

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

COREY JOHNSON,

Defendant and Appellant.

E053453

(Super.Ct.No. FVA900387)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed.

Patrick J. Hennessey, Jr., 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, Peter Quon, Jr. and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Corey Johnson, of possessing cocaine (Health & Saf. Code, § 11350, subd. (a)), transporting cocaine (Health & Saf. Code, § 11352, subd. (a)) and resisting/obstructing/delaying a police officer (Pen. Code, § 148, subd. (a)(1)). The jury found true allegations that defendant had suffered two strike priors (Pen. Code, § 667, subds. (b)-(i)) and four priors for which he served prison sentences (Pen. Code, § 667.5, subd. (b)). He was sentenced to prison for 10 years and appeals, claiming the trial court erred in allowing admission of taped phone conversations he had while in jail and he was incompetently represented by trial counsel. We reject his contentions and affirm.

FACTS

On February 1, 2008, a Fontana Police officer detained a stopped vehicle in which defendant was the front passenger because it did not have a license plate. Defendant got out of the car and began walking away. The officer talked to defendant, who consented to be searched. The officer found what he believed to be and what defendant said was cocaine, wrapped in cellophane, in defendant's pocket. The officer arrested and handcuffed defendant and put the cocaine on the hood of the car. Defendant bumped the officer to the side, threw himself onto the hood of the car, sucked the bundle of cocaine off the car and swallowed it, despite the officer attempting to prevent him from doing so. Defendant pulled away from the officer, the two struggled and defendant eventually gave up and was placed in the officer's patrol car. A rock of cocaine, weighing 27.94 grams (almost an ounce) and having a street value of between \$800 and \$1600 was found in the front passenger door panel area of the car.

The prosecution introduced into evidence recordings of calls defendant had made from the jail, which will be summarized below.

A police officer with training and experience in narcotics testified that, during the first of these calls, defendant's acknowledgment that he knew that the driver of the car had narcotics on her person was significant because it is common both for drug dealers to have another person with no prior record carry their drugs for them and for females to work with male drug dealers because females have more places on their bodies where drugs can be secreted.

1. Admission of Jailhouse Telephone Conversations by Defendant

Before trial, the People moved to have admitted into evidence recordings of three phone conversations defendant had while in county jail. Defense counsel objected to the admission of any of the taped conversations. The trial court concluded that they were more probative than prejudicial. Defense counsel said if a portion of each conversation was played, he wanted the entire conversation played. The trial court ruled it would admit the recordings and instruct the jury that statements made on them by those other than defendant were being admitted for the non-hearsay purpose of explaining the effect their words had on defendant or to provide meaning to what defendant said, but only defendant's statements were being admitted for the truth of what he asserted in them. The trial court said it still wanted to redact portions of the conversations that were more prejudicial than probative, for example, references to defendant being a third striker. The trial court told defense counsel to provide the court with the redactions he wanted made

and counsel agreed. During trial, the prosecutor played the first two below-described tapes for the jury.¹

In the first recording, defendant told a male friend that the police officer who stopped the car said he found an ounce of narcotics in the passenger side door of the car, but he was trying to set defendant up, because there were no narcotics in the car, as they were inside the female driver's vagina, where an officer found them. Defendant told his male friend that the officer let the driver go without even issuing her a ticket and he inappropriately blamed defendant for the drugs. Defendant also told his male friend that when the officer searched him, he found drugs on him, and, despite defendant's "explanation" that he put these drugs in a cigarette and smoked them, the officer was going to book defendant for possessing them. Defendant admitted that he put these drugs in his mouth and swallowed them. Defendant's male friend made a three-way call to a female who informed defendant that he had been charged with transporting cocaine and possessing cocaine for sale. Defendant told her that the driver sold him out by telling the police that the cocaine in her car was defendant's. Then, the driver came on the line and defendant asked her why she did that to him. She responded that she did not tell the officer anything. Defendant asked her what she meant by saying that. Defendant told her that she had the drugs on her and he asked her how the drugs got put into the door panel of the car. She replied that she put them there. He asked her why she put the drugs on

¹ We refer in our discussion to the redacted versions of the tapes, which were played for the jury, not the unredacted versions that the trial court considered in making its ruling.

his side of the car. She said that she put them under the seat. He asked her why she did that. He told her that the police have her on tape. She responded that the officer made her say things by threatening to arrest her if she did not. Defendant replied that if she had been arrested, she would have bailed out. He again accused her of selling him out. He repeated that she could have bailed out immediately, like another female he had previously bailed out. He told her that the police have her on tape saying that she knows nothing about the drugs and they were not hers. He appeared to say that the police planted them on her. She replied that they did not. She said she initially tried to throw them. She added that they were not found on her. She said at first she was going to put them in her hair, but the female officer who searched her did such a thorough job that it was a good thing she did not do that. Defendant said that he told her, while they were in the car, to put the drugs in her vagina and she acted like she was going to. She replied that she tried to, but she couldn't. He accused her of having the drugs on her when she was in the police car. She said she did not. She repeated that she did not tell the police anything. Defendant asked her if the police gave her a ticket and she responded that they did not, but they took her contact information, told her they would be calling her and let her go. She repeated that she put the drugs in the middle of the car (not on the passenger side). He again asked her why she didn't throw the drugs out of the car. He appeared to suggest that she should have kept the drugs on her person and/or said the drugs were hers and she could have gotten bailed out immediately. He repeated that she sold him out, which she denied.

In the second recording, defendant again talked to his male friend and he told him that the driver had the drugs in her bra and he wanted his friend to listen to what the driver was about to say so the friend could determine if the driver was lying. When the male friend reminded defendant that he had previously said that the drugs were in the driver's vagina, defendant acknowledged telling the driver, when she had been driving the car, to put them there and he watched her do it. Defendant said that the driver had said that she tried to put the drugs into her vagina, but they were too big. He said that she did not say where she was when she tried to put it in her vagina (her car or the police car), but he thought she had it on her and that's where the police found it and they made her say that it was his.² Defendant directed his male friend to call the driver because defendant had "to sweet talk [her] to confessing" When she came on the line, defendant asked her if she knew what he was up against. The driver said that when she was in the police car with the officer, he told her that she did not have a record and she was not the one they wanted. Defendant said that because she had no record, the police could not have done anything to her other than having her undergo Proposition 36 treatment even if she had told them that she was a drug user and the drugs were for her personal use. She asked defendant whom she had to call to do what he wanted her to do. Defendant told her that she had to write a statement that she and he were on the way to a party. He interrupted his instructions by asking her if she had the drugs on her when the police found them and said they were going to blame him for them. She replied that she

² Defendant appeared to say that he told the driver to take the drugs out of her bra and put them into her vagina.

had put the drugs in the car when defendant had gotten out of the car. She reminded defendant that when he had gotten out of the car, she had asked him if he wanted her to keep the drugs, and she thought he had said yes, but they were in her bra and they could not be secured there, so she had put them in the car because she didn't think the police were going to be able to search the car. Defendant asked her why she gave permission for her car to be searched and she said she did not—that the police said they had to search it. Defendant told her that the search of her car was illegal and she was to say that she told the police that she did not want them to search it. He repeated that the police told him that they had her on tape saying the drugs were his and she had to tell him exactly what she told the police. She denied telling the police that the drugs were defendant's. She told defendant that the officer had asked her where they had come from, she had responded that it was Los Angeles, he had asked her what they were doing in Fontana, she had said she brought defendant to pick up a rental car and the officer questioned this, so she added that defendant had friends in the area. She continued that the officer asked her if she saw defendant throw anything and she said no. The officer then asked her if she knew about defendant dealing crack, she said no, but she volunteered that she and defendant had smoked "a blunt" earlier. After the officer found the drugs either on defendant or in the car, he asked her if she had any on her and he told her that they were going to thoroughly search the car and send a female officer to search her. Defendant asked her if she had put the drugs under the armrest between the seats and she said she had. He asked her why she did not throw them outside the car and she said she did not do so because the officer was right there by the time she got out of the car. He repeated that

because the police could not do anything to her, they were blaming him for the drugs. He told her twice that she would have to tell the police that the drugs were hers. He said the police expected the drugs to be crack cocaine, but they were not.

Defendant here asserts, without any analysis whatsoever, that the tapes were prejudicial, a notion with which we do not disagree. Based on this undeniable premise, defendant asserts, that just because the evidence was prejudicial, the trial court abused its discretion in admitting it into evidence. This is insufficient. It is not enough to say that the tapes were prejudicial and if they had not been introduced, it is possible, depending on the standard that is applied, that defendant would not have been convicted. This does not mean that the trial court acted unreasonably in admitting them. Moreover, the tape the *defense* introduced at trial,³ which we summarize below, demonstrated that defendant attempted to persuade the driver that he had been set up by the police and she should submit a writing saying that the drugs were hers, for her personal use, because nothing would be done to her if she did. We fail to see how the tapes that were introduced by the prosecution could have been substantially more prejudicial to defendant than this, in light of the other strong evidence of his guilt. The fact that defendant used profanities often in speaking during the recordings that were introduced by the prosecutors did not, as defendant here asserts, substantially prejudice him compared with his struggling with the arresting officer and swallowing the drugs that were found on his person.

³ Defendant does not say this in his opening brief, leaving the implication that all three tapes were introduced by the prosecution.

In another recording, which was made before the second recording, and was introduced as evidence by the defense, defendant accused the arresting officer of being physically and verbally abusive towards him and suggested that there had to be some video of the encounter. The call became a three way between defendant, his male friend and the mother of his child and defendant said he was thinking about getting the driver to write a letter saying what the police told her to do and what she did. Defendant said that he had to put some pressure on the driver and he told the mother of his child to call her. Defendant said that the police had the driver on tape at the scene of the stop and the whole thing was a set-up. The driver came on the line and defendant told her that he had been beaten up, presumably, by the police, and had his jaw broken. Defendant told the driver that he needed to know everything that she told the officer because he had been set up. She said that the officer wanted her to say that she saw defendant swallow the drugs. She said she told the officer that she did not see defendant do that, so then the officer told her she was to say that she saw defendant throw the drugs. She added that when she told the officer that she did not know that defendant had been sitting on the passenger side of her car, the officer told her that she did not know where he had found the drugs. Defendant asked the driver if all this was on the tape and she replied that she thought it was. Defendant repeated that he needed to know exactly what the officer had asked her on the tape. She said he asked her where she and defendant were coming from and she had told the officer that she was bringing defendant to rent a car. The officer asked her why they had come all the way out to Fontana to do that. The officer then asked her whether they were going to McDonald's and she replied that they were on their way to

use a bathroom and get a cup of coffee for defendant. She continued that the officer told her that he knew that defendant had crack and he suggested that she knew nothing about a crack problem. She said she told him that she and defendant smoked marijuana, but she knew nothing about crack. Defendant again said that the police were trying to set him up and asked her if the police told her that defendant had thrown something.⁴ She said that the officer told her that he had seen defendant throw the drugs, but he found them. She told the officer that she did not see defendant throw the drugs. She said the officer asked her if she had seen him put the drugs on the hood of the car and she said she had. She said the officer told her that defendant tried to swallow the drugs that that had been placed on the car. Defendant asked her if she meant the larger quantity of drugs that were found in the car and she said she guessed that the officer said that there was a separate amount found in the car. Defendant asked her if she had a record and she said she did not. Defendant told her that the police had her do and say what she did to make it look like he was the guilty party because they knew they would not have been able to do anything to her—that she would have been out of jail that night. Defendant told her that the police could not do anything to her and she should write a statement describing everything that happened, including what the police told her to say, and that she told the

⁴ Defendant contends that at this point in the conversation, the suggestion appears that “there may have been some scheduled sale of th[e] drugs by [defendant] later that night.” That portion of the conversation is as follows,

“[THE DRIVER]: . . . [W]hen [the police] sat me in the [squad] car, I was reading the monitor. [¶] . . . [¶] It was saying . . . something like . . . we on the side of K-mart or something, so that’s why I was thinking that the person that, who’s suppose to be there, was either a underco, the dude, the white dude.” We do not derive the same implication from this statement that appellate counsel does.

police that the drugs were hers, but they didn't even give her a ticket.⁵ When defendant again brought up that he was physically abused at the scene of the stop, the driver said she saw the police push defendant to the ground. Defendant told her that she had to tell the police that she used drugs and she intended to use the drugs that were found. He repeated that she should write everything down.

2. Defense Counsel Possibly Informing the Prosecutor of the Existence of the Jailhouse Telephone Call Recordings

In his self-authored motion for a new trial, defendant personally asserted that his trial attorney improperly disclosed, in an email, confidential information to the prosecutor which had been communicated to counsel during the course of the attorney-client relationship. Specifically, that information was the existence of the recorded jailhouse telephone calls between defendant and others. At the hearing on the new trial motion, the trial court summarized defendant's allegation in this respect as follows, "[Defense counsel] . . . t[old] the [prosecutor], either through an e-mail or otherwise, that there were various jailhouse phone calls made by [defendant] and that he made the [prosecutor] aware of these" The prosecutor recalled a conversation he had had with trial counsel concerning this and he represented to the court that trial counsel would say that he had

⁵ In connection with this, defendant said, "You gotta write everything that . . . happened, you gotta write what the . . . police told you to say and you got to fabricate it, and tell that they told you to do this and told you to do that, and you told the[m] that [the drugs were] yours" It is subject to interpretation whether defendant was telling the driver to lie other than to say that she told the police that the drugs were hers. Based on listening to all three tapes, there is room to debate whether defendant even knew what the word "fabricate" means.

been directed by defendant to obtain the recording of these calls because defendant believed they would exonerate him. The trial court pointed out to defendant that he had no reasonable expectation of privacy in the calls and that they “could be listened to by the prosecutor, whether [defense counsel] said something or not, or the jail could have given them to the prosecutor[.] . . . [¶] . . . [¶] [W]hether [defense counsel] said to [the prosecutor, ‘T]here’s some calls there[’] . . . doesn’t matter . . . or how [the prosecutor] came by those calls because he could have gotten them himself without talking to anybody. The jail could have given them to [the prosecutor] or some other prosecutor. . . . [T]here’s no privilege in the actual calls. [¶] What [defendant] talked about with [defense counsel] about the calls probably is privileged. . . . [¶] . . . [¶] There [were] . . . some calls that may have been arguably favorable to you and to your presentation. But there were some that were very incriminating . . . [b]ut it has nothing to do with what you said to [defense counsel] about the calls, nothing.” Defendant said, “. . . [I]f [my attorney] wanted to get the calls for whatever reason, he didn’t explain it to me. He didn’t tell me nothing about getting the calls. . . . [¶] Next thing I know, . . . he’s telling me that he just got through listening to the [tapes] with the [prosecutor]. . . . It wasn’t about the calls, him getting the calls. It was about the information that was obtained from the calls. It was about the information that I gave him, and it was about the information that was retrieved outside of our conversation.” In this assertion, defendant appears to be all over the place—saying that he was not objecting to the fact that the prosecutor had the recording of the calls, but it was about what was on the calls, which the trial court had just told defendant were not privileged. Then, he states that his

attorney disclosed information to the prosecutor that defendant gave the attorney, then, he immediately asserts that it was information “retrieved outside our conversation.” The trial court concluded that defense counsel had not disclosed confidential communications. The court also concluded that the existence of the tapes were not discovered by disclosure of confidential attorney-client communications. The trial court disabused defendant of his notion that the tapes could not have been obtained by the prosecutor outside formal discovery—they could be obtained by the prosecutor or defendant’s investigator. The court ruled that anything defense counsel would have to say about the matter was irrelevant to the motion. Finally, the court said, “Your ground is, at best, [that defense counsel] told [the prosecutor] about the calls. [The prosecutor] never would have known about them and he never would have found them. That’s the best thing you can say, and I’m saying that won’t form the basis for a motion for a new trial”

Rather than contest the denial of his new trial motion, defendant here assumes that defense counsel disclosed the existence of the tapes to the prosecutor and he asserts that this constituted ineffective assistance of counsel, for which there is no reasonable tactical basis. First, there is nothing in the record before us demonstrating that the prosecutor was unaware of the recordings outside of defense counsel telling him that they existed.⁶ If defense counsel had subpoenaed the tapes, or informally obtained them from the jail,

⁶ Appellate counsel engages in further speculation in his reply brief when he says, “. . . [T]he [prosecutor] would have been able to obtain disclosure of the tapes. However, such a procedure is extremely rare and there is no indication that the [prosecutor] would have made any effort to check [defendant’s] telephone records had he not been told of their existence by defense counsel.”

nothing would have prevented jail personnel from notifying the prosecutor that this had been done and alerting him to the possible significance of the tapes. Second, if defense counsel had, in fact, notified the prosecutor about the existence of the tapes, there is nothing in the record about the circumstances under which he did this. For example, if he notified the prosecutor after deciding to use one or more of the tapes at trial, the prosecutor would necessarily have found out about the tapes regardless of what defense counsel did. Third, defendant ignores the fact that his trial attorney introduced one of the recordings, believing that it helped his case. As the trial court observed, there may have been some calls that were arguably favorable to the defense and the one that the counsel played for the jury was, at least, in part, favorable. As to the latter, in the third tape summarized above, defendant insisted that he had been set up by the police and he appeared to genuinely be unaware of the fact that the driver had no criminal background, which undermined the testimony of the narcotics officer that dealers chose people with no criminal records to carry their drugs for them. The fact that defense counsel initially attempted to keep all three of the above-summarized recordings out of evidence does not change this. There is simply no basis in the record before us to conclude that even if trial counsel alerted the prosecutor to the existence of the tapes, and the prosecutor would not have otherwise been made aware of them, that this constitutes a performance by counsel that fell below an objective standard of reasonableness under these circumstances. This matter would best be addressed in a petition for writ of habeas corpus where the pertinent facts, and not mere speculation on the part of defendant and his appellate counsel, may

serve as the basis for action by the trial or this court.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.