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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH BROADNAX,

Defendant and Appellant.

B252681

(Los Angeles County
Super. Ct. No. NA094937)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Jean, Jr., Judge. Affirmed.

Karen Hunter Bird, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

An information, filed on June 11, 2013, charged Kenneth Broadnax with one count of sale of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). The information specially alleged two prior convictions for purposes of a sentence enhancement under Health and Safety Code section 11370.2, subdivision (a). A jury found Broadnax guilty of the charge. Broadnax waived a jury trial on the prior conviction allegations. The trial court found that Broadnax had two qualifying convictions under Health and Safety Code section 11370.2, subdivision (a), but dismissed one of them on the ground that it had been committed many years ago, in 1988. The court sentenced Broadnax to a county jail term of eight years, consisting of the upper term of five years for the violation of Health and Safety Code section 11352, subdivision (a), plus a three-year enhancement under Health and Safety Code section 11370.2, subdivision (a). Broadnax appealed, contending that the judgment should be reversed because substantial evidence does not support his conviction, the instructions confused the jury on the requirement of conviction by proof beyond a reasonable doubt and the prosecutor committed misconduct during closing argument. We disagree with Broadnax's contentions and thus affirm the judgment.

DISCUSSION

1. *Substantial Evidence Supports the Conviction*

In reviewing challenges to the sufficiency of the evidence, we “consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]” (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted.) Substantial evidence is that which is “reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Broadnax contends the evidence is not sufficient to support his conviction for violation of Health and Safety Code section 11352, subdivision (a). To convict under that provision, the jury must conclude beyond a reasonable doubt that the defendant sold

a controlled substance and knew of its presence and nature as a controlled substance. The prosecutor proceeded on an aiding and abetting theory, and the trial court instructed the jury on aiding and abetting principles.

According to the evidence, viewed in the light most favorable to the judgment, the police arranged a controlled buy of cocaine base about 12:00 p.m. on February 27, 2013, at an apartment complex in Wilmington. An informant, who had served in this capacity numerous times and previously involving the same individuals, entered the apartment occupied by Rosalie Smith and Raynae Mack, wearing a device to procure an audio recording of the incident. She carried no drugs on her person and had three marked \$20 bills given to her by the police. Smith asked the informant if she needed anything, and the informant replied “a 40,” which means \$40 worth of rock cocaine. Mack used the informant’s cellular telephone to call someone and told that person he needed “40 of T-shirt,” also meaning rock cocaine. Mack said he would meet the person with the drugs at an auto-parts store, but it would take several minutes. In the meantime, Mack took one of the marked \$20 bills from the informant to go to the store to add minutes to Smith’s cellular telephone. After Mack left, the informant received a call from the same number Mack had called. Smith spoke to the caller, said “[h]e is here,” and took the two remaining marked \$20 bills from the informant. Smith then went outside, gave Mack the bills and took from Mack a small bag that appeared to come from a liquor store. Smith returned to the apartment with the bag, containing beer, water and minutes for her telephone. While Smith and the informant were in the apartment, Mack walked down the street to the parking lot of the auto-parts store and got into a red Lexus that was parked in the lot with someone in it. Mack exited the Lexus about one minute later, and the person inside the Lexus drove away. Mack returned to the apartment, having been gone about 10 minutes, and gave the informant rock cocaine. The informant left the apartment and gave the drugs to a nearby police officer. About one mile from the apartment complex, the police conducted a traffic stop of the red Lexus. Broadnax was driving the Lexus. From his person, police recovered two of the informant’s marked \$20 bills.

The evidence also includes two additional controlled buys involving the informant, Broadnax, Mack and Smith, on February 7 and February 13, 2013. On February 7, about 3:00 p.m., the informant entered the apartment complex with instructions to buy \$40 worth of rock cocaine. Mack exited the complex and walked to a nearby burger stand where he met Broadnax, who was driving a red Lexus. Mack got into the car, and Broadnax drove around the block and dropped Mack off at the apartment complex. Mack gave rock cocaine to the informant, who then left the complex and gave the drugs to the police. On February 13, about 4:00 p.m., the informant called Smith and told her she wanted \$40 of rock cocaine. The informant met Smith and Mack on a corner and then went to the apartment complex. Mack walked to the nearby burger stand where he met Broadnax driving a white pickup truck. Mack got into the truck, and Broadnax drove away for about 10 minutes, while followed by undercover police, and then dropped Mack off at the apartment complex. Mack went into the complex, and the informant exited soon thereafter and gave the drugs to police.

This evidence is sufficient to demonstrate that Broadnax aided and abetted the sale of cocaine on February 27, 2013. He met Mack in a parking lot. Mack entered his car. Mack exited his car and returned to the apartment complex, where he gave cocaine base to the informant. Police later stopped Broadnax in his car and found on his person two of the marked \$20 bills previously possessed by the informant. The jury could conclude from this evidence that Broadnax aided and abetted the sale of what he knew to be cocaine base. The evidence of the other two incidents reinforces the jury's conclusion. Broadnax's arguments to the contrary simply ask us to reweigh the evidence or to substitute contrary inferences for those of the jury, neither of which we can do based on the limited appellate review of substantial evidence claims.

2. *The Jury Instructions Did Not Lower the Burden of Proof to Convict Broadnax*

Broadnax contends that, because the case against him was based on circumstantial evidence, the instructions that the jury could consider evidence of other crimes for a limited purpose if it found the crimes had been committed by a preponderance of the

evidence allowed the jury to convict Broadnax of the charged offense based on that lower standard of proof. We disagree.

The trial court instructed the jury under CALJIC No. 2.90, “A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything related to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.” With respect to circumstantial evidence, the court told the jury under CALJIC No. 2.01, “[E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In another words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.” The jury thus was told that to convict Broadnax it had to find guilt beyond a reasonable doubt, including finding proof beyond a reasonable doubt of facts or circumstances supporting inferences used to establish guilt.

The instructions on the relevance and proof of “other crimes” were limited to those crimes. The trial court instructed the jury under CALJIC No. 2.50, “Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the *limited purpose* of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed

the crime, if any, of which the defendant is accused. [¶] For the *limited purpose* for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose.” (Italics added.) The court continued under CALJIC No. 2.50.1, “Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed crimes other than that for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crimes. [¶] *If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.*” (Italics added.)

Reading the instructions, as we must, as a whole (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182), the instructions specifically limited the preponderance-of-the-evidence standard to the “other crimes” and directed the jury several times that it could not convict Broadnax of the charged crime unless it found proof beyond a reasonable doubt that he was guilty of that crime. Both counsel, referring to the instructions in closing argument, repeatedly reinforced the People’s burden of proof beyond a reasonable doubt for the charged crime. Broadnax nevertheless maintains that confusion might have occurred because the circumstantial evidence instruction under CALJIC No. 2.01 requires proof beyond a reasonable doubt of facts and circumstances on which inferences rest, but “other crimes” can be proved by a preponderance of the evidence based on circumstantial evidence. Any dichotomy in these instructions is explained by the “special rules” created “for the consideration of other crimes evidence.” (*People v. Medina* (1995) 11 Cal.4th 694, 764.) Taking the instructions as a whole, the preponderance-of-the-evidence standard was limited to the “other crimes” evidence, and the jury knew it could not convict Broadnax of the charged crime absent proof beyond a reasonable doubt. It is not reasonably probable that the jury applied the instructions in a

constitutionally deficient manner to convict Broadnax by a standard of proof less than beyond a reasonable doubt. (*Letner and Tobin*, at p. 182.)¹

3. *No Basis Exists to Reverse the Judgment for Prosecutorial Misconduct*

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Broadnax contends the prosecutor committed misconduct by making improper remarks during his rebuttal closing argument. According to Broadnax, the prosecutor’s statements that “there is no explanation as to why [Broadnax] has the buy money” and “[t]here is no explanation for” “the same exact plan, same exact conduct” in all three incidents improperly “call[ed] into question [Broadnax’s] failure to testify because only [he] would be able to answer these questions.” We disagree. Smith and Mack were involved in the interactions with the informant who supplied the marked bills so either of those individuals if called to testify could have explained why Broadnax had one of the bills. Moreover, in context, the remarks, based on the instructions, were argument to the jury that the only reasonable explanation for the evidence was that Broadnax was guilty. As a result, the prosecutor’s remarks were not necessarily, as Broadnax contends, a comment on his failure to testify.

¹ Broadnax also contends the word “crime” in CALJIC No. 2.50 prejudiced him because CALCRIM No. 375 uses different terminology. Although the CALCRIM instruction does not say “crime,” the jury under CALJIC Nos. 2.50 and 2.50.1 was directed on the standard of proof and the limited purpose of the evidence of the other two incidents involving the informant, and nothing suggests that the mere use of the word “crime” prejudiced Broadnax. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 763 [approving use of other crimes evidence and related instruction under CALJIC].)

The final remark that Broadnax challenges is the prosecutor's statement that "these are smart people. They know that the police have been trying to track them for years." Broadnax maintains that this remark contains facts that were not supported by the evidence. As to this remark, even if improper and whether viewed by itself or together with the other challenged statements, it is not reasonably probable Broadnax would have obtained a more favorable verdict absent the alleged misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1220 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice to claim of prosecutorial misconduct].) The trial court instructed the jury pursuant to CALJIC No. 2.60, "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." The court further directed, "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element." The court also told the jury, "Statements made by the attorneys during the trial are not evidence." It is presumed the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 [alleged prosecutorial misconduct not prejudicial when trial court properly instructed on the law because jury presumed to have followed instructions]; *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 [jury presumed to have treated "prosecutor's comments as words spoken by an advocate in an attempt to persuade"].) In addition, the evidence against Broadnax, although circumstantial, was strong. As a result, given the strength of the evidence and the instructions, the purported misconduct did not prejudice Broadnax.

DISPOSITION

The judgment is affirmed.

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ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.