

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY LEE KERPER,

Defendant and Appellant.

F062329

(Super. Ct. No. TF00541A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

It was alleged in an information filed June 23, 2010, that appellant, Gary Lee Kerper, committed possession of methamphetamine for purposes of sale (Health & Saf. Code, § 11378;¹ count 1), a felony, and possession of drug paraphernalia (§ 11364; count 2), a misdemeanor. A jury convicted appellant on count 1 and acquitted him on count 2. In the midst of the trial, appellant moved to dismiss the charges on grounds of the prosecution's failure to preserve exculpatory evidence. The court denied the motion. In a separate proceeding, the court found true an enhancement allegation that appellant had suffered a prior section 11378 conviction (§ 11370.2, subd. (c)). The court imposed a prison sentence of four years four months, consisting of 16 months on the substantive offense and three years on the enhancement.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant, apparently in response to this court's invitation to submit additional briefing, has submitted a brief in which he argues, as best we can determine, as follows: The court erred in denying appellant's motion to dismiss the charges; the prosecutor committed misconduct by misstating the evidence during closing argument; appellant was denied his right to the effective assistance of counsel; the court committed instructional error; and the evidence was insufficient to support his conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

On November 29, 2008, Kern County Deputy Sheriff Keith Miller and other law enforcement personnel went to a house in Taft to execute a search warrant. The front door was slightly ajar and when Deputy Miller knocked, it opened. The deputy entered

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

and saw several persons, including appellant, inside. Deputy Miller ordered appellant to lie on the floor, and the deputy and his colleagues handcuffed appellant and the house's other occupants and conducted a search of the house.

The search uncovered the following items: in the kitchen, parts of plastic bags that Deputy Miller recognized as drug packaging material; in the bathroom, a gram scale; and under a heater grate on the floor near where appellant had been lying, a plastic baggie containing what was later determined by chemical testing to be methamphetamine. The bag and its contents weighed 3.9 grams. The substance containing methamphetamine inside the bag weighed 2.96 grams. A deputy conducted a search of appellant's person and found, in appellant's left front pocket, a methamphetamine smoking pipe.

After the search was completed, appellant was transported to the Kern County Sheriff's Department (KCSD) Taft substation, where, after KCSD Deputy Jeffrey Eveland advised appellant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and appellant agreed to speak to the deputy, appellant stated the following. The methamphetamine found in the house belonged to him. His price for an "eight ball," which is approximately three grams of methamphetamine, is \$240. He would purchase one-half ounce for \$550 and, after "step[ping] on it," sell it for \$960.

Deputy Eveland opined that appellant possessed methamphetamine for purpose of sale, rather than personal use, based on the quantity of methamphetamine, the scale, the packaging materials and appellant's statements.

The parties stipulated that on November 29, 2008, appellant lived in the house where the contraband was found.

Motion to Dismiss

Testimony was taken at trial over the course of two days. On the afternoon of the first day, defense counsel informed the court he had been to the KCSD evidence room, and that the methamphetamine pipe was not there. He moved for a dismissal of count 2.

The prosecutor responded that dismissal would be “premature” because he had not been given an opportunity to locate the pipe. The court denied the motion without prejudice. Defense counsel then moved for an order directing the prosecution to produce the pipe for trial. The prosecutor offered to inquire as to the pipe’s whereabouts during the court’s next recess and the court directed him to do so.

The next morning, Deputy Eveland, called as a witness by the defense, testified to the following. He was in charge of “gathering evidence” in the instant case. He learned the previous day that the pipe was not in the bag in the KCSD evidence room where it had been placed. The bag was “removed during a prior ... perusal by a previous district attorney.” Deputy Eveland had not had the “opportunity to look at the evidence log and contact every person who has checked out evidence in this case[.]” He did not know where the pipe was.

Later that morning, defense counsel presented an oral motion “pursuant to *Arizona v. Youngblood* [(1988) 488 U.S. 51 (*Youngblood*)] and [*California v.*] *Trombetta* [(1984) 467 U.S. 479 (*Trombetta*)] and with respect to the issue of the pipe” In an argument apparently directed at the count 1 charge, he asserted that the pipe constituted exculpatory evidence because in its absence, and in the absence of any photograph of the pipe, he could not establish the size of the pipe and therefore he was unable to make the following argument that the methamphetamine found in the house was not his: If the pipe was small enough to be placed under the grate, a person hiding methamphetamine under the grate would have hidden the pipe in the same place. Thus, the fact that the evidence showed the pipe was found on appellant’s person and not under the grate cast doubt on the prosecution’s claim that appellant placed the methamphetamine in its hiding place, which in turn cast doubt on the claim that he was in possession of the contraband.

Defense counsel also argued, apparently with respect to the count 2 charge, that the pipe was exculpatory because in the absence of the pipe he could not determine if

there was methamphetamine residue in it. If there was no residue, he asserted, he could argue the pipe did not constitute drug paraphernalia.

Finally, defense counsel argued that the prosecution's failure to preserve the pipe was an act of bad faith for the following reason. At an earlier point, before the current prosecutor had been assigned to the case, someone in the office of the Kern County District Attorney's (KCDA) office had "looked at the documentation or looked at the evidence" and had determined that some photographs were missing. At that point, the KCDA's office must have become aware the pipe was missing, yet did not inform defense counsel, thus depriving the defense of information that "would certainly [have] influence[d] negotiations."

The prosecutor disputed the defense's claim as to the exculpatory value of the pipe, and, on the issue of bad faith, argued: "[W]e just don't know when this pipe came up missing. We don't know whether anybody in my office was aware the pipe was missing before me. I had nothing in the file to indicate the pipe was missing." Another attorney had represented appellant prior to current defense counsel and, the prosecutor stated, "For all I know she may have known about this.... We simply don't know." A prosecutor previously assigned to the case has in his possession some evidence—baggies and photographs—but "he says he didn't check out the pipe" and does not have it.

The court denied "the motion seeking dismissal of Count 2 or other appropriate sanctions"

DISCUSSION

Denial of Motion to Dismiss

Appellant makes various complaints that relate to the missing methamphetamine pipe. Specifically, he argues the prosecutor should have asked for a continuance in order to gain time to attempt to locate the pipe; the prosecutor violated an order of the court by failing to find and produce the pipe; and the prosecutor's ignorance of the whereabouts of

the pipe constituted “bad faith.” Appellant also argues that the pipe constituted exculpatory evidence and that because the prosecution failed to produce it, appellant’s “rights to a fair trial and due process were violated,” regardless of whether the prosecutor’s failure to produce the pipe was “in[ad]vertent[.]” or “intentional[.]” All these arguments, as best we can determine, amount to a challenge to the denial of appellant’s motion to dismiss the charges.

At the outset, we note that although defense counsel, in presenting his oral motion, did not explicitly state that his motion was directed at both charges, he presented argument directed at both charges. It is apparent that the trial court, however, was under the impression that appellant was seeking an order dismissing count 2 only, and restricted its ruling to refusing to dismiss that count. Defense counsel did not press for a ruling as to count 1. Therefore, appellant is precluded from obtaining appellate review of issues relating to the court’s failure to dismiss count 1. As noted in *People v. Obie* (1974) 41 Cal.App.3d 744, in which a trial court neglected to actually rule on a motion under Penal Code section 995, “[w]here the court, through inadvertence or neglect, neither rules nor reserves its ruling ... the party who objected must make some effort to have the court *actually rule*. If the point is not pressed and is forgotten, he may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place.” (*Id.* at p. 750, overruled on another ground in *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4; accord, *People v. Brewer* (2000) 81 Cal.App.4th 442, 459 [motion to traverse and quash search warrant].) However, in order to forestall a claim of ineffective assistance of counsel on this point, we address the merits of appellant’s claim that the prosecution’s failure to preserve the pipe violated his due process rights as to both counts.

In *Trombetta*, the United States Supreme Court held that law enforcement agencies have a duty under the federal due process clause to preserve evidence “that might be expected to play a significant role in the suspect’s defense.” (*Trombetta, supra*,

467 U.S. at p. 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence “must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Trombetta, supra*, at p. 489.) In that regard, the mere “possibility” that information in the prosecution’s possession may ultimately prove exculpatory “is not enough to satisfy the standard of constitutional materiality.” (*Youngblood, supra*, 488 U.S. at p. 56.) When evidence is only potentially useful, the failure to preserve such evidence does not constitute a violation of due process unless the defendant proves bad faith on the part of the State. (*Id.* at p. 57; see also *People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [adopting the standard set forth in *Trombetta* and *Youngblood* to evaluate due process challenge under state law].) “On review, we must determine whether, viewing the evidence in the light most favorable to the superior court’s finding, there was substantial evidence to support its ruling. [Citation.]” (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

Appellant has not established that the pipe was exculpatory. He does not explain in his supplemental brief what exculpatory value the pipe had, exculpatory value is not apparent on this record, and trial counsel’s arguments below relating to the size of the pipe and the possibility that it contained methamphetamine residue are only speculation. (Cf. *People v. Alexander* (2010) 49 Cal.4th 846, 878-879 [defendant’s claim that erased audio tape had exculpatory value based on speculation something on it would have contradicted evidence unfavorable to defense].) In addition, the prosecutor’s profession of ignorance constitutes substantial evidence that the prosecution did not act in bad faith. Thus, appellant’s *Trombetta/Youngblood* claim fails.

Prosecutorial Misconduct

Appellant argues that the evidence showed the amount of methamphetamine seized was enough for approximately 30 individual doses, and that the prosecutor “misstated facts,” and thereby committed “misconduct,” when he stated during closing argument that appellant had enough methamphetamine to provide 40 to 80 doses. It appears that appellant bases this claim on the following. The total weight of the plastic bag containing methamphetamine was 3.9 grams, but the weight of the methamphetamine alone was only 2.96 grams. Deputy Eveland based his opinion that appellant possessed methamphetamine for purposes of sales, rather than for personal use, in part on the quantity of methamphetamine seized. The prosecutor asked Deputy Eveland on direct examination, “Approximately how many doses can you get from the quantity seized ... in this case?” The deputy, referring to the weight of the methamphetamine *plus* the plastic bag, responded, “Assuming four grams, ... at least 40 uses” On cross-examination he reiterated this testimony and stated further that four grams could provide up to 80 uses for a first-time user. In closing argument, the prosecutor stated appellant “had four grams total package weight, approximately 40 to 80 doses.” It is apparently this statement to which appellant now objects.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition;

otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’ [Citations.]” (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

“[T]he judgment will not be reversed [on state law grounds] unless, after a review of the entire cause, it appears that it is “reasonably probable” that a result more favorable to the defendant would have occurred had the district attorney refrained from the misconduct in question [citations]. If it is asserted that the alleged misconduct is of constitutional dimensions, it need only be clear “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained” [citation].” (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182-183.)

Here, any possibility of prejudice resulting from the instance of alleged misconduct could have been cured by an admonition. Appellant’s failure to make a timely objection bars him from now challenging the portion of the prosecutor’s argument in question. Moreover, the isolated instance of purported misconduct about which appellant complains does not constitute a *pattern* of conduct, egregious or otherwise, that violated appellant’s federal due process rights. Finally, even if the prosecutor’s statement can be regarded as deceptive under state law, it is not reasonably probable, given the overwhelming evidence against appellant, including evidence on the question of whether he possessed methamphetamine for sales purposes rather than for personal use, that the jury would have reached a result more favorable to appellant in the absence of the purportedly offending statement by the prosecutor.

Lesser Included Offense

The court instructed the jury on possession of methamphetamine for purposes of sale and on the lesser included offense of simple possession. Appellant complains that neither he nor the jury was advised of the possibility of conviction of the lesser offense until “the end of the trial.” It is not clear what appellant’s claim of error is, but there was no error in either the content or the timing of the lesser included offense instruction.

Sufficiency of the Evidence

Appellant argues the evidence was insufficient to support his conviction. It appears he bases this contention on the following. One of the deputies who participated in the search described the methamphetamine seized as a “powdery[,] ... white substance,” whereas the police criminalist who analyzed the contraband indicated it was a “white crystalline material.” Appellant’s contention is meritless.

“When a defendant challenges the sufficiency of the evidence, “[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”” (*People v. Clark* (2011) 52 Cal.4th 856, 942.) ““[O]n appeal all presumptions favor proper exercise” of the trial court’s power to “judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences”” (*People v. Alexander, supra*, 49 Cal.4th at p. 883.)

When we apply this standard, we conclude that notwithstanding what appellant suggests is a conflict in the evidence, substantial evidence supports the judgment.

Ineffective Assistance of Counsel

Appellant contends his counsel was constitutionally ineffective in failing to (1) ask for a continuance, presumably to give him time to find the missing pipe; (2) “bring in an expert witness”; and (3) request that the methamphetamine found in his house be reanalyzed. This contention too is without merit.

“To prevail on a claim of ineffective assistance, a defendant must show both that counsel’s performance was deficient—it fell below an objective standard of reasonableness—and that defendant was thereby prejudiced. [Citation.] Such prejudice exists only if the record shows that but for counsel’s defective performance there is a

reasonable probability the result of the proceeding would have been different.” (*People v. Cash* (2002) 28 Cal.4th 703, 734.)

Appellant’s argument is, in essence, a claim that his trial counsel failed to take steps to obtain and present certain evidence, viz., the missing methamphetamine pipe, additional chemical analysis of the seized contraband, and expert witness testimony, on what subject appellant does not say. However, appellant has not established that a continuance would have enabled to him obtain the pipe; that the pipe, once obtained, would have been helpful to appellant’s cause; that re-testing of the contraband would have shown that the substance was not methamphetamine; or that an expert witness could have provided favorable testimony. Appellant has not met his burden of showing either deficient performance or prejudice. Therefore, his claim of ineffective assistance of counsel fails.

Independent Review of the Record

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.