Filed 6/27/05 P. v. Rimert 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. KIRK SCOTT RIMERT, Defendant and Appellant.	F043718 (Super. Ct. No. 1054323) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Stanislaus County. Wray F. Ladine, Judge.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Virna L. DePaul, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Appellant Kirk Scott Rimert was convicted by jury verdict of manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)). The trial court sentenced appellant to three years of formal probation on the condition he serve 300 days in the county jail. In addition, the court ordered appellant to participate in a controlled substance detection program at his own expense and to pay $1,000 in attorney's fees.

FACTS

Appellant and his codefendant, Bargas, lived in separate houses on the same property. The property, which also contained some outbuildings (including one that housed chickens and roosters), was cluttered with household items, junk, cars, and animals (about 100 chickens and roosters and one pig). The entire property was owned by Bargas and his siblings.

Bargas lived alone in the smaller house, which was only 12 feet by 20 feet in size and which was situated 62 feet from the larger main house. In the larger main house, Bargas's brother and his wife lived with their daughter, Lisa, and her boyfriend, appellant. Bargas's brother had previously been convicted of possessing drugs for sale. He owned the chickens and roosters that were on the property.

On February 20, 2003, at about 4:00 p.m., several law enforcement officers went to Bargas's house to conduct a search. Bargas was on the far side of the main house raking the yard. The officers detained appellant, Bargas, Lisa, and a man named Kelly.

At the smaller house, officers moved into position. One officer positioned himself to observe the fenced backyard while others moved around to the back of the property and two others approached the front door of the house. Shortly after taking his position, the officer observing the backyard saw appellant exit the back door of the house carrying a white plastic grocery bag. He clutched the bag to his side and walked quickly, slightly bent over, toward the tree at the back of the property. He walked to the other side of a piece of plywood propped up against the tree and he bent over. When he stood back up, he was no longer holding the bag. He moved quickly back toward the house's back door.

The officer communicated with the other officers by radio, informing them that appellant was near the back of the yard. An officer yelled at appellant to stop and approach the fence. Appellant looked in the officer's direction but continued walking quickly toward the backdoor. Another officer yelled to appellant, "Hey, come on over here. Sheriff's office. Come over to the fence." Appellant also looked toward that officer but still continued toward the backdoor and entered the house. In total, appellant was in the backyard for only about 20 seconds. An officer informed the other officers by radio that appellant had gone back into the house.

At that point, the officers at the front door started knocking on the door, loudly identifying themselves as law enforcement officers and demanding that appellant open the door. During the course of the officers' 7 to 10 hard knocks on the door, a male voice inside responded that he was coming to the door. After between 30 and 120 seconds, appellant opened the door, although he could have opened the door within a few seconds based on the size of the house. By one estimation, there were only about 20 feet between the back door and the front door, which, in a courtroom demonstration, required 5.86 seconds to travel. When appellant opened the door, a strong odor distinctive of methamphetamine production came from the house and vapors were even visible in the air. The officers had appellant exit the house and they handcuffed him. They performed a brief security check of the house, again noticing the persisting strong odor and also a hot plate in the living room.

An officer told Bargas they wanted to search the house because they thought methamphetamine manufacturing was occurring in the house and Bargas consented in writing to a search.

In the back yard, in the area concealed behind the plywood, the officers found the white grocery bag appellant had carried from the house about five minutes earlier. The bag was open. It contained an empty box of coffee filters, along with wet coffee filters that were stained a dark color and had a chemical smell but did not contain any coffee

grounds. The bag also contained wet paper shop towels with the same chemical smell. Two black trash bags nearby also contained wet coffee filters and wet paper shop towels, both with the chemical smell. Near the bags was a plastic drink bottle with a tube sticking out of the modified top, which could have been used in the manufacture of methamphetamine. The bottle also contained similar wet trash. The process of methamphetamine manufacturing produces a large amount of lab waste, including toxic chemicals, rags, and containers. The three bags also contained household trash. None, however, contained coffee grounds.

The officers found nothing related to chickens in the backyard. But, in the main chicken shed on the property outside of the backyard, an officer observed glass ampules of what appeared to be veterinary medicine.

Before searching the house, the officers allowed the house to ventilate for 15 to 30 minutes. In the house, officers found a two-burner hotplate with one burner on. The burner had chemical stains consistent with iodine, which is used in the manufacture of methamphetamine. Electrical hotplates are very commonly used as a heat source for manufacturing methamphetamine. There was a warm saucepan half-full of water on the floor and a computer fan wired into the electrical system and in the on position. Fans are used to accelerate the evaporation process and to disperse the fumes in the manufacture of methamphetamine. The officers found aluminum foil and a small propane tank. The foil was cut in small strips and creased down the middle. One strip had burn marks on it. Foil strips can be used to heat and inhale the vapors of methamphetamine and can also be used in its manufacture.

The officers found a 20-ounce soda bottle in the freezer, about one-fourth full of an amber-colored liquid that contained methamphetamine, acetone, and an acid. The liquid was cold but not frozen or crystallized. Acetone does not freeze at the temperature of a normal household freezer. The outside of the bottle was wet and covered with some slightly frozen material. It was not possible to conclude how long the bottle had been in

the freezer. Approximately 45 minutes had passed between the time appellant had opened the front door and the time the bottle was removed from the freezer.

The methamphetamine in solution in the freezer was in the process of methamphetamine production. It was nearly finished and only needed to be cooled into crystals and filtered from the liquid by something such as the coffee filters or shop towels found in the back yard trash. Filtration steps are performed at various phases during methamphetamine production, such as before the liquid is placed in the freezer, and again after. Thus, the liquid in the freezer would have been through a previous filtration step to separate it from a solvent, such as acetone, resulting in the wet, chemical-smelling coffee filters found in the trash. If acetone or a liquid such as that found in the freezer were poured through a coffee filter, and the coffee filter were left exposed to the air, the filter would not remain wet for very long. Since these types of chemicals usually evaporate off the filter fairly quickly, the fact that the filters in the trash were still wet to the touch, despite being in an open bag, indicated they had been used fairly recently.

There was a coffee pot in the kitchen sink, and a small can of acetone was between the kitchen and living room. Acetone is used to purify methamphetamine and promote its crystallization.

In the bedroom area, officers found a two-liter plastic soda bottle about three-fourths full of a bilayered liquid. The liquid contained ephedrine, methamphetamine, and an organic solvent used to extract methamphetamine. The contents of the bottle in the bedroom could have been a by-product of methamphetamine production, possibly of the liquid found in the freezer, or it could have been in the early stages of methamphetamine production.

Not all of the chemicals needed to make methamphetamine were found at the house but the steps of methamphetamine production can occur at different times in different places. The officers found nothing related to chickens in the house.

The officer who processed the lab in Bargas's house concluded that methamphetamine was being manufactured there. The strong odor and vapor, plus the wetness of the coffee filters, indicated that the methamphetamine production had occurred recently.

After the search was completed, Bargas agreed to speak to an officer. Bargas volunteered: "I wasn't makin' nothing. I was out back with the chickens." He explained he was feeding and caring for the chickens and Kelly was helping him. Kelly was found to be carrying a notebook containing entries regarding chickens and roosters. The officer asked Bargas why appellant was in his house and Bargas replied that appellant was going to try to make chicken vitamins for him. The officer asked Bargas what kind of vitamins he used for the chickens. He said he used powdered Vitamix in a container with a dog on the label. He had some in the shed but needed to buy more. Because he did not have any money, appellant told him he could make some vitamins for the chickens. Bargas told the officer that appellant lived in the main house with Lisa. When the officer asked Bargas why appellant would use Bargas's house to make chicken vitamins, Bargas said, "I don't know why." The officer asked Bargas whether he used methamphetamine and he said he did use it, most recently in the last couple of days. When the officer asked Bargas if he knew drugs were being made in his house, he said he did not know anyone was making drugs in his house.

After interviewing the detainees, the officer searched Bargas and found a plastic pen casing cut in half and containing methamphetamine/amphetamine residue. Bargas claimed he had found the pen casing. The officer also searched appellant and found a similar pen casing containing the same residue. These pen casings were consistent with the types of devices, such as straws or hollowed-out pens, often used to ingest methamphetamine in powder form.

When appellant and Bargas were booked into jail, neither had any chicken-related items on their persons.

DISCUSSION

I.

A.

Appellant contends the admission of Bargas's statements to the officer denied appellant his Sixth Amendment right to confrontation under the reasoning of *Crawford v. Washington* (2004) 541 U.S. 36, which held that admission of a "testimonial" hearsay statement by a declarant who is not available at trial violates the Sixth Amendment confrontation clause unless the defendant had a prior opportunity to cross-examine the declarant. (*Id*. at pp. 68-69 ["Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation"].) *Crawford* also held that a statement obtained by a police officer in the course of an interrogation is testimonial (*id.* at p. 52) and that the admission of such a statement violates the Sixth Amendment even if the statement would be admissible hearsay under the jurisdiction's rules of evidence and even if it bears indicia of reliability (*id.* at pp. 61-62, 68-69).

Appellant argues that Bargas's statements, introduced through the testimony of the officer, were testimonial and that Bargas, who was also on trial for the same charge, was not subject to cross-examination at any time. To attempt to establish prejudice, appellant asserts that Bargas's statement that he did not know anyone was making drugs in his house undermined the heart of appellant's defense that he had nothing to do with manufacturing methamphetamine, and that Bargas's statement that appellant was making chicken vitamins contradicted appellant's defense that he had nothing to do with manufacturing *anything*, even chicken vitamins.[1]

---

[1] We ignore all issues arising from the fact that appellant did not object at trial on Sixth Amendment grounds to the admission of Bargas's statements against appellant and the fact that appellant did not request a specific instruction limiting the effect of Bargas's statements to Bargas's alleged liability only.

B.

During trial, neither the prosecution nor the defense for appellant treated either of Bargas's statements as evidence relevant to the culpability of appellant; instead, the statements were viewed as relevant only to Bargas's culpability as a codefendant.[2]

The prosecution never used Bargas's statements against appellant but instead argued they were lies made up by Bargas to avoid the impression that he was aware of the illegal activity occurring in his house. Because Bargas's statements, and in particular his chicken-vitamin story, went to his defense, the prosecutor argued more than once during his summation that there was no evidence to support the story. Appropriately, the prosecutor's argument on this subject referred solely to Bargas and never to appellant. The prosecutor first argued that Bargas's "bogus story" was unsupported and showed that Bargas knew appellant was in his house and that Bargas therefore had the intent or purpose of committing or encouraging the crime.

Understandably, appellant's counsel in his summation did not make any reference to Bargas's statements in his argument or refer to the chicken-vitamin story, obviously because counsel did not consider them (or considered them unpersuasive) and because the prosecutor did not use them as evidence against appellant. Instead, appellant's counsel argued that there was insufficient evidence that methamphetamine was being manufactured and appellant's presence in the house and his disposal of the trash were not enough to show he was involved in methamphetamine manufacturing.

Bargas's counsel in his summation, again for obvious reasons, relied in part upon Bargas's statements and argued that Bargas had no knowledge of what appellant was

---

[2] Bargas's chicken-vitamin story, although attacked by the prosecution as a ludicrous fabrication, was not entirely nonsensical or unbelievable because of the large chicken and rooster operation on the property and other evidence that Bargas was involved with raising chickens and roosters. But the story was simply not supported by the evidence.

doing in the house and genuinely thought appellant was making chicken vitamins. He asserted that the lack of chicken-related evidence supported his story that he needed chicken vitamins and thus that he believed appellant was making chicken vitamins for him. Counsel for Bargas reiterated that the chicken-vitamin story went to the issue of Bargas's knowledge and he emphasized that the evidence showed that Bargas thought appellant was helping him by making chicken vitamins and that Bargas did not suspect appellant was using his house to make methamphetamine.

Consistently, in his closing comments the prosecutor limited his use of Bargas's statements to the issue of Bargas's knowledge and argued that Bargas's statements reflected that he did indeed know what was happening in his house because the chicken-vitamin story was "crazy." He contended that Bargas knew appellant was making methamphetamine in his house and needed to make up an excuse, so he lied about the chicken vitamins. He argued that Bargas, but not appellant, was involved with the chickens and thus it was unreasonable and unbelievable that Bargas would think appellant, who knew nothing about chickens, could make chicken vitamins. He argued that there was no evidentiary corroboration of Bargas's story and that his lies showed he had knowledge, a consciousness of guilt, and a connection to the methamphetamine production in his house.

C.

We are satisfied that, even assuming it was error under *Crawford* to admit the officer's testimony of Bargas's statements without limitation to Bargas alone, any such error was harmless beyond a reasonable doubt because the jury would have concluded beyond a reasonable doubt that appellant was guilty of manufacturing methamphetamine even without the use of Bargas's statements against appellant. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 791, citing *Chapman v. California* (1967) 386 U.S. 18.)

As the prosecution and appellant's trial counsel appear to have believed, Bargas's statements were irrelevant to appellant's liability and they were treated as such by

counsel during their respective arguments to the jury. And, as we explain in Part II below, the evidence against appellant consisted of his sole presence in the house, his access to the house, his disposal of lab waste, his refusal to respond to the officers' demands, the methamphetamine laboratory and products in the house, and the recent and ongoing manufacturing activity in the house.

Additionally, Bargas's statements that he did not know anyone was making drugs in his house or that he thought appellant was making chicken vitamins did not inculpate appellant in any way. Bargas's statements were in response to, and a reiteration of, the officer's direct question whether he knew anyone was making drugs in his house. Bargas's denials of that knowledge did not implicate appellant or impair any defense he sought to raise. Indeed, appellant presented no affirmative evidentiary defense case for the prosecution to contradict. Appellant presented no evidence at all, and thus no evidence to establish that he was or was not manufacturing anything, even chicken vitamins. Appellant did, however, argue in closing that there was insufficient evidence of methamphetamine production, that he was merely taking out the household trash when the officers arrived, and that he was not connected to any drug manufacturing occurring in Bargas's house. Appellant had the opportunity to present an alternative explanation as to why he was present in Bargas's house under these suspicious circumstances if he felt Bargas's chicken-vitamin explanation was not helpful to his case. Moreover, although the chicken-vitamin story placed appellant in Bargas's house, that fact had already been established; appellant had exited the house and been handcuffed by the officers.

In sum, on this record, the overwhelming evidence of appellant's guilt, including the absence of any evidence to support any chicken-vitamin production story, satisfies the *Chapman* test.

II.

Appellant contends there was insufficient evidence to support his conviction for manufacturing methamphetamine because the evidence did not establish that he

knowingly participated in the manufacturing process. He argues the prosecution merely presented evidence that he was physically present at the moment police arrived, was seen taking out household trash, and possessed a pen casing with trace residue. There was no substantial evidence, appellant maintains, connecting him to the manufacturing process.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The standard is the same when a case relies in part on circumstantial evidence. '"'"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]"' [Citation.]" (*People v. Lee* (1999) 20 Cal.4th 47, 58.) It does not matter that other cases might have involved more compelling evidence. (See *People v. Menius* (1994) 25 Cal.App.4th 1290; *People v. Small* (1988) 205 Cal.App.3d 319, 325-326.) Merely because different, more, or even more persuasive evidence was present in other cases does not require a finding that the evidence here was insufficient as a matter of law; each case must be considered on its own facts. "Reversal … is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

To prove that a defendant manufactured methamphetamine in violation of section 11379.6, subdivision (a), the prosecution is required to prove that the defendant directly or indirectly manufactured methamphetamine, *with knowledge that methamphetamine was being manufactured.* (§ 11379.6, subd. (a), italics added; *People v. Coria* (1999) 21 Cal.4th 868, 880 [merely engaging in chemical synthesis is not enough; defendant must have knowledge of the facts that make the chemical synthesis unlawful, i.e., that methamphetamine is being manufactured].) The conduct proscribed by section 11379.6,

subdivision (a) encompasses the initial and intermediate steps carried out to manufacture, produce, or process methamphetamine. (*People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503-1504.) The Legislature "intended to criminalize all acts which are part of the manufacturing process, whether or not those acts directly result in completion of the final product." (*People v. Heath* (1998) 66 Cal.App.4th 697, 705.) It is not necessary that a fully functioning lab be found. (*People v. Lancellotti* (1993) 19 Cal.App.4th 809, 812-813 [boxed, nonfunctioning laboratory in storage locker containing virtually all necessary equipment plus distinctive odor provided substantial evidence of incremental process of methamphetamine manufacturing]; *People v. Combs* (1985) 165 Cal.App.3d 422, 427 [presence of nearly all the necessary equipment and materials to manufacture phencyclidine, plus a quantity of the actual substance, established beyond question that manufacturing process had taken place].) Alternatively, a defendant can be convicted under section 11379.6, subdivision (a) as an aider and abettor if there is proof that he or she acted with knowledge of the criminal purpose of the perpetrator and with an intent either of committing the offense or of encouraging or facilitating commission of the offense. (*People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208.)

Here, there was more than enough evidence here to permit the jury to conclude beyond a reasonable doubt that appellant was knowingly involved in the manufacture of methamphetamine in Bargas's house.

A well-nigh overwhelming case of methamphetamine production was established. There was firm evidence of manufacture. Lab trash (not ordinary household trash as appellant misstates) was disposed of in a concealed area in the backyard. The trash contained wet coffee filters that smelled of chemicals consistent with methamphetamine production. No coffee grounds were found. When appellant opened the door to the house, strong odors and vapors of methamphetamine production were emitted. The house contained a methamphetamine laboratory and products at various stages of methamphetamine production. The hot plate was on. Appellant possessed a device for

ingesting methamphetamine. In addition, the wet coffee filters and the strong odors and visible vapors strongly supported the inference that the drug production was recent and ongoing.

A well-nigh overwhelming case of appellant's knowledge of such illegal manufacture was also presented. Appellant's quick disposal and hiding of fresh lab trash, his two purposeful refusals to respond to the officers' demands to stop, and his long delay in opening the door in response to the officers' loud knocking and demands (not a prompt response as appellant again misstates) despite evidence that he heard the officers' demands and despite the fact that he delayed in responding to the officers' demands to open the door even though the house was only 12 feet by 20 feet in size and he could have opened the door within 6 seconds, all circumstantially established that appellant possessed a guilty knowledge of the illegal nature of the methamphetamine manufacture. Appellant's possession of a methamphetamine-ingesting device, which contained methamphetamine residue, supported the inference that he used methamphetamine and was aware of its nature. These factors made it exceedingly unlikely that appellant believed he was participating in the manufacture of a lawful chemical. In addition, the jury could reasonably infer that appellant had ready access to Bargas's house, which was only 62 feet from appellant's residence, was jointly owned by the man with whom appellant lived, and in which appellant was found alone.

We thus disagree with appellant that his conviction was based only on appellant's mere presence in the house. An avalanche of evidence, direct and circumstantial, tended to prove that appellant was knowingly involved with the methamphetamine manufacture occurring in Bargas's house.

III.

Appellant contends that admission of Bargas's out-of-court statements to the officer made necessary complete sua sponte instructions to the jury about the rules applicable to accomplice testimony.[3] The trial court did give CALJIC No. 3.10 [accomplice defined], but appellant takes the position the court should also have given CALJIC Nos. 3.11, 3.12, 3.16, and 3.18.[4] Appellant argues that Bargas's statements

---

[3] The accomplice jury instructions are CALJIC No. 3.10 (definition of accomplice), CALJIC No. 3.11 (testimony of an accomplice must be corroborated), CALJIC No. 3.12 (what evidence is sufficient to corroborate accomplice testimony), and CALJIC No. 3.18 (accomplice testimony must be viewed with caution). (See *People v. Frye* (1998) 18 Cal.4th 894, 965.)

[4] CALJIC 3.11. [Testimony Of Accomplice Must Be Corroborated] provides: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense. [¶] [Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true.]"

CALJIC 3.12. [Sufficiency Of Evidence To Corroborate An Accomplice] provides: "To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice is corroborated."

CALJIC 3.16. [Witness Accomplice As Matter Of Law] provides: "If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration."

were the typical sort of statements "an accomplice would make," and "clearly an attempt to exculpate himself and inculpate appellant." Because appellant is of the opinion that the evidence against him was insufficient to support his conviction, he submits that his conviction was ensured by Bargas's statements.

If the evidence is susceptible of a conclusion that a witness is implicating the defendant as an accomplice, the trial court must instruct the jury on the meaning of the term "accomplice." It also must instruct that an accomplice's *incriminating* testimony must be viewed with caution and must be corroborated. If the witness is an accomplice as a matter of law, the court must so inform the jury. If the evidence could support such a factual conclusion, the court must instruct the jury to determine whether the witness was an accomplice. (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268; *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) "[T]he instruction concerning accomplice testimony should … refer only to testimony that tends to incriminate the defendant." (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

As we have already explained, appellant's characterization of Bargas's statements is in our view inaccurate. As we see it, neither of the statements tended to incriminate appellant; in fact, the prosecution characterized them as unbelievable lies. Therefore, there was no need for accomplice instructions based upon Bargas's statements. In addition, even if we assume error in the manner asserted by appellant, the mistake was harmless, given the overwhelming independent evidence of appellant's guilt that we

---

CALJIC 3.18. [Testimony Of Accomplice To Be Viewed With Care And Caution] provides: "To the extent that an accomplice gives testimony that tends to incriminate [the] [a] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case."

detailed above in Part II of this opinion. (*People v. Lawley* (2002) 27 Cal.4th 102, 161; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV.

Appellant contends the trial court erred by failing to instruct sua sponte that manufacturing a controlled substance is a specific intent crime, as stated in the optional third element listed in CALJIC No. 12.09.1.[5] Thus, he argues, the court removed an element of the offense from the jury's consideration and deprived appellant of the opportunity to have the jury instructed on the defense's theory of the case.

Manufacturing a controlled substance is not a specific intent crime. (See *People v. Coria, supra,* 21 Cal.4th at p. 879.) The use note for CALJIC No. 12.09.1 so states; it says in relevant part that "Offering is a specific intent crime. Manufacturing is a general intent crime. Do not use element number 3 in brackets unless offering is the charged crime."

And, regardless of whether manufacturing is characterized as a general or a specific intent crime, section 11379.6 nonetheless requires proof that the defendant had actual knowledge of the character of the drug being manufactured. (*People v. Coria, supra,* at p. 879; see *People v. Daniels* (1975) 14 Cal.3d 857, 860-861.) Here, the trial court properly instructed the jury that it must find appellant knew the substance to be manufactured was a controlled substance. This proof was missing in *Coria,* the case upon which appellant relies. There, the instructions essentially rendered the offense a strict liability offense regardless of the defendant's knowledge. Such is not the case here.

---

5 CALJIC No. 12.09.1 provides in relevant part: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person [(manufactured, etc.)] [offered to (manufacture, etc.)] either directly or indirectly, by means of chemical extraction, or independently by means of chemical synthesis, a controlled substance, namely _____; [and] [¶] 2. That person knew that the substance [to be] manufactured had the character of a controlled substance[.] [; and] [¶] [3. That person had the specific intent to (manufacture, etc.) a controlled substance, namely _____.]"

V.

Appellant contends that various other instructional errors occurred and, in combination with the previously alleged errors, resulted in a complete undermining of confidence in the verdict.

A.

The trial court instructed the jury that there were two ways to prove the charged crime of manufacture of methamphetamine (§ 11379.6, subd. (a)). Regarding the first theory -- direct liability -- the court instructed:

> "Every person who manufactures, compounds, converts, produces, derives, or prepares methamphetamine, a controlled substance, either directly or indirectly, by chemical extraction or independently by means of chemical synthesis, is guilty of a violation of Health and Safety Code Section 11379.6, Subdivision A, a crime.
>
> "The crime of manufacturing a controlled substance, and the term manufacture, as used in this instruction, does not require proof or mean that the process of manufacturing be completed. Rather, the crime is committed with [*sic*] a person knowingly participated in the initial or immediate steps carried out to process a controlled substance. Thus, it is unlawful for a person to engage in this synthesis, processing or preparation of a chemical used in the manufacture of a controlled substance, even if the chemical is not itself a controlled substance, provided the person knows that the chemical is to be used in the manufacturing of a controlled substance.
>
> "In order to prove this crime, each of the following elements must be proved:
>
> "One, the defendant manufactured, compounded, converted, produced, derived or prepared, either directly or indirectly, by means of chemical extraction or independently by means of chemical synthesis, a controlled substance, namely, methamphetamine; and
>
> "Two, the defendant knew that the substance to be manufactured had the character of a controlled substance."

Regarding the second theory -- aiding and abetting -- the court instructed:

"The crime [of manufacturing a controlled substance] may also be proved if the defendant, as an aider and abettor, knowingly provided space for manufacturing a controlled substance and had the specific intent to facilitate the manufacture of a controlled substance.

"Persons who are involved in committing a crime are referred to a[s] principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. [¶] … [¶]

"A person aids and abets the commission of a crime when he or she, one, with knowledge of the unlawful purpose of the perpetrator, and, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and, three, by act or advice aids, promotes, encourages or instigates the commission of the crime."

The trial court also instructed that appellant could be convicted of the lesser crime of attempted manufacture of methamphetamine:

"If you are not satisfied beyond a reasonable doubt that the defendants are guilty of the crime charged, you may, nevertheless, convict on any lesser crime, if you are convinced beyond a reasonable doubt that the defendants are guilty of the lesser crime.

"The crime of attempted manufacture of a controlled substance is lesser to that of the manufacture of a controlled substance, as charged in the information.

"Thus, you are to determine whether the defendants are guilty or not of the crimes charged or of any lesser crimes…. However, the Court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime."

The court also instructed on the principles of attempt:

"An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.

"In determining whether or not such an act was done, … it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. However, the acts of a person who intends to commit

a crime will constitute an attempt where those acts clearly indicate a certain unambiguous intent to commit the specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

"A person who has once committed acts which constitute an attempt to commit a crime is liable for the crime of attempted compounding, conversion, derivation, processing, preparation or manufacture of methamphetamine even though he does not proceed further with the intent to commit the crime, either by reason of voluntarily abandoning his purpose or because he was prevented or interfered with in completing the crime.

"If a person intends to commit a crime but, before committing any act toward the ultimate commission of the crime, freely and voluntarily abandons the original intent and makes no effort to accomplish it, that person has not attempted to commit the crime."

The court then explained, in various contexts, the requirement that there be a union of act and intent:

"In the crime charged, namely, the manufacture of a controlled substance and the crime of making a building available for the manufacture of a controlled substance, which is a lesser crime, there must exist a union or joint operation of act or conduct and general criminal intent[,] ... even though the person may not know that the act or conduct is unlawful.

"In the crime of the attempted manufacture of a controlled substance, which is a lesser crime, there must exist a union or joint operation of act or conduct and certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed.

"The specific intent required is included in the definition of the crime of attempt set forth elsewhere in these instructions.

"In the crime charged, namely, the manufacture of a controlled substance under the aider and abettor theory, and the crimes of the attempted manufacture of a controlled substance under the aider and abettor theory, and the making a building available for the manufacture of a controlled substance, there must exist a union or joint operation of act or conduct and certain mental state and/or knowledge in the mind of the

perpetrator. Unless this mental state and/or knowledge exists, the crime to which it relates is not committed.

"The mental state and/or knowledge required is included in the definitions of the crimes set forth elsewhere in these instructions."

B.

First, appellant contends the trial court erred by instructing on the lesser included offense of attempted manufacturing of methamphetamine. Appellant claims the instruction denied him the right to present a defense and the right to have a jury reach a verdict on the lesser included offense of attempted manufacture because the elements of attempt so conflicted with the elements of manufacturing that the attempt instruction effectively withdrew the alternative crime from the jury's consideration.[6] Appellant believes there is no logical difference between attempt and manufacture but also believes that attempt contains more elements and poses a higher burden of proof on the prosecution. Therefore, appellant concludes, the attempt instruction allowed the jury to find insufficient evidence of attempt and convict on manufacture.[7]

It is unlikely the jurors confused the crimes of manufacture and attempted manufacture. Knowingly completing even a single step of methamphetamine production is an effectual act constituting manufacture. (*People v. Jackson, supra*, 218 Cal.App.3d at pp. 1503-1504.) On the other hand, an ineffectual act done toward the manufacture of methamphetamine -- an act that fails to be successful because the person who specifically intended to make methamphetamine was interrupted, interfered with, or prevented from completing the crime -- amounts to only attempted manufacture. (Pen. Code, §§ 21a,

---

6 One can only wonder how appellant was prejudiced by the giving of an instruction that, in appellant's own view, was ineffective, or how the giving of an instruction deprived him of the alternative theory presented by the instruction.

7 Again we wonder how appellant was prejudiced. If no attempt instruction was given, the only alternative available to the jury would have been outright acquittal, the same situation in which appellant says the giving of the instruction left him.

664.) Thus, the two crimes are readily distinguishable by the success of the perpetrator in accomplishing some step in the manufacture of methamphetamine.

Here, the jurors were instructed on these principles and are presumed to have understood, collated, and followed the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 [the presumption that jurors understand and follow instructions is the crucial assumption underlying our constitutional system of trial by jury].) Further, the evidence did not support a conclusion that appellant's efforts to manufacture methamphetamine were unsuccessful. Indeed, the solution found in the freezer, which was in the final stages of production, contained methamphetamine. At most, this situation is one where a legally sound instruction was given though there were insufficient facts to justify the charge. (*People v. Guiuan, supra,* 18 Cal.4th at p. 565 [where instruction on a theory of liability is legally correct but not supported by the evidence, reversal is not required if another legally correct theory supported by the evidence was before the jury and there is nothing in the record to suggest that the jury relied upon the unsupported theory].)

Next, appellant contends the court did not clearly instruct that only Bargas could be found guilty of providing a place for manufacture.[8] Again, it was highly unlikely the jurors were confused in this regard. The court did properly instruct on the crime of providing a location for illegal manufacture, and there was absolutely no evidence to suggest that appellant had provided a place for manufacturing drugs.

Appellant also claims the court's instructions on intent were confusing. The record shows that the court informed the jury that the manufacture of methamphetamine under the aiding and abetting theory required a specific intent. Although the instruction addressing the union of act and intent did not specify what type of intent was required to prove manufacture of methamphetamine under the aider and abettor theory, the

---

8 We ignore the fact that appellant did not ask for a clarifying instruction at trial.

instruction did state that proof of that crime required the union of conduct and a *certain* mental state and that the certain mental state required was set forth elsewhere in the instructions. An earlier instruction informed the jurors that proof of the crime under this theory required that appellant "had the specific intent to facilitate the manufacture of a controlled substance." The jury was thus told precisely what was the nature of the required specific intent.

In sum, appellant does not claim, and he cannot, that the trial court's instructions on the various crimes were legally incomplete or inaccurate. Most were standard, approved form instructions. While the court could have organized the various instructions differently for purposes of further clarity, the instructions as a whole did not omit or misstate any applicable legal principle. In addition, the jury was told that the order in which the instructions were given was not material. (CALJIC No. 1.01.) Again, the jury was presumed to have understood the instructions. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 139.)

VI.

Appellant contends the trial court erred in ordering him, at the sentencing hearing, to pay certain fees. The court directed, among other things, that appellant serve 300 days in jail, participate in a controlled substance detection program at his own expense, and reimburse the county for $1,000 in attorney's fees. Thereafter, the court stated: "I find that you … have the present ability to pay, given what I saw to be the bail bond that was posted by [you] in the amount of $100,000 …."

Appellant challenges the sufficiency of the evidence supporting the trial court's finding that he had the ability to pay, arguing that the trial court based its conclusion on the fact that he posted $100,000 in bail, although the record does not establish that he personally posted the bail and therefore had the ability to pay.

Probation fees and attorney fees are collectible as civil judgments but cannot be imposed as probation conditions. (*People v. Flores* (2003) 30 Cal.4th 1059, 1067, fn. 5;

People v. Washington (2002) 100 Cal.App.4th 590, 592-593; *People v. Hart* (1998) 65 Cal.App.4th 902, 906-907.) Both require an ability-to-pay finding by the trial court. (Pen. Code, §§1203.1, subd. (b), 987.8.) That finding need not be express but may be implied through the content and conduct of the hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71-72.) While the finding of a present ability to pay may be implied, the order to pay fees cannot be upheld on appeal unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.) When the issue on appeal is sufficiency of the evidence, "we must draw all reasonable inferences in favor of the judgment [or order]. [Citation.]" (*People v. Mercer* (1999) 70 Cal.App.4th 463, 467.)

A.

An attorney's fee order is not mandatory and a determination that a defendant has the present ability to pay is a prerequisite. (Pen. Code, § 987.8.) The ability to pay is statutorily defined as "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her...." (Pen. Code, § 987.8, subd. (g)(2).) The factors for assessing the ability to pay include "(A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant." (*Ibid.*)

Regarding appellant's likelihood of employment, the probation officer's report stated that appellant attended school through the 12th grade but did not graduate. He was currently taking the GED exam and was hoping to become a real estate agent. Prior to being arrested, appellant worked as a heavy equipment operator for four months. He had been employed for one year in 2002 and had been employed between 1996 and 2001. His skills included heavy equipment operation, construction, concrete work, and bird dog training. At the sentencing hearing, the court asked appellant about his dog training at a particular kennel. Appellant explained that he was one of the best dog trainers in the country.

There was ample evidence that appellant had the skills and work history necessary to allow him to earn and pay the $1,000 if he were out of custody; however, as a condition of appellant's probation, he was required to serve 300 days in the county jail. Because he had 104 days of credit, his actual time would be reduced to 196 days. This period of time still extended beyond the six-month period the court was allowed to consider in determining whether appellant had the ability to pay.[9]

The court expressly based its conclusion that appellant had the ability to pay on his payment for a $100,000 bail bond. According to Penal Code section 987.8, subd. (g)(2)(D), the court was allowed to consider "[a]ny factor or factors which may bear upon defendant's capability to reimburse the county ...." Thus, the court properly considered appellant's ability to post a $100,000 bail. A reasonable inference from the record before the trial court is that appellant and not a third party paid the premium for the bail; there is no evidence that a third party paid the premium. Moreover, appellant had the opportunity

---

9 The People argue that appellant would likely be out of custody before that time due to his probable good conduct in jail. But appellant's probable good conduct and possible early release were not appropriate factors for the court's consideration (indeed there is no evidence the court considered them). Thus, there was no evidence appellant would be able to work within six months.

at the hearing to inform the court that a third party posted the bail, if that was the case, and he did not.

Drawing all reasonable inferences in favor of the trial court's order, we conclude there was sufficient evidence that appellant had the present ability to pay attorney's fees.

B.

A defendant who is granted probation may be ordered to pay the reasonable costs of probation, but the payment of such collateral costs cannot be made a condition of probation. (Pen. Code, § 1203.1b; *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.) Moreover, the payment of these costs cannot be ordered until a determination is made that a defendant is financially able to do so. (Pen. Code, § 1203.1b; *People v. Hall*, *supra*, at p. 892.) An order that a probationer pay the collateral costs of probation is enforceable only as a separate money judgment in a civil action. (*Brown v. Superior Court. supra*, at p. 322; *People v. Hart, supra*, 65 Cal.App.4th at p. 907.)

According to Penal Code section 1203.1b, subdivision (e), "'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, … and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs."

In contrast to our previous conclusion regarding appellant's prospects for timely employment, under section 1203.1b, subdivision (e), the court was allowed to consider appellant's ability to obtain employment within one year. Thus, there was sufficient record evidence to support the trial court's finding that appellant had the ability to pay for

substance detection because he had paid a $100,000 in bail bond premium and also because he would likely obtain employment after his release from jail.

DISPOSITION

The judgment is affirmed.

_____
Dibiaso, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Cornell, J.