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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Glenn)

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THE PEOPLE,

Plaintiff and Appellant,

v.

CHARLES EDWARD GREEN,

Defendant and Appellant.

C074862

(Super. Ct. No. 13NCR09622)

Following a court trial, the trial court convicted defendant Charles Edward Green of offering to sell a controlled substance and felony possession of a controlled substance. The trial court also found true enhancement allegations that the offense took place within 1,000 feet of a school while minors were using the facility (the school zone enhancement). The trial court sentenced defendant to 13 years four months in prison.

Defendant now contends there was insufficient evidence to support the school zone enhancement, and the abstract of judgment must be corrected to conform to the trial court's oral pronouncement of judgment.

The People respond that substantial evidence supports the school zone enhancement, but that the problems with sentencing are not limited to the abstract of judgment. The People argue the trial court imposed an unauthorized sentence and that we must remand for resentencing.

We conclude substantial evidence supports the school zone enhancement, and we will affirm defendant's convictions. However, we agree with the People that there are sentencing errors, and we will remand the matter to the trial court for resentencing.

### BACKGROUND

Craig Salvagno, Angela Hillyard and Jennifer Sites were observing softball practice at a baseball diamond in Vinsonhaler Park in Orland on February 21, 2013. Salvagno was watching from his car in the parking lot. He was about 100 feet from the baseball diamond, and about 200 yards from the high school football field. Defendant rode his bicycle up to Salvagno and asked if Salvagno knew anyone who wanted to buy Norco. Salvagno said he did not.

Defendant then approached Hillyard, who was also watching practice from her car in the parking lot. Defendant asked if she knew anyone interested in buying Norco. Hillyard said no. Defendant asked if she wanted to buy some, and she declined. Defendant left and rode toward the baseball diamond. Salvagno went over to Hillyard to discuss what had happened with defendant. Salvagno then called the police.

Sites was sitting in the bleachers with her younger daughter watching her older daughter practice. Defendant rode by on his bicycle, shouting, "Yellow Norco pills." Sites said, "Excuse me?" Defendant responded, "Would you like to buy a yellow Norco pill?" Sites declined and moved herself and her daughter to another area of the bleachers. Defendant continued to ride his bicycle in the area; by the time he returned toward the parking lot, police had responded to Salvagno's call, and Sites identified defendant to the police.

Officers Kalen Hagins and Severn Lemstrom searched defendant. He had a manila envelope containing a prescription bottle of hydrocodone. There was no name on the bottle's label, but defendant stated it was his prescription for back pain. The bottle had 83 tablets of hydrocodone. Lemstrom asked defendant if he "was selling drugs at the Vinsonhaler Park." Defendant said, "No."

The grandstand area of Vinsonhaler Park is by the public pool and behind the Orland High School football field. The park's baseball diamond is adjacent to the high school football field, and they are separated by a cyclone fence. Officer Lemstrom described the baseball diamond as being in the park, next to the city pool, and east of the high school football field. Sites testified the baseball diamond was not on school property, as opposed to the football field which is on school grounds.

The trial court took judicial notice that Orland High School uses the baseball diamond and that the facility is part of the high school. Specifically, the trial court stated, "the baseball field is part of the high school, by the way, and I can take judicial notice of that. It is where the high school team plays its football -- baseball, which is next to the football. If you want me to take judicial notice, I will. This is a -- This is a facility -- as part of that facility is the baseball field, and that's Orland High School." Defense counsel responded, "Okay; that helps, your Honor. Thank you." The trial court went on, "Okay. And this is Vinsonhaler Park, which we all know that live here, is used by the community, but it's on part of the school property." Defense counsel did not object to either the judicial notice or the trial court's statements.

An information charged defendant with three counts of offering to sell a controlled substance (Health & Saf. Code, § 11352, subd. (a) -- counts 1 through 3), and one count of felony possession of a controlled substance (Health & Saf. Code, § 11351 -- count 4). As to counts 1 through 3 the information also alleged the offense took place within 1,000 feet of a school while minors were using the facility (Health & Saf. Code, § 11353.6, subd. (b)) and that defendant had two prior felony convictions (Pen. Code, §§ 667, subd. (b), 667.5, subd. (b), 11701.12, subd. (a); Health & Saf. Code, § 11370.2).<sup>1</sup> Defendant waived his right to a jury trial.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

The trial court found beyond a reasonable doubt that defendant attempted to sell illegal narcotics to three different individuals, as alleged in counts 1 through 3. As to the school zone enhancement allegations, the trial court found “[t]his offense did take place within 1,000 feet of a school; minors were using a facility connected with the high school. Even if it weren’t part of the high school, it is a public park. It’s still within a thousand feet of a school, and that’s what I think the essential allegation is for.” The trial court found the enhancements true.

The trial court sentenced defendant to an aggregate prison term of 13 years four months, consisting of the following: on count 1, the midterm of four years doubled to eight years pursuant to the prior strike enhancement, plus three years for the Health and Safety Code section 11370.2, subdivision (a) prior conviction enhancement, one year for the section 667.5, subdivision (b) prior conviction enhancement, and one-third the midterm of 16 months for the school zone enhancement. The trial court imposed but stayed sentences on counts 2, 3, and 4.

## DISCUSSION

### I

Defendant contends there was insufficient evidence to support the school zone enhancement. He claims the baseball diamond is not part of the school facility or campus, there is no evidence the minors playing on the baseball field were using a school facility, and the prosecution was required to prove there were students using the school facility at the time of the offense.<sup>2</sup>

On a claim of insufficient evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence such that

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<sup>2</sup> Defendant filed a request for judicial notice asking this court to take judicial notice of (1) the 2007 Glenn County Needs Assessment Report, (2) the Orland City Counsel minutes of June 4, 2012, and (3) the City of Orland Park Guide. We denied the request.

a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) Substantial evidence is evidence which is reasonable, credible, and of solid value. (*Ibid.*) Evidence which merely raises a strong suspicion of the defendant's guilt is insufficient to support a conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In reviewing the record, we presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) And we resolve all conflicts in the evidence and all questions of credibility in favor of the verdict. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) We will reverse a judgment for insufficient evidence only if it appears that upon no hypothesis whatever is there substantial evidence to support the verdict. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The school zone enhancement statute provides in pertinent part that where the specified drug offense “takes place upon the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school during hours that the school is open for classes or school-related programs, or at any time when minors are using the facility where the offense occurs,” the offender shall receive an additional punishment of three, four or five years at the trial court's discretion. (Health & Saf. Code, § 11353.6, subd. (b).) The enhancement “applies whenever students are on campus -- whether school is open or closed -- and the offense takes place either on campus or in a public area within 1,000 feet of the school boundary.” (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1397, italics omitted.) However, the issue is not the “proximity between the offender and any children who might be in the 1,000-foot zone when school is closed.” (*Id.* at p. 1399, italics omitted.) The enhancement does not apply to “drug offenses committed in proximity to children when the nearby campus is closed and deserted.” (*Ibid.*) Thus, the People were required to establish both that the offense took

place on either a campus or in a public area within 1,000 feet of the school boundary *and* that minors were present on campus at the time of the offense.

Defendant does not challenge the sufficiency of the evidence that the offense occurred either on campus or within 1,000 feet of the campus. This element was established irrespective of whether Vinsonhaler Park is part of the high school campus. There was no evidence on the issue of whether the high school was open for classes or school-related programs. Thus, the evidentiary challenge here arises as to whether there were minors using the school facility. The only evidence as to the presence of minors was that there were children using the baseball field at Vinsonhaler Park. Because the offense requires both proximity to a campus and minors' presence *on the campus*, the issue of whether Vinsonhaler Park was part of the campus is not legally irrelevant.

Defendant contends the evidence "make[s] perfectly clear" the park is not part of the school campus. He acknowledges the trial court "filled [the] evidentiary gap" by taking judicial notice that the baseball field at Vinsonhaler Park is part of the high school. He argues the trial court erred in taking judicial notice, both as a matter of procedure and fact.

But defendant's trial counsel did not object to the trial court taking judicial notice that the baseball diamond was part of the campus. "Judicial notice is a judicial short-cut, a doing away [in the case of evidence] with the formal necessity for evidence because there is no real necessity for it." (*Varcoe v. Lee* (1919) 180 Cal. 338, 344.) As with other evidentiary issues, the failure to make a timely and specific objection forfeits the issue on appeal. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 20; Evid. Code, § 353.) We disagree with defendant's assertion that any objection would have been futile. The trial court had not made other rulings suggesting an objection would have been futile, nor did the trial court's statements indicate an unwillingness to sustain a properly taken objection. In fact, the trial court stated it could take judicial notice that the baseball field was part of the high school, "[i]f you want me to take judicial notice, I will." Defense

counsel responded, “Okay; that helps, your Honor. Thank you.” That exchange in no way supports the conclusion that an objection would have been futile. Furthermore, an objection here would have afforded the trial court the opportunity to correct any error. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 9-10.) Accordingly, defendant forfeited his contention on appeal by failing to object to the trial court taking judicial notice.

Anticipating this conclusion, defendant contends the failure to object to the court’s offer to take judicial notice was ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant must prove that (1) trial counsel’s representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*People v. Maury* (2003) 30 Cal.4th 342, 389; *Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [80 L.Ed.2d 674, 692-693].) “Prejudice is shown when there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 215.) If defendant makes an insufficient showing on either one of these components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington, supra*, 466 U.S. at p. 687 [80 L.Ed.2d at p. 693].)

“It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.)

On the record before us, we cannot categorically state that there could be no satisfactory explanation for counsel's failure to object. The trial court said the high school team played baseball on the baseball diamond and the facility is part of the high school, adding that "Vinsonhaler Park, which we all know that live here, is used by the community, but it's on part of the school property." The statements suggest that defense counsel could be part of the community. Defense counsel's acquiescence in the trial court's offer to take judicial notice could have been based on defense counsel's shared knowledge of the facts and circumstances. There is nothing in the record that demonstrates otherwise.

Nor can we say, to the extent there was any deficiency, that it resulted in prejudice to defendant. To establish a reasonable probability that the result of the proceeding would have been different, defendant would have to establish that the park was not, in fact, on school property or used as part of the school facility. There is testimony from witnesses suggesting the park is not on school grounds, but there is no indication in the record that those witnesses had actual knowledge as to the property boundaries of the school. In addition, because the trial court took judicial notice of the fact, we cannot know what evidence the prosecution might have been able to produce on this point. Nor can we know if the prosecution could have put forward evidence that the school was, in fact, being used by minors at the time of the offense. On this record, we cannot say there is a reasonable probability the result would have been different.

Defendant's contentions lack merit.

## II

Defendant next contends the abstract of judgment must be corrected to conform to the trial court's oral pronouncement of judgment.

The trial court imposed an eight-year term (the midterm of four years, doubled pursuant to the strike) on count 1. As to counts 2 and 3, the court imposed a consecutive term of one-third the midterm, stayed. The abstract of judgment reflects the sentences

imposed on counts 2 and 3, but does not reflect the sentences were stayed under section 654.

The People respond that the trial court never discussed either double punishment or section 654. The People go on to contend there is no statutory authority for staying the consecutive subordinate terms; thus, this was an unauthorized sentence.

“[T]he lack of an objection by trial counsel to the consecutive sentence . . . does not constitute a waiver of the section 654 issue. ‘It is well settled . . . that the court acts in “excess of its jurisdiction” and imposes an “unauthorized” sentence when it erroneously stays or fails to stay execution of a sentence under section 654’ and therefore a claim of error under section 654 is nonwaivable. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)” (*People v. Le* (2006) 136 Cal.App.4th 925, 931.) “A sentence cannot be imposed so as to simultaneously run consecutively to another count and be stayed pursuant to Penal Code section 654; these are mutually exclusive options.” (*People v. Toure* (2015) 232 Cal.App.4th 1096, 1107.) Thus, the trial court erred in both imposing consecutive sentences on counts 2 and 3, and staying execution of those sentences.

“ ‘ “Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the ‘intent and objective’ of the actor.” [Citation.]’ [Citation.] ‘ “The defendant’s intent and objective present factual questions for the trial court. . . .” [Citation.]’ [Citation.] The trial court usually makes these determinations after hearing all of the facts and circumstances of the case at trial.” (*People v. Archer* (2014) 230 Cal.App.4th 693, 703.) “ ‘In sentencing pursuant to Penal Code section 654, the trial court retains discretion to impose punishment for the offense that it determines, under the facts of the case, constituted the defendant’s “primary objective” ’ keeping in mind the overall purpose of section 654. [Citation.] ‘The protection against multiple punishment

is to insure that the defendant's punishment will be commensurate with his criminal liability.’ [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 268.)

We will remand the matter to the trial court to exercise its discretion under section 654 and make any factual determinations appropriate to the exercise of that discretion.

### III

The People further contend the trial court imposed an unauthorized sentence when it sentenced defendant to one-third the midterm on the school zone enhancement. The People point to Health and Safety Code section 11353.6, subdivision (e), which provides: “The additional terms provided in this section shall be in addition to any other punishment provided by law and shall not be limited by any other provision of law.” The People argue that language required the trial court to impose a full consecutive term based on the statutory triad.

Defendant responds that the school zone enhancement is one of the enhancements to which section 1170.1 expressly applies. But section 1170.1 provides in pertinent part: “The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.” That is, “[s]ection 1170.1, subdivision (a) applies the one-third limit to ‘specific enhancements applicable to those subordinate offenses.’ ” (*People v. Beard* (2012) 207 Cal.App.4th 936, 941.) It does not apply the one-third limit to specific enhancements applicable to the *principal* offense.

Here, the information charged defendant with a specific enhancement under Health and Safety Code section 11353.6, subdivision (b) as to counts 1, 2, and 3.

The trial court selected count 1 as the principal offense and counts 2 and 3 as subordinate offenses. The trial court then imposed a sentence of 16 months, one-third the midterm, for the Health and Safety Code section 11353.6, subdivision (b) enhancement applicable to count 1. The trial court did not impose any sentence on the Health and Safety Code section 11353.6, subdivision (b) enhancements applicable to counts 2 and 3. The prosecution argued to the trial court that as an enhancement to the principal term, the sentence on the school zone enhancement should be full term. The prosecution was correct. The trial court should have imposed a full term sentence on the school zone enhancement applicable to count 1, the principal offense. Moreover, the trial court should have imposed sentences of one-third the midterm on the two subordinate enhancements applicable to counts 2 and 3.

We will remand this matter to the trial court for resentencing.

#### DISPOSITION

Defendant's convictions are affirmed. The matter is remanded to the trial court for resentencing on counts 2 and 3 and the enhancement allegations under Health and Safety Code section 11353.6, subdivision (b).

MAURO, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.