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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. THOMAS KING, JR., Defendant and Appellant.	B229834 (Los Angeles County Super. Ct. No. MA049522)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Reversed.

Joseph S. Klapach, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

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In this appeal from a criminal conviction, appellant Thomas King, Jr., shows that he was prohibited from cross-examining the chief prosecution witness and only percipient witness on the fact that she had been diagnosed with schizophrenia four months prior to the incidents underlying the conviction. We conclude that her diagnosis, which included auditory hallucinations and delusions, was relevant to her ability to perceive and therefore impacted her credibility.

The error in prohibiting appellant from asking any questions during cross-examination about the witness's mental illness prejudiced appellant because the jurors had extreme difficulty reaching a verdict and even informed the court that they agreed "the evidence [was] insufficient" rendering them incapable of reaching a verdict "on any of the counts . . . ." Although jurors eventually found one of six counts true and four lesser offenses true, there was a reasonable chance they would have reached a different verdict if appellant had been permitted the cross-examination he requested. We reverse the judgment.

FACTS AND PROCEDURE

In a six-count amended information, appellant was charged with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] criminal threats (§ 422), false imprisonment by violence (§ 236), dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)), and arson of the property of another (§ 451, subd. (d)). It was further alleged that appellant used a deadly weapon, to wit a broom. Prior to trial, the court conducted an in camera *Pitchess* hearing and found no discoverable information. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) Appellant pled not guilty and was tried by a jury.

At trial, the prosecution's chief witness D.N. testified that on June 23, 2010, she allowed appellant, a friend of hers, to enter her house after he knocked on her window. They watched a DVD of a funeral. D.N. pretended to call her insurance agent to inquire how much money she would receive if she cashed in the life insurance policies on her

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

daughter and other family members in order to recover her jewelry from a pawn shop. D.N. did not actually speak to her insurance agent.

When he heard D.N. suggest she would cash in her daughter's life insurance policy, appellant repeatedly called D.N. a "mean old bitch." D.N. asked appellant to leave, and he took her cell phone and keys against her will. Appellant then retrieved a butcher knife from D.N.'s kitchen and cut the cord to two of D.N.'s televisions, telling D.N. she did not deserve them. Appellant threatened to take D.N.'s car to a place "where nobody can find it."

D.N. snuck in the bedroom and called 911. D.N. asked for help and then put the phone down and walked away. The 911 operator disconnected the call.

When D.N. told appellant she would call the police, appellant put hedge clippers around D.N.'s neck and threatened to chop off her head. Appellant dragged D.N. through the house with the hedge clippers for about four minutes. Appellant cut the cord to D.N.'s telephone. Appellant also threatened to kill D.N.

That same evening, appellant lit a broom on fire and told D.N. he would burn her face to make her ugly. D.N. tried to leave the house but appellant slammed the door shut, preventing her from exiting. Appellant moved the broom in circles, and D.N. fell to the floor to avoid the flames. Appellant's waiving the broom over D.N. resulted in several injuries including scars on her face, a singed eyebrow, burnt hair, and a burnt shoulder.

Under a ruse to get to a phone, D.N. requested appellant and she go to a store to purchase beer. D.N. drove appellant to the store. At the store, D.N. called 911 and stated appellant took her keys, phone, and burnt her with a broom. D.N. told the operator that appellant ran when he saw her on the phone. D.N. retrieved her cell phone and keys from appellant's home the next day.[2]

Los Angeles County Deputy Sheriff Jason Goedecke responded to the call and found D.N. crying hysterically with burns on her face and forearms. Goedecke drove D.N. to her house where he observed soot damage in the front of D.N.'s home as well as

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[2] D.N. admitted that she suffered two convictions for petty theft, a conviction for battery, and a conviction for prostitution.

ashes that appeared to have been swept into a corner. Goedecke did not observe any cut television wires. Officers found appellant early the next morning curled up in a cabinet in his mother's home. Prior to entering the home, Goedecke heard a male voice say "mom, tell the cops I'm not home."

Appellant's mother Stacy Sally testified that D.N. told her that D.N. accused appellant because a detective forced her to do so. D.N. told Sally that the injuries were inflicted by D.N.'s ex-boyfriend, not appellant. On June 24, 2010, D.N. went to Sally's house and dangled keys and smirked in front of Sally. Sally admitted that she had been convicted of giving a false identification to a police officer, selling marijuana, voluntary manslaughter, attempted murder, and murder. D.N. disputed all of the statements about her contained in Sally's testimony.

After twice informing the court that they were unable to reach a verdict, jurors ultimately convicted appellant of dissuading a witness from reporting a crime, misdemeanor unlawfully causing a fire (a lesser included offense of arson), battery (a lesser included offense of assault with a deadly weapon), and misdemeanor false imprisonment (a lesser included offense of false imprisonment by violence). With respect to the dissuading a witness count, jurors found true that appellant used a dangerous and deadly weapon. The court granted the prosecution's motion to dismiss the criminal threats allegations.

The court sentenced appellant to six years six months in state prison. This appeal followed.

DISCUSSION

Appellant's principal argument that the court erred in excluding evidence of D.N.'s schizophrenia diagnosis has merit and requires reversal of appellant's convictions. To assist on remand, we also consider appellant's arguments (1) that the court was required to sanitize appellant's mother's convictions when she testified as a defense witness and (2) that this court review the trial court's compliance with the *Pitchess*

procedure. Because reversal is required, we need not consider appellant's remaining arguments.[3]

1. D.N.'s Medical Records

Appellant contends the trial court erred in excluding evidence that D.N. suffered from schizophrenia. Respondent argues that the evidence was properly excluded to protect D.N.'s privacy interest and because the prejudicial impact of the evidence outweighed its probative value. We first provide background. We then discuss the parties' arguments. We conclude that the court abused its discretion in excluding *all* cross-examination of D.N.'s mental illness.

A. Background

Prior to trial, D.N. admitted that she suffered from schizophrenia and told the prosecutor that she did not recall whether she took her medication on June 23, 2010 – the day of the incident with appellant.

D.N.'s medical records from February 5, 2010, stated that she had a history of schizophrenia and reported hearing voices telling her to kill herself. D.N. also reported obsessive ruminations and believed a "detective [was] harassing her after she called to give a description of a suspect." D.N. reported that the detective called her daily and referred to her as a "dumb bitch." The detective allegedly harassing D.N. was the same detective Sally testified D.N. had indicated told her to accuse appellant.

D.N. reported that she had attempted suicide and had suicidal ideation. D.N. was assessed as suffering from paranoia, delusions, and hallucinations.

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3 We need not consider appellant's claim that cumulative error requires reversal because we find only one error, nor appellant's contention that his sentence should have been stayed pursuant to section 654 because we reverse the convictions. Finally, we need not consider appellant's claim that the court erred in entering a restraining order limited to the duration of the criminal proceeding because as a result of our reversal, the criminal proceeding has not terminated. Respondent does not dispute appellant's contention that the court erred in entering a restraining order under section 273.5 because this case does not involve violence of a spouse, former spouse, cohabitant, former cohabitant or the mother or father of appellant's child, and therefore the statute governing a restraining order in those circumstances is inapplicable.

Defense counsel sought to cross-examine D.N. regarding her mental illness, to admit D.N.'s February medical records, and to call Dr. Jack Rothberg as an expert to discuss symptoms of schizophrenia. Defense counsel represented that Dr. Rothberg would testify that schizophrenia is controllable but not curable. Defense counsel wanted to argue to jurors that D.N. perceived things differently.

Initially, the court was inclined to allow cross-examination, but after reviewing D.N.'s medical records in camera, the court concluded appellant could not cross-examine D.N. regarding her mental illness, admit any of the medical records, or call Dr. Rothberg to testify. Although the court noted that the records refer to a February 2010 diagnosis of schizophrenia, it found "no relevance of the medical records." The court found the probative value of the medical records slight and substantially outweighed by the danger of undue prejudice and confusion of issues and undue consumption of time. The court also emphasized D.N.'s privacy rights.

Under the court's ruling, defense counsel was permitted to cross-examine D.N. regarding the medication she took on June 23, 2010, and the effect of that medication on her ability to perceive or recollect events. The court also allowed counsel to cross-examine D.N. on medication she was taking at the time of her testimony.

During cross-examination, D.N. testified that on June 23, 2010, she was taking Xanax, Lotrim, and Risperdal. She testified that the medication would stop her from hearing voices. The court sustained an objection to defense counsel's question whether D.N. saw "things that are not there" if she failed to take her medication. D.N. testified that she did not take medication on the day of trial.

B. Exclusion of the Evidence Violated Appellant's Right to Confront Witnesses

A diagnosis of schizophrenia may be relevant to the reliability of a witness's testimony because it bears on the witness's credibility. (*People v. Abel* (2012) 53 Cal.4th 891, 931 (*Abel*).) "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw

inferences relating to the reliability of the witness.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*).)

A criminal defendant's confrontation right must be balanced with the state-created evidentiary privilege protecting psychotherapist/patient communications. (*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1295.)[4] It cannot reasonably be disputed that the interest in confrontation is weighty as it implicates fundamental fairness of trial. (*Abel*, *supra*, 53 Cal.4th at p. 931.) Nor can it reasonably be disputed that the psychotherapist/patient privilege safeguards an important public policy.[5] "'Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life . . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 555.) "The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy. [Citations.] It is also well established, however, that the right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.)

"'[W]hen a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon . . . to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve.' [Citation.]" (*Abel*, *supra*, 53 Cal.4th at p. 931.) "[M]ental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness

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4 It is unclear whether the confrontation clause permits pretrial discovery rights. (*People v. Webb* (1993) 6 Cal.4th 494, 517-518.) However, this case does not involve pretrial discovery but the ability to cross-examine a witness and present evidence at trial. From our record, it appears defense counsel had possession of D.N.'s medical records and no argument is made on appeal concerning this pretrial disclosure.

5 Evidence Code section 1014 provides in pertinent part: "[t]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

may be cross-examined on that subject, if such illness affects the witness's ability to perceive . . . ." (*People v. Gurule* (2002) 28 Cal.4th 557, 591-592; see also *People v. Hammon* (1997) 15 Cal.4th 1117, 1123-1127.)

Here, D.N.'s schizophrenia diagnosis with concomitant auditory hallucinations and delusions was relevant to D.N.'s credibility. D.N.'s diagnosis was close in time to the events involving appellant, rendering it probative of her mental state at the relevant time. Significantly, D.N. admitted to the prosecutor that she could not recall whether she had taken her medication on June 23, 2010, supporting the inference that her illness may not have been under control on the relevant date. Appellant was precluded from presenting *any* evidence of D.N.'s mental disorder. Prohibiting any evidence of D.N.'s schizophrenia diagnosis violated appellant's right under the confrontation clause to confront the witnesses against him.

The trial court abused its discretion in excluding at trial *all* evidence that D.N. suffered from a mental illness that affected her perception. Appellant made a showing that D.N.'s illness was close in time to the events for which he stood trial. D.N. even admitted (at least to the prosecutor) that she could not recall whether she took her medication June 23, and she had short-term memory loss. Permitting cross-examination on the issue of mental illness would have assisted appellant's right to confront and cross-examine D.N. as no other evidence bore on her ability to perceive the events of June 23. The fact that evidence of D.N.'s mental illness would have produced a significantly different impression of her credibility distinguishes this case from *People v. Cooks* (1983) 141 Cal.App.3d 224, 301, on which respondent heavily relies. This case is also distinguishable from *Cooks*, in that the witness there suffered from a severe personality disturbance, but not from delusions or hallucinations. (*Ibid*.)

C. The Probative Value of the Evidence Outweighed Its Prejudice

Respondent also argues that the court did not abuse its discretion in determining the probative value of the evidence D.N. suffered from schizophrenia was substantially outweighed by the probability that its admission would necessitate undue consumption of time and create substantial danger of undue prejudice. We disagree.

As respondent acknowledges, under California law "'[t]he mental illness . . . of a witness can be relevant on the issue of credibility . . . if such illness affects the witness's ability to perceive, recall or describe events in question.' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 292.) Evidence Code section 780, subdivision (d) permits a jury to consider, in determining the credibility of a witness, the witness's ability to perceive, recollect, or communicate any matter about which he or she testifies.

The evidence that D.N. suffered from hallucinations and delusions four months prior to June 23 was highly probative as it was very close in time to the date D.N. reported appellant's crimes. D.N.'s credibility was not a "collateral credibility issue" as respondent argues but instead was the primary issue at trial as she was the chief prosecution witness and the only percipient witness.[6] The prejudicial nature of the evidence in undermining D.N.'s credibility was not only explicitly permitted under Evidence Code section 780, but also relevant to the most important issue at trial – whether D.N. was believable. Respondent's concern that a juror may have an irrational fear of mental illness is insubstantial when balanced against the probative nature of the evidence.

The time required to illicit the relevant evidence also was insubstantial in light of its importance. Moreover, the trial court retained latitude to ensure that cross-examination of D.N. was not overly lengthy or unduly time consuming. Barring *any* cross-examination on D.N.'s mental illness constituted an abuse of discretion. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 [Court of Appeal reviews for abuse of

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6 During closing argument, the parties disputed D.N.'s credibility. The prosecutor argued that D.N. was a credible witness. According to the prosecutor's argument she "was very candid and forthright to you. That's important to note because when you have a true victim of crime, this is how they appear." The prosecutor continued: "You heard there were some discrepanc[ies] between the testimony and . . . the testimony of Deputy Goedecke and later on the defendant's mother. Now, you as jurors are going to have to determine if those discrepancies are important to you or not." Defense counsel argued that D.N. was not credible because "she's not a person able to perceive things as they were happening."

discretion trial court's ruling that probative value of evidence is outweighed by prejudicial impact].)

D. Exclusion of the Evidence Was Prejudicial

The exclusion of the evidence of D.N.'s mental illness was prejudicial because this case was extremely close. The court prohibited all inquiry into D.N.'s mental illness. D.N. was the lone percipient witness, who was disbelieved in part by the jury. Jurors expressed difficulty reaching a verdict and more than once indicated that they were unable to do so, at least in part because they questioned the sufficiency of the evidence, necessarily based on D.N.'s testimony. Initially, jurors stated, "We the jury all agree that the evidence is insufficient and we will not be able to make a decision on any of the counts and everyone is set on their decision." Later that day, jurors sent another note stating, "We the jury cannot make a decision on any of the counts 1-6." When jurors ultimately reached a decision, they must have rejected substantial portions of D.N.'s testimony as they convicted appellant of only one of six counts as pled.

Under both federal and state standards, the error was prejudicial. Under the federal standard, the error was not harmless beyond a reasonable doubt. (See *Van Arsdall*, *supra*, 475 U.S. at pp. 680, 684 [holding *Chapman* standard applicable to confrontation clause violation].)[7] Jurors may have viewed D.N.'s testimony differently had they learned that she suffered from hallucinations and delusions. Under the *Watson* standard applicable to state law error in excluding evidence, it is reasonably probable appellant would have obtained a more favorable outcome if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Partida* (2005) 37 Cal.4th 428, 439 [evidentiary error under state law evaluated under *Watson* standard].)[8]

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[7] *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

[8] Evidence that appellant hid in a file cabinet after the incident was not sufficiently strong to show the error in excluding all evidence of D.N.'s mental illness was harmless. Additionally, jurors heard that evidence and still did not convict appellant of most of the charged crimes.

2. Sally's Priors

As noted, Sally testified for the defense and admitted that she had been convicted of murder, voluntary manslaughter, and attempted murder. Appellant argues the court erred in refusing to sanitize Sally's prior convictions or allow her to explain the circumstances of those convictions. According to appellant, "[t]he trial court enabled the prosecution to utterly destroy Ms. Sally's credibility with evidence that she was a convicted murderer, while simultaneously depriving Appellant of the ability to rehabilitate her." Sally sought to testify that her companions shot the victims and also shot her. Appellant's counsel represented that "the reason why she got these convictions was not because she believed she was guilty of the charges but she took the deal." Appellant argues that this evidence would have tended to minimize the inference of moral turpitude from her offenses. We find no error.

A prior conviction is admitted only if it is relevant to a witness's veracity by demonstrating a readiness to do evil. (*People v. Castro* (1985) 38 Cal.3d 301, 314.) Sally's convictions for murder, voluntary manslaughter, and attempted murder involve moral turpitude and are admissible for impeachment. (*People v. Hinton* (2006) 37 Cal.4th 839, 888 [murder and attempted murder crimes of moral turpitude]; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1110 [voluntary manslaughter crime of moral turpitude].)

A trial court has discretion under Evidence Code section 352 to "bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) In considering a request to bar impeachment for a witness who is not the defendant, the court should consider "whether the conviction (1) reflects on honesty and (2) is near in time." (*Ibid*.) Sally's convictions were highly probative of her credibility and strongly reflected on her honesty. Even though the convictions were relatively old, their strong probative value militated in favor of their admission. Prejudice was mitigated by the fact that the crimes were committed by appellant's mother, not by him. It was reasonable for the court to conclude

that the convictions were highly relevant and should not be sanitized.[9] Appellant shows no abuse of discretion. (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183 [identifying abuse of discretion standard of review].)

Appellant's claim that allowing his mother to explain the convictions would have negated their moral turpitude because they would have shown that she was not the shooter and was shot by her confederates. Assuming mother was not the shooter (a fact unsupported by evidence in the record), an accomplice shares liability with the direct perpetrator. (§ 31.) That appellant's mother associated with persons willing to also shoot her does not undermine her culpability or enhance her credibility. Appellant does not show this is a case with "rare extenuating circumstances which might negate the moral turpitude" associated with Sally's crimes. (*People v. Thomas* (1988) 206 Cal.App.3d 689, 700, fn. 6.) Allowing Sally to explain the circumstances of her crime likely would have required a trial within a trial as even defense counsel recognized such testimony would open the door to the prosecutor seeking a "detailed explanation of what happened." Appellant demonstrates no abuse in the court's exercise of its discretion to refuse to allow an explanation of the crimes.

3. **Pitchess *Motion***

In response to appellant's request, we have reviewed the sealed record of the in camera hearing and concluded that the trial court appropriately exercised its discretion in ruling that no discoverable material existed. (*People v. Gaines* (2009) 46 Cal.4th 172, 180-181; *People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

DISPOSITION

The judgment is reversed. The case is remanded to the trial court.

FLIER, J.

We concur:

BIGELOW, P. J. GRIMES, J.

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[9] Although the charge of assault with a deadly weapon was arguably similar, appellant was not convicted of that crime.