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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREG CHRISTOPHER
TONCHE,

Defendant and Appellant.

B277884

(Los Angeles County
Super. Ct. No. GA098142)

APPEAL from a judgment of the Superior Court for Los Angeles County, Michael Villalobos, Judge. Affirmed.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Greg Christopher Tonche appeals from a judgment of the superior court after a jury found him guilty of second degree burglary of a vehicle. Tonche contends that the officer who arrested him gave improper lay opinion testimony at trial about Tonche's guilt. As we explain below, we find nothing improper about the officer's testimony. We therefore affirm.

BACKGROUND

A. Factual Background

Around noon on August 27, 2015, Tonche threw a brick through the rear driver's side window of Rolando Medina's silver four-door Toyota Corolla as the car sat in a parking lot in Arcadia. An eyewitness watched Tonche break the car window and climb into Medina's car. Tonche made eye contact with the eyewitness, who was sitting in a nearby car, before he broke Medina's window.

After he broke the window, Tonche opened the car's back door and got in. Medina had left a small bag on the car's front passenger seat; Tonche rifled through the bag and left its contents strewn over the car's back seat. Tonche did not remove anything from the car. Tonche followed the eyewitness into a nearby store; one of the store's employees contacted police. Tonche left the store and walked back to the crime scene. Arcadia police almost immediately responded to an auto burglary in progress call; as the police arrived, Tonche laid face down on hot pavement in broken glass next to the car.

At the scene, Tonche was bleeding from his hand. Because he was injured, Tonche was taken by ambulance from the scene to Methodist Hospital of Southern California in Arcadia. The arresting officer, Adam Hernandez, followed the ambulance in his

patrol car. Hernandez followed Tonche's gurney into the hospital and stayed at the hospital with him.

As Hernandez followed the gurney from the ambulance into the hospital's emergency room, Hernandez heard Tonche tell the paramedics and hospital staff that "he cut himself breaking a window" and that "he broke into the wrong car."

B. Procedural Background

Tonche was charged with a single count of second degree burglary of a vehicle under Penal Code section 459.¹ The People also alleged prior convictions to invoke sentence enhancements under section 1170.12, subdivision (c)(1), section 667, subdivision (d), section 667.5, subdivisions (b) and (c).

The case was tried to a jury on July 14, 15, and 18, 2016. On July 18, the jury returned a guilty verdict on Tonche's second degree vehicle burglary charge.

Tonche waived his right to a jury trial on his prior convictions. After a court trial on the prior convictions, the trial court found true all of the alleged prior convictions.

The trial court sentenced Tonche to the midterm of two years for violation of section 459, doubled to four years under the "Three Strikes" law, and added an additional four years for prior convictions under section 667.5, subdivision (b), all to run consecutive. Tonche timely appealed.

DISCUSSION

A. Opinion Testimony

Hernandez heard Tonche tell the paramedics and hospital staff that "he cut himself breaking a window" and that "he broke into the wrong car." At trial, the People asked Hernandez why he

¹ Statutory references are to the Penal Code unless otherwise specified.

made a note of those two statements in his police report. Hernandez said that those two statements were significant because they were “relevan[t] to” the auto burglary aspect of the call to which he responded. Hernandez testified over Tonche’s objection that the “wrong car” comment was “interesting” to him because “it could [imply] that there was nothing in the car worth taking.”

Tonche contends the trial court abused its discretion by allowing Hernandez to testify about why Tonche’s statement was “interesting” to him over Tonche’s objection. Tonche contends the testimony was opinion testimony and, citing *People v. Prince* (2007) 40 Cal.4th 1179, refers to the testimony as putative expert testimony that Tonche was guilty of auto burglary. Tonche refers to the testimony as “‘expert opinion testimony on topics so common that persons of “ordinary education could reach a conclusion as intelligently as the witness.” ’ ”

The People characterize the testimony differently. The People contend Hernandez’s testimony was about the statement’s effect on his own investigation, and not about Tonche’s intent to steal or Tonche’s guilt. In reply, Tonche contends that “how and why [Hernandez] conducted his investigation was not an issue before the jury and not under challenge by the defense.”

California Evidence Code section 800 states: “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.” Hernandez was not testifying as an expert.

In spite of Tonche's argument to the contrary, why Hernandez conducted an auto burglary investigation *was* an issue before the jury and *was* under challenge by the defense. Tonche's defense relied heavily on observations by responding officers of Tonche's aberrant behavior and objective symptoms suggesting that Tonche might be under the influence of drugs. Tonche leveled a strong voluntary intoxication defense, and asked for and received a voluntary intoxication jury instruction. The core of Tonche's defense was that when he got into the back of Medina's Corolla and rifled through his belongings, Tonche lacked the necessary intent to steal something. Even if his intoxication defense was unsuccessful, Tonche argued that there was no evidence that he intended to do anything other than get arrested—that his actions were a “cry for help.” Tonche argued that there was nothing to suggest that he meant to take anything from the car, and so should not have been charged with auto burglary.

Tonche's defenses necessarily placed Hernandez's observations at issue and challenged why he conducted an auto burglary investigation. The suggestion that there was no evidence of auto burglary *necessarily* prompts the question why an officer would have been investigating an auto burglary. Hernandez was not asked about whether Tonche intended to steal anything from Medina's car, or about Tonche's veracity; rather, Hernandez was asked to explain to the jury how *he* interpreted Tonche's statement and why *he* conducted an auto burglary investigation rather than a vandalism or auto tampering investigation. (See *People v. Medina* (1990) 51 Cal.3d 870, 887.) The evidence could also have been helpful to a jury for

a clear understanding of Hernandez's observations of Tonche's odd behavior in the context of a voluntary intoxication defense.

"A lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 130; *People v. Chatman* (2006) 38 Cal.4th 344, 397.) The testimony to which Tonche objects is not an opinion about Tonche's state of mind or intent, but it could be interpreted as describing behavior consistent with a specific intent.

We are not persuaded by Tonche's arguments. Hernandez's testimony was both relevant and helpful to the jury, particularly in light of the defenses Tonche employed. We find, therefore, that the trial court acted well within its discretion in admitting Hernandez's testimony over Tonche's objection.

B. Prejudice

The trial court did not abuse its discretion, but even if we were to conclude that it did, we would still affirm. Any error was harmless, and not prejudicial. Error is prejudicial "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

There is no reasonable probability that the outcome would have been different had the trial court excluded Hernandez's statement about his interpretation of Tonche's "wrong car" admission. Tonche admitted throwing a brick through the rear window of Medina's Corolla. An eyewitness watched Tonche open the car door and get into the car. Medina testified that a bag he

had left on the front seat was opened and its contents rifled through and strewn throughout the back seat. And Tonche did not object to the introduction of his “wrong car” statement, only Hernandez’s interpretation of it. The evidence is overwhelming that Tonche intended to steal from Medina when he broke into the Corolla.

On the record before us, we find that *if* the trial court’s admission of Hernandez’s statement was error, it was harmless.

DISPOSITION

The judgment is affirmed.

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CHANNEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.