

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL G. ANDRADE,

Defendant and Appellant.

B281609

(Los Angeles County
Super. Ct. No. PA065012)

APPEAL from an order of the Superior Court of
Los Angeles County. Hilleri G. Merritt, Judge. Affirmed.

Rudy Kraft, 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, Victoria B. Wilson, Scott A. Taryle and
Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and
Respondent.

After a court trial on March 12, 2010, Miguel Andrade was found not guilty by reason of insanity on various charges arising from an incident in which he threatened his landlord with a gun and poured gasoline on the sidewalk outside of the residence in which he was renting a room. The trial court ordered his commitment to a state hospital.

On September 12, 2016, Andrade filed a petition for restoration of sanity under Penal Code section 1026.2.¹ The first trial on Andrade's petition resulted in a mistrial when the jury could not reach a verdict. The parties then stipulated that the trial court could decide the petition based upon the record from the first trial. The court denied the petition in an oral ruling on March 14, 2017. Andrade filed a timely notice of appeal from the order denying his petition.²

On appeal, Andrade argues that: (1) the evidence was insufficient to support the trial court's ruling; and (2) the trial court improperly considered inadmissible case-specific hearsay in reaching its decision. We reject both arguments.

Andrade forfeited the second argument, as he did not object at trial to the evidence he argues on appeal was inadmissible. We also reject Andrade's argument that the lack of an objection amounted to ineffective assistance of counsel, as his trial counsel

¹ Subsequent undesignated statutory references are to the Penal Code.

² Such an order is appealable under section 1237, subdivision (b). (See *People v. Coleman* (1978) 86 Cal.App.3d 746, 750.)

might have had valid strategic reasons to permit the challenged testimony.

We reject Andrade's first argument based upon the applicable standard of review. As explained below, Andrade provided evidence from which a reasonable fact-finder could conclude that he is not now a danger to the health and safety of others so long as he is taking the medication prescribed for his mental illness. However, under the deferential standard that we must employ on appeal, the issue that we decide is not whether we find Andrade's evidence persuasive, but rather whether the trial court could reasonably rule against Andrade based upon the evidence before it. Because there was sufficient evidence in the record for the trial court reasonably to conclude that Andrade could pose a danger to others under some circumstances if living unsupervised in the community, we must affirm.

BACKGROUND

1. *The Law Concerning Restoration of Sanity*

Section 1026.2 establishes a two-step procedure to determine if sanity has been restored to a person who has been committed to a treatment facility following a finding of not guilty by reason of insanity. First, after a period of commitment of at least 180 days, the person is eligible for a hearing in which the court determines whether the person will be a danger to others "if under supervision and treatment in the community." (§ 1026.2, subds. (d) & (e).) If the person does not pose such a danger, the court will order the person placed in a "forensic conditional release program," which includes outpatient supervision and treatment. (§ 1026.2, subd. (e).)

Second, after one year in such an outpatient program, the person is entitled to a jury trial to determine if his or her sanity

has been restored. (§ 1026.2, subd. (e); *In re Franklin* (1972) 7 Cal.3d 126, 148 [interpreting prior section].) Under section 1026.2, the restoration of sanity means that “the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder.” (§ 1026.2, subd. (e).)

2. *Andrade’s Offense*

On September 9, 2009, Andrade was charged in a three count information with: (1) criminal threats under section 422; (2) attempting to burn a structure under section 455; and (3) assault with a firearm under section 245, subdivision (a)(2). The charges resulted from an incident on July 12, 2009 during which Andrade engaged in bizarre behavior and threatened his landlords, Lucky Sidik and Dede Santana.

According to testimony at the preliminary hearing, when Sidik and Santana returned to their house in the afternoon of July 12, 2009, Andrade asked them to go inside the house. Andrade made some reference to taking or drawing his blood, and challenged Sidik to a fight. Andrade was wearing shorts and shoes and was covered with dirt or some kind of blackening material.

Sidik and Santana began to leave the house, but Andrade met Santana carrying a gun. Andrade held the gun to Santana’s head and told her, “ ‘we’ll die together.’ ” Andrade then put the gun down and went to his room, saying he was “going to burn down the house.” Santana left the house and called the police.

Andrade came outside carrying a container of gasoline. He poured the gasoline out in front of the house. Sidik saw that Andrade was also carrying a lighter.

At the sanity restoration trial, Andrade testified that he was delusional at the time of these events. He explained that his

work hours had been drastically cut because of the economic downturn. The resulting financial stress led to his delusions. He believed that the government was intentionally creating the recession through the Federal Reserve. He thought he was getting messages from the television and from “listening to the room.” He also had paranoid thoughts that Sidik would attack him with a knife because he had not paid his rent. He did not intend to hurt anyone with his gun, but he wanted to “establish [his] dominance” with the gun and then walk away from the incident. He also did not intend to hurt anyone by starting a fire, but poured the gasoline in front of the house to “create a fire line.” He was “very delusional at the time.”

3. *Andrade’s Conviction and Commitment*

Andrade pled not guilty by reason of insanity. Following psychiatric evaluations, the parties stipulated to a court trial based on the court’s review of the preliminary hearing transcript and the doctors’ reports.

The court found Andrade not guilty by reason of insanity. The court ordered Andrade committed “to the California Department of Mental Health for placement in a state hospital pursuant to . . . section 1026 until such time as his . . . sanity is restored.” Confinement was limited to a period not to exceed 14 years and eight months, less credit for 295 days in custody, which was the maximum possible state prison sentence for the charged offenses.

4. *The Trials on Andrade’s Application for Restoration of Sanity*

Andrade was placed in Patton State Hospital (Patton). In late 2011 and early 2012, Patton and the Gateways Forensic Conditional Release Program in Los Angeles (CONREP) provided

reports offering the opinion that Andrade was “no longer a danger to the health and safety of others while under the supervision and treatment of the community.” Based upon those reports, after a hearing on March 28, 2012 the court placed Andrade on outpatient status under CONREP’s supervision.

On September 12, 2016, Andrade filed an application for restoration of sanity. A jury trial on Andrade’s application took place from January 25 to January 30, 2017.

a. *Andrade’s evidence*

Andrade’s witnesses included two experts, his sister, and an employee of the CONREP facility where he lived as an outpatient. Andrade also testified.

Andrade’s two experts, Dr. Sanjay Sahgal and Dr. Phani Tumu, were both appointed to evaluate Andrade in connection with his application for restoration of sanity, and to offer an opinion as to whether he continued to pose a danger to others. Tumu was originally appointed by the district attorney, but testified for Andrade.

Both doctors are board certified in general psychiatry and forensic psychiatry. Sahgal has testified in court about 1,000 times and Tumu has testified over 100 times. Both doctors testified that, despite their extensive prior experience, they were not aware of any case in which CONREP had recommended that a patient be restored to sanity.

Sahgal and Tumu each met with Andrade for about an hour and reviewed his treatment records. Both doctors offered the opinion that Andrade suffers from schizophrenia, but that his medication for that disease is effective. Both also testified that, so long as Andrade takes his medication, Andrade does not pose a substantial danger to others. Tumu offered the further opinion

that “[a]s long as a therapeutic dose of medication is given, [Andrade’s] symptoms will be controlled and he can resume a normal life.” Tumu testified that, in his opinion, Andrade has “been restored to sanity.”

Andrade’s sister, Amalia Ellis, lives in Hollister, in Northern California. She testified that she and her husband were prepared to provide financial support, housing and transportation to Andrade if he were unconditionally released. She had researched the mental health services in her area and knew the resources that were available if needed.

Andrade testified that, if unconditionally released, his immediate plans were to continue living in the board and care facility where he currently lived, continue to go to college, and eventually to get a job. His preference is to live in Los Angeles. Andrade has income through social security. He also has access to transportation through a card issued to disabled persons permitting bus access and van services. Andrade volunteers at the Veteran’s Administration, where he has the possibility of obtaining a paid position.

Andrade explained that he was delusional at the time he committed the underlying offense. Since taking his prescribed medication, his thinking is a lot more clear and he has insight into what triggered his offense. He intends to keep taking his medication if released.

b. *The district attorney’s evidence*

The district attorney called two professionals employed by CONREP, Miranda Gibbs and Ashley Cabadas. Gibbs is a psychologist and forensic evaluator for CONREP. She evaluated Andrade in connection with his petition for restoration of sanity. Cabadas was Andrade’s “forensic clinician” at the time of trial.

Gibbs testified that, in her opinion, Andrade was not “appropriate for unconditional release.” She testified that “without the structure of our program, [Andrade] remains at an elevated risk for reoffense or dangerousness.”

Gibbs based her opinion in part on her observation that Andrade has residual symptoms of his mental illness. Those symptoms relate to an interest in “conspiracy theories, government oversight, fringe kinds of topics.” These behaviors are “similar to ones that were going on at the time of his crime.”

Gibbs acknowledged that Andrade has been in the CONREP program since 2012 and has been a compliant patient without any incidents of violence. Andrade has taken his medication and reliably shows up for appointments. He has also successfully taken college classes. Nevertheless, Gibbs’s opinion was that Andrade poses a threat to the community if unsupervised because of his residual symptoms and the lack of a support system for him in Los Angeles.

Gibbs also testified about an incident that was reported to Andrade’s treatment team in December 2016, just about a month before trial. According to Andrade’s roommate, Andrade was engaging in “bizarre, obsessive-type behaviors.” Andrade’s treatment team responded to the reports by changing Andrade’s medication and temporarily moving him to a locked satellite facility.

Cabadas testified that she has met with Andrade about 10 times to conduct individual psychotherapy. Andrade reports that he takes his medication, but he frequently brings up “research and self-help books that state that one can be weaned off of their psychotropic medication.” She also testified that, after the reports of his bizarre behavior in December, Andrade was more

anxious in their sessions. She has noted “evidence of residual paranoia” and “thought disorder,” including paranoid thinking about the government and concerns about being monitored through the television set. Andrade did not appear to recognize that such thinking was a remnant of his mental disease, which Cabadas found concerning.

Cabadas spoke to Andrade’s sister around the time that Andrade was moved temporarily to the satellite facility in December. From their conversation, it appeared that Andrade had not told his sister why his medication had been changed and why he was moved to the other facility. Andrade’s sister also did not appear concerned that Andrade had an increased interest in researching “fringe topics,” and said that a lot of people research such topics. This also concerned Cabadas, as Andrade’s sister is an important part of his support network.

Cabadas testified that she believed Andrade “could potentially be dangerous if released from a very supervised program such as ours.” Thus, CONREP did not recommend his restoration to sanity.

c. The trial court’s findings

The jury could not reach a verdict, and the court declared a mistrial on January 30, 2017.³ The parties subsequently stipulated that the trial court could decide the case based upon the record of the jury trial.

On March 14, 2017, the court heard arguments and issued an oral ruling denying Andrade’s request for restoration of

³ The jury reported that it was split 7-5 in favor of a finding of restoration of sanity.

sanity. The court found that Andrade “is doing extremely well under CONREP.” However, the court noted that was not the issue, and that the court must decide “whether the petitioner has shown by a preponderance of the evidence that Mr. Andrade is not a danger to others because of the medication he takes, and that he will continue to take.”

The trial court found that, because of Andrade’s desire to wean himself from his medication and the fact that his support system was so far away, “at this juncture, I do not feel that the petitioner has met [his] burden.” The court also referred to the evidence that Andrade is “still rather fascinated with conspiracy theories.”

The trial court explained that it had considered the testimony of Saghal and Tumu, but concluded that the CONREP doctors “have more interaction with Mr. Andrade.” The court also noted that, during Andrade’s testimony, “when speaking of or questioned about his interests in conspiracy theories and his desire to one day perhaps wean himself off the medication . . . I wouldn’t go so far to say Mr. Andrade became agitated as much as his demeanor did change a little bit and became very concerned.”

The court complimented Andrade on his attitude, his punctuality, and his goals and progress in the treatment program. The court told Andrade that “[y]ou are doing everything you need to do, and I truly believe you will achieve the goal of restoration of sanity. I just don’t think that goal has been met yet.”

DISCUSSION

1. *Substantial Evidence Supports the Trial Court's Ruling*

We apply the substantial evidence standard of review to Andrade's argument that the evidence does not support the trial court's decision. Under that standard, an appellate court reviews the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is " 'reasonable, credible, and of solid value.' " (*People v. Avila* (2009) 46 Cal.4th 680, 701, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) In conducting such a review, the court " 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Avila*, at p. 701, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Reversal is not warranted "simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Lindberg*, at p. 27.) An appellate court "neither reweighs evidence nor reevaluates a witness's credibility." (*Ibid.*)

Andrade argues that two aspects of the evidence in this case warrant reversal. First, he argues that the trial court should have accepted the testimony of Sahgal and Tumu because their qualifications are superior to those of the CONREP experts, and because CONREP has an institutional bias against recommending the release of patients. Second, he argues that the stated reasons for the CONREP experts' opinion that Andrade was not ready for release were not sufficient to support their opinion. We reject both arguments.

a. *This court may not re-weigh conflicting expert testimony*

The trial court in this case was faced with the task of weighing competing expert testimony. On the one hand, the appointed experts—Sahgal and Tumu—both offered opinions supporting the conclusion that Andrade’s sanity had been restored. On the other hand, the CONREP professionals—Gibbs and Cabadas—testified that, while doing well, Andrade was not yet ready for unconditional release into the community.

Weighing conflicting expert opinions is the task of a fact-finder. We may not substitute our judgment for the judgment of the trial court concerning which expert testimony to believe unless no reasonable trier of the facts could accept the opinions of the experts that Andrade urges us to disregard. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292 (*Schmidt*) [“An expert’s opinion is substantial evidence if it has evidentiary support and is accompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion”].)

Andrade has not provided any valid ground to reject the expert testimony supporting the trial court’s ruling. Andrade argues that Sahgal and Tumu are more qualified than the CONREP professionals, and that Sahgal is more credible because he was appointed by the trial court. Such credibility arguments may provide reasons for a fact-finder to believe one expert over another, but they do not provide any basis for reversal on appeal. (See *Schmidt, supra*, 228 Cal.App.4th at p. 1298 [rejecting argument that the jury should not have believed an expert witness because “we do not reweigh evidence or assess the credibility of witnesses on review for substantial evidence”].)

Andrade also claims that the trial court's decision to reject the conclusions of the appointed experts and to rely upon the observations of the CONREP witnesses "amounts to a determination that no one gets out of CONREP without CONREP's explicit permission." Andrade suggests that the trial court's ruling "demonstrates a fundamental flaw" in the system, because "[i]t appears . . . that the Los Angeles CONREP program rarely approves of sanity restoration."

It is not our task to evaluate the wisdom of the system to determine the restoration of sanity in California or to judge CONREP's record of performance within that system. Our role is simply to determine whether the trial court made a rational decision based upon the evidence in this case. The record shows that the trial court did so.

Nothing in the record suggests that the trial court believed it was *required* to accept the conclusions of the CONREP witnesses. The court weighed the qualifications, the objectivity and the basis for the opinions of both the appointed experts and the CONREP experts. The court noted that the opinions of Sahgal and Tumu were "important," but were not "the end all, be all." Referring to testimony that the CONREP witnesses had spent more time with Andrade than had the appointed experts, the trial court stated that "there is a difference between interviewing someone in a very clinical setting, maybe an office setting, and seeing someone day in and day out." The court reasoned that "doctors Gibbs and Cabadas, while young, and one of them relatively new to CONREP, they do have more interaction with Mr. Andrade." And the trial court considered "[t]he concerns [Gibbs and Cabadas] expressed, simply that

[Andrade's] got this desire to wean himself off medication," and "that he is still rather fascinated with conspiracy theories."

The trial court also considered and rejected Andrade's argument that the CONREP witnesses were biased. Andrade argued at trial that CONREP has financial reasons to retain patients, and rarely if ever recommends finding that a resident's sanity has been restored. The trial court disagreed. The court explained that it did "not believe that CONREP has any financial gain with Mr. Andrade insofar as there are plenty of people waiting to come out of Patton and Metropolitan to be a part of CONREP," and that "it is not as if restoration of sanity is granted that CONREP has somehow got some bias because they are losing money."⁴ Thus, the trial court clearly made a decision to credit the testimony of Gibbs and Cabadas, not simply because they were employed by CONREP, but because they had more experience with Andrade; they had no reason to lie; and they presented credible reasons for their conclusions.

On this record, Andrade's argument that the trial court committed reversible error in accepting the conclusions of the

⁴ There was support in the record for these conclusions. Gibbs testified that CONREP is funded through a budget that is set annually, and that Andrade's absence from the program would not affect its funding. She also testified that "we always have people coming in [to CONREP]," and that CONREP "typically [has] a wait list." With respect to the number of people that CONREP recommends for restoration of sanity, she testified that CONREP has, on average, about four patients per year who petition for restoration of sanity, and that within the last 12 to 24 months CONREP had recommended four persons for restoration of sanity.

CONREP experts amounts to a claim that, as a matter of law, a trial court *must* reject the testimony of CONREP witnesses if that testimony is not supported by an appointed expert. That is not the law. We therefore reject Andrade's claim that the trial court erred in weighing the expert testimony.

b. *Sufficient evidence supports the conclusion that Andrade was not ready for unconditional release*

Andrade is on more solid legal ground in arguing that the *reasons* that the CONREP experts provided for their opinions were insufficient to support the conclusion that Andrade continued to present a danger to others. An expert opinion has no evidentiary value if it is "unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion," because "an 'expert opinion is worth no more than the reasons upon which it rests.'" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, quoting *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-525.) However, while Andrade's argument has an appropriate legal basis, we conclude that it is not supported by the record.

Among other things, Gibbs and Cabadas based their conclusions that Andrade could still pose a danger to others on: (1) Andrade's continuing interest in conspiracy theories, which they identified as a residual symptom of, and potential trigger for, his mental illness; (2) Andrade's interest in research and books concluding that one can be weaned off of psychotropic medication; and, (3) problems with the support system on which Andrade would rely if released.

Andrade argues that none of these reasons rationally supports the conclusion that he poses a danger to others. He

argues that, even if an interest in conspiracy theories is a residual symptom of his mental illness, it does not demonstrate that he will engage in dangerous behavior while on medication that has been effective in controlling that illness. He also argues that the evidence does not show he will stop taking the medication. He has taken the medication consistently since entering treatment, and he acknowledged in his testimony that he must take the medication for the rest of his life. He reasons that his “interest in researching whether he could ever stop taking his medication did not justify an inference that he would not take his medication.” Similarly, he argues that the location of his primary support structure in the Bay Area did not justify an inference that he will stop taking the medication.

Although Andrade’s arguments are reasonable, one cannot dismiss a contrary view as *unreasonable* based upon the evidence. Because that is the standard we must employ, we decline to reverse the trial court’s ruling.

Conspiracy Theories

The expert testimony concerning Andrade’s continuing interest in conspiracy theories was mixed. Sahgal testified that Andrade’s interest did not concern him, as he saw no evidence of a preoccupation with such theories or of delusional thinking. He explained that, if Andrade had a pathological interest in such theories, he would not have been able to “contain it” in the hour that Sahgal met with him. Tumu similarly testified that he would not be concerned if Andrade was continuing to research conspiracy theories. He explained that, even though Andrade was preoccupied with the “Illuminati” at the time of his offense and was experiencing delusions about hearing voices and being monitored, at that time he was in a “psychotic state of mind.” He

is now on medication, and many people have an interest in conspiracy theories without acting “out on it.”

In contrast, Gibbs testified that Andrade’s interest in conspiracy theories is a residual delusion that contributes to “an elevated risk for reoffense or dangerousness.” Gibbs explained that CONREP does not “require that our clients are symptom-free,” but it does expect “that clients are able to recognize that it is possible that they are still having symptoms.” She testified that, in interviews, Andrade “demonstrated an inability to recognize” that his continuing interest in conspiracy theories could be a trigger for delusions and was not a good idea. Cabadas testified similarly that, although Andrade is able to identify a focus on conspiracies as a “trigger for his mental illness,” he is “unable to recognize that he is actively engaging in those behaviors while even in the program.”

Other testimony also supported the conclusion that Andrade’s continuing interest in conspiracy theories is a risk factor for delusions that might pose a danger. Andrade himself acknowledged that researching conspiracy theories could place him “at risk for decompensation,” although he explained that it would not be problem so long as he is not obsessed with a specific area. Andrade’s sister testified that Andrade had not discussed conspiracy theories with her for years, and that it would affect her opinion that Andrade was ready for release if she knew he was actively researching conspiracy theories on the internet.

While the testimony was conflicting, there is sufficient evidence in the record to support the trial court’s reliance on Andrade’s continuing interest in conspiracy theories as a risk factor for future dangerous behavior. The court fairly characterized the testimony of Gibbs and Cabadas as expressing

a concern “that going back toward conspiracy theory might trigger some of the things that triggered back in ’09.”

Medication

There was no dispute that Andrade has consistently taken his medication, and Andrade testified that he understands he must be on medication for the rest of his life. However, while far from compelling, there is sufficient evidence in the record to support the trial court’s conclusion that Andrade has a “desire to wean [himself] off the medication.”

Cabadas testified that Andrade is “frequently bringing up research and self-help books that state that one can be weaned off of . . . psychotropic medication.” Gibbs also testified that Andrade mentioned such research in his initial interview with her, although he indicated “that wasn’t his plan.” Gibbs characterized Andrade’s statements to her and to Cabadas as indicating that, despite Andrade’s stated intention to take his medications, “that might not necessarily be the case.” The trial court could rationally infer from the evidence of Andrade’s interest in the feasibility of stopping psychotropic medication that there is some risk he might attempt to do so.

Moreover, there is evidence in the record that exposure to triggers for Andrade’s prior delusions could pose a risk even if Andrade continues to take his medication. Gibbs analogized the risk of Andrade’s continued exposure to conspiracy theories to the risk that celebrity stalkers face if they continue to research or follow social media stories about the persons they stalked. Gibbs testified that such exposure can be a trigger for delusions, even if such persons are “stable.” Gibbs also analogized Andrade’s interest in conspiracy theories to “an alcoholic hanging out in a bar. It doesn’t necessarily mean they are going to drink, but it

really is going to increase their likelihood that they might be triggered to do so.”

Support System

Andrade’s support system in Los Angeles consists of his sponsor in Narcotics Anonymous, two half brothers and a cousin. While Andrade’s sister testified that she was prepared to provide support, she lives in Northern California.

Gibbs testified that Andrade’s support system in Los Angeles was inadequate. This caused Gibbs concern, because Andrade said he would rely on other people to let him know “if he was starting to be triggered, or have symptoms of his mental illness.”

The trial court could rationally conclude from this evidence that, because Andrade’s primary support system “is so far away,” he has an increased risk of recurrence of delusions that he would not recognize.

This evidence concerning Andrade’s continuing research into conspiracy theories; his research into the possibility of weaning off medication; and weaknesses in his support system in Los Angeles provided adequate support for the conclusions of the CONREP experts that Andrade continued to present a danger to others. The trial court therefore could properly rely on those conclusions in finding that Andrade was not ready for unconditional release, despite competing evidence from the appointed experts and the undisputed evidence showing that Andrade has complied with his treatment program.

2. *Andrade’s Counsel Was Not Ineffective in Failing to Object to Case-Specific Hearsay*

Andrade argues that some of the expert witnesses testified about case-specific hearsay that was inadmissible under *People v.*

Sanchez (2016) 63 Cal.4th 665. However, as Andrade acknowledges, his counsel did not object to that expert testimony at trial.⁵ Andrade’s argument that the trial court should not have considered that testimony has therefore been forfeited. (*People v. Stevens* (2015) 62 Cal.4th 325, 333; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 407-408 [appellant forfeited objection to case-specific hearsay in particular exhibits by failing to object at trial].)⁶

⁵ During a pretrial hearing under Evidence Code section 402, Andrade objected to any hearsay testimony by experts about the incident with his roommate in December 2016. The trial court ruled that experts could testify only to the fact that they had spoken to particular persons and not to “the underlying hearsay itself.” However, the trial court also cautioned that “once I have ruled on a 402, trials are fluid. Rulings can change, but only if they are readdressed.” When Gibbs began testifying about hearsay statements by Andrade’s roommate during trial, Andrade did not object. Andrade’s failure to object during trial forfeited the objection despite the trial court’s pretrial ruling. (*People v. Maciel* (2013) 57 Cal.4th 482, 528-529 [lack of objection to a videotape during trial forfeited the objection despite a pretrial ruling excluding hearsay statements in the videotape from evidence].)

⁶ Because there was no objection to this alleged hearsay at trial, the trial court could properly consider it for any purpose, including for its truth. (See *People v. Panah* (2005) 35 Cal.4th 395, 475-476 [trial court properly considered uncontested hearsay testimony concerning the source of an exhibit in finding an adequate foundation to admit the exhibit].) Nevertheless, we presume that the trial court gave this hearsay testimony the weight that it deserved. (See *Gideon v. Gideon* (1957) 153 Cal.App.2d 541, 546.)

Andrade argues that expert testimony about case-specific hearsay nevertheless requires reversal because his counsel's failure to object below constituted ineffective assistance of counsel. We reject the argument.

To prevail on his ineffective assistance claim, Andrade must show "by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) Absent a showing to the contrary, we presume that Andrade's trial counsel's performance fell within the wide range of professional competence and that his counsel's conduct can be explained as trial strategy. (*Centeno*, at pp. 674-675.) When the appellate record does not provide any explanation for why trial counsel acted as he or she did, an appellant must show that there was " " " 'no conceivable tactical purpose' " " " for counsel's conduct. (*Id.* at p. 675, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 675.)

The main focus of Andrade's ineffective assistance claim concerns his counsel's failure to object to hearsay about Andrade's alleged change in behavior in December 2016, leading to his temporary transfer to the satellite facility. Andrade's counsel could have had legitimate strategic reasons not to object to such testimony. Andrade was the first to offer testimony about the December events. Andrade explained that his roommate was frustrated because Andrade was making an audiotape in the early evening, which involved a great deal of repetitive recording and stopping. Andrade suspected that the roommate reported his behavior to CONREP employees. Given that Andrade's trial

strategy was to show that CONREP has an institutional bias against recommending the restoration of sanity, Andrade's trial counsel might have concluded that CONREP's response to his roommate's complaint was an overreaction that would be helpful to his defense.

This conclusion is supported by Andrade's counsel's cross-examination of Gibbs immediately after Gibbs had testified on direct about the roommate's report that Andrade had been engaging in "bizarre, obsessive-type behaviors." Andrade's counsel brought out that Andrade's roommate had recently been "brought back out to the community," and was at an "intensive level of care." That level of care means that the roommate either did not follow the rules or was "more fragile psychiatrically." Gibbs conceded that someone who is "more fragile psychiatrically" is "[n]ot necessarily" credible.

Andrade also called as a witness an employee of the CONREP facility where Andrade lived who testified that there was nothing different about Andrade's behavior at the time the roommate complained. Thus, the trial record is consistent with a strategy that included Andrade's affirmative use of hearsay testimony concerning the events in December 2016. In addition, Andrade's counsel might have preferred that testimony about the December incident come in through hearsay, rather than forcing the district attorney to call a percipient witness (such as the roommate), which might have highlighted the incident or been less predictable.

Andrade also identifies other allegedly inadmissible case-specific hearsay in the experts' testimony, including: (1) information about the details of Andrade's offense and the events leading to it; (2) Andrade's conduct in the CONREP program;

(3) statements by Andrade's sister to Cabadas; (4) Gibbs's testimony about statements Andrade made to Cabadas; (5) Gibbs's testimony about her consultation with other CONREP professionals leading to the decision not to recommend restoration of sanity for Andrade; and (6) Cabadas's testimony about statements by another CONREP doctor to Andrade about changing his medication following the December 2016 incident. Andrade's counsel could have had legitimate tactical reasons not to object to the experts' testimony about each of these challenged statements.

Some of the challenged expert testimony simply duplicated admissible evidence in the record. For example, as discussed above, Andrade himself testified about the circumstances of his offense and the stresses that led to it. He also testified about his conduct while in the CONREP program. Andrade's sister testified about her conversation with Cabadas, and Cabadas testified about statements that Andrade made to her concerning his research into the possibility of ceasing medication.⁷ Andrade's counsel could have decided not to object to such duplicative testimony because the evidence was already admitted, or likely would be admitted, through other means.

Andrade's counsel also might have had tactical reasons not to object to the other hearsay statements that Andrade identifies. Andrade's counsel could have made a strategic decision not to challenge Gibbs's testimony that she discussed her opinion with other members of the CONREP evaluation team, despite the

⁷ Andrade's statements to Cabadas were of course party admissions under Evidence Code section 1220.

implication that other CONREP doctors held similar opinions about Andrade's potential dangerousness. Gibbs offered that testimony during cross-examination by Andrade's counsel about reports that Gibbs had written. Andrade's counsel could have decided not to move to strike the testimony because it was consistent with the defense theory that CONREP as an *institution* was biased against Andrade's release. Or he could have decided that a motion to strike and an admonition to disregard the testimony at that point would have simply emphasized the testimony rather than curing any prejudice.

Andrade also complains about testimony by Cabadas concerning statements by another CONREP doctor to Andrade after the December 2016 incident. The doctor's statements expressed his concerns about Andrade's reluctance to change his medication. However, Cabadas had already testified about similar concerns. Andrade's counsel could have concluded that those statements were simply duplicative or, as discussed above, that they actually helped to show an institutional bias at CONREP.

Because Andrade has not shown that there was "no conceivable tactical purpose" for his trial counsel's decision not to object to the expert's hearsay testimony, we reject his ineffective assistance claim. (*Centeno, supra*, 60 Cal.4th. at p. 675.)

DISPOSITION

The trial court's order is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.