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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

THE PEOPLE, Plaintiff and Respondent, v. LISA ROBIN MCCALL, Defendant and Appellant.	C038946 (Super. Ct. No. 01F004B)

APPEAL from a judgment of the Superior Court of Trinity County, Anthony C. Edwards and John K. Letton, Judges. Reversed in part and affirmed in part.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, J. Robert Jibson, Supervising Deputy Attorney General, Judy Kaida, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Lisa Robin McCall was convicted by jury of manufacturing methamphetamine (Health & Saf. Code, § 11379.6,

subd. (a))[1], possession of ephedrine with intent to manufacture methamphetamine (§ 11383, subd. (c)(1)), possession of hydriodic acid with intent to manufacture methamphetamine (§ 11383, subds. (c)(2) and (f)), and use and possession of methamphetamine. (§§ 11550 and 11377.)[2]

She was sentenced to serve a total of six years in prison on concurrent terms as follows: five years on count one, six years on count two, four years on count three, and two years on count four. Execution of the sentence was suspended pursuant to section 3051, upon a finding defendant is in imminent danger of becoming addicted to narcotics. She appeals from the judgment of conviction.

On appeal, McCall challenges the denial of her motion to suppress evidence seized from her residence and raises several instructional and evidentiary errors.

We agree with her claim that count three must be reversed because the jury was instructed with an unconstitutional mandatory presumption which required it to find defendant possessed hydriodic acid if it found she possessed the essential chemicals red phosphorous and iodine.[3] We will reverse the

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

[2] Defendant was charged jointly with Barry Youngman.

[3] The Reporter of Decisions is directed to publish the opinion except for Parts I and III through IV of the Discussion.

conviction on count three and affirm the judgment in all other respects.

FACTUAL BACKGROUND

A. The Prosecution's Case

On the afternoon of January 4, 2001, law enforcement officers from the Trinity County Sheriff's Department went to defendant's cabin at Mills Camp in Peanut to arrest her. Officers contacted James Youngman, co-defendant Barry Youngman's father. He told them that defendant was not home. The officers asked if they could go inside the house and look and he said "sure." Upon entry, the officers detected a strong chemical odor coming from the kitchen. When they went into the kitchen, officers saw a glass pan containing a line of a white powdery substance. A glass pipe used to smoke methamphetamine and a piece of paper containing an unidentified substance was found in a back room. The house is an 800 square foot cabin with two bedrooms, a living room, kitchen and laundry room.

Law enforcement officers obtained a search warrant of defendant's residence and returned to execute it later that same day. When the officers were approximately 30 feet from the residence, they smelled a chemical odor. Inside the house, officers observed male and female adult clothing, various receipts and other documents bearing the names of defendant and Barry Youngman, and one bed. In the kitchen there was a full complement of cooking and eating utensils. It appeared that two people resided in the house.

Officers seized four firearms, a glass methamphetamine smoking pipe containing residue, and a hypodermic syringe, a piece of drinking straw with residue buildup consisting of .03 grams of methamphetamine, and a small brown rock determined to be .02 grams of methamphetamine.[4] Also seized were numerous zip lock empty baggies of varying sizes commonly used to package illegal narcotics, boxes of ephedrine tablets and sinus medication containing pseudoephedrine, containers of solvent, coffee filters stained with a reddish-colored substance, a can containing zip lock baggies with a reddish powdered substance, a digital scale, duct tape, a tetracycline prescription bottle containing beads and a lid with a yellow stain, a small electric coffee grinder containing a white powdery residue, rubber tubing, two bottles labeled red devil lye, a small measuring cup, and a piece of paper bearing an address for the Alpha Iodine Company with prices for various amounts. The majority of the seized items were found either in the utility room or the kitchen.

A blue pickup truck was parked outside at defendant's residence. During a search of the truck on January 4th, officers seized from its interior, a rifle, a letter addressed to defendant, and Sudafed tablets containing pseudoephedrine.

On the morning of January 6th, defendant was arrested as she entered the pickup truck in the parking lot of the Burger

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[4] Expert testimony established that .02 and .03 grams of methamphetamine are usable amounts.

King in Weaverville. At that time, sheriff's deputies found located on the seat of the truck, a key for room number 6 at the Indian Creek Motel in Douglas City. The deputies went to room number 6 at the Indian Creek Motel. The room was registered to Barry Youngman. Barry was in the room at the time and was immediately arrested. During a search of the motel room, deputies seized a canvas bag containing defendant's California identification card and a small piece of tinfoil containing an off-white powdery substance later identified as .02 grams of methamphetamine.

Subsequent testing of the powdery substances and the liquids seized from defendant's residence revealed the presence of methamphetamine; ephedrine, a precursor to methamphetamine; phenyl-2-propanone (P-2-P), a by-product in the manufacturing of methamphetamine by the ephedrine-hydriodic acid method; red phosphorus containing methamphetamine and other by-products from the manufacture of methamphetamine by the ephedrine-hydriodic acid method; red phosphorus; and iodine crystals, mixed with water and red phosphorus.

Defendant's latent fingerprints were found on a can of Naptha solvent, and 11 of Barry Youngman's latent fingerprints were found on various items, including jars, bottles, flasks, a dish containing residue, and a coffee grinder, all used in the manufacture of methamphetamine. Defendant and Barry and James Youngman all tested positive for methamphetamine upon their arrests.

Expert testimony established that pseudoephedrine is the only precursor of the ephedrine-hydriodic acid method of processing methamphetamine. A precursor is a primary chemical that is changed into a finished product. Substances used in the manufacture of methamphetamine by the ephedrine-hydriodic acid method include pseudoephedrine tablets, solvents, bases such as Red Devil lye, red phosphorus, and iodine; equipment used to manufacture methamphetamine by that same method include coffee filters, plastic baggies, coffee grinders, funnels, separators, pans, containers, and jars.

An expert opined there was a laboratory to manufacture methamphetamine by the ephedrine-hydriodic acid method in defendant's residence, and that there was a sufficient quantity of pseudoephedrine, red phosphorus, and iodine present to manufacture methamphetamine.

B. The Defense

Defendant did not testify but called Barry Youngman, who testified he was convicted of manufacturing methamphetamine based upon the same facts presented in the instant case. He lived with defendant from June 2000 to January 2001 and manufactured methamphetamine at her residence in January of 2001. However, he never showed defendant the manufacturing operation, and attempted to "keep it a secret from her" by hiding materials and laboratory equipment "off the premises" in a travel trailer and a van that he kept on her property.

Barry admitted both he and defendant were at her residence on January 3rd and the morning of January 4th, but he claimed he

did not manufacture methamphetamine on January 4th until defendant left her residence at approximately 1 p.m. to go to court. When Barry saw law enforcement officers arrive at the residence, he fled, leaving his father at the residence. Barry owned three of the four firearms found in defendant's residence but never showed them to her. He tested positive for methamphetamine on January 6th and gave defendant that drug on that same day. During the time he lived with defendant, he manufactured methamphetamine for the two of them to ingest and defendant knew where he obtained the drug.

DISCUSSION

I
The Search Warrant

Defendant contends the trial court erroneously denied her motion to suppress evidence seized from her residence because information alleged in the affidavit in support of the search warrant was illegally obtained during a prior warrantless entry of her residence. She argues the trial court improperly shifted to her the burden of proving the illegality of the warrantless search, and that the People, who had the burden of proving the legality of that search, may not do so with inadmissible hearsay, namely the affidavit in support of the search warrant.[5] Respondent contends the motion to suppress evidence was properly denied because defendant failed to establish that the averments

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[5] Defendant does not challenge the facial sufficiency of the affidavit.

in the affidavit contained deliberate or reckless falsehoods or omissions. Because defendant's argument is based upon the incorrect assumption the People had the burden of proof, we reject her claim of error.

When making a suppression motion, the People have the burden of establishing the lawfulness of a warrantless search (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [80 L.Ed.2d 732, 743]), while the defendant has the burden of proving the unlawfulness of a search incident to a search warrant. (*Franks v. Delaware* (1978) 438 U.S. 154, 171-172 [57 L.Ed.2d 667, 682].)

Because the burden of proof depends upon whether the search is a warrantless search or is incident to a warrant, we examine the object of defendant's suppression motion to determine which search she challenged. Defendant contends that because the initial entry was without a warrant, the People had the burden of proving the entry was lawful, and since they failed to establish that James Youngman had actual or apparent authority to give consent to enter her residence, the information gained by the officers upon that entry should have been excised from the affidavit in support of the search warrant, leaving the affidavit devoid of sufficient probable cause. Defendant is mistaken.

Defendant's notice of motion to suppress evidence moved "for an order suppressing all evidence . . . seized January 4, 2001 pursuant to execution of Search Warrant No. 01-SW-001." The motion was made on the grounds "the preceding illegal entry cannot be the probable cause for the issuance of a search

warrant," and argued that the information obtained incident to the warrantless consent search should be excised from the affidavit, citing *Franks v. Delaware, supra,* 438 U.S. 154 [57 L.Ed.2d 667]. Defendant also filed an amended notice of motion, which moved "additionally for an order quashing the search warrant, and as previously noticed, suppressing all evidence seized pursuant to Search Warrant No. 01-SW-001."

Thus, defendant's motion only sought to suppress evidence obtained pursuant to the search warrant. While she argued that the warrantless entry was unlawful and the information obtained upon entry should be excised from the probable cause affidavit, she did not separately move to suppress the evidence obtained incident to the warrantless search.

In her reply brief, defendant cites *People v. Leichty* (1988) 205 Cal.App.3d 914, *People v. Brown* (1989) 210 Cal.App.3d 849, *People v. Ivey* (1991) 228 Cal.App.3d 1423, and *People v. Ingham* (1992) 5 Cal.App.4th 326, for the proposition that information obtained from an unlawful warrantless search cannot be used to support a later obtained search warrant unless the prosecution establishes the validity of the first search. Defendant's reliance on these cases is misplaced. Cases are not authority for propositions not raised and resolved. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893,

943.) Since none of the cases cited address the proposition asserted by defendant, they do not assist her.[6]

In sum, defendant did not separately seek to suppress the evidence obtained during the warrantless search,[7] she only sought to suppress the evidence obtained incident to the warrant. By so doing, she left open only two avenues to challenge the legality of the warrantless entry. Those avenues were to mount a facial challenge to the sufficiency of the affidavit or to traverse the warrant under *Franks v. Delaware, supra,* 438 U.S. 154 [57 L.Ed.2d 667], by alleging and proving the affidavit contained deliberate falsehoods or statements made with reckless disregard for the truth, and that those falsehoods were material

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[6] Nor do any of these cases demonstrate the principle asserted by defendant. In *Ivey*, the People conceded the search warrant was unlawful, but argued that the good faith exception under *United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677] applied to bar application of the exclusionary rule. The defendants in *Leichty, Brown,* and *Ingham*, unlike defendant herein, moved to separately suppress evidence obtained during the warrantless search and then moved additionally to suppress the evidence seized pursuant to the search warrant as a fruit of the unlawful search.

[7] If defendant had separately challenged the legality of the initial entry, and then argued the affidavit in support of the search warrant was a "fruit of the poisonous tree" under *Wong Sun v. United States* (1963) 371 U.S. 471 [9 L.Ed.2d 441], she would be in a different position on appeal. Under that legal theory, the People would have the burden of proving the legality of the initial warrantless search (*Welsh v. Wisconsin, supra*, 466 U.S. at p. 750 [80 L.Ed.2d at p. 743]), and the affidavit in support of the search warrant would have been inadmissible hearsay for that purpose, although here, counsel failed to object to the introduction of the affidavit on that ground or any other ground.

to the magistrate's finding of probable cause. (*Id.* at pp. 171-172 [57 L.Ed.2d at p. 682].) On appeal, defendant does not challenge the facial sufficiency of the affidavit nor the denial of her *Franks* motion. We therefore reject her claim of error.

II

Mandatory Presumption on Count Three[8]

Defendant contends section 11383, subdivision (f) and the corresponding CALJIC instructions "create an impermissible mandatory presumption that possession of iodine and red phosphorus is sufficient to prove possession of hydriodic acid." Respondent contends that subdivision (f) is not an unconstitutional mandatory presumption "because the predicate facts that a defendant possessed essential chemicals (i.e., iodine and red phosphorus) sufficient to manufacture hydriodic acid, with the intent to manufacture methamphetamine, necessarily prove that a defendant possessed hydriodic acid."

Defendant was charged in count three with possessing hydriodic acid with intent to manufacture methamphetamine in violation of section 11383, subdivisions (c)(2) and (f).[9]

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[8] Defendant raises several additional instructional errors relating to count three. Because we find the jury was given an unconstitutional mandatory presumption requiring reversal of count three, we do not address defendant's other instructional claims relating to that count.

[9] Section 11383, subdivision (c)(2) provides: "Any person who, with intent to manufacture methamphetamine or any of its analogs specified in subdivision (d) of Section 11055, possesses hydriodic acid or any product containing hydriodic acid is guilty of a felony . . . ."

Subdivision (f) of section 11383 provides in pertinent part:

> "possession of immediate precursors sufficient for the manufacture of . . . hydriodic acid . . . shall be deemed to be possession of the derivative substance. Additionally, possession of essential chemicals sufficient to manufacture hydriodic acid, with intent to manufacture methamphetamine, shall be deemed to be possession of hydriodic acid."

Pursuant to subdivision (f), the jury was instructed in pertinent part as follows:

> "The defendant is charged in count three of having violated section 11383(c)(1) [sic] of the Health and Safety Code, which is a crime.
>
> "Every person who, with the intent to manufacture methamphetamine or any of its analogs, namely hydriodic acid, possesses any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine or possesses at the same time any of the following, a combination product thereof, namely red phosphorous and iodine, is guilty of a violation of Health and Safety Code section 11383(c)(1) [sic], a crime.
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> "In order to prove this crime, each of the following elements must be proved: [¶] A person possessed . . . red phosphorus and iodine; and [¶] that person had the specific intent to manufacture methamphetamine . . . . For the purpose of this section, possession of immediate precursors is sufficient for the manufacture of hydriodic acid with the intent to manufacture methamphetamine, shall be deemed to be in possession of hydriodic acid."

In essence then, the jury was instructed that it must find defendant possessed hydriodic acid if it found she possessed the precursors of hydriodic acid, namely, red phosphorus and iodine.

Mandatory presumptions in criminal statutes may be unconstitutional if they relieve the prosecution from having to prove each element of the offense beyond a reasonable doubt. (*People v. Roder* (1983) 33 Cal.3d 491, 496-498; *Sandstrom v.*

Montana (1979) 442 U.S. 510, 520 [61 L.Ed.2d 39, 48].) A mandatory presumption is one that tells the trier of fact that it *must* assume the existence of the elemental fact from proof of the basic fact. (*People v. Roder, supra,* at p. 498; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 158 [60 L.Ed.2d 777, 792].) The prosecution may not rely on a mandatory presumption unless it is accurate. There must be a "rational connection" between the basic fact proved and the ultimate fact presumed (*Ulster County Court v. Allen, supra*, at p. 165 [at p. 797]) and "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." (*Id.* at p. 167 [at p. 798]; *Sandstrom v. Montana, supra,* 442 U.S. at pp. 521-524 [61 L.Ed.2d at pp. 49-51].)

Subdivision (f) specifies that a finding of the basic fact that the defendant possessed the immediate precursors or the essential chemicals (red phosphorous or iodine) sufficient to manufacture hydriodic acid, is deemed a finding of the ultimate fact of possession of hydriodic acid. Because the jury is not free to reject the inference of the presumed fact once it finds the proved facts, the statute and the instruction constitute mandatory presumptions.

A mandatory presumption may be constitutional if it is accurate beyond a reasonable doubt. (*Sandstrom v. Montana, supra,* 442 U.S. at pp. 521-524 [61 L.Ed.2d at pp. 49-51].) Here, neither the statutory presumption nor the instruction based upon the statute are accurate. They both equate

possession of the essential chemicals with possession of the synthesized substance. They are not the same.

Expert testimony established that hydriodic acid is a controlled substance that is difficult to purchase so methamphetamine manufacturers generally make their own. They do this by combining iodine, red phosphorus, and water and heating the three chemicals together. Therefore, while there is a rational basis to conclude that red phosphorus and iodine are the essential chemicals of hydriodic acid, there is no rational basis to conclude that those two essential chemicals constitute hydriodic acid. The latter substance is a different substance which does not come into existence until it is synthesized from its essential components under a process of heat. At that point, the iodine is converted to hydriodic acid while the red phosphorous retains its original properties as red phosphorous. We therefore conclude the presumption is unconstitutional.

Nor was the instructional error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]; *Rose v. Clark* (1986) 478 U.S. 570 [92 L.Ed.2d 460].) "The issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." (*Yates v. Evatt* (1991) 500 U.S. 391, 404-405 [114 L.Ed.2d 432, 449], overruled on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [116 L.Ed.2d 385, 399].)

In this case, the answer to that question is perfectly clear because there is absolutely no evidentiary support for a

finding of the presumed fact of possession of hydriodic acid. The prosecution conceded no hydriodic acid was found in defendant's residence. In order to establish the presumed fact, the prosecutor relied on the unconstitutional presumption, arguing there was "red phosphorous and iodine, and these two things, in combination make hydriodic acid." Accordingly, because there was no evidence upon which the jury could have found defendant was in possession of hydriodic acid, we hold the error was not harmless.

III

Failure to Give an Instruction on Knowledge

Relying on *People v. Coria* (1999) 21 Cal.4th 868 (hereafter *Coria*), defendant contends the jury instructions on counts one, two, and three[10] were prejudicially erroneous because they failed to require the jury to find she knew the narcotic or illegal character of methamphetamine and its precursors. Respondent contends *Coria* is inapposite and that under other properly given instructions, the jury necessarily found defendant knew that methamphetamine was a controlled substance. We agree with respondent.

The defendant in *Coria, supra*, 21 Cal.4th 868, was charged with manufacturing methamphetamine. (§ 11379.6, subd. (a).) The trial court gave a modified version of CALJIC No. 12.09.1. The jury was instructed that "'[a]wareness of the physical

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[10] Because we reversed count three on other grounds, we only address this claim with respect to counts one and two.

character of the substance being manufactured, i.e., that the product of the chemical synthesis is methamphetamine is not necessary'" and that it need only find the following two elements: (1) the person engaged in the process of manufacturing, either directly or indirectly by means of chemical extraction or independently by means of chemical extraction and (2) a controlled substance, namely, methamphetamine. (*Id.* at p. 874, and fn. 2.) The defendant argued that this instruction converted the offense of manufacturing methamphetamine into a strict liability offense and negated his defense. He had testified that he helped his brother wash ephedrine pills, believing this was being done for the purpose of salvaging and reselling the pills. When he was told they were extracting ephedrine to make methamphetamine, he immediately quit.

The Supreme Court agreed with Coria's claim and held that the crime of manufacturing methamphetamine requires proof the defendant know the character of the substance being manufactured. To avoid converting a felony offense into a strict liability offense, the court found the element of knowledge implicit in the statutory language. The court reasoned, "there is no reason in law or logic to construe section 11379.6 as a strict liability offense and thus permit the conviction of a person for manufacturing methamphetamine, a felony, for extracting pseudoephedrine from pills if the person does not know the extraction was performed for the purpose of, or as part of the process of, manufacturing methamphetamine.

Merely engaging in chemical synthesis is not enough; the defendant must have knowledge of the facts which make the chemical synthesis unlawful, i.e., that methamphetamine is being manufactured.” (21 Cal.4th at p. 880.)

Coria does not assist defendant. The version of CALJIC No. 12.09.1 given by the trial court below differed from the one given in *Coria* in two significant respects.[11] First, it did not tell the jury that awareness of the physical character of the substance being manufactured is not necessary and second, it included a third element, i.e. “that [defendant] had the specific intent to manufacture that controlled substance, which is methamphetamine.” Thus, the instruction did not allow the jury to return a verdict for a strict liability offense. To the contrary, it required the jury to find that defendant knew methamphetamine was being manufactured.

Additionally, under other properly given instructions, the jury necessarily found defendant knew methamphetamine was a

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[11] The trial court gave CALJIC No. 12.09.1 as follows:

“Defendant is accused in count one of having violated 11379.6(a) of the Health and Safety Code. [¶] Every person who manufactures 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 11379.6(a). [¶] In order to prove this crime, each of the following elements must be proved: [¶] A person manufactured either directly or indirectly, by means of chemical extraction, or independently by means of chemical synthesis; [¶] A controlled substance, namely methamphetamine; [¶] and that person had the specific intent to manufacture that controlled substance, which is methamphetamine.”

dangerous and controlled substance. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) In count four, defendant was charged with the offense of possessing methamphetamine for purpose of sale. (§ 11378.) The jury was therefore instructed on this offense and its lesser included offense of possessing methamphetamine. (§ 11377, subd. (a).) These instructions told the jury, inter alia, that defendant "knew of [methamphetamine's] nature as a controlled substance." Therefore by convicting defendant of possessing methamphetamine for sale, the jury necessarily found she knew the narcotic character of methamphetamine.[12]

Nor do we find any error in the instructions given on possession of ephedrine with the intent to manufacture methamphetamine. (§ 11383, subd. (c)(1).) The statutory language defining that offense does not include a knowledge element.[13] Instead, the statute requires proof the defendant had the intent to manufacture methamphetamine and the jury below was

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12 During her closing argument to the jury, defense counsel conceded that defendant was guilty of using methamphetamine on January 6, 2000. Certainly one who uses a controlled substance knows of its narcotic nature.

13 Section 11383, subdivision (c)(1) states in relevant part: "Any person who, with intent to manufacture methamphetamine . . . possesses ephedrine or pseudoephedrine, . . . or who possesses a substance containing ephedrine or pseudoephedrine, . . . or who possesses at the same time any of the following, or a combination product thereof, is guilty of a felony . . . ."

so instructed.[14] Because the offense requires the intent to manufacture methamphetamine, it is not a strict liability offense, and therefore there is no need to construe the statutory language to include the additional element of knowledge to avoid such a result. Because the instructions correctly reflected the statutory language, there was no instructional error. Accordingly, we reject defendant's instructional claim.

IV
Conspiracy Instructions and Failure to Give Instructions on Aiding and Abetting

Defendant complains the trial court instructed the jury on the law of conspiracy without also instructing on the law of aiding and abetting, thereby allowing her to be convicted on the four charged offenses without proof she possessed the specific intent to commit those offenses or proof that she aided and abetted the commission of those offenses. She argues the conspiracy instructions were merely supposed to assist the jury in understanding her aider and abettor liability for the charged offenses. Therefore, according to defendant, the conspiracy

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[14] The jury was instructed: "The defendant is accused in count two of having violated section 11383(c)(1) of the Health and Safety Code, a crime. [¶] Every person who, with intent to manufacture methamphetamine, possesses ephedrine or pseudoephedrine or a substance containing ephedrine or pseudoephedrine is guilty of a violation of Health and Safety Code section 11383(c))(1). [¶] In order to prove this crime, each of the following elements must be proved: [¶] A person possessed ephedrine or pseudoephedrine or a substance containing ephedrine or pseudoephedrine; and [¶] that person had the specific intent to manufacture methamphetamine."

instructions may have led the jury to convict her based upon inadequate evidence. She also argues that application of the natural and probable consequence doctrine to her would permit prosecutors to convict all methamphetamine users of manufacturing because all users have to make some kind of agreement with their suppliers and it is reasonably foreseeable the supplier will have manufactured the drug prior to providing it to the end user. Respondent contends the jury was properly instructed.

We hold the trial court properly instructed the jury on conspiracy liability, and under the limited circumstances of this case, manufacturing methamphetamine is the natural and probable consequence of possessing or using methamphetamine.

A. The Instructions

The prosecutor argued that convictions for manufacturing methamphetamine and possession of ephedrine with intent to manufacture methamphetamine, could be based upon either one of two theories: (1) that defendant and co-defendant Barry Youngman conspired to manufacture methamphetamine or (2) that defendant and Youngman conspired to commit the target offenses of possession and use of methamphetamine and that the manufacture of methamphetamine (count one) and the possession of ephedrine with intent to manufacture methamphetamine (count two) were the

natural and probable consequences of the conspiracy to possess and use that drug.[15]

Over defense counsel's objection, the trial court instructed on the law of conspiracy. Instructions on aiding and abetting were not given.

However, despite the prosecutor's argument, the trial court only instructed the jury on the prosecutor's second theory which required the jury to find that manufacturing methamphetamine is the natural and probable consequence of the offenses of use and possession of methamphetamine.[16] Because the jury was not instructed on the first theory, we will confine our analysis to the second theory.

It is well established, "the prosecutor, not the court or the defendant, exercises the discretion to decide which crimes will be charged and on what theory they will be prosecuted." (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052; see also *People v. Vargas* (2001) 91 Cal.App.4th 506, 553; *People v. Cortes* (1999) 71 Cal.App.4th 62, 79; *People v. Tenorio* (1970) 3 Cal.3d 89, 95.) Furthermore, where the prosecutor fails to charge a conspiracy but there is evidence of a conspiracy to

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[15] The prosecutor argued that "Lisa knew that the guy she met at the rehab center in another county, who was a meth maker, would go out and make meth for their use."

[16] "In this case it is alleged the defendant conspired to commit the following public crimes: possession and use of methamphetamine . . . ." The court also gave CALJIC No. 6.11, the standard jury instruction on conspiracy which explains the natural and probable consequence doctrine.

commit the substantive offenses, it is not error for the prosecutor to introduce evidence of the uncharged conspiracy to establish liability for the charged offenses and for the trial court to instruct on the law of conspiracy. (*People v. Washington* (1969) 71 Cal.2d 1170, 1174; *People v. Belmontes* (1988) 45 Cal.3d 744, 790.)

"The doctrine of conspiracy plays a dual role in our criminal law. First, conspiracy is a substantive offense in itself -- 'an agreement between two or more persons that they will commit an unlawful object (or achieve a lawful object by unlawful means), and in furtherance of the agreement, have committed one overt act toward the achievement of their objective.' [Citations.] Second, proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy. Thus, 'where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all.' (*People v. Kauffman* (1907) 152 Cal. 331, 334 [92 P. 861].)

"This second aspect of conspiracy -- which imposes joint liability on conspirators -- operates independently of the first aspect, which makes a conspiracy itself a crime. Thus, 'It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. [Citations.] "Failure to charge conspiracy as a

separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory [citations].”’ (*People v. Belmontes* (1988) 45 Cal.3d 744, 788-789 [248 Cal.Rptr. 126, 755 P.2d 310] . . . .” (*People v. Salcedo* (1994) 30 Cal.App.4th 209, 215-216.)

In *People v. Belmontes, supra*, 45 Cal.3d 744, the court rejected the defendant’s claim that failure to give aiding and abetting instructions was error, where the People elected to establish defendant’s liability for murder based upon an uncharged conspiracy. (*Id.* at p. 793.)

In sum, derivative or vicarious criminal liability may be imposed under principles of either or both conspiracy and aiding and abetting. (*People v. Croy* (1985) 41 Cal.3d 1, 12; 1 Witkin and Epstein, California Criminal Law (3d ed. 2000), Introd. to Crimes, § 80, at p. 128.) Proof of conspiracy liability does not necessitate proof of aider and abettor liability (*People v. Kauffman, supra*, 152 Cal. 331; *People v. Belmontes, supra,* 45 Cal.3d at pp. 788-789, 793; *People v. Salcedo, supra,* 30 Cal.App.4th at pp. 215-216; *People v. Luparello* (1986) 187 Cal.App.3d 410, 441), although proof of a conspiracy may be relevant to prove aider and abettor liability. (*People v. Brigham, supra,* 216 Cal.App.3d at pp. 1051-1052; *People v.*

Wheeler (1977) 71 Cal.App.3d 902, 906-907; *People v. Durham* (1969) 70 Cal.2d 171, 181.)[17]

Applying these principles, we find no instructional error. Although defendant was not charged with the offense of conspiracy, the prosecutor was entitled to introduce evidence of the uncharged conspiracy to establish defendant's liability for the charged offenses. Having done so, the trial court was required to instruct on the law of conspiracy. Since defendant was not tried as an aider and abettor, the trial court had no duty to instruct on that theory. (*People v. Belmontes, supra*, 45 Cal.3d at p. 793.) Defendant does not claim the conspiracy instructions given to the jury were erroneous under the law of conspiracy. We therefore find no instructional error.

B. Natural and Probable Consequences

The doctrine of natural and probable consequences as applied to conspiratorial liability may be found in the early and often cited case of *People v. Kauffman, supra*, 152 Cal. 331, where the court explained, "'where several parties conspire or combine together to commit any unlawful act, each is criminally

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17 Confusion in terminology has arisen because some cases have used the terms "combination or conspiracy" when addressing issues involving aiding and abetting. (*People v. Kauffman, supra,* 152 Cal. at pp. 335-337; see *People v. Brigham, supra,* 216 Cal.App.3d at p. 1047.) In *People v. Durham, supra,* 70 Cal.2d 171, an aiding and abetting prosecution, the Supreme Court explained, citing *Kauffman*, that in such cases "the resort to language of conspiracy . . . does not refer to the crime of that name but only to the fact of combination as it has relevance to the question of aiding and abetting in the commission of the charged crime." (*Id.* at p. 182, fn. 9.)

responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. . . . Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design." (*Id.* at p. 334; see also *People v. Luparello, supra,* 187 Cal.App.3d at pp. 437-438.)

The determination whether the offense committed (the nontarget offense) is the natural and probable consequence of the agreed upon offense (the target offense) is a question of fact for the jury. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530; *People v. Luparello, supra*, 187 Cal.App.3d at p. 443.) The test is an objective one, which looks not at the issue in the abstract, but one to be resolved by the jury in light of all of the circumstances surrounding the incident. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; *People v. Nguyen, supra*, 21 Cal.App.4th at p. 531.) The question does not turn on the defendant's subjective state of mind, but upon "whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence" of the

agreed upon target offense. (See *People v. Nguyen, supra*, 21 Cal.App.4th at p. 531.)

The parties have not cited any case involving a conviction for manufacturing a controlled substance based upon a finding it was the natural and probable consequence of the offenses of use or possession of that same substance and we have been unable to find one ourselves. Nevertheless, while we agree with defendant that in the abstract, the nontarget offense is not the natural and probable consequence of the target offenses, we reach a contrary conclusion when considering, as we must, the circumstances of this case.

The natural and probable consequence doctrine requires that the nontarget offense be "the ordinary and probable effect" of the target offense. It is reasonable to conclude that one who uses or possesses methamphetamine will ordinarily and probably need to acquire the drug. It does not follow, however, that one who uses or possesses that drug will ordinarily and probably manufacture it. As a practical matter, manufacturing methamphetamine requires knowledge, equipment, and the intention to do so. It cannot reasonably be said that everyone who uses or possesses methamphetamine has the capability or inclination to manufacture the drug.

However, as we stated above, the question whether a nontarget offense is the natural and probable consequence of the target offense is a question of fact to be determined, not in the abstract, but under all the circumstances present. (*People v. Nguyen, supra*, 21 Cal.App.4th at p. 531.)

Here, the evidence established that defendant and Youngman were addicted to methamphetamine, they lived together in defendant's house, where Youngman had set up a lab to manufacture methamphetamine for their mutual use. The equipment for the lab was located throughout defendant's house, although most of it was located in the utility room and kitchen. Moreover, defendant's fingerprints were found on a can of Naptha solvent, a substance used in the manufacture of methamphetamine.[18]

Based upon this evidence, the jury could find that defendant knew Youngman had set up a lab in her house to manufacture methamphetamine in order to supply both of them with their drug of choice. Under these circumstances, it was reasonably foreseeable that Youngman would manufacture methamphetamine in order to satisfy their mutual drug addiction. Accordingly, we find, the jury could conclude, under these circumstances, that manufacturing methamphetamine was the natural and probable consequence of the conspiracy to possess and use methamphetamine. We therefore find no error.

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[18] Methamphetamine is manufactured by using pseudoephedrine, which is extracted from cold pills by grinding up the pills and adding solvents such as water or acetones. When the pseudoephedrine floats to the surface, the liquid and pseudoephedrine are removed using a coffee filter, leaving the binders from the pill in the coffee filter. The liquid is then evaporated off and the remainder is added to hydriodic acid, which when heated produces methamphetamine.

V

Admission of Drug Test Results

Defendant contends the trial court erroneously admitted evidence that she, Barry Youngman (Barry), and James Youngman (James) tested positive for methamphetamine, that methamphetamine was seized from James upon his arrest, that defendant and Barry met while they were in a drug rehabilitation program, that defendant and Barry consistently used methamphetamine between June 2000 and January 2001, and that defendant was not employed. She argues this evidence is essentially evidence of prior bad acts which is inadmissible under Evidence Code section 1101, subdivision (a). Respondent contends the evidence was properly admitted to prove defendant's knowledge of the narcotic character of methamphetamine. We find the evidence was properly admitted.

During in limine motions, the court admitted evidence that upon their arrests, defendant, Barry, and James tested positive for methamphetamine. The prosecution argued that evidence of defendant's test results and use of methamphetamine was relevant to show her knowledge of the narcotic character of the methamphetamine. The court found the test results and possession by defendant and her two co-defendants were relevant to show "the relationship of the three individuals in the processing of and possession and use of methamphetamine."

During trial and over objection by defense counsel, the court admitted a plastic bag containing a white powdery substance found in James' pocket by jail personnel upon his

arrest on January 10th.[19] It was offered to show the connection between the defendant, Barry, and James. Trinity County Sheriff's Deputy Bruce Haney identified the plastic bag as an item seized from James' wallet upon his arrest. The content of the bag was not identified.

Barry testified on cross-examination that he met defendant at an in-patient treatment program in 1998 and that the two of them consistently used methamphetamine between June 2000 and January 2001. Defense counsel objected to this testimony on the grounds it exceeded the scope of direct examination and violated Barry's Fifth Amendment rights. Youngman also testified, without objection, that defendant was not employed.

On appeal, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718; *People v. Williams* (1997) 16 Cal.4th 153, 197.) We will find error only where the trial court's decision exceeded the bounds of reason. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.) Moreover, we review the

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[19] Without providing a record citation, defendant contends the evidence admitted was a piece of methamphetamine found in James' pocket, while respondent contends that exhibit was a plastic bag. The record is unclear. The evidence in question was identified and introduced as Exhibit 34. The index in the Reporter's Transcript describes Exhibit 34 as a plastic bag with a white powdery substance, while the trial court described it as "the methamphetamine" found in James' pocket. We have conducted our own inquiry and are satisfied the index of the Reporter's Transcript properly describes Exhibit 34 as a plastic baggie with a white powdery substance.

trial court’s ruling, not its reasoning. (*People v. Mason* (1991) 52 Cal.3d 909, 944.)

Only relevant evidence is admissible. (Evid. Code, § 350.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) While evidence of a person’s character or trait of character is inadmissible to prove the person’s conduct on a specified occasion (Evid. Code, § 1101, subd. (a)), evidence of wrongdoing is admissible when relevant to prove motive, plan, or knowledge. (Evid. Code, § 1101, subd. (b); *People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [prior narcotic offenses admissible to prove knowledge and intent in prosecution for furnishing and selling dangerous drug]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 326 [evidence that defendant is a narcotic addict admissible to show motive to sell drugs and steal]; *People v. Thornton* (2000) 85 Cal.App.4th 44, 49-50 [use of heroin admissible to show knowledge of its narcotic character].)

Defendant was charged in count four with possessing for sale, a controlled substance, to wit, methamphetamine. (§ 11378.) “Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and [its] illegal character.” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746; *People v. Harris* (2000) 83 Cal.App.4th 371, 374.)

Thus, the narcotics-related evidence, namely defendant's drug test results and her consistent use of methamphetamine for the six months prior to her arrest, was admissible to establish her knowledge of its narcotic character. (*People v. Thornton*, *supra,* 85 Cal.App.4th at pp. 49-50.)

The other narcotic related evidence, including the test results for Barry and James, the evidence that defendant and Barry met in a rehabilitation facility, that she and defendant consistently used methamphetamine, and that defendant was unemployed, was relevant to establish the motive of the three co-conspirators to engage in a conspiracy to manufacture methamphetamine to satisfy their common drug habits. (*People v. Guyette* (1964) 231 Cal.App.2d 460, 467.) Defendant's and Barry's stay in a drug rehabilitation facility followed by their continued and consistent drug use, established the nature of their relationship, the extent of their addiction and the resulting strength of their motive to secure methamphetamine for their combined use. Defendant's unemployed status was relevant to establish her need to join the conspiracy so that she could satisfy her addiction despite the fact she had no lawful income to support her habit. There was no abuse of discretion in admitting this evidence.

However, the probative value of the plastic baggie seized from James Youngman's wallet was minimal because there was no testimony identifying the white powdery residue in the bag. Nevertheless, admission of the baggie was harmless in light of the evidence James tested positive for methamphetamine upon his

arrest, and Barry's testimony that he "felt remorse for making [defendant] an addict," that he manufactured the methamphetamine mostly for himself and defendant, and that between June 2000 and January 2001, defendant knew where Barry got the methamphetamine. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, we reject defendant's claims of prejudicial error.

DISPOSITION

The judgment of conviction on count three is reversed. The judgment is affirmed in all other respects.

BLEASE, Acting P. J.

We concur:

DAVIS, J.

MORRISON, J.