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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE KING,

Defendant and Appellant.

C083692

(Super. Ct. No. 16FE011907)

A jury convicted defendant Dale King of possession of methamphetamine for sale. In bifurcated proceedings, the trial court found true allegations of four prior prison terms and a prior drug conviction. The trial court sentenced defendant to an aggregate prison term of 11 years.

Defendant now contends (1) defense counsel rendered ineffective assistance in failing to object to an expert's interpretation of his jail call, and (2) the trial court erroneously instructed the jury on the procedure for considering the lesser included offense of simple possession. We find no merit in the contentions.

In supplemental briefing, defendant asserts (3) that the three-year enhancement imposed for his prior drug conviction must be stricken pursuant to a recent amendment to Health and Safety Code section 11370.2. The People agree, and we do too. We will modify the judgment to strike the three-year enhancement imposed for defendant's prior drug conviction, and affirm the judgment as modified.

BACKGROUND

Sheriff's deputies on patrol in Rancho Cordova contacted defendant and a female companion. A search of defendant's person revealed a pouch with four pieces of methamphetamine weighing 28.0 grams, 6.41 grams, 6.46 grams, and 6.52 grams. One ounce equals 28.5 grams with a street value of \$300 to \$350. An "eight ball" equals 3.5 grams with a street value of \$80 to \$100. Defendant possessed approximately \$780 worth of methamphetamine. He did not possess any paraphernalia for use or for sales.

The deputies placed defendant in a patrol car equipped with a recording device. While the two deputies and defendant's companion stood next to the patrol car, defendant said, "You gotta take this case baby. Baby, you gotta take this case baby."

Defendant's phone calls from jail were also recorded. Two days after his arrest, defendant called an individual named John and said "she gotta take it" several times. Defendant explained that he had gone to the park "trying to handle [his] business," that an individual named Danny had called saying he "need one," that defendant went through a gate and "snatched it," and that defendant was on his way to see Danny to "do what [he] needed to do." John responded, "[t]hat's business man." Defendant told John to call Danny and explain what had happened, that Danny should call defendant's "people" and

explain it and give them “what he had,” and that Danny should “continu[e] doing what it is that they was doing. Okay?” John responded, “Yeah, I got you.”

Detective Christina Montano, the prosecutor’s expert on possession of methamphetamine for sale, explained that drug dealers use code in talking about drugs and drug deals. She had listened to defendant’s call with John and interpreted the conversation as follows: Defendant wanted a woman to be charged with the offense rather than him, and he had gone to the park to sell narcotics which he considered to be his business. After he was arrested, defendant expected his contacts would continue the business.

Detective Montano said that in determining whether someone possessed methamphetamine for sale, she considers the amount of methamphetamine possessed, the packaging, the presence or absence of sale paraphernalia, and jail calls. Based on a hypothetical with facts similar to the present case, Detective Montano opined that defendant possessed methamphetamine for sale. Noting that a typical dose equals 0.1 grams, the detective said defendant had 470 doses. The fact that defendant did not carry a means to ingest it also suggested it was for sale rather than personal use. Although a heavy user can smoke 3.5 grams a day, Detective Montano said that was not very common based on the cost and risk of overdose. Defendant also had three packages which each contained almost two “eight balls” and another package with 28 grams, almost an ounce, which suggested the packages were ready for distribution to particular clients because he did not have extra baggies or a scale. Each package had been shorted about 0.5 grams.

The jury convicted defendant of possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) In bifurcated proceedings, the trial court sustained four prior prison terms (Pen. Code, § 667.5, subd. (b)) and a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (c)). The trial court sentenced defendant to an aggregate prison term of 11 years.

Additional facts are included in the discussion as relevant to the contentions on appeal.

DISCUSSION

I

Defendant contends defense counsel rendered ineffective assistance in failing to object to Detective Montano's interpretation of his jail call.

A

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient -- that it fell below an objective standard of reasonableness under prevailing professional norms -- and that defendant suffered prejudice as a result, establishing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

“When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]” (*People v. Mai* (2013) 57 Cal.4th 986, 1009, original italics.)

“ ‘Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence.’ [Citation.] ‘Generally, failure to

object is a matter of trial tactics as to which we will not exercise judicial hindsight A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) A failure to object rarely establishes ineffective assistance of counsel. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502 (*Hillhouse*).)

B

Defendant claims his defense counsel was ineffective in failing to object when Detective Montano said defendant's use of the word "business" in his jail call with John, and his statements that "he needed one" and "they can continue doing what they were doing," were all slang or code for drug dealing. Defendant argues Detective Montano "was in no better position than the jury to interpret this vague language" and that her testimony went beyond her area of expertise. Defendant concedes that defense counsel challenged Detective Montano's testimony on cross-examination, asking if her testimony about the jail call was "conjecture" or nothing but "presumptions." He notes, however, that the prosecutor's objection to the question as argumentative was sustained.

Defendant has failed to demonstrate that counsel was deficient in failing to object to Detective Montano's testimony about the phrases used by defendant. Detective Montano testified as an expert on the possession of methamphetamine for sale. Although defendant's intent was an issue for the jury, an expert may give an opinion on whether the drugs possessed were for the purposes of sale. (*People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378.) The detective testified that she considered jail calls in determining whether methamphetamine is possessed for sale. She also testified that a drug dealer uses code in phone calls. An expert may render an opinion on phrases used in the drug-dealing context because it is a subject "sufficiently beyond common experience" that would assist the jury. (Evid. Code, § 801, subd. (a).) Under these circumstances, defense counsel was not deficient in declining to object.

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