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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUDY BEN LOBATO, Defendant and Appellant.	F040408 (Super. Ct. No. 01CM1106J) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of PROCEDURAL BACKGROUND, FACTS, and parts I.A.and II. of DISCUSSION.

INTRODUCTION

Defendant and appellant Rudy Ben Lobato appeals from a judgment following a jury trial in which he was convicted of conspiracy to commit certain drug offenses and a weight enhancement allegation was found to be true. In the published portion of the opinion, we reject appellant's contention that the weight enhancement, which was imposed under Health and Safety Code section 11370.4, subdivision (b)(2), must be vacated because the jury's verdict form did not expressly include the substantial involvement in the underlying offense element of the allegation. In the unpublished portions of the opinion, we reject appellant's claim that there is insufficient evidence to support the true finding on the weight enhancement, but conclude that appellant's sentence was not authorized because appellant was not sentenced based on conspiracy to commit the felony with the greatest maximum term. Accordingly, we remand for resentencing.

PROCEDURAL BACKGROUND*

On January 8, 2002, appellant and his codefendant, Alejandro Flores, were charged in a first amended information with having conspired with Jose Magana, Arthur DeSoto, and other unnamed and unknown coconspirators, between August 1, 2000, and April 30, 2001, to violate one or more of the following laws: possession of marijuana for sale (Health & Saf. Code, § 11359); possession of methamphetamine for sale (Health & Saf. Code, § 11378); transportation and distribution of methamphetamine (Health & Saf. Code, § 11379, subd. (a)); or manufacture of methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)). (Count I; Pen. Code, § 182, subd. (a)(1).)[1] The information further alleged that in the commission of this offense, appellant and his codefendant conspired to violate Health and Safety Code section 11378 or 11379, subdivision (a),

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*See footnote, *ante*, page 1.

[1]Appellant's codefendant was also charged in count II with unlawful possession for purpose of sale of methamphetamine. (Health & Saf. Code, § 11378.) Codefendant Flores is not a party to this appeal.

with respect to a substance containing methamphetamine, where the substance exceeded four kilograms by weight, within the meaning of Health and Safety Code section 11370.4, subdivision (b)(2).

On March 8, 2002, a jury, sworn on February 26, 2002, convicted appellant of conspiracy as charged in count I and found all four of the alleged objectives true. The jury also found the weight enhancement allegation true.

On April 5, 2002, appellant was sentenced to state prison for a total term of nine years, composed of the upper term of four years for conspiracy to transport and distribute methamphetamine, and a consecutive term of five years for the weight enhancement. On April 12, 2002, appellant timely filed a notice of appeal.

FACTS[*]

In August 2000, the Federal Bureau of Investigation (FBI), with the assistance of the Kings County Narcotics Task Force, began an investigation in Kings County of a suspected drug dealer named Jose Magana as a result of information received from Tony Araujo, a feed store owner who had sold methyl sulfonyl methane (MSM), a food additive, to people involved in methamphetamine manufacturing. MSM is a substance used to "cut" methamphetamine for purposes of distribution. The investigation revealed that Magana headed a narcotics trafficking enterprise from which purchases or seizures of methamphetamine exceeded four kilograms by weight.

Appellant personally made multiple purchases of MSM from Araujo, beginning sometime in 1999. Appellant first started purchasing one-pound and four-pound containers of MSM on a weekly basis. About six months later, appellant began buying 10-pound containers of MSM, also on a weekly basis. Araujo sold appellant about five or six of the 10-pound containers. In late 1999, appellant introduced Magana to Araujo. Appellant told Araujo that Magana was a friend of his, and asked Araujo if it would be alright if Magana picked up MSM on a regular basis. Appellant stopped purchasing

[*]See footnote, *ante*, page 1.

MSM from Araujo after appellant introduced Magana to him. Magana then began purchasing 10-pound quantities of MSM from Araujo once or twice a week; the purchases averaged 50 to 70 pounds of MSM per month.

Eventually Magana asked Araujo to stop selling MSM to any other individuals so Magana could use Araujo's stock of MSM to "cut" a large quantity of methamphetamine he was planning to "cook." Sometime after this, appellant came to Araujo's store and asked to buy MSM. Araujo told him Magana had bought all the MSM, and appellant would have to get Magana's approval before Araujo would sell any to him. Appellant called Magana, who gave Araujo approval to sell MSM to appellant.

Jesus Solorio purchased methamphetamine and marijuana from Magana during the years 2000 and 2001. He would buy the methamphetamine in pure form, "cut" it with MSM, which he purchased from Araujo, and resell it. Solorio knew appellant and saw him talking to Magana at Magana's place in Hanford about three or four times. Solorio saw appellant buy what appeared to be methamphetamine from Magana on one occasion. Magana told Solorio appellant was there to pick something up and take it somewhere for him. In the beginning of 2001, Solorio's relationship with Magana ended because Magana discovered that Solorio was selling drugs to Magana's customers. About a month later, Solorio saw appellant outside a convenience store. Appellant stared at Solorio like he wanted to hurt Solorio, and told Solorio "'I'm going to wait until your head gets bigger,'" which Solorio testified means that he was going to wait to get more money to take Solorio "out" or "down." This encounter made Solorio nervous.

Paul Sandoval also purchased methamphetamine and marijuana from Magana. Sandoval bought the methamphetamine in pure form, cut it with MSM, which he purchased from Araujo, and then resold it. While Sandoval was selling drugs, he also ran a lawn care business. Magana was one of his customers in the lawn care business; Sandoval worked on Magana's lawn once every two weeks. Each time Sandoval worked on Magana's lawn during the entire year of 2000, he saw appellant there, getting methamphetamine and marijuana from Magana. Sandoval generally saw appellant being

handed a couple of pounds of marijuana and a pound or two of methamphetamine each time. Sandoval never saw money being exchanged. Appellant would be at Magana's house 20 or 30 minutes during these visits.

Kings County Sheriff's Deputy Arend LaBlue testified as an expert in the area of illegal drug manufacturing, preparation and distribution, and the structure of drug organizations. Deputy LaBlue testified that there are three tiers in methamphetamine distribution organizations—an upper level, a midlevel and a street level. Deputy LaBlue explained that the upper level controls everything, including the manufacturing and distribution processes, and acts as the bosses. Deputy LaBlue further testified that the midlevel of the organization acts as sergeants and does the "dirty work" of the upper level, such as transporting large quantities of drugs and chemicals, manufacturing the drugs, and buying drugs from the upper level dealer and selling them to a street level dealer. Generally, the upper level dealer will sell pounds of methamphetamine to the midlevel dealer, who will then sell quantities to street level dealers that are less than a pound, such as half pounds, quarter pounds or ounces. The street level dealer is generally a drug user who will use half of the drugs he or she purchases and sell the other half in very small quantities. Deputy LaBlue has never heard of a personal user purchasing a half ounce of either cut or uncut methamphetamine for personal use; in Deputy LaBlue's opinion, a half ounce of pure methamphetamine would be possessed for sale.

At any level, the methamphetamine can be diluted or cut with various other substances before it is distributed to increase monetary profit. Generally, only the midlevel dealer is able to purchase pure methamphetamine from the upper level dealer; Deputy LaBlue has never seen a user buy pure methamphetamine. Deputy LaBlue testified that an ounce of cut methamphetamine generally sells for about $400 on the street, a half pound for $3,000, and a pound for $5,000. Generally, a user will possess a 16th of an ounce or less. Deputy LaBlue testified that often a midlevel dealer will collect money owed for drug debts for upper level dealers, and lower level dealers will collect

money for midlevel dealers. Money collection can be done by threatening the subject physically unless he or she pays.

As part of the investigation into the Magana organization, the FBI monitored approximately 3,700 telephone calls made to and from Magana's cellular telephone from March 14, 2001, to April 12, 2001, many of which were recorded. Approximately 68 of these telephone calls involved someone by the name of "Rudy." Twenty-eight telephone conversations, which had been recorded as a result of the monitoring and involved appellant, were played to the jury. As the tape was played, Deputy LaBlue testified to any words that have a special meaning in the drug culture. The voices in the conversations were identified as belonging to Magana, Arthur DeSoto, Araujo, Julio Bautista, and appellant. DeSoto, whose alias is Furbie, was a runner for Magana; a runner is someone who makes deliveries and does errands for the top tier of individuals in the drug organization.

In the first series of telephone calls, appellant told Magana that he had "a whole one," a "P," which is slang for a "whole pound," and Magana told appellant to meet "him there" in 10 minutes. Magana then called DeSoto and told him to take a "zone," which is slang for an ounce, to appellant, and to meet him "over there at the same place" in 10 minutes. The next day, DeSoto told Magana that he took "that zone" to "Rudy."

Two days later, appellant called Magana and asked him to bring him a "half." Magana told appellant he would send Furbie when he returned from Traver. About five hours later, DeSoto told Magana that appellant keeps calling him and telling him to take him a "half a zone of … dirt," which is slang for a half ounce of methamphetamine. Magana told DeSoto not to take appellant anything until he tells him to. About a half hour later, appellant called Magana and told him he had been waiting for "him" to come, but he never showed up. Magana told appellant he wouldn't let "him" take anything unless he calls "him" first, but he would send "him" over now. Magana then immediately called DeSoto and told him to take to appellant "a half ounce of pure," which means a half ounce of pure methamphetamine. DeSoto, however, never showed

up. When appellant called Magana an hour later to complain that DeSoto hadn't come, Magana told appellant to come over to his "pad." About 10 minutes later, Magana called appellant and told him to "sock" someone for driving on Magana's lawn. Appellant told Magana he would "take care of it."

Five days later, appellant called Magana and told him he had come across 30 gallons of Freon. Magana told appellant he would buy all of it, but it had to be R-11 type because R-12 won't "pull it." Appellant responded that he would call Magana back and let him know what it is. Appellant called back about 15 minutes later and told Magana that the Freon was either R-12 or R-34A, but there was no R-11. Magana asked appellant to get a gallon of R-12 so he could test it to see if he still might be able to "pull it." Deputy LaBlue explained that Freon is a solvent used in the manufacture of methamphetamine, and that R-11 is the type of Freon used to manufacture methamphetamine. Deputy LaBlue further explained that R-12 is not as a good a solvent as R-11 in manufacturing methamphetamine, and that the term "pull it" refers to the methamphetamine coming out of the liquid and attaching itself to the solvent so the solvent can be drained off and separated from the other by-products.

Later that night, at 8:50 p.m., Magana called appellant and told him that "they're not done yet," "they" had barely started "making it," that it would not be done until four or five the next day, and that he should have it in his hands by eight or nine the next day. Appellant asked if he should come and pay Magana. Magana said no, he was going to go over and help because half of it was his, and that appellant should "come through" at about eight or nine o'clock. Deputy LaBlue explained that it takes six to eight hours to cook methamphetamine, and if the cook began at 9:00 p.m., it would be done at approximately 4:00 or 5:00 a.m. It would then take a few more hours to process the methamphetamine, which would make the final product done by 8:00 or 9:00 a.m.

Three days later, appellant called Magana to warn him that a sheriff was posted one block from Magana's house. A couple days later, Magana called appellant at 11:44 a.m. and told him that he would pick appellant up at 12. Magana told appellant that the

previous night, someone "stole that shit" from him, that he knows "this dude" set it up, and he needed appellant to back him up. Magana told appellant he would "break [him] off like five hundred bucks," meaning he would give him $500. A call placed about 45 minutes later shows that Magana was in front of appellant's mother's house, where appellant was.

The next morning, appellant called Magana and told him he had been trying to get a hold of him all night. Appellant told Magana that "they" brought him "liquid" with that "shit," and that a "dude" says he had about "ten blocks" and he could bring him "thirty more." Magana told appellant he would be over in about an hour and a half. Deputy LaBlue testified that the term "block" refers to an amount of marijuana, usually a pound. Later that night, appellant called Magana. Magana told appellant he had been trying to call him all day, and that he "went out there with the dude that knows about it," and that tomorrow he could "go again." Appellant told Magana he had a gallon of "liquid." Magana told appellant he would go check it out in about a half hour.

Eight days later, appellant called Magana. Appellant told Magana he needed 10 pounds of "cut," that he was there talking to "homeboy," and "homeboy" said that he needed to get an okay from Magana before he could let one go because Magana had everything bought out. Magana told appellant he could get one "over here," but appellant said he was right there with "them," and he just needed an okay from Magana. Magana told appellant to "go for it." A minute later, appellant called Magana. Araujo got on the phone with Magana, who told Araujo to "go ahead." About a half hour later, appellant called Magana and joked about Araujo making him call Magana back.

The next day, appellant called Magana and asked him if he had any "yell," which is slang for cocaine. Magana told him the little bit he had "took off" last night, but he might have a "zone." Magana told appellant if he wanted it he would have to pay cash, because he never fronted that, meaning that he did not give credit on that, and to call him when he was ready.

The next day, appellant called Magana and asked how much he wanted "for those." Magana responded "[t]hree and a half for each one." Appellant asked if Magana was going to have some more ready for him; Magana responded he wouldn't have more until the next night, when he would get another "load." Deputy LaBlue testified that "three and a half" could be $350, which is an amount commonly associated with either a pound of marijuana or an ounce of methamphetamine.

Two days later, appellant called Magana and handed the phone to Julio Bautista, who asked Magana whether he owed him money from "the shit that [he] got from Rudy, that 'chronic,'" meaning high-grade marijuana, and whether the amount was "eighteen hundred," which Deputy LaBlue testified could refer to a pound of high-grade marijuana, which would be an amount for sale rather than personal use. Bautista said that was the amount "Rudy" was trying to collect on right now. Bautista then put appellant on the phone. Appellant asked Magana whether that was "it." Magana said yes, and asked appellant if he remembered that he owed him (Magana) and appellant had said to him (Magana) to "just have him pay you." Appellant told Magana that he would "take a little somethin' from him, right now" and then tell him he was coming back next week.

Ten minutes later, appellant called Magana and told him that he took everything "he" had and he "didn't whip his ass." Appellant told Magana that when Bautista stops giving him money, he's going to "beat the fucking shit out of that mother fucker." Appellant also told Magana that he just wanted to call him to let him know what was going on with "this mother fucker."

Jonathan Crowe, an FBI officer involved in the Magana investigation, testified that the day after an incident that occurred at Monson Market, in which Magana stole 10 pounds of methamphetamine from another drug dealer, Magana called appellant to have him go with him to try to sort out the situation because they realized the person he stole the drugs from called his bluff and said he knew it was a set-up.

DISCUSSION

I. The Weight Enhancement

Appellant contends the true finding on the weight enhancement appended to the conspiracy charge must be stricken because it is not supported by sufficient evidence and the verdict omitted the required finding that appellant substantially was involved in the conspiracy. We disagree with both contentions.

A. Sufficiency of the Evidence*

Where a weight enhancement is attached to a charge of conspiracy, the prosecution must show the defendant was "substantially involved in the planning, direction, execution, or financing of the underlying offense." (Health & Saf. Code, § 11370.4, subd. (b); *People v. Garcia* (1992) 3 Cal.App.4th 582, 585-586.) Appellant contends the evidence is insufficient to support a true finding on the weight enhancement because there was no evidence that he was substantially involved in the direction or supervision of the conspiracy to possess, transport or distribute methamphetamine. Appellant contends that at most the evidence showed he may have acted as a low-level dealer independent of the Magana organization.

In analyzing these contentions, we are bound by the standard rules on the sufficiency of the evidence in a criminal case. (*People v. Howard* (1995) 33 Cal.App.4th 1407, 1416-1417.) We view the evidence in the light most favorable to the prosecution, and with that view we determine whether any rational trier of fact could have found the elements of the crime (or the truth of the allegation) beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. We must presume the existence of every fact in support of the judgment that the trier could reasonably deduce from the evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Unless it is shown that on no hypothesis whatsoever is there

*See footnote, *ante*, page 1.

sufficient substantial evidence to support the verdict of the jury we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

Although appellant may not have planned, directed, or financed the conspiracy to possess, transport or distribute methamphetamine, there was substantial evidence that he was involved in its execution. Appellant did not make one or two small purchases; he was seen picking up a pound or two of methamphetamine at least every two weeks directly from Magana. He purchased pure methamphetamine, which low-level street dealers do not usually purchase. Magana kept appellant apprised of the production schedule for the methamphetamine. Although Magana instructed DeSoto not to deliver methamphetamine to appellant until he told DeSoto to make the delivery, when DeSoto failed to deliver the methamphetamine as instructed, Magana invited appellant over to his house. Magana then instructed appellant to "sock" someone who had driven over his lawn, which infers that appellant was working for Magana. This inference is also supported by appellant threatening to take "out" Magana's competitor, Solorio.

In addition to purchasing large quantities of methamphetamine, appellant was involved in other aspects of the Magana organization which show his substantial involvement. Appellant offered to arrange the purchase of Freon for production of methamphetamine. Appellant warned Magana when a sheriff was posted near Magana's home. Magana offered to pay appellant $500 to back him up when confronting someone who stole methamphetamine from him, which offer appellant apparently accepted. Appellant purchased large quantities of MSM from Araujo and arranged for Magana to purchase MSM from Araujo. While on one or two occasions appellant needed Magana's approval to purchase MSM from Araujo, this was because Araujo refused to release it to appellant without Magana's approval, which was freely and easily given, with Magana even suggesting that appellant come to his place to pick up the MSM instead of buying it from Araujo.

From this evidence, the jury could reasonably infer that appellant was more than "peripherally involved" in the conspiracy to distribute methamphetamine. (See *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1735.) Appellant contends that he must be a "coordinator or overseer of activities," or have a pager, in order to be substantially involved in the execution of the conspiracy to distribute methamphetamine, citing *People v. Consuegra*, *supra*. In that case, the appellate court concluded there was substantial evidence to support the jury's finding that the four defendants were substantially involved in a conspiracy to possess cocaine for sale where none of the defendants was "peripherally involved" in the large-scale operation, one of the defendants had a pager which could receive messages nationwide and whose conduct suggested he was "a coordinator or overseer of activities," and the other three defendants took turns driving or riding in a loaded pickup truck, which was ultimately driven into a garage and emptied of its contents, which turned out to be 200 kilograms of cocaine. (*People v. Consuegra*, *supra*, at pp. 1730-1731, 1735.)

Contrary to appellant's assertion, the court in *Consuegra* did not hold that a defendant must carry a pager or be a coordinator of activities in order to be substantially involved in the conspiracy, as shown by its finding that other defendants who apparently did not carry pagers and were not coordinators were also substantially involved. Instead, as the court concluded, the evidence must be sufficient to establish the defendants "were individuals who all played substantial roles in the conspiracy to possess cocaine." (*People v. Consuegra*, *supra*, 26 Cal.App.4th at p. 1735.) Viewed as a whole, the evidence here established that appellant was an individual who played a substantial role in the conspiracy to distribute methamphetamine. The jury's finding was proper.

B. Special Finding on Verdict Form

Appellant contends the jury did not find, as part of its special verdict on the weight enhancement appended to the conspiracy charge, that appellant was substantially involved in the conspiracy. Appellant claims that, absent a finding of substantial involvement, the weight enhancement appended to the conspiracy count must be stricken.

(*People v. Garcia*, *supra*, 3 Cal.App.4th at p. 586; Health & Saf. Code, § 11370.4, subd. (b).)

The trial court instructed the jury as to the weight allegation in the language of CALJIC No. 17.21 as follows:

> "It is also alleged in Count I that at the time of the commission of the crime of which the defendants are accused, the defendant conspired to sell, transport, distribute and/or possess for sale a substance containing methamphetamine which exceeded four kilograms by weight. [¶] If you find a defendant guilty of the crime charged in Count I, you must then determine whether this allegation is true.
>
> "If you find a defendant guilty of the crime of conspiracy to commit a violation of Health and Safety Code Section 11378 or 11379 involving a substance containing methamphetamine which exceeds four kilograms by weight, an essential element of this allegation is that the defendant was substantially involved in the planning, direction, execution, or financing of the conspiracy and its objective. [¶] The People have the burden of proving the truth of this allegation and each of its elements. If you have a reasonable doubt that it is true, you must find it to be not true. [¶] Include a special finding on that question in your verdict, using a form that will be supplied to you for that purpose."
>
> The verdict form provided as follows:
>
> "We, the jury, _____ that the defendant, RUDY BEN
> FIND / DO NOT FIND
> LOBATO, conspired to violate Health and Safety Code section 11378 and/or 11379(a) with respect to a substance containing methamphetamine where the substance exceeded four (4) kilograms by weight, within the meaning of Health and Safety Code section 11370.4(b)(2), as alleged on the Information."

The jury inserted the word "Find" in the space provided.

Appellant contends the jury was required to make a special finding that he was "substantially involved" in the planning, direction, execution, or financing of the underlying offenses, and that the failure to include "substantial involvement" language on the verdict form constitutes reversible error as to the weight enhancement. Appellant's contention was squarely rejected in *People v. Chevalier* (1997) 60 Cal.App.4th 507. In

that case, the Court of Appeal held that the verdict for a weight enhancement related to a count of conspiracy need not expressly include the substantial involvement element. The court concluded that where the jury is fully instructed as to each element of the enhancement, it is not necessary for the verdict to enumerate each of those elements. (*Id.* at p. 514.) In this case, as in *Chevalier*, the jury properly was instructed it had to find appellant was substantially involved in the conspiracy in order to find the weight enhancement true, therefore the absence of the substantial involvement language on the verdict does not require the enhancement be stricken.

Appellant acknowledges the holding in *People v. Chevalier*, but notes that there is contrary authority, citing *People v. Garcia*, *supra*. In that case, this court struck a weight enhancement where the jury was not instructed that it had to find the defendant was substantially involved in the planning, direction, execution, or financing of the underlying offense, and the verdict form did not expressly contain the element of substantial involvement. (*People v. Garcia*, *supra*, 3 Cal.App.4th at pp. 584-586.) In holding that the jury instruction was insufficient, we mentioned that a verdict form "*should* require a finding by the jury of [the] defendant's substantial involvement." (*Id.* at p. 586, italics added.) In *Garcia*, however, we were not presented with the issue of whether a weight enhancement must be stricken where the jury was correctly instructed on the need for substantial involvement, but that element was not expressly stated on the verdict. For this reason, our statement in *Garcia* regarding the form of the verdict is not controlling here, where the jury was properly instructed regarding the findings necessary to sustain a true finding on the weight enhancement.

Appellant also contends that *People v. Chevalier* has been overruled by the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466. Appellant contends *Apprendi* requires the verdict contain an express factual finding that appellant was substantially involved in the underlying conspiracy. We disagree. As recently explained by the California Supreme Court, *Apprendi* teaches us that "[e]xcept for sentence enhancement provisions that are based on a defendant's prior conviction, the

federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the 'prescribed statutory maximum' punishment for that crime. (*Apprendi*, *supra*, 530 U.S. at p. 490 ….) Therefore, a trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' (*Ibid.*)." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

Here, the jury was fully instructed on the elements of the weight enhancement. As explained in *People v. Chevalier*, it was unnecessary for the verdict to enumerate each of those elements. (*People v. Chevalier*, *supra*, 60 Cal.App.4th at p. 514.) The decision in *Apprendi* does not change this conclusion, as it does not purport to require any written findings which expressly detail every element of an enhancement. It requires only that the jury find, beyond a reasonable doubt, every element of a sentence enhancement. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) Having been instructed on the elements of the weight enhancement, we can presume that the jury made the findings as instructed when it found the conspiracy weight enhancement true. (*People v. Chevalier*, *supra*, at pp. 514-515.) *Apprendi* does not require anything more. Accordingly, the claim of error fails.

II. Unauthorized Sentence*

Appellant contends, and respondent concedes, that the trial court imposed an unauthorized sentence. The trial court, recognizing that appellant was convicted of a single conspiracy with multiple objectives, constructed appellant's sentence by imposing a four-year base term for conspiracy based on the objective of transporting and distributing methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and enhancing

*See footnote, *ante*, page 1.

that term by five years based on the weight enhancement (Health & Saf. Code, § 11370.4, subd. (b)(2).)

Penal Code section 182 states the various punishments for the crime of conspiracy. When a defendant is convicted of "conspiracy to commit two or more felonies which have different punishments and the commission of those felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term." (Pen. Code, § 182, subd. (a) [4th unnumbered para.].) Thus, according to the statutory language, the court was required to sentence appellant on the conspiracy count based on the underlying *felony* which has the greatest potential punishment, not on the *felony plus enhancement* that had the greatest potential punishment. As both parties point out, of the four crimes appellant was convicted of conspiring to commit, the manufacture of methamphetamine, with a sentencing range of three, five or seven years (Health & Safe. Code, § 11379.6, subd. (a)), is the felony with the greatest potential punishment, not the transportation and distribution of methamphetamine appellant was sentenced on, which has a sentencing range of two, three or four years (Health & Saf. Code, § 11379, subd. (a)).[2]

Thus, under Penal Code section 182, the trial court was required to sentence appellant based on the conspiracy to manufacture methamphetamine. The weight enhancement, however, does not attach to a conspiracy to manufacture methamphetamine.[3] Therefore, the trial court was required to sentence appellant based solely on the conspiracy to manufacture methamphetamine, without imposing the weight enhancement. It could not, as it did, determine which felony the weight enhancement attached to, and then sentence appellant based on the conspiracy to violate that felony and

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[2]The other two felonies appellant was convicted of conspiring to commit, possession of marijuana and methamphetamine for sale, are both punishable by imprisonment in the state prison for 16 months, two years or three years. (Health & Saf. Code, §§ 11359, 11378; Pen. Code, § 18.)

[3]The weight enhancement attaches only to conspiracies to violate Health and Safety Code sections 11378, 11378.5, 11379, and 11379.5. (Health & Saf. Code, § 11370.4, subd. (b).)

then impose the weight enhancement. The current sentence is unauthorized. Accordingly, we will vacate appellant's sentence and remand for resentencing.

DISPOSITION

The sentence is vacated and the case is remanded for resentencing in conformance with this opinion. In all other respects, the judgment is affirmed.

_____
GOMES, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

_____
LEVY, J.