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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKIE LEROME KENNEDY,

Defendant and Appellant.

F063265

(Super. Ct. No. 10CM3373)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Grace Lidia Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On June 29, 2011, appellant Frankie Lerome Kennedy was convicted after jury trial of transporting a controlled substance (count 1) and possessing a controlled substance, as a lesser included offense to the charged crime of possessing a controlled substance for the purpose of sale (count 2). (Health & Saf. Code, §§ 11352, subd. (a), 11350, subd. (a).)¹ Appellant admitted special allegations that he suffered one prior conviction for a strike offense and served one prior prison term. (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subd. (b)-(i), 667.5, subd. (b).) Appellant filed a motion to dismiss the prior strike in the interests of justice (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), which was denied. He was sentenced to an aggregate term of nine years' imprisonment.

Appellant presents three appellate issues. He challenges the sufficiency of the evidence supporting the guilty verdict on count 1. He argues that the trial court committed prejudicial error by misreading CALCRIM No. 3500. Finally, appellant argues that denial of his *Romero* motion was an abuse of discretion. None of these arguments is convincing. The judgment will be affirmed.

FACTS

During the evening of September 10, 2010, City of Lemoore Police Officer John Henderson observed a Chevrolet Tahoe stopped in the middle of the roadway. A group of people were congregated around it. The people scattered when they saw the patrol vehicle. Officer Henderson followed the Tahoe. After the driver made two turns without

¹ Appellant was jointly tried with Arnold Horn. The jury found Horn guilty of transporting a controlled substance, possessing a controlled substance and possessing cocaine base. On motion of the prosecutor, the court dismissed count 4, which alleged that appellant and Horn violated Health and Safety Code section 11350, subdivision (a).

signaling, Officer Henderson conducted a traffic stop. Appellant was seated in the passenger seat; Horn was seated in the driver's seat.

Officer Henderson returned to his patrol vehicle to run appellant's and Horn's names through dispatch. When he returned to the Tahoe, Horn was talking on his cell phone. Officer Henderson testified that Horn "was telling this other subject he's going to jail. And I asked him why and he said that he already knew what was going on, I had called for a back-up unit and I was going to search his vehicle." Officer Henderson asked Horn if "there was something in the vehicle," and Horn replied, "You already know."

Officer Henderson decided to search the Tahoe. He returned to his patrol vehicle and radioed for backup. He "kept an eye on" appellant and Horn "the entire time. The patrol vehicle was parked 10 to 12 feet behind the Tahoe. Two "very bright" spotlights were activated and shining on the Tahoe. One of the spotlights illuminated the driver's side of the Tahoe and the other spotlight illuminated the passenger's side of the Tahoe. Officer Henderson had no difficulty seeing appellant and Horn. Officer Henderson testified that "[a]s I was observing the [Tahoe] I saw an object fly out the passenger window and hit a small wooden fence that was a few feet to the west of the Tahoe, about three feet high. Saw it hit the fence, heard it hit the fence and saw it drop to the ground." The fence was on the passenger's side of the Tahoe, approximately six to nine feet away from the vehicle. Officer Henderson did not see who threw the object. Horn was talking on his cell phone during the entire time Officer Henderson was watching the vehicle.

Officer Henderson approached the passenger's side of the Tahoe. He asked the occupants if "they threw anything out the window[?]" Appellant "replied he threw out a candy bar." Officer Henderson "looked down and saw a candy bar wrapper with chocolate on it, no actual candy bar in it, directly at the passenger door."

Officer Henderson walked to the fence and found "a white substance inside of a clear baggie." The parties stipulated that the white substance "contained 81.2 grams of

cocaine.” Officer Henderson photographed the baggie before touching it; the photograph was admitted at trial as exhibit 1. He did not find a candy bar.

Officer Henderson sat in the Tahoe’s driver’s seat and front passenger’s seat. He testified that a person could not have thrown the baggie containing the cocaine “in a straight line from that driver’s seat to where the drugs were,” because the windshield served as an obstruction. A person could have thrown the baggie out the passenger window to the place where the baggie came to rest because “the driver’s front windshield of the car doesn’t obstruct a straight line to where the drugs were found.”

Romanisha Tunstall, who identified herself to Officer Henderson as Horn’s girlfriend, arrived at the scene. Officer Henderson heard Horn say to her, that “she can get the money at the house. That we, the police, would be going there to search.”

Horn’s residence was searched later that night. A black baggie containing a white rock-like substance was found in a nightstand in the bedroom. The parties stipulated that the substance “was found to contain 20 grams of cocaine base.” A paycheck with Horn’s name was also found in this nightstand. A pager was found inside a dresser in the bedroom. A digital scale, marijuana and a medical marijuana card were found in the kitchen.

Horn admitted to Officer Henderson that the cocaine belonged to him. He said it was for personal use only. Horn said that the pager was necessary to take care of an uncle.

City of Lemoore Police Officer Ryan Obarr gave expert testimony “in the area of controlled substances.” He testified that the powdered cocaine was consistent with possession for purpose of sale and had a street value of approximately \$6,480. The cocaine base was consistent with possession for sale and had a street value of approximately \$2,000.

Ernest Tunstall was the only defense witness. Tunstall testified that he was listening to the stereo in Horn’s Tahoe with two friends. Appellant joined them. A white

police vehicle with its lights off passed by, almost hitting Tunstall. Appellant and Horn drove away in the Tahoe. Tunstall heard that they had been pulled over. He called Horn's cell phone about six times.

DISCUSSION

I. Count 1 Is Supported By Substantial Evidence.

Appellant was convicted in count 1 of transporting a controlled substance in violation of Health and Safety Code section 11352, subdivision (a) (count 1). To prove this crime the People are required to establish all of the following elements: (1) A person transported cocaine; (2) with knowledge of its presence and nature as a controlled substance; and (3) the substance transported was in an amount sufficient to be used as a controlled substance. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) “[O]ne having the requisite knowledge may be found guilty of illegal transportation if he also has joint or exclusive possession of the drug in a moving vehicle.” (*People v. Rogers* (1971) 5 Cal.3d 129, 133-134.) Possession can be either actual or constructive. (*Id.* at p. 134.) Constructive possession “is established by showing that defendant maintained some control or right to control over contraband in the physical possession of another.” (*Ibid.*) Even though “possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may ‘transport’ marijuana or other drugs even though they are in the exclusive possession of another.” (*Ibid.*)

The rules governing the substantial evidence standard of review are axiomatic:

“... When reviewing a claim of insufficient evidence, we examine the entire record in the light most favorable to the prosecution to determine whether it contains reasonable, credible and solid evidence from which the jury could find the defendant guilty beyond a reasonable doubt. If the circumstances reasonably justify the verdict, we will not reverse simply because the evidence might reasonably support a contrary finding. This standard applies to cases based on circumstantial evidence. [Citation.] The testimony of just one witness is enough to sustain a conviction, so long as that testimony is not inherently incredible. [Citation.] The trier of fact determines the credibility of witnesses, weighs the evidence, and resolves factual conflicts. We cannot reject the testimony of a

witness that the trier of fact chooses to believe unless the testimony is physically impossible or its falsity is apparent without resorting to inferences or deductions. As part of its task, the trier of fact may believe and accept as true only part of a witness's testimony and disregard the rest. On appeal, we must accept that part of the testimony which supports the judgment. [Citation.]" (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.)

Appellant argues the guilty verdict on count 1 lacks sufficient evidentiary support because Officer Henderson's "observations were simply not enough to warrant the jury in finding, beyond a reasonable doubt, that appellant had thrown the drugs from the car. He was not seen to do so, and he did not admit doing so." We reject this argument because it fails to take into account a crucial portion of Officer Henderson's testimony. The officer testified that after he saw "an object fly out the passenger window and hit a small wooden fence that was a few feet to the west of the Tahoe," he asked the Tahoe's occupants if "they threw anything out the window[?]" Appellant "replied he threw out a candy bar." Thus, appellant admitted throwing an object out the passenger window.

The jury was free to accept as true Officer Henderson's testimony that appellant said he threw something out the window while rejecting appellant's identification of the object as a candy bar. (*In re Daniel G., supra*, 120 Cal.App.4th at p. 830.) The trier of fact "may believe and accept as true part of the testimony of a witness and disbelieve the remainder. On appeal that part which supports the judgment must be accepted, not that part which would defeat or tend to defeat it." (*People v. Hrisoulas* (1967) 251 Cal.App.2d 791, 796; *People v. Jones* (2010) 186 Cal.App.4th 216, 248, fn. 4; *In re Daniel G., supra*, 120 Cal.App.4th at p. 830.) Appellant's statement that it was a candy bar he threw out the window "did no more than create a conflict in the evidence that the [jury] had the duty to and did resolve; [the jury] was not required to give credence to defendant's story and it is not our function to reappraise its effect." (*People v. Hrisoulas, supra*, 251 Cal.App.2d at pp. 796-797.)

Appellant's admission that he threw something out the window, coupled with Officer Henderson's testimony that he saw an object fly out the Tahoe's passenger

window and hit the fence, the photograph of the baggie near the fence and the parties' stipulation that the substance inside the baggie contained 81.2 grams of cocaine, constitutes substantial evidence proving that appellant threw a baggie containing cocaine out of the Tahoe's window. Appellant's guilty knowledge can reasonably be inferred from his lie that the object he threw was a candy bar. (*People v. Foster* (1953) 115 Cal.App.2d 866, 869.)

Accordingly, we hold that the record contains substantial evidence from which a trier of fact could find beyond a reasonable doubt that appellant threw the baggie containing cocaine out of the Tahoe's window. Appellant does not challenge the sufficiency of the evidence proving the remaining elements of the crime of transporting a controlled substance. Having examined the record, "we are satisfied that the judgment is amply supported by the evidence." (*People v. Hrisoulas, supra*, 251 Cal.App.2d at p. 796.)

II. Misreading Of CALCRIM No. 3500 Was Not Prejudicial.

A. Facts.

The court instructed on unanimity with CALCRIM No. 3500. In relevant part, this instruction provides: "You must not find a defendant guilty unless you all agree that the People have proved that the defendant[s] committed at least one of these acts and you all agree on which act he committed." When reading CALCRIM No. 3500 to the jury, the trial court misread this sentence by erroneously adding the word "not" in front of the word "guilty."

CALCRIM No. 200 was included in the jury charge. In relevant part, CALCRIM No. 200 states that the court "will give you a copy of the instructions to use in the jury room.... Only consider the final version of the instructions in your deliberations."

B. The instructional misreading was nonprejudicial.

Appellant argues that the court's error when reading CALCRIM No. 3500 violated his federal and state constitutional rights to a unanimous jury. We disagree. Our

Supreme Court has consistently ruled that when the jury is provided with a written copy of the instructions, an error made by the trial court during its oral reading of the jury charge is not prejudicial. (*People v. Mills* (2010) 48 Cal.4th 158, 200-201 (*Mills*); *People v. Osband* (1996) 13 Cal.4th 622, 687; *People v. Davis* (1995) 10 Cal.4th 463, 542; *People v. Crittenden* (1994) 9 Cal.4th 83, 138-139.)²

Mills, supra, 48 Cal.4th 158 is directly on point. There, the trial court misspoke three times when reading the jury instructions. The Supreme Court rejected the appellant's claim of reversible error, as follows:

“The trial court committed no reversible error, structural or otherwise. The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke. ‘We of course presume “that jurors understand and follow the court’s instructions.” [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.’ [Citation.] Because the jury was given the correctly worded instructions in written form and instructed with CALJIC No. 17.45 that ‘[y]ou are to be governed only by the instruction in its final wording,’ and because on appeal we give precedence to the written instructions, we find no reversible error. [Citations.]” (*Mills, supra*, 48 Cal.4th at pp. 200-201, fn. omitted.)

Likewise, in this case the jury was provided with a copy of the written instructions and told that it was to be governed by the final version of the instructions in their deliberations. The closing arguments of counsel did not exploit the ambiguity created by the trial court's misreading of the unanimity instruction. Appellant's assertion that “it does not appear the jury read the written instructions, because it did not question the court about the discrepancy,” is pure speculation. It is presumed that the jurors followed the court's direction and relied on the written instructions. “We indulge that presumption

² We reject respondent's assertion that the point was forfeited by the absence of contemporaneous objection. A challenge to the trial court's reading of the jury charge can be raised for the first time on appeal if it affects appellant's substantial rights. (*Mills, supra*, 48 Cal.4th at p. 201, fn. 15.)

here.” (*People v. Davis, supra*, 10 Cal.4th at p. 542.) It is not reasonably likely that the jury erroneously applied the unanimity instruction. (*Ibid.*) Therefore, we hold that the court’s inadvertent misreading of the unanimity instruction was nonprejudicial. (*Mills, supra*, 48 Cal.4th at pp. 200-201; *People v. Crittenden, supra*, 9 Cal.4th at pp. 138-139.)

III. Denial Of The *Romero* Motion Was Not An Abuse Of Discretion.

A. Facts.

The probation report reflects that in 2000 appellant had a juvenile referral for violating Penal Code sections 594, subdivision (a) and 148, subdivision (a); the referral “was handled informally” and he “received 16 hours of work program.” In 2002, appellant was convicted of violating Penal Code section 422 and sentenced to three years’ imprisonment. He was paroled in 2004 and returned to custody for a parole violation the following year. He was paroled again in 2006 and discharged from parole in 2007. In 2005, he was convicted of misdemeanor marijuana possession and fined. That year he also suffered misdemeanor convictions for driving without a license and failing to appear; he was fined and jailed for three days. He was cited for traffic infractions in 2001 and 2005. Appellant does not have a work history. He suffers from an unspecified learning disability and receives “State Disability.”

During the sentencing hearing on September 1, 2011, defense counsel made an oral *Romero* motion. He stated that the prior strike conviction occurred when appellant was 18 years old. He argued that the prior conviction is now “more than eight years old” and, since being released from prison, appellant “has had minimum contact with law enforcement.” Defense counsel also stated that appellant cares for his children and ill mother. Finally, he asserted that appellant’s role in the cocaine possession crime “was of a minor nature.”

The prosecutor opposed the *Romero* motion. He argued that “[t]he strike is not that old. He hasn’t lived a crimefree life. He was returned to custody for parole violations. He had the misdemeanor possession of marijuana [conviction].”

The trial court declined “to exercise its discretion under the *Romero* decision,” to dismiss the prior strike. It made the following findings in support of this ruling:

“The Court would find that the prior serious crime does involve an act of violence, a serious danger to the public, and in and of itself was life threatening. Although the defendant was relatively young at the time the offense occurred, at least as what’s been presented to me, it does appear to the Court that the mandated punishment under the Three Strikes Law would not cause a severe, unreasonable or disproportionate detriment to the defendant when taken into consideration with all the factors as brought forth to the Court, especially considering the fact that at the time the defendant committed the current offense he cannot in any way argue that he was not aware he had the prior [Penal Code section] 422 conviction and was certainly aware of the circumstances of what would occur if he committed another felony offense.”

Appellant was sentenced to an aggregate term of nine years’ imprisonment.

B. Appellant is not outside the spirit of the three strikes law.

In ruling on a request to dismiss a prior strike conviction, the court must conduct a fact-based inquiry to determine whether the defendant falls outside the spirit of the three strikes law. Relevant factors include the nature of the present offense, defendant’s prior criminal history, the defendant’s background, character and prospects, as well as other individualized considerations. (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Philpot* (2004) 122 Cal.App.4th 893, 905 (*Philpot*).) “[A] court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) The burden is on the party attacking the sentence to demonstrate that the lower court’s decision was “so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

It is unclear from appellant’s briefing on what basis he claims that the trial court abused its discretion. His sole argument is that “[t]his case may be compared to” *Carmony, supra*, 33 Cal.4th at page 378. In *Carmony*, the Supreme Court held that the trial court’s refusal to dismiss a prior strike was not an abuse of discretion and reversed the Court of Appeal’s ruling because it erroneously focused exclusively on the nature and

circumstances of the defendant's current offense. (*Id.* at p. 379.) Here, it appears that appellant wants us to compare his circumstances to the ones before the Supreme Court in *Carmony* and find that, unlike *Carmony*, he is outside the spirit of the three strikes law. Such an argument is not convincing.

The record fully supports the trial court's exercise of discretion. Appellant did not remain free from criminality after he was released from prison. He violated his parole and was returned to custody. He suffered a misdemeanor drug possession conviction, as well as misdemeanor convictions for being an unlicensed driver and failing to appear in court. A juvenile work program, fines, a short jail sentence, a prison term and parole have all failed to eradicate appellant's recidivism. Appellant's criminality is escalating; his current offenses are significantly more serious than his prior crimes. Appellant's participation in the current crimes was not minor. He threw the bag of cocaine out the Tahoe's window. Appellant's "conduct as a whole was a strong indication of unwillingness or inability to comply with the law. It is clear from the record that prior rehabilitative efforts have been unsuccessful for [him]." (*Philpot, supra*, 122 Cal.App.4th at p. 906.) We concur in the trial court's determination that appellant is not outside the spirit of the three strikes law. Denial of the *Romero* motion is not an abuse of discretion. (*Id.* at p. 907.)

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

DETJEN, J.