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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MACK FULLER, Defendant and Appellant.	B232379 (Los Angeles County Super. Ct. No. MA050496)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher G. Estes, Judge. Affirmed as modified.

John Scott Cramer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury acquitted Mack Fuller on charges of transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base (Health & Saf. Code, § 11351.5), but found him guilty of one count of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), a lesser included offense of the possession for sale charge. On appeal, Fuller contends the prosecutor engaged in several instances of prejudicial misconduct, and that the trial court erred in denying him probation pursuant to Proposition 36. Fuller also asserts, and the People concede, that the abstract of judgment is incorrect. In addition, Fuller requests that we review the in camera proceedings the trial court conducted pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We direct the trial court to modify the abstract of judgment, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2010, two deputy sheriffs were in Lancaster, working in an area notorious for gang activity and narcotics sales. The deputies had received information that caused them to be on the lookout for a particular car. They saw the car and watched as it parked in front of an apartment complex. Fuller and a woman got out of the car. Fuller was carrying a small white pharmacy bag with red and blue coloring. The woman had nothing in her hands. Fuller looked in the direction of the deputies, then quickened his pace toward the apartment complex. Fuller and his companion went into the complex. The two deputies followed, and when they reached the outside security gate they told Fuller to stop and open the gate. Fuller did not respond, but instead continued to walk into apartment B. The deputies gained entry into the complex three or four minutes later. A man was standing outside apartment B. He appeared to be under the influence of narcotics. He told the deputies he was on parole or probation and that he lived in apartment B. The deputies entered the apartment.

Three people were inside apartment B: Fuller, his female companion, and another woman. Fuller and his companion were standing in front of a couch, and the other woman was sitting on a reclining chair. Between the cushions of the reclining chair, deputies found a glass pipe used to smoke cocaine base, and a little bag containing rock

cocaine. On the floor next to the couch deputies found the paper bag they saw Fuller carry into the apartment. Inside the bag was a razor blade, a digital scale, and a piece of rock cocaine base. There was a white powdery residue on the scale. The piece of rock cocaine base in the pharmacy bag and the rock cocaine found in the chair appeared to have the same coloring and consistency. In the bedroom, deputies found small "nickel-sized, zip-lock bags that you would commonly put narcotics in." The deputies never saw Fuller in the bedroom. The small bags were not booked into evidence.

Neither Fuller nor his companion appeared to be under the influence. When deputies searched Fuller, they found an asthma inhaler in his pants pocket. Inside the inhaler was a small piece of a grocery bag. Deputies additionally found a cell phone attached to a case on Fuller's belt. The deputies saw an incoming text message on the phone that read: "My girl here and she want 50. Call back now." Fuller was interviewed twice after receiving *Miranda*[1] advisements. During the first interview, he told the interviewing deputy he went to apartment B to meet a friend and he knew nothing about any illegal items in the apartment. During the second interview, he told the deputies his companion was not involved with the cocaine, and he agreed to work with the deputies, in part based on the condition that she be released. Fuller told the deputies a friend gave him the cocaine base because Fuller was having financial difficulties. Fuller said he expected to sell the cocaine at apartment B.

The People charged Fuller with one count of sale or transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)), and one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5.) The People alleged Fuller had suffered prior felony convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). The People further alleged Fuller's sentence should be enhanced pursuant to Penal Code section 667.5, and that he was on bail or released on his own recognizance at the time of the offenses, within the meaning of Penal Code section 12022.1. Prior to trial, Fuller filed a motion seeking *Pitchess* discovery. As to the two

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1 *Miranda v. Arizona* (1966) 384 U.S. 436.

arresting deputies, Fuller sought all complaints relating to fabrication of evidence, dishonesty, and other matters bearing on credibility. The trial court conducted an in camera hearing and found no discoverable information.

At trial, one of the arresting deputies testified that in his opinion, the rock cocaine found in the pharmacy bag was intended for sale because it was far more than one person could consume in one day, or a week. He also testified that the packaging of the drugs, the scale, and the razor blade, were all consistent with Fuller's statement that he took the rock cocaine to apartment B to sell it. The deputy indicated the cocaine in the small bag found on the reclining chair had a market value of between $10 and $20. On cross-examination, the deputy testified Fuller did not have any money on him at the time of the arrest. The other three individuals had a total of $9.94 between them. Fuller's companion had thirty-five cents.

The other arresting deputy similarly testified and opined a razor blade might be used to cut pieces off a larger rock of cocaine to package it for sales. A scale would be used to weigh the narcotics to be sold. The deputy further testified the piece of grocery bag in Fuller's asthma inhaler was "blocking the pathway of the inhaler," and the deputy thought it looked like there may have been rock cocaine in the inhaler at one time.

On cross-examination, both arresting deputies admitted the scale, baggies, and razor blade were not tested for fingerprints. They also admitted they did not book Fuller's cell phone into evidence. One of the deputies explained he did not book the phone into evidence because Fuller said he would work with them, and in order to do that he would need his cell phone to reach his suppliers and others. The deputy explained that the phone was put into "somebody's property," but he did not know whose. On cross-examination he testified that he had written in a supplemental report that he may have put the phone in Fuller's companion's property. The parties stipulated that Fuller knew what cocaine base or rock cocaine was.

The jury found Fuller not guilty on both counts, but concluded he was guilty of possession of cocaine base as a lesser included offense of possession of cocaine base for sale. The trial court found Fuller had suffered three prior felony convictions within the

meaning of Penal Code section 667.5, subdivision (b), and further found true the on-bail allegation under Penal Code section 12022.1. Fuller requested probation under Proposition 36. The trial court denied the request and sentenced Fuller to a total prison term of six years.

DISCUSSION

I. No Prejudicial Prosecutorial Misconduct

Fuller argues the prosecutor engaged in three instances of prosecutorial misconduct while delivering his closing argument. We find no prejudicial error.

A. Comment on Fuller's Failure to Call Potential Defense Witnesses

During closing argument, defense counsel attempted to discredit the arresting deputies' testimony based on inconsistencies and what he characterized as illogical statements. In his rebuttal argument, the prosecutor responded:

"[Prosecutor]: The attorney for the defendant lamented that you have the officers' words regarding what occurred there. [¶] Now, the attorney for the defendant knows, and he has known for his ten years of being an attorney, that he has the same subpoena power of the court to bring in any other witnesses to have them testify in front of you as he wants, providing they're relevant to the events. [¶] And if Ms. Addison . . . and Mr. Green and Ms. Cavness had anything to say that was contrary to what the defendant had to say about the events in question, he could have brought them in under the power of the court—

[Defense counsel]: Your Honor, I object.

[Prosecutor]: --under penalty of arrest, and it didn't happen.

The Court: Hold on.

[Defense counsel]: Shifting the burden, your Honor.

The Court: Based on the arguments, overruled.

[Prosecutor]: Yes, it's not shifting the burden of evidence. As counsel told you in his opening statement, he doesn't have to present a defense. This is not castigating the fact that he didn't present a defense. This is pointing out that he asks you to disbelieve the witnesses who did testify under oath under a speculation that other people would have testified somehow differently, or the facts that were testified to you about by the deputies are somehow not true. [¶] Again, if any of those three individuals could provide any support for his allegations, he could have used the absolute power of the court to bring them in. He chose not to, hoping that the power of his argument would overcome the fact that they had nothing to say that would contradict what the deputies talked about.

[Defense counsel]: Objection, your Honor. Misstates the evidence.

The Court: Ladies and gentlemen, again, you are the judges of the facts in this case and you are to judge this case based on the evidence that you received during the trial and the law that I have stated to you."

The prosecutor subsequently argued: "The attorney for the defendant wants to say that you can't rely on the deputies again, but there was [*sic*] other people who were there and he didn't bother to bring them in if they had anything different to say."

On appeal, Fuller contends the prosecutor's comment about other potential defense witnesses was misconduct because he referred to or relied on facts not in evidence. This contention misses the mark. The prosecutor did not identify any facts or evidence he believed the potential defense witnesses would have provided, had they been called. (Compare *People v. Gaines* (1997) 54 Cal.App.4th 821, 824-825 with *People v. Lewis* (2009) 46 Cal.4th 1255, 1302-1304; see also *People v. Hall* (2000) 82 Cal.App.4th 813, 817 [prosecutor's argument that defendant could have called a witness was proper; misconduct was arguing to jury that the witness's testimony would have replicated other specific trial testimony in favor of the prosecution].) Instead, he commented on Fuller's failure to call logical defense witnesses in line with the defense theory of the case. This is permissible. (*People v. Thomas* (2012) 54 Cal.4th 908, 945 [not misconduct for prosecutor to argue no witnesses came forward to provide alibi evidence for defendant]; *People v. Brady* (2010) 50 Cal.4th 547, 565-566 [not misconduct for prosecutor to argue defendant did not present any evidence suggesting anyone else committed the crime]; *People v. Carter* (2005) 36 Cal.4th 1215, 1266-1267 [not misconduct for prosecutor to argue nothing prevented defendant from offering witnesses to explain why defendant was in the car with property linking him to victims].)

B. The Prosecutor's Demonstration of How One Might Cut Cocaine for Sale

The defense argued Fuller did not have enough time after entering apartment B to cut a small piece of cocaine off the larger rock, weigh it, package it, and give it to the

woman in the apartment.[2] In response, the prosecutor engaged in a mock demonstration, in which he purported to go through the motions of cutting off a piece of cocaine, weighing it, and putting it in a baggie. Defense counsel objected that the demonstration was not part of the evidence. The court allowed the prosecutor to continue, but advised the jury: "Again, ladies and gentlemen, this is the argument of the attorneys. Again, you are the judges of the facts, and you're to rely on the evidence that you heard during the course of this trial."

We need not decide whether the prosecutor's demonstration constituted prosecutorial misconduct because it is clear that it was harmless. (*People v. Thomas* (2012) 53 Cal.4th 771, 823.) The trial court repeatedly instructed the jury that the lawyer's arguments were not evidence, including with respect to this very demonstration. We presume the jury followed the court's instructions. (*People v. Friend* (2009) 47 Cal.4th 1, 33; *People v. Gray* (2005) 37 Cal.4th 168, 217.) In addition, the issue of the amount of time it would take to cut and package a piece of cocaine base was only relevant to the issue of whether Fuller had the intent to sell the narcotics. The jury acquitted Fuller on the charges related to sale of cocaine base, thus we cannot conclude there was any reasonable possibility the prosecutor's demonstration affected the jury's determination. Even if the prosecutor committed misconduct with the demonstration, we see no prejudice to Fuller.

C. Prosecutor's Comments on Reasonable Doubt

In the defense closing statement, counsel referred to reasonable doubt, arguing: "You have to find beyond the exclusion of all reasonable doubt that what those officers said is the truth, there's no other reasonable explanation at all. He was the one that was selling the drugs there." Later, defense counsel similarly argued to the jury: "You see,

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[2] Defense counsel argued: "[R]emember there was only three or four minutes before the officers got in there. [¶] So did he have enough time to take that chunk and cut it off and put it on a scale and put it in a baggie, and then give it to the lady on the couch? . . . . I mean, three or four minutes, with the police right behind you? Does that even make sense? I mean, don't lose your common sense please."

because you have to make sure that it's beyond the exclusion of all reasonable doubt. There cannot be one reasonable interpretation in your mind in order to find the defendant guilty."

In his rebuttal argument, the prosecutor argued there was no indication the deputies lied on the stand, then continued:

"So if you believe that they got up there and perjured themselves for the purpose of getting this defendant, as if there isn't enough crime to deal with, then the defendant is not found guilty beyond a reasonable doubt—not all reasonable doubt, whatever that standard is. All reasonable doubt is so you can forget the word 'reasonable doubt' and put 'all' in front of it. . . . The standard is reasonable doubt. Because words mean things. And when the attorney for the defendant put in the word 'all' he wanted that to register with you and mean something. It's not the legal standard. You will have the jury instructions. I bring it up –

[Defense counsel]: Objection, your Honor. Misstates the law.

Court: Again, ladies and gentlemen, what the attorneys say now is not evidence. It's their interpretation of the evidence, and they're arguing the facts and the law to you. You are to rely on the evidence you heard and law I read to you, which you will get in written form.

[Prosecutor]: It's reasonable doubt. So if you believe they got up and perjured themselves for the purpose of getting this defendant, then he's not guilty beyond a reasonable doubt."

Fuller contends the prosecutor's statements misstated the law and constituted prejudicial misconduct. We disagree. " 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation].' " (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) Although the prosecutor's rebuttal statements about reasonable doubt may not have been a model of clarity, he repeatedly emphasized the proper standard was "reasonable doubt," as it was described in the jury instructions.

Even if the prosecutor misstated the law, any possible error was harmless under any standard. "[W]e do not reverse a defendant's conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct." (*People v. Williams* (2009) 170 Cal.App.4th 587, 635.) Here, the trial court twice instructed the jury on the reasonable doubt standard, as a pre-instruction before the jury was selected, and in the final jury instructions. The court also repeatedly instructed the jury that it was to rely only on the court's instructions on the law, not the attorney's statements. We presume the jury understood and followed the trial court's instructions. (*Ibid.*) Moreover the jury's verdict acquitting defendant on both counts, and finding him guilty of only a lesser included possession offense, strongly suggests the jury did not hold the prosecution to a lesser burden of proof. (*People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) There was no prejudicial error.

II. The Trial Court Properly Denied Proposition 36 Probation

Under Proposition 36, a defendant convicted of a "nonviolent drug possession offense" must receive probation and diversion into a drug treatment program, unless one of several exceptions applies. (Pen. Code, § 1210.1, subds. (a)-(b); *People v. Harris* (2009) 171 Cal.App.4th 1488, 1495.) " 'Nonviolent drug possession offense,' as defined in Proposition 36, includes 'the unlawful personal use, possession for personal use, or transportation for personal use' of specified controlled substances, including cocaine base. (Pen. Code, § 1210, subd. (a); see also Health & Saf. Code, § 11054, subd. (f)(1).) It excludes 'the possession for sale' of any controlled substance. [Citation.]" (*People v. Dove* (2004) 124 Cal.App.4th 1, 6 (*Dove*).)

We agree with the courts that have concluded that even if the defendant is acquitted of charges for transportation or possession for sale of narcotics, the court "is not constitutionally precluded from determining by a preponderance of the evidence . . . that a defendant's transportation [or possession] of a controlled substance was or was not for personal use within the meaning of section 1210, subdivision (a) . . . ." (*Harris,* at p. 1497.) For example, in *Dove, supra,* the defendant was convicted of transportation of

cocaine base, but acquitted of possession for sale. As in this case, the jury found the defendant guilty of the lesser included offense of simple possession of cocaine base. (*Dove, supra,* 124 Cal.App.4th at p. 3.) The *Dove* court noted that "a jury's verdict will not necessarily determine whether the defendant is eligible or ineligible" for Proposition 36 probation, and "the defendant has the burden of proving that the possession or transportation was for personal use." (*Id.* at p. 10.) The reviewing court will sustain the trial court's finding regarding Proposition 36 eligibility "as long as it is supported by substantial evidence." (*Ibid;* see also *People v. Glasper* (2003) 113 Cal.App.4th 1104, 1115 (*Glasper*) [Proposition 36 does not require jury to make a finding beyond a reasonable doubt that substance was not possessed for personal use before a court can find defendant ineligible for Proposition 36 probation].)

Although the defendant in *Dove* was convicted of transportation of cocaine base, the court's reasoning is still applicable here. The "acquittal on the charge of possession for sale," or for transportation of cocaine base, "did not bind the trial court. The acquittal 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." (*Dove,* at p. 11.) The *Dove* court relied in part on *U.S. v. Watts* (1997) 519 U.S. 148, 157, in which the High Court concluded "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proven by a preponderance of the evidence."

In this case, the trial court's finding that Fuller possessed the cocaine base for sale, and was therefore ineligible for Proposition 36 probation, was supported by substantial evidence. There was evidence that Fuller got out of his car with a white bag in his hand, in a neighborhood known for drug sales. When deputies followed him into apartment B, they found the bag, and inside the bag was a relatively large amount of cocaine base—more than a drug user could consume in days or a week—a scale, and a razor blade. Fuller told deputies he went to the apartment to sell the drugs. In addition, Fuller admitted he was going to sell the cocaine. The trial court could reasonably conclude

based on a preponderance of the evidence that Fuller possessed the cocaine base in order to sell it. Although the jury was not convinced beyond a reasonable doubt that Fuller possessed the drugs for sale, or that he transported the drugs, the jury was applying a different standard than that applicable to the Proposition 36 eligibility determination. There was no express jury finding that Fuller possessed the drugs for personal use. (See *Harris, supra,* 171 Cal.App.4th at pp. 1497-1498.) The trial court properly redetermined the personal use issue based on the underlying conduct. (*Glasper, supra,* 113 Cal.App.4th at p. 1113; *People v. Towne* (2008) 44 Cal.4th 63, 84-88.)

III. *Pitchess* Review

In response to appellant's request, we have reviewed the sealed record of the in camera *Pitchess* hearing. We conclude the trial court properly conducted the hearing and appropriately exercised its discretion in ruling that no discoverable material existed. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *People v. Gaines* (2009) 46 Cal.4th 172, 180-181; *People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

IV. Abstract of Judgment

The parties agree the abstract of judgment incorrectly indicates the jury found Fuller guilty of possession for sale of cocaine base. We direct the trial court to correct the abstract of judgment to reflect that Fuller was convicted only of possession of cocaine base in violation of Health and Safety Code section 11350, subdivision (a).

DISPOSITION

The trial court is directed to correct the abstract of judgment as described above in section IV, and to forward copies to the Department of Corrections. In all other respects, the judgment is affirmed.

BIGELOW, P. J.

I concur:

FLIER, J.

RUBIN, J. - CONCURRING

I concur in the judgment.

RUBIN, J.