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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff, Appellant and Cross-
Respondent,,

v.

ALEJANDRO ORNELAS,

Defendant, Respondent and Cross-
Appellant.

2d Crim. No. B238634
(Super. Ct. No. 1362952)
(Santa Barbara County)

The People appeal from an order dismissing two prior felony conviction enhancements. (Pen. Code, § 1238, subd. (a)(10).)¹ Alejandro Ornelas cross-appeals from the judgment. (§ 1237, subd. (a).) Cross-appellant was found guilty by a jury of assault with a deadly weapon. (§ 245, subd. (a)(1).) In a bifurcated proceeding, the trial court found true allegations that he had sustained one prior serious felony conviction (§ 667, subd. (a)(1)) and one prior serious or violent felony conviction within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court dismissed the prior convictions pursuant to section 1385. It sentenced cross-appellant to prison for the upper term of four years.

¹ All statutory references are to the Penal Code.

When cross-appellant committed the assault with a deadly weapon, he was on probation for a conviction of threatening to commit a crime that would result in death or great bodily injury. (§ 422.) The trial court revoked his probation and imposed a consecutive eight-month prison term. Thus, his aggregate prison sentence was four years, eight months.

After a mental competency examination, cross-appellant was found competent to stand trial. He contends that the trial court erroneously admitted statements he had made during the competency examination. These statements rebutted his defense that a seizure had rendered him unconscious at the time of the assault.² Cross-appellant also contends that the trial court erroneously instructed the jury.

We conclude that the trial court abused its discretion in dismissing the prior felony conviction enhancements. We reverse the sentence and remand for resentencing. In all other respects, we affirm.

CROSS-APPELLANT'S APPEAL

Facts

Cross-appellant lived with his mother and two sisters. On July 17, 2010, he and his mother argued in the living room of their residence. The previous night, cross-appellant had complained to his mother that he was mad at his sisters for playing loud music. Mother asked him "to please behave and ignore them [his sisters]." She then walked out the door to go to work.

Cross-appellant's sister Veronica Uribe (Veronica) walked into the living room and sat down on a couch. Cross-appellant was seated on another couch about four feet away. Veronica asked him "what was going on." he replied, "None of [your] business."

Cross-appellant got up from the couch, walked about 12 feet to a closet, and grabbed a baseball bat inside the closet. Before grabbing the bat, he said, "This is all I came here for." He walked behind Veronica and struck her three times with the bat: once

² "Unconsciousness, when not voluntarily induced, is a complete defense to a charged crime. [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 887.)

on her lower back, once on her shoulder, and once on the left side of her head. He held the bat with two hands and "swung it like you would normally swing a baseball bat."

Mother and both sisters are aware that he was subject to a seizure disorder. They testified that in the past he had acted violently toward his family, but the violence had not occurred during a seizure. When a seizure occurred, cross-appellant would not remember what had happened during the seizure.

Within minutes after the assault, Officer Timothy Xiong came to the family's residence. He asked cross-appellant what was going on. Cross-appellant replied "that he was upset at his sisters because they would have parties all the time at the residence." Officer Xiong asked him to describe what had happened. Cross-appellant did not respond and "had a confused look on his face." Officer Xiong asked him why he had hit his sister with a baseball bat. He replied "that he just snapped, and sometimes he does that." Officer Xiong understood cross-appellant's response as meaning that he "snapped" because he has anger problems. Officer Xiong told cross-appellant that he could have killed his sister. Cross-appellant "responded by saying he never wanted to harm his sister."

Cross-appellant did not testify. In support of his defense of unconsciousness, he called Dr. David Frecker, a neurologist. Frecker testified as follows: Cross-appellant suffers from a form of epilepsy known as complex partial seizures. When cross-appellant hit his sister with a baseball bat, "it is highly probable" that he was experiencing a complex partial seizure. "[I]t is likely the seizure began when [cross-appellant] stood up and went to a closet to get a baseball bat." A person experiencing a complex partial seizure is not fully conscious. Amnesia for the seizure period is "almost universal." Cross-appellant is usually able to remember when a seizure occurred, but he cannot remember what happened during the seizure. Cross-appellant did not come "to a conclusion one way or another whether he had a seizure" when he assaulted his sister. But "he did recognize . . . [that] something unusual had happened."

*Admission of Statements Made at
the Mental Competency Examination*

During cross-examination, the prosecutor asked Dr. Frecker if he had reviewed a report written by Dr. Thomas Wylie, a neuropsychologist. Frecker replied that he had reviewed the report and that it was "part of [his] overall assessment." The report was a court-ordered evaluation of whether cross-appellant was mentally competent to stand trial.

The prosecutor asked Frecker: "[A]ccording to this report, [cross-appellant] told Dr. Wylie he remembered everything [about what happened on July 17, 2010], right . . . ?" Frecker responded, "Yes." The prosecutor then asked: "And [cross-appellant] also told Dr. Wylie that it was his belief his actions were not related to seizure activity, right? Quote from [cross-appellant] to Dr. Wylie, 'I just lost it, no seizure, no nothing', right?" Frecker replied, "That is correct." Frecker noted that cross-appellant "wouldn't have a recollection of the event if he had a seizure." Nevertheless, Frecker testified that cross-appellant's statements to Dr. Wylie did not change his opinion that cross-appellant had committed the assault while experiencing a seizure.

In his report, which was not received in evidence, Wylie wrote: "[S]ome caution is advised as regards [cross-appellant's] ability to recall the events leading to his arrest. He notes that the police report is based on information from family members, stating 'I remember everything'. However, he was quite guarded as to these events and did not in fact report his independent recall. He did state his belief that his actions were not related to seizure activity[:] 'I just lost it, no seizure, no nothing'." "[W]ith consideration of the cautions regarding his memory of the events leading to his arrest which affect both his ability to disclose pertinent information to counsel and to testify in his defense, [cross-appellant] appears to be reasonably trial competent."

During redirect examination, Dr. Frecker confirmed that he had relied in part on Dr. Wylie's report "in coming to [his] conclusions about whether or not [cross-appellant] suffered a seizure on July 17th, 2010." Frecker specifically relied on Wylie's indication that, although cross-appellant claimed to have remembered "everything," he appeared to

have memory problems. When asked what he had "take[n] away" from Wylie's report, Frecker replied: "That Dr. Wylie felt that [cross-appellant] . . . had a specific inability to recall pertinent events that most people would remember at the time they commit an act such as swinging a baseball bat." This was "consistent with someone . . . [who] suffers from a complex partial seizure."

*No Error in Admitting Statements Made
at the Mental Competency Examination*

Cross-appellant contends that the Fifth Amendment of the United States Constitution and California law prohibited the People from introducing statements made by him during the mental competency examination. "A court-compelled competency examination implicates a defendant's Fifth Amendment rights. [Citations.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 619.) To avoid a violation of these rights, courts "have established a rule of immunity providing that ' "neither the statements of [the defendant] to the psychiatrists appointed under section 1369 nor the fruits of such statements may be used in trial of the issue of [the defendant's] guilt." ' [Citation.]" (*Ibid.*) This rule ensures "that a defendant will not be convicted by statements he made in the course of a court-compelled competency examination." (*Ibid.*)

But there is an exception to the rule of immunity. When a defendant presents expert "testimony in support of a mental status defense at the guilt phase, the Fifth Amendment [does] not preclude the prosecution from impeaching [the expert] with the evidence on which he based his opinion," including "the reports of the court-appointed competency experts." (*People v. Taylor, supra*, 48 Cal.4th at p. 620.) Such impeachment evidence is also admissible under California law. (*Id.*, at pp. 620-621.)

The exception to the rule of immunity applies here. Cross-appellant's expert, Dr. Frecker, gave testimony supporting the unconsciousness defense. He testified that he had relied in part on Dr. Wylie's report in concluding that cross-appellant was experiencing a seizure when he assaulted his sister. In these circumstances, the prosecutor was entitled to impeach Dr. Frecker with cross-appellant's statements to Dr. Wylie as set forth in the report. (*People v. Taylor, supra*, 48 Cal.4th at pp. 620-621.)

Cross-appellant asserts that the exception to the rule of immunity is inapplicable because the defense of unconsciousness resulting from a seizure is not a mental status defense. We disagree. A defendant who claims the defense of unconsciousness puts in issue his mental status at the time of the crime.

Cross-appellant argues that the exception is inapplicable because it does not encompass statements concerning the charged offense that the defendant makes during the competency examination. The exception allegedly applies only to " 'general observations' of the defendant's mental state." But cross-appellant cites no authority holding that the exception is so limited.

We reject cross-appellant's contention that such a limitation is supported by *Buchanan v. Kentucky* (1987) 483 U.S. 402 [107 S.Ct. 2906, 97 L.Ed.2d 336]. There, the defendant presented "the 'mental status' defense of 'extreme emotional disturbance.'" (*Id.*, 483 U.S. at p. 423.) The defendant did not call any expert witnesses. Instead, he called a social worker who read from various psychological reports. To rebut this psychological evidence, the trial court permitted the prosecution to introduce excerpts from a pretrial psychiatric evaluation "in which the psychiatrist had set forth his general observations about the mental state of [defendant] but had not described *any* statements by [defendant] dealing with the crimes for which he was charged." (*Id.*, 483 U.S. at p. 423.) The trial court had ordered the evaluation not to determine the defendant's competency to stand trial, but to determine whether he should be involuntarily hospitalized for psychiatric treatment pending trial. (*Id.*, at p. 411, fn. 11.) The Supreme Court held: "The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." (*Id.*, 483 U.S. at pp. 423-424.) The Supreme Court did not consider whether excerpts from the report would have been admissible if they had included statements by the defendant dealing with the charged offenses. Nor did the court consider the situation here where cross-appellant's statements in a competency report were offered to impeach the testimony of an expert who had relied on the report in forming his opinion. Cross-appellant's statements that he remembered the incident and

had not suffered a seizure were highly probative to impeach Dr. Frecker's testimony that a seizure had rendered him unconscious.

Cross-appellant maintains that, even if the exception allowed the admission of his statements to impeach Dr. Frecker, the prosecutor improperly used them to bolster the opinion of a rebuttal witness, Dr. Michael Selby. Selby opined that cross-appellant had not suffered a seizure. He testified that cross-appellant's statements to Dr. Wylie "factor[ed] into [his] opinion." Selby explained: "[I]f [cross-appellant] has a recollection for his behavior then he wasn't having a seizure. When you're having a seizure there's loss of consciousness, so explaining to Dr. [Wylie] what happened . . . clearly indicates to me that seizure was not present when he committed the offense."

Dr. Selby's testimony was admissible. It was properly offered in rebuttal to impeach Dr. Frecker's testimony that cross-appellant had experienced a seizure during the assault. (See *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1125 ["*except for appropriate rebuttal* [of a mental state defense], the defendant's statements to the prosecution [mental] experts may not be used . . . to bolster the prosecution's case against the defendant" (italics added)].)

Even if the trial court had erroneously admitted cross-appellant's statements, the error would have been harmless beyond a reasonable doubt. The evidence establishes that cross-appellant hit his sister with a baseball bat not because he had a seizure, but because he was angry at her. The night before the assault, cross-appellant complained to his mother that he was mad at his sisters for playing loud music. Cross-appellant told Officer Xiong "that he was upset at his sisters because they would have parties all the time at the residence," and that he had "just snapped." When mother left for work immediately prior to the assault, she and cross-appellant argued about his sisters. Cross-appellant's anger was evident when he told Veronica that it was "none of [her] business" in response to her asking "what was going on."

Before cross-appellant grabbed the baseball bat inside the closet, he said, "This is all I came here [to the closet] for." Cross-appellant's statement is the remark of a thinking human being, not an unconscious automaton. As Dr. Selby testified, "What happened

was a purposeful goal directed movement towards getting a baseball bat out of the closet then attacking his sister with it." Dr. Frecker opined that "it's very rare" for a person to arm himself during a partial complex seizure.

Cross-appellant never mentioned anything to Officer Xiong about a seizure. If he had been rendered unconscious by a seizure, he would not have remembered the incident. But cross-appellant did not claim a loss of memory when he spoke to Officer Xiong. Appellant's statement to Dr. Wylie that he had "just lost it" was cumulative of his statement to Officer Xiong that he had "just snapped." Both statements indicate that cross-appellant remembered the incident. Cross-appellant acknowledges that, "if he remembered the attack, he was not in seizure and thus not unconscious."

The Trial Court Did Not Err in Instructing the Jury

Without objection, the trial court instructed the jury that "[e]vidence of defendant's mental condition is not admissible to prove the absence of general intent." Cross-appellant contends that the instruction misstated the law because it failed to indicate that evidence of the defendant's mental condition is also not admissible to prove the presence of general intent. This "omission implied that such evidence could be used to prove intent." In addition, cross-appellant argues that "the jury may have understood the instruction as somehow limiting the relevance of the CPSD [complex partial seizure disorder] evidence." Thus, the instruction "lightened the prosecution's burden of proof with regard to both general intent and consciousness, which were the central issues in this case."

The instruction was not a misstatement of the law. It was taken verbatim from appellate opinions: " 'Evidence of defendant's mental condition is not admissible to prove the absence of general intent.' [Citations.]" (*People v. Bejarano* (2009) 180 Cal.App.4th 583, 589.) " ' "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." [Citation.] If [cross-appellant] thought the instruction should be clarified to avoid any implication that [evidence of mental condition is admissible to

prove general intent], [he] should have so requested.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1168-1169.)

The instruction must be viewed together with other instructions given to the jury. Another instruction clearly stated that cross-appellant was not guilty if he had acted while unconscious. Thus, the instruction at issue could not have misled the jury as to the relevance of the seizure evidence.

PEOPLE'S APPEAL

Background

According to the People's Supplemental Sentencing Brief, before the preliminary hearing the People offered to allow cross-appellant to plead guilty in exchange for a two-year prison sentence. Before defense counsel communicated the offer to cross-appellant, the People revoked it because they discovered that the victim had been pregnant at the time of the assault and had miscarried a week later.

But defense counsel declared, and the trial court found, that before revocation (1) counsel had communicated the offer to cross-appellant, (2) cross-appellant had accepted it, and (3) the preliminary hearing magistrate had approved it. The trial court judge had also served as the preliminary hearing magistrate.

At the preliminary hearing, the magistrate found the evidence insufficient to support a great bodily injury allegation based on the victim's miscarriage. The magistrate concluded that, without testimony from a medical expert, there was no showing of a "sufficient connection" between the assault and the miscarriage.

The felony complaint did not allege any prior convictions. After cross-appellant was held to answer, the People filed an information alleging a strike and a prior serious felony conviction. The trial court found these allegations to be true. Both the strike and prior serious felony conviction were based on a single conviction of threatening to commit a crime that would result in death or great bodily injury. (§ 422.) This single conviction was the same one for which appellant was on probation when he committed the present offense.

In his sentencing memorandum, cross-appellant conceded that he was not entitled to specific performance of the plea agreement because he had not detrimentally relied on it. But cross-appellant asked the trial court to return him to "[t]he position [he] was in prior to the withdrawal of the prosecution from the [plea] agreement," when the complaint charged him "with one count of PC245(a)(1), deadly weapon, with no special allegations." The trial court accepted cross-appellant's concession that he had not detrimentally relied on the plea agreement. The court also accepted his argument that it "should place him back in the position that he was [in] prior to the offer being withdrawn." Accordingly, the trial court dismissed the strike and prior serious felony conviction pursuant to section 1385.

*The Trial Court Erred in Dismissing the
Strike and Prior Serious Felony Conviction*

The trial court did not have discretion to dismiss the section 667(a)(1) prior serious felony conviction. "Where a person has been convicted of a serious felony in the current case, and it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), the trial court must impose a consecutive five-year term for each such prior conviction. The trial court has no discretion and the sentence is mandatory. [Citation.]" (*People v. Purata* (1996) 42 Cal.App.4th 489, 498.) Section 1385, subdivision (b) provides: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."

For purposes of the Three Strikes law, a trial court has limited discretion to dismiss a strike pursuant to section 1385. In exercising its discretion, "the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court abused its discretion. It did not consider the nature and circumstances of cross-appellant's present and prior serious felony convictions. Nor did it consider his background, character, and prospects. Furthermore, the trial court never considered whether cross-appellant should be deemed to be outside the spirit of the Three Strikes Law. It dismissed the strike because of a plea bargain offer that the People had lawfully withdrawn before the preliminary hearing. "[A] prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain." (*People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1354.)

Cross-appellant argues that, pursuant to *People v. Rhoden, supra*, 75 Cal.App.4th 1346, the trial "court acted within its discretion to return [him] to the pre-bargain position." In *Rhoden* the appellate court concluded that, absent a showing of detrimental reliance on a plea bargain offer that had been withdrawn before the defendant pleaded guilty, " '[i]t was not fundamentally unfair for defendant to be returned to [her] pre-bargain position' [Citation.]" (*Id.*, at p. 1357.) Cross-appellant's pre-bargain position was a defendant charged in a felony complaint with assault with a deadly weapon. When the People revoked their offer before the preliminary hearing, cross-appellant was returned to that position. The complaint's omission of prior felony conviction allegations did not preclude the People from adding them to the information: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions" (§ 969a.) A complaint is required to include allegations of prior convictions only when the defendant pleads guilty to the charges in the complaint: "When the complaint is used as a pleading to which the defendant pleads guilty under Section 859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations" (§ 806.) The trial court, therefore, could not dismiss the strike and prior serious felony conviction under the guise of returning cross-appellant

to the position he was in before the preliminary examination. That position did not shield him from the allegation of prior convictions in the information.

Disposition

The sentence is reversed and the matter is remanded to the trial court for resentencing in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Edward H. Bullard, Judge
Superior Court County of Santa Barbara

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