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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DARIN FREEMAN, Defendant and Appellant.	B230587 (Los Angeles County Super. Ct. No. BA368167)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Mitchell, Judge. Affirmed as modified.

Joy A. Maulitz, 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, Senior Assistant Attorney General, Margaret Maxwell and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Darin Freeman was convicted after a jury trial of possession of cocaine for sale, possession of Ecstasy for sale, transportation of cocaine and transportation of Ecstasy. On appeal he contends the trial court erred in failing to instruct on simple possession as a lesser included offense of possession of a controlled substance and should have stayed imposition of sentence on the transportation counts pursuant to Penal Code section 654. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

After stopping Freeman for traffic violations and learning his driver's license was suspended, the car he was driving was not registered to him and he was on parole, Los Angeles Police Officers Thomas Onyshko and Jeff Von Lutzow searched Freeman and the vehicle. Officer Onyshko found a clear plastic bag containing marijuana and $273 in different denominations inside a pocket of Freeman's shorts. After finding no contraband inside the car Freeman had been driving, Officer Von Lutzow searched the undercarriage of the vehicle and recovered a hide-a-key holder containing a plastic bag. There were seven smaller bags insider the larger bag, six of which bore the emblem of a clover and contained a white powdery substance resembling cocaine. The seventh bag contained eight pills resembling Ecstasy.

The powdery substance in three of the six smaller bags was tested and confirmed to contain cocaine. The total weight of the powder, excluding the packaging, was 2.88 grams. Five of the eight pills were tested and found to contain Ecstasy.

Freeman was charged by amended information with one count of possession of cocaine for sale (Health & Saf. Code, § 11351, count 1), possession of Ecstasy for sale (Health & Saf. Code, § 11378, count 2), transportation of cocaine (Health & Saf. Code, § 11352, subd. (a), count 3) and transportation of Ecstasy (Health & Saf. Code, § 11379, subd. (a), count 4). The information specially alleged Freeman had two prior drug-related prison convictions (Health & Saf. Code, § 11379, subd. (a)) and had served three separate prison terms for felonies (Pen. Code, § 667.5, subd. (b)).

At trial Officer Onyshko opined the amount of cocaine, its individual packaging and where it was found in the vehicle, the amount and denominations of the currency in

Freeman's possession and the absence of drug paraphernalia were consistent with his possession of the cocaine for sale. Onyshko estimated the street value of the cocaine as $100 to $150. Detective Craig Piantanida similarly opined the packaging of the two drugs, the amount of currency in Freeman'a possession, the fact the two drugs were found together and were hidden underneath the vehicle were consistent with "potentially 14 one-use sales." Piantanida estimated the combined street value of the drugs as $280. Additionally, Piantanida testified, while 2.88 grams of cocaine could be found on a "heavy user," that much cocaine for personal use would more likely be purchased wholesale in bulk rather than in individual bags at a greater expense. According to Piantanida, personal users of Ecstasy generally ingest only one to two pills per night.

The defense did not call any witnesses. The trial court granted defense counsel's request to have a portion of the preliminary hearing testimony of Officer Von Lutzow, who was unavailable for trial, read to the jury. The testimony, according to defense counsel, would cast doubt on Officer Onyshko's credibility. The jury heard Von Lutzow's testimony on cross-examination that Onyshko first searched the interior and the trunk of the vehicle and found nothing. Thereafter, Von Lutzow searched the trunk and the undercarriage of the car and recovered the hide-a-key.

After inquiring of defense counsel, who stated he did not want the jury instructed on lesser included offenses,[1] the trial court did not instruct the jury on simple possession of cocaine or Ecstasy. The defense theory, developed primarily through cross-examination, was the People had failed to prove Freeman knowingly possessed the cocaine and Ecstasy, which were secreted underneath a car not registered to him.

The jury convicted Freeman on all counts. In a bifurcated proceeding Freeman admitted the special allegations.

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[1] The trial court stated to defense counsel, "I just asked you off the record, I'll ask you on the record, does the defense request instructions for lesser included offenses?" Defense counsel answered, "No we don't." The court confirmed, "You don't want them?" Defense counsel again answered, "No, we do not." The court replied, "Good enough. I've prepared the instructions with them. And I'll delete them."

The trial court sentenced Freeman to an aggregate state prison term of five years, consisting of the three-year middle term for possession of cocaine for sale (count 1), plus two years for the most recent prior prison term enhancements. The court imposed concurrent terms for each of the remaining charges.

After Freeman appealed from the judgment, his appointed counsel filed an opening brief in which no issues were raised. (See *People v. Wende* (1979) 25 Cal.3d 436, 441.) In response to a notice from this court advising Freeman he could personally submit any contentions or issues he wanted us to consider, Freeman submitted a supplemental brief, contending, among other issues, his defense counsel had provided ineffective assistance in failing to request jury instructions on simple possession. We then requested the parties to submit supplemental briefing on the following issues: (1) Whether the trial court should have instructed on simple possession as a lesser included offense of possession for sale as to both cocaine and Ecstasy; and (2) Whether the trial court should have stayed sentence on one or more counts pursuant to Penal Code section 654.

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error by Not Instructing on Simple Possession as a Lesser Included Offense*

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, "'"'those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.'"'" (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question whether the elements of the lesser included offense, but not the greater offense, are present. (*Ibid.; People v. Breverman* (1998) 19 Cal.4th 142, 154.) The existence of "'any evidence, no matter how weak'" will not justify instructions on a lesser included offense. There must be "'evidence that a reasonable jury could find persuasive.'" (*Breverman*, at p. 162.) In addition, the failure to instruct on a lesser included offense in noncapital cases is "at most, an error of

California law alone" requiring reversal only when "an examination of the entire record establishes a reasonable probability the error affected the outcome." (*Id.* at p. 165.)

Simple possession of a controlled substance is a lesser included offense of possession for sale of the same controlled substance. (*People v. Oldham* (2000) 81 Cal.App.4th 1, 16.) On cross-examination Detective Piantanida conceded the amount of cocaine found could have been for the personal use of a very heavy drug user (although he explained why in his opinion that was highly unlikely). However, even if that concession was sufficient to support lesser-included-offense instructions on simple possession, Freeman was not prejudiced by the omission. The issue as presented to the jury was whether Freeman knowingly possessed the drugs found underneath the car he was driving, not whether the drugs were possessed for personal use as opposed to sale. There was extensive evidence, including expert testimony based on the method of packaging and the value of the drugs, that the cocaine and Ecstasy were, in fact, possessed for sale. The testimony was undisputed the amount of drugs recovered would yield an approximate combined total of 14 street-level sales, Freeman had $273 in his pocket, and he had no paraphernalia on his person or in the car. On the record here, there is no reasonable probability he would have benefitted from those instructions. (See *People v. Breverman, supra,* 19 Cal.4th at p. 165.)

2. *Imposition of Sentence on the Two Transportation Counts Should Have Been Stayed*

Penal Code section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Latimer* (1993) 5 Cal.4th 1203, 1206.)[2] "'Whether *a course of criminal conduct* is divisible and therefore

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[2] Penal Code section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses, but not for more than one.'" (*Rodriguez*, at p. 507; accord, *People v. Lewis* (2008) 43 Cal.4th 415, 519.)

Generally, the trial court has broad discretion in determining whether a defendant had multiple criminal objectives independent of, and not merely incidental to, each other for purposes of Penal Code section 654. On appeal we will uphold the court's express or implied finding a defendant held multiple criminal objectives if it is supported by substantial evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Freeman contends, the People acknowledge and we agree the trial court violated Penal Code section 654 in failing to stay the sentences for transportation of cocaine (count 3) and transportation of Ecstasy (count 4). The evidence shows the two transportation offenses arose out of the same indivisible course of conduct as the possession for sale counts and were incident to the same objectives. (See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

DISPOSITION

The judgment is modified to stay the sentences on count 3, transportation of cocaine, and count 4, transportation of Ecstasy. As modified, the judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.