/Bakersfield Police Department drug task force observed and videotaped Rios's conduct. At trial, the prosecution played a surveillance video depicting this transaction in the parking lot. Matthew Rainsberg, a DEA forensic chemist, testified the drug seized at the parking lot testified positive for methamphetamine and weighed .24 pounds (112 grams).

Counts III and IV (April 21 Incident)

On April 21, 2005, Rios introduced Agent Chavez to appellant at the latter's shop. Rios told appellant that Chavez was "the money man." Chavez told appellant he liked the quality of the drug purchased on March 31. Appellant said the drug was "good quality" but claimed he could get a better quality substance if Chavez wanted it.

Appellant and Chavez then negotiated for one-half pound of high-grad "ice methamphetamine" for $4,600. Ice methamphetamine is a substance with 80 percent or greater purity.

Agent Chavez and Rios waited 30 minutes for appellant's source to deliver the drug. During their wait, Alfredo Castro approached Chavez and said he had a different source who could provide "very high quality" methamphetamine. Alfredo also told Chavez he did not want appellant to know about this because it would undercut appellant's deal with Chavez and Rios.

Gerardo Fuentes eventually drove up in his black pickup truck and walked into appellant's business. The group agreed to drive to the Food Maxx parking lot to exchange drugs and money. While Agent Chavez and Rios were traveling to Food Maxx, Alfredo telephoned Rios and asked to meet at a nearby gas station. Agent Chavez conferred with his surveillance team and then declined a meeting at the gas station. The parties then decided to meet in the parking lot at Lowe's.

Alfredo and Fuentes drove a gold Toyota 4Runner into the Lowe's parking lot. Alfredo parked the car and told Agent Chavez to switch seats with him. Alfredo got into Chavez's car and the agent entered Alfredo's car. Agent Chavez introduced himself to Fuentes. Fuentes, in turn, handed Chavez two packages of methamphetamine. Each package was the size of a tennis ball. Fuentes deducted $100 from the purchase price and Chavez handed him the sum of $4,500. Fuentes then placed the packages in a folded baseball cap so Chavez could carry the drug back to his car. The two men shook hands and "agreed to do future business." Matthew Rainsberg testified the drug seized at the parking lot testified positive for methamphetamine and weighed .49 pounds (222.9 grams).

On June 14, 2005, DEA agents arrested appellant at his home and transported him to the regional DEA office for an interview. DEA Agent Stephen Peterson assisted Agent Beris in conducting the Spanish-language interview. The agents asked appellant

about his drug sales activities. Appellant told the agents he usually sold only street-level amounts of drugs. These "street-level" amounts included "eight ball" quantities of methamphetamine. Appellant told the DEA agents he dealt with Fuentes when he needed large amounts of methamphetamine. Appellant acknowledged brokering a deal between Fuentes and the DEA operatives. Appellant believed he was not culpable for selling methamphetamine because he never handled the drug. Agent Beris said the unrecorded interview with appellant lasted for about 15 minutes.

Defense

Appellant testified on his own behalf and denied ownership of the automobile repair shop. He said he first met Rios in December 2004, when the latter brought his car to the shop for repair. At that time, Rios handed one "Huero" a suitcase containing marijuana. Huero lived and worked at the repair shop. Rios returned in February 2005 to thank appellant for the car repair but made no mention of drugs during their conversation.

Rios returned in April with Agent Chavez and asked whether appellant knew anyone who sold drugs. Appellant denied possessing drugs or receiving money for drug transactions. Appellant also denied making a drug deal with Agent Chavez. Appellant claimed he knew Agent Chavez was an undercover officer because Rios had previously disclosed that fact to him. Agent Chavez asked appellant for drugs but appellant declined to sell him any. Appellant said he simply told Rios where the latter could purchase drugs.

On June 14, 2005, DEA agents questioned appellant after his arrest. Appellant said Agent Peterson's Spanish language skills were poor, the agent did not understand him, and he did not understand the agent. Appellant claimed the agents threatened him to "tell them the truth" or he would be "facing 15 years and deportation afterward." Appellant denied telling the agents he sold methamphetamine in "eight-ball quantities."

Alfredo Castro did not testify but chose to rely on the state of the evidence.

DISCUSSION

I.

MOTION TO EXCLUDE STATEMENTS

Appellant contends the trial court should have suppressed his confession to DEA agents because it was involuntarily obtained by coercion and therefore violated his Fourteenth Amendment right to due process of law.

On November 16, 2005, appellant filed a motion in limine to exclude his statements to law enforcement officers or, in the alternative, for an Evidence Code section 402 hearing to determine the admissibility of such statements. On November 15, 2005, the court conducted an Evidence Code section 402 hearing on the motion. At the hearing, Stephen Peterson testified he was the DEA resident agent in charge at the Bakersfield office and had served in law enforcement for slightly more than 23 years. Agent Peterson said he had attended an extensive language school, spoke Spanish, and had completed DEA assignments in Bolivia, Peru, Puerto Rico, and Colombia. Peterson said he had used the Spanish language to interview witnesses and informants.

On June 14, 2005, Agent Peterson acted as an interpreter during an interview between Agent Bob Beris and appellant. Appellant had been placed under arrest and the interview took place at the DEA office in Bakersfield. Peterson spoke Spanish to appellant and said appellant appeared to understand him. Beris gave appellant a Spanish-language card bearing the advisements required by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Peterson asked in Spanish whether appellant could read the card and appellant said he could. Peterson then gave appellant a few minutes to read the card. Appellant told Peterson he understood the contents of the card. Peterson then made a photocopy of the card and had appellant sign the copy. Agents Beris and Randy Hoover also signed the copy. Peterson said appellant was not threatened in any way and the officers present—Peterson, Beris, and Hoover—did not have their guns drawn.

On cross-examination, Agent Peterson said he asked appellant whether he would rather speak in English or Spanish during the interview and that appellant said he would rather speak in Spanish. Peterson said he served as the interpreter and that Agent Beris conducted the interview. Peterson recalled: "There was some mention of – we were advising him what he is facing, and we do that with every defendant. This is the charge that if you are convicted you could face. And so, with the amount of drugs that were seized, we just wanted to advise him of what he could face." Peterson elaborated: "[A]t one point I just said in Spanish that, you know, he is arrested, he is going to be facing some time if he is found guilty, and we would like to talk to you about it." Peterson denied telling appellant that he would do 15 years in prison if appellant did not talk with DEA agents. Peterson explained: "I never said that to him. Absolutely not. I never phrased it in that term. I just explained to him what he was arrested for and the possible penalty for that." Peterson further explained that a 15-year term was the potential penalty under federal law.

Agent Beris testified he conducted the interview with appellant on June 14, 2005, and that Agent Peterson served as interpreter. Beris remained in the interview room while Peterson went to make a photocopy of the *Miranda* advisement card. Beris said neither he nor Agent Hoover threatened appellant during Peterson's absence. Beris said appellant did appear to have some understanding of English. Beris also said appellant was advised during the interview of how much prison time he was facing. Beris recalled this took place after the *Miranda* advisement at a point when the interview was "stalling." Beris said, "[W]e had mentioned to him that he was looking at the time – with the amount of drugs that were seized during this, he was probably looking at approximately 10 to 15 years in prison." Beris added, "[W]e figured if he knew what kind of charges he was actually facing he may wish to give further statements." Beris said the interview was not recorded in any way because it was not a common DEA practice. Defense counsel questioned Agent Beris about his testimony at appellant's preliminary hearing. Counsel

specifically asked whether Beris told appellant "he would do 15 years in prison if he didn't talk." Beris examined the reporter's transcript of the preliminary hearing and noted his response was: "During the interview I don't recall. We may have." Beris said his preliminary hearing response was "[s]ubject to interpretation" and that he could not specifically recall a statement about doing 15 years in prison. However, Beris said, "I do remember telling him what kind of time he was facing and that I do remember saying it would be in his best interests to speak with us at this point."

Appellant testified he was placed under arrest on June 14, 2005, put in a van, and taken to the DEA office where he was placed in a room by himself. Appellant said Agent Peterson spoke to him on the way to the DEA office but claimed Peterson did not speak Spanish very well "[b]ecause I couldn't understand what he was asking, and he wasn't able to understand me either." Appellant said Agent Beris questioned him at the DEA office and used a translator. Appellant admitted signing a paper but claimed it was "[a] white blank piece of paper that later on the writing was added to it." Appellant said he told the agents "... I didn't know anybody and that I wasn't involved in the things that they were accusing me of being involved with." Appellant also said the agents threatened him. He testified: "They told me that I would be doing 15 years if I didn't tell them the truth. And they told me ... if I wanted to help them. I responded that the person that was needed their help was amongst them." Appellant said he spoke with the agents because of "the threat and the fear that they instilled in me." He said Agent Beris threatened "[t]hat I would do the 15 years and then that I would be deported afterwards." On cross-examination, appellant said the agents told him "[t]hat I would be possibly facing up to 15 years." As to deportation, appellant recalled the agents saying "that I would be possibly deported to my country."

On rebuttal examination, Agent Beris said appellant signed a photocopy of the *Miranda* rights card and not a blank page. The court ruled:

> "… And the Court has to review the evidence to determine whether the statements by the defendant were voluntary and not the result of compulsion or promise of reward, noting that a confession is involuntary and inadmissible if it was elicited by any promise of benefit or leniency, whether express or implied.
>
> "I also note that the cases talk about whether or not the statement depends – whether or not a statement is involuntary depends on the nature of the benefit to be derived by the defendant if he speaks the truth.
>
> "And in considering all the evidence, I do not find that the evidence is persuasive that the defendant was either told that he might expect more lenient treatment if he tells the truth or that he would reasonably have that expectation based upon the conduct and statements of the officers. The statements by the officers were more of the nature of it would be better for him to tell the truth. I don't find that stating the consequences of his conduct in terms of the potential charge rises to the level of a threat of harsh penalty as described in the case law.
>
> "So, again, I have considered all the circumstances. I do not find in this case that there was compulsion or promise of reward within the meaning of the case law. I do find the statements of the defendant were voluntary under the circumstances and not in violation of his Miranda Rights or any other constitutional rights."

Mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.) In terms of assessing inducements assertedly offered to a suspect, when the benefit pointed out by the police is "'merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]" (*People v. Jimenez*, *supra*, at pp. 611-612; *People v. Howard* (1988) 44 Cal.3d 375, 398.)

The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. Although adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never

been the norm that dictates the rules of investigation and the gathering of proof. The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.)

A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*People v. Maury* (2003) 30 Cal.4th 342, 404.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it does not itself compel a finding that a resulting confession is involuntary. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked . (*People v. Maury, supra*, at p. 405.) We look to the totality of the circumstances to determine whether a statement is voluntary. (*People v. Kelly* (1990) 51 Cal.3d 931, 950.) With respect to conflicting testimony, the reviewing court must accept that version of events which is most favorable to the People, to the extent it is supported by the record. (*People v. Maury, supra,* at p. 404.)

Appellant argues:

> "Here, appellant's statement to law enforcement provided substantial evidence of his guilt. According to Agent Ber[]is, appellant said he ordinarily only dealt with 'eight ball quantities' of drugs, and admitted dealing with Gerardo Fuentes for large quantities. Also according to Ber[]is, appellant said he had purchased quarter-pound quantities of methamphetamine from Fuentes approximately four times in the past month, and sold a quarter pound of meth to Agent Chavez on two occasions.
>
> "Appellant's statement, as described by Ber[]is, appeared to actually acknowledge that he sold methamphetamine. In contrast, the admissible evidence against appellant was that he knew someone who sold methamphetamine, and agreed to introduce Rios and Chavez to that person. Appellant never was known to have actual contact with the substance, and he was never even present when the transactions took place.

> "Given the difference between Ber[]is's description of appellant's statement and the admissible evidence, it is very likely that without the statement, the jury would have found the evidence was not sufficient to convict appellant on a theory of aiding and abetting. It certainly cannot be said, beyond a reasonable doubt, that the admission of appellant's statement did not contribute to the verdict."

Appellant's confession was voluntary in light of the totality of the circumstances. Agents Peterson and Beris did not make promises or threats to appellant. Rather, they discussed what maximum penalty appellant might receive if found guilty under federal law. The agents did not state or imply that appellant would receive this penalty if he failed to cooperate with their investigation. Both agents denied telling appellant he would get substantial time in prison unless he cooperated with them.

Further even assuming arguendo that the trial court's ruling was erroneous, such error was harmless beyond a reasonable doubt. (*People v. Cahill, supra,* 5 Cal.4th at pp. 499, 509-510.) Edgar Rios testified to both the March 31 and April 21 drug transactions. Although he was impeached with a prior felony conviction, DEA agents corroborated his testimony. A surveillance videotape captured the March 31 drug transaction. Agent Eduardo Chavez was a percipient witness to the April 21 drug transaction.

In view of this independent evidence, the admission of appellant's confession to DEA agents was harmless beyond a reasonable doubt.

II.

CALJIC NOS. 2.60 AND 2.61

Appellant contends the trial court lowered the prosecution's burden of proof by instructing the injury in CALJIC Nos. 2.60 and 2.61.

Although appellant testified on his own behalf, the court instructed the jury in CALJIC Nos. 2.60 (defendant not testifying—no inference of guilt may be drawn) and

2.61 (defendant may rely on state of evidence) without apparent objection on appellant's part.[3]

CALJIC No. 2.60, as read to the jury, stated:

"A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way."

CALJIC No. 2.61, as read to the jury, stated:

"In deciding whether or not to testify the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element."

Appellant argues:

"Because appellant did testify, this instruction was not relevant, and it is improper and erroneous for a court to give irrelevant instructions which can mislead the jury. [Citations omitted.] The giving of this instruction was plainly error for this reason.

"The instruction challenged here told the jurors the defendant has a right not to testify and to rely on the inadequacy of the prosecution's evidence. By implication, the instruction told the jurors that appellant deemed it necessary to testify to counter the strength of the prosecution's evidence. That implication effectively reduced the prosecution's burden of proof and violated appellant's state and federal (Fourteenth Amendment) constitutional rights to due process by suggesting that Mr. Castro bore some burden of explanation because he apparently believed the prosecution had proved its case against him up to that point in the trial.…"

---

3 An appellate court may review any instructions given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby. (Pen. Code, § 1259.)

The trial court is required to instruct the jury on the points of law applicable to the case. (Pen. Code, § 1093, subd. (f).) No particular form is required as long as the instructions are complete and correctly state the law. Jury instructions must be read together and understood in the context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. An erroneous instruction requires reversal only when it appears the error was likely to have misled the jury (Cal. Const., art. VI, § 13). (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10-11.) Jury instructions must be considered in their entirety and it is not expected that each instruction fully states the law of the case. One instruction may be helped and explained by another on the same point. The court will look to the pertinent instructions altogether. Thus, error cannot be predicated on the fact that verbal inaccuracies appear in some parts of the instructions, or that isolated phrases, sentences, or excerpts are open to criticism. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1074-1075.) Moreover, when we consider a claim of this sort, the question we ask is whether there is a reasonable likelihood the jury construed or applied the challenged instructions in an objectionable fashion. (*People v. Osband* (1996) 13 Cal.4th 622, 679.)

Here, as respondent points out, the trial court properly gave CALJIC Nos. 2.60 and 2.61 because Alfredo Castro, appellant's codefendant, did not testify at trial and chose to rely on the state of the evidence. Because the instructions were applicable to the codefendant, the trial court did not err in giving them during Alfredo's joint trial with appellant.[4] Appellant nevertheless contends the two instructions were irrelevant as to him.

---

[4] Instructions such as CALJIC Nos. 2.61 and 2.62 must be given upon request. (*Carter v. Kentucky* (1981) 450 U.S. 288, 300, 305.) The failure to give these instructions on request is subject to harmless error analysis. (*People v. Evans* (1998) 62 Cal.App.4th 186, 196-198.)

CALJIC No. 1.01, as read to the jury, provided in relevant part: "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others." CALJIC No. 17.31, as read to the jury, provided in relevant part: "The purpose of the Court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the fact." The trial court also instructed the jury in CALJIC No. 2.90 as to the presumption of innocence, reasonable doubt, and the burden of proof.

The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. Similarly, although it is error for a trial court to give an "abstract" instruction which is correct in law but irrelevant to the case, in most cases this is only a nonprejudicial technical error which does not constitute grounds for reversal. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.) In the instant case, the trial court gave CALJIC Nos. 2.60 and 2.61, which were applicable to appellant's codefendant, Alfredo Castro. The court also gave CALJIC Nos. 1.01 and 17.31, which advised jurors to consider the instructions as a whole and that all instructions were not necessarily applicable. Moreover, the court instructed the jurors on the standard of proof beyond a reasonable doubt. We must assume the jurors understood and faithfully followed the instructions. Reversal for alleged instructional error is not required.

III.

THE CONSPIRACY CONVICTIONS

Appellant contends one of his conspiracy convictions must be reversed because the two charged conspiracies were actually a single conspiracy designed "to accomplish the one ultimate purpose of selling methamphetamine."

Appellant specifically submits:

> "[T]here was one overriding scheme in which appellant was a middle person for hooking up buyers with the seller. The same individuals were involved in both transactions, and the goals were obviously the same in both instances.
>
> "Comparing appellant's two convictions to his brother's additional conspiracy charges highlights the problems with the instant case. The evidence did, in fact, support a second conspiracy conviction for Alfredo, as he deliberately went behind [the] appellant's back to negotiate with an entirely different dealer.… [¶] ... [¶]
>
> "[I]n the case of Alfredo, it does appear he was involved in two ongoing conspiracies; one with his brother and one in which he cautiously and deliberately went behind his brother's back. No so with appellant, who, according to the evidence, was involved in only a single ongoing conspiracy with Alfredo to steer business to Gerardo Fuentes. [¶] ... [¶]
>
> "Appellant in this case was improperly convicted of two conspiracies, when there was evidence of only a single agreement between himself, his brother, and either Gerardo Fuentes or some other person. There was no evidence that new conspiracies were hatched each time the undercover operatives approached with a request for drugs; rather, the evidence showed there was a mechanism in place that was part of an ongoing enterprise. The same parties were involved for both transactions, and the fact the methamphetamine was delivered within hours on the same [day] it was requested by Rios and Chavez indicates a single agreement that was already in place between the parties. One of appellant's conspiracy convictions must be reversed."

Count I of the information alleged in relevant part:

> "ON OR ABOUT MARCH 31, 2005, ARTURO RAMOS CASTRO, AND ALFREDO RAMOS CASTRO, DID WILFULLY [*sic*] AND

> UNLAWFULLY CONSPIRE TOGETHER OR WITH GERARDO FUENTES AND/OR ANOTHER PERSON OR PERSONS WHOSE IDENTITY IS UNKNOWN, TO COMMIT THE CRIME(S) HEALTH AND SAFETY CODE SECTION 11379, FELONY(S), IN VIOLATION OF PENAL CODE SECTION 182(A)(1), A FELONY...."
>
> Count III of the information alleged in relevant part:
>
> "ON OR ABOUT APRIL 21, 2005, ARTURO RAMOS CASTRO, AND ALFREDO RAMOS CASTRO, DID WILLFULLY AND UNLAWFULLY CONSPIRE TOGETHER AND/OR WITH GERARDO FUENTES AND/OR ANOTHER PERSON OR PERSONS WHOSE IDENTITY IS UNKNOWN, TO COMMIT THE CRIME(S) HEALTH AND SAFETY CODE SECTION 11379, FELONY(S), IN VIOLATION OF PENAL CODE SECTION 182(A)(1), A FELONY...."

Each of the counts set forth a number of overt acts that took place on the date specified in the substantive count.

The necessary elements of a criminal conspiracy are: (1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy. Where only two persons are involved and one is a government agent or informer, the other cannot be convicted of conspiracy. That is because the crime of conspiracy requires at least two people to have the requisite criminal specific intent and a government agent by definition cannot be a coconspirator. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.)

Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy. (*Clune v. United States* (1895) 159 U.S. 590, 595; *Williams v. Superior Court* (1973) 30 Cal.App.3d 8, 10; *People v. Seter* (1963) 216 Cal.App.2d 238, 247.) Conspiracy is an inchoate crime and it does not require the commission of the substantive offense that is the object of the conspiracy. As an inchoate crime, conspiracy fixes the point of legal intervention at the time of

agreement to commit a crime, and thus reaches further back into preparatory conduct than attempt. In some instances, the object of the conspiracy is defined in terms of proscribed conduct. In other instances, it is defined in terms of a proscribed result under specified attendant circumstances. (*People v. Morante* (1999) 20 Cal.4th 403, 416-417.) To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree, but also that they intended to commit the elements of that offense. One agreement gives rise to only a single offense, despite any multiplicity of objects. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 551-552.)

In contemplation of law the act of one conspirator is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences. (*People v. Harper* (1945) 25 Cal.2d 862, 871; *People v. Benenato* (1946) 77 Cal.App.2d 350, 356, disapproved on another ground in *In re Wright* (1967) 65 Cal.2d 650, 654-655; *People v. Stoddard* (1941) 48 Cal.App.2d 86, 89.) Thus, it is not necessary that a party to a conspiracy shall be present and personally participate with his coconspirators in all or in any of the overt acts. (*People v. Benenato, supra*, 77 Cal.App.2d at p. 356.) Under California law, one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) One may be guilty of conspiring to possess for sale or to transport a controlled substance without physically possessing it. (*People v. Morante, supra,* 20 Cal.4th at p. 418.)

When two or more persons agree to commit a number of criminal acts, the test of whether or not they have formed a single conspiracy is whether the acts were merely steps or stages in the formation of a larger and ultimately more general, all-inclusive

conspiracy directed at achieving a single unlawful result. Under this rule, where the evidence shows a group of conspirators agreed to commit a number of different crimes incident to a single objective, there is only one conspiracy and convictions for multiple conspiracies cannot be sustained. (*People v. Liu*, *supra*, 46 Cal.App.4th at p. 1133.) Generally speaking, a conspiracy comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated. Under California law, it is for the trier of fact—considering the unique circumstances and the nature and purpose of the conspiracy of each case—to determine precisely when the conspiracy has ended. (*People v. Hardy* (1992) 2 Cal.4th 86, 143.) However, whether there is a single or multiple conspiracies is not a question of fact and a trial court does not err in declining to submit it to a jury for determination. (*People v. Liu*, *supra*, 46 Cal.App.4th at p. 1133.)

In the instant case, appellant divides his primary contention into several subordinate contentions. First he contends a single conspiracy exists when there is a single agreement to commit one or more substantive crimes. Without citing to the record on appeal, he argues:

> "[P]roof of a conspiracy may have been established by the overt acts described in Counts One and Three. But ... the crime of conspiracy was committed at the point when the parties agreed to work together to sell methamphetamine and undertook the first overt act to accomplish that end. The fact that the crime of violating Health and Safety Code section 11379 occurred twice does not establish several conspiracies.…"

A judgment of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent. Error must be affirmatively shown on appeal. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Here, appellant fails to cite to any portion of the record to establish a single conspiracy as opposed to multiple conspiracies. According to the record, appellant, his brother Alfredo, and Gerardo Fuentes worked together to sell methamphetamine to DEA operatives on two different dates. Appellant told Agents Peterson and Beris he typically

sold drugs in street level amounts, such as one-eighth ounce increments known as "eight-balls." Appellant also told the agents he dealt with Fuentes when he needed larger amounts of the drug. As respondent points out, "there was not a single conspiracy amongst the parties, but several opportunistic agreements hatched in series for the purpose of selling methamphetamine upon request by a buyer."

Second, appellant contends even if two conspiracies could be established upon the instant record, a second conspiracy could not be upheld absent a finding of fact by the jury. A trial court is required to instruct the jury to determine whether a single or multiple conspiracies exist only when there is evidence to support alternative findings. (*People v. Vargas, supra,* 91 Cal.App.4th at p. 554.) The test is whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy. If so, there is but a single conspiracy. (*People v. Skelton* (1980) 109 Cal.App.3d 691, 718.)

In the instant case, appellant briefly reviews the record and claims there was a single conspiracy because "[t]he same individuals were involved in both transactions, and the goals were obviously the same in both instances." However, appellant has not cited and we have been unable to find evidence that the acts "'were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result.'" (*People v. McLead* (1990) 225 Cal.App.3d 906, 920.) Once again, the record reflects a series of individual agreements arrived at for the purpose of delivering and selling methamphetamine.

Finally, appellant contends his conviction of multiple conspiracies violates the Double Jeopardy Clause (U.S. Const., Fifth Amend.) and requires reversal. That claim must be rejected because no plea of double jeopardy can properly be made where, as here, the defendant is tried but once. (*People v. Tideman* (1962) 57 Cal.2d 574, 578; *People v. Polowicz* (1992) 5 Cal.App.4th 1082, 1088.)

Reversal or striking of one of the conspiracy counts is not required.

IV.

LESSER INCLUDED OFFENSES

Appellant initially contended in his opening brief on appeal that counts II and IV are lesser included offenses of counts I and III and must be stricken under the accusatory pleadings test.

In his reply brief, appellant concedes:

> "In *People v. Reed* (2006) 38 Cal.4th 1224, decided after appellant filed his Opening Brief in the instant matter, the California Supreme Court held that the pleadings test does not provide an alternative to the statutory elements test for determination of lesser included offenses. Appellant recognizes that this Court is bound by the Supreme Court's decision in *Reed* (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455) ...."

Appellant nevertheless presents the argument from his opening brief to this court "for possible reconsideration by the Supreme Court and/or federal review." The decisions of the California Supreme Court are binding upon and must be followed by all the state courts of California. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction and it is not their function to attempt to overrule decisions of a higher court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Appellant's contention must be rejected.

V.

IMPOSITION OF UPPER AND CONSECUTIVE TERMS OF IMPRISONMENT

Appellant contends the trial court violated his rights to a jury trial and to due process of law by imposing an upper term of imprisonment on count II and a consecutive term of imprisonment on count IV. Appellant maintains the sentence violated the principles of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) because it was based upon facts not found to be true beyond a reasonable doubt by a jury.

A. The Upper Term of Imprisonment

Appellant's argument originates with *Blakely, supra,* 542 U.S. 296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Blakely*, the United States Supreme Court reaffirmed the rule it announced in *Apprendi*: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 542 U.S. at p. 301, quoting *Apprendi, supra*, 530 U.S. at p. 490.) One year later, the Supreme Court reiterated the right to a jury trial requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker* (2005) 543 U.S. 220, 244.)

In *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), the California Supreme Court considered the effect of *Apprendi* and *Blakely* on this state's determinate sentencing law and held that the imposition of upper terms does not constitute an increase in the penalty for a crime beyond the statutory maximum, and therefore "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence ... does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

In *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) ___ U.S. ___ [2007 D.A.R. 1003] (*Cunningham*), the high court held that California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendments right to a jury trial to the extent it permits a trial court to impose an upper term based on facts—other than the fact of a prior conviction—found by the court rather than by a jury beyond a reasonable doubt. The court stated in relevant part:

> "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior

conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). '[T]he relevant "statutory maximum,"' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely*, 542 U.S., at 303-304 (emphasis in original).... [¶] ... [¶]

"… Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL [Determinate Sentencing Law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* ___ U.S. ___ [2007 D.A.R. 1003, 1005, 1010, fn. omitted].)

In the instant case, the sentencing court stated in relevant part:

"And the Court does find that the following circumstances in this case — I find no circumstances in mitigation.

"I do find the following circumstances in aggravation: One, the crime involved a large quantity of contraband, to wit: approximately 404.1 grams of methamphetamine; two, defendant's prior convictions as an adult are numerous; three, the defendant was on two grants of misdemeanor probation when the crime was committed; four, the defendant's prior performance on misdemeanor probation was unsatisfactory in that he failed to complete DUI school, failed to pay fines, failed to appear for jail commitments, and violated terms and continued to reoffend. [¶] ... [¶]

"I also find that the aggravating circumstances or factors in aggravation preponderate, justifying imposition of the upper term. And I find those – with regard to the findings I am making on the circumstances in aggravation, I find those to apply to all counts that he was convicted on. So I do find that the upper term is justified as to Count 2, as well as the other counts. And Count 2 will be the primary term."

Consistent with *Cunningham*, the sentencing court imposed the upper term based upon the fact of appellant's numerous "prior convictions as an adult," among other circumstances in aggravation. Under well-established California law, only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Thus, no error occurred at sentencing in the instant case as a

result of imposition of the upper term. Even if we were to assume error under *Cunningham* on this record, the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24; furthermore, there was no abuse of discretion under *People v. Watson* (1956) 46 Cal.2d 818, 836.

B. Consecutive Sentences

Appellant further contends the sentencing court violated his rights to a jury trial and to due process of law by imposing a consecutive term of imprisonment on count IV.

The sentencing court stated in relevant part:

> "With regard to the issue of consecutive sentencing, the Court does find that the crimes were committed in counts 2 and 4 at different times or separate places rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. And I find under the circumstances of this case that consecutive sentences on counts 2 and 4 are appropriate, consistent with the purpose and goals of our sentencing laws."

The *Cunningham* court did not address the distinct issue of imposition of consecutive sentencing for separate crimes. Moreover, the California Supreme Court has obviated the claim that criminal defendants are entitled to a jury trial on factors used to determine whether prison sentences will run concurrently or consecutively. The Supreme Court stated:

> "... *Blakely*'s underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently. ... The high court's decisions in *Blakely* and *Apprendi* are intended to protect the defendant's historical right to a jury trial on all elements of the crime, which the court concluded would be jeopardized if a legislature could label facts affecting the length of the authorized sentence for an offense as sentencing factors rather than as elements and thereby eliminate the right to a jury trial on such facts.
>
> "No such danger is created by a statute that permits judges to decide whether to impose consecutive sentences without jury factfinding. The jury's verdict finding the defendant guilty of two or more crimes authorizes the statutory maximum sentence for each offense. When a judge considers the circumstances of each offense and the defendant's criminal history in

> determining whether the sentences are to be served concurrently or consecutively, he or she cannot be said to have usurped the jury's historical role. Permitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses. Nothing in the high's court's decisions in *Apprendi*, *Blakely*, or *Booker* suggests that they apply to factual determinations that do not serve as the 'functional equivalent' of an element of a crime." (*Black, supra,* 35 Cal.4th at pp. 1262-1263, fn. omitted.)

The sentencing court's imposition of consecutive terms on count IV did not violate appellant's rights to a jury trial and to due process of law.

DISPOSITION

The judgment is affirmed.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
WISEMAN, J.

_____
KANE, J.