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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHADRACK J. PHILLIPS,

Defendant and Appellant.

A133778

(San Francisco City and County
Super. Ct. No. 215850)

Appellant Shadrack J. Phillips was convicted by a jury of assault with force likely to cause great bodily injury (Pen. Code, § 245, former subd. (a)(1)),¹ false imprisonment (§ 236), possession of a controlled substance (heroin) (Health & Saf. Code, § 11350, subd. (a)), and possession of a controlled substance (oxycodone) (Health & Saf. Code, § 11350, subd. (a)). Phillips contends that his conviction for oxycodone possession is unsupported by substantial evidence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because Phillips challenges only the sufficiency of evidence supporting his conviction for possession of oxycodone, our recitation of facts focuses on those relevant thereto.

Prosecution Case

On July 27, 2010, Phillips was arrested on suspicion of assaulting, stabbing, and falsely imprisoning Ari Schaefer. When a police officer conducted a booking search of

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

Phillips, the officer found two bindles of black tar heroin in a coin purse in his waistband. The officer found two more bindles of suspected heroin in a canister that was hanging on a lanyard around Phillips's neck. Inside the canister, the officer also found a Ziploc bag containing several tablets and capsules. One of the capsules contained morphine.

A white, partial tablet found in the same canister tested positive for oxycodone. The tablet itself was admitted into evidence as People's Exhibit 16B. Another partial tablet, very similar in size, shape and markings to the oxycodone tablet, was admitted into evidence, but was not tested for content.² A criminalist, who was qualified as an expert at trial, concluded that the first partial tablet contained oxycodone based both on the results of a gas chromatography mass spectrometry (GC/MS) test and because the partial markings on one side of the tablet were similar to "a tablet that contains 5 milligrams of oxycodone." The criminalist explained: "The site I used was drugs dot com to get an indication of what would be in those, and then I ran . . . those tablets individually on the GC/MS. [¶] . . . The capsule was found to contain morphine. And the white tablet was found to contain oxycodone."

The criminalist was asked, on cross-examination, "[i]s it not possible to tell exactly how much oxycodone is in 16B?" He answered: "It is possible, but we don't do quantitative analysis, we don't find the purity. So I didn't perform that test, but it could be done. It's not generally done on one single tablet because it's a small amount to work with, but it can be done if needed." The criminalist weighed each of the tablets individually, but the actual weight of the tested oxycodone tablet was never given at trial.

Defense Case

Phillips called several witnesses who testified on subjects unrelated to the oxycodone charge.

² The court sustained defense counsel's objection to the district attorney's reference to the second partial tablet during closing argument.

Motion for Judgment of Acquittal

Prior to submission of the case to the jury, Phillips moved for a judgment of acquittal, under section 1118.1, with respect to the charge of oxycodone possession. Phillips argued that there was no substantial evidence that he possessed a usable amount of oxycodone. He relied on the absence of expert opinion testimony on whether the partial tablet constituted a usable amount. The trial court denied the motion. The court described the drugs at issue as “half or three-quarters of a pill,” and expressly found that, under governing authority, there was “no requirement that a witness testify that an amount in question is a usable quantity.” The court explained: “[T]here’s a total absence of testimony about usable amount. But given the exhibit itself, . . . it’s going to be up to the jury to be convinced that this is a pill that could not be used or could not be sold.”

Verdict and Sentence

As noted *ante*, the jury convicted Phillips of, inter alia, possession of oxycodone. He ultimately was sentenced to an aggregate term of 12 years, of which 16 months was for the oxycodone possession. This timely appeal followed.

II. DISCUSSION

On appeal, Phillips contends that the evidence is insufficient to support his conviction for possession of oxycodone because none of the prosecution witnesses testified that the oxycodone found was a usable amount. He points out: “In this case, no witness was ever asked in any way, direct or indirect, whether the oxycodone in the partial tablet . . . tested was a usable quantity. The criminalist was not asked and explained his failure to test for the level of oxycodone by saying that he did not usually conduct such tests were [*sic*] quantity was so small. The officer who seized the tablet was not asked. No one was asked.” (Underlining omitted.) Phillips also maintains that his conviction, on this record, violates his right to due process under the federal and the California constitutions. We conclude that the absence of such testimony is not determinative.

“ ‘In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is

“whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ’ [Citations.] We apply an identical standard under the California Constitution. [Citation.] ‘In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” ’ [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1175, italics omitted.) “[A] reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (*Id.* at p. 1181.)

The jury was properly instructed, consistent with CALCRIM No. 2304: “To prove that the defendant is guilty of [possessing oxycodone], the People must prove that: [¶] 1. The defendant unlawfully possessed a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance’s nature or character as a controlled substance; [¶] 4. The controlled substance was oxycodone, [¶] AND [¶] 5. *The controlled substance was in a usable amount.* [¶] A usable amount is a quantity that is enough to be used by someone as a controlled substance. Useless traces or debris are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.” (Italics added.)

The usable amount requirement has its origins in our Supreme Court’s decision, in *People v. Leal* (1966) 64 Cal.2d 504, in which the defendant possessed a small spoon on which was encrusted one-half grain (approximately 32 milligrams) of crystallized substance stipulated to contain heroin. (*Id.* at p. 505.) The court held: “[I]n penalizing a person who possesses a narcotic the Legislature proscribed possession of a substance that has a narcotic potential; it condemned the commodity that could be used as such. It did not refer to *useless* traces or residue of such substance. Hence the possession of a minute crystalline residue of narcotic useless for either sale or consumption . . . does not

constitute sufficient evidence in itself to sustain a conviction.” (*Id.* at p. 512.)

Accordingly, the case was remanded for a determination of whether the “residue was usable for sale or consumption.” (*Ibid.*)

In *People v. Rubacalba* (1993) 6 Cal.4th 62 (*Rubacalba*), the defendant dropped a rock of cocaine that was about one-quarter the size of an aspirin. The arresting officer testified that this was a “ ‘usable quantity,’ ” which “ ‘could be placed in a pipe or similar smoking device and smoked.’ ” (*Id.* at p. 64.) After the defendant was convicted of possession of cocaine, he argued, on appeal, that the trial court improperly restricted his right to cross-examine prosecution witnesses regarding the amount of cocaine needed “ ‘to get one high.’ ” (*Ibid.*) Our Supreme Court explained that “the decisions construing *People v. Leal*, *supra*, 64 Cal.2d 504, limit its holding to substances useless in form or quantity. There is no requirement that any particular purity or potential narcotic effect be proven. [¶] . . . [¶] The chemical analysis of the material possessed need only establish the existence of a controlled substance. A quantitative analysis establishing the purity of the controlled substance is not required. [Citations.]” (*Id.* at p. 65.) The court held: “[T]he *Leal* usable-quantity rule prohibits conviction *only when the substance possessed simply cannot be used*, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven.” (*Id.* at p. 66.)

Phillips’s reliance on *People v. Gossett* (1971) 20 Cal.App.3d 230 (*Gossett*), is misplaced. In *Gossett*, the defendant was convicted of unlawfully furnishing heroin. (*Id.* at p. 232.) On appeal, the defendant argued that the heroin sold was not a usable quantity. (*Id.* at p. 234.) In affirming the conviction, the reviewing court reasoned: “[H]ere, the undercover agent, himself a heroin user, testified that the quantity he purchased from defendant would be one dose for an addict. The drug abuse chemist testified that the narcotic substance sold by defendant contained .022 grams of pure heroin, a usable quantity. The fact the parties to the transaction treated it as a salable quantity is evidence that it was a usable quantity.” (*Ibid.*)

Phillips suggests that we must reach a contrary conclusion to that reached by the *Gossett* court because “in the present case, there was no evidence introduced about the quantity of oxycodone, either in general or by weight.” But, neither *Rubacalba* or *Gossett*, nor any of the other opinions cited by Phillips, hold that a narcotics conviction must be reversed without explicit testimony on the usable amount issue. Opinions are not authority for propositions not considered. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 4.) And, in fact, our Supreme Court has explicitly held that there is no requirement to show purity or quantity. (*Rubacalba, supra*, 6 Cal.4th at p. 66.)

We think this case is actually most similar to *People v. Stafford* (1972) 28 Cal.App.3d 405, in which the reviewing court rejected a contention that substantial evidence did not support the defendant’s possession of a usable quantity of heroin. (*Id.* at p. 413.) The court explained: “[The testifying chemist] did not . . . weigh the capsules or their powdery contents, and he did not testify to any opinion as to the quantity of powder or heroin in the capsules. Nor does the written record contain any evidence concerning the quantity of the contents of the capsules. We have, however, inspected the exhibit. The capsules are transparent. They are full of white powder. We hold that the real evidence, together with the chemist’s testimony, creates a prima facie case that defendant possessed a usable quantity. [Citation.]” (*Id.* at pp. 413–414.)

Here too, although there was no opinion testimony on the usable amount issue, the physical evidence was sufficient to allow the jury to reasonably conclude, beyond a reasonable doubt, that the one partial tablet (“half or three-quarters of a pill”) was a usable amount of oxycodone, rather than a useless trace amount. The inference that the oxycodone remained in a form and quantity that can be used is further supported by the fact that Phillips was carrying the partial tablet in a canister around his neck. Substantial evidence supports Phillips’s conviction for possession of oxycodone.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.