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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. JUSTIN LEE TAYLOR, Defendant and Appellant.	B234268 (Los Angeles County Super. Ct. No. NA088025)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari and Tomson T. Ong, Judges. Affirmed.

Kari E. Hong, 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, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Justin Taylor was convicted of one count of possession of marijuana for sale (Health & Saf., § 11359). He contends on appeal that his conviction should be reversed due to prosecutorial misconduct and also asks that this court review the in camera proceedings conducted by the trial court pursuant to his motion for production of documents under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether any discoverable documents were not provided to the defense. We affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Long Beach Police officer Jeffrey Shurtleff was on patrol with his partner on February 8, 2011. From the patrol car, Shurtleff saw Taylor ride his bike unsafely across lanes of traffic. Shurtleff's partner was forced to slow the police vehicle to avoid colliding with Taylor. Shurtleff's partner activated the lights and siren on the police car, and Taylor looked back at them as he rode away. After briefly losing sight of Taylor, the officers caught up with him at a street corner. Taylor was no longer on his bicycle, and he was standing with his head and hands inside a city trash can. When Taylor looked up from the trash can, Shurtleff recognized him.

The officers pulled their vehicle over to the side of the road and asked Taylor where his bicycle had gone. Taylor, who was holding a cell phone, said he had dropped his bicycle off at his home. Shurtleff conducted a pat-down search of Taylor for weapons, and found a hard object in his pocket. Shurtleff removed the item; it was a wad of cash in the amount of $517. There were three $100 bills, five $20 bills, nineteen $5 bills, one $2 bill, and twenty $1 bills. Shurtleff's partner examined the trash can into which Taylor had been bending, and recovered a bag of marijuana that was sitting on top of the waste in the can. The bag contained 15.15 grams of marijuana.

Taylor was arrested and read his *Miranda* rights. Taylor agreed to talk to Shurtleff. He stated that he was going to smoke half the bag of marijuana and sell the other half. Taylor said that he sold dime bags of marijuana to youngsters. He estimated

the value of the marijuana at $100. Taylor also told the police that he had seen them when he was riding his bicycle, but that he wanted to conceal the marijuana before the police stopped him. Shurtleff looked at Taylor's cell phone and saw text messages reading, "My neighbor wants a dime," and "I need 100." Shurtleff asked Taylor what a dime was, and Taylor responded that a dime was a measurement of an amount of marijuana.

Taylor was charged with possession of marijuana for sale. At trial, a police officer with expertise in drug offenses opined that marijuana in the amount recovered that was obtained under circumstances such as those present in this matter was possessed for the purposes of sale. The quantity represented 40 to 50 doses, a two-week supply for most users, and it would be unusual for a person to be out carrying that amount of marijuana unless it was for sales. The cash on hand, the text messages on the cell phone, and the statements attributed to Taylor were also consistent with drug sales. A "dime" is a slang term for $10 of drugs, the expert witness testified. It is typical for marijuana to be sold in $10 quantities. A "100" is a hundred dollars' worth of drugs. It is also a typical amount for a sale. It is common for marijuana dealers to use marijuana as well. The location in which Taylor was arrested is also a common location for sales. It is close to a high school and after school many students attempt to buy drugs there.

Taylor testified in his own defense. He testified that he was a barber and that on the day of his arrest he was coming home on his bicycle from getting a haircut himself. He saw the police but did not see their lights on; he heard the siren chirp but was not sure it was for him, so he proceeded on his way. As a precaution, he discarded his marijuana in the trash. He was found by the police when he went back to retrieve it, although he had not taken it from the trash can yet because he did not know if the police were still in the area.

Taylor testified that he had been using marijuana for about six years and smoked it three to four times per day. He had a medical marijuana card in the past and had one at the time of trial as well, but at the time of his arrest he only had a prescription that was not valid because it needed to be renewed. Taylor testified that he typically purchased

between an eighth of an ounce and an ounce of marijuana and that he usually purchased larger quantities. He explained, "I'm an addict. I like to smoke weed." A larger quantity would last him a little less than a week, as he smoked three or four times per day and used about a gram in each marijuana cigarette. He typically kept his whole drug stash with him to keep his sister or others from taking it. He denied intending to sell the marijuana he possessed.

Taylor testified that the text message from E.J., a youngster in his neighborhood, saying that his neighbor wanted a dime, meant that E.J.'s neighbor wanted 10 dollars' worth of marijuana. Taylor said he regularly received text messages from friends asking for marijuana, and he explained that "[t]hey tend to know that I smoke a lot so they ask for weed." Although he got two or three texts per day from people who wanted marijuana, he never sold or gave marijuana to his friends. Taylor testified that the text message stating "I need 100" was from a client who wanted three haircuts; she would pay $80 for the haircuts and $20 for the tip, for a total of $100. Taylor also testified that the money he possessed was money he had earned cutting hair. He had it with him because "I carry all my belongings. I save[,] that's why I had money and marijuana." Taylor denied telling the police that he smoked half his marijuana and sold the other half or that he sold marijuana to youngsters.

Taylor was convicted of possession of marijuana for the purpose of sales. He appeals.

DISCUSSION

I. Pitchess

The trial court granted Taylor's motion for discovery of the personnel records of Officer Shurtleff with respect to issues of truth and veracity, and Taylor requests that we review these proceedings for any error. We have reviewed the sealed record of the proceedings. At the in camera proceedings the trial court appropriately inquired whether the custodian had produced all potentially responsive documents concerning false or fabricated reports and described thoroughly the documents produced by the custodian of

records and reviewed by the court. We conclude the trial court appropriately exercised its discretion in determining which materials were relevant to Taylor's case and that disclosure of material from the officers' personnel files beyond the information relating to the two complaints the court ordered to be disclosed was not appropriate. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

II. Closing Argument

During closing argument, Taylor's counsel conceded that Taylor possessed marijuana but urged the jury to find him not guilty of possession for sale. She urged the jury to consider "[t]he fact that Mr. Taylor was never seen speaking to anyone. There was no inclination [*sic*] whatsoever that day that he had sold drugs to anybody or he was planning on selling drugs to anybody. Because those facts, ladies and gentlemen, within here, within these four walls, those are the facts that we call reasonable doubt. And in this case where the consequence is so grave and where there is so much reasonable doubt, I ask that you don't try to get into his mind like everybody else did. Instead, I ask that you listen to what he told you. You have no reason not to believe him. He told you plenty of things that made him look bad. If you do this I am confident you will return a verdict of not guilty. We are not asking for a full acquittal. We are asking that you convict him for what is wrong; you convict him on the possession and return a not guilty verdict for the possession for sale."

In rebuttal, the prosecutor said, "Now, counsel got up here and said that well, he admitted to the simple possession, so that should tell you that he is telling the truth when he denies selling and really, the way laws are with marijuana, simple possession, it's like a speeding ticket. There is no consequence to him admitting. There is almost no consequence to him admitting that he had it. There is no consequence. He might as well say, well, I'm telling the truth that I didn't sell because I admitted to crossing—making the lane change illegally on my bicycle. I admitted to that so I must be telling the truth. That doesn't hold any water. Now, finally, along those notes, the consequences of this case you should not consider and the judge said repeatedly and I have told you, you can't

make this decision when you are in there because you feel sorry for him, you feel bad for him, he looks sad, he has got his nice rosary on today. You can't make this decision on this case based on those feelings. The consequences should not enter into your deliberations. It shouldn't enter into the discussion. It shouldn't even be in your mind. That's up to the judge. You have to trust that the judge is going to follow the law and do the right thing. So that's his domain. Yours is to decide the facts. You can't think about the consequences."

After closing argument and outside the presence of the jury, defense counsel objected to the prosecutor's rebuttal argument. She said, "I believe he said there is no consequence and then he said, 'Almost no consequence. It's like a speeding ticket.' If the court will recall in my cross-examination of the officer, I tried to bring that up and was told not to bring up the consequence and that it wasn't relevant. I clearly could have argued that the consequence for a [Health & Safety Code section] 11357[, subd.] (b) is the reason why the officers did what they did, because they wanted to have a felony instead of an infraction. However, I was not able to make that record." The court responded that the prosecutor was not the only one who had referred to consequences in closing: "I know you mentioned the word 'consequences.' I guarantee you I was following along and really there was the word 'consequence' was used during your closing argument, Ms. Hudak [Taylor's counsel]." The court added that the arguments of attorneys are not evidence and that the jury had already been instructed that it was not to consider penalty or punishment.

Taylor argues that the prosecutor's reference to the absence of consequences for admitting simple marijuana possession closing argument constituted misconduct. "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible

methods to attempt to persuade either the court or the jury.”’” [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Taylor contends that the comments were improper because considerations of punishment are never appropriate for the jury; because the prosecutor diverted the jury from its obligation to weigh the evidence objectively; and because the comments effectively undermined Taylor’s key defense that his admission to possession bolstered his credibility regarding his denial that he sold drugs.

“It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence.” (*People v. Allen* (1973) 29 Cal.App.3d 932, 936.) Otherwise, “a jury may permit their consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment.” (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306.) For counsel to refer to the punishment for a crime is ordinarily impermissible, but here, Taylor’s own counsel urged the jury to contemplate the consequences of a conviction for possession of marijuana for sale during her closing argument when she argued, “And in this case *where the consequence is so grave* and where there is so much reasonable doubt, I ask that you don’t try to get into his mind like everybody else did.” Instead, she argued, the jury should credit Taylor’s denial of the intent to sell marijuana because he had demonstrated honesty by admitting that he had broken the law by possessing marijuana. The prosecutor rebutted the defense contention that Taylor’s admission to possessing marijuana demonstrated his forthrightness and credibility by pointing out that Taylor suffered little to no downside by admitting simple possession.

Because defense counsel promulgated a consequence-based argument concerning the greater charge of possessing marijuana for sale, and because Taylor admitted his guilt of the lesser charge of possessing marijuana, whether the prosecutor erred when he referred to the consequences of the lesser charge of simple possession while rebutting the defense’s closing arguments is a difficult determination. We need not resolve this question, however, because even if we assume error it is not reasonably probable that a result more favorable to Taylor would have occurred had the prosecutor not made this

statement. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318.) The prosecutor's comment was brief, and the jury was properly instructed both that the attorneys' arguments were not evidence and that jurors were not to consider consequences in reaching their verdict. Moreover, the evidence against Taylor was overwhelming: he was found with one to two weeks' supply of marijuana and a large amount of cash in bills of small denominations; the cell phone he possessed contained text messages indicative of drug sales; and he admitted to the police that he sold marijuana. Any error in the prosecution's rebuttal to the defense attorney's argument was harmless in the face of this compelling evidence of guilt.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.