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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEVIN RASHUN ROBINSON, Defendant and Appellant.	D043106 (Super. Ct. No. SCD175688)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Steven T. Oetting, Deputy Attorneys General, for Defendant and Appellant.

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1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II, III and IV.

On June 30, 2003, the San Diego County District Attorney filed a complaint, charging Kevin Rashun Robinson with two counts of robbery in violation of Penal Code[2] section 211, with two prior prison term enhancements under section 667.5, subdivision (b), and with two or more felony convictions making him presumptively ineligible for probation pursuant to section 1203, subdivision (e)(4). At a preliminary hearing on July 15, 2003, the court held Robinson to answer on both robbery counts and the complaint became the information.

On September 11, 2003, the prosecution made a motion to amend the information by adding a count of petty theft under section 484 with a prior theft-related offense under section 666. Robinson did not object to this amendment and the court accepted it.

Robinson pleaded not guilty and denied the special allegations. A bifurcated jury trial began on September 12, 2003, and four days later the jury acquitted him of the two robbery counts but found him guilty of petty theft. After he waived his right to jury trial, the trial court found the prior prison term enhancements true and sentenced him to a total of four years in prison, including two years for the petty theft count and one year for each of the two prison priors.

On appeal, he argues his counsel was ineffective for failure to object to amendment of the information, failure to preserve evidence resulted in deprivation of constitutional rights and resulted in impermissible opinion testimony, and the evidence is insufficient to support his conviction. We affirm the judgment.

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2 All further statutory references are to the Penal Code unless otherwise specified.

BACKGROUND

On June 23, 2003, appellant entered a Ralphs grocery market and began walking back and forth in the liquor aisle near a display case of Jack Daniels. He cast occasional glances at two Ralphs employees working in the nearby meat department. The employees, David Pena and Mario Garcia, thought his actions were "unusual." After Pena returned from a storeroom, during which time he did not observe appellant, he saw him take one bottle of Jack Daniels from the shelf and put it in his jacket. He asked appellant to put the whiskey back. Appellant responded by saying "it's expensive here, man" and then walked away. Pena did not see appellant touch any other bottles.

Pena believed a theft was in progress and he signaled Garcia for help to stop it. As he was walking down the liquor aisle, Garcia picked up two security tags lying on the floor close to where appellant was standing. The security tags, which the store attaches to liquor bottles such as Jack Daniels, trigger a sensor at the front of the store if they are not properly deactivated by the cashier and an alarm will sound. Garcia picked up the two security tags and discovered one of them had part of a label attached to it. Neither employee saw appellant remove security tags from anything.

Appellant walked out of the store and both Pena and Garcia followed him. According to Garcia, appellant was not holding anything as he left the store, he did not stop to pay for anything and the security sensor at the front doors did not sound when appellant walked past them. The Ralphs employees saw appellant pick up a bag lying on the sidewalk. Garcia approached him, identified himself as a Ralphs employee and asked

him to give the liquor back. In exchange for returning it, Garcia said they would let appellant go without calling the police.

Appellant responded by swearing and becoming aggressive. He denied he had anything and claimed to have put the bottle back on the shelf. When the employees asked him to return to the store, he tried to "move [them] out of the way" or "manpower himself" through them. Appellant hit Garcia on the shoulder.

After the initial scuffle, appellant moved away from the Ralphs employees. As he walked across the street, he removed a bottle of Jack Daniels from his pants and threw it at Garcia, shattering the bottle to pieces at Garcia's feet. Appellant began to run and a second bottle fell from his pants. The top of the bottle broke off. Appellant ran into a Greyhound bus station where the Ralphs employees saw him take off his hat and place it under his jacket. with the help of additional Ralphs employees and sheriff's deputies from the nearby county courthouse. The deputies arrested appellant.

San Diego Police Officer Jeffrey Gross arrived at the scene and took pictures of a broken bottle of Jack Daniels lying on the concrete in front of the store. Someone had already cleaned up the bottle that shattered at Garcia's feet. Both Garcia and Officer Gross testified a piece of label attached to one of the security tags Garcia had picked up inside the store matched the torn label on the remaining bottle. Officer Gross said it matched "like a jigsaw puzzle" although he admitted that he never "literally pull[ed] it up [next to the bottle] and say they match[ed]." Officer Gross did not impound the bottle because it was open and leaking and would have been difficult to store. He testified it was departmental policy to take pictures of food items but not to impound them, although

the picture he took did not show the back of the label and the tear which supposedly matched the piece of label attached to the security tag. He returned the bottle to Garcia.

DISCUSSION

I

Defense counsel was not ineffective for failing to object to the prosecution's motion to amend the information to charge petty theft with a prior.

Appellant contends he received ineffective assistance of counsel when his attorney did not object to the prosecution's motion to amend the information to include a charge of petty theft with a prior theft-related offense pursuant to section 666, without first proving the prior theft-related offense at the preliminary hearing. We examine this argument first because if appellant prevails on this ground, the remaining issues are moot.

In order to prevail on a claim his counsel was ineffective for failure to object to the amendment, appellant must demonstrate counsel's performance was deficient under an objective standard of responsibility and that there is a reasonable probability that but for counsel's error, a determination more favorable to him would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) If the record does not reflect why defense counsel acted, or failed to act, in the manner challenged, the case will be affirmed unless counsel failed to provide an explanation when asked, or there is no possible satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Appellant contends the amendment here violated section 1009, which prohibits the amendment of any information "to charge an offense not shown by the evidence taken at the preliminary examination." He argues that because the prosecution did not adduce

evidence at the preliminary hearing proving he committed a prior theft-related offense and did not prove he had served a prison sentence for that offense, the prosecution could not later amend the information to charge him with a felony based on his prior theft-related convictions. We disagree.

Section 666 does not establish a separate substantive offense of petty theft with a prior conviction. It is a discretionary sentencing statute which, upon the establishment of a qualifying prior conviction, allows the trial court to punish petty theft as either a felony or a misdemeanor. (*People v. Bouzas* (1991) 53 Cal.3d 467, 471.) In this respect, section 666 operates in the same manner as the "three strikes" law and section 667.71; it does not establish an enhancement, but rather establishes an alternate and elevated penalty for a petty theft conviction when a recidivist defendant has served a prior term in a penal institution for a listed offense. (*People v. Murphy* (2001) 25 Cal.4th 136, 155; *People v. Tardy* (2003) 112 Cal.App.4th 783, 787.) Thus evidence supporting the existence of the prior convictions need not be adduced at the preliminary hearing (see *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 150-151; *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902, 906-907) and section 666 need not be specifically pleaded in the information or indictment. (*People v. Tardy, supra,* 112 Cal.App.4th at pp. 786-787.)[3]

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[3] Appellant's reliance on *Thompson v. Superior Court* and *Miranda v. Superior Court* for the proposition that a preliminary hearing must be held to determine the existence of priors for purposes of section 666 is misplaced. Although *Thompson* contains language alluding to a "procedural necessity" to determine priors at the preliminary hearing where the prior will elevate an offense from a misdemeanor to a felony (*Thompson v. Superior Court, supra,* 91 Cal.App.4th at pp. 150-151), and *Miranda* assumes section 666 is a sentence-enhancing statute that must be pleaded and

We also disagree with appellant's claim he was denied due process for failure to adduce evidence of the prior convictions at the preliminary hearing. Due process requires the pleading apprise the defendant of the potential for an enhanced penalty and allege every fact and circumstance necessary to establish the increased penalty. (*People v. Thomas* (1987) 43 Cal.3d 818, 826; *People v. Tardy, supra,* 112 Cal.App.4th at p. 787.) Here the complaint charging appellant with two counts of robbery necessarily put him on notice that he could also be convicted of the necessarily lesser included offense of petty theft. (*People v. Ortega* (1998) 19 Cal.4th 686, 697.) For purposes of probation denial under section 1203, subdivision (e)(4), the complaint enumerated six prior felony convictions, two of them for felony petty thefts pursuant to sections 666 and 484. One of the two felony petty theft priors was also alleged as a prison prior under sections 667.5, subdivision (b), and 668. The amended information expressly charged the crime of petty theft with a prior petty theft (§§ 484, 666) and alleged the same two prior theft-related offenses previously set forth in the complaint. Appellant was found guilty of petty theft by a jury. In a bifurcated trial the court expressly found the priors to be true. On these facts we conclude appellant was from the outset apprised of the potential for increased

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proved at a preliminary hearing (*Miranda v. Superior Court, supra,* 38 Cal.App.4th at pp. 907-908), neither case had the present issue before it. In each case section 666 is addressed in dicta, in *Thompson* as a concession by the People and in *Miranda* as part of a comparison made by the defendant. Most importantly, *Thompson* and *Miranda* stand squarely for the proposition that priors alleged under the three strikes law need not be proved at a preliminary hearing. Following clarification by the Supreme Court that priors under section 666 are to be treated the same as three strike priors, it follows that those cases support the proposition that priors used to elevate petty theft to a felony need not be proved at a preliminary hearing.

penalty and each fact and circumstance necessary to establish that increased penalty. He was not denied due process.

Regardless, appellant has not shown " ' "there simply could be no satisfactory explanation" ' [citation] for counsel's failure to object." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 181.) Without that showing we cannot find incompetence. Even assuming the prosecution must prove the prior theft-related offense at the preliminary hearing, defense counsel may well have had reasonable tactical grounds for not doing so. For example, reasonable defense counsel would have recognized that if he objected to amending the petition, the prosecution could simply have moved to dismiss the charges and re-file with the new count. Under such circumstances, all defense counsel would have gained by objecting would have been delay. We find the amendment was proper and appellant did not suffer ineffectiveness of counsel.

II

The failure to preserve the bottle did not result in a violation of appellant's constitutional rights.

Officers Gross and Pena testified that in their opinions the portion of the label missing from the remaining (unshattered) bottle of Jack Daniels appeared to match a fragment of label attached to one of the security tabs found on the floor in Ralphs. Appellant contends this testimony was improperly admitted because the bottle was not preserved and because the resulting testimony on the subject constituted improper opinion evidence. In the alternative he alleges his attorney was ineffective for failing to raise the claims.

A. Failure to Preserve the Bottle Did Not Result in Deprivation of Appellant's Rights to Confrontation and Due Process

Initially, we agree with the People that appellant has waived the substantive claim that the Jack Daniels bottle should have been preserved. There are three methods by which an appellant can be found to have preserved a claim that testimony related to evidence no longer available should be suppressed. (*People v. Gallego* (1990) 52 Cal.3d 115, 180.) The preferable method is to make a motion before trial to exclude the evidence. Another option is to object to the admission of testimony when it is presented at trial, and, finally, the least preferable method is to make a motion to strike. In *Gallego*, as in our case, the defense took the least preferred approach. In *Gallego* the defendant claimed that because the prosecution had not preserved a DNA sample, thereby preventing the defense from conducting tests on it, the Supreme Court should strike incriminating testimony based on that evidence. Yet "[b]ecause defendant waited [to ask the court to strike testimony] until after the expert testified and the prosecution rested on rebuttal, it was too late for the court to suppress the testimony." (*Id.* at p. 180.) The court concluded the issue was waived. Similar requests to strike testimony in cases where the prosecution did not preserve evidence reach the same results. (*People v. Taylor* (1977) 67 Cal.App.3d 403; *People v. Mayorga* (1985) 171 Cal.App.3d 929.) In *Taylor* the court observes: "[O]nce the evidence which a successful assertion of a *Hitch* [*People v. Hitch* (1974) 12 Cal.3d 641] issue would suppress, has been received without objection, it is too late." (*People v. Taylor, supra*, 67 Cal.App.3d at p. 409.) In that case "[t]hat

testimony . . . was received entirely without objection. Thus, defendant waived any *Hitch* claim he might have had." (*Id*. at p. 410.)

Even if appellant had not waived any claim he might have had, we would reject his argument that Officer Gross's decision not to preserve the bottle as evidence violated appellant's right to confront evidence and his right to due process of law.

The Sixth Amendment to the United States Constitution grants criminal defendants the right to "be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." These rights constrain state prosecutions through the due process clause of the Fourteenth Amendment. (*Pointer v. State of Texas* (1965) 380 U.S. 400, 403 [85 S.Ct. 1065].) A component of this right is a "constitutionally guaranteed access to evidence." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867 [102 S.Ct. 3440].) Not only does a defendant have a constitutionally protected privilege to ask and obtain from the prosecution evidence either material to the guilt of the defendant or relevant to his punishment (*Brady v. State of Maryland* (1963) 373 U.S. 89, 87 [83 S.Ct. 1194]), but even in the absence of a specific request the prosecution must provide the defense with evidence having exculpatory value that could raise a reasonable doubt as to the defendant's guilt. (*United States v. Agurs* (1976) 427 U.S. 97, 112 [96 S.Ct. 2392].)

Here, the bottles of Jack Daniels liquor no longer existed at the time of trial. One was shattered by appellant and one was cracked and leaking. The leaking bottle was taken from the scene by Ralphs employees and was not preserved. As the United States Supreme Court noted in *California v. Trombetta,* "[w]henever potentially exculpatory

evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown, and, very often, disputed." (*California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528].) In both *California v. Trombetta* and *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333] the Supreme Court limited the scope of evidence the prosecution is responsible for collecting and limited the circumstances under which law enforcement's decision not to collect evidence would result in the exclusion of testimony, retrial or dismissal of charges. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citation], evidence must both possess an exculpatory value *that was apparent before the evidence was destroyed*, and be of a such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*United States v. Trombetta, supra*, 467 U.S. at p. 2534, italics added, fn. omitted, citing *United States v. Agurs, supra*, 427 U.S. at pp. 109-110.)

Even when the prosecution fails to collect evidence it has a duty to collect, related testimony based on it will remain admissible so long as the prosecution did not show bad faith in failing to collect the evidence. The test to determine whether bad faith existed is whether the behavior of law enforcement officers showed they believed the evidence they intended not to collect could form a basis for exonerating the defendant. (*Arizona v. Youngblood, supra*, 488 U.S. 51.) In *Arizona v. Youngblood* the Supreme Court held that while "[t]he Due Process Clause . . . , as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material

exculpatory evidence . . . [W]e think the Due Process Clause requires a different result when we deal with the failure of the state to preserve evidentiary material of which no more can be said than that it could have been subjected to tests . . . . We think that requiring a defendant to show bad faith on the part of the police . . . limits the police's obligation to preserve evidence to reasonable bounds." (*Id*. at p. 58.)

Here, there was no indication either the shattered bottle or the cracked and leaking bottle had apparent exculpatory value. On the contrary, Officer Gross had every reason to believe they were inculpatory in nature. The officer testified a piece of label attached to one of the security tags found on the floor of the store matched the torn bottle label from the remaining cracked bottle as if they were matching pieces of a jigsaw puzzle. Appellant possessed two bottles of Jack Daniels and two security tags were left on the floor of the Ralphs market. When confronted inside the store, appellant complained the price of the liquor was too high. When confronted outside the store, he struck an employee and ran away. Appellant also destroyed a bottle of liquor by throwing it at Garcia.

Moreover, appellant has made no showing of bad faith. The record does not indicate Officer Gross made a conscious effort to dispose of the cracked bottle in order to hinder the defense. Pursuant to the police department policy that food items are not retained as evidence, he took a photograph of the leaking bottle. The shattered bottle thrown at Garcia was cleaned up and disposed of before Officer Gross arrived at the scene. Failure to preserve the remaining bottle did not result in any deprivation of appellant's rights.

B. The Opinion Testimony Was Proper

Officers Gross and Garcia testified as to whether and how the fragment of the label attached to the security tag matched the label remaining on the broken bottle. Appellant claims their testimony constituted improper lay opinion in violation of Evidence Code section 800. He asks us to strike that testimony from the record on review.

Initially, we note the People argue appellant waived any claim the opinion testimony was improper because he did not make a motion to suppress it during trial. We agree. In *People v. Roberts* the Supreme Court considered similar circumstances and arrived at the same conclusion. In that case the "defendant never sought to challenge the witnesses' qualifications . . . and it is too late to raise the issue [on appeal]. Moreover, the decision of a trial court to admit expert testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Roberts* (1992) 2 Cal.4th 271, 298.)

In any case, we find the testimony of Officers Gross and Garcia was permissible. Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." Lay opinion is admissible when a witness cannot adequately describe his observations without using opinion wording. (*People v. Miron* (1989) 210 Cal.App.3d 580, 583; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.) When an opinion is the only way to present a crucial piece of evidence at trial, the court can admit it because it is helpful to a clear

understanding of that evidence and because it is inherently helpful to a clear understanding of a witness's testimony, thereby satisfying section 800, subdivisions (a) and (b). Such are the circumstances in our case. Here the officers did not preserve the bottle and as we have observed, they were not required to do so. Absent a quality photograph, which apparently was not produced, the only way to present any evidence related to the compatibility of labels was through witness observations. Therefore the opinion testimony was helpful to a clear understanding of that evidence and was inherently helpful to a clear understanding of their testimony. It was admissible.

C. Counsel Was Not Ineffective

Contrary to appellant's argument, defense counsel was not ineffective for failure to raise issues of retention of the bottle or the propriety of opinion testimony of Officers Gross and Pena. Because neither issue is meritorious, there is no probability a determination more favorable to appellant would have resulted had the issues been raised. (*People v. Holt, supra,* 15 Cal.4th at p. 703.)

IV

The evidence is sufficient to support the verdict.

Appellant also urges the evidence is insufficient to support the verdict.

Reviewing courts have limited roles in determining whether evidence is sufficient. "In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence–evidence that is reasonable, credible and of solid value, such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781].) In cases that rely on circumstantial evidence, appellate courts must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" ' " (*People v. Kraft, supra*, 23 Cal.4th at p. 1054.)

Here, a Ralphs employee saw appellant take a bottle of liquor from a shelf and put it in his clothing. When confronted by the employee, appellant refused to put it back. Outside the store, appellant said he did not possess any bottle of liquor even though he had two bottles of Jack Daniels in his pants. When confronted outside the store, he demonstrated that he understood the wrongfulness of his conduct by throwing one of the bottles at a Ralphs employee, then ran away and attempted by removing his hat to change his appearance in the Greyhound station. A store employee found two security tags on the floor next to the shelf of Jack Daniels where appellant was standing. Examining the entire record in the light most favorable to the judgment we conclude there is sufficient evidence to sustain the conviction.

DISPOSITION

The judgment is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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HALLER, J.

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AARON, J.