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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.

KIRBY GEON BAILEY,

Defendant and Appellant.

E054129

(Super.Ct.No. FSB905125)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Phillip I. Bronson, 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, Collette Cavalier and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

After defendant and appellant Kirby Geon Bailey sold cocaine base to a confidential informant during four separate controlled buys, a jury convicted him of four

counts of possessing cocaine base for sale and four counts of selling a controlled substance. Defendant admitted to several prior convictions and was sentenced to 16 years in prison. In this appeal, defendant contends: (1) the trial court prejudicially erred when it refused to instruct the jury with CALCRIM No. 360; (2) three of the counts should be reversed because they stem from two controlled buys of the same substance on the same day; and (3) one of the consecutive sentences for possessing cocaine base for sale should be stayed under Penal Code section 654 because it stemmed from the same criminal intent as the controlled buy transacted earlier the same day. As discussed below, we affirm the conviction and sentence.

FACTS AND PROCEDURE

San Bernardino Police used a confidential informant to make several “controlled buys” of cocaine base from defendant in August and September of 2009. The informant wore a hidden camera and testified against defendant at trial. The jury saw and heard the videotape taken during each purchase, which did not always show the actual exchange of money and drugs. Officer Beall was the investigating officer for each purchase, meaning that he directed the informant to set up each buy, he searched her car for drugs prior to each buy, gave her the money to conduct each buy, and collected the cocaine base after each buy.

Counts 1 and 2—August 25, 2009

In the afternoon of August 25, 2009, the informant drove to defendant’s house after arranging with defendant by telephone to purchase a quarter ounce of cocaine base. Defendant got inside the informant’s car and told her he had only an eighth of an ounce

and was waiting for more. The informant purchased the eighth of an ounce of cocaine base for \$100 cash. Because the price was to be \$110 and the informant did not have change, the two agreed that the informant would owe defendant \$10.

Counts 3 and 4—August 25, 2009

Later on the same day, the informant again drove to defendant's house after determining by telephone that defendant could sell her an eighth of an ounce that she had asked to purchase earlier that day. The informant called defendant to tell him she was parked in front of his house. Defendant arrived in his own vehicle, went inside his house, and then came out again. Defendant dropped the packet of cocaine base into the informant's lap and the informant gave defendant \$120, made up of the \$110 price plus the \$10 the informant owed defendant from earlier in the day.

Counts 5 and 6—September 2, 2009

On September 2, 2009, the informant spoke with defendant by telephone and they agreed to meet in the parking lot of a fast-food restaurant. The informant got out of her car and got into defendant's car. Defendant drove the informant to a house belonging to "his people." The informant paid defendant in cash on the drive over. Defendant went into the house and returned with two duct taped balls of cocaine base, which he tossed to the informant. The two returned to the fast-food parking lot and the informant got back into her own car.

Counts 7 and 8—September 16, 2009

On September 16, 2009, the informant arranged to purchase a quarter ounce of cocaine base from a different target at a hotel room the informant had rented. Defendant showed up instead and the informant completed the purchase with defendant.

In a second amended information filed in September 2010, the People charged defendant with five counts of possessing cocaine base for sale (Health & Saf. Code, § 11351.5)¹ in counts 1, 3, 5, 7 and 9, and four counts of selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)) in counts 2, 4, 6 and 8. The People further alleged that defendant had two prior prison term convictions (Pen. Code, § 667.5, subd. (b)) and three prior drug-related convictions (Health & Saf. Code, § 11370.2, subd. (a)).

On October 14, 2010, a jury found defendant guilty on counts 1 through 8 and not guilty on count 9.² On March 25, 2011, defendant admitted one prior prison term and two prior drug-related convictions. On May 27, 2011, the trial court sentenced defendant to a total of 16 years in prison as follows: the upper term of five years on count 1 and consecutive terms of 16 months each on counts 3, 5 and 7. The court stayed the sentences on counts 2, 4, 6 and 8 pursuant to Penal Code section 654, and imposed a one-

¹ All section references are to the Health and Safety Code unless otherwise indicated.

² Count 9, possessing cocaine base for sale, was based on a search of defendant's motel room that took place on December 8, 2009. The search revealed two small pieces of cocaine base, consistent with street level sales, and some marijuana.

year term for the prior prison term enhancement and two 3-year terms for the drug-related prior convictions. This appeal followed.

DISCUSSION

1. No Prejudice in Failure to Instruct with CALCRIM No. 360

At trial, the prosecutor questioned Officer Beall regarding the second controlled buy, which is the basis for counts 3 and 4. Specifically, the prosecutor asked Officer Beall what factors in the investigation led him to express his expert opinion that the cocaine base the informant had purchased from defendant was possessed for the purpose of sale. Officer Beall replied: “The amount of the cocaine base, the way it was packaged *and the statements from the informant that Mr. Bailey had in fact sold the cocaine base to her* as well as the—my later reviewing the video.” (Italics added.)

Later on, during discussions between the parties and the trial court regarding jury instructions, the defense asked the trial court to instruct the jury with CALCRIM No. 360. The purpose was to inform the jury that it could not consider Officer Beall’s statement that the informant had told him that defendant had “in fact sold cocaine base to her” when it considered whether defendant had sold the informant cocaine base.

CALCRIM No. 360 provides as follows: “[The expert witness] testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by You may consider (that/those) statement[s] only to evaluate the expert’s opinion. Do not consider (that/those) statements as proof that the information contained in the statement[s] is true.”

The trial court denied the defense request on the ground that the statements by the informant were in fact admitted elsewhere during the trial under an exception to the hearsay rule. The trial court referred to the use notes to CALCRIM No. 360 to the effect that the instruction should not be given if all the statements relied on by the expert were admitted under applicable hearsay exceptions.

Defendant argues the trial court prejudicially erred when it declined to instruct the jury with CALCRIM No. 360. CALCRIM No. 360 is normally given, upon request, when an expert relies upon statements in forming an opinion, when those statements do not fall within an exception to the hearsay rule and are only admissible as a basis for the opinion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 700, fn. 15.) Here, although the informant testified at trial that she had purchased the cocaine base from defendant, we could not find any testimony to the effect that the informant had told officer Beall that she had purchased the cocaine base from defendant. Such testimony would have made CALCRIM No. 360 unnecessary here.

Even assuming error in refusing CALCRIM No. 360, we conclude there is no reasonable likelihood that this changed the result; that is, there is no reasonable likelihood the jury would have acquitted defendant of counts 3 and 4 had it been instructed using CALCRIM No. 360. (*People v. Breverman* (1998) 19 Cal.4th 142, 172-174.) This is because, whether or not the jury had been instructed with CALCRIM No. 360 not to accept as true the informant's statements to Officer Beall that defendant had sold her cocaine base during the second controlled buy on August 25, 2009, the jury also heard testimony directly from the informant herself, as mentioned above, that defendant had

sold her cocaine base during the second controlled buy on August 25, 2009.³ Thus, because the jury heard directly from the informant that she had purchased cocaine base from defendant during the second controlled buy, any error in not instructing the jury to disregard the informant's statement to Officer Beall, which was one of the bases of his expert opinion, was plainly not prejudicial.

2. *Counts 1-4 Are Four Separate Crimes*

Defendant contends counts 2, 3, and 4 should be reversed because they, along with count 1, constituted only a single crime—for two reasons. First, defendant argues that he had only a single intent and design over the course of the first and second controlled buys—that is, to exchange a quarter ounce of cocaine base for \$220, which would collapse counts 3 and 4 into counts 1 and 2. Second, defendant argues the drug that was possessed and sold was of one kind only, cocaine base, thus collapsing the remaining count 2 into count 1, under the reasoning in *People v. Schroeder* (1968) 264 Cal.App.2d 217.

Defendant contends that the second controlled buy took place only because he had just an eighth of an ounce of cocaine base during the first controlled buy. The informant returned later on that same day for the second controlled buy solely for the purpose of

³ During her trial testimony regarding the second controlled buy that was the basis for counts 3 and 4, the prosecutor asked the informant, "So were you able to purchase the half a quarter from Mr. Bailey?" The informant answered, "Yes." The prosecutor then asked, "And you gave him the \$120?" The informant answered, "Yes." Later, the prosecutor on redirect examination asked the informant again about the second controlled buy, asking her, "But based on your memory you remember him selling you that substance?" The informant replied, "Yes, he did sell it to me."

completing the first transaction and, thus, both buys sprang from a single intent and design—to complete a transaction for a quarter ounce of cocaine base for \$220. The People counter that the course of conduct at issue during the first controlled buy was distinct from the course of conduct during the second controlled buy. The People reason that because the informant contacted defendant two separate times and drove to his house twice to conduct the two separate transactions, for which she ultimately paid two sums of \$110 each, these were two distinct sale transactions constituting two separate crimes. Neither party cites to any case law, nor were we able to find any that is specifically on point regarding multiple drug transactions.

Defendant cites mainly to *People v. Bailey* (1961) 55 Cal.2d 514, in which the issue was whether the defendant, who received payments as the result of welfare fraud over a number of months, was guilty of a single grand theft or a series of petty thefts. “Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan.” (*Id.* at p. 519) As defendant concedes, this “single-intent-and-plan doctrine” set forth in *Bailey* is consistently used in theft cases where there is a single victim, but has not yet been applied to drug sales.

Our review of the testimony and transcripts of the video regarding the first and second controlled buys shows that while the informant may have had a single intent and plan to purchase a quarter ounce from defendant over two controlled buys, defendant’s

intent during each of the controlled buys was merely to sell the informant as much cocaine base as he had available and that she could be persuaded to purchase. The following is from the first controlled buy, which took place around 4:30 pm on August 25, 2009:

“[INFORMANT:] You got the cookies?

“[DEFENDANT:] Yeah. I thought you wanted half a quarter?

“[INFORMANT:] I wanted the quarter piece.

“[DEFENDANT:] Aww. Well you didn’t tell me that.

“[INFORMANT:] You only got the half a quarter? You got on you right now? Do you got another one?

“[DEFENDANT:] I’ll go get it.

“[INFORMANT:] How long that’s gone take?

“[DEFENDANT:] Shit, it only take a minute. Hey, if you had ah told me I would ah got planned.

“[INFORMANT:] What time is it right now? It’s 4:30. You’ll have it before 6:00? [¶] . . . [¶]

“[DEFENDANT:] How much you got there?

“[INFORMANT:] I got two twenty for the quarter piece.

“[DEFENDANT:] Two twenty’s?

“[INFORMANT:] Yeah.

“[DEFENDANT:] You know it’s two forty. Ahhh . . . you out of line.

“[INFORMANT:] [Unintelligible.]

“[DEFENDANT:] Awe, you trying to pull that shit again man.

[Unintelligible.]

“[INFORMANT:] Okay, well, listen. I’m . . .

“[DEFENDANT:] What you got? You got two twenty’s?

“[INFORMANT:] Yeah.

“[DEFENDANT:] I got a 10-dollar bill? No gonna have to owe me \$10.00
then.

“[INFORMANT:] You got the quarter piece?

“[DEFENDANT:] I gotta half quarter.

“[INFORMANT:] Okay, well I’m fixing to give you what? One . . .

“[DEFENDANT:] No, you want the whole quarter or you want the half
quarter again?

“[INFORMANT:] I want, I’m ah take the half a quarter now . . .

“[DEFENDANT:] . . . And I’m ah come back and get the other half . . .

[talking at the same time]

“[INFORMANT:] And I’m ah come back and get the other half.

“[DEFENDANT:] Okay.

“[INFORMANT:] Or I might want more than that.

“[DEFENDANT:] Oh yeah?

“[INFORMANT:] So, I, I’ll text you on your phone just the number that,
what I want.

“[DEFENDANT:] Oh, okay. Alright.

“[INFORMANT:] So I’m ah give you a hundred—shoot, two, three, four and a five and I’ll bring you back your \$10.00 dollar.”

The informant returned later that afternoon and the following is an excerpt from the transcript of the second controlled buy:

“[DEFENDANT:] Hum? The other half [talking at the same time].

“[INFORMANT:] . . . Keeps going dead. This other half?

“[DEFENDANT:] Uh-huh. What you talkin bout? You want the whole quarter?

“[INFORMANT:] Yeah.

“[DEFENDANT:] No. You just said . . .

“[INFORMANT:] Are you going to give me . . . the whole quarter right now?

“[DEFENDANT:] You just told me you wanted the other half.

“[INFORMANT:] I said give me, I said I was gone come back and get the whole thing.

“[DEFENDANT:] Well, I didn’t hear that. I thought you say you was gone come back and get the other half . . .

“[INFORMANT:] You could sell me the half . . . it’s ok

“[DEFENDANT:] Hum?

“[INFORMANT:] I’ll take the . . . half now and . . . fuck around tomorrow.

“[DEFENDANT:] Go head.

“[INFORMANT:] [Unintelligible.] Tomorrow.

“[DEFENDANT:] Hey, you must be sellin’ it to em like in a big chunk

....

“[INFORMANT:] [Unintelligible.] I’m sellin’ the whole thing to him.

[Talking at the same time].

“[DEFENDANT:] But like how much?

“[INFORMANT:] The half quarter two of those.

“[DEFENDANT:] Is that right?

“[INFORMANT:] Yeah, I’m giving him a deal. Motherfucker wouldn’t sell him the half quarter for two hundred dollars. But that’s what I’m trying. I’m just basically trying to just double my damn money.

“[DEFENDANT:] Uh-hum. That’s what you doing though.

“[INFORMANT:] That’s it. I’m not trying’ to [unintelligible] bag.

“[DEFENDANT:] [Unintelligible.] Because

“[INFORMANT:] Too slow.

“[DEFENDANT:] You don’t make that much off a half a quarter anyhow I don’t think. Depends on how you cut it. For two hundred dollars it a good deal . . . two hundred dollars is good deal though. Tell me when you’re ready for one then.

“[INFORMANT:] In a little bit.”

Our review of the above two conversations between defendant and the informant shows that defendant had no overall plan to sell informant a quarter ounce of cocaine base between the two transactions. Rather, the transcript shows that defendant was

willing to sell cocaine base to the informant whenever she called and in whatever amount she wanted, provided that he had it to sell. For example, in the first transaction, defendant states that he had only an eighth of an ounce to sell because he thought that is what the informant wanted. He stated that he would have brought the entire quarter ounce had there not been a miscommunication. He also asked the informant whether, when he came back with the additional cocaine base, she would want only the rest of the quarter ounce or an additional quarter ounce. The two parted on the understanding that the informant would let defendant know how much she wanted before they met again later that day.

Similarly, in the second transaction, defendant was prepared to sell the informant an eighth of an ounce of cocaine base because that is what he thought she wanted. It appears that the informant was prepared to purchase an entire quarter ounce, but had not communicated that to the defendant. The informant purchased only an eighth of an ounce because that is what defendant had brought, because in turn that is what he thought she wanted. The transcripts reveal no overall plan or intent on defendant's part to sell the informant any particular amount of cocaine base, other than what he thought she wanted to buy. It is clear the informant controlled the amount of the two purchases and that defendant simply sold the informant whatever amount he thought she had asked for. For this reason, defendant was properly convicted of counts 3 and 4.

Defendant further argues he should not have been convicted of counts 2 and 4 (sale of a controlled substance) because he was also convicted in counts 1 and 3 of possessing cocaine base for sale. This is because under *People v. Schroeder* (1968) 264

Cal.App.2d 217, each conviction involved the same type of drug, cocaine base. In *People v. Schroeder*, the defendant was charged with and convicted of nine counts of unlawfully possessing a controlled substance when he was found in possession of a box of prescription drugs stolen from a pharmacy. The appellate court concluded the defendant should have been convicted of two counts rather than nine because the drugs that he possessed were of only two types—opiates and morphine derivatives. (*Id.* at p. 228) We agree with the People that the reasoning in *People v. Schroeder* does not apply here. Whereas counts 2 and 4 are for *sale* of a controlled substance, counts 1 and 3 are for *possession for sale* of cocaine base. *People v. Schroeder* might apply here only if all of the counts were for possession.⁴ They are not, and so defendant’s argument fails.

3. *Penal Code Section 654 Does Not Apply to Count 3.*

Finally, defendant contends his sentence for count 3 should be stayed pursuant to Penal Code section 654 because it was part of an indivisible course of conduct with count 1. We disagree.

Penal Code section 654, subdivision (a), provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of

⁴ Defendant cites to *People v. Schroeder* in his opening brief for the principle that “a defendant cannot be multiply convicted of simultaneous possession of a substance or its derivatives proscribed in only one of the subdivisions of Health and Safety Code section 11001 (now § 11019).” True, but irrelevant when the same illicit substance is both: (1) sold, and (2) possessed for sale.

imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

Penal Code “[s]ection 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 294.) “The purpose of [Penal Code] section 654 is to prevent multiple punishment for a single act or omission [or indivisible course of conduct], even though that act or omission [or indivisible course of conduct] violates more than one statute and thus constitutes more than one crime. . . .” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; see also *People v. Harrison* (1989) 48 Cal.3d 321, 335.) “The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]” (*Liu*, at pp. 1135-1136.)

As discussed above, the record contains substantial evidence that defendant's intent when he sold the informant an eighth of an ounce of cocaine during the second controlled buy was to sell her whatever amount she wished to purchase and that he had available, rather than to merely complete a single transaction. For this reason, we conclude that defendant harbored multiple criminal objectives between the first and second controlled buys, and thus should be separately punished for both.

DISPOSITION

The judgment of conviction and the sentence are affirmed.

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RAMIREZ

P. J.

We concur:

KING

J.

MILLER

J.