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

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY BARNELL GOFFNER,

Defendant and Appellant.

F063908

(Super. Ct. No. F10904062)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

J. Wilder Lee, 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, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Jimmy Barnell Goffner was convicted after jury trial of possessing cocaine base and marijuana for purpose of sale (counts 1 and 3) and of transporting cocaine base and marijuana (counts 2 and 4). (Health & Saf. Code, §§ 11351.5, 11352, subd. (a), 11359, 11360, subd. (a).) Appellant admitted special allegations that he suffered four prior strike convictions and two prior drug related convictions and that he previously served four prior prison terms. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b); Health & Saf. Code, § 11370.2, subd. (a).) He was sentenced to two consecutive terms of 25 years to life imprisonment (counts 1 and 3).

Appellant argues the prosecutor committed prejudicial misconduct during his closing argument. Anticipating that we would find this issue was forfeited by the absence of contemporaneous objection, appellant also presents a related ineffective assistance claim. We conclude that the alleged prosecutorial misconduct was not preserved for direct appellate review. The ineffective claim fails because the challenged remark fell within the bounds of acceptable argument and an objection on this ground would not have succeeded.

Appellant also raises two sentencing claims. First, he argues the lower court erred when it determined that it was statutorily required to order the term imposed for count 3 to run consecutive to the term imposed for count 1. Respondent concedes this point and we accept its concession as properly made. The court possessed discretion to order these terms to run concurrently. “[A]n abuse of discretion occurs where the trial court was not ‘aware of its discretion’” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) Remand for exercise of judicial discretion is unnecessary because the court stated on the record that if it possessed discretion it would run these two terms concurrently. Second, appellant contends that Proposition 36, the Three Strikes Reform Act of 2012 (the Act),

applies retroactively and he is entitled to resentencing. This exact argument was rejected by this court in *People v. Yearwood* (2013) 213 Cal.App.4th 161. We will modify the sentence to order the terms imposed for counts 1 and 3 to run concurrently and affirm the judgment as so modified.

FACTS

On August 8, 2010, Fresno Police Officers Caleb Janca and Justin Baroni observed appellant riding a bicycle in circles on a public roadway. They detained appellant because he had earphones in both ears and was carrying a MP3 type device. Appellant was holding something wrapped in plastic in his left hand. Officer Baroni asked, “[W]hat’s in your hand?” Appellant replied, “[I]t’s just some weed.” Officer Janca took the plastic-wrapped marijuana from appellant and escorted him to the curb. As appellant stepped off his bicycle and started walking, Officer Janca saw a plastic bindle fall from the bottom of appellant’s shorts onto the ground. The bindle held three baggies containing crack cocaine and one baggie containing marijuana.

Appellant was arrested. He was wearing a backpack, which the officers searched. It contained two baggies of marijuana and \$70.96 in cash, consisting of nine \$5 bills, 20 \$1 bills and coins.

There was no indication that appellant was under the influence of alcohol or narcotics. No pagers, cell phones, pay/owe sheets, rolling papers, pipes, needles or weapons were found.

It was stipulated that the suspected narcotics were sent to the California Department of Justice for testing and determined to be cocaine base and marijuana. The cocaine base had a total weight of 5.4 grams. The marijuana had a total weight of 87 grams. “The marijuana was in bags of 75.72 grams, 1.9 grams, 5.8 grams and 2.7 grams. The cocaine base was in bags of 2.2 grams, 1.5 grams, and 1.6 grams.” Each of these amounts is a usable quantity. Appellant stipulated that he “knew that these substances

were marijuana and cocaine base.” He further stipulated to having been convicted of violating Health and Safety Code section 11351.5 (possession of cocaine base for purpose of sale) on January 24, 2005.

Detective Robert Gonzales testified as an expert in narcotics sales. Based on properly formulated hypothetical questions, he opined that the facts were consistent with possession of marijuana and cocaine base for the purpose of sale. The absence of drug paraphernalia and the packaging of the drugs in different weight increments contributed to his opinion that the possessor was a dealer. Crack cocaine users typically do not purchase five grams of cocaine for themselves at one time. The absence of a cell phone or pay/owe sheets did not change his opinion. Drug dealers often use intermediaries to communicate and do not carry pay/owe sheets.

The defense rested on the state of the evidence.

DISCUSSION

I. The Prosecutor Did Not Engage In Misconduct During Closing Arguments.

A. Facts.

The jury was instructed on the standard of proof beyond a reasonable doubt (CALCRIM No. 220), direct and circumstantial evidence (CALCRIM No. 223) and the use of circumstantial evidence to prove intent (CALCRIM No. 225).

During the prosecutor’s first closing argument he said that in order to convict appellant of possession with intent to sell “you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent.” He continued, “if you come to the conclusion that it is reasonable that the defendant wasn’t intending to sell it, based on your facts, then it’s very simple. You vote not guilty of possession for sale. And then you vote guilty of the simple possession and vote guilty of the transportation. [¶] But if you believe the only reasonable conclusion is that he was possessing for sale, then ladies and gentlemen, I

submit to you [that] you should vote guilty.” Concluding this argument, the prosecutor said:

“And finally on reasonable doubt ..., I submit to you the best way to think about it is if you know he’s guilty and that knowledge is based on the testimony you heard, the evidence you heard, then that is proof beyond a reasonable doubt.... And if based on the evidence you don’t know, then you have to ask yourself well what is that doubt? Is that doubt reasonable? Is that doubt based on the evidence? And if [it’s] not based on that evidence, or in some cases lack of evidence or lack of things the police have shown you, then it still will be a guilty. It would still be okay to find the defendant guilty. [¶] However, if those doubts are based on evidence you heard, then [you would] have to vote not guilty.”

During defense counsel’s closing argument he acknowledged that appellant possessed and transported the marijuana and cocaine. He argued that appellant should be found guilty of simple possession because “the government simply hasn’t proven beyond a reasonable doubt that [appellant] intended to sell it.” He said “the facts in this case do not exclude the reasonable alternative circumstantial evidence based conclusion that he was a user not a dealer.” Also, “there are so many facts and circumstances to which we don’t know the answer that we must draw the conclusion at some point the possibilities here are endless.”

In rebuttal, the prosecutor argued:

“... You heard the evidence. Now, a lot of it was about [appellant’s] intent. And [defense counsel is] asserting, you know, somehow this might be for his personal use. But you have to ask yourselves what evidence did you hear about personal use? There was no evidence that the defendant personally used those drugs.... [¶]...[¶] ... Detective Gonzalez told you a little bit about drug dealers, told you a lot about drug dealers, how they don’t all look the same.... [¶]...[¶] ... They are not all cut from the same mold. Some are large like Detective Gonzalez is talking about. Some are like [appellant] who is just selling on the corner who had a small amount. Doesn’t make him any less of a drug dealer. And People’s burden is not to show that he is some major drug dealer, simply that the drugs he had he intended to sell. All the evidence supports that. *Because there is no*

evidence he ever used drugs. No evidence he used marijuana. No evidence he used crack cocaine. It's all simple possibilities. Possibilities, if they are reasonable, needs to be based on evidence you heard from the stand or that came from through stipulation. There was no such evidence.

“So what it really comes down to is reasonable doubt. You have the evidence before you. And you need to make that decision as to whether or not the case has been proven beyond a reasonable doubt [¶]...[¶] So this concept of reasonable doubt, as I told you before, I think the best way to think about it is if you know he's guilty and that belief is based on that evidence that you heard, that ladies and gentlemen is proof beyond a reasonable doubt. Sure, everything in life is open to doubt, but here the case has been proven beyond a reasonable doubt.” (Italics added.)

Defense counsel did not object to any portion of the prosecutor's closing arguments.

B. Appellant forfeited direct appellate review of the alleged misconduct.

Appellant argues that the prosecutor engaged in misconduct during his second closing argument because the portion of the argument that is italicized *ante* “had the effect of flipping the burden of proof and asking the jury to convict of the greater crime because there was no evidence of the lesser crime.” This point was forfeited.

““As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]”” (*People v. Thomas* (2011) 51 Cal.4th 449, 491-492.)

“The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if “an admonition would not have cured the harm caused by the misconduct.” [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if ‘the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.’ [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Appellant did not object to any portion of the prosecutor’s closing arguments. “[T]he record fails to disclose grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction.” (*People v. Frye* (1998) 18 Cal.4th 894, 970.) An objection would not have been futile because the judge conducted the trial in an evenhanded manner and ruled on counsels’ objections in an appropriate manner without gratuitous commentary. Any harm caused by the challenged portion of the prosecutor’s argument could have been cured by judicial admonition. Consequently, appellant’s “claim of prosecutorial misconduct is barred in its entirety.” (*Ibid.*; *People v. Thomas, supra*, 51 Cal.4th at p. 492.)

C. The ineffective assistance claims fails because deficient performance was not established.

Anticipating forfeiture, appellant argues defense counsel was ineffective because he did not object to the challenged remark. We are not convinced. As will be explained, the challenged remark was not improper argument. It is not reasonably likely that the jury construed it as an inversion of the burden of proof or in any other objectionable manner. Defense counsel did not have a duty to interpose a meritless objection that would have failed.

1. Legal standard.

The law governing direct appellate review of ineffective assistance claims is axiomatic:

“ ... First, a defendant must show his or her counsel’s performance was ‘deficient’ because counsel’s ‘representation fell below an objective standard of reasonableness [¶] ... under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel’s act or omission. [Citations.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.] ‘Finally, it must also be shown

that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.’ [Citation.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611.)

“Reviewing 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. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence [outside] the record may be taken to determine the basis, if any, for counsel’s conduct or omission.” (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

“Judicial scrutiny of counsel’s performance must be highly deferential.” (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” (*Ibid.*) Consequently, there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. To prevail on an ineffective assistance claim, the defendant must overcome the presumption that, under the circumstances, the challenged act or omission might be considered sound trial strategy. (*Ibid.*) “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” (*Id.* at p. 690.) Defense counsel’s failure to object to evidence or argument ordinarily “is a matter of trial tactics as to which we will not exercise judicial hindsight.” (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) “Of course “[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel” [citation].’ [Citation.]” (*People v. Gurule, supra*, 28 Cal.4th at pp. 609-610.)

2. Defense counsel's failure to object was a sound tactical decision because the prosecutor's argument was proper and did not misstate the burden of proof.

Determining if defense counsel's performance was constitutionally deficient requires us to assess the merits of appellant's prosecutorial misconduct claim. If the challenged remark was legally proper and an objection would have been overruled, appellant cannot demonstrate that defense counsel's failure to interpose such an objection was an unprofessional error. Such is the case here.

“The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. 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 trial court or the jury.... [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

In conducting this inquiry, a prosecutor's statements must be examined in light of the argument as a whole and judged in the context in which they were made. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.) The reviewing court will not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's remarks. (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

We agree with the Attorney General that the challenged remark falls within the bounds of permissible argument. The remark was part of the prosecutor's rebuttal to defense counsel's closing argument that “the facts in this case do not exclude the reasonable alternative circumstantial evidence based conclusion that he was a user not a dealer” and there were “so many facts and circumstances to which we don't know the answer that we must draw the conclusion at some point the possibilities here are endless.”

When the remark is examined in context, it is evident that the prosecutor was arguing that a doubt is not reasonable if it is wholly speculative and is not based on the trial evidence and inferences that can be drawn from the evidence. The prosecutor appropriately commented on the lack of circumstances supporting a reasonable conclusion that appellant possessed the drugs for personal use. This argument, including the challenged remark, is permissible and does not invert or lessen the burden of proof. “Moreover, viewing the challenged statement[] in context, we do not believe there is a reasonable likelihood that the jury understood him to be making such an argument.” (*People v. Lucas, supra*, 12 Cal.4th at p. 475.)

Since the prosecutor was making a permissible argument an objection to the challenged remark on the ground advanced on appeal would have been overruled. “It is ... well established that trial counsel is not required to make frivolous or futile motions, or indulge in idle acts.” (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409; *People v. Memro* (1995) 11 Cal.4th 786, 834.) Consequently, appellant has not established deficient performance and the ineffective assistance claim fails.

II. The Court’s Determination That It Lacked Discretion To Order The Sentence Imposed For Count 3 To Run Concurrent With The Sentence Imposed For Count 1 Was Erroneous.

A. Facts.

Appellant was sentenced on December 13, 2011. The trial court denied his motion to strike the prior strikes. It imposed a term of 25 years to life on count 1 (possession of cocaine base with the intent to sell). It stayed the terms imposed for counts 2 and 4 (transportation of cocaine base and marijuana) pursuant to section 654. It struck the prior prison term enhancements and the prior drug conviction enhancements in the interests of justice.

Then the court asked counsel the following question, “The court has no authority but to impose a 25 year to life term consecutive. Isn’t that true, counsel?” The prosecutor replied, “I believe so, Your Honor,” and defense counsel said, “Yes.” The court said, “I believe it is as well. Therefore, the total term is 50 years to life.” Defense counsel said that “the imposition of a consecutive 25 to life on Count Three would be a federal violation of the Eighth Amendment.” The court replied, “Let me say this to protect Mr. Goffner’s record here in this case. So if there is an issue on the Court of Appeals it doesn’t need to come back here. If the court believed that it had authority not to impose that consecutively, I would not for the reasons I’ve already articulated. [¶]...[¶] So I’m satisfied if I had discretion that I would make this 25 years to life and run that Count Three concurrent. It’s just my impression I do not have that authority.” Defense counsel said, “And regrettably I agree.”

B. Consecutive sentencing on counts 1 and 3 was not mandatory.

Appellant argues that consecutive sentencing on counts 1 and 3 was not statutorily mandated and the lower court erred when it concluded that it lacked discretion to order the sentence imposed for count 3 to run concurrent with the sentence imposed for count 1. Respondent concedes this point and we accept the concession as properly made.

“Consecutive sentencing is not mandated under subdivision (c)(6) [of section 667] if the current felonies are committed on the same occasion or arise from the same set of operative facts.” (*People v. Hendrix* (1997) 16 Cal.4th 508, 513.) “The phrase ‘committed on the same occasion’ is commonly understood to refer to at least a close temporal and spatial proximity between two events, although it may involve other factors as well.” (*People v. Deloza* (1998) 18 Cal.4th 585, 594-595.) Appellant simultaneously possessed the cocaine base and the marijuana. Consequently, counts 1 and 3 were committed on the same occasion. Therefore, consecutive sentences were not statutorily mandated.

“[A]n abuse of discretion occurs where the trial court was not ‘aware of its discretion’....” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378; see also *People v. Leigh* (1985) 168 Cal.App.3d 217, 223 [case remanded where the trial court wrongly determined that it did not possess discretion to reduce a murder conviction from first to second degree].) Here, the lower court erroneously concluded that it did not possess discretion to order the terms imposed for counts 1 and 3 to run concurrently. Its misguided conclusion constitutes an abuse of discretion. (*Carmony*, *supra*, at p. 378.)

The parties agree that remand for exercise of judicial discretion is not necessary because the trial court unequivocally stated on the record that it would have ordered the sentences on counts 1 and 3 to run concurrently if it possessed discretion to do so. The court said, “I’m satisfied if I had discretion that I would make this 25 years to life and run that Count Three concurrent.” In this circumstance we “may correct this error without remanding for further proceedings in the presence of [appellant].” (*People v. Smith* (2001) 24 Cal.4th 849, 854; cf. *People v. Rogers* (2009) 46 Cal.4th 1136, 1174.)¹

III. Appellant Is Not Entitled To Resentencing.

In supplemental briefing, appellant requests his sentence to be vacated and the matter remanded to the trial court for resentencing pursuant to the Act because his case was not final on its effective date. We rejected this exact argument in *People v. Yearwood*, *supra*, 213 Cal.App.4th 161. *Yearwood* explained that the Act was not intended to apply retroactively to prisoners, like appellant, who were sentenced prior to the Act’s effective date but whose judgments were not final as of that date. Such persons must seek relief through a petition for recall of sentence, which is the specified

¹ This determination renders appellant’s related ineffective assistance claim moot.

postconviction remedy. We express no opinion on the proper disposition of any petition for recall of sentence he might file in the trial court.

DISPOSITION

The sentence is modified as follows: the term of 25 years to life imprisonment imposed for count 3 shall run concurrent to the term of 25 years to life imprisonment imposed for count 1. As so modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and to transmit a copy of it to the parties and the California Department of Corrections and Rehabilitation.

LEVY, J.

WE CONCUR:

WISEMAN, Acting P.J.

KANE, J.