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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MICHAEL BOULTINGHOUSE, Defendant and Appellant.	G033611 (Super. Ct. No. 02HF0537) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Law Offices of Ronald Richards and Associates, and Ronald Richards, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meagan J. Beale and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

*Under California Rules of Court, rules 976(b) and 976.1, only the Factual and Procedural Background, part I, and the Disposition are certified for publication.

Christopher Boultinghouse was convicted of possessing steroids for personal use and possessing for sale gammabutyrolactone (GBL), which is listed as a controlled substance under California law. (Health & Saf. Code, § 11054, subd. (e)(3).) Because GBL is not listed as a controlled substance under federal law, Boultinghouse claims his GBL conviction violates the supremacy clause of the federal Constitution. He also alleges prosecutorial misconduct, as well as evidentiary and sentencing error. Finding no basis to disturb the judgment, we affirm.

* * *

On March 21, 2002, federal agents searched Boultinghouse's apartment and found 54 bottles of GBL, 4 types of steroids and $34,500 in cash. Boultinghouse told agent Eric Ball he did not know where or when he got the GBL. He referred to it as "Renewtrient" and "Blue Nitro" and claimed it was a legal substance commonly used by body builders.

At trial, Ball testified GBL was once widely available as a legal body building substance. However, he said it was banned for consumption around 2000 because it is very similar to gamma hydroxybutyric acid (GHB), a federally controlled substance. In fact, he said once GBL is ingested, it naturally converts into GHB and has the same effect as that drug.

Troy Gielish, a "drug recognition expert," echoed Ball's testimony. He said that while GBL is not expressly listed as a federally controlled substance, it has been illegal to consume under federal law since 2000 because it is an analogue of GHB. Known on the street as "E" or "Ecstasy," Gielish said GHB is a very dangerous depressant that has been linked to numerous date rapes and overdoses.

Boultinghouse testified he got his GBL from a friend at the gym and used it to enhance his muscles and sleep better. He denied using it to get high or having any intention to sell it. But he did admit knowing that GBL is very similar to GHB. His

testimony also included his acknowledgement that in 1998 he was convicted of battery causing serious bodily injury, a felony.

The jury convicted Boultinghouse of possessing GBL for sale and four misdemeanor counts of unlawfully possessing steroids. The court then found Boultinghouse suffered two strike convictions in 1998, one for battery with serious bodily injury and one for assault by means of force likely to produce great bodily injury. The court found not true an additional allegation Boultinghouse had suffered a strike conviction in 1995. The court struck the 1998 assault conviction in the interest of justice and sentenced Boultinghouse to eight years in prison, representing double the upper term of four years on the GBL count.

I

Boultinghouse argues his GBL conviction contravenes federal supremacy principles because GBL is not a controlled substance under federal law and is in fact legally used for some industrial purposes.[1] However, notwithstanding Congress' failure to designate GBL a controlled substance, it is, as explained below, still illegal for individuals to possess the drug for private use or sale under federal law. Therefore, Boultinghouse's conviction for possessing GBL for sale is not inconsistent with federal law.

When it comes to criminalizing illicit drug activity, Congress has made it clear it did not intend to prevent the states from getting in on the act. Indeed, it has expressly declared that "[n]o provision of [the federal Controlled Substances Act] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the

[1] Boultinghouse invites us to take judicial notice of a website that lists some of these purposes, but there is no need to do so because the government's own witnesses acknowledged GBL has some legally sanctioned industrial applications.

State, *unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together*." (21 U.S.C. § 903, italics added.)

"This express statement by Congress that the federal drug law does *not* generally preempt state law gives the usual assumption against preemption additional force. [Citation.]" (*National Pharmacies, Inc. v. De Melecio* (D. P. R. 1999) 51 F.Supp.2d 45, 54.) Nonetheless, because Congress has not specifically classified GBL as a controlled substance, Boultinghouse reasons federal lawmakers intended to prevent the states from doing so. The claim is not watertight. The fact GBL is not a federally controlled substance does not mean private use or sale of the drug is lawful under the federal statutes. Indeed, the opposite is true.

In *United States v. Ansaldi* (2d Cir. 2004) 372 F.3d 118, 121-122, the court set forth the history of the federal statutory scheme governing GBL and GHB: "In 1999, Congress became aware of significant problems stemming from [GHB's] presence in sexual-assault and driving-under-the-influence cases. In response to these problems, Congress enacted the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000 . . ., which resulted in the scheduling of GHB as a [s]chedule I controlled substance. [Citation.] [¶] Congress also noted a significant and growing problem for law enforcement arising from the use of various precursors and analogues to GHB. Specifically, Congress expressed concern about the fact that '[i]f taken for human consumption, common industrial chemicals such as [GBL] . . . are swiftly converted by the body into GHB.' [Citation.] Although Congress did not schedule GBL as a controlled substance, it did make GBL a 'listed chemical' subject to various registration requirements. [Citation.] It also noted that '[t]he designation of [GBL] . . . as a listed chemical . . . does not preclude a finding . . . that the chemical is a controlled substance analogue.' [Citation.]"

This is significant because Congress has declared that any controlled substance analogue intended for human consumption is to be treated as a schedule I

controlled substance for purposes of federal law. (21 U.S.C. § 813.) In so doing, Congress intended to "prevent underground chemists from producing slightly modified drugs that are legal but have the same effects and dangers as scheduled controlled substances." (*United States v. Hodge* (3rd Cir. 2003) 321 F.3d 429, 432; see also *United States v. Reichenbach* (C.M.A. 1989) 29 M.J. 128 [reviewing history of federal controlled substance laws].) Thus, the question becomes whether GBL is an analogue of GHB and thus prohibited under federal law? As explained in *United States v. Fisher* (11th Cir. 2002) 289 F.3d 1329, the answer is yes.

In *Fisher*, the court stated, "It is undisputed that GBL has no pharmacological effects in a vacuum. However, the human body is not a vacuum. It is also undisputed that upon ingestion, GBL converts into . . . GHB. Therefore, [we] find[] that GBL upon ingestion meets the definition of a controlled substance analogue as its chemical structure and effect on the central nervous system are substantially similar to GHB, a [s]chedule I [c]ontrolled [s]ubstance. 21 U.S.C. § 802(32)(A)(i)-(ii). People of ordinary intelligence would easily be able to determine that a substance, which is converted upon ingestion into a metabolite with a substantially similar chemical structure and effect on the central nervous system as a schedule I controlled substance, would meet the definition of a controlled substance analogue." (*United States v. Fisher, supra*, 289 F.3d at p. 1339.) Thus, "[r]egardless of any other ways in which the [federal] laws governing controlled substances might be vague, there is one thing they make perfectly clear — the sale of GBL for human consumption is illegal." (*United States v. Ansaldi, supra*, 372 F.3d at p. 122.)

Because Congress has made the consumption of GBL illegal, it is hard to see how California's prohibition on the drug positively conflicts with federal law. But Boultinghouse claims it does, and in so arguing he relies on the particular manner in which California has chosen to outlaw GBL. Rather than going the analogue route, as Congress has done, California has come right out and designated GBL as a controlled

substance. (Health & Saf. Code, § 11054, subd. (e)(3).) Boultinghouse submits this makes its possession easier to prosecute than if it were treated as an analogue, at least with respect to proving the defendant's knowledge of the substance's illegal nature. (Compare *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [in prosecution for possession of a controlled substance defendant need only be aware of substance's restricted character] with *United States v. Turcotte* (7th Cir. 2005) 405 F.3d 515, 527 [defendant charged with possessing a controlled substance analogue under federal law must know its chemical structure is substantially similar to a controlled substance, and he must either know it has similar physiological effects or intend or represent it does]; but see *People v. Silver* (1991) 230 Cal.App.3d 389 [although patterned after federal law, state analogue statute is satisfied if substance in question has a substantially similar chemical structure or effect as a controlled substance].)

Even if that were true, it would not create a conflict between federal and state law. In *Gonzales v. Raich* (2005) __ U.S. __ [125 S.Ct. 2195], upon which Boultinghouse relies, the court found such a conflict, but in that case the California and federal laws were both different and contradictory. Whereas federal law generally prohibits the manufacture, distribution, or possession of marijuana, the California law under review in *Gonzales* authorized marijuana use for medicinal purposes. (*Id*. at pp. 2199, 2204.) In finding the federal law to be a proper exercise of Congress' commerce power, the Supreme Court noted, "It is beyond peradventure that federal power over commerce is '"superior to that of the States to provide for the welfare or necessities of the inhabitants,"' however legitimate or dire those necessities may be. [Citations.]" (*Id.* at pp. 2211-2212.)

Unlike *Gonzales*, our case does not present any issues respecting Congress' authority under the commerce clause. Rather, it involves the issue of preemption. While state power must yield to a legitimate exercise of federal commerce power, preemption is a far less restrictive doctrine when it comes to state authority. In fact, there is a strong

presumption against federal preemption when it comes to the exercise of historic police powers of the states. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.) That presumption will not be overcome absent a clear and manifest congressional purpose. (*Ibid*.)

California's authority to regulate narcotics is well established. (*People v. Shephard* (1959) 169 Cal.App.2d 283, 287.) Indeed, "'The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.' [Citation.]" (*Robinson v. California* (1962) 370 U.S. 660, 664; see also *People v. Aston* (1985) 39 Cal.3d 481, 490 [California has a weighty interest in the suppression of controlled substances].) It would, therefore, take a clear expression of Congressional intent to convince us the preemption doctrine is applicable in this case. However, as noted at the outset, Congress has chosen to take a deferential approach to the states in the area of drug enforcement. Thus, we are loath to disturb Boultinghouse's conviction on the grounds of preemption.

It matters little that other states have chosen not to make GBL illegal. (See, e.g., *State v. Boyd* (Ariz. Ct.App. 2001) 31 P.3d 140, 142 [under Arizona law "GHB is listed as a dangerous drug . . . but GBL is not"].) *Boyd* makes clear that the knowing possession of a particular substance is illegal when the Legislature has proscribed that substance. (*Id*. at p. 143.) Our Legislature *has* proscribed GBL, and Boultinghouse does not challenge the sufficiency of the evidence to support his conviction for possessing that substance for sale. Rather, his primary argument is centered on the notion of preemption and the state's authority to make GBL a controlled substance in the first place. However, as we have explained, there is no federal authority that positively or even remotely conflicts with the law under which Boultinghouse was convicted. We therefore find no violation of federal supremacy principles in this case.

II

Boultinghouse also contends the prosecution "knowingly allowed false testimony regarding the legality of GBL in California." Specifically, he argues that because California did not make GBL a controlled substance until January 1, 2002, it was an "outrageous fabrication" for Gielish to testify it was illegal to possess GBL before then. However, Gielish's testimony was clearly based on his understanding of federal law. And as we have explained, Congress did pass a law in 2000 that effectively prohibits the consumption of GBL. Therefore, Gielish's testimony was not false or misleading.

Nor was there anything wrong with the prosecutor relying on Gielish's testimony in closing argument. In the end, the prosecutor made clear Boultinghouse's conviction arose from what federal authorities found in his apartment on March 21, 2002. As of that date, personal possession of GBL for sale was illegal under both federal and state law. No misconduct or prejudice has been shown.

III

Boultinghouse argues the court erred in allowing him to be impeached with his 1998 conviction for felony battery because that offense does not involve moral turpitude. (See *People v. Mansfield* (1988) 200 Cal.App.3d 82, 87.) However, when the issue came up during trial, defense counsel told the court all three offenses of which Boultinghouse had been convicted — the assault and battery felonies in 1998 and the 1995 felony battery — were crimes of moral turpitude. Thus, it seems the defense contributed to any error that may have occurred.

Moreover, although Boultinghouse may not have been subject to impeachment for committing felony battery, he could have been impeached for committing felony assault. (*People v. Elwell* (1988) 206 Cal.App.3d 171.) This fact was not lost on the trial court, as it believed all three of Boultinghouse's priors involved moral turpitude. However, in the interest of fairness, it ruled Boultinghouse could only be

impeached with one of the priors, and it let defense counsel decide which one that would be. As it turned out, defense counsel picked one involving felony battery, which laid the groundwork for this appeal. Still, the fact remains, Boultinghouse was subject to impeachment based on his prior conduct. For purposes of assessing prejudice, we cannot see that it matters that the wrong offense may have been chosen.

It is also worth noting that in closing argument, the prosecutor actually downplayed the significance of Boultinghouse's prior battery conviction, saying "[i]t just goes to credibility. It doesn't matter. That is not what this case is about." For all these reasons, it is not reasonably probable the outcome of the trial would have been different but for the claimed error. Therefore, reversal is not required. (*People v. Castro* (1985) 38 Cal.3d 301, 319.)

IV

Boultinghouse also contends there is insufficient evidence his 1998 conviction for felony battery qualifies as a prior strike. He admits the jury in that case did find him guilty of battery with serious bodily injury. However, he maintains that is not enough to make the conviction a strike because the jury did not make any "special findings" relative to that count. Although Boultinghouse does not fully articulate this argument, the law is clear: Battery with serious injury is not specifically enumerated as a serious felony, i.e., a strike offense. It only becomes a strike when, during its commission, "the defendant specifically intends to personally inflict great bodily injury on any person, other than an accomplice . . . ." (Pen. Code, § 1192.7, subd. (c)(8).)

The record in Boultinghouse's 1998 case shows the jury convicted him of both battery with serious bodily injury and assault by means likely to produce great bodily injury. With respect to the assault, the jury found Boultinghouse personally inflicted great bodily injury upon the victim. Although the jury was not asked to make any such finding on the battery count, the parties in the present case recognized both counts arose from a single incident in which Boultinghouse struck the victim, a total

stranger, in the face. Indeed, it was the counts' common factual basis that prompted the court to dismiss the assault prior. This supports the conclusion Boultinghouse personally inflicted great bodily injury on the victim during both the assault and the battery. It also seems to explain why Boultinghouse's sentencing brief contains the telling concession that the record includes "enough evidence to conclude that both [of his 1998 convictions] qualify legally as a strike." We agree and uphold the trial court's finding to that effect.

In his supplemental briefing, Boultinghouse argues the Supreme Court's recent decision in *Shepard v. United States* (2005) __ U.S. __ [125 S.Ct. 1254] precludes us from looking beyond the face of a prior conviction to determine whether it qualifies as a strike. That is an overstatement. *Shepard*, a plea bargain case, simply forecloses consideration of police reports and complaint applications, documents that are not at issue in this case. (*Id*. at p. 1257.) Consistent with California law, *Shepard* allows a trial court to look at charging documents and other aspects of the judicial record in evaluating a prior conviction. (*Id*. at p. 1263; accord *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [in determining the substance of a prior conviction trial court may look to the entire record of conviction]; *People v. Reed* (1996) 13 Cal.4th 217 [the record of conviction includes charging documents and court records pertaining to that conviction].)

Moreover, a trial court's consideration of these documents for sentence enhancement purposes does not violate the defendant's Sixth Amendment right to a jury trial. "Courts have long considered prior criminal history as a sentencing factor for the court rather than a fact issue for the jury, *Almendarez-Torres v. United States* [(1998)] 523 U.S. 224, 243-44, . . . and that principle has been reaffirmed most recently in [*United States v. Booker* (2005) __ U.S. __ [125 S.Ct. 738]] . . . . [I]t was not changed in *Shepard*." (*United States v. Mattix* (8th Cir. 2005) 404 F.3d 1037, 1038.) As such, there is no basis for disturbing the trial court's finding on the prior strike allegations.

V

Boultinghouse argues the trial court's decision to impose an upper term sentence violated his Sixth Amendment right to a jury trial. (See *Blakely v. Washington* (2004) 542 U.S. 296.) The California Supreme Court has recently rejected this argument (*People v. Black* (2005) 35 Cal.4th 1238), and under the doctrine of stare decisis, we are duty bound to do the same (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Boultinghouse also challenges his sentence on the ground the trial court relied on his prior convictions to impose the upper term. Because the trial court also used one of the priors to double his sentence under the Three Strikes law, Boultinghouse argues this amounted to an improper dual use of facts. But the record shows Boultinghouse has suffered multiple convictions in addition to the prior strikes. He therefore had a sufficient number of priors to justify the imposition of an upper term, even without considering the one used to double his sentence.

Lastly, Boultinghouse challenges the trial court's finding his prior convictions were of increasing seriousness. But even if that finding were suspect, an upper term was justified by the sheer fact Boultinghouse has suffered numerous prior convictions. (Cal. Rules of Court, rule 4.421 (b)(2).) The trial court specifically mentioned this factor as a basis for the upper term. The court also made clear it had read and considered the probation report, which lists several other aggravating factors that Boultinghouse does not contest. (See, e.g., Cal. Rules of Court, rule 4.421 (b)(4) & (5) [he was on probation at the time of the current offenses and his prior performance on probation has been unsatisfactory].) The probation report contains no mitigating factors. Under these circumstances, there is no reason to disturb the trial court's sentencing decision. (See generally *People v. Scott* (1994) 9 Cal.4th 331, 355 [a trial court's error in identifying or articulating its sentencing choice is subject to harmless review analysis and

the sentence will not be disturbed on appeal unless it is reasonably probable a more favorable sentence would have been imposed absent the error].)

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.