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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MICHAEL J. BUSSE, Defendant and Appellant.	2d Crim. No. B279445 (Super. Ct. No. 16PT-00333) (San Luis Obispo County)

A jury determined that Michael J. Busse met the criteria as a mentally disordered offender (MDO). (Pen. Code, § 2970.) The trial court ordered him to undergo one year of additional treatment. (Pen. Code, § 2972.) Busse contends the judgment should be reversed because the court admitted case-specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and erroneously instructed the jury how to evaluate expert testimony based on that hearsay evidence. He also argues ineffective assistance of counsel because counsel did not preserve his contentions by making proper objections at trial. We affirm.

BACKGROUND

A psychologist evaluated Busse and determined that he met the criteria for an MDO commitment extension. (Pen. Code, § 2970.) The psychologist testified that Busse had a severe mental disorder, schizophrenia, which was consistent with his diagnosis at the Atascadero State Hospital (ASH). She said that his disorder was not in remission.

The psychologist based her opinions on a review of Busse's criminal history, previous MDO evaluations, and prior forensic assessments. She examined law enforcement reports. She consulted with Busse's treating psychologist and treating psychiatrist. She also personally interviewed Busse.

According to law enforcement reports, Busse committed his MDO-qualifying offense when he assaulted ASH staff members. The following year he had an argument with his public defender, assaulted a deputy, and was removed from a courtroom. The reports conclude that Busse has a history of delusions and paranoia, a conclusion with which the psychologist agreed.

Hospital records indicate that Busse had a low participation rate in his treatment groups at ASH. The records show he did not attend groups designed to educate patients about their mental illnesses, and that he was placed on an involuntary medication order. The psychologist worried about Busse's risk for medication noncompliance in an unstructured setting. Busse's history of drug abuse and failure to develop a relapse prevention plan also concerned her.

During an interview, Busse and the psychologist discussed his discharge plan. Busse remained cooperative during the interview until the psychologist brought up letters he wrote

threatening to kill the governor, his MDO evaluators, his parole agents, and doctors at ASH. He then grew agitated and guarded and stated that he was not the person who sent the letters.

DISCUSSION

Hearsay Evidence

Busse argues the trial court erroneously admitted case-specific hearsay in violation of *Sanchez*. In most instances, Busse forfeited his argument because he did not properly object at trial. But that forfeiture did not constitute ineffective assistance of counsel. In two instances, we agree the court erred, but the error was harmless.

1. Forfeiture

A trial objection must be "sufficiently specific to encompass" the issue raised on appeal. (*People v. Williams* (1988) 44 Cal.3d 883, 906.) If defendants do not object to testimony as hearsay, they forfeit the issue on appeal. (*People v. Doolin* (2009) 45 Cal.4th 390, 448 (*Doolin*); see also *People v. Roa* (2017) 11 Cal.App.5th 428, 452-453 (*Roa*) [forfeiture doctrine applies to *Sanchez* objections]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408-409 (*Burroughs*) [same].) This is especially true if the defendant elicits the same testimony on cross-examination. (*People v. Boone* (1954) 126 Cal.App.2d 746, 749 (*Boone*).)

During her testimony, the psychologist testified about the contents of letters Busse wrote and threats he made; other psychologists' and psychiatrists' opinions of Busse's condition; reports detailing Busse's criminal history, violent past, and substance abuse; the details of prior hospital admissions; records of Busse's therapy attendance and medication history while at ASH; and what may happen if Busse is released.

Counsel objected to the testimony three times: When the psychologist testified that she agreed with a report concluding that one of Busse's prior offenses was linked to his mental illness, counsel objected that he "would rather she give her own opinion rather than an opinion related by other doctors." When the psychologist explained the basis for her opinion that Busse's mental disorder was not in remission, counsel objected that she was "buttressing her opinion by providing opinions offered by others." And when the psychologist described the incident between Busse and his public defender and the deputy, counsel objected that the testimony was nonresponsive. The trial court overruled all three objections.

Busse's two objections to the testimony about other experts' opinions were sufficiently specific to encompass the *Sanchez* claims he raises on appeal. (*People v. Bob* (1946) 29 Cal.2d 321, 324-325 [objection to "any statement made by" outside witness sufficiently specific to raise hearsay issue on appeal]; see also *People v. Campos* (1995) 32 Cal.App.4th 304, 307-308 (*Campos*) [nontestifying psychiatrist's report is hearsay].) But his nonresponsive objection was not sufficiently specific to preserve his hearsay claim. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 856, 865, disapproved on another ground by *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15; cf. *Burroughs*, *supra*, 6 Cal.App.5th at p. 408 [foundation objection insufficient to preserve hearsay issue].) That claim is forfeited. (*Doolin*, *supra*, 45 Cal.4th at p. 448.)

Busse lodged no hearsay objections to the balance of the psychologist's testimony, and brought out reiterations of much of it—including details of his medical charts at ASH, his medical regimen, and prior MDO evaluations—on cross-

examination. By not objecting he forfeited his hearsay claims. (*Boone*, *supra*, 126 Cal.App.2d at p. 749.)

Busse contends an issue is not forfeited if an objection would have been futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159.) But additional objections would not have been futile: The overruling of an objection to some evidence as hearsay does not render futile hearsay objections to other evidence. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 585, fn. 7.) Nor does a court's unfamiliarity with a case render an objection futile, since "defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

2. Ineffective assistance of counsel

An MDO defendant is entitled to effective assistance of counsel. (*People v. Smith* (2013) 212 Cal.App.4th 1394, 1407, fn. 7.) To demonstrate that counsel provided ineffective assistance, Busse must show both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.) We evaluate counsel's performance "in the context of the available facts," and if the "record on appeal fails to disclose why counsel acted . . . in the manner challenged, we will affirm the judgment."[1] (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

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[1] To bolster his claim of ineffective assistance of counsel, Busse requests we take judicial notice of the appellate record in three other MDO cases where, as here, the attorneys failed to object to case-specific hearsay. Those records are not relevant here: They involve different defendants, different attorneys, and different judges. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414, fn. 41.) That similar errors allegedly

Busse's claim fails because the record does not demonstrate that counsel's performance was deficient. "Failure to object rarely constitutes constitutionally ineffective legal representation." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) And "this is not one of those rare cases": Not objecting to the proffered evidence on hearsay grounds may have been designed to allow the psychologist to testify to case-specific hearsay to avoid having other experts take the stand and reinforce her testimony. (*People v. Maury* (2003) 30 Cal.4th 342, 419 (*Maury*); see *People v. Gray* (2005) 37 Cal.4th 168, 214.) An "inherently tactical" decision is not deficient performance. (*Maury*, at p. 419.)

3. Harmless error analysis

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." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) We review an order for admission of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) If evidence was erroneously admitted, we review for harmless error under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Roa*, *supra*, 11 Cal.App.5th at p. 455.)

The trial court abused its discretion when it admitted the psychologist's testimony of other doctors' opinions over Busse's objection. But the error was harmless. Evidence admitted without objection is properly considered in the harmless error analysis. (Evid. Code, § 140; see also *Powers v. Board of Public Works* (1932) 216 Cal. 546, 552 (*Powers*) ["incompetent evidence admitted without objection is sufficient to support a

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occurred in those cases does not render them relevant. (*People v. Zamora* (1980) 28 Cal.3d 88, 96.)

finding"], superseded by statute on another ground as stated in *Villain v. Civil Service Com. of S.F.* (1941) 18 Cal.2d 851, 858-859.)

Such evidence was considerable here, and included law enforcement officers' reports; prior MDO evaluations and forensic assessments; the testifying psychologist's interview with Busse; reports about his criminal history, past hospitalizations, and threats he had made; and his records from ASH. Consideration of the evidence admitted without objection and the evidence properly admitted as compared to the minor instances of improperly admitted hearsay renders the latter harmless. (*Campos*, *supra*, 32 Cal.App.4th at pp. 308-309 [expert's references to prior medical evaluations harmless where they consumed small portion of testimony and remainder of testimony sufficient to show that defendant met MDO criteria].) Reversal on this ground is unwarranted. (*People v. Lloyd* (1950) 98 Cal.App.2d 305, 313 (*Lloyd*) [defendant waives right of reversal if he or she "remains silent while the court does or allows an unauthorized act"].)

Jury Instruction

A trial court must instruct the jury on the law necessary to its understanding of the case. (*People v. Roberge* (2003) 29 Cal.4th 979, 988; see Pen. Code, § 1127b [instructions on expert testimony].) We independently review whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) If they do not, we review for harmless error under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1194.)

The trial court instructed the jury pursuant to CALCRIM No. 332, which states, in relevant part: "You must

decide whether information on which the expert relied is true and accurate." This instruction was erroneous only to the extent it "required the jury to evaluate the [psychologist's] testimony, unmoored from the admissible evidence that supported the . . . opinion." (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 416 (*Vega-Robles*); see also *Sanchez*, *supra*, 63 Cal.4th at p. 684 [without "independent competent proof of . . . case-specific facts," jurors "cannot decide whether the information relied on by the expert 'was true and accurate' without considering whether the specific evidence identified by the instruction, and upon which the expert based [her] opinion, was also true"].) But Busse did not object to the instruction.

To the extent CALCRIM No. 332 instructed the jury to consider evidence to which there was no proper objection at trial, Busse forfeited his contention because the instruction correctly stated the law and Busse did not object to it. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 (*Hudson*).) Most of the evidence presented was properly admitted because Busse did not object at trial. (*People v. Armstrong* (1991) 232 Cal.App.3d 228, 233, fn. 6.) There was thus the requisite "independent competent proof" of most of the facts on which the psychologist relied. (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) An objection to the instruction would have been meritless, negating any claim of ineffective assistance. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038 [prejudice]; *People v. Ochoa* (1998) 19 Cal.4th 353, 463 [deficient performance].)

To the extent CALCRIM No. 332 instructed the jury to consider improperly admitted hearsay, it was an incorrect statement of law that required no objection for Busse to raise his erroneous instruction contention on appeal. (*Hudson*, *supra*, 38

Cal.4th at p. 1012.) But the error was harmless. As above, it is proper to consider the evidence to which Busse did not properly object at trial in the harmless error analysis. (Evid. Code, § 140; *Powers*, *supra*, 216 Cal. at p. 552.) That evidence was extensive, and renders any instructional error harmless beyond a reasonable doubt. (*Vega-Robles*, *supra*, 9 Cal.App.5th at p. 417; *Lloyd*, *supra*, 98 Cal.App.2d at p. 313.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

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