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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DENNIS SHELLHOUSE, Defendant and Appellant.	2d Crim. No. B194359 (Super. Ct. No. 2005019146) (Ventura County)

Dennis Elliot Shellhouse appeals from the judgment entered after a jury convicted him of kidnapping for ransom (Pen. Code, § 209, subd. (a)),[1] first degree residential burglary (§§ 459, 460, subd. (a)), two counts of making criminal threats (§ 422), and exhibiting a firearm with the intent to resist arrest by a peace officer. (§ 417.8.) As to the kidnapping for ransom, the jury found true an allegation that appellant had personally used a firearm within the meaning of section 12022.53, subdivision (b). Except for the offense of exhibiting a firearm, as to the remaining offenses the jury found true allegations that appellant had personally used a firearm within the meaning of section 12022.5, subdivision (a). The jury acquitted appellant of two counts of assault with a firearm upon a peace officer. (§ 245, subd. (d)(1).) The trial court sentenced him to a determinate term of 17 years plus life with the possibility of parole.

[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant contends that the trial court erroneously (1) refused to instruct on his "defense of unconsciousness resulting from involuntary intoxication caused by prescription drugs," (2) permitted the prosecutor to cross-examine a psychiatrist concerning statements made by appellant during his mental competency examination, (3) failed to give a limiting instruction on the use of such statements, and (4) refused to strike excerpts from the probation report that were not supported by the evidence. In addition, appellant contends that the prosecutor committed prejudicial misconduct. We affirm.

Facts

Jamie Burtzloff, the victim of the kidnapping, resided in a gated community in Thousand Oaks. On June 7, 2005, the security guard at the gate informed her that someone wanted to make a delivery. Burtzloff waited in front of her house for the delivery. Appellant drove up in a minivan and exited the vehicle. He said that he had a delivery for Burtzloff's husband, but that she could sign for it with proper identification. When Burtzloff started to hand her driver's license to appellant, he pointed a gun at her. Appellant said, "We're going to go inside and talk."

Appellant and Burtzloff entered the house and went into the family room. Appellant handed a ransom letter to Burtzloff. The letter demanded $50,000 in cash.

Burtzloff's housekeeper, Olga Rivera, was inside the house. Appellant told Rivera that he would kill her if she did not cooperate with him.

Burtzloff saw a friend, Alyssa Woodall, coming up the walkway to Burtzloff's house. Appellant said to Burtzloff, "Get rid of her." Burtzloff opened the front door and "mouthed 'call 911' " to Woodall. Woodall ran to her car and drove away.

Appellant ordered Burtzloff to pack a bag and go with him. Burtzloff refused. Appellant threatened to "pop" Burtzloff's daughter or Rivera if she did not obey him. Burtzloff agreed to go with appellant.

Appellant and Burtzloff started walking toward appellant's minivan. Before they reached the minivan, Burtzloff told appellant that she would not go with him. She said, "If I go with you, you're just going to kill me."

A neighbor drove by and asked if everything was okay. Appellant shouted, "Yes," but Burtzloff shouted, "No." The neighbor drove down the street and dialed 911.

Appellant said "something to . . . the effect . . . [of] I know what I'm doing. This isn't over. I'll just come back and kill your whole family." Appellant entered his minivan and drove away.

Deputy Sheriff Damian Schmidt responded to the 911 calls. He saw appellant's minivan and pursued it. Schmidt and two other patrol vehicles followed appellant onto the 101 freeway, where the pursuit continued and was joined by the California Highway Patrol.

The pursuit ended in Alhambra. The tires of appellant's minivan deflated after the vehicle had run over a spike strip. A California Highway Patrol officer executed a "pit maneuver," forcing appellant's vehicle into a sound wall. Several patrol vehicles surrounded the disabled minivan.

The Los Angeles County Sheriff SWAT Team drove three armored vehicles to the scene. Upon arriving there, Deputy Tom Harris of the SWAT Team saw appellant inside the minivan with "a phone in one hand and a gun in the other." He was pointing the gun at his head.

The standoff between appellant and the SWAT Team continued for approximately four hours. Finally, in an attempt to drive appellant out of the minivan, the team members broke its windows and introduced tear gas inside.

Deputy Tom Harris saw appellant point a handgun "out the passenger door window towards" Deputies Murray and Patterson. Deputy Jeffrey Coates saw appellant raise his gun and point it in the "general direction" of other deputies. It appeared to Coates that appellant was "looking to . . . shoot somebody." Coates shot appellant one time.

Deputy Sheriff Anna Wollenzier was a member of the Crisis Negotiation Team. During the standoff in Alhambra, she called appellant on his cellular telephone and conversed with him for several hours.

In his defense, appellant called Dr. Stuart Shipko, a board-certified psychiatrist. His testimony was as follows:

Prior to his retention by appellant, Dr. Shipko had "not done any criminal case work." He had never completed a training program in forensic psychiatry and had no expertise in that area. "Forensic psychiatry is the subspecialty of psychiatry that involves the application of psychiatry to the legal system such as a criminal case . . . ."

Dr. Shipko interviewed appellant on April 9, 2006. Appellant told Dr. Shipko that he had stopped taking Prozac a year before the incident in question, but had started taking it again a month before the incident. Persons who take Prozac "might experience mania both when they start to take the drug and when they stop . . . ." Mania is a "mood state" where "a person is inappropriately euphoric, they're filled with energy, they're grandiose . . . ." Persons suffering from mania lack insight and have poor judgment. Mania may deteriorate into psychosis. "Psychosis is a mental state in which the person is not in touch with reality and it's characterized by hallucination and delusions."

Dr. Shipko was "more impressed" with appellant's taking of prednisone than Prozac. On May 13, 2005, 25 days before the incident in question, appellant was given a 10-day, 20-milligram prescription for prednisone. Mania and depression "are common as a side effect of prednisone." Prednisone can also cause delirium and psychosis. At the dosage prescribed for appellant, approximately 1.3 per cent of persons develop "mania, psychosis, or other mood changes."

Appellant told Dr. Shipko that he "liked the way it [prednisone] made him feel." The drug "gave him a euphoria." Appellant said that prednisone made him feel "edgy," which Dr. Shipko interpreted as meaning "more mentally acute." Appellant told Dr. Shipko that "he felt completely focused on the day he committed his crimes."

Dr. Shipko opined that, at the time of his examination of appellant in April 2006, appellant was suffering from "a substance induced mood disorder manic type." The substance was Paxil, which had been given to appellant for depression. The Paxil had caused him to become "grandiose, inappropriately euphoric."

Dr. Shipko was not capable of diagnosing appellant's mental state at the time that the offenses had been committed. He had "no opinion about whether [appellant] was exhibiting manic symptoms" at that time. However, Dr. Shipko opined that appellant "was experiencing a manic episode when he took prednisone," and that he "may have been in a manic state when he committed the crimes." Dr. Shipko found it difficult "to assess the role of Prozac" in the commission of the crimes.

During appellant's telephone conversation with Deputy Wollenzier, the crisis negotiator, appellant said that a "fortune from [a] fortune cookie is what gave him the idea to come to California." This statement struck Dr. Shipko "as possibly delusional, possibly a psychotic thought."

Appellant's testimony on direct examination was limited to the medications he had been taking. Appellant testified that, from December 2004 to June 2005, he had taken Prozac "on and off." It was "highly possible" that he had also taken prednisone during this period of time. On cross-examination, appellant testified that he "was in a fog" up until the incident in question. But things were "crystal clear at the crime scene in Ventura County."

Instructions on Unconsciousness and Involuntary Intoxication

Appellant contends that the trial court erred in refusing to instruct on his "defense of unconsciousness from involuntary intoxication caused by prescription drugs." Appellant asserts: "[His] defense was that he was suffering from the unanticipated side effects of Prozac and prednisone, prescription drugs that he was taking and which rendered him manic and psychotic. He was acting unconsciously in the legal sense of the term."

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.] To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' [Citation.] If the defense presents substantial evidence of unconsciousness, the trial court errs in

refusing to instruct on its effect as a complete defense. [Citations.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, __; 64 Cal.Rptr.3d 721, 753.) " ' "Substantial evidence" in this specific context is defined as evidence which is "sufficient to 'deserve consideration by the jury, i.e., "evidence from which a jury composed of reasonable men could have concluded" ' that the particular facts underlying the instruction did exist." [Citations.]' [Citation.]" (*People v. Lemus* (1988) 203 Cal.App.3d 470, 477.)

The record contains no substantial evidence that, when he committed the offenses, appellant was unconscious due to involuntary intoxication with Prozac and prednisone. Dr. Shipko testified that these drugs could cause mania and psychosis. He never testified that they could cause appellant to become unconscious. Indeed, appellant told Dr. Shipko that "he felt completely focused on the day he committed his crimes." Furthermore, on cross-examination appellant testified that things were "crystal clear at the crime scene in Ventura County."

"In sum, because [appellant] presented no substantial evidence he was unconscious when he committed the offenses, the trial court did not err in refusing the instructions on unconsciousness [induced by involuntary intoxication] as a complete defense. [Citation.]" (*People v. Halvorsen, supra,* 42 Cal.4th at p. __; 64 Cal.Rptr.3d at p. 754.)

Mental Competency Examination

Dr. Nightingale evaluated appellant as to his mental competency to stand trial. (§ 1368.) Appellant contends that the trial court erred in permitting the prosecutor to cross-examine Dr. Shipko concerning statements made by appellant to Dr. Nightingale. The statements were contained in a report prepared by Dr. Nightingale. In forming his opinion concerning appellant's mental condition, Dr. Shipko had considered this report.

"There is a rule of immunity for all statements and fruits of a mental competency examination which prevents their use at the guilt trial. [Citations.]" (*People v. Arcega* (1982) 32 Cal.3d 504, 518.) But because appellant did not object on this ground, the

issue was not preserved for appellate review. (*People v. Weaver* (2001) 26 Cal.4th 876, 961.)

Even if appellant had objected on the ground that his statements to Dr. Nightingale were inadmissible under the rule of immunity, the trial court would not have erred had it overruled the objection. Because Dr. Shipko had considered Dr. Nightingale's report in forming his opinion concerning appellant's mental condition, the rule of immunity did not preclude cross-examination of Dr. Shipko on the contents of the report. (Evid. Code, § 721, subd. (a); *People v. Combs* (2004) 34 Cal.4th 821, 864.)

If appellant had wanted to preclude such cross-examination of Dr. Shipko, he should have assured that the report was not made available to Dr. Shipko. (See *In re Hernandez* (2006) 143 Cal.App.4th 459, 477 ["The fruit of the defendant's competency evaluations, i.e., the competency expert's impressions, reports or the results of the evaluator's testing, are not to be made available to experts appointed to testify on the issues of the defendant's guilt, sanity, or penalty."].)

Limiting Instruction

Appellant contends that the trial court erred in failing to instruct the jury that statements made by him to Dr. Nightingale could not be used to prove the truth of the matters stated. But the trial court gave the following limiting instruction: "Dr. Shipko testified that in reaching his conclusions as an expert witness, he considered statements made by the defendant and his wife and Attorney Becker. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." Since Dr. Shipko testified that he had considered Dr. Nightingale's report, which contained statements by appellant to Dr. Nightingale, this instruction was sufficient to inform the jury that such statements could not be considered as proof of the truth of the matters stated.

Moreover, appellant never objected to this instruction. If he believed that the instruction was inadequate, he should have made his views known to the trial court. By

failing to object, appellant waived the issue. (See *People v. Holloway* (2004) 33 Cal.4th 96, 132; *People v. Burnett* (2003) 110 Cal.App.4th 868, 875.)

Probation Report

Appellant contends that the trial court abused its discretion in refusing to strike excerpts from the probation report stating that appellant had pointed a gun at deputy sheriffs and had resisted arrest. The trial court did not abuse its discretion. These statements are a matter of record. Deputy Harris saw appellant point a handgun "out the passenger door window towards" Deputies Murray and Patterson. Deputy Coates saw appellant raise his gun and point it in the "general direction" of other deputies. These statements were not inconsistent with the jury verdicts. Although the jury acquitted appellant of two counts of assault with a firearm upon a peace officer (§ 245, subd. (d)(1)), it convicted him of exhibiting a firearm with the intent to resist arrest by a peace officer. (§ 417.8.)

Prosecutorial Misconduct

A. *Griffin* Error

"In *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) Here appellant voluntarily testified in his own behalf, but his testimony on direct examination was limited to his taking prescription drugs. He did not testify about the circumstances of the charged offenses, nor did his testimony constitute a general denial of any of these offenses. Appellant waived his privilege against self-incrimination only as to matters within the scope of relevant cross-examination. (*People v. Coffman* (2004) 34 Cal.4th 1, 72.)

Appellant contends that, during closing argument, the prosecutor twice committed *Griffin* error by commenting upon appellant's failure to testify on matters not within the scope of relevant cross-examination. The first error allegedly occurred when the prosecutor stated: "The defendant had an opportunity to get up on the stand and tell you

anything he wanted to tell you about his plans to kidnap for ransom. He chose not to do that. He chose only to testify about the fact that he had some medication and he brought that to California with him." The second error allegedly occurred during rebuttal when the prosecutor stated: "Nobody knows what [the fortune cookie] said. In fact, the defendant took the stand and could have told us about that fortune cookie. He could have told us what it said and what the significance of it was, but he didn't. And I submit to you that there was no significance to the fortune cookie and that that is just ridiculous to base an opinion on that."

Appellant concedes that his trial counsel did not object to the prosecutor's comments. The claim of *Griffin* error was not preserved for appellate review. (*People v. Lancaster* (2007) 41 Cal.4th 50, 84.)

Appellant maintains that by not objecting, he was denied the effective assistance of counsel. "The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) In determining whether counsel was deficient, we measure counsel's performance "against the standard of a reasonably competent attorney . . . ." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of

lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington, supra,*466 U.S. at p. 697.)

We need not consider whether counsel was deficient in not objecting to the prosecutor's statements. Appellant has failed to "prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank, supra,* 16 Cal.4th at p. 1241.) The evidence against appellant was overwhelming. It is not reasonably probable that the result would have been different if counsel had objected to the prosecutor's comments and had sought a cautionary instruction to disregard them.

B. Remarks Concerning Qualification of Dr. Shipko

Appellant contends that the prosecutor "improperly told the jury [during closing argument] that Dr. Shipko was not qualified to render an opinion in a criminal case." (AOB 35) The remarks of which appellant complains were as follows: "He [Dr. Shipko] certainly wasn't qualified to render an opinion in a criminal case and he was pretty up front about that. He admitted that he has no experience whatsoever prior to this case in forensic psychiatry. He had never evaluated a criminal with regard to his mental state. He admitted that is a very specialized area of psychiatry . . . ."

Appellant failed to preserve this issue for appellate review because he did not object to the prosecutor's remarks. (*People v. Turner* (2004) 34 Cal.4th 406, 422.) In any event, the remarks were fair comment on the state of the evidence. The prosecutor was indicating to the jury that it should not rely on Dr. Shipko's expert opinion because he had no experience in forensic psychiatry and had not previously evaluated a defendant in a criminal case. " ' "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' " (*People v. Ward* (2005) 36 Cal.4th 186, 215.)

C. Character Evidence

The prosecutor played for the jury a recording of a telephone conversation between appellant and Deputy Wollenzier, the crisis negotiator. During the conversation,

Wollenzier asked appellant if he had a criminal record. Appellant responded that he had a criminal record, but it had been "sealed . . . a long time ago." Appellant contends: "It was misconduct to present evidence of appellant's character in the form of his prior criminal conduct . . . ."

Appellant did not object to this portion of the conversation. He has therefore not preserved the issue for appellate review. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20.) Appellant asserts that, because his counsel did not object, he was denied the effective assistance of counsel. But appellant provides no argument in support of this assertion. In the absence of such argument, he has failed to carry his burden of proving ineffective assistance of counsel. (See *People v. Babbitt, supra,* 45 Cal.3d at p. 707.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Herbert Curtis III, Judge

Superior Court County of Ventura

Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

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