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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

GILBERTO RODRIGUEZ,

Defendant and Appellant.

F049540

(Super. Ct. No. MCR018416C)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Gilberto Rodriguez appeals his convictions for (1) conspiring to manufacture methamphetamine and conspiring to possess pseudoephedrine with the intent to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1));[1] (2) manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)); (3) possession of pseudoephedrine with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)); and (4) possession of chemicals to manufacture hydriodic acid or a reducing agent with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (g)). The trial court sentenced him to an aggravated term of seven years for manufacturing methamphetamine. The terms on the remaining counts were either stayed pursuant to section 654 (counts 1 and 3) or imposed concurrently (count 4). A jury also convicted his two codefendants, Pedro Martinez Hernandez and Genero Castro Diaz, but their cases are not before us.

Rodriguez argues the judgment must be reversed because (1) there was not substantial evidence that he intended to manufacture methamphetamine; (2) the trial court erred in admitting evidence about his limited involvement in the cleanup of debris from a methamphetamine manufacturing site two years before his arrest; and (3) the trial court erroneously instructed the jury on the use of this evidence. We reject each of these arguments.

We agree with him that the trial court erred in imposing an aggravated term and in failing to stay the sentence for possession of chemicals to manufacture hydriodic acid. (§ 654.) Therefore, we will affirm the conviction but remand for resentencing.

FACTUAL AND PROCEDURAL SUMMARY

Michael Jerome Severson is a detective for the Fresno County Sheriff's Department assigned to the Fresno Methamphetamine Task Force. On April 26, 2004,

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[1] All further statutory references are to the Penal Code unless otherwise stated.

Severson was in an airplane providing aerial surveillance when he observed a vehicle parked in an almond orchard near a small shed (hereafter the shed). He observed two individuals in and around the shed during his surveillance. He also observed a white pickup approach the shed. The two individuals already present at the shed approached the pickup. The pickup left the area after a short time.

Eric John Skidmore was assigned to the Fresno Methamphetamine Task Force by the California Highway Patrol. Skidmore was participating in a stakeout of the shed when he observed the white pickup leaving. Skidmore followed the pickup for a short time and initiated a traffic stop when the speed of the pickup reached 90 miles per hour. Rodriguez was the driver and only occupant of the vehicle. Skidmore arrested Rodriguez and transported him to a different shed located near a ranch house that also was a location of interest to the task force (hereafter the ranch shed).

Robert Michael Richardson was assigned to the Fresno Methamphetamine Task Force by the Madera County Sheriff's Department. He knows that "ice" is a form of methamphetamine that looks like ice. Although it has a different appearance, it is the same substance as crystal methamphetamine (which looks like powdered sugar).

Richardson served a search warrant on the same date at the shed. He also recorded the events on videotape. Hernandez and Diaz were arrested at the shed. They had a white powdery substance on their arms when they were arrested. This substance is consistent with the evaporation process of methamphetamine manufacturing.

During the search of the shed, the officers located five 5-gallon buckets, each containing a bilayered solution typical of the evaporation process used in manufacturing methamphetamine. A receipt for denatured alcohol was recovered, which is a solvent used in the evaporation process. The officers also recovered a propane tank, a large metal pot, a large burner, several cans of denatured alcohol, a hose, drills, flasks, lye, an electric burner, an electronic scale, lighter fluid, muriatic acid, and plastic bags. Each item is used in the methamphetamine manufacturing process.

In reviewing the cellular phones found in the possession of the three defendants, Richardson determined that someone using the cellular phone in Hernandez's possession had placed a call to the cellular phone found in Rodriguez's possession. Similarly, someone used the phone possessed by Rodriguez to place a call to the phone possessed by Hernandez.

Janel Iskendarian is a detective with the Fresno Police Department assigned to the Fresno Methamphetamine Task Force. She served a search warrant for the ranch shed on the same day. She was able to open the ranch shed using a key obtained from Rodriguez. Inside she found three large containers of cat litter, 15 containers of charcoal lighter fluid, dishes, latex gloves, plastic tubing, face masks, 10 containers of lye, acetone, work gloves, trash bags, a white bucket containing a red powdery substance, duct tape, and a water jug that contained an acidic solution.

Michael Allen Appel is a criminalist with the California Department of Justice. He tested the liquid substance found in the five-gallon buckets at the shed and determined that it contained ephedrine and ethyl alcohol. Other substances found at the shed included iodine crystals and hypophosphorous acid. Each of these substances is used when manufacturing methamphetamine.

John Albert Galvan is a police officer with the City of Fresno assigned to the Fresno Methamphetamine Task Force. Galvan interviewed Diaz at the shed. Diaz admitted he brought the equipment used for manufacturing methamphetamine to the shed from San Jose. Diaz admitted participating in the manufacturing process and that he knew they were attempting to manufacture methamphetamine. Diaz also said he and Hernandez were going to make ice methamphetamine, and he was helping to earn some money. Rodriguez was not involved in transporting the items to Madera, nor was he involved in the manufacturing process.

David Garza, Jr., is a police officer with the City of Fresno who assisted in the search of the ranch shed. He spoke with Rodriguez at that time. Rodriguez stated he was

the foreman for the properties on which the shed and the ranch shed were located. Both properties were owned by the same individual. Rodriguez permitted someone to put cat litter and drain cleaner in the ranch shed. The cat litter was being used to mask odors. Rodriguez said he was to be paid $1,000 to permit the items to be stored on the property. Rodriguez admitted he had "an idea" how the items were going to be used.

Phil Gregory Hudecek is an environmental health specialist with Madera County. In January 2002 Hudecek was called out to the shed site to clean up methamphetamine debris. At that time there was a mobile home on the site that had been used for methamphetamine production.

Hudecek contacted the property owner, who in turn told Hudecek to contact Rodriguez, who was the property foreman. Rodriguez assisted in the cleanup by using a tractor to remove tree trimmings that covered the waste from the methamphetamine production.

As he was cleaning up the site, Hudecek told Rodriguez what the various items of debris were and how they were used in the methamphetamine manufacturing process so that if Rodriguez were confronted with such debris in the future, he would know to call an environmental health specialist to clean up the site.

Hudecek found various items stored in the shed related to methamphetamine production. Rodriguez possessed keys to the mobile home and opened it to allow Hudecek access.

Diaz testified that on the day in question he drove from San Jose to Madera. He denied ever manufacturing methamphetamine prior to this occasion. At the time he was arrested, Diaz was in the shed crushing tablets. The tablets were delivered to the shed by a man in a van. Diaz had never seen the man before. Diaz brought 10 cans of alcohol, five buckets, and a tank of gas to the shed. Diaz was promised $200 to bring the items from San Jose to Madera. He did not know the items were going to be used to manufacture methamphetamine.

Hernandez, Diaz, and Rodriguez were charged with (1) conspiring to manufacture methamphetamine and conspiring to possess pseudoephedrine with the intent to manufacture methamphetamine (§ 182, subd. (a)(1)); (2) manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)); (3) possession of pseudoephedrine with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)); and (4) possession of chemicals to manufacture hydriodic acid or a reducing agent with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (g)).

The jury found the defendants guilty of the charges. In addition, the jury made a special finding that the defendants intended to manufacture a crystalline form of methamphetamine, which is an aggravating factor for sentencing purposes. (§ 1170.74.)

Rodriguez's motion for a new trial was denied, and he was sentenced to the aggravated term of seven years for manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and a concurrent aggravated term of six years for possession of chemicals to manufacture hydriodic acid (Health & Saf. Code, § 11383, subd. (g)). Aggravated terms were imposed on the conspiracy (§ 182, subd. (a)(1)) and possession of pseudoephedrine counts (Health & Saf. Code, § 11383, subd. (c)(1)), but stayed pursuant to section 654.

DISCUSSION

I. Substantial Evidence

Hernandez and Diaz were prosecuted as direct participants in the manufacturing of methamphetamine. There was overwhelming evidence of their guilt.

Rodriguez, on the other hand, was not tied directly to the manufacturing process. The prosecution theorized that he aided and abetted the manufacturing process and therefore was guilty of the charged crimes. To obtain a conviction under this theory, the prosecution was required to prove that Rodriguez knew of the unlawful purpose (manufacturing methamphetamine) of those he was accused of aiding and abetting.

(*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) Rodriguez argues the evidence was insufficient to establish he had the requisite knowledge.

Our review of the sufficiency of the evidence is deferential. We "'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

"The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonable 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.] '"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

The testimony at trial established that Rodriguez was the ranch foreman for the property on which the shed and the ranch shed were located. Two years before he was arrested, Rodriguez knew this same property had been used to manufacture

methamphetamine because he assisted Madera County Environmental Health Specialist Hudecek in cleaning up the debris left by the individuals who manufactured the methamphetamine, and he was present when Hudecek inspected the mobile home near the shed that had been used for the production of methamphetamine.

These facts were known by Rodriguez when he was contacted by an unknown person and offered $1,000 to "store some items" in the ranch shed. It was quite reasonable for the jury to infer that when Rodriquez accepted this offer, he was fairly certain that the property was going to be used for an illegal purpose. After all, why would someone "rent" storage space from Rodriguez at a cost of $1,000 when a storage unit could be rented at a much lower cost? The obvious answer is that the space was to be used for an illegal purpose.

The jury also could quite reasonably infer that once Rodriguez saw the cat litter and drain cleaner being stored in the shed, he must have known of the illegal purpose to which the property was to be put. Rodriguez knew the cat litter was used to mask odors. While it is true the interviewing officer did not ask Rodriguez what odors were to be masked, it was reasonable for the jury to infer that Rodriguez knew the odors to be masked were from the methamphetamine manufacturing process. Cat litter is one of the items that was found two years earlier at the dump site and was one of the items that Hudecek showed Rodriguez and explained its purpose in the methamphetamine manufacturing process.

The jury also knew there was direct communication between Rodriguez and Hernandez. While it is true that the investigating officers failed to obtain the records that would permit verification that Hernandez and Rodriguez spoke to each other on their cell phones, the jury could reasonably infer that the two spoke by phone because a phone call was made from the phone possessed by Hernandez to the phone possessed by Rodriguez, and a phone call was made from the phone possessed by Rodriguez to the phone possessed by Hernandez. This inference becomes stronger when considering that

Rodriguez went to the shed while Hernandez and Diaz were manufacturing methamphetamine.

The most reasonable explanation for Rodriguez's arrival at the shed is that he knew Hernandez was there and wanted to speak to him for some reason. None of the evidence at the trial suggested that Rodriguez was surprised by Hernandez's presence at the shed, or that Rodriguez ordered him to leave, or that Rodriguez took steps to make him leave (such as calling the police to report illegal activity on the property). Rodriguez did not suggest any of these things when he was interviewed by officers that afternoon *after he was arrested*. It was reasonable for the jury to infer that had Rodriguez been surprised by Hernandez and Diaz's presence at the shed, he would have so informed the officers during this interview. His failure to do so supports the inference that he knew they were going to be there. It also is reasonable to infer that Rodriguez knew their activities were illegal.

Finally, Rodriguez accepted the $1,000 payment as "rent" when, if it truly were rent, it rightfully belonged to the property owner. The jury could infer that the payment was not rent at all, but instead it was to secure the assistance of Rodriguez.

Rodriguez asks us to look at some of the facts in isolation and thereby conclude that there was insufficient evidence to establish that he knew Hernandez and Diaz were participating in illegal activity. Our task, however, is to look at all of the evidence, along with the inferences that reasonably could be deduced therefrom. When this task is performed properly, it is apparent that substantial evidence supports the jury's conclusion that Rodriguez had much more than an idea that methamphetamine was being manufactured at the shed. Indeed, the evidence and reasonable inferences establish that Rodriguez was not some innocent bystander who was taken advantage of by unscrupulous criminals, but instead suggests he had significant knowledge of the purpose to which the property was to be put that afternoon.

The case on which Rodriguez relies, *People v. Clark* (1967) 251 Cal.App.2d 868, does not change our conclusion. The defendant, Clark, was convicted of the unlawful taking of a vehicle. (Veh. Code, § 10851.) The undisputed evidence was that the vehicle was stolen around 8:00 p.m. Approximately four and one-half hours later, a police officer attempted to stop the vehicle for a traffic violation. The vehicle accelerated away from the traffic officer in an attempt to escape. A collision occurred and the occupants of the vehicle ran from the accident scene. Clark was caught by the pursuing officers. Clark told the officers he was at a party when an acquaintance offered him a ride home. He had arrived at the party in a different vehicle with some other individuals. He was not driving the vehicle and did not know it had been stolen. When the driver attempted to evade the officer, Clark thought it might have been stolen. He ran because he was afraid of the police. Clark apparently also presented evidence that he was at home at the time the vehicle was stolen. (*Clark*, at pp. 873-874.)

The appellate court held there was not substantial evidence that Clark participated in the theft of the vehicle because his assertion that he did not know the car was stolen some four and one-half hours before he was found riding in it was not contradicted. "Here there is no evidence that defendant was anything other than a passenger, so that his conviction must rest on the theory that defendant was 'a party or accessory to or an accomplice in the driving,' of the [vehicle]. But that theory requires proof of more than mere presence in the automobile. At a minimum, defendant must have known that the vehicle had been unlawfully acquired and must have had that knowledge at a time when he could be said to have, in some way, aided or assisted in the driving. Knowledge of the unlawful taking, acquired after the ride started and when defendant could neither stop the trip nor leave the vehicle is not enough. But, in the instant case, none of the prosecution's evidence is inconsistent with a state of innocence. The superior court file, before us, shows a young Negro boy with a history of prior involvement with the law; nothing connects him with the [vehicle] prior to the ride which resulted in the chase and

arrest; the sudden acceleration of that vehicle when the police sought to stop it for a minor offense could well have been the fact that created, for the first time, a suspicion that something was wrong and a reflex reaction that, with his record, he would be well advised to disassociate himself from any subsequent proceedings. In other words, while (if his alibi and other evidence was rejected) there is nothing to show that he had not participated in the original taking, or that he had not knowingly accepted a ride in an illegally acquired car, and while his running away may have been caused by his knowledge of his individual guilt, still it is equally true that there is nothing to show that he was involved in either of these ways or otherwise than as a innocent passenger or that his running away was not a result of something other than a consciousness of guilt. A conviction based on such evidence may not stand." (*People v. Clark, supra*, 251 Cal.App.2d at p. 874.)

The reason *Clark* does not assist Rodriguez is because in this case, unlike *Clark*, there was evidence that Rodriguez knew before he was stopped by officers as he drove away from the shed that illegal activity was occurring at the property. As explained above, there was substantial evidence, including Rodriguez's statement to the police, and the reasonable inferences that could be drawn therefrom, to support the conclusion that Rodriguez knew he was being paid $1,000 so that methamphetamine could be manufactured on the property. Therefore, we reject his claim that there was not substantial evidence to support the verdict.

II. Hudecek's Testimony

The prosecution obtained a ruling before trial permitting the introduction of Hudecek's testimony regarding the 2002 methamphetamine production cleanup and Rodriguez's participation therein. Rodriguez objected on numerous grounds, primarily that the testimony was not relevant and that its probative value was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (Evid. Code, §§ 210, 350, 352.)

At the pretrial hearing the prosecution anticipated that Hudecek would testify that he was called out to clean up some debris left over from methamphetamine production. The debris was located on the property that Rodriguez managed and was covered by clippings from the orchard. The property owner was contacted regarding the debris. He referred Hudecek to Rodriguez, who assisted in removing the orchard debris so that Hudecek could recover the methamphetamine debris.

The prosecution argued the evidence was relevant to show Rodriguez's knowledge and intent regarding the methamphetamine production for which he was arrested. Rodriguez argued that Hudecek's testimony was not relevant because the 2002 debris was from a completed production, and the production in this case was in the very initial stages, so most of the items recovered in 2002 were in a different form than the chemicals and other items associated with the current case. Rodriguez also argued the jury was likely to infer that he was involved in the 2002 methamphetamine lab since it was on the property he managed, thus resulting in significant prejudice because the jury was likely to convict him in the current case for his assumed participation in the 2002 methamphetamine lab. The trial court overruled the objection, concluding that Hudecek's testimony was relevant for the reasons stated by the prosecution and that any possible confusion between the 2002 incident and the current case could be avoided by an appropriate limiting instruction to the jury.

Hudecek testified to the discovery of the debris in 2002, Rodriguez's assistance in the cleanup, and that he explained to Rodriguez the identity of the recovered items and their purpose in the methamphetamine production process. Hudecek testified that he provided this explanation to Rodriguez so Rodriguez would understand how dangerous the items were and would contact him if he discovered any debris in the future. This was the testimony it was anticipated Hudecek would provide.

Hudecek, however, went on to testify that the production site for the methamphetamine in 2002 was a mobile home near the shed and that Hudecek was able

to gain access to the locked mobile home with a key provided by Rodriguez. Hudecek also testified that some items used in the production of methamphetamine were located inside the same shed that was used for this crime. This last portion of Hudecek's testimony came as a surprise to the trial court, Rodriguez, his counsel, and apparently to the assistant district attorney prosecuting the case.

Rodriguez moved for a mistrial after Hudecek's testimony, which eventually was denied. The trial court, however, gave the following limiting instruction: "Evidence has been received in this trial that defendant Gilberto Rodriguez was present on January 7, 2002 when Mr. Hudecek was in the process of cleaning up a methamphetamine laboratory site at [the shed]. [¶] This evidence is limited to the issues of the defendant Gilberto Rodriguez'[s] knowledge, intent or state of mind in the matter on trial. [¶] There is no evidence and the People do not contend that defendant Gilberto Rodriguez was involved in any way with the methamphetamine laboratory or its garbage other than to assist Mr. Hudecek in its cleanup." Rodriguez moved for a new trial, arguing that Hudecek's testimony should not have been admitted, which also was denied by the trial court.

Rodriguez argues here that Hudecek's testimony erroneously was admitted and assigns numerous errors to its admission. First, he argues the trial court abused its discretion in admitting the evidence at all. Second, he argues the trial court erred by refusing to strike Hudecek's testimony. Third, he contends the trial court erred in denying his motion for a new trial. Fourth, he argues that since the trial court admitted the evidence, it should have instructed the jury with CALJIC Nos. 2.50, 2.50.1, and 2.50.2 so that it would evaluate the testimony properly. Finally, Rodriguez argues the trial court erred in instructing the jury that it could consider Hudecek's testimony on the issue of intent.

A. Admissibility of Hudecek's testimony

Rodriguez's first three contentions are different versions of the same argument. Whether we consider the issue in the context of its admissibility, or refusal to strike, or refusal to grant a mistrial, or refusal to grant a new trial, the question remains the same: Did the trial court abuse its discretion in admitting Hudecek's testimony and, if it was admitted erroneously, did the error result in a miscarriage of justice requiring reversal of the judgment? (Cal. Const., art. VI, § 13.)

Reduced to its essence, Rodriguez's argument is that Hudecek's testimony undoubtedly convinced the jury that he was part of the 2002 methamphetamine production that occurred near the shed, thus impermissibly influencing the verdict in this case. In other words, Rodriguez contends the probative value of the evidence was substantially outweighed by the probability that the testimony would result in undue prejudice to Rodriguez. (Evid. Code, § 352.)

We begin with the relevance of the proffered testimony or, stated another way, its probative value. Rodriguez was charged with conspiracy to manufacture methamphetamine, manufacturing methamphetamine, possession of pseudoephedrine with the intent to manufacture methamphetamine, and possession of chemicals that could produce hydriodic acid with the intent to manufacture methamphetamine. The common thread running through each count is the intent to manufacture methamphetamine. The prosecution was required to prove, therefore, that Rodriguez had the intent to manufacture methamphetamine, or had the intent to aid and abet those whom he knew intended to manufacture methamphetamine. (See, e.g., Judicial Council of Cal. Crim. Instns. (2006-2007) CALCRIM Nos. 400, 401, 2338.)

Since there was no evidence that Rodriguez directly participated in the methamphetamine manufacturing process, the prosecution relied on the theory that he aided and abetted Hernandez and Diaz. To convict Rodriguez as an aider and abetter, the prosecution was required to prove that the perpetrators (Hernandez and Diaz)

manufactured methamphetamine, Rodriguez knew the perpetrators were going to manufacture methamphetamine, that before or during the manufacturing process Rodriguez intended to aid and abet the commission of the crime, and Rodriguez's actions actually assisted the manufacturing process. (CALCRIM No. 401 at pp. 177-178.) Therefore, if Rodriguez did not know that Hernandez and Diaz were manufacturing methamphetamine, or did not know the chemicals stored at the ranch shed were to be used in the manufacturing process, or did not know that the people who offered him a significant amount of money to store boxes, cat litter, and drain cleaner intended to use the items in the manufacturing process, then he would not be guilty of the charged crimes.

Obviously, Rodriguez's knowledge of the methamphetamine manufacturing process clearly was a contested issue at the trial. Hudecek's testimony was relevant on this issue. Specifically, his testimony that he explained to Rodriguez the use of the white buckets and the cat litter in the manufacturing process was relevant to the prosecution's position that Rodriguez knew the cat litter stored at the ranch shed was to be used to manufacture methamphetamine. Moreover, Rodriguez's being informed that methamphetamine manufacturing had occurred on the property two years previously also was relevant.

The jury reasonably could infer that his knowledge that methamphetamine had been manufactured on this property in the past should have led him to believe, and probably did lead him to believe, that the people approaching him with the $1,000 offer intended to manufacture methamphetamine on the property again. Contrary to Rodriguez's contention, therefore, Hudecek's testimony was relevant to the issues at trial.

Rodriguez argues the evidence was not admissible pursuant to Evidence Code section 1101, subdivision (b) as argued by the prosecution in the trial court. We think Rodriguez and the prosecution are mistaken.

Evidence Code section 1101, subdivision (a) prohibits, with certain exceptions, the introduction of evidence of a person's character to prove his conduct on a specific occasion. Evidence Code section 1101, subdivision (b) provides that it is permissible to introduce evidence that a person committed a "crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge …) other than his or her disposition to commit such an act." The prosecution relied on subdivision (b) to argue Hudecek's testimony was admissible because it established Rodriguez's knowledge and intent. Rodriguez then seized on the prosecution's reasoning in performing this analysis and repeats these arguments in this court.

Evidence Code section 1101, subdivision (b) is inapplicable in this case because Hudecek's testimony did not establish that Rodriguez committed a crime, civil wrong, or other act.[2] In other words, Hudecek's testimony was not intended to establish that Rodriguez was involved in the manufacturing process in 2002 or that he assisted in cleaning up the debris. Instead, the testimony was relevant to establish Rodriguez's knowledge of the methamphetamine manufacturing process *in 2004*.

While the need to establish an individual has certain knowledge is one of the circumstances that may invoke Evidence Code section 1101, subdivision (b), the prosecution needs to resort to this section only if it is seeking to introduce evidence that Rodriguez had this required knowledge because he committed a crime, civil wrong, or other act. For example, if the prosecution sought to prove Rodriguez's knowledge of the methamphetamine manufacturing process with testimony that he had manufactured

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[2] Rodriguez's participation in the cleanup in 2002 was relevant only to show the context in which Hudecek related knowledge of the methamphetamine manufacturing process to Rodriguez. Hudecek's testimony would have been just as relevant if he had approached Rodriguez as part of a community outreach.

methamphetamine in the past (or had been convicted for doing so), resorting to Evidence Code section 1101, subdivision (b) would be appropriate.

This was not the prosecution's position in the trial court. Instead, it argued that Rodriguez learned about manufacturing methamphetamine from Hudecek during the 2002 cleanup. Since the People did not contend that Rodriguez committed a crime, Evidence Code section 1101, subdivision (b) was inapplicable.

The appropriate analysis should have been the same used for any item of proffered evidence: Was the proposed evidence relevant and, if so, should it have been excluded pursuant to policy considerations such as those enunciated in Evidence Code section 352? As explained, the evidence was relevant. The issue is whether the probative value of the evidence was substantially outweighed by its prejudicial effect. (Evid. Code, § 352.) The trial court and Rodriguez both recognized the potential that Hudecek's testimony could lead the jury to conclude that Rodriguez was involved in manufacturing methamphetamine *in 2002*. The obvious concern was that the jury would infer he was involved in the current offenses because he was involved in the 2002 methamphetamine production. Rodriguez argued this inference was irremediable and required either a mistrial, new trial, or the striking of Hudecek's testimony. The trial court disagreed and felt the potential prejudice could be minimized by an appropriate jury instruction.

We conclude the trial court did not abuse its discretion. While the inference that concerned Rodriguez certainly was one that the jury could draw, it was not the only conclusion the jury could reach. The instruction specifically informed the jury that Rodriguez was not involved in manufacturing methamphetamine in 2002. We assume the jury followed the instructions, and there is nothing in the record to suggest otherwise. (*People v. Ramirez* (2006) 39 Cal.4th 398, 460.)

Moreover, the case against Rodriguez was strong. He admitted accepting $1,000 to "store" some items. He obviously knew that Hernandez and Diaz were on the property because he drove to the shed to meet them. He knew the purpose of the cat litter. Under

these circumstances we do not agree that the conviction was tainted by Rodriguez's involvement in the 2002 cleanup. The trial court did not err in denying Rodriguez's motion for a mistrial and his motion for a new trial.

B. CALJIC Nos. 2.50, 2.50.1, and 2.50.2

Rodriguez argues that once the trial court decided to admit Hudecek's testimony, it was required to instruct the jury with CALJIC Nos. 2.50, 2.50.1 and 2.50.2. CALJIC Nos. 2.50, 2.05.1, and 2.50.2 are intended to inform the jury of the purpose that evidence of other crimes (or acts) was introduced and the standard of proof that must be met before the jury may consider the evidence. He argues that reversal is required because the jury was not adequately equipped to evaluate this evidence.

Rodriguez's argument erroneously is based on the contention that Hudecek's testimony implicated Rodriguez in a criminal act. The jury was specifically informed that the prosecution did not contend that Rodriguez committed a criminal act in 2002. Since Hudecek's testimony was not admitted for the purpose of proving that Rodriguez committed a criminal act in 2002, these instructions were unnecessary. The trial court did not err. Indeed, had the instructions been requested, which they were not, the trial court should have rejected the request.

C. Instruction on intent

The trial court instructed the jury that use of Hudecek's testimony was "limited to the issues of the defendant Gilberto Rodriguez'[s] knowledge, intent or state of mind in the matter on trial." Rodriguez contends the trial court erred in informing the jury it may consider this evidence on the issue of intent. Rodriguez is wrong.

As explained above, Rodriguez's intent was an issue in the trial, perhaps the main issue. The prosecutor was required to prove that Rodriguez intended to aid and abet the manufacturing process begun by Hernandez and Diaz. Hudecek's testimony permitted the jury to infer that Rodriguez knew the purpose to which the items stored in the ranch

shed would be put and, accordingly, permitted the jury to infer that he had the intent to aid and abet the manufacturing process. There was no error.

III. Denial of Probation

Rodriguez was presumptively ineligible for probation pursuant to the provisions of section 1203.073, subdivision (b)(3). As pertinent to this case, section 1203.073, subdivision (b)(3) provides that probation may not be granted to a defendant convicted of violating Health and Safety Code section 11379.6, subdivision (a), the statute Rodriguez was convicted of violating in count 2. The trial court may grant a defendant probation in this situation if it determines the case before it is "an unusual case where the interests of justice would best be served" by so doing. (§ 1203.073, subd. (a).)

The trial court was aware of its authority but concluded there was "nothing to support [the] conclusion" that this was an unusual case where the interests of justice would best be served by granting Rodriguez probation. Rodriguez contends the trial court erred in reaching this conclusion.

The trial court is guided by California Rules of Court, rule 4.413(c)[3] in determining whether the case before it is an unusual case in which probation should be granted.[4] The factors the trial court is to consider are divided into two categories, those

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[3] All further references to rules are to the California Rules of Court.

[4] Rule 4.413(c) states in full:

"**(a) Consideration of eligibility**

"The court must determine whether the defendant is eligible for probation.

"**(b) Probation in unusual cases**

"If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in [California Rules of Court,] rule 4.414 to decide whether to grant probation.

"**(c) Facts showing unusual case**

relating to the basis for a limitation on the right to probation, and those relating to the defendant's culpability. These factors are not to be read expansively. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1227.)

None of the factors in either category applies to Rodriguez. Nothing in Rodriguez's briefing suggests otherwise.[5] Therefore, when the trial court stated there

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"The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) *Facts relating to basis for limitation on probation*

"A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

"(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

"(2) *Facts limiting defendant's culpability*

"A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

[5] Rodriguez argues that he should have received probation in this case because the factors in mitigation deserved more weight than the factors in aggravation. This argument reflects a misunderstanding of the task facing the trial court. The trial court

was "nothing to support [the] conclusion" that this was an unusual case where probation should be granted, it is reasonable to infer it was referring to the inapplicability of the rule 4.413(c) factors.

Despite none of the rule 4.413(c) factors suggesting this is an unusual case where probation should be granted, Rodriguez contends the trial court erred because it based its decision that this was not an unusual case on Rodriguez's lack of remorse, an "inapplicable" factor. This error, according to Rodriguez, requires resentencing without any prejudice analysis.

Rodriguez's contention arises out of the following comment of the trial court:

> "[The] Court has read and considered the report and recommendation of the Probation Officer. The Court will note that the defendant is presumptively ineligible for probation pursuant to Section 1203.073, Subdivision (b), Subdivision (3), of the Penal Code, unless the Court deems this to be an unusual case where the interest[s] of justice would best be served by granting probation. And the Court has found nothing to support that conclusion. [¶] And in making that determination, I would note that the defendant has shown no remorse for his conduct whatsoever. I am well aware that he has a wife and family. But he has engaged in conduct here which is inherently dangerous to not only people and property, but the methamphetamine epidemic in the community. And it's serious business. And [the prosecutor] takes it very seriously, as does the Court. And your client could care less. He is in it for the money. [¶] Therefore, probation is denied."

In context, the trial court's comments are not as narrowly focused as Rodriguez claims. The trial court's comments indicate that it was considering not only Rodriguez's apparent lack of remorse, but also that the crimes of which he was convicted were especially dangerous and that Rodriguez's only motivation for participating in the crime was monetary gain. These considerations would negate any possibility that Rodriguez's

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must first determine whether the case before it is an unusual case where probation may be granted before it considers the criteria listed in rule 4.414 to decide whether to grant probation. Rodriguez's inability to establish this was an unusual case renders the factors in rule 4.414 irrelevant.

culpability was reduced and would instead establish that the statutory presumption of probation ineligibility was not overcome.

Even if we assume, for the sake of argument, that the trial court erroneously relied on Rodriguez's lack of remorse, we would not reverse the judgment and remand for resentencing. The cases on which Rodriguez relies are inappropriate. Footnote 8 in *People v. Belmontes* (1983) 34 Cal.3d 335, 348, to which Rodriguez refers, discusses the retroactive application of a new interpretation of the law. In supporting its conclusion that the new interpretation of the law was fully retroactive, the Supreme Court noted that a defendant is entitled to be sentenced by a trial court that fully understands the scope of its discretion. Here, there is direct evidence that the trial court fully understood the scope of its discretion.

The issue in *People v. Senior* (1992) 3 Cal.App.4th 765 was the failure to state on the record the reasons for imposing a full consecutive term. Here, the trial court explained the reasons for concluding the statutory presumption was not overcome.

In *In re Huddleston* (1969) 71 Cal.2d 1031, the matter was remanded for resentencing after the Supreme Court determined that a prior conviction, which had made the defendant ineligible for probation, was invalid.

In *In re Cortez* (1971) 6 Cal.3d 78, the issue involved the procedure to be followed for prisoners who had been sentenced under a sentencing scheme held invalid by the Supreme Court in *People v. Tenorio* (1970) 3 Cal.3d 89.

We do not think any of the cases cited by Rodriguez have any application to this case. There has been no change in the law, the trial court did not fail to state reasons on the record, and one of the factors relied on by the trial court has not been found inapplicable. Instead, Rodriguez argues that the trial court considered a factor it should not have considered.

A similar issue was addressed in *People v. Lesnick* (1987) 189 Cal.App.3d 637. There the defendant was statutorily ineligible for probation because he used a dangerous

or deadly weapon and inflicted great bodily injury. (§ 1203, subd. (e)(2), (3).) The trial court sentenced the defendant to a midterm sentence without addressing the issue of probation eligibility. On appeal, the defendant argued the failure to address probation eligibility was error. The appellate court disagreed. "Appellant could have been granted probation only if the court found that 'interests of justice would best be served' thereby and specified on the record and in the minutes what those circumstances were. (§ 1203, subds. (e), (f).) 'Since the court did not so find, the presumption of the statute remained unrebutted. Thus there was no occasion for the court to state what was self-evident, that mitigating factors favoring probation were perforce rejected and the court was bound to comply with the mandate of the statute.' [Citation.] It would be illogical indeed to require a trial court to set forth reasons for doing something which is mandated by statute absent certain findings." (*Lesnick*, at p. 644.)

If remand were unnecessary when the trial court failed to address the issue of probation, it would be illogical to require remand when the issue was addressed. As in *Lesnick*, the statutory presumption of probation ineligibility was not rebutted. Indeed, the record demonstrates that there was no factor that would suggest the presumption could have been rebutted. There was no abuse of discretion.

IV. Aggravated Terms

Rodriguez was sentenced to aggravated terms for each crime. He had no record at the time of sentencing. The trial court found that there was a large amount of contraband, the crime involved a significant amount of planning, and Rodriguez violated the trust of his employer. He argues the trial court erred in basing the terms on aggravating factors it found to be true, thus violating his Sixth Amendment right to trial by jury.

This issue has been resolved by *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] where the United States Supreme Court held that California's Determinate Sentencing Law violated the Sixth and Fourteenth Amendments to the extent it permitted aggravated sentences to be imposed based on factors, other than a

prior conviction, not found to be true by a jury applying the beyond-a-reasonable-doubt standard. (*Id.* at p. ___ [127 S.Ct. at pp. 860, 863-864, 868, 871.) As Rodriguez did not have any prior convictions, all of the aggravating factors found by the trial court are subject to this holding. The judgment, therefore, must be reversed to permit Rodriguez to be resentenced consistent with *Cunningham*.

V. Section 654

Rodriguez was sentenced to concurrent terms for manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)) and for possession of chemicals to manufacture hydriodic acid (Health & Saf. Code, § 11383, subd. (g)). Rodriguez argues this was error and the possession count should have been stayed pursuant to section 654.

Section 654 provides that a single act or omission shall not be punished under more than one provision of the code. The application of section 654 is guided by well-established principles. "'Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.' [Citation.] It is the defendant's intent and objective that determines whether the course of conduct is indivisible. [Citation.] Thus, '"[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once."' [Citations.]" (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

It seems apparent that Rodriguez's possession of the ingredients to make hydriodic acid (count 4) was for the purpose of manufacturing the methamphetamine for which he was convicted in count 2. While the trial court did not explain its reasoning for not applying section 654 to count 4, the probation report contended that because the chemicals were located at the ranch shed, instead of at the shed where Hernandez and Diaz were located, the chemicals may have been intended for another batch of methamphetamine.

The People reiterate this theme in their brief and cite *People v. Goodall* (1982) 131 Cal.App.3d 129 to support their position. Goodall was convicted of possession of piperidine and cyclohexanone with intent to manufacture PCP (Health & Saf. Code, § 11383, subd. (b)), possession for sale of PCP (Health & Saf. Code, § 11378.5), and manufacturing PCP (Health & Saf. Code, § 11379.5).[6] He was sentenced to consecutive terms on each count.

Goodall argued that section 654 precluded the consecutive sentences imposed by the trial court. The appellate court disagreed, concluding "the trial court could reasonably conclude that [Goodall] intended (1) to manufacture PCP; (2) to sell the PCP they had manufactured, if they could find a buyer; and (3) to manufacture more PCP with the ingredients not used up in step (1).… The two counts involving manufacturing PCP and possessing piperidine and cyclohexanone may also be separately punished by analogy to the drug seller cases, in circumstances where the court could reasonably conclude that the remaining inventory of chemicals is possessed with intent to manufacture more PCP." (*People v. Goodall, supra,* 131 Cal.App.3d at pp. 147-148.) The drug seller cases referred to by the appellate court were those that permitted dual punishment for sales of a drug and possession for sales of the drug where the defendants sold only part of the drugs they possessed.

The difference between *Goodall* and this case is the stage of the manufacturing process. The manufacturing process in *Goodall* was complete. At the time he was arrested, Goodall possessed one and one-half gallons of PCP, along with piperidine and cyclohexanone, which when combined make an essential ingredient of PCP. Other evidence at the crime scene demonstrated that the manufacturing process recently had

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6 Several other individuals also were arrested with Goodall. The defendants were tried and convicted together. Numerous defendants appealed, asserting various arguments. We refer only to Goodall as his appeal addresses the issue asserted by Rodriguez.

been completed. Since the manufacturing process was complete, the only use Goodall had for the piperidine and cyclohexanone was for future manufacturing activities.

Here, the manufacturing process was in the very beginning stages. Rodriguez permitted the chemicals, along with other items needed to manufacture methamphetamine, to be stored in the ranch shed. The prosecution's expert witnesses testified that the items in the ranch shed were needed to complete the manufacturing process. Moreover, there was no evidence that Rodriguez agreed to store the chemicals for future use. Without resorting to speculation, the only logical conclusion that we can reach from the facts of this case is that there was but one manufacturing process, and Rodriguez had a single intent and objective. So, section 654 requires the punishment for count 4 to be stayed.

CONCLUSION

We will affirm the convictions, but we will vacate the judgment of sentence and remand the matter for resentencing. It is tempting for us simply to reduce the imposed upper term to the middle term. But, while the United States Supreme Court in *Cunningham* invalidated the *process* by which the trial court here imposed the upper term, we cannot say for certain on this record that the same term may not be imposed anew, consistent with *Cunningham.*

DISPOSITION

The judgment of sentence is vacated with directions as follows: If the People, or the trial court on its own motion, do not bring the matter before the trial court for a contested resentencing hearing within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a sentence of the middle term and shall so modify the abstract of judgment. The People shall notify the trial court and Rodriguez's trial counsel in writing of their intentions in this regard within 30 days after the filing of the remittitur. Should the People state an intention not to contest the modification to the middle term, or fail to

notify the trial court of its intentions within the 30 days, and the trial court declines to schedule a contested resentencing hearing on its own, the trial court shall modify the abstract of judgment as provided here, including staying the sentence on count 4 pursuant to section 654. The judgment is otherwise affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

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DAWSON, J.

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KANE, J.