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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A112831**

v. **(Solano County Super. Ct. No. FCR-225077)**

TONY RICHARD LOW,

Defendant and Appellant.

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Tony Richard Low appeals from a judgment entered after a jury convicted him of vehicle theft, (Veh. Code, § 10851, subd. (a)) and smuggling drugs into a jail. (Pen. Code, § 4573.)[1] He contends his conviction on the smuggling offense must be reversed because (1) section 4573 did not apply to his conduct, (2) applying the statute in this instance would violate his due process rights, (3) applying the statute to his conduct would violate his right to equal protection, (4) the evidence was insufficient to support his conviction, (5) the trial court erred when it denied his motion for a new trial, and (6) the court instructed the jury incorrectly. We conclude the court did not commit any prejudicial errors and affirm.

[1] Unless otherwise indicated, all further section references will be to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant worked for a contractor named Christopher Terrell. On June 21, 2005, appellant took Terrell's truck. When appellant failed to return the truck for several days, Terrell called the police and reported it as stolen.

On June 29, 2005, appellant was driving Terrell's truck on Interstate 80 near Davis when he passed Detective Ronald Jones of the Sacramento County Sheriff's Department. Detective Jones ran a registration check on the truck and learned it had been reported as stolen. He pulled appellant over.

Appellant was uncooperative. Detective Jones had to call for help. It was five minutes before another officer arrived. During that time, appellant was moving around inside the truck and moving his hands up and then bringing them back down. Detective Jones had asked appellant to keep his hands in the air several times. Officer Christopher Wahl arrived on the scene. He also saw movement inside the truck through the tinted windows. Officer Wahl used his public address system to order appellant out of the vehicle and with Detective Jones's help, Wahl was able to arrest appellant.

Officer Wahl advised appellant of his *Miranda* rights. Appellant waived those rights and made a statement denying he had stolen the truck. Wahl searched appellant for weapons and contraband, and then drove him to the county jail. When he pulled into a sally port area outside the jail facility, Wahl advised appellant that it was illegal to bring drugs inside. Appellant denied that he had any contraband. After appellant entered the jail, he was searched. A small, one inch square bag containing a visible "clear crystal substance" was found in the ankle portion of his sock. A forensic toxicologist testified the small "coin size[d]" ziplock plastic bag contained 20 milligrams of a "white crystalline powder" containing methamphetamine.

Based on these facts, an information was filed charging appellant with the offenses we have described. The information also alleged appellant had served three prior prison terms within the meaning of section 667.5, subdivision (b).

The case proceeded to trial where a jury convicted appellant on both offenses. In a court trial that followed, the court found the prior prison term allegations to be true.

Appellant filed a motion for new trial. He argued he could not validly be convicted of smuggling under section 4573 because that statute did not apply to his conduct. The trial court disagreed and denied the motion.

Subsequently, the court sentenced appellant to the upper term of four years on his smuggling conviction, plus eight months for vehicle theft, and an additional one year for each of the prior prison term findings.

II. DISCUSSION

A. Does section 4573 apply to appellant's conduct?

Underlying each of appellant's arguments is the contention that section 4573 does not apply to his conduct, and therefore his smuggling conviction must be reversed.

As is relevant, section 4573 states, "Except when otherwise authorized by law . . . any person, who knowingly brings or sends into . . . any state prison . . . or any other place where prisoners of the state are located under the custody of prison officials . . . or into any county, city and county, or city jail . . . or any other place where prisoners or inmates are located under custody of any sheriff . . . or within the grounds belonging to the institution, any controlled substance . . . is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county."

Appellant contends section 4573 must be interpreted as applying only to those who "voluntarily" enter a detention facility to bring illegal drugs into the facility, or non-inmates who assist in such activity. Because he did not enter the jail voluntarily, but was brought there pursuant to his arrest, appellant contends he cannot be convicted of violating the statute.

We reject this argument because that is not what the statute prohibits. The statute states it is illegal for "any person" to "knowingly" bring illegal drugs into a detention facility. The statute does not say that it applies only to those who "voluntarily" enter a detention facility carrying illegal drugs. We may not, under the guise of interpretation,

add language to a statute that is not otherwise present. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632; *People v. Winters* (2001) 93 Cal.App.4th 273, 280.)

Appellant contends that "unintended and absurd" consequences would result if a voluntariness element is not read into the statute. First, he contends that a person who possesses drugs could be found guilty of violating section 4573 if an arresting officer is not able to conduct a thorough search before bringing the person to a jail. We find nothing absurd about this scenario. It is a crime to possess illegal drugs. (Health & Saf. Code, § 11377.) It is also a crime to smuggle drugs into a detention facility. (§ 4573.) It is not absurd to hold a person responsible for a smuggling offense because an arresting officer is unable to prevent the offense from occurring.

Appellant further contends that if section 4573 can be applied to persons who are involuntarily brought to a jail, then any person who is caught possessing drugs could be found guilty of attempted smuggling. We disagree. To prove an attempt, "there must be proof of both specific intent to commit the crime and a direct, but ineffectual, act done toward its commission." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1126.) Therefore, a person would not be guilty of attempted smuggling simply because he possessed illegal drugs. The prosecution also would be obligated to prove the person had the specific intent to bring drugs into a jail.

Next, appellant argues section 4573 must be interpreted as applying only to those who "intentionally" bring drugs into a detention facility. According to appellant, this additional element is required by section 20, which states "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." First, as we have noted, the statute does not state that it applies to those who "intentionally" enter a detention facility carrying illegal drugs. Second, appellant misconstrues the statute upon which he relies. Section 20 describes the general criminal intent or "mens rea" that is required for most crimes. (*In re Jorge M.* (2000) 23 Cal.4th 866, 872; see also 1 Witkin, Cal. Criminal Law (3d ed. 2000) Elements, § 1, p. 198.)

The jurors were instructed on that requirement using the standard CALJIC instruction.[2] Appellant has not cited, and we are not aware of, any authority that holds the import of section 20 is that all crimes must be committed "intentionally."

Next, appellant argues that section 4573 must be interpreted as applying only to "non-inmates". To do otherwise, appellant argues, would render the language of the statute mandating that warning signs be posted outside all detention facilities surplusage because such warnings are "of no moment to arrestees . . . who are not voluntarily entering the facilities in the first place and may never see such signs." We reject this argument for two reasons. First, the statute prohibits "any person" from bringing illegal drugs into a detention facility. It is not limited to "non-inmates." Again, appellant urges us to add language that is not present in the statute. We may not do so. (*Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 632; *People v. Winters*, *supra*, 93 Cal.App.4th at p. 280.) Second, applying the statute to persons who are in custody would not render the statute's warning language surplusage. Appellant concedes the statute applies to visitors. Since visitors to a detention facility presumably would see the warning signs, the statutory language is not rendered surplusage because those in custody might not see them.

Finally, appellant contends the conclusion that section 4573 must be applied only to "non-inmates" is supported by the fact that the section is found in Part 3, Title 5, Chapter 3 of the Penal Code, entitled "Unauthorized Communications with Prisoners" rather than Chapter 1 of Part 3, Title 5, entitled "Offenses by Prisoners." However, it is well settled that division, chapter, article and section headings are not indicative of

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[2] The jurors were instructed with CALJIC No. 3.30 as follows:

"In the crime charged in Count Two, namely, BRINGING DRUGS INTO A JAIL, there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

legislative intent. (§ 10004,[3] *People v. Trout* (1955) 137 Cal.App.2d 794, 796.) The description of the chapter in which the section is located is not determinative.

B. Due Process

Appellant contends that applying section 4573 to his conduct would violate his due process rights. Appellant's argument on this point is based on his Fifth Amendment right not to incriminate himself. Appellant notes it is "well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.'" (*In re Lewallen* (1979) 23 Cal.3d 274, 278, quoting *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.) Appellant appears to argue that refusing to disclose his possession of drugs in response to Officer Wahl's admonition and query whether appellant possessed controlled substances is compelled nonverbal expression. He reasons that because he was arrested with drugs in his possession, he was forced to either disclose his possession of those drugs, or face harsher punishment for smuggling. According to appellant, placing him in that dilemma violated the Fifth Amendment and resulted in a due process violation.

Appellant has not cited any case that holds a person who is forced to make this sort of choice has suffered a violation of his Fifth Amendment rights. The primary case he does cite, *People v. Whitfield* (1996) 46 Cal.App.4th 947, does not so hold. The court in *Whitfield* held that when a police officer asks a suspect whether she has drugs, the suspect's act of producing the drugs, is a "statement" for *Miranda* purposes. (*Id.* at p. 958, fn. 6.) In this case, appellant did not produce drugs in response to questioning by Detective Jones or Officer Wahl. Indeed, appellant was given his *Miranda* rights, he waived them, and then, after he was informed of the no drugs in jail rule, appellant made a statement flatly denying that he had anything. *Whitfield* is not controlling under these very different facts.

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[3] Section 10004 states, "Division, chapter, article, and section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section hereof."

More relevant in our view is a line of cases from the federal court. In *Witt v. United States* (9th Cir. 1969) 413 F.2d 303 (*Witt*), the defendant was convicted of smuggling marijuana into the country. On appeal he argued his conviction must be reversed because "a person bringing [marijuana] into the United States must smuggle it in, because to invoice it and present it for inspection would provide a 'link in the chain' of evidence tending to establish his guilt, and would violate his Fifth Amendment privilege against self-incrimination." (*Id.* at pp. 305-306.) The *Witt* court rejected that argument flatly: "There is about as much logic in that reasoning as there would be in the contention of a bank robber that he was required to shoot the bank guard who ordered him to drop his gun and raise his hands, because to comply with the guard's orders would be self-incriminating and would provide a 'link in the chain' of evidence tending to establish his guilt, all in violation of his Fifth Amendment privilege against self-incrimination. The same claim might be made by the burglar who is accosted by a police officer as he crawls out of the window of a residence at three A.M. and is ordered to submit to an inspection of the luggage he is carrying. To hold that the privilege was available in any of these cases would border on the ridiculous and would effectively frustrate all criminal laws." (*Id.* at p. 306.)

The holding in *Witt* on this point has been followed in many cases including *United States v. Vaught* (9th Cir. 1970) 434 F.2d 124, 125, fn. 2, *United States v. Lopez* (9th Cir. 1970) 432 F.2d 547, 548, *United States v. Betancourt* (5th Cir. 1970) 427 F.2d 851, 855, and *United States v. Perez* (9th Cir. 1970) 426 F. 2d 799, 800. We find these cases to be persuasive and will follow them here.

C. Equal Protection

Appellant contends that applying section 4573 in this context would violate his equal protection rights. His argument is based on what he perceives to be the differing treatments of those who are arrested with drugs on their person. According to appellant, an equal protection violation is established because those who elect to admit they have

drugs will suffer a lower level of punishment than those who say nothing and attempt to smuggle the drugs into jail.[4]

The concept of equal protection means that persons who are similarly situated should receive like treatment. (*In re Eric. J.* (1979) 25 Cal.3d 522, 531.) An essential prerequisite to establishing an equal protection violation is a "showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Id.* at p. 530.) Here, the state has not adopted a classification system that treats similarly situated persons in an unequal manner. Those who possess illegal drugs and who admit that fact are not similar to those who attempt to smuggle drugs into a jail. The latter not only possess an illegal substance, they attempt to smuggle that substance into a locked and controlled facility. There is no equal protection violation.

D. Sufficiency of the Evidence

Appellant contends his smuggling conviction must be reversed because it is not supported by substantial evidence.

Our role when evaluating this type of argument is "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not

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[4] Illegal possession under Health and Safety Code section 11377 is a wobbler that can be punished by up to one year in the county jail or 16 months, two years, or three years in prison. (See § 18.) Smuggling under section 4573 carries a sentence of two, three, or four years in prison.

substitute our evaluation of a witness's credibility for that of the fact finder.' [Citations.]" (*Ibid.* quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

Here, appellant contends the evidence was insufficient because it failed to establish he possessed a usable quantity of methamphetamine.

Section 4573 makes it illegal to smuggle into a jail "any controlled substance, the possession of which is prohibited by" the Health and Safety Code. To sustain a conviction for possession, the evidence must establish, among other things, that the substance possessed was an amount that is sufficient to be used as a controlled substance. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 64-65.) The usable quantity element may be proven by circumstantial evidence. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; cf. *People v. Perry* (1969) 271 Cal.App.2d 84, 97 [the fact that heroin was found in a balloon, protected by a cup, and concealed in a rain gutter, supported the inference it was sufficient to be used].)

Applying these principles, we conclude the evidence was sufficient. The record shows the officer who searched appellant inside the jail found a one-inch square baggie hidden in the ankle portion of appellant's sock. The baggie contained 20 milligrams of what the toxicologist described as a "white crystalline powder" that contained methamphetamine. Several factors support the conclusion that appellant possessed a usable quantity of the drug. First, appellant was a methamphetamine user,[5] and the methamphetamine at issue was found *hidden in his sock.* The jurors examined the bag. They could infer that appellant was knowledgeable concerning the requisite quantity considered usable and that appellant knowingly possessed and secreted the drug because he intended to use it. Second, appellant lied when Officer Wahl asked whether he had any drugs in his possession. The lie shows consciousness of guilt. Third, the packaging

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5 Appellant's friend Lacy Urmberg testified that she used methamphetamine with appellant while he possessed the stolen truck. While Urmberg immediately recanted this aspect of her testimony claiming she had not heard the question correctly, the jury was entitled to decide which version was true. Urmberg also testified while she was staying at the victim Terrell's house, she saw Terrell give appellant a bag with methamphetamine in it shortly before the vehicle theft that is the subject of this case occurred. Terrell denied giving drugs to appellant.

of the drug, a one-inch square ziplock plastic bag, provides some support for the jurors' verdict. It suggests appellant possessed the drug purposefully and not by mistake. Finally, the forensic toxicologist testified that there was enough substance in the bag that she could test it not just once, but twice. The jurors might reasonably conclude that if the toxicologist could manipulate it repeatedly, appellant could use it. We conclude the evidence is sufficient.

Appellant contends the evidence was insufficient under *People v. Leal* (1966) 64 Cal.2d 504 where the court stated, "the possession of a minute crystalline residue of narcotic useless for either sale or consumption . . . does not constitute sufficient evidence in itself to sustain a conviction." (*Id*., at p. 512.) However, in *People v. Rubacalba, supra,* 6 Cal.4th 62, the court clarified its ruling in *Leal*: "The chemical analysis of the material possessed need only establish the existence of a controlled substance." (*Id.* at p. 65.) ". . . [T]he *Leal* usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. . . . No particular purity or narcotic effect need be proven." (*Id.* at p. 66.) The evidence we have discussed supports the conclusion that the methamphetamine at issue could be used. *Leal* is distinguishable.

Alternately, appellant seems to argue that the insufficiency of the evidence is demonstrated by the fact that it failed to satisfy CALJIC No. 12.32. The instruction states:

"Proof that the controlled substance possessed, if any, was in an amount sufficient to be used as a controlled substance may be established:

"1. By expert testimony, or

"2. By evidence that the amount possessed, if any, was sufficient to be used in any manner customarily employed by users of the substance."

Appellant's argument on this point is premised on the assumption that the usable quantity element *can only* be proven by direct evidence. That is not correct. (*People v. Palaschak, supra,* 9 Cal.4th at p. 1242.)

We conclude the evidence was sufficient.

E. New Trial

Appellant contends the trial court erred when it denied his motion for a new trial. His arguments on this point are premised on the statutory, due process, and equal protection arguments that we have discussed above. Since we have rejected each of those arguments, we reject the new trial argument as well.

F. Instruction

Appellant contends his smuggling conviction must be reversed because the trial court failed to instruct on the lesser included offense of possessing methamphetamine. (Health & Saf. Code, § 11377.) The People concede simple possession is a lesser included offense of section 4573, but they argue no other instruction was required here. We agree with the People.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present . . . but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, internal quotation marks omitted.)

Here, the evidence showed appellant had methamphetamine hidden in his sock and that he knowingly brought that methamphetamine into the county jail. Indeed, appellant brought the methamphetamine into the jail even though Officer Wahl had warned him that doing so was a criminal offense. There is no evidence that appellant committed an offense that was less than that charged. The court was not obligated to instruct on simple possession.

G. Sentencing

Appellant contends his upper term four-year sentence for violating section 4573 must be reversed under the United States Supreme Court's recent decision in *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856 (*Cunningham*).

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the Supreme Court held that "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." In *Cunningham,* the court ruled California's sentencing procedure is unconstitutional under that standard because it "authorizes the judge, not the jury, to find the facts permitting an upper term sentence . . . ." (*Cunningham, supra,* 127 S.Ct. at p. 871.)

But the rule articulated in *Apprendi* remains subject to an exception. It does not apply to "the fact of a prior conviction. . . ." (*Apprendi, supra,* 530 U.S. at p. 490.) In *Cunningham,* the court expressly recognized the continuing vitality of this exception. (*Cunningham, supra,* 127 S.Ct. at p. 860.)

Here, the trial court imposed the upper term primarily because appellant had a lengthy prior criminal history. As the court noted at the sentencing hearing, appellant had at least 10 prior felony convictions.[6] In our view, this is the type of finding the court was authorized to make under *Apprendi.* We conclude the court did not err when it based its sentencing decision on appellant's prior criminal history.

The court here also said it was imposing the upper term sentence because appellant's prior performance on parole was poor. We need not decide whether the court could validly rely on that factor because the transcript of the sentencing hearing demonstrates that appellant's lengthy prior criminal history was the primary factor that motivated the court's decision. A single factor can support an upper term sentence,

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6 We note the court could not validly rely on three of those prior convictions because they were charged and found true as enhancements. (See Cal. Rules of Court, rule 4.420(c).) However, appellant did not object on this ground in the court below, (*People v. Scott* (1994) 9 Cal.4th 331, 352-353) and even if he had, appellant had at least 7 prior felony convictions on which the trial court could validly rely.

(*People v. Osband* (1996) 13 Cal.4th 622, 728) and it is not reasonably probable the court would have imposed a different sentence, had it known the factor related to appellant's prior performance on parole was improper. (*People v. Price* (1991) 1 Cal.4th 324, 492.) Indeed, the court's comments are so clear we can say any possible error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Gemello, J.

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Miller, J.*

*Judge of the Superior Court of San Francisco County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.