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

THE PEOPLE,

Plaintiff and Respondent,

v.

ARNOLD WESLEY HORN, JR.,

Defendant and Appellant.

F063350

(Super. Ct. No. 10CM3373)

OPINION

THE COURT*

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

Patrick J. Hennessey, Jr., 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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* Before Cornell, Acting P.J., Kane, J. and Detjen, J.

Defendant Arnold Wesley Horn, Jr., was sentenced to eight years eight months in prison, after a jury convicted him, in count 1, of transportation of cocaine (Health & Saf. Code,¹ § 11352, subd. (a)); in count 2, of possession of cocaine (§ 11350, subd. (a)) as a lesser included offense of the charged possession of cocaine for sale (§ 11351); and, in count 3, of possession of cocaine base (§ 11350, subd. (a)) as a lesser included offense of the charged possession of cocaine base for sale (§ 11351.5); and he admitted having suffered a prior narcotics conviction (§ 11370.2, subd. (a)) and having served a prior prison term (Pen. Code, § 667.5, subd. (b)).² Defendant now challenges the sufficiency of the evidence as to count 1 and the trial court’s imposition of a prison term. We affirm.

FACTS

I

PROSECUTION EVIDENCE

At around 8:45 p.m. on September 10, 2010, Lemoore Police Officer John Henderson was on duty, in uniform and a marked patrol vehicle, in the Home Gardens area of Hanford.³ As he approached the intersection of Home Avenue and 4th Place, he observed a vehicle parked in the middle of a residential street. Its brake lights were on and approximately 10 people were gathered near its front doors. Based on his training and experience, Henderson believed it was possible a drug deal was taking place.

Henderson turned onto 4th Place, whereupon people “scattered pretty quickly” and the vehicle left at a “reasonable” speed. Henderson followed, and when the vehicle made two turns without a turn signal being activated, turned on his lights to make a stop for the

¹ Further statutory references are to the Health and Safety Code unless otherwise stated.

² Defendant was jointly charged and tried with Frankie Lerome Kennedy. Kennedy is not before us on this appeal.

³ As a member of the county gang task force, Henderson worked throughout the county.

traffic violations. The vehicle yielded. Defendant was the driver and Kennedy was the passenger. Both men were cooperative when Henderson contacted them.

Henderson went to his patrol car to run the men's names through dispatch. When he returned, defendant was on a cell phone. As Henderson walked up, he heard defendant tell the person to whom he was speaking that he had to go and would call back later, because the officer was going to take him to jail. When Henderson asked why, defendant said he already knew what was going on, that Henderson had called for a backup unit and was going to search defendant's vehicle. Henderson, who had not intended to search the vehicle, asked if defendant was wanted or there was something in the vehicle. Defendant replied, "You already know."

Henderson returned to his patrol car and radioed for another unit, as he had now decided to search defendant's vehicle. As he observed defendant's vehicle, Henderson saw an object fly out through the passenger window, hit a fence several feet away, and fall to the ground. Although Henderson could not see who threw the object, defendant appeared to be on his cell phone the entire time.

Henderson walked up to the passenger side and asked if the occupants threw anything out the window. Kennedy said he threw out a candy bar. Looking down, Henderson observed an empty candy bar wrapper "directly at" the passenger door. Once backup arrived, Henderson retrieved the item at the fence. It was a clear plastic baggie containing 81.2 grams of cocaine. There were no fingerprints on the baggie. However, Henderson later sat in the vehicle and determined there was a straight line from someone sitting in the passenger seat to where the drugs were found, while someone in the driver's seat could not have thrown them to that location. Although he looked, Henderson did not find any candy.

Around this time, defendant's girlfriend, Romanisha Tunstall, arrived. Defendant obtained Henderson's permission to speak to her. Defendant, who was under arrest and in the backseat of a patrol car, told her she could get the money at the house, and the

police would be going there to search. At that point, Henderson terminated the conversation.

Defendant's apartment was searched later that night. On a dresser in the bedroom was a pager. In a nightstand drawer was a black baggie that contained a 20-gram chunk of cocaine base. Also found in the apartment were a digital scale, some marijuana in a jar, and a medical marijuana card in defendant's name. While officers were at the apartment, the pager went off a number of times.

Defendant subsequently told Henderson the cocaine in the apartment belonged to defendant, but his girlfriend did not know about it. Defendant denied selling it and said he had it to get high. He said he had the pager so an uncle, of whom he took care, could contact him. Asked why the pager was going off so late at night (a little after 11:00 p.m.), defendant did not respond. When Henderson asked about drugs in the car, defendant replied, "Like I said, the drugs in the apartment are mine."

Henderson checked defendant's cell phone, but it did not contain any text messages. They had been erased. The phone rang repeatedly.

Officer Obarr of the Kings County Narcotics Task Force testified as an expert on the subject of controlled substances. He explained that there are 28.5 grams in an ounce, and cocaine is typically sold on the streets in quarter (.25) grams. The typical single dose is .05 grams. Cocaine base (also called rock or crack) is usually sold on the streets in amounts of .05 to .10 grams. The usual individual dose is .05 grams, which the seller typically chips off a larger rock.

Based on the amount, Obarr opined that the cocaine base in this case was possessed for sale. Twenty grams would produce 400 individual dose units and have a street value of \$2,000. In Obarr's training and experience, users possess one to two rocks at a time, not \$2,000 worth of crack cocaine. In Obarr's opinion, the cocaine was also possessed for sale. The 81.2 grams had a street value of \$6,480. Users typically do not possess that much at one time.

II

DEFENSE EVIDENCE

Ernest Tunstall was the father of defendant's girlfriend. He had known defendant about 15 years and defendant's father about 20 years. On the evening defendant was arrested, Tunstall and about 15 of his friends were gathered at their clubhouse, playing dominoes and cards. Defendant had put a music system in his car, and Tunstall telephoned him around 8:00 p.m. and asked him to come by to let Tunstall listen to it. Defendant showed up in his vehicle about 15 to 20 minutes later. Tunstall believed defendant was alone.

Defendant got out of his vehicle, opened the back, and showed Tunstall and a couple of others, including Kennedy, his stereo system. The group listened to music for five to 10 minutes, then defendant said he was going home. He and Kennedy got in defendant's vehicle and left.

Tunstall and his friend Lalo were still standing in the street, talking, when a white car went by, fast, with its lights off. Tunstall telephoned defendant because there had been a lot of gang violence, and he did not know what to make of the car following defendant with its lights off. The car was going too fast for Tunstall to realize it was a police car. Defendant did not answer either time Tunstall called, then Tunstall's daughter contacted Tunstall and said the police had stopped defendant.

Tunstall got in his car and eventually found defendant. Tunstall telephoned him again, but somebody else answered defendant's phone. Tunstall was close enough to see the officer had defendant's phone.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Defendant says the evidence was insufficient to establish he knowingly transported cocaine. We disagree.

The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, at p. 578.) An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). “Where the circumstances support the trier of fact’s finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant’s innocence. [Citations.]” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

“Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]” (*People v. Meza, supra*, 38 Cal.App.4th at p. 1746.) One may become criminally liable for transporting a controlled substance through actual or constructive possession of the substance. (*People v. Morante* (1999) 20 Cal.4th 403, 417.) Thus, a defendant may be convicted of transportation of a controlled substance “when his or her dominion and control are exercised through the acts of an agent. [Citations.]” (*Id.* at pp. 417-418.) As this court has said, “[E]ach of these essential elements may be proved by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citations.]” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.)

Defendant says the evidence did not show he knew Kennedy was in possession of cocaine until at or immediately before the traffic stop. Although the jury could have reached this conclusion, it also reasonably could have concluded — particularly from the statements Henderson overheard defendant making on his cell phone and his ensuing conversation with defendant — that defendant was fully aware of the cocaine’s presence all along. This being the case, the jury’s verdict must stand.

II

VALIDITY OF PRISON SENTENCE

As previously described, in addition to transportation of cocaine, defendant was charged with possession of cocaine and possession of cocaine base, both for sale. In each instance, the jury acquitted him of the charged offense and convicted him instead of simple possession of the particular substance. As a result, defense counsel argued at sentencing that defendant was eligible for Proposition 36 treatment. The prosecutor disagreed, claiming the trial court could find possession for sale by a preponderance of the evidence despite the jury’s verdicts and so sentence defendant to prison. The court found it “substantially beyond any reasonable or objective belief” that the drugs found could be for personal use, and concluded the circumstances were “not ... within the purview of Penal Code Section 1210 or the Proposition 36 program.” Accordingly, it sentenced defendant to prison.

Defendant now contends the sentence was unauthorized. He says he was eligible for Proposition 36 probation by virtue of the jury’s verdicts and, under the particular facts of this case, the trial court erred by sentencing him to prison instead. We disagree.

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, is codified in section 11999.4 et seq., and in Penal Code sections 1210, 1210.1, and 3063.1. (*People v. Canty* (2004) 32 Cal.4th 1266, 1273, fn. 1.) It mandates, with certain exceptions, that any person convicted of “a nonviolent drug possession offense” is to receive probation, as a condition of which “the court shall require participation in and

completion of an appropriate drug treatment program.” (Pen. Code, § 1210.1, subd. (a).) These provisions create an alternative sentencing scheme for those convicted of certain drug offenses, and do not afford a trial court discretion to impose a prison term, rather than probation with drug treatment, for qualifying offenders. (*People v. Superior Court (Edwards)* (2007) 146 Cal.App.4th 518, 520-521.) “When a defendant is eligible for Proposition 36 treatment, probation is mandatory unless he or she is disqualified in accordance with specified statutory exceptions. [Citation.]” (*Id.* at p. 521.)

“The term ‘nonviolent drug possession offense’ means the unlawful personal use, possession for personal use, or transportation for personal use of any [specified] controlled substance [including cocaine or cocaine base], or the offense of being under the influence of a controlled substance The term ‘nonviolent drug possession offense’ does not include the possession for sale ... of any controlled substance” (Pen. Code, § 1210, subd. (a).) Accordingly, if defendant possessed cocaine or cocaine base for sale, he was disqualified from Proposition 36 probation, and the trial court retained discretion to sentence him to prison.⁴

In the present case, the jury convicted defendant of lesser included nonviolent drug possession offenses, and acquitted him of the charged disqualifying offenses. Nevertheless, the trial court properly considered the trial testimony in determining defendant’s eligibility for Proposition 36 probation. (*People v. Glasper* (2003) 113 Cal.App.4th 1104, 1113.) In this regard, there was ample evidence, including expert testimony, from which to conclude both the cocaine in the vehicle and the cocaine base at the apartment were possessed for sale. Although the expert testimony furnished a basis for finding possession for sale beyond a reasonable doubt (see *People v. Harris* (2000) 83

⁴ Because defendant was sentenced before October 1, 2011, his case does not fall within the provisions of “realignment.” (See Pen. Code, § 1170, subd. (h); *People v. Cruz* (2012) 207 Cal.App.4th 664, 668.)

Cal.App.4th 371, 374-375; accord, *People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378), for purposes of finding defendant ineligible for Proposition 36 probation, the trial court was only required to find by a preponderance of the evidence that the drugs were not possessed for personal use. (*People v. Dove* (2004) 124 Cal.App.4th 1, 4, 10-11; cf. *United States v. Watts* (1997) 519 U.S. 148, 156.)⁵ The court having properly so found, it validly sentenced defendant to prison.

Defendant calls our attention to *People v. Harris* (2009) 171 Cal.App.4th 1488, which he views as similar to his case. In *Harris*, the jury convicted the defendant of transportation of cocaine base and possession of narcotics paraphernalia, and he was sentenced to prison. (*Id.* at p. 1491.) On appeal, the defendant argued he should have been granted Proposition 36 probation. (*Harris, supra*, at p. 1491.) The appellate court agreed, but only because of the “unique facts” of the case: The jury made an express, unanimous finding, by means of an allegation appended to the verdict, that the transportation was for personal use within the meaning of Penal Code section 1210, subdivision (a). (*Harris, supra*, at pp. 1491, 1494.) The court stated:

“We recognize that the acquittal of a charge or not true finding of a sentencing allegation generally does not bind the trial court from redetermining the personal use issue for Proposition 36 purposes based on the preponderance of the evidence standard because an acquittal or not true finding merely means that the jury was not convinced beyond a reasonable doubt on such issue. [Citations.] Further such determination may be implied from the fact a prison sentence is imposed. [Citations.] However, on the particular facts of this case, we simply cannot imply a judicial factfinding at the time of sentencing regarding personal use

⁵ *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny do not apply, since the trial court’s finding did not increase the penalty for defendant’s crimes beyond the statutory maximum prescribed therefor, and Penal Code section 1210.1 did not somehow create a sentence enhancement. (See, e.g., *In re Varnell* (2003) 30 Cal.4th 1132, 1141-1142; *People v. Dove, supra*, 124 Cal.App.4th at pp. 4, 7-11; *People v. Glasper, supra*, 113 Cal.App.4th at p. 1115; *People v. Barasa* (2002) 103 Cal.App.4th 287, 294.)

“Unlike in the cases on which the People rely, the question of whether Harris was ‘eligible’ for Proposition 36 treatment was specifically decided by the jury’s verdict and special finding in this case. [Citation.] Even though Harris did not present any direct evidence in his defense at trial, through vigorous cross-examination his counsel adduced evidence from the prosecution witnesses to show Harris’s transportation of the cocaine base was for his personal use. The People do not challenge the sufficiency of the evidence to support the jury’s express finding, made beyond a reasonable doubt, that Harris’s transportation of the cocaine base was for personal use. The People neither asked the trial court to redetermine the issue of personal use ... at the time of sentencing nor objected to the jury’s finding as an improper verdict. Under these circumstances, the court’s determination at the time of sentencing was guided by the jury’s authorized verdict and express finding. We will not marginalize that finding or permit the People to essentially now have another chance to make their transportation for sales case by implying the trial court made a finding it was not asked to make contrary to the express jury finding already recorded.” (*Harris, supra*, at p. 1498, fn. omitted.)

In the present case, the jury made no such express finding, but merely convicted defendant of lesser included offenses. Accordingly, “the acquittal[s] on the charge[s] of possession for sale did not bind the trial court. The acquittal[s] simply meant the jury was not convinced beyond a reasonable doubt that the possession was for sale.... [T]he trial court was free to redetermine the personal use issue based on the preponderance of the evidence. [Citations.]” (*People v. Dove, supra*, 124 Cal.App.4th at p. 11.)

DISPOSITION

The judgment is affirmed.