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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. CHARLES GROVER POKOVICH, Defendant and Appellant.	C043253 (Super. Ct. No. 02F2465)

APPEAL from a judgment of the Superior Court of Shasta County, William Gallagher, Judge. Affirmed.

Hayes H. Gable III, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez and Ruth M. Saavedra, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II.

A jury convicted defendant Charles Grover Pokovich of four counts of shooting at a motor vehicle (Pen. Code, § 246; further section references are to this code unless otherwise specified) and eight counts of assault with a firearm (§ 245, subd. (a)(2)), and found that he personally used a firearm in the commission of the assaults (§ 12022.5, subd. (a)). Sentenced to an aggregate term of 16 years four months in state prison, defendant appeals.

In the published part of this opinion, we reject defendant's claim that the trial court erred by permitting the prosecution to impeach defendant's testimony with statements that he made to court-appointed experts who evaluated his competency to stand trial. As we will explain, a defendant's statements to experts appointed to determine competency ordinarily may not be used at trial on the issue of defendant's guilt. But this shield cannot be used by a defendant as a license to perjure himself at trial, free from the risk of confrontation with his prior inconsistent statements. Thus, the court properly allowed the prosecution to impeach defendant's testimony with statements he made to the experts.

In the unpublished part of this opinion, we find no merit in defendant's contention that the court erred in failing to order a competency hearing at sentencing when trial counsel declared a doubt about defendant's competency to be sentenced. (§§ 1367-1368.) Accordingly, we will affirm the judgment.

FACTS

At approximately 3:00 p.m. on Easter Sunday, March 31, 2002, Deborah Bentrim drove her car down Iron Mountain Road in Keswick,

followed by her cousins, Virginia and Jerome Holman, who were driving their van. After stopping for some children, Bentrim heard three popping sounds and felt a burning sensation and pain in her right side near her hip. After turning onto another road, she stopped her car and discovered a bullet hole in the passenger door. She then realized that she had been shot. A bullet was later found on the driver's seat of her car.

Virginia Holman also heard a loud noise "like a boulder hit [Holman's] van" as she was following Bentrim on Iron Mountain Road. She later stopped along with Bentrim, and discovered a bullet hole in the van.

After trying to call 9-1-1 on a cell phone, the Holmans and Bentrim drove to a fire station, where a call was made.

At about the same time along the same stretch of Iron Mountain Road, a bullet passed through the right rear passenger door of a truck containing the Tucker family, Leah, Eugene, and two-year-old Javona.

Defendant lived in a mobile home along the road. The home of Joyce Muse's parents was directly across the street from defendant's driveway. As Muse and her fiancé, Lawrence Taylor, were driving down her parents' driveway, Muse heard a pop and a "blam" as something hit their vehicle. They stopped and saw defendant standing on his porch. Taylor observed that defendant was holding a rifle. Defendant yelled and told them, "'Get the fuck off my property.'" They returned to the home of Muse's parents, and called 9-1-1.

After receiving three 9-1-1 calls, deputy sheriffs set up roadblocks. Defendant drove up and explained that he was the one they wanted because Joyce Muse seemed to think he was shooting at her.

A rifle and ammunition were recovered from defendant's mobile home. Five empty shell casings found in front of the mobile home were matched to his rifle. The bullet fragment recovered from Bentrim's car matched the ammunition and the rifle. Other bullet fragments were recovered from the Tucker family truck.

Defendant testified that he fired his rifle twice, or three or four times, about 10:00 a.m. to scare blue jays away from his fruit trees. At 3:00 p.m., he was inside reading a novel and drinking iced tea.

Defendant's testimony was then impeached with statements that he had made to experts who examined him prior to trial to determine whether he was competent to be tried. (§ 1367 et seq.) We recount those statements below in our discussion.

DISCUSSION

I

Defendant contends the trial court erred in permitting the prosecution to impeach his testimony with statements he made to two doctors during pretrial competency evaluations. We disagree.

A

Before the preliminary hearing, defense counsel declared a doubt as to defendant's competency based upon "certain of his conduct which would indicate hallucinations, that there's a certain

lack of reality . . . ." The trial court appointed Dr. Kent Caruso and Dr. Aravind Pai to examine defendant.

Both evaluators found that defendant was competent to stand trial. Defense counsel submitted the issue on the reports, and the trial court found defendant competent.

After defendant testified at trial that he shot his rifle several times at 10:00 a.m. to scare away noisy blue jays, the prosecutor sought the court's permission to introduce certain statements defendant made to Doctors Pai and Caruso that were inconsistent with defendant's testimony at trial, citing *People v. Crow* (1994) 28 Cal.App.4th 440, and *People v. Humiston* (1993) 20 Cal.App.4th 460, as authority for such impeachment. The trial court concluded that there was no applicable privilege preventing the impeachment, and overruled defense counsel's Evidence Code section 352 objection that the inconsistent statements were more prejudicial than probative.

The prosecutor then questioned defendant concerning statements he made to Dr. Pai about drinking beer on the day of the shooting. Defendant acknowledged he told Dr. Pai that he "drank one beer and . . . opened another one and started to drink it and didn't finish it." Defendant denied he had told Dr. Caruso that he was aware multiple shots were fired at persons in vehicles from on or about his property at the same time that he had been firing his rifle at blue jays and rabbits. In rebuttal, Dr. Caruso testified defendant told him that witnesses referred the sheriff to defendant because he had been shooting at birds and rabbits at the same time as when shots were fired at the vehicles.

B

The United States Supreme Court has ruled that, absent a waiver of the Fifth Amendment privilege, a defendant's responses to questions by experts evaluating his competency ordinarily are not admissible as evidence against the defendant in the guilt phase of the trial. (*Estelle v. Smith* (1981) 451 U.S. 454, 466-469 [68 L.Ed.2d 359, 371-373].)

Likewise, California's judicially declared rule of immunity provides that statements a defendant makes to experts appointed to determine competency ordinarily may not be used at trial on the issue of defendant's guilt. (*People v. Weaver* (2001) 26 Cal.4th 876, 959-961.) The rule of immunity '"is necessary to ensure that an accused is not convicted by use of his own statements made at a court-compelled examination. The rule also fosters honesty and lack of restraint on the accused's part at the examination and thus promotes accuracy in the psychiatric evaluation. Hence, the rule protects both an accused's privilege against self-incrimination and the public policy of not trying persons who are mentally incompetent.' [Citations.]" (*Id.* at p. 960, quoting *People v. Arcega* (1982) 32 Cal.3d 504, 522.)

However, both the United States Supreme Court and the California Supreme Court have held that the testimonial privilege "cannot be construed to include the right to commit perjury." (*Harris v. New York* (1971) 401 U.S. 222, 225 [28 L.Ed.2d 1, 4] (hereafter *Harris*); accord, *People v. May* (1988) 44 Cal.3d 309, 319.)

Accordingly, in *Harris*, the United States Supreme Court ruled that a defendant's testimony at trial can be impeached with evidence of his inconsistent pretrial statements made voluntarily but obtained in violation of the Fifth Amendment rule of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (hereafter *Miranda*). The court explained: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris, supra,* 401 U.S. at p. 226 [28 L.Ed.2d at p. 5].) Thus, "[h]aving voluntarily taken the stand, [Harris] was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional time-testing devices of the adversary process." (*Id.* at p. 225 [28 L.Ed.2d at p. 4], fn. omitted.)

The same reasoning applies to California's judicially declared rule of immunity with respect to statements made by a defendant to experts during a section 1368 examination. (See, e.g., *People v. Crow, supra,* 28 Cal.App.4th at pp. 450-453 [defendant's statements during plea negotiations may be used to impeach his inconsistent testimony at trial]; *People v. Humiston, supra,* 20 Cal.App.4th at p. 474-475 & fn. 11 [statements made at fitness hearing may be used for impeachment]; *People v. Drews* (1989) 208 Cal.App.3d 1317, 1325-1326 [testimony at suppression hearing may be used for impeachment]; but see *People v. Harris* (1987) 192 Cal.App.3d 943, 949-950.)

As a matter of sound public policy, the Fifth Amendment and California's judicially declared rule of immunity cannot be used

by a defendant as a shield to commit perjury at trial. Hence, the trial court properly allowed the prosecution to impeach defendant's testimony at trial with inconsistent statements he made to Doctors Pai and Caruso.

In any event, we conclude beyond a reasonable doubt that defendant was not prejudiced by the impeachment testimony because the other evidence of his guilt was overwhelming.

II*

Next, defendant argues the trial court should have appointed two evaluators at sentencing after defense counsel declared another doubt as to defendant's competence. Again, we disagree.

At sentencing, defense counsel requested the appointment of new experts to evaluate defendant's competency. Counsel contrasted defendant's private conduct and statements with his public demeanor and statements, and referred to information provided by the family concerning "delusional" matters. Counsel noted that he was ethically prohibited from revealing the subject of the delusions because the court would be sentencing defendant, and the information could work against him. When pressed, counsel gave examples of defendant's delusional beliefs that he "was a singer with a famous group and that he's entitled to all this money."

Defendant disputed his counsel's doubt about competency, stating: "Your Honor, I feel I'm totally competent."

Finding defendant competent to proceed with sentencing, the court stated: "I will tell you right now I don't have any doubt whatsoever of [defendant's] competence. There hasn't been one moment in the entire course of the proceedings in this department

in which I suspected he was incompetent . . . . And even allowing for the fact that he may have delusions of grandeur at best or may have some delusional thought, that doesn't mean he's incompetent. That doesn't suggest to me he wasn't able to assist you in defending him or that he didn't know the nature of the offenses charged against him or his connection to those offenses. [¶] . . . I don't have any doubt, it should be clear, and we're going to go on to the next phase of the proceeding [sentencing]."

When given the opportunity to speak to the court regarding sentencing, defendant stated: "I appreciate it, your Honor. [¶] First off, I do want to apologize to all the victims for what I have done. Miss Bentrim, she's a wonderful woman. . . . And if there was any way I could take back what happened, I would, but I can't. All the victims. [¶] I was -- I didn't know what I was doing. I had no sense of reason at the time. There were people that screwed with my life so much that I lost all sense of reason. That people stole from me, came down into my yard when I was home and I was in bed asleep. They would come down to my yard and take things that my mother had left when she passed away at all hours. People would just screw with my life. [¶] That's no excuse. And I am not asking the Court to accept that as an excuse. There's no excuse for someone doing what I did. . . . [¶] . . . [¶] I would like to apologize to my family, to all the people in Shasta County, and everyone that was so good to me. . . . [¶] . . . [¶] I wasn't shooting at people. I was shooting at the cars. . . . I was trying to eliminate the cars from screwing with me anymore. [¶] . . . [¶]

There's so many things I would like to say. Those were the most important. I will leave the rest."

Contrary to defendant's claim on appeal, he was not entitled to a full evidentiary hearing simply because his defense counsel and family expressed doubts as to defendant's competency to proceed with sentencing.

"When, at any time prior to judgment, a trial court is presented with substantial evidence of a defendant's incompetence to stand trial, due process requires a full competency hearing. [Citation.] '"When a competency hearing has already been held and defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding."' [Citation.] A trial court may appropriately take into account its own observations in determining whether the defendant's mental state has significantly changed during the course of trial. [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 136.)

Defendant's testimony, behavior, and statements to the court gave no evidence of a change in his mental state after two experts had found him to be competent to stand trial. Indeed, defendant's statements at sentencing, quoted above, reflect his understanding of the proceedings. While it is true, as defendant points out, that the trial court did not have the benefit of seeing and hearing defendant at times other than when he was in court, the doubt of defense counsel and defendant's family as to defendant's competence

was dispelled by the experts' earlier findings of competency and defendant's behavior and statements both during trial and at the sentencing hearing.

Because the court was not presented with any specific evidence demonstrating a substantial change of circumstances casting serious doubt on the validity of the experts' earlier findings, the court properly denied defense counsel's request for the appointment of new experts to evaluate defendant's competency. [END OF PART II.]

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

SIMS, J.

RAYE, J.