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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. AMIN LITTLE, Defendant and Appellant.	2d Crim. No. B277959 (Super. Ct. No. 16PT-00457) (San Luis Obispo County)

"If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the [trier of fact] for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*People v. Sanchez* (2016) 63 Cal.4th 665, 684

(*Sanchez*).) In the instant matter, neither side objected to the introduction of such hearsay at trial.

Appellant Amin Little challenges the trial court's determination that he qualifies as a mentally disordered offender (MDO). (Pen. Code, § 2962.)[1] He contends that his trial counsel was ineffective for failing to object to evidence that was received in violation of *Sanchez*. He also claims that defense counsel was ineffective for failing to subpoena appellant's expert witness and for stipulating to the admission of the expert's report along with the report of one of the prosecution's experts. We conclude based on the limited record before us on appeal that counsel was not ineffective and that any error in admitting the evidence was harmless. We affirm.[2]

FACTS AND PROCEDURAL BACKGROUND

In 2012, appellant pled guilty to the offense of causing corporal injury to a spouse. (§ 273.5, subd. (a).) He was sentenced to four years in prison.

Appellant's parole release date was April 5, 2016. Prior to that date, appellant had received at least 90 days of treatment for his severe mental disorder. On April 4, 2016, the Board of Prison Terms (BPT) determined that appellant met the six criteria of an MDO.[3] (§ 2962.) As a condition of parole,

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[1] All further statutory references are to the Penal Code.

[2] Prior to oral argument, appellant requested that we take judicial notice of the appellate record in three other pending cases: *People v. Bona* (No. B277751), *People v. Lin* (No. B278102) and *People v. Busse* (No. B279445). We deny the request.

[3] The six MDO criteria are satisfied if "the defendant (1) has a severe mental disorder; (2) used force or violence in

appellant was required to accept treatment through the Department of State Hospitals (DSH). Appellant filed a petition challenging the BPT's determination. After appellant waived his right to a jury trial, the trial court found that he met the criteria of an MDO and denied the petition. The trial, which was held on August 30, 2016, occurred two months after *Sanchez* was decided. (See *Sanchez*, *supra*, 63 Cal.4th at p. 665.)

Dr. Brandi Mathews, an expert witness in MDO cases, met with appellant for 20 to 30 minutes and reviewed his medical and court records. She specifically reviewed multiple prior MDO evaluations, a probation report, interdisciplinary notes, physician progress notes, and both psychiatric and psychological assessments. At trial, Dr. Mathews testified as to four of the six criteria in the MDO statute (§ 2962).[4] First, she stated that appellant suffered from a severe bipolar disorder with psychotic features, which qualified as a severe mental disorder under the MDO statute. That opinion was based on a history of

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committing the underlying offense; (3) had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people." (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.)

[4] The second and fifth criteria were undisputed. Appellant used force or violence in committing the underlying offense of corporal injury to a spouse, and the parties stipulated that appellant was treated for his severe mental disorder at least 90 days in the year before being paroled. (See § 2962.)

symptoms appellant exhibited. This historical analysis of appellant's symptoms was likely based on documentary evidence.

Next, Dr. Mathews opined that appellant's severe mental disorder was an aggravating factor in his underlying criminal conviction. That opinion was based on the facts of the offense, which "showed the level of mood instability." At least part of her opinion was based on information appellant conveyed during their interview. For example, appellant told her that "there were spirits around his wife at the time of the offense and he was trying to grab the spirits."

Dr. Mathews also testified that appellant's condition was not in remission and that it could not be kept in remission without treatment. She based that opinion on her review of documentary sources. In her view, "it was evident that [appellant] continued to exhibit overt signs and symptoms of his severe mental disorder." She cited several examples, including a note by appellant's psychiatrist dated June 8, 2016, stating that appellant "reported . . . hearing voices from angels as well as dogs."

Finally, Dr. Mathews stated that appellant's severe mental disorder represented a danger of physical harm to others. Her opinion was based on the fact that appellant engaged in a "high level of violence" during his qualifying offense. She discovered from documentary sources that appellant had previously denied having a mental illness and, as a result, refused his medications. Eventually, he was placed on a *Qawi*[5] order. During their interview, appellant acknowledged his mental disorder, and stated he had not completed substance abuse treatment even though "he was under the influence of

[5] *In re Qawi* (2004) 32 Cal.4th 1 (*Qawi*).

alcohol at the time of the qualifying offense." Dr. Mathews also referenced appellant's prior criminal history, although it is not clear whether she learned of that history from documentary sources or through her interview with appellant.

Appellant testified that after beginning medication for his bipolar disorder, his symptoms improved. He said he would continue taking his medications if he was released from his commitment. Appellant further explained that his underlying offense occurred because he "was sick of getting hurt" from ongoing abuse from his wife. He stated he was drunk at the time, and his wife said something that "triggered" him and he "had a blackout." Thereafter, appellant divorced his wife. He did not believe he would be a danger to the public if he were released.

Although appellant intended to call Dr. Douglas Korpi of the DSH as an expert witness, Dr. Korpi did not appear at trial even though he was "informally" served with a subpoena. Instead, the prosecutor and defense counsel stipulated to admit Dr. Korpi's report into evidence. In Dr. Korpi's opinion, appellant did not meet the third and sixth MDO criteria, i.e., his severe mental disorder was not a cause or aggravating factor in the qualifying offense and he does not represent a substantial danger of physical harm to others. Dr. Korpi agreed he met the other four criteria.

In exchange for the stipulation to allow Dr. Korpi's report, defense counsel stipulated to the admission of a report by Dr. Sergio A. Castillo, a forensic psychologist with the California Department of Corrections and Rehabilitation. Dr. Castillo interviewed appellant and reviewed his "available medical records, documentation, and self-reports, which were considered to be reflective of the inmate's current state of mental health."

Dr. Castillo's report reinforced Dr. Mathews's testimony that appellant met the MDO criteria.

DISCUSSION

A. Defense Counsel's Failure to Object to Inadmissible Case-Specific Hearsay

Appellant contends that he received ineffective assistance of counsel because defense counsel did not object to evidence that he considers inadmissible case-specific hearsay under *Sanchez*, *supra*, 63 Cal.4th 665. The People respond that defense counsel had a reasonable tactical purpose for not objecting to the evidence and that, in any event, appellant has not demonstrated prejudice. We agree with the People.

1. Standard of Review

We review appellant's claims of ineffective assistance of counsel in accordance with the established standard of review for such claims on direct appeal. That is, "'where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [claim of ineffective assistance more appropriately decided in a habeas corpus proceeding].) And even where there is no conceivable reason for an act or omission, reversal is still unwarranted if a more favorable outcome is not reasonably probable absent the act or omission. (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.)

2. The Sanchez Rule

In *Sanchez*, *supra*, 63 Cal.4th 665, a gang expert testified about statements the defendant made to police officers,

as documented in various police records that were not admitted into evidence. The expert never met the defendant, but opined that the defendant was a gang member, based in part on the defendant's statements to the officers. (*Id.* at pp. 672-673.) Our Supreme Court held that an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686.) The court nevertheless reaffirmed the principle that an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) An expert may also tell the jury "generally the kind and source of the 'matter' upon which his opinion rests," so that the jurors can evaluate the probative value of the expert's testimony. (*Id.* at p. 686.) The restrictions on hearsay therefore come into play only when an expert conveys the actual content of that hearsay to the fact finder.[6]

3. Tactical Reasons for Failing to Object to Portions of Dr. Mathews's Testimony

Appellant cites nine instances in which Dr. Mathews testified to inadmissible case-specific hearsay. By way of example, Dr. Mathews described the facts of appellant's November 2012 offense and stated that according to the

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[6] This *Sanchez* rule concerning expert testimony is a rule of evidence under California statutory law and applies in both criminal and civil proceedings. (See *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 34 (*Reisig*) [the "aspect of *Sanchez* concerning state evidentiary rules for expert testimony applies in civil cases such as this nuisance lawsuit"]; *People v. Roa* (2017) 11 Cal.App.5th 428, 448-449 [applying *Sanchez* to civil sexually violent predator proceedings]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 403 [same].)

documents she reviewed, appellant continued to exhibit symptoms of his severe mental disorder. Defense counsel did not object to the testimony. Appellant believes that defense counsel either was unaware of *Sanchez* or mistakenly believed it did not apply to MDO proceedings. He acknowledges, however, that counsel may have been aware of *Sanchez* and had tactical reasons for not raising any objections. His position is that there were no valid tactical reasons for failing to make at least some *Sanchez* objections.

It is well established that "'"[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel" [citation].' [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 609-610; see *People v. Jones* (2003) 29 Cal.4th 1229, 1254 ["'"[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."'"]; *People v. Riel* (2000) 22 Cal.4th 1153, 1185 ["'Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions'"].)

As the People point out, a reasonable attorney might have elected to forego objections to case-specific hearsay rather than require the People to present live testimony or other direct evidence highlighting her client's severe mental disorder and the facts of his commitment offense. Defense counsel may have reasoned that an expert's recounting of hearsay would be less credible or vivid for the trier of fact than live, percipient testimony.

Moreover, at the time Dr. Mathews testified, defense counsel was planning to call its own expert witness, Dr. Korpi,

who likewise would recount and rely on case-specific hearsay in presenting his opinion testimony. In fact, his report, which was admitted, contains such hearsay.

In addition, even if Dr. Mathews had been precluded from conveying case-specific hearsay, she still would have been allowed to state her opinions and to indicate that they are based on hearsay without reciting the specific matters upon which she relied. Realizing that Dr. Mathews was going to opine that appellant met the criteria of an MDO, defense counsel chose to attack the basis for those opinions. To do so, counsel had to explore the case-specific facts Dr. Mathews learned through her review of documentary sources. For example, on cross-examination, defense counsel established that appellant's condition had improved on his current regimen of medication. Counsel also established that appellant had not been resistant to taking medications since being placed on the *Qawi* order. The only means of obtaining this evidence was to allow Dr. Mathews to testify to the facts contained in her documentary sources. Thus, on the record presented, we cannot conclude that defense counsel had no valid tactical reasons for failing to lodge a *Sanchez* objection to the case-specific hearsay.

4. Lack of Prejudice

Even if defense counsel was ineffective for not objecting to portions of Dr. Mathews' testimony, appellant has not demonstrated that there was a reasonable probability that the outcome would have been more favorable had she objected. (*In re Avena* (1996) 12 Cal.4th 694, 721.) As previously discussed, Dr. Mathews' opinions based on case-specific hearsay were admissible, as was her general description of the sources of information underlying those opinions. Those sources were

reliable, and her opinions established the criteria for the MDO commitment beyond a reasonable doubt.

Citing *People v. Wright* (2016) 4 Cal.App.5th 537, appellant contends that expert opinion testimony is not substantial evidence if it is not supported by evidence in the record. While it is true that "speculation is not evidence and cannot support . . . an involuntary commitment," Dr. Mathews's opinions were not speculative. (*Id.* at p. 546.) She interviewed appellant and reviewed his medical and court records in forming her opinions. Under *Sanchez*, Dr. Mathews was allowed to rely on hearsay and to tell the fact-finder in general terms that she did so. (*Sanchez*, *supra*, 63 Cal.4th at p. 685.)

Moreover, only two of the six MDO criteria were disputed by the experts. They agreed on the existence of the other four criteria. In Dr. Korpi's opinion, the prosecution had not established the third criterion, i.e., that appellant's severe mental disorder was the cause of or an aggravating factor in his commitment offense. But appellant admitted during his interview with Dr. Mathews that "there were spirits around his wife at the time of the offense and he was trying to grab the spirits." Appellant concedes that this evidence, which supported Dr. Mathews's opinion that appellant was experiencing "a level of psychosis," was not subject to a *Sanchez* objection.

Dr. Korpi also opined that the prosecution had not established the sixth criterion, i.e., that appellant poses a serious threat of physical harm to other people. Dr. Mathews testified, however, that appellant had admitted to her that he was drunk at the time of his commitment offense and that he had not completed any substance abuse treatment. Thus, Dr. Mathews's opinion as to appellant's continued dangerousness was not based

entirely on case-specific hearsay. It also was based on admissible statements made by appellant regarding his substance abuse history.

5. Admission of Dr. Castillo's Report

Appellant contends that defense counsel was ineffective for stipulating to the admission of Dr. Castillo's report. He claims the report contains at least 23 instances of inadmissible case-specific hearsay which, at a minimum, should have been redacted.

Defense counsel had a tactical reason for stipulating to the admission of Dr. Castillo's report. Dr. Korpi planned to testify that appellant did not meet two of the criteria listed in the MDO statute. Because Dr. Korpi did not appear to testify, defense counsel wished to admit his report in lieu of his testimony. The prosecution was willing to stipulate to admission of Dr. Korpi's report if defense counsel agreed to the admission of Dr. Castillo's report. Given that Dr. Korpi's opinions were not going to be admitted absent the stipulation, defense counsel had a reasonable tactical basis for the stipulation, despite any hearsay issues it presented. The stipulation also aided appellant by placing Dr. Korpi's opinions before the court.

In any event, appellant was not prejudiced by the stipulation. As other admissible evidence established the six MDO criteria, there was no reasonable probability that appellant would have received a more favorable outcome had defense counsel not entered into the stipulation.

B. Defense Counsel's Failure to Formally Subpoena Dr. Korpi

Appellant contends that defense counsel was ineffective for failing to subpoena Dr. Korpi and for failing to seek

a continuance when Dr. Korpi did not appear at trial. We are not persuaded.

When Dr. Korpi failed to appear at trial, the court asked if he had been subpoenaed. Defense counsel responded: "I did in the usual fashion that we undertake, which is to fax [a subpoena] up to DSH. They pass it along to the doctors and the doctors show up. It is not technically a valid subpoena method in that he wasn't personally served by myself or my agent. It's been our custom for three years, that practice."

In *People v. Angel* (2017) 9 Cal.App.5th 1107 (*Angel*), the defendant intended to call two police officers who were on the prosecution's witness list. Defense counsel did not subpoena the officers because of a custom between the public defender's office and the district attorney's office "which permitted defense counsel to not serve a second subpoena on officers that were on the prosecution's witness list." (*Id.* at pp. 1110-1111.) On appeal, the defendant claimed that defense counsel was ineffective due to his failure to subpoena the officers. (*Id.* at pp. 1111-1112.) The Court of Appeal disagreed, holding that "[r]easonably relying on opposing counsel's professional courtesy is effective assistance, in particular where that courtesy has developed into a common custom and practice." (*Id.* at p. 1112.)

Here, defense counsel faxed a subpoena for Dr. Korpi's appearance to DSH, relying on a three-year-old custom to ensure that MDO defense expert witnesses appear at trial. As in *Angel*, counsel's reasonable reliance on this "common custom and practice" constituted effective assistance. (*Angel, supra,* 9 Cal.App.5th at p. 1112.)

We further conclude that defense counsel was not ineffective for failing to request a continuance of the trial.

Counsel had Dr. Korpi's report, which contained the opinions to which he was expected to testify. In defense counsel's judgment, stipulating to the admission of Dr. Korpi's and Dr. Castillo's reports made the most tactical sense given the circumstances. Not only was counsel able to get Dr. Korpi's opinions before the trial court, but she also was able to avoid the possibility of the prosecution calling Dr. Castillo as a rebuttal witness.

We also reject appellant's contention that it is reasonably probable that appellant would have achieved a more favorable outcome had Dr. Korpi testified. The trial court considered the substance of Dr. Korpi's intended testimony, as set forth in his report, and noted that "there have been differences of opinion . . . from the doctors." Notwithstanding Dr. Korpi's opinion that appellant did not meet the third and sixth MDO criteria, the court found that the evidence showed that appellant met all six criteria. It is not reasonably probable that Dr. Korpi's live testimony would have changed the result.

Appellant asserts that Dr. Castillo's report was prejudicial and that had the evidence been limited to Dr. Korpi's testimony against Dr. Mathews's testimony, the judgment may have been different. We reject this assertion as speculative. Dr. Castillo's report simply bolstered the opinions articulated by Dr. Mathews through her testimony. There is nothing in the record to suggest that Dr. Castillo's opinions tipped the scales in the prosecution's favor. To the contrary, Dr. Mathews had credibility with the trial court, which had "heard Dr. Mathews testify many times." Dr. Mathews based her opinions on reliable sources, including an interview with appellant. The court acknowledged that the qualified experts had competing opinions, but "[could not] find that this [was] a petition that [could] be granted."

C. Cumulative Error

Appellant contends that even if the claims raised in this appeal were not individually prejudicial, "they were together cumulative prejudicial error." We disagree.

"The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.'" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, appellant has failed to show he was deprived of a fair trial. At most, appellant "has . . . shown that his '"trial was not perfect—few are."'" (*People v. Cooper* (1991) 53 Cal.3d 771, 839.)

DISPOSITION

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Gayle L. Peron, Judge
Superior Court County of San Luis Obispo

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