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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY PACE,

Defendant and Appellant.

E053004

(Super.Ct.Nos. RIF123421 &
RIF123562)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge.

(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed with directions.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, Lynne McGinnis, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION¹

More than seven years ago, defendant Anthony Pace sold rock cocaine to undercover police officers. A jury convicted defendant of five counts (counts 1, 3, 5, 7, and 9) for the sale of cocaine in violation of section 11352, subdivision (a), and one count (count 15) for possession of cocaine base for sale in violation of section 11351.5. The jury also found true a sentence enhancement on count 1 for a prior felony. (§ 11370.2, subd. (a).)²

The court sentenced defendant to a total prison term of 14 years eight months, including the middle term of one year four months for count 15.

On appeal, defendant challenges his conviction for one year four months on count 15 based on two arguments: first, that the court erred in admitting two forensic reports and, second, that the court failed to give a unanimity instruction on count 15. Defendant also requests this court strike the \$450 drug program fee and the \$409.43 booking fee.

We affirm the judgment, subject to remand on the issue of fees and assessments as discussed below. The parties agree the abstract of judgment should be corrected to reflect 236 days of presentence credits.

¹ All statutory references are to the Health and Safety Code unless stated otherwise.

² The jury found defendant not guilty on two counts of cocaine sales (counts 11 and 13) and two counts of participation in a criminal street gang (counts 12 and 14). (Pen. Code, § 186.22, subd. (a).) The trial court declared a mistrial on counts 2, 4, 6, 8, 10, and 16 for participation in a criminal street gang. (Pen. Code, § 186.22, subd. (a).)

II

FACTUAL BACKGROUND

During March and April 2005, undercover officers conducted a sting operation called "Save Our Streets," in which the officers executed controlled drug buys at a Riverside apartment complex. Defendant sold rock cocaine to officers on March 8 and 15, 2005, and April 6, 2005. Defendant acted as a lookout during another drug buy on March 16, 2005.

After each controlled buy, the substances were weighed in the field and tested positive for cocaine base in a usable amount. Javed Khan (Khan), a criminalist at the Department of Justice (DOJ) confirmed the field test results.

On May 10, 2005, the police executed a search warrant at the apartment complex and found 12 rocks of cocaine weighing 4.7 grams in a nightstand in a detached garage being used as a living space. The police detained defendant at the location.

During a custodial interview, defendant disclosed he was concealing in his buttocks eight rocks of cocaine, weighing 2.9 grams. Defendant's wallet contained \$345. A police expert testified defendant possessed the cocaine for sale because of the quantity, the individual rocks, the amount of cash defendant possessed, and the other sales conducted by defendant.

Defendant testified, acknowledging he had sold drugs to help support his mother and his children. He denied any gang involvement and he was not convicted of any gang-related offenses.

III

THE FORENSIC REPORT

In challenging his conviction on count 15, defendant argues the jury heard inadmissible evidence when Khan, the DOJ criminalist, testified about a forensic report, exhibit 49, that he did not prepare, concerning the 12 rocks of cocaine recovered from the nightstand on May 15, 2005. Although Khan testified about the drugs purchased by the undercover officers in March and April 2005, a different analyst, Lynn Melgoza, tested the 12 rocks of cocaine. Khan also did not testify about exhibit 50—the forensic report about the eight rocks of cocaine recovered from defendant’s person when he was arrested—which the court nevertheless admitted into evidence. We conclude any error in admitting the two forensic reports that Kahn did not prepare was harmless beyond a reasonable doubt. (*People v. Loy* (2011) 52 Cal.4th 46, 69-70.)

During defendant’s trial in March 2007, Kahn testified about Melgoza’s report concerning the 12 rocks of cocaine. Subsequently, the United States Supreme Court held in *Bullcoming v. New Mexico* (2011) ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, that forensic laboratory reports—written by analysts employed at a state laboratory and required by law to assist in police investigations—were “testimonial” statements for the purpose of the Sixth Amendment. (*People v. Blacksher* (2011) 52 Cal.4th 769, 813, fn. 27.) As such a forensic report is not admissible unless the analyst who created it is available to testify. (*Crawford v. Washington* (2004) 541 U.S. 36, 59; *Bullcoming*, at p. 616.) Respondent does not disagree except to comment the issue is still pending before the California Supreme Court

in four cases from 2009. We conclude the issue was actually resolved by the United States Supreme Court in 2009 and 2011, as acknowledged by the California Supreme Court in *Blacksher*.

Khan's testimony about exhibit 49 and the 12 rocks of cocaine should not have been admitted. Notwithstanding this error, we conclude the error was harmless and there was no prejudice to defendant because the prosecutor argued the basis for defendant's conviction on count 15 for possession for sale was the eight rocks concealed on defendant's person, not the 12 rocks recovered from the nightstand. Even if exhibit 50, the report about the eight rocks was improperly admitted, the other evidence substantially supported that defendant possessed cocaine base for sale.

Specifically, the evidence at trial established that defendant sold cocaine in March and April 2005. During his police interview of May 15, 2005, he admitted having drugs on his person and he removed from his buttocks a bag of eight rocks of a substance, which was tested in the field and identified as 2.9 grams of cocaine base. Defendant was also carrying \$345. The prosecution's drug expert testified that defendant possessed the cocaine base for sale. The jury could reasonably conclude defendant possessed cocaine base for sale. Even if the two forensic reports should not have been admitted into evidence the error was harmless beyond a reasonable doubt. (*People v. Loy, supra*, 52 Cal.4th at pp. 69-70.)

IV

UNANIMITY INSTRUCTION

In a supplemental brief, defendant contends a unanimity instruction was required on count 15 because the prosecution presented evidence of two events or acts and some of the jurors may have based their verdict on defendant possessing the 12 rocks, not the eight rocks, for sale. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132-1135.) This argument fails because the prosecutor argued unambiguously that the basis for defendant's conviction on count 15 for possession for sale was the eight rocks concealed on defendant's person, not the 12 rocks, which the prosecutor did not even mention.

V

OTHER ISSUES

The full record establishes the court intended to impose the sentence recommended by the probation officer, including the \$450 drug program fee, although the court did not include it orally at the sentencing hearing. (*People v. Cleveland* (2004) 32 Cal.4th 704, 768, citing *People v. Smith* (1983) 33 Cal.3d 596, 599.) The \$450 fee did not exceed the statutory maximum. (§ 11372.7, subd. (a).) The \$409.43 booking fee was not mentioned, either in the probation report or by the court at the sentencing hearing. The booking fee is mandatory, however, regardless of defendant's ability to pay. (Gov. Code, §§ 29550, subds. (a)(1), (d)(1) and 29550.1) Therefore, it may not be stricken from the abstract of judgment.

The trial court did not consider additional mandatory statutory penalty assessments. (Pen. Code, §1464; §§ 11372.5 subd. (a), and 11372.7; Gov. Code,

§ 76000.) Other statutes may also apply. (Pen. Code, § 1465.7; Gov. Code, §§ 70372 and 76104.6.) Under the circumstances, we remand to the trial court for imposition of all additional appropriate drug program and criminal laboratory fines and the related mandatory penalty assessments. (*People v. High* (2004) 119 Cal.App.4th 1192, 1201.)

VI

DISPOSITION

We order the matter remanded to the trial court to determine and impose any additional appropriate fines and assessments and to correct the presentence credits in the abstract of judgment to 236 days. In all other respects, we affirm the judgment.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.