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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS CADE GUDEON, Defendant and Appellant.	B267425 (Los Angeles County Super. Ct. No. KA109583)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Nicholas Cade Gudeon of possessing cocaine for sale, possession of heroin, and possession of methamphetamine. The court placed him on probation for three years, and ordered him to serve 365 days in county jail and to pay certain fines and fees.

Defendant contends that the court limited his attorney's cross-examination of a prosecution witness and thereby violated his constitutional right to confront the witness. We reject the argument and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

At approximately 2:00 a.m. on April 27, 2015, defendant was walking along a street in El Monte near a convenience store. A police officer noticed a large bulge in defendant's jacket pocket. The officer asked defendant what was in the pocket and defendant said it was marijuana. With defendant's permission, another officer removed from defendant's pocket a paper bag containing a cigarette carton and a small plastic container. The plastic container held 0.31 grams of heroin. The cigarette carton contained a plastic bindle that contained 1.57 grams of cocaine. The officers found in defendant's wallet a folded piece of paper containing 0.1205 grams of methamphetamine. Defendant also had some marijuana.

Defendant also possessed a hollowed-out pen and a piece of foil bearing burn marks. According to a police officer, such items are commonly used to ingest narcotics. Defendant did not possess scales or plastic baggies.

Detective Randall Marsh, a narcotics expert, interviewed defendant on the morning he was arrested. An audio recording of the interview was played for the jury. During the interview, defendant admitted that he possessed marijuana, "[c]oke, heroin and meth" at the time the police stopped him. He said he paid $40 for the cocaine, $25 for the marijuana, and $20 for the heroin.

After telling Detective Marsh that he smoked marijuana every day, the following colloquy took place.

"[Detective] Marsh: How often do you do cocaine?

"Defendant: Not often at all.

"[Detective] Marsh: But you've done it before.

"Defendant: Mhmm[.]

"[Detective] Marsh: Not addicted or anything like that?

"Defendant: No[.]

"[Detective] Marsh: Th[e]n why would you buy 40 bucks worth then?

"Defendant: Well . . .

"[Detective] Marsh: Are you going to try and make money from it?

"Defendant: Yeah.

"[Detective] Marsh: So you wanted to chop it up a little bit and maybe try to sell it to make some a little extra.

"Defendant: Yeah I was just trying to make a little extra money.

"[Detective] Marsh: Ok.

"Defendant: I mean, I'm fucking broke."

Defendant said he bought the cocaine two days prior. He explained that he had the drugs with him because he had not gone "into the [motel] room" where he lived. Detective Marsh asked him: "Was there hopes [*sic*] that maybe you'd run into someone along the way and maybe say hey you got anything and sell it to them?" Defendant said, "Kind of, but. . . . Yeah, kind of, I'm just fucking absent minded."

During trial, Detective Marsh opined that defendant possessed the cocaine to sell it. He based his opinion on defendant's interview statements and his investigation of the case. He testified that the area where defendant was stopped was a "high drug traffic area" where defendant could have "easily" sold narcotics, and that the amount of cocaine defendant possessed could have been sold for "[a]bout double" his $40 cost.

During cross-examination, Detective Marsh identified facts that might lead him to believe that a suspect possessed drugs for sale. Such facts include possession of a scale, multiple baggies containing drugs, pay-owe sheets, and a cell phone—none of which defendant possessed when he was arrested. Detective Marsh agreed that possession of drugs without possession of paraphernalia for ingesting the drugs also indicates possession for sale, not personal use. Defendant possessed such paraphernalia—the hollowed-out pen and piece of foil. Defense counsel elicited from Detective Marsh that no one saw defendant engage in a drug transaction or even speak to anyone, and that he was cooperative and forthcoming during his police interview. Detective Marsh also stated that the location where the police

officers arrested defendant was not only commonly used for drug *sales*, as Detective Marsh testified on direct, but also for drug *use*.

On redirect, Detective Marsh said the reason he asked defendant whether he was going to sell the cocaine was because defendant said he was not a regular user and the amount he possessed suggested "that he might have the intention to sell." Detective Marsh explained that it was "a fairly large amount" for one who is not a regular user to possess. Even a regular user, he added, would not usually carry that amount with him.

On recross, defense counsel asked Detective Marsh about defendant's statement that he "had everything on him" because he had not gone home to his motel room. When counsel asked if Detective Marsh knew when defendant had last been home, the court admonished counsel, stating: "We're beyond the scope of redirect, so tighten it up, counsel." Counsel then questioned Detective Marsh as to the amount of narcotics that drug users usually carry with them. The testimony included with the following colloquy.

"[Defense counsel]: You had said that you usually when you find someone, they only have a single use on them. Is that really common, that when you find someone in simple possession of a drug, that they just have one . . . enough for one singe use?

"[Detective Marsh]: Usually, yes.

"[Defense counsel]: They never have more than enough for one single use?

"[Detective Marsh]: I would never—wouldn't use the word, 'never.'

"[Defense counsel]: So it does happen where you arrest someone for simple possession of a drug, and they're in possession of more than just one single use?

"[Detective Marsh]: Again, I go with the same statement that any amount is a usable amount. So that single bag could be multiple uses for that person. It just—every person is different, and every user is different.

"[Defense counsel]: I guess that's what I'm getting at. I think earlier it sounded like usually when you find someone, they're in possession of enough drugs for just one single use. I just want to clarify if that's entirely accurate.

"[Detective Marsh]: Yeah. I—again, it's—everybody's different, so everybody's usage is different.

"[Defense counsel]: Okay. So sometimes when you arrest someone, they have more than enough drugs for just one single use. Would you say that that is common?

"[Detective Marsh]: Yes."

At this point, the court asked Detective Marsh:

"Absent [defendant's] statement, what would your opinion be in terms of simply the quantity found and the circumstances in which it was found, in terms of the cocaine? What would your opinion be, in terms of what it was possessed for?

"[Detective Marsh]: Based on the statement of—

"[The Court]: Don't include the statement.

"[Detective Marsh]: Any of his statements?

"[The Court]: None of the statements, just the cocaine by itself.

"[Detective Marsh]: It's—again, I couldn't say. It would just be based on the totality of the circumstances then and there, that individual person. I mean, if I just had that amount and that person, yeah, I would tend to believe that they're selling."

The court then asked defense counsel to proceed.

"[Defense counsel]: If you had further information, though, about where they were coming from, how long they'd been away from home, how long they'd been using, would that change your opinion about that amount?

"[Detective Marsh]: Not those particular factors."

"[Defense counsel]: Would anything change your opinion about that amount?

"[Detective Marsh]: No.

"[Defense counsel]: So every time someone—"

At this point, the court interrupted:

"Counsel, now you're getting into an area of speculation and conjecture. We're beyond the scope of redirect. Unless you have something that is relevant to what counsel raised on redirect, then your cross is over."

Defense counsel responded: "I'm done now."

After Detective Marsh's testimony, the prosecution rested and the defense did not call any witnesses.

DISCUSSION

Defendant contends that the trial court cut short his counsel's cross-examination of Detective Marsh and thereby violated his right of confrontation under the Sixth Amendment to the federal constitution. That amendment guarantees to the accused in a criminal prosecution "the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The " ' "main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*." ' " (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) It does not, however, guaranty "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.) Trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination" ' (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679; accord *People v. Quartermain* (1997) 16 Cal.4th 600, 623), and, generally, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's constitutional rights (*People v. Kraft* (2000) 23 Cal.4th 978, 1035).

The Attorney General argues that defendant has forfeited his confrontation clause claim by failing to raise it below. We agree. Defendant did not assert that the statements he now characterizes as terminating his counsel's cross-examination deprived him of his right of confrontation or was otherwise erroneous. He has therefore forfeited challenges to the statements. (See Evid. Code, § 353; *People v. Thornton* (2007) 41 Cal.4th 391, 427.)

We also reject the argument on the merits. Initially, we do not accept defendant's premise that the court terminated or cut off defense counsel's cross-examination of Detective Marsh. As the conclusion of the quoted colloquy reveals, the court did not prohibit defense counsel from questioning Detective Marsh further; rather, it merely limited further examination to questions that are "relevant to what [the prosecutor] raised on redirect." By responding, "I'm done now," defense counsel implied that she had no more questions that met that criteria. The dialogue shows that the court required only that counsel abide by the statutory requirement that she limit

cross-examination to "matter within the scope of the direct examination" (Evid. Code, § 773, subd. (a)), and that counsel complied.[1] The limitation did not infringe upon defendant's right of confrontation. (See *U.S. v. Urena* (9th Cir. 2011) 659 F.3d 903, 907-908 [limiting cross-examination to scope of direct did not violate right of confrontation].)

To the extent defense counsel had relevant questions for Detective Marsh that exceeded the scope of redirect, she could have questioned Detective Marsh during the defense case or requested the court to allow a broader scope of cross-examination. Under these circumstances, the court did not deprive defendant of his right to confront Detective Marsh. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1118-1119; see also *People v. Foalima* (2015) 239 Cal.App.4th 1376, 1392 [no Sixth Amendment violation when counsel declines the opportunity to examine a prosecution witness].)

We also reject defendant's argument that the court erred by informing counsel that she "was getting into an 'area of speculation and conjecture.' " Defendant asserts without citation to the record that his counsel "was attempting to prove that the officer could not and would not look at the totality of the circumstances of this case in particular, regardless of the statements made by [defendant]," and that "counsel was laying down a series of questions that would have helped her defense." The absence of record citations highlights the fact that defense counsel failed to make an offer of proof as to what she was "attempting to prove" or what questions she would be "laying down." Defendant thus deprived the trial court of an opportunity to consider these arguments and to rule on any particular issue. In any case, the court's comment amounts to no more than a cautionary observation, not an evidentiary ruling. We therefore reject defendant's contention.

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[1] The rule that cross-examination is limited to the scope of direct examination is applied in federal courts and the majority of the states. (See 1 McCormick On Evidence (2016 supp.) § 21.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.