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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ZACHARY EDWARD DAVIS, Defendant and Appellant.	B229615 (Los Angeles County Super. Ct. No. BA367204)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

John Raphling, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Zachary Edward Davis appeals his conviction for sale of a controlled substance and possession of a controlled substance. He argues there is insufficient evidence to support the jury's guilty verdict, and that the instructions provided to the jurors removed an element of the offense from their determination. We conclude there is sufficient evidence to support the conviction. We also conclude that, to the extent there was instructional error, that error was harmless. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On December 31, 2009, members of the Los Angeles Police Department (LAPD) Gang Narcotics Division Buy Team conducted an undercover operation at a rave party held at the Los Angeles Coliseum. One of the undercover officers, Romeo Rubalcava, attempted to purchase from appellant the drug methylenedioxymethamphetamine (MDMA), commonly known as Ecstasy. After their initial encounter, Officer Rubalcava saw appellant walk to meet with another individual, Jeffrey Kiralla. After a brief meeting, appellant then returned to Officer Rubalcava and handed him two blue pills from a plastic container. Officer Rubalcava gave appellant $20 in exchange.

Appellant was arrested. Kiralla also was arrested, and as officers approached him, he dropped a plastic bag containing 19 blue pills. The LAPD crime lab tested the two pills sold by appellant to Officer Rubalcava and a representative sample of the 19 pills recovered. The tests showed the pills contained MDMA. Appellant was charged with sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a)),[1] in count 1; and possession for sale of a controlled substance (§ 11378), in count 2. He pleaded not guilty.

At trial, Wubayehu Tsega, a criminalist from the LAPD crime lab, testified that the pills tested positive for MDMA. Officer Rubalcava testified about the sale of the pills. He also testified that MDMA is a "raiser drug" and a "party drug," the effects of which can last up to 24 hours. The defense called no witnesses.

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

The jury found appellant guilty as charged on count 1, and guilty of the lesser included offense of possession of a controlled substance (§ 11377) on count 2. The court sentenced appellant on count 1 to 36 months formal probation with the condition that he serve 90 days in county jail. The sentence on count 2 was stayed pursuant to Penal Code section 654, subdivision (a). This appeal followed.

DISCUSSION

I

Appellant contends there is insufficient evidence to support the conviction. In reviewing the sufficiency of evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence, such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Substantial evidence is evidence that is reasonable, credible, and of solid value. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.)

Sections 11377 and 11379 prohibit the possession of "any controlled substance" specified in several statutes, including sections 11054 and 11055. MDMA is not listed explicitly as a controlled substance in any of these statutes.[2] However, section 11055, subdivision (d)(1) identifies "[a]mphetamine, its salts, optical isomers, and salts of its optical isomers." Section 11055, subdivision (d)(2) lists "[m]ethamphetamine, its salts, isomers, and salts of its isomers" as a controlled substance. More broadly, subdivision (d) of section 11055 provides that "any material, compound, mixture, or preparation" containing "any quantity" of several substances having a "stimulant effect on the central nervous system," including amphetamine and methamphetamine, is a controlled substance.

Section 11054, subdivision (d)(6) identifies "methylenedioxy amphetamine" (MDA) as a controlled substance, and subdivision (d) of section 11054 includes "any

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[2] MDMA is listed as a controlled substance under federal law. (51 Fed.Reg. 36552 (Oct. 14, 1986).)

material, compound, mixture, or preparation" containing "any quantity" or any "salts, isomers, and salts of isomers" of any listed hallucinogenic substance, including MDA.

An analog of a listed controlled substance is treated the same as the listed controlled substance. (§ 11401, subd. (a).) A "'controlled substance analog'" is defined as a substance that: (1) has a substantially similar chemical structure as the controlled substance, or (2) has, is represented as having, or is intended to have a substantially similar or greater stimulant, depressant, or hallucinogenic effect as the controlled substance. (§ 11401, subd. (b).)

In sum, MDMA may be treated as a controlled substance in one of two ways: (1) by containing any quantity of amphetamine, methamphetamine, or MDA; or (2) by meeting the definition of a controlled substance analog.

Appellant argues that because MDMA is not a named controlled substance, the prosecution was required to introduce expert testimony expressly comparing MDMA's chemical structure and physiological effects to that of a specifically named controlled substance. Because the prosecution did not introduce such testimony, appellant asserts, there was insufficient evidence for the jury to find that the MDMA appellant sold to the undercover officer was an unlawful controlled substance.

Appellant cites two decisions for the proposition that only expert testimony expressly comparing MDMA to another controlled substance is sufficient to sustain a conviction for possession or sale of MDMA. In *People v. Becker* (2010) 183 Cal.App.4th 1151 (*Becker*), the defendant was convicted of possessing MDMA in violation of section 11377. He argued the prosecution failed to introduce substantial evidence that MDMA is a controlled substance. (*Id.* at p. 1155.) At trial, an investigator testified that Ecstasy, which is MDMA, includes methamphetamine, and thus has a stimulant effect substantially similar to the stimulant effect of methamphetamine. (*Id.* at p. 1156.) The court rejected the defendant's argument, holding that on the basis of the investigator's testimony, the jury reasonably could have concluded that MDMA was a controlled substance itself or a controlled substance analog of methamphetamine. (*Ibid.*) Thus, the court determined that substantial evidence supported the defendant's conviction.

Similarly, in *People v. Silver* (1991) 230 Cal.App.3d 389, 392 (*Silver*), the defendant was convicted by a jury of possession for sale and sale of MDMA in violation of sections 11378 and 11379. At trial the parties presented competing expert testimony as to whether MDMA is an analog of methamphetamine. (*Id.* at pp. 392-393.) The experts compared the molecular structure and physiological effect of the two drugs. (*Id.* at pp. 392-393, 396.) The court concluded that this testimony provided sufficient evidence to support the jury's guilty verdict. (*Id.* at p. 396.)

Appellant is thus correct that both *Becker* and *Silver* held that testimony expressly comparing MDMA to an enumerated controlled substance was sufficient evidence to support a jury conviction. However, neither decision suggests that such testimony is necessary to uphold a jury's guilty verdict on appeal.

After the conclusion of briefing in this case, Division Two of this district decided *People v. Le* (2011) 198 Cal.App.4th 1031 (*Le*). During trial, the prosecutor and defense counsel stipulated that pills confiscated from the defendant contained MDMA; however the parties did not stipulate that MDMA was a controlled substance. (*Id.* at pp. 1034-1035.) The court addressed whether the stipulation alone was sufficient evidence to support the defendant's conviction for transportation for sale and possession for sale of a controlled substance. (*Id.* at p. 1033.) The court held that it was not. (*Id.* at p. 1038.) Rather, the court noted "there is no doctrine that permits a trial court (or the trier of fact) to conclude that 3, 4-methylenedioxymethamphetamine contains amphetamine merely because their names are similar." (*Id.* at p. 1037.) Overturning the defendant's conviction, the court concluded "[i]n the absence of a stipulation [that MDMA is a controlled substance], the prosecution must offer an expert who testifies that the language of a controlled substance statute or the analog statute has been satisfied." (*Id.* at pp. 1037-1038.)

If we were to follow *Le*, we would have to overturn appellant's conviction, because there was neither a stipulation nor expert testimony showing that MDMA meets the definition of a controlled substance or controlled substance analog. The evidence offered by the prosecution on this issue was MDMA's chemical name, which contains the

terms amphetamine and methamphetamine. Criminalist Tsega testified that the pills recovered from appellant contained MDMA or Ecstasy. The prosecution thus presented evidence that the pills appellant sold to Officer Rubalcava contained MDMA, and evidence adduced at trial showed that MDMA is the abbreviation for methylenedioxymethamphetamine. MDMA's formal name contains both methamphetamine and amphetamine, drugs that are enumerated controlled substances. Its name also is similar to "methylenedioxy amphetamine," or MDA, which is a listed controlled substance under the statute.[3] We apply common sense in concluding that the chemical name of the substance, by including the term "methamphetamine" and not including any suffix or term negating the inference (e.g., "pseudo"), supports the inference that the pills appellant sold to Officer Rubalcava contained methamphetamine. We accordingly decline to follow *Le*.

We also take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy," bearing on the issue. (Evid. Code, § 452, subd. (h).)[4] "These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145.)

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[3] Before it was listed as a controlled substance under federal law, MDMA was treated as an analog of MDA. (*United States v. Carlson* (11th Cir. 1996) 87 F.3d 440, 445; *United States v. Raymer* (10th Cir. 1991) 941 F.2d 1031, 1045-1046; *United States v. Desurra* (5th Cir. 1989) 865 F.2d 651, 652.) Indeed, the development of MDMA as an unregulated alternative to MDA, a controlled substance, prompted Congress to regulate controlled substance analogs. (*Id.* at p. 653, citing S.Rep. No. 99-196, 99th Cong., 1st Sess. 2 (1985); H.R.Rep. No. 99-848, 99th Cong., 2d Sess. 4 (1986).)

[4] In a letter sent to the parties, we informed them that we were considering the propriety of taking judicial notice, and afforded them an opportunity to respond.

Reference to learned treatises verifies that MDMA's chemical name reflects its component elements, which include methamphetamine and, by extension, amphetamine. The scientific names of chemical compounds reflect their composition. (Zumdahl, Chemical Principles (2d ed. 1995) p. 39.) Both methamphetamine and MDMA are derivatives of amphetamine. (Baer & Holstege, Encyclopedia of Toxicology (2d ed. 2005) p. 96.) In chemistry, a derivative is a compound that may be produced from another compound in one or more steps. (Stedman's Medical Dictionary (28th ed. 2006) p. 516). Methamphetamine's scientific name, consisting of meth and amphetamine, confirms that it is "[a] methyl derivative of amphetamine."[5] (Oxford English Dict. Online (3d ed. 2001) <http://www.oed.com> [as of Oct. 05, 2011].) Similarly, MDMA's name demonstrates that it is produced from methamphetamine by the addition of methylenedioxy. The scientific name of MDMA thus accurately reflects that it is derived from methamphetamine and amphetamine. (See also Stedman's Medical Dictionary, *supra*, at p. 1164.)

Based on the foregoing and the absence of any evidence or logic to the contrary, we conclude it may be inferred that MDMA contains some quantity of methamphetamine or amphetamine under section 11055, subdivision (d). We therefore hold that the evidence is sufficient to establish that the pills appellant sold to Officer Rubalcava contained a controlled substance under state law.

II

Appellant also argues that MDMA's status as a controlled substance or controlled substance analog is an element of the offenses of which he was convicted, and that the jury should have been instructed, *sua sponte*, to determine the issue as one of fact.[6]

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[5] Meth represents methyl in compound words. (Stedman's Medical Dictionary, *supra*, at p. 1196.)

[6] Respondent argues that appellant forfeited his claim of instructional error because he did not object to the provided instructions. But, "[i]nstructions regarding the elements of the crime affect the substantial rights of the defendant, thus requiring no objection for

We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. (*People v. Ramos* (2008) 163 Cal.App.4th 1082.) Instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions. (*People v. Flood* (1998) 18 Cal.4th 470, 479-480 (*Flood*).) In reviewing the instructions, we look to "whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos, supra,* 163 Cal.App.4th at p. 1088.)

The court instructed the jury as follows: "The defendant is charged with selling methylenedioxymethampetamine, commonly called Ecstasy, a controlled substance. . . . To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant sold a controlled substance; 2. The defendant knew of its presence; 3. The defendant knew of the substance's nature or character as a controlled substance; and 4. The controlled substance was methylenedioxymethampetamine, commonly called Ecstasy. . . . The People do not need to prove that the defendant knew which specific controlled substance he sold, only that he was aware of the substance's presence and that it was a controlled substance." The court provided a similar instruction for the possession charge.

In *Silver,* the defendant was convicted of possessing MDMA for sale. On appeal, the court rejected Silver's claim that the jury was confused, noting that the trial court instructed that "'It will be your function to determine whether M.D.M.A. is an analog of methamphetamine because a controlled substance analog is regarded the same as the controlled substance of which it is an analog. [¶] . . . [¶] The burden is on the prosecution to prove beyond a reasonable doubt that M.D.M.A. is an analog of

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appellate review." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503; see also Pen. Code, § 1259.) Appellant claims that the issue whether MDMA is a controlled substance or a controlled substance analog is an element of the offense and a question of fact to be determined by the jury. This claim is one affecting his substantial rights. Thus, appellant's failure to object to the instruction at trial did not forfeit his right to appellate review.

methamphetamine. If you have a reasonable doubt whether M.D.M.A. is an analog of methamphetamine, you must give the defendant the benefit of that doubt and find him not guilty.'" (*Silver*, *supra*, 230 Cal.App.3d at p. 397.) The court concluded the jury was properly instructed that it was its function to determine whether MDMA is an analog of methamphetamine. (*Id.* at pp. 397-398.)

Here, the trial court did not instruct the jury that in order to find appellant guilty of possessing or selling MDMA it had to determine that MDMA is a controlled substance or a controlled substance analog. Because there was a reasonable inference that the MDMA pills were a controlled substance and no evidence to the contrary was presented, arguably it was proper for the trial court to presume the truth of the fact in the instruction. Nonetheless, we believe the better view is that the jury should have been instructed on the point since we find MDMA's status as a controlled substance to be an inference rather than a presumption.[7] Had an instruction been provided, it would have been appropriate to tell the jury that it was logical to infer that MDMA was a controlled substance. Given that there was no instruction, we will assume for the purposes of this appeal that the failure to do so was in error.

On appeal, we apply harmless error analysis when reviewing a trial court's instruction that removed an element of the offense from jury consideration. (*Flood, supra,* 18 Cal.4th at pp. 502-503.) "Error is harmless 'where an omitted element is supported by uncontroverted evidence,' as 'where a defendant did not, and apparently could not, bring forth facts contesting the omitted element.'" (*People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1154, quoting *Neder v. United States* (1999) 527 U.S. 1, 18.) Stated another way, when the defendant effectively concedes or admits the omitted element, such error is harmless. (*Flood*, *supra*, 18 Cal.4th at p. 504.)

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[7] "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (a).)

In *Flood, supra,* 18 Cal.4th at pages 475, 477, the trial court removed an element of an offense from the jury's consideration, not by failing to instruct on it, but by telling the jury that it was a given and not a fact for the jury to determine. Although the Supreme Court stated that this instruction violated the defendant's due process rights to have the jury determine each element of the offense, it ultimately decided the error was harmless because the defendant effectively conceded the element. (*Id.* at pp. 504-505.) Such concessions include the failure to request mention of the element in the jury instruction, to refer to this element during trial, to argue to the jury that the prosecution had failed to prove the element beyond a reasonable doubt, to present evidence on the issue, and to dispute the prosecution's evidence on the issue. (*Id.* at p. 505.) "[I]ndeed, he did not ask that the issue even be considered by the jury." (*Ibid.*) The court acknowledged that a defendant's tactical decision not to "'contest'" an essential element of an offense did not forgo the requirement that the jury consider whether the prosecution had proved every element of the crime. (*Ibid.*) But, the court reasoned that because the defendant's actions were tantamount to a concession on the disputed element, any error in the jury instructions did not contribute to the jury's guilty verdict and thus was harmless. (*Ibid.*)

Here, as in *Flood*, appellant effectively conceded the issue of whether MDMA constitutes a controlled substance or controlled substance analog that he now claims was erroneously excluded from jury consideration. Appellant failed to request that the element be included in the jury instruction and did not object to instructions provided without the element. Appellant also did not argue to the jury that the prosecution had failed to carry its burden in proving the element. At trial, appellant did not dispute that MDMA was a controlled substance. In their summations, both attorneys argued their case as if it were a given fact that MDMA was a controlled substance. Defense counsel often referred to Ecstasy as a "drug" and a "narcotic." The record thus establishes that appellant effectively conceded that MDMA constitutes a controlled substance.

On this record, it is not reasonably probable the verdict would have been different had the jury been properly instructed. "The United States Supreme Court has

admonished that, '[h]armless-error analysis addresses . . . what is to be done about a trial error that, in theory, may have altered the basis on which the jury decided the case, but in practice clearly had no effect on the outcome.' [Citation.]" (*People v. Harris* (1994) 9 Cal.4th 407, 431, italics omitted.) We are satisfied beyond a reasonable doubt that the instructional error here played no part in the jury's verdict.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.