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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JIMMY LEE THOMAS, Defendant and Appellant.	B232646 (Los Angeles County Super. Ct. No. BA355110)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Jimmy Lee Thomas appeals from a sentence of 13 years in state prison for possession for sale of cocaine base. He contends: (1) his conviction should be reversed because gang evidence was improperly introduced during the trial; (2) the trial court erred in denying his motion for a new trial on the ground of insufficiency of the evidence; (3) the court erred in denying his motion for a new trial on the ground of ineffective assistance of counsel; and (4) he received ineffective assistance of counsel because he was not informed of a plea bargain. Finding no error, we affirm.

STATEMENT OF THE CASE

An information charged appellant with possession for sale of cocaine base (Health & Saf. Code, §§ 11351.5; count 1), and with possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2).[1] As to count 1, it was further alleged appellant was personally armed with a firearm within the meaning of section 12022, subdivision (c). As to both counts, it was alleged appellant had suffered three prior convictions which qualified as strikes under the provision of the "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served five prior prison terms (§ 667.5, subd. (b)).[2] Appellant pleaded not guilty and denied the allegations.

A jury found appellant guilty of count 1, and found the firearm allegation not true. The jury hung 11 to 1 to convict as to count 2. The trial court declared a

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

[2] The information also named Jenique Williams and Brenda Salter as co-defendants, but their names and the associated allegations were later deleted by interlineations.

mistrial on that count, and dismissed it in furtherance of justice, pursuant to section 1385.

Appellant filed a motion for a new trial on the basis of insufficiency of the evidence. Later, he was appointed new counsel, and new counsel filed an addendum to the motion for a new trial, adding the ground that appellant had received ineffective assistance of counsel because trial counsel failed to call a third party witness. The trial court heard and denied the motion. Appellant waived jury trial on the priors, and the court found appellant had suffered four prior convictions, three of which qualified as prison priors within the meaning of section 667.5, subdivision (b). The trial court struck two of appellant's strike priors pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court sentenced appellant to the aggregate term of 13 years, consisting of the upper term of five years on count 1, doubled pursuant to sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), plus three years for the three prison priors.

After appellant filed a timely notice of appeal, this court appointed counsel to represent him. After examining the record, appointed appellate counsel filed a brief raising no issues, but asking this court to independently review the record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441-442. (See *Smith v. Robbins* (2000) 528 U.S. 259, 264.) On November 29, 2011, we advised appellant he had 30 days within which to submit by brief or letter any contentions or argument he wished this court to consider. On January 13, 2012, appellant filed a letter brief raising the four contentions noted above.

STATEMENT OF FACTS

City of Los Angeles Police Officer Cesar Orozco testified he had extensive experience and training regarding all aspects of narcotics sales, and had conducted hundreds of narcotics arrests. Between March 2 and 7, 2009, he had been investigating narcotic activity at 1194 West 34th Street, Apartment 2. During the surveillance of Apartment 2, Officer Orozco observed activity consistent with the sale of narcotics. He also noticed a small security camera outside the apartment, which he believed was used as a lookout for police activity. As a result of his observations, Officer Orozco obtained a search warrant for the apartment, which he and a "tactical team" served on April 7th.

Officer Cedric Washington testified he was part of the team that executed the search warrant. As he approached the apartment, he yelled out "we're compromised," based on the fact that there was a security camera. He testified the apartment's interior door was open, but its exterior metal security door or grate was locked. Looking through the security door, Officer Washington saw appellant sitting on the couch and holding what appeared to be a handgun. Appellant placed the handgun between the arm of the couch and the seat cushion, and then ran up the stairs.

On cross-examination, defense counsel sought to discredit Officer Washington's testimony by eliciting his admission that he did not notify the other officers that he saw appellant holding a handgun, although he was trained that "if you see a gun, it's customary to yell, 'Gun.'" After Officer Washington acknowledged he did not know how many individuals were in the apartment, defense counsel asked, "And, you know, this is an area where there are sometimes a gang of people; right?" Officer Washington answered, "Yes. It's a Rolling 30's

-- Rolling 30's Harlem Crip criminal street gang neighborhood." Defense counsel made no motion to strike the testimony.

Officer Orozco testified that when the tactical team approached the door to Apartment 2, he heard people inside yelling, "'The police is here' or something to that effect." As the officers forced their way into the apartment, Officer Orozco saw appellant and Ms. Williams running up the stairs to the second floor. He checked the first floor of the apartment, and found two other individuals in the back. After the officers secured the apartment, Officer Orozco recovered a handgun from the couch. He also saw a monitor inside the apartment that displayed the information captured by the outside camera.

Officer Orozco testified that the coffee table in front of the couch held two digital scales, baggies, a plate and razor, a cell phone, and a large amount of white debris, resembling cocaine base. Officer Orozco then went upstairs and saw the other officers had detained appellant and Ms. Williams. In the upstairs toilet of the nearby bathroom, he saw a box of cigarettes with a baggie of rock cocaine in it. He also saw a baggie of rock cocaine lying in the grass directly outside the bathroom window. Appellant did not show the symptoms of being a drug addict, and was "very coherent." The officers recovered $493 in cash in one of appellant's pocket and $150 from the other pocket. The officers also found a plate with a razor and residue of rock cocaine on a glass shelf in the living room, and a small amount of rock cocaine in one of the second floor bedrooms.

Officer Orozco opined that "a narcotics dealer would possess [a] firearm for protection . . . from other narcotics dealers or other gang members and law enforcement, at least to create a diversion, if nothing else." He also opined that "[n]arcotics dealers commonly use cell phones to communicate and to be communicated with from buyers and for them to call in orders and be contacted."

In Officer Orozco's opinion, the narcotics that were recovered were possessed for sale. His opinion was based on what he observed during surveillance, which was consistent with the sale of rock cocaine, and on the evidence seized during the search, such as the security camera and monitor, the rock cocaine recovered from different parts of the apartment, the presence of scales and baggies, the handgun and cell phone, and the United States currency in different denominations recovered from appellant's pockets.

Officer Alfredo Morales testified he was part of the tactical team, and was assigned to cover the back of the apartment complex. During the operation, Officer Morales saw appellant try to jump out the second floor bathroom window. He also saw a baggie being thrown out the same window.

The prosecutor and defense counsel stipulated that if chemist Chrissy Su had been called to testify, she would have testified that she tested the white residue the police recovered from the scene and determined it to be 5.34 grams of microcrystal cocaine in the form of cocaine base.

DISCUSSION

In his letter brief, appellant contends his conviction for possession for sale of cocaine base should be reversed because (1) the trial court erred in denying his motion for a new trial; (2) superfluous and prejudicial gang evidence was introduced at his trial; and (3) he was not informed about a six-year plea disposition, which he would have accepted.

1. New Trial Motion Based on Ineffectiveness of Trial Counsel

Appellant filed a motion for a new trial, contending he had received ineffective assistance of counsel during trial because his trial counsel failed to call NaKeisha Johnson. Appellant presented evidence in his motion for a new trial that his original trial counsel was aware Ms. Johnson would testify that she threw a

baggie containing cocaine outside the bathroom window. Appellant attached to the motion for a new trial a notarized writing, which stated as follows:

> "June 9, 2009
>
> "To Whom It May Concern:
>
> "On April 7, 2009, I, NaKeisha Johnson and Larelle were setting [*sic*] on the couch before the Police came in the house. He and I went into the downstairs bathroom. I threw a small plastic bag out the window. The plastic bag contained a very small amount of cocaine.
>
> "[Signed]
>
> "NaKeisha Johnson."

Appellant contends Ms. Johnson's testimony was exculpatory evidence because it tended to show he did not throw a baggie containing cocaine base out the bathroom window. He argues trial counsel rendered ineffective assistance by failing to call Ms. Johnson as a witness. We disagree.

In order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate, by a preponderance of evidence, both that his counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for that error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Assuming, arguendo, that Ms. Johnson's testimony would have rebutted Officer Morales's, appellant cannot show prejudice because based on the other evidence, there is no reasonable probability the jury would have rendered a different verdict had Ms. Johnson been called to testify.

The police found cocaine base in various places in the apartment, including residue on plates on the coffee table and a glass shelf, and small amounts of rock

cocaine in a cigarette carton in the toilet and in the second floor bedroom. In addition, there was extensive evidence to support a finding that persons in the apartment were packaging and selling drugs, including: a security camera and its monitor, a cell phone, a handgun, two digital scales and baggies, and two plates with razors. Many of the items were in plain view, and appellant was in close proximity to them. Officer Washington testified appellant was sitting on the couch adjacent to a coffee table containing most of the drug packaging paraphernalia, and was holding a handgun. Appellant was detained near the toilet where the box of cigarettes containing the cocaine was found. Given the strength of this evidence, appellant cannot demonstrate a reasonable probability that the jury would have rendered a different verdict had trial counsel called Ms. Johnson as a witness. Accordingly, the trial court did not err in denying the motion for a new trial on the basis of ineffective assistance of counsel.

2. New Trial Motion Based on Insufficient Evidence

Appellant's motion for a new trial also challenged the sufficiency of the evidence to support his conviction. "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Here, the record was sufficient for a rational jury to find appellant guilty beyond a reasonable doubt. As discussed previously, rock cocaine was found in the apartment and there was extensive evidence that the apartment was the site of narcotics sales. In addition, Officer Orozco, an expert in narcotics sales, opined that the cocaine was possessed for sale. Finally, appellant

was found in the apartment, in close proximity to drug paraphernalia, and had on his person $643 cash in various denominations. On this record, a rational trier of fact could find appellant guilty of possession for sale of rock cocaine. The trial court did not err in denying the motion for a new trial.

3. Gang Evidence

Appellant contends his constitutional rights were violated by the admission of irrelevant and prejudicial gang evidence during the cross-examination of Officer Washington. Specifically, he contends that Officer Washington's testimony that Apartment 2 was located in the "Rolling 30's Harlem Crip criminal street gang neighborhood" was improperly admitted. In support, appellant cites *People v. Albarran* (2007) 149 Cal.App.4th 214, 232 (*Albarran*), in which the appellate court ordered the trial court to grant a motion for a new trial because the prosecution introduced highly inflammatory and marginally relevant gang evidence. The gang evidence in this case, however, was neither inflammatory nor introduced by the prosecution. It was defense counsel who opened the door to the testimony when he asked Officer Washington, "And, you know, this is an area where there are sometimes a gang of people, right?" Officer Washington confirmed that he did because it was a Rolling 30's Harlem Crip gang neighborhood. He did not further elaborate. Thus, unlike in *Albarran*, there was no testimony that appellant was a gang member or that he was associated with a violent gang. (Cf. *Albarran, supra*, 149 Cal.App.4th at pp. 227-228 [aside from defendant's gang membership, "[t]he prosecution presented a panoply of incriminating gang evidence. . . . Deputy Gillis testified at length about . . . , the wide variety of crimes [the gang] had committed and the numerous contacts between the various gang members (other than Albarran) and the police. He described a specific threat [the gang] had made in their graffiti to kill police officers."].) Accordingly, we reject this claim of error.

4. Assistance of Counsel During Plea Bargaining Stage

Finally, appellant contends he received ineffective assistance of counsel because he was not informed of a plea disposition. (See *Missouri v. Frye* (2012) __ U.S. __, 132 S. Ct. 1399, 1408 ["[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."].) After reviewing the record, we conclude appellant has failed to show he is entitled to relief.

In this case, the issue of a rejected plea disposition was discussed during a post-trial hearing at which defendant was present with his original trial counsel, Mr. Nadler. The trial court asked the prosecutor whether the People were going to retry count 2, on which the jury had hung 11 to 1 in favor of conviction. The prosecutor informed the court he wanted to retry the count and would be seeking a sentence of 25 years to life. The court noted the information alleged that appellant had two robbery convictions, and asked about "the story as to the two robberies." The following colloquy then occurred:

> "Mr. Nadler: I think my client was quite young at the time [he committed the robberies], and my recollection, your Honor, is we did have significant settlement discussions prior to trial, and if I'm not mistaken, I think Your Honor at one point -- on the open plea to the Court we may have been talking about approximately a 14-year sentence, something to that effect.
>
> "The Court: The final offer prior to going to [trial] would be six years, and that was rejected.
>
> "Mr. Nadler: I'm sorry, Your Honor?
>
> "The Court: It was six years.
>
> "[Pause in proceeding]

"Mr. Colleta [prosecutor]: Not by the People. It may have been a Court indicated. Maybe it was because I know that Ms. Jennifer Zepeda, the D.A. trying the case had instructions to proceed on 25 to life so I think --

"Mr. Nadler: Your Honor, are we -- any chance that was for one of the co-defendants?

"The Court: No. let me look. Possibly.

"Mr. Colletta: There was Williams and Salter.

"The Court: Possibly. Let me look again.

"Mr. Colletta: I know it was -- for Brenda Salter -- Ms. Salter received Prop 36 treatment because we were obligated by law to make that available to her, and she did take that prior to trial.

"The Court: That was here. The prosecutor's offer on the 6 of 10 was for Mr. Thomas 25 to life. The counteroffer, there was none. There was an offer by someone, maybe myself, on an open plea of six years, and that was rejected.

"Mr. Nadler: Your Honor, I don't have any recollection of a six year offer. I very much believe my client would have accepted that. I don't know --

"The Court: Well, that's what I have written down. I don't have a memory of it now."

On this record, appellant has not shown there was a plea disposition which was not communicated to him by trial counsel. First, the prosecutor did not believe a plea offer had been made because he knew the previous prosecutor "had instructions to proceed on 25 to life." Second, Mr. Nadler had no recollection of such an offer and stated that it would have been accepted, had it been made. The

record suggests that if a six-year plea offer was made, it may have been extended to one of the co-defendants. Third, the written notation that the court may have indicated a six-year sentence on an open plea and that this offer was rejected suggests that if such an offer was made, appellant was informed of it and rejected it in open court. Finally, appellant did not articulate any concerns about this possible plea disposition during the hearing. From his silence, we may infer either that he was informed of the offer and rejected it, or that no such offer was ever made to him. On this record, we conclude appellant has failed to show there was a plea disposition offered by the prosecutor or indicated by the court, which was not communicated to him by trial counsel. Accordingly, we reject appellant's claim of ineffective assistance of counsel during the plea bargaining stage.

This court has examined the entire record in accordance with *People v. Wende, supra,* 25 Cal.3d at pages 441-442, and is satisfied defendant's attorney has fully complied with the responsibilities of counsel, and no arguable issues exist. Accordingly, we affirm the judgment of conviction.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.