

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

TYRONE MAURICE WADE,

Defendant and Appellant.

E059225

(Super.Ct.No. FWV1102122)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed.

Lewis A. Wenzell, 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, Charles C. Ragland and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Tyrone Maurice Wade of four counts of selling cocaine. (Health & Saf. Code, § 11352, subd. (a).) The court found that he had

one serious and/or violent felony prior conviction (Pen. Code, § 667, subd. (e)(1)) and two prison priors (Pen. Code, § 667.5, subd. (b)).

Defendant was sentenced to 14 years in state prison; the low term of three years for count 1, doubled to six years due to the prior strike conviction, plus three consecutive sentences of 32 months (one-third the middle term, doubled) for counts 2 through 4. The court stayed the terms for the prison priors.

Defendant contends that with respect to counts 1, 3, and 4, that the trial court erred in admitting the criminalists' evidence regarding the cocaine allegedly obtained from him. We conclude that defendant forfeited his objection to the admission of evidence and, in any case, the trial court did not err. Defendant also contends that the court erred in staying, rather than striking the terms for the two prison priors. This latter issue is moot. We, therefore, affirm the judgment.

FACTS

During an operation conducted by the Cities of Ontario and Upland, an undercover police officer, Officer Darwin, purchased suspected cocaine from appellant on four separate occasions: July 22 and 28, and August 2 and 18, 2011.¹

Count 1: On July 22, Officer Darwin of the Ontario Police Department gave appellant \$40 and received in exchange a small, clear plastic resealable bag of white powdery substance, which appeared to be cocaine. Officer Garcia of the Upland Police

¹ Each sale forms the basis of a separate count in the information, referred to in chronological order as counts 1, 2, 3 and 4.

Department later took possession of the baggie, weighed it and its contents, and attached evidence tag No. 302251 to it. This tag also included identifying information, including the date and suspected nature of the substance, as well as the suspect's name and date of birth. He then deposited the evidence in the locked evidence locker at the Ontario Police Department through a one-inch wide slot. Based on his experience booking evidence there, Officer Garcia testified that evidence deposited in the evidence locker is submitted directly to the San Bernardino County Sheriff's Department's Crime Laboratory for analysis.

Beverly White, a criminalist with the San Bernardino County Sherriff's Department, testified that when the evidence is brought in from the Ontario Police Department, the porter must sign in and list on a green paper form the suspect's name, the officer's name, the date of the offense, and the case number. She then goes to the property unit within the crime lab and requests the evidence relating to those cases assigned to her. She signs out for the evidence and puts it in a locker at her workstation. She analyzes the evidence one piece at a time and then returns it to the property unit.

White stated that she received evidence with tag No. 302251, which had also been assigned a Laboratory Information Management System (LIMS) No. 11-09269. The item had an information sheet that indicated it was submitted by the Ontario Police Department, the suspect was defendant, and the date of July 22, 2011. The item was a substance contained in a plastic baggie that was in a "KPAK," a heat-sealed plastic pouch used by the Sheriff's Department to preserve evidence, which was in turn enclosed in a sealed envelope. White tested the substance and determined that it was cocaine.

Count 3:² On August 2, 2011, Officer Darwin again paid defendant \$40, receiving a resealable plastic bag containing a white powder, appearing to be cocaine. The baggie had red hearts on it. He gave this baggie to Officer Garcia who tagged it (evidence tag No. 302254) and provided other identifying information, as well as agency case No. 110800105 before placing it into the evidence locker.

Criminalist Jason McCauley analyzed the evidence with the tag No. 302254 and LIMS No. 11-09821. He testified that the information sheet listed the Ontario Police Department as the submitting agency, the booking by Officer Garcia, and defendant as the suspect. The substance was in a plastic bag with red hearts, within a KPAK, all inside a sealed manila envelope. McCauley concluded that the white powder substance was cocaine.

Count 4: On August 18, 2011, Officer Darwin again made a \$40 purchase of a white powder substance from appellant. The substance was in a baggie that bore red hearts. Officer Darwin himself booked, weighed, and tagged (tag No. 301501) the substance before placing it through a small slot into the evidence locker. Only evidence technicians can access the locker.

Criminalist Michelle Woods analyzed the evidence with the tag No. 301501. She stated that the information sheet indicated it had been submitted by Officer Darwin in relation to an incident on August 18, 2011, involving defendant. The white substance

² The evidence forming the basis for count 2 will not be discussed because appellant does not raise any issue regarding the admission of evidence with respect to that count.

was inside a plastic baggie, inside a KPAK, in a tape-sealed manila envelope. She did not note whether or not the baggie had red hearts on it. She determined that the white powder substance was cocaine.

DISCUSSION

Defendant contends that there were vital links missing in the chain of possession of the substances purchased from him on three dates (counts 1, 3 and 4), making it as likely as not that the samples tested were not the evidence originally received. He points to the well-established rule that over a chain of custody objection, the party offering the evidence has the burden of proof to show with reasonable certainty that the particular item of evidence has not been altered. (*People v. Jimenez* (2008) 165 Cal.App.4th 75, 81.)

The Attorney General contends that defendant has forfeited the chain of custody claim. We agree. During a pretrial hearing, defendant himself voiced concern about the chain of custody, but his attorney never objected to the admission of the criminalists' testimony. Defendant's utterance failed to preserve the issue for appeal. First, his attorney had complete control of all tactical and procedural decisions (*People v. D'Arcy* (2010) 48 Cal.4th 257, 281-282), and chose to raise questions about the chain of custody through cross-examination of the criminalists. Second, a pretrial objection must be renewed at trial in order to preserve the objection for appeal. (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

Defendant disputes that he forfeited and/or waived the chain of custody claim. Because no physical evidence was introduced, defendant asserts his cross-examination of

the criminalists was sufficient to raise the chain of custody issue. Not so. In order to preserve the issue for appeal, defendant should have objected to the criminalists' testimony on the ground of lack of foundation due to failure to establish the chain of custody. (See *People v. Hall* (2010) 187 Cal.App.4th 282, 291-292.)

In any case, we reject defendant's contention on the merits.³ As in *People v. Wallace* (2008) 44 Cal.4th 1032, the record of the chain of custody was far from perfect, but these shortcomings did not render the evidence inadmissible nor inadequate to support the verdict. "While a perfect chain of custody is desirable, gaps will not result in the exclusion of evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering." (*People v. Catlin* (2001) 26 Cal.4th 81, 134; see also *People v. Riser* (1956) 47 Cal.2d 566, 581 [in the absence of evidence of actual tampering, the prosecution is not required to negate all possibility of tampering].)

Here, all three criminalists testified that the evidence tag number on the items analyzed corresponded to the numbers placed on the items by the police officers. With respect to count 3, criminalist McCauley also testified that the substance was in a baggie with red hearts. This matched the description of the item Officer Garcia placed in the evidence locker. Officer Darwin testified that he received the baggies containing the white powder and either booked them himself or turned them over to Officer Garcia to book. There was no direct testimony that the items were transported from the police

³ Appellant's argument can be understood to be that there was insufficient evidence to support the convictions on the three counts because the prosecution had failed to establish the chain of custody to a reasonable degree of certainty.

station to the crime laboratory, but identifying numbers according to the criminalists matched the information given by the officer who had booked the evidence. In addition, the case information was consistent. Thus, although the packaging had changed from the time of collection with the placement of the plastic baggies inside KPAKs, this discrepancy did not implicate a vital link in the chain of custody given that the identifying information was consistent and there was no indication of tampering. (See *People v. Wallace, supra*, 44 Cal.4th 1032, 1060-1061 [repackaging of evidence did not in itself implicate a vital link in the chain of custody].) Any inadequacies in the chain of custody merely go to the weight of the evidence. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 311, fn. 1.)

Defendant argues that the trial court erred in staying sentence based on two prison prior convictions. He contends that sentence on a prison prior must either be imposed or stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) The issue is moot in light of the trial court's filing of an amended abstract of judgment striking the prison priors.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.