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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.

JEFFERY MICHAEL LIPSCOMB,

Defendant and Appellant.

E061604

(Super.Ct.No. FMB1300600)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Jeffrey Michael Lipscomb, on one count of possession for sale of a controlled substance (Health & Saf. Code, § 11378, count 1) and one count of possessing a baton or “billy” (Pen. Code, § 22210, count 2). The jury found true the allegation that defendant was personally armed with a firearm while committing the possession for sale of a controlled substance offense. (§ 12022, subd. (c).)¹ The trial court imposed the middle term of two years in state prison on count 1, a concurrent middle term of two years in state prison on count 2, and a consecutive lower three-year prison term for the firearm enhancement. The trial court awarded defendant 141 days of actual custody credit and 140 days of conduct credit.

Defendant appeals, contending his conviction should be reversed because his counsel was ineffective in failing to object when the prosecution asked an expert to opine that defendant possessed methamphetamines and did so with the intent to sell. Defendant also contends his sentence should be corrected to give him one extra day of presentence custody credit on the ground that the court calculated his conduct credit using the wrong formula.

We affirm.

I

FACTUAL BACKGROUND

On December 7, 2013, San Bernardino County sheriff’s deputies were patrolling a part of Oasis Avenue in Twentynine Palms known to law enforcement as a location of

¹ Unlabeled statutory citations refer to the Penal Code.

methamphetamine use and sales. The deputies approached a group of people, which included defendant, outside an apartment complex at 6563 Oasis Avenue. Defendant and another man, Patrick Wastie, stood outside defendant's apartment.

When the deputies walked up, Wastie walked into the apartment and sat down on a recliner chair on the north side. The investigating deputy testified that Wastie did not appear to have anything with him when he entered the apartment. He also testified he kept Wastie in sight for all but one or two seconds. The deputies asked Wastie to come out and talk to them, and he complied. Defendant told the deputies Wastie was just visiting his apartment and Wastie confirmed he did not live there.

After talking to both men, the deputies sought and received permission to search the residence, a studio apartment containing two recliner chairs and two tables. Defendant said the reclining chair on the southwest side of the apartment belonged to him. Deputies found a used methamphetamine pipe, a digital scale, an expandable baton, and electronic equipment on a coffee table that sat a foot or two in front of defendant's chair. Deputies found other items on the floor around defendant's chair, including a second used methamphetamine pipe, a KY-405 rifle inside a rifle bag, a container with a Snoopy logo, a container with an Illy Coffee logo, and a bag containing three broken but usable methamphetamine pipes. Inside the Snoopy container, deputies found two baggies of marijuana and five baggies of methamphetamine. Inside the Illy Coffee container, deputies found "eight unused hypodermic needles that were still in the packaging." The deputies also found on a table a green cloth bag "that had multiple small, 1-by-1 . . .

Ziploc baggies with little green aliens on them,” which a deputy testified “are used to package narcotics.”

One of the investigating deputies testified the methamphetamine weighed 17 grams, which he said is more than a useable amount, worth about \$400 to \$500 wholesale. He testified, “if you were selling it on the street level and breaking it down to tenth of a gram, you can make double . . . that.” A sheriff’s lab criminalist testified the five bindles weighed 16.84 grams, she performed tests on two of the five bindles, and both tested positive for methamphetamine.

Defendant admitted many of the items the deputies found belonged to him. He said the digital scale was his and he used it “to weigh rocks, coins, and other miscellaneous items.” He admitted owning the expandable baton and the rifle. However, defendant told the deputies he had moved into the apartment hurriedly six days earlier, had not had time to clean up, and had put his belongings on top of items already in the apartment. Defendant told the deputies his roommate found the Snoopy container in the kitchen when they moved in. He admitted the roommate gave him the container and that he put it next to his chair, but said he had never opened it and did not know it contained drugs. Defendant denied knowing anything about the Illy Coffee container and its contents. Defendant also denied knowing anything about any of the methamphetamine pipes. Wastie denied any of the items near defendant’s recliner belonged to him, and defendant said he did not think anything in the apartment belonged to Wastie.

After law enforcement arrested defendant and he waived his *Miranda*² rights, defendant gave a new statement that confirmed what he had already told the deputies. The prosecution played a recording of that interview for the jury.

At trial, defendant's roommate, Benjamin Worthington, testified that he and defendant had moved into the apartment in mid-November, but that he had not yet spent a night at the apartment. Worthington said he never sat in defendant's chair. He said he gave defendant the Snoopy container when they lived in a different apartment. He testified the methamphetamine pipes in the apartment did not belong to him, but admitted he had smoked methamphetamine with defendant in the past and that defendant had given him the drug. Worthington said he had not bought methamphetamine from defendant and denied selling it himself. He testified that he found the small plastic baggies deputies found in the apartment. He knew defendant had a rifle behind his chair and had seen defendant holding the baton.

Deputy Sheriff James Thornburg testified at trial as a narcotics expert. He testified that he had seen baggies of the sort found in defendant's apartment used to package methamphetamine. He testified 16 grams of methamphetamine is a significant quantity and generally indicates possession for the purpose of sales rather than personal use. He testified that other indicia a residence is being used to sell drugs include: pay-owe ledgers, stolen property, cell phones with frequent text or telephonic messages, drug packaging materials, digital scales, heavy foot traffic, and firearms. He testified that drug

² *Miranda v. Arizona* (1966) 384 U.S. 436.

dealers often possess firearms or batons for defense and to instill fear in buyers.

According to Deputy Thornburg, methamphetamine dealers often sell other drugs, keep syringes or pipes for their customers, and store methamphetamine in several baggies.

Methamphetamine dealers typically sell one gram or less to each customer.

The prosecution asked Deputy Thornburg the following question, which it characterized as a hypothetical: “If there is 16.84 grams of methamphetamine in five separate bags inside a container right next to the chair where the defendant always sits and sleeps, and a rifle being behind the chair that the defendant says is his in a corner within arm’s reach, and a baton which he says is his on a table right in front of the chair where the defendant sits, and cleaned 1-by-1 inch plastic sealable baggies that are found in the apartment close by, and an electronic scale on the table right in front of the chair where the defendant sat, and a used meth pipe right on top of the table and several in a container next to the chair and next to a container that has eight clean syringes in it right next to five baggies of meth, and people always being in the apartment with the defendant, some known to use meth, in an area known for meth sales, and the defendant not having a job, based on your background, training, and experience, have you formed an opinion as to whether or not the defendant was possessing . . . meth for the purpose of sale?”

Deputy Thornburg responded, “Yes, I have formed an opinion,” and testified, “The methamphetamine possessed by the defendant was possessed for sales and not solely personal use.” He explained he reached that conclusion “based upon the amount of methamphetamine, with the number of cases that I have dealt with over the years, a

personal use, a gram, maybe 2 grams in comparison to a half of an ounce, with a person that has no form of employment, a person with no job, in my training and experience would normally have, at most, a gram or a half a gram. The amount with the digital scale and lack of employment lead me to believe it is possessed for sales and not solely for personal use.”

On cross-examination, defense counsel questioned Deputy Thornburg about evidence related to Wastie’s entry into the apartment and asked whether that evidence changed his opinion that it was defendant who possessed the drugs. On redirect, the prosecution asked Deputy Thornburg, “If the hypothetical is that a person did go inside the building, however, he was seen sitting in a chair that wasn’t anywhere close to the Snoopy container, in fact, it was closer to the door, and in order to reach the Snoopy container, he would have to pass that chair, which he actually was sitting in, would that change your opinion about who possessed the methamphetamines for sale?” Deputy Thornburg responded, “My opinion, based upon everything explained to me, still is that the methamphetamine belongs to the defendant and that the individual that walked into the apartment did not possess it and place it there.”

Defendant did not testify at trial and did not present evidence. The jury convicted defendant of all charges. After trial, the trial court imposed a term of two years in state prison on count 1, a concurrent term of two years in state prison on count 2, and a consecutive three-year prison term for the firearm enhancement. Because defendant had served 141 days prior to sentencing and qualified for all conduct credits available, the

trial court awarded defendant 141 days of actual custody credit and 140 days of conduct credit.

II

DISCUSSION

A. *Defendant's Counsel Was Not Ineffective.*

Defendant contends his trial counsel “provided ineffective assistance of counsel in failing to object when the people’s expert witness improperly testified that appellant, in particular—as opposed to a hypothetical individual in a similar situation—possessed the methamphetamine in question and possessed that methamphetamine with the intent to sell.”

“California law permits a person with “special knowledge, skill, experience, training, or education” in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*Id.*, subd. (a).)” (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*)). An officer with experience in narcotics and narcotic sales “may give his opinion that the narcotics are held for purposes of sale based upon matters such as quantity, packaging, and the normal use of an individual.” (*People v. Hunt* (1971) 4 Cal.3d 231, 237.)

However, an expert’s “opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. . . . To put it another way, the trier of fact is

as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.’ [Citations.]” (*Vang, supra*, 52 Cal.4th at p. 1048.) It is for that reason that an expert may not in the normal case testify that a *specific defendant* committed an offense. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, holding limited by *Vang*, at pp. 1047-1048 & fn. 3; but see *Vang, supra*, at p. 1048, fn. 4 [noting without deciding that “in some circumstances, expert testimony regarding the specific defendants might be proper”].) Instead, “an expert may render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.]’ [Citation.]” (*Vang, supra*, at p. 1045.) “Such a hypothetical question must be rooted in facts shown by the evidence. . . .’ [Citation.]” (*Ibid.*)

Defendant objects to the prosecution’s expert testimony on two grounds. First, he objects that Deputy Thornburg should not have been permitted to testify that “the methamphetamine belong[ed] to the defendant.” Second, he objects that the expert should not have been permitted to testify, in response to an improper hypothetical question, that defendant himself, not a hypothetical defendant in his position, possessed the drugs for the purpose of selling them. Defendant argues the expert’s testimony on both points was of no assistance to the jury.

Because defense counsel did not object at trial, to prevail on appeal, defendant must establish the failure to object constituted ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Defendant must show “(1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more

favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover ““a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.’ [Citation.]” [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).

In evaluating a claim of deficient performance, we give great deference to counsel’s reasonable tactical decisions. (*People v. Farnam* (2002) 28 Cal.4th 107, 148.) We evaluate trial counsel’s decisionmaking in the context of the available facts, and generally do not find tactical errors at trial to be cause for reversing a judgment. (*Ibid.*) Even when there is a basis for objection, “[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel’s tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel’s incompetence.” (*People v. Hayes* (1990) 52 Cal.3d 577, 621.)

We also hesitate to find ineffective assistance on direct appeal because often the record is not developed enough to evaluate the attorney’s conduct. (*People v. Pope, supra*, 23 Cal.3d at p. 426, overruled on other grounds as recognized in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10 [“Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus,” where “there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of”].) On direct appeal, ““courts will reverse

convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.’ [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 980 (*Zapien*)).

Here, the record on appeal sheds no light on why defense counsel did not object. One possible satisfactory explanation for not doing so is that there was such overwhelming evidence, apart from the challenged testimony, that defendant possessed the methamphetamine for sale. Defense counsel may reasonably have concluded that objecting to the testimony would serve no beneficial purpose since it would not favorably alter the outcome of the trial. (*People v. Spence* (2012) 212 Cal.App.4th 478, 510 [holding expert testimony “tended to interfere with the jury’s ability to decide the ultimate issues,” but concluding error was harmless because jury verdict supported by other trial evidence].) Trial counsel is under no obligation to make fruitless objections or motions. (*People v. Hart* (1999) 20 Cal.4th 546, 629; *People v. Constancio* (1974) 42 Cal.App.3d 533, 546.)

Indeed the evidence, other than Deputy Thornburg’s testimony concluding defendant possessed the methamphetamine, so strongly supports the jury’s verdict that defendant’s ineffectiveness challenge would fail even if defense counsel’s failure to object was not justified. (See *Holt, supra*, 15 Cal.4th at p. 703.) The evidence that defendant possessed the drugs starts with the investigating deputy’s testimony that he found the methamphetamine inside defendant’s apartment, bundled inside a container defendant admitted belonged to him. The container lay next to a recliner chair defendant admitted he used both for sitting and sleeping. Though defendant said his roommate

found the container in the apartment when they moved in, his roommate contradicted him by testifying he had given the container to defendant when they lived in a previous apartment. Given this overwhelming evidence, it is not reasonably probable that defendant would have obtained a more favorable result even if Deputy Thornburg had not opined that defendant possessed the drugs.

Contrary to defendant's contention, the evidence that someone else possessed the methamphetamine was minimal. Defendant's roommate testified he had not yet spent a night in the apartment. Defendant admitted Wastie was just visiting the apartment. And though Wastie entered the apartment when the police arrived, he sat apart from defendant's chair, and the investigating deputy testified he could see Wastie throughout, except for one or two seconds when the deputy was approaching the doorway. He also testified "it didn't appear [Wastie] had anything in his hands" when he entered the apartment.

The evidence, other than Deputy Thornburg's response to the challenged hypothetical, also overwhelmingly supports the jury's conclusion defendant possessed the methamphetamine for the purpose of selling it. Deputies found defendant standing in front of his apartment with Wastie in a part of town law enforcement knew as a site for methamphetamine sales. Defendant possessed 16 grams of methamphetamine, which Deputy Thornburg testified is an amount far greater than what individuals use. Defendant also had in his possession a digital scale, baggies suitable for breaking the drug up into smaller portions, and "eight unused hypodermic needles that were still in the packaging," all paraphernalia Deputy Thornburg identified as indicating the person

possessing them intends to sell the drugs. “It is well settled that ‘ . . . experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld.” (*People v. Parra* (1999) 70 Cal.App.4th 222, 227 [Fourth Dist., Div. Two].) It is therefore not reasonably probable defendant would have obtained a more favorable outcome even in the absence of Deputy Thornburg’s response to the challenged hypothetical question.

Defendant contends the evidence against him was not overwhelming because the deputies found pipes and syringes, which he argues are consistent with personal use, but did not find pay-owe sheets or cell phones, which are indicative of possession for sale. This evidence does not undercut the strength of the evidence against defendant. Deputy Thornburg explained to the jury that drug dealers often keep pipes and syringes on hand for their customers. He also testified that it would not change his opinion to learn that defendant did not have pay-owe sheets or phones in his apartment, because “[a]ny of the items listed that I look for in regards to sales, there is not one particular item that will seal the deal. It is the totality of the circumstances of each case in and of itself, whether I believe it to be held for personal use or held for sales.” Thus, the absence of pay-owe sheets and phones does not weaken the case against defendant, and the presence of pipes and syringes is, at worst, neutral.

B. The Trial Court Correctly Calculated Conduct Credits.

Defendant contends the trial court used the wrong formula to calculate conduct credits under section 4019, subdivision (f). According to defendant, he was entitled to

one day of conduct credit for each day of presentence incarceration he completed. Instead, the trial court gave him two days of conduct credits for every two completed days of presentence incarceration. Because defendant had served 141 days, awarding credits for each completed two-day period left him with one day served for which he received no credit. Defendant contends he should have received a credit for that day as well.

The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591 (*Chilelli*)). Because the trial court's determination concerns the interpretation of a statutory provision, we review the determination de novo. (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1394.) "In interpreting the statute, we attempt to discern the Legislature's intent, first by considering the words of the provision. [Citation.] If the statutory language is unambiguous, the plain meaning controls and consideration of extrinsic sources to determine the Legislature's intent is unnecessary. [Citation.]" (*People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1358, review den. Nov. 10, 2015 (*Whitaker*)).

Section 4019, subdivision (f) governs the award of conduct credits for prisoners in local presentencing custody. (*People v. Brown* (2012) 54 Cal.4th 314, 317.) It states "[i]t is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." Based on this clear language, a "defendant should . . . receive[] conduct credit at a rate of two days for every two days in presentence custody under section 4019 as amended in

2011. (Stats. 2011, ch.15, § 482.)” (*Chilelli, supra*, 225 Cal.App.4th at p. 591.) Thus, section 4019 “requires that a defendant actually serve *two days* in custody before he or she will be entitled to two additional days of conduct credit. A defendant who serves an odd number of days is not entitled to an additional single day of conduct credit for his or her final day of actual custody.” (*Whitaker, supra*, 238 Cal.App.4th at p. 1358.)

The formula for calculating time served is simple and has been endorsed by the California Supreme Court. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26 (*Marquez*).) When the Supreme Court issued its decision in *Marquez*, defendants received two days of credit for every four days served. (*Ibid.*) Defendants now receive two days of credit for every two days served. (§ 4019, subd. (f).) However, the pertinent statutory language is otherwise identical.³ Thus, in calculating custody credits, trial courts “take the number of actual custody days . . . divide by [2] (discarding any remainder) . . . [and] then multiply the result by 2.” (*Marquez, supra*, at p. 26.) Applying that formula to defendant’s situation, we divide his 141 days of actual custody by two, which yields 70 days with a remainder of one day. We discard the remainder and multiply by two, which gives us a total of 140 days. Because the trial court reached the same conclusion, we affirm.

³ The current version of section 4019, subdivision (f) provides: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.” The version of the statute in effect when the Supreme Court decided *Marquez* provided: “If all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody.” (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.)

Defendant contends the Legislature rejected this formula when it enacted former section 2933, subdivision (e) on January 25, 2010. That provision provided “[a] prisoner sentenced to the state prison under Section 1170 shall receive one day of credit for every day served in a county jail, city jail, industrial farm, or road camp after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019.”⁴ (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010, italics added.) There are two problems with this argument. First, the Legislature did not amend section 4019, subdivision (f) to specify that conduct credits would be calculated by awarding one day of credit for every day served. Second, “section 2933, subdivision (e), was repealed in October 2011, at the same time section 4019 was amended again to provide for the current two-for-two conduct credit formula.” (*Whitaker, supra*, 238 Cal.App.4th at p. 1361.) We conclude from these facts that the Legislature did not disapprove of the *Marquez* formula, which is based on the plain language of the statute the Legislature has not changed, except to increase the *rate* of awarding credits.

Defendant contends that section 2933, subdivision (e)(1) constitutes “a clear indication of the legislature’s view of how the language of section 4019, used both then and in its current version, should be interpreted.” For that reason, he argues, the subsequent repeal of section 2933, subdivision (e) is irrelevant; it demonstrates the

⁴ Defendant requests that we take judicial notice of prior versions of the statutes and associated legislative history. We grant the request and have reviewed the documents submitted. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1127, fn. 11.)

Legislature intended the phrase “a term of four days will be deemed to have been served for every two days spent in actual custody” be interpreted to mean “a term of two days will be deemed to have been served for every one day spent in actual custody.” We disagree. We “presume the Legislature was aware of prior judicial interpretations of the law and that in amending the statute, it ‘intended to change all the particulars upon which we find a material change in the language of the act.’ [Citation.]” (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 891-892.) The Legislature “could have written the statute to provide for a one-for-one formula for conduct credits if it had intended that credits be awarded in that manner” (*Whitaker, supra*, 238 Cal.App.4th at p. 1361), but it did not do so.

Defendant contends the plain language interpretation of the statute “should not prevail if it is contrary to the legislative intent apparent in the statute.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) He argues we should consult the legislative history to uncover a “latent ambiguity.” We do not think that exercise is called for. This is not a case where construing the statutory provision in context reveals a second reasonable interpretation of section 4019, subdivision (f) or where reading the statute literally would undermine or frustrate its purpose. (See *Lungren v. Deukmejian, supra*, at p. 735.) On the contrary, the statutory language is clear, consistent with the overall purpose of the statute, and contradicts defendant’s proposed interpretation. We therefore decline defendant’s invitation to refer to the legislative history. (*Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 61 [“Because the statutory language is unambiguous, there is no need to consider legislative history”].)

III
DISPOSITION

We affirm the judgment.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.