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

THE PEOPLE,

Plaintiff and Respondent,

v.

SHONAY ASHLEY INGLEMAN,

Defendant and Appellant.

F066310

(Super. Ct. No. 12CM7119)

OPINION

THE COURT*

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

Elaine Forrester, 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, Eric L. Christoffersen and Kevin L. Quade, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

A jury convicted appellant, Shonay Ashley Ingleman, of possession of marijuana in state prison (Pen. Code, § 4573.6), possession of drug paraphernalia in state prison (Pen. Code, § 4573.6) and possession of drugs in a state prison (Pen. Code, § 4573.8). The court placed appellant on three years' probation.

On appeal, appellant contends the court erred in permitting prosecution witnesses to testify as experts on the question of what constitutes a usable amount of marijuana. Alternatively, appellant argues that if her contention is deemed waived by her counsel's failure to object to this testimony, such failure constitutes ineffective assistance of counsel. We affirm.

FACTS

On March 4, 2012, shortly after arriving by car at the visitor's parking lot on the grounds of Corcoran State Prison, appellant encountered Correctional Officer Craig Lane, who, in a search of appellant's purse, found a glass smoking pipe. Lane testified to the following: The bowl of the pipe was "full." There was "a burnt substance across the top," but the contents of the bowl "hadn't been fully burnt."

Lane further testified to the following: In his 23 years as a correctional officer, he gained "experience in determining whether something is a usable quantity"¹ through talking to "other correctional officers" and inmates "about what a usable quantity is." "There is really no training in that specific subject."

Lane opined that the substance in the pipe found in appellant's purse was marijuana. He further opined that the pipe contained a usable amount of marijuana based on the following: "[T]he substance wasn't falling out of the bowl [of the pipe], wasn't blowing away in the wind. You could turn it upside down and it held there."

¹ Throughout the reporter's transcript, the word we spell "usable" appears as "useable." We consider the former spelling preferable, and to avoid confusion, when quoting the transcript we have changed the spelling to "usable."

Thomas Sneath testified he is a toxicologist and he has “been working in the field of drug testing since 1972.” The prosecutor, without objection, “tender[ed] [Sneath] as an expert in the field of forensic analysis of controlled substances.”

Sneath further testified to the following: He is familiar with the term “usable quantity” as applied to controlled substances, and he gained that familiarity over the course of his career from talking to attorneys and to “people who work in the crime labs,” i.e., “[f]orensic scientists, toxicologists doing the testing.” He understood the term “usable quantity” of a controlled substance to refer to “an amount that can be manipulated and introduced into the body and used.”

Sneath performed chemical testing on approximately five milligrams of the substance found in the pipe and opined, based on that testing, that the substance in the pipe was marijuana. He further opined that the pipe contained a usable quantity of the drug. He explained, “you can see the amount that is here, a little bit in there. It appears to be not completely burnt up, and enough there to use in my opinion.”

DISCUSSION

In order to establish the offense of possession of a controlled substance, the prosecution must prove, in addition to other elements, that the controlled substance is of a usable quantity. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) A usable quantity of a controlled substance is an amount sufficient to be used in any manner customarily employed by users of the substance, as opposed to “useless traces or debris.” (*People v. Piper* (1971) 19 Cal.App.3d 248, 250.)

Appellant first argues that the court erred in admitting the expert testimony of Sneath and Lane that the marijuana found in the pipe retrieved from appellant’s purse was a usable amount because the determination of what constitutes a usable amount of marijuana is “not beyond common experience.”

Appellant did not object to the expert testimony of Sneath and Lane on this specific ground. Therefore, this claim is not cognizable on appeal. (Evid. Code, § 353²; *People v. DeHoyos* (2013) 57 Cal.4th 79, 120-121.)

Appellant also argues her counsel's failure to object on this specific ground deprived her of her constitutional right to the effective assistance of counsel. We disagree.

“The burden of proving ineffective assistance of counsel is on the defendant.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) Under the two-prong test articulated in *Strickland v. Washington* (1984) 466 U.S. 668, 687-695, the defendant must demonstrate deficient performance, as well as prejudice, under the federal and state Constitutions. To establish deficient performance, a defendant must show trial counsel's representation fell “below an objective standard of reasonableness.” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

“[E]xpert opinion is admissible if it is ‘[r]elated to a subject that is sufficiently beyond common experience [and] would assist the trier of fact.’ (Evid. Code, § 801, subd. (a).)” (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) “[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” [Citation.]” (*Ibid.*) Although we assume it is common knowledge that marijuana is often consumed by smoking the substance, we do not believe it can be said that it is common for persons “of ordinary education” (*ibid.*) to have first-hand knowledge of the use of marijuana or that such persons commonly acquire more detailed knowledge of this subject. Determination of what constitutes a usable

² All further statutory references are to the Evidence Code.

amount of marijuana is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*Ibid.*) Because appellant fails to show her objection would have been successful, she has not met her burden of establishing that her counsel’s failure to make this objection was objectively unreasonable. Therefore, her claim of ineffective assistance of counsel fails.

Appellant next argues that the court erred in allowing Sneath and Lane to testify as experts because their respective opinions on the question of what constitutes a usable quantity of marijuana “simply did not fall within the ambit of [their] particular education, training and experience.” In support of this claim, appellant notes Sneath testified he gained his knowledge of the subject of what constitutes a usable quantity not through formal training, but by talking to forensic scientists and toxicologist, and that Lane, similarly, “received no training” on the subject.

Appellant likens the instant case to *People v. Hogan* (1982) 31 Cal.3d 815 (*Hogan*) and *People v. Williams* (1992) 3 Cal.App.4th 1326 (*Williams*). In *Hogan*, our Supreme Court held that a criminalist, though qualified to testify about whether certain stains were blood and about the blood typing of the stains, was not qualified to give expert testimony as to whether the blood had been “spattered” or “transferred by contact.” (*Hogan*, at pp. 852, 853.) The court found that the criminalist’s qualifications on this subject were “nonexistent” because, among other reasons, he had “never performed any laboratory analyses *to make such determinations*,” nor had he received any “formal education or training *to make such determinations*.” (*Id.* at p. 852, italics added.)

In *Williams*, this court held that a police officer who administered a horizontal gaze nystagmus (HGN) test and who, the court assumed, was qualified to do so, should not have been allowed to give expert opinion testimony that the eye movements the officer observed were the result of alcohol consumption. “Being qualified to attribute the observed eye movements to a particular cause,” this court stated “is a far different

matter” than being qualified to administer an HGN test. (*Williams, supra*, 3 Cal.App.4th at p. 1334.)

Hogan and *Williams* are distinguishable because in each case the witness sought to offer expert testimony *on a subject* for which he did not have sufficient expertise. Here, by contrast, Sneath and Lane both testified that they had acquired knowledge of the very subject on which they testified as experts, viz., what constitutes a usable amount of marijuana. And contrary to appellant’s suggestion, formal education and training are not the only means by which a person can acquire the expertise necessary to qualify and testify as an expert witness.

Section 720 provides that a person may testify as an expert, “if he has special knowledge, skill, experience, training, or education sufficient to qualify him” (§ 720, subd. (a)), which “may be shown by any otherwise admissible evidence, including his own testimony” (§ 720, subd. (b)). Once qualified, an expert may give an opinion only if the opinion is “[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion *upon the subject to which his testimony relates.*” (§ 801, subd. (b), italics added.) Thus, taken together, sections 720 and 801 explicitly provide that a person may qualify as an expert and, once qualified, testify, based not only on “education” and “training,” but on “knowledge” and “skill,” and that these factors may be established by the witness’s testimony. Here, both Sneath and Lane testified as to the source of their knowledge of the subject at issue—for Sneath, discussions with forensic scientists and toxicologists, and for Lane, discussions with inmates and other officers. Appellant offers nothing to support the notion, and the record does not suggest, that such sources are not of the type that reasonably may be relied upon in forming an opinion on the determination of what constitutes a usable amount of marijuana.

“The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion [is] shown.” (*People v. Bloyd* (1987) 43 Cal.3d 333, 357; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 162 [“Error regarding a witness’s qualifications as an expert will be found only if the evidence shows that the witness ““clearly lacks qualification as an expert”””].) Here, it cannot be said that Sneath nor Lane were clearly unqualified to testify as an expert as to what constitutes a usable amount of marijuana. In admitting their testimony on this subject, the court acted well within its discretion.

Finally, appellant argues that the testimony of Sneath and Lane discussed here constituted a violation of appellant’s right to due process of law under the Fourteenth Amendment to the United States Constitution. The major premise of this contention is that the evidence in question was improperly admitted. As demonstrated above, this premise is false. There was no due process violation. (See *People v. Hall* (1986) 41 Cal.3d 826, 834 [“As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense”].)

DISPOSITION

The judgment is affirmed.