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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND DAVID ELLIS,

Defendant and Appellant.

D058667

(Super. Ct. No. SCE285569)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Affirmed.

INTRODUCTION

A jury convicted Raymond David Ellis of possessing a controlled substance for sale (Health & Saf. Code, § 11378).¹ In addition, Ellis admitting having a prior strike conviction (Pen. Code, §§ 667, subd. (b)-(i), 668, 1170.12). The trial court sentenced Ellis to eight months in prison consecutive to Ellis's sentence in another case.

¹ All further statutory references are also to the Health and Safety Code unless otherwise specified.

Ellis contends the trial court deprived him of the effective assistance of his defense counsel by preventing his defense counsel from demonstrating a point during closing arguments. We conclude any error was harmless and affirm the judgment.

BACKGROUND

Trial Evidence

El Cajon police detective William Guerin and other officers lawfully searched Ellis's home. In the kitchen, the officers found a plastic bag containing 2.78 grams of crystal methamphetamine, a black pouch containing 21.45 grams of methamphetamine and a white plastic spoon with methamphetamine residue on it, and over 75 pieces of white plastic approximately three inches square cut from a shopping bag. Guerin testified that the plastic shopping bag pieces are often used to package methamphetamine or other drugs.

The officers also found a scale on the kitchen counter and another in the master bedroom. Both scales had methamphetamine residue on them. Guerin testified scales are commonly used to weigh drugs for sale. Because of the quantity of drugs found in Ellis's home, particularly the black pouch with the spoon, as well as the scales with residue and the packaging material, Guerin believed Ellis possessed the methamphetamine for sale.

On cross-examination, Guerin testified he only found evidence of one person living in Ellis's home, but he did not know whether other people came and went from the home, or stayed overnight. He also did not know who brought the methamphetamine into Ellis's home or how long it had been there. In addition, he did not actually catch Ellis selling drugs and did not find large amounts of cash, weapons, or ledgers documenting

drug sales in Ellis's home. Guerin subsequently testified the absence of such ledgers did not change his opinion that Ellis possessed the methamphetamine for sale.

Defense Counsel's Closing Arguments

During closing arguments, defense counsel asked jurors 7 and 9 what was under their chairs. The prosecutor objected to defense counsel's direct communication with the jurors, and the trial court agreed defense counsel's inquiry was improper. Defense counsel then asked the jurors if he could look under their seats. The prosecutor again objected and the trial court held a sidebar conference.

During the sidebar conference, defense counsel indicated he had placed a little cup of sugar under the jurors' chairs. He stated he had performed the same demonstration in every drug sales trial he had handled in the preceding 12 years. He intended to argue by analogy that the existence of drugs in Ellis's home did not mean Ellis knew the drugs were there and intended to sell them. In defense counsel's view, the demonstration was "almost like using a poster board."

The trial court disagreed with defense counsel's view, finding the demonstration misleading. The trial court also found it improper for defense counsel to speak directly to jurors and characterized the demonstration as "theatrics" and "cheap histrionics." The trial court prohibited defense counsel from going forward with the demonstration and admonished him not to refer to it; however, the trial court indicated defense counsel could use some other verbal example to make his point. The trial court then instructed the jury "to disregard the comments of counsel earlier, directed to any of the jurors" as "[t]hey were not properly made."

After this instruction, defense counsel briefly continued with his arguments. As to whether Ellis knew the drugs were in his home, defense counsel pointed out that if the police did not know how or when the drugs got into Ellis's home, then "how do we know?"

DISCUSSION

Ellis contends the trial court's refusal to allow defense counsel to proceed with the demonstration denied him an opportunity to argue a critical defense theory (i.e., that he did not know the methamphetamine was in his home). Consequently, he contends the trial court deprived him of the effective assistance of defense counsel and relieved the prosecution of its burden to prove its case beyond a reasonable doubt. We need not decide whether the trial court improperly disallowed the demonstration as we conclude such error, if any, was harmless.

In addition to charging Ellis with possession of a controlled substance for sale (§ 11378), the prosecution charged Ellis with the lesser included offense of possession of a controlled substance (§ 11377, subd. (a)). Defense counsel's theory of the case was that Ellis possessed the methamphetamine for his personal use and not for sale.² Consistent with this theory, defense counsel conceded during his closing arguments that Ellis was

² Although many of defense counsel arguments in support of this theory occurred after the trial court disallowed defense counsel's demonstration, it appears from the record defense counsel pursued this theory from the outset of the case. For instance, at the beginning of his closing arguments, he stated he had previously told the jury there was only one issue in the case. Then, before attempting his demonstration, defense counsel acknowledged Ellis was using methamphetamine and pointed out that, while Ellis had not left the methamphetamine lying around his home, he also had not hidden it where it would be difficult to access.

guilty of the lesser possession offense and asked the jury to convict Ellis of this offense, rather than the greater possession for sale offense.

Both offenses contain the same knowledge requirements (i.e., that the defendant knew of the presence and nature of the controlled substance). (*People v. Saldana* (1984) 157 Cal.App.3d 443, 454-455; CALCRIM Nos. 2302 and 2304.) By conceding Ellis was guilty of the lesser possession offense, defense counsel necessarily conceded Ellis knew the methamphetamine was in his home. Thus, the trial court's refusal to allow defense counsel to proceed with his demonstration of how sugar could be present under jurors' chairs without their knowledge had absolutely no bearing on the outcome of the case and was harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.