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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN MICHAEL ROSEVEAR,

Defendant and Appellant.

A140678

(Contra Costa County
Super. Ct. No. 131300-6)

Sean Michael Rosevear appeals from a judgment upon a jury verdict finding him guilty of possessing methamphetamine with the intent to sell. (Health & Saf. Code, § 11378, count 1.) He contends that there is insufficient evidence to support the finding of possession with intent to sell, that the prosecutor committed misconduct during closing argument, and that these cumulative errors violated his constitutional rights. We affirm.

I. FACTS

On May 25, 2013, Officer Rick Hoffman of the Antioch Police Department noticed defendant inside of a gas station at 2710 Contra Loma Boulevard in Antioch, California. He approached defendant and proceeded to perform a lawful search of defendant’s person.

Hoffman found one clear sandwich bag containing a white crystallized substance inside defendant’s pocket. Hoffman also found a cell phone on defendant and an insignificant amount of money in defendant’s truck. He did not find anything else associated with drug use or drug sales inside the truck. He arrested defendant and

charged him with possession with intent to sell. Defendant did not display any signs of being under the influence at the time of arrest.

A criminologist tested the contents of the bag and determined that it contained 27.991 grams of methamphetamine. Hoffman testified that in his experience, most methamphetamine users possess a gram or less, and consume it with pipes, syringes, beverages, or snort it with a dollar bill.

Detective Matthew Koch testified as an expert on distinguishing possession of methamphetamine for sale versus possession for personal use. He stated that he had roughly 16 years of experience in law enforcement, including 40 hours of narcotics training that included methamphetamine. In distinguishing possession for sale versus use, he noted that there is no set list of factors to distinguish the two, but quantity, currency, packaging, scales, pay/owe sheets, a firearm, a cell phone, and a police scanner represent a strong set of indicators. He further noted that the absence of drug user paraphernalia is another indicator he considers when distinguishing possession for use versus sale.

Koch also testified that an average methamphetamine user consumes .10 grams per use and an extremely heavy user might consume 1.7 grams a day. The most common amount found on users is between half a gram and a sixteenth of a gram. Responding to a hypothetical, Koch testified that anyone in possession of 27.991 grams of methamphetamine, without the presence of user paraphernalia, would likely be in possession with the intent to sell. He stated that the amount alone, which could supply up to 270 to 280 uses, was much more than one would possess for personal use. He also testified that the street value of an ounce, or 28.5 grams, was approximately \$650 to \$700.

Defendant did not testify at trial. Dr. Daryl James Clemens testified as a defense expert on the purchase habits, methods of ingestion, amount of usage, and the symptoms displayed by methamphetamine users. In his experience, methamphetamine use depends on the level of user. An average user may consume one to two grams a day. A medium user could consume anywhere from two to six grams a day, which would include sharing

with four to five people. A heavy user may consume anywhere from eight to twelve grams a day.

II. DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends that there is insufficient evidence to support a jury finding of possession with intent to sell. He argues that Detective Koch's testimony that the amount of methamphetamine found on defendant indicated that it was possessed for sale was insufficient evidence of intent.

We review the judgment under the substantial evidence standard. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.) Under this standard, we must view the record in the light most favorable to the People and "must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*Ibid.*; and see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

To sustain a conviction for possession with intent to sell narcotics, the prosecution must show the accused had control over the contraband with knowledge of its character and that such possession was for the purpose of sale. (*People v. Shipstead* (1971) 19 Cal.App.3d 58, 77.) Possession with intent to sell may be proven by circumstantial evidence. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374 (*Harris*.)

Here, it is undisputed that defendant had control over the contraband and knowledge of its character. The question is whether he possessed the methamphetamine for sale.

Defendant contends that Detective Koch's testimony was insufficient to show that he intended to sell the methamphetamine in his possession. He recognizes "experienced officers may give their opinion that the narcotics are held for purposes of sale based upon

such matters as the quantity, packaging and normal use of an individual,” and that convictions of possession for sale have been upheld on the basis of that testimony (*People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862), but argues that in those cases the convictions were supported by more than simply the quantity of the drug.

As the Attorney General points out, however, the testimony of a single witness is sufficient to support the verdict “ ‘unless the testimony is physically impossible or inherently improbable.’ ” (*People v. Brown* (2014) 59 Cal.4th 86, 106.) Here, Koch testified that the large quantity of methamphetamine found on defendant together with the absence of drug user paraphernalia were factors indicating that the drug was possessed for sale. (See *People v. Parra* (1999) 70 Cal.App.4th 222, 227 [sufficient evidence to support conviction where experienced narcotics officer opined that quantity of cocaine seized plus lack of any drug paraphernalia indicated possession with intent to sell].) He also noted that the amount found—27.991 grams of methamphetamine—could supply methamphetamine for up to 270 to 280 uses, far more than necessary for personal use. Even defendant’s expert acknowledged that an average user would consume only one to two grams a day.

People v. Glass (1975) 44 Cal.App.3d 772 (*Glass*), cited by defendant, is inapposite. In *Glass*, the court determined that there was insufficient evidence to support a conviction of possession for sale of amphetamines because the defendant was merely a visitor at the apartment and there was no evidence connecting him to the apartment or showing that he exercised dominion and control over the amphetamines found underneath a couch. (*Id.* at pp. 776–777.)

Defendant cites *Harris, supra*, 83 Cal.App.4th 371, and *People v. Peck* (1996) 52 Cal.App.4th 351, to support his insufficiency of the evidence claim, contending that the absence of drug sale paraphernalia such as packaging, pay/owe sheets, scales, and a firearm more strongly indicate possession for use in this case rather than possession for sale. His reliance on these cases is misplaced. Rather, both cases support the verdict

here. In each case, the courts relied on an officer's opinion that the defendant possessed the drugs for sale.

In *Harris, supra*, 83 Cal.App.4th 371, the defendant was an inmate at Atascadero State Hospital and was found in possession of a large quantity of marijuana and methamphetamine and more than 800 postage stamps. (*Id.* at pp. 373–374.) An officer testified that patients used stamps to buy contraband. (*Ibid.*) In holding the officer's testimony in *Harris* sufficient to support the jury's finding that the defendant possessed the drugs for sale, the court stated, “[t]he large quantity of drugs, the postage stamps, and the manner in which the drugs were smuggled into the hospital supported [the officer's] opinion that appellant possessed the drugs for sale.” (*Id.* at p. 374.)

In *People v. Peck, supra*, 52 Cal.App.4th at p. 356, the defendant was a priest in a religious group that used marijuana as a sacrament. He was apprehended at a border patrol checkpoint with 40 pounds of marijuana in the trunk and \$2,350 under the dashcover of his car. (*Ibid.*) The trial evidence included a sheriff investigator's opinion that, based on the quantity of marijuana the defendant possessed, the contraband was possessed with the intent to sell. (*Id.* at p. 357.) The court held that the investigator's opinion was sufficient to support a conviction of possession for sale. (*Ibid.*)

Here, as well, Koch's testimony based on the quantity of methamphetamine found and the lack of any drug user paraphernalia was sufficient to support defendant's conviction of possession with intent to sell. The fact that other indicia of intent to sell, such as possession of a large sum of cash or other tender, were not present does not undercut Koch's opinion. His extensive experience in the field of identifying controlled substances and, more specifically, in determining whether controlled substances are possessed for the purpose of sale or personal use, sufficed to support the verdict.

Defendant would have this court conclude that the quantity of controlled substances alone can never provide sufficient evidentiary support for an expert's opinion that the contraband was possessed for sale. The law does not so provide.

B. Prosecutorial Misconduct

Defendant next contends that the prosecutor committed misconduct during closing argument by stating “[t]here are a number of—and I’ll use air quotes—explanations for why Mr. Rosevear might have had 280 dosage units of methamphetamine, but there’s only one reasonable one and that’s that he intended to sell it. [¶] The evidence is not there. There is nothing to suggest that he had it for his own personal use, nothing.” The court overruled defendant’s objection to the prosecutor’s argument, stating, “She’s simply arguing the alternatives between reasonable and unreasonable interpretations of the evidence.”

Defendant argues that the prosecutor’s statement was prejudicial because it in effect argued that defendant was required to show that he intended to use the drugs for personal use. Hence, defendant asserts that the prosecutor’s argument undermined the reasonable doubt burden of proof and presumption of innocence, and resulted in a violation of his constitutional rights.

Prosecutorial misconduct requires reversal only when, viewing the record as a whole, it results in a miscarriage of justice. (*People v. Green* (1980) 27 Cal.3d 1, 29, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239.) A prosecutor commits misconduct under state law if he or she uses “ ‘deceptive or reprehensible methods’ ” in an attempt to persuade the jury. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, contrary to defendant’s argument, the prosecutor did not suggest that defendant was required to produce evidence that the methamphetamine he possessed was for personal use. Rather, when read in the context of the prosecutor’s entire argument, she was simply arguing that the jury infer, based on the evidence, that defendant did not possess the methamphetamine for his personal use. The prosecutor thus was making a proper comment about the state of the evidence. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [distinction exists between permissible comment that a defendant has not produced any evidence and an improper statement that a defendant has a duty to produce evidence].)

Indeed, prior to defense counsel’s closing argument, the court explained its reasoning for overruling defendant’s objection to the prosecutor’s closing argument: “Ms. Murray [deputy public defender] at one point—Ms. Tavenier [deputy district attorney] was arguing during the course of her opening closing argument that there was no evidence of Mr. Rosevear using methamphetamine. You objected on the ground of shifting the burden of proof, and I overruled that. And the reason for that is this: In the abstract, one can say that two reasonable inferences can be drawn from possession of methamphetamine in this case. One is—one reasonable inference would be that he possessed it for sale, and another would be that he possessed it simply for use and, in fact, you argued the circumstantial evidence instruction to the jury pointing out to them that when there are two reasonable inferences, you can—you must acquit. [¶] However, this is not a person in the abstract. This is Mr. Rosevear. So Mr. Rosevear can say that, although theoretically or in the abstract, two reasonable inferences can be drawn, in this case, you cannot draw those two—drawing of those two inferences is not reasonable. Just drawing the one of sale is reasonable, and not drawing the one of usage because there is, as she would argue, there is some evidence that he wasn’t using and there is no evidence presented that he was a user. So that’s her argument, all by way of saying, [i]t’s not reasonable to infer in this case that the product was being used for usage—simple usage, as opposed to possession for sale or possession for sale and usage. [¶] [MS. MURRAY]: So I— [¶] [THE COURT]: So it doesn’t relieve her of the burden of proving that it was for sale, but the fact that there was no evidence—but she can point out that there was no evidence of usage to show that the alternative explanation for the possession of the item is unreasonable.”¹

¹ Defendant’s reliance on *People v. Centeno* (2014) 60 Cal.4th 659 is misplaced. There, our Supreme Court determined that the prosecutor’s argument had confused the concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. (*Id.* at pp. 672–673.) The prosecutor “repeatedly suggested that the jury could *find defendant guilty* based on a ‘reasonable’ account of the evidence. These remarks clearly diluted the People’s burden.” (*Id.* at p. 673.) Here, the prosecutor did not confound the concepts of evaluating inferences from the evidence with the reasonable

The court gave the jury the standard instructions on reasonable doubt and burden of proof. And both the prosecutor and defense counsel emphasized the prosecutor's burden of proof. On this record, the court did not abuse its discretion in overruling defendant's objection to the prosecutor's argument. It is not reasonably likely the jury construed the prosecutor's argument to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt.

Next, defendant contends that the prosecutor's argument that "[t]he evidence is not there" constituted *Griffin*² error. He argues that the statement was an inappropriate comment on his failure to testify. The *Griffin* court held that the Fifth Amendment forbids "comment by the prosecution on the accused's silence." (*Id.* at p. 615.)

The Attorney General argues that defendant waived his right to raise *Griffin* error on appeal because he objected on grounds of "burden shifting" at the trial level, not *Griffin* error. We agree.

Defendant concedes that his counsel did not object on the basis of *Griffin* error but argues that such an objection would have been futile in light of the court's ruling on his burden shifting objection. Although "[t]he lack of a specific objection on the ground now urged precludes consideration on appeal . . ." (*People v. Price* (1991) 1 Cal.4th 324, 440; *People v. Lancaster* (2007) 41 Cal.4th 50, 84, [defendant's failure to object waives *Griffin* error]), we consider the issue to obviate any claim that his trial counsel was ineffective for failing to make the objection.

Under *Griffin*, error is committed whenever the prosecutor or the court comments upon a defendant's failure to testify. Here, the prosecutor's comment that there was no evidence that defendant possessed the methamphetamine for his own personal use was a

doubt standard of proof. Her suggestion that a reasonable explanation for defendant's possession of 280 doses of methamphetamine was that he intended to sell it was simply a reference to the state of the evidence and a suggestion that the correct inference was that the methamphetamine was possessed for sale rather than personal use.

² *Griffin v. California* (1965) 380 U.S. 609.

fair comment on the state of the evidence. The *Griffin* rule “does not extend to comments on the state of the evidence” (*People v. Burns* (1969) 270 Cal.App.2d 238, 247.)

In light of our disposition of the issues raised on appeal, defendant’s cumulative error argument fails.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.