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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

DANIEL CHEN, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents,	B290999 (Los Angeles County Super. Ct. No. BC598154)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Barrera & Associates, Patricio T.D. Barrera, and Ashley A. Davenport for Plaintiff and Appellant.

Gordon Rees Scully Mansukhani, Stephen E. Ronk, Christopher R. Wagner, and Erika L. Shao for Defendants and Respondents.

Plaintiff Dr. Daniel Chen sued defendants, Regents of the University of California (UCLA) and Jennifer Pelkey, alleging claims for discrimination, harassment, and retaliation under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.). A jury found in favor of defendants on each cause of action. Chen moved for a new trial based on alleged evidentiary errors and juror misconduct. After the court denied the motion, Chen timely appealed. For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

A. *Background*

Chen was born in Taiwan and immigrated to the United States in 1984 at the age of 12 years. His native language is Mandarin and he speaks English fluently.

In July 2014, Chen began a post-doctoral fellowship in UCLA's department of pathology. Chen's faculty supervisors for the fellowship were Dr. Fabiola Quintero-Rivera (Quintero), Dr. Nagesh Rao, Dr. Carlos Tirado, and Dr. Sibel Kantarci. According to the terms of the fellowship agreement, Chen's position would expire after one year on June 30, 2015 "unless [he is] reappointed as a post[-]doctoral scholar." The parties do not dispute, however, that the duration of the fellowship is ordinarily two years.

Among other requirements of the fellowship, Chen was required to learn a method of analyzing chromosomes known as karyotyping. Pelkey, a cytogenetic technologist, was assigned to train Chen in karyotyping.

Pelkey was critical of Chen's work, and Chen believed that Pelkey contributed to a "hostile working environment" for him. According to Chen, Pelkey would tell him to speak English and not to "speak Chinese," even though he spoke to her in English. Pelkey

denied she said such things or that she had ever criticized anyone about the way they spoke English.

During a review of Chen's work in August 2014, Pelkey informed Chen that he had done "it all wrong." According to Chen, Pelkey asked him: Did "you have a stroke, do you have a brain infarct"? Pelkey denied ever using the phrase "brain infarct" or its near-homophone "brain fart." She testified that she made the comment about a stroke, but that she did so in jest after Chen realized he had made an error and told Pelkey, "I don't know what's wrong with my brain today." Chen testified that on another occasion Pelkey asked Chen, "[W]hat's wrong with your brain?" Pelkey denied saying this.

Approximately two months after Chen's fellowship began, Quintero met with him to discuss Chen's performance. In an email following that meeting, Quintero informed Chen that Chen was "not performing according to the fellowship's expectations." In particular, Chen was required to complete 20 karyotype training cases and 13 microarray training cases by August 31, but had completed only four karyotype training cases and four microarray training cases. In addition, Chen was not following Quintero's and Pelkey's directions, and was "having a hard time focusing on [his two] assignments." Quintero told Chen not to ask for help from "other technologist[s]" because it disrupts the work of others and hinders Chen's learning process. Chen responded to Quintero, telling her that he "will improve" on each point.

After three months in the fellowship, Chen's supervisors evaluated his performance using a form that ranked his performance in various areas as either: "[p]erforms below expected level"; "[m]arginal: [r]equires close supervision"; "[p]erforms at expected level"; or "above expected level." No supervisor rated his performance as "above expected level." One supervisor commented that Chen "is a dedicated fellow, however he needs . . . close

supervision for his daily lab activities. He is currently not ready to work independently."

Pelkey scored Chen as performing "below expected level" in each of 16 applicable categories, and commented: "[Chen] is one of the least capable people I've ever had the pleasure of trying to train in the field of cytogenetics. He has no natural affinity/ability, apparently, for the pattern-recognition skills needed for cytogenetics. He seems to lack logic and reasoning ability, and often fails to follow instructions." She further described Chen as "impatient, childish, [and] petulant." Although Pelkey did not intend for Chen to see this draft of her evaluation, she testified that it reflected her "honest assessment" of Chen at the time she prepared it.

Chen believed that Pelkey harassed him by requiring that he manually cut photographs of chromosomes rather than use a computer software program for cutting digital images of the chromosomes. Pelkey explained that relying on the computer program to cut the chromosome images hinders a trainee from acquiring the ability to recognize and analyze the chromosomes. Rao supported Pelkey's explanation, testifying that the manual cutting technique is "how most of us get trained," and it was not unusual for Pelkey to require it. Chen acknowledged in a September 2014 email to Pelkey that "the real cutting and pasting method[ ] is very helpful."

Chen also believed that Pelkey improperly restricted his ability to speak with others and get help with his work from those with more experience. Pelkey denied that she told Chen not to speak with others. Although she did tell Chen not to get help from others, she explained that she did so because she saw a difference in the quality of Chen's work when he had help from others, and she "needed to know exactly how he was actually progressing in his own knowledge and his own ability."

In September and October 2014, Chen complained about Pelkey to Quintero and numerous others, including UCLA's human resource director. In an email to a supervisor, Pelkey commented: "I'm unhappy with this situation—hopefully he will be able to learn faster and be more comfortable with someone else's instruction—perhaps someone who speaks his language, who he actually respects." Pelkey testified that her reference to "someone who speaks his language" was "meant metaphorically" to refer to "someone who could communicate well with him in every way." She said she was not referring to Chen's native language; if she had "meant Chinese," she explained, she "would have said Chinese."

As a result of Chen's complaints, Wendy Wei, who speaks Mandarin fluently, replaced Pelkey in mid-October 2014 as Chen's karyotyping trainer. In January 2015, Wei wrote an evaluation of Chen in which she scored him at or above the "expected level" in every applicable category. Evaluations by others for the same period, however, continued to characterize Chen's performance as "[m]arginal" and "requir[ing] close supervision" in numerous areas.

In February 2015, there was an incident in a laboratory involving Chen, Pelkey, and Wei. In an email to laboratory supervisors, Wei wrote: "I would like to report a hostile and discriminatory accident which happened on Friday [February 13] . . . while I was talking to [Chen] about an amniotic fluid case karyotype correction at his Cytovision station while we were about to finish and upload the picture and report, [Pelkey], all of [a] sudden, made a big sound 'shu' asking us not to talk, she 'yelled' at us in anger saying that it is personal to her, and we need to talk in English . . . . Our voice was not even loud to begin with and only between us privately."

Pelkey responded to Wei's complaint in an email, explaining that she "simply asked . . . Wei and . . . Chen to please go to the break room to carry on their obviously personal conversation

(because it was in Chinese). Their voices were also quite loud, and it's distracting to all of us who are trying to focus on our work. It wasn't just a couple of sentences, or a quick exchange—it was a long, drawn out conversation." Pelkey added: "We should have a non-hostile environment, conducive to team-work and optimum productivity. If speaking Chinese in the workplace is to be allowed, then maybe we need to designate a separate room for them . . . but that's probably not practical."

Pelkey testified about the incident, stating that Chen and Wei had been carrying on a long conversation loudly in Chinese for about two hours in a laboratory. Pelkey and others in the room were "trying to critically work fast" in a small space without distractions. She asked Chen and Wei "if they could please take it and go to the break room . . . to continue the conversation." Pelkey also explained that her insistence on speaking English in the laboratory was to ensure patient safety and to abide by UCLA's employee language policy, which requires that "employees speak English when discussing work-related matters."

In March 2015, Chen made oral presentations to faculty members. Written evaluations of the presentations were marked mostly with scores corresponding to "inadequate" or "fair." Regarding one presentation, Quintero stated: "This is the second time [Chen] presents this topic. The first time the presentation was inadequate/poor. He was given specific points to improve it, which he did NOT follow." Regarding another presentation, Quintero wrote that "it is worrisome that [Chen's] understanding of both technical and clinical aspects [is] so poor." Rao wrote: "Speak up, know your slides, prepare good quality slides & spend time on the content." Tirado scored Chen as "inadequate" in each of 10 categories and advised Chen: "Prepare better." Kantarci commented that one of Chen's presentations was "[m]issing important data" and there was "not enough attention for the types

of specimens." Regarding another presentation, Kantarci stated: "I highly suggest [Chen] read the cytogenetics book chapters regularly. He should take the previous presentation's suggestions/feedbacks more serious[ly] for a successful presentation."

Also in March 2015, Chen took an exam that identifies areas of strength or weakness in the trainee's work. Chen scored lower than the average trainee in five categories, equal to the average in one category, and higher than the average in one category. Chen testified that his scores were "pretty good" because he was in his first year of the fellowship and the average scores included the scores of trainees with more experience.

Performance evaluations by Tirado, Rao, and Kantarci from January to April 2015 indicated that Chen was still performing "marginal[ly]" and continued to require close supervision in most applicable areas. Rao stated that although Chen "has shown moderate improvement in his ability to interpret the karyotyping, he still has a limited concept of what is clinically relevant or important. He also made careless mistakes, like switching gender or writing [the] wrong gene symbols."

By April 2015, Quintero had decided not to renew Chen's fellowship for a second year. She informed the other members of the faculty committee of that decision at a meeting in April. Chen was informed of the decision by letter and email in early June. The letter did not state a reason for the decision.

In October 2015, Chen filed a complaint alleging causes of action arising under FEHA for national origin discrimination and retaliation against UCLA and a cause of action for harassment against UCLA and Pelkey.

B. *Exhibit 317: The Delshadi Report*

During trial, Chen introduced the testimony of Dr. Anthony Reading, a psychologist, as an expert with respect to Chen's emotional distress damages. According to Reading, Chen developed a psychiatric disorder following his termination from the fellowship, which would not have developed if he had remained at UCLA for a second year. He based his opinions in part on Chen's statements to him and his review of Chen's medical and mental health history, which revealed "no prior psychiatric illness or symptoms."

During cross-examination of Reading, defense counsel showed him a six-page report prepared in February 2014, a few months before Chen began his UCLA fellowship, by Lana Delshadi, a clinical neuropsychologist. According to the report, a psychiatrist had referred Chen to Delshadi for evaluation "to (1) determine . . . Chen's current level of functioning, (2) assist with differential diagnosis, and (3) provide him with appropriate recommendations." The report is prepared on the letterhead of "LD Neuropsychological Services," and describes Chen's educational, occupation, medical, and psychiatric history, and the "[h]istory of [his] [c]urrent [p]roblem." The problem, as reported by Chen to Delshadi, includes "difficulties with staying focused," "difficulties with attention and organization," and his tendencies "to interrupt others" and be "forgetful." The report refers to four assessment dates with Chen in January 2014, describes Delshadi's evaluation procedure, identifies various tests that she administered, and sets forth Delshadi's observations, conclusions, diagnostic impressions, and recommendations. Delshadi signed the report above her California psychologist license number PSY16895.

Defendants obtained the Delshadi report pursuant to a subpoena issued to a physician, not Delshadi, who had treated Chen. A copy of the subpoena was served on Chen's counsel. The

document was accompanied by a custodian of records declaration pursuant to Evidence Code section 1561.[1] The declaration, which appears from the reporter's transcript to have been shown to Chen's counsel and the trial court and discussed among them during trial, is not included in the record on appeal.

Chen's counsel apparently did not arrange to obtain copies of the subpoenaed documents, and Reading had not previously seen the report.

Defense counsel asked the court to "publish" the report using an overhead projector so the jury could "all follow along" as he asked Reading about the document. Chen's counsel objected to the report on authentication and hearsay grounds. Defense counsel initially stated that the document would be used for impeachment of Reading, but later explained that it "reaches the issues of [Chen's] psychological functioning, his emotional state, his ability to concentrate and all the things that have become an issue in this case." The court overruled the objections and allowed the report into evidence as exhibit 317.

Defense counsel proceeded to question Reading about the following statements that Delshadi made about Chen in her report and to relate the statements to Chen's performance during the fellowship: (1) "He has been having difficulties in [his] residency [in pathology] and his supervisors indicate that they suspect he has ADHD or a learning disability"; (2) "His attention seemed to fluctuate and he had difficulty holding on to information at times"; (3) "He also had difficulty staying focused on tasks that demand mental effort for long periods of time"; (4) "He seemed to tire quickly and he would often yawn and scratch his head"; (5) Chen's

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[1] Statutory references are to the Evidence Code unless indicated otherwise

report of a longstanding history of difficulties in attention and organization "is currently affecting his ability to progress at his residency program"; and (6) Chen "[o]ften fails to give close attention to details or makes careless mistakes."

The court then interrupted the cross-examination and informed counsel outside the presence of the jurors: "You know, when I first looked at [exhibit 317], I saw statements from Chen, which are clearly admissible [as an] exception to the hearsay rule. Now, as we go closer into it, you're offering opinions of a person out of court." After some colloquy among the court and counsel, the exhibit was removed from the overhead projection and the court informed the jurors: "To the extent that this document relates what . . . Chen has said outside of court, that you can consider. That's an exception to the hearsay rule. To the extent this document relates opinions and conclusions of somebody made outside of court, that's much more problematic, and for the time being, I'm going to strike this and take this off your plate, and counsel and I will discuss it further next week. So remember I told you the most important thing about being a judge was the self-discipline? You have to discipline yourself to consider certain things and not consider other things. You have to be able to unring the bell and forget the bell ever rung. Okay? I'm confident you guys are totally in this game. You've been paying very close attention. So I'm going to ask you to unring this bell until we can revisit the issue."

The court asked counsel for, and received, briefs on the admissibility of exhibit 317 and heard further argument. The court found that the authenticity requirement had been satisfied by the declaration of a custodian of records accompanying the document, then ruled that Chen's statements in the exhibit were admissible, but that Delshadi's conclusions and opinions are inadmissible. After further discussion, and over Chen's additional objection under

section 352, the court allowed the defense to introduce a redacted version of exhibit 317 that, insofar as it is relevant here, includes the following statements on page five of the exhibit:

"The symptoms [Chen] demonstrates are as follows:

"(a) often fails to give close attention to details or makes careless mistakes.

"(b) often has difficulty sustaining attention in tasks.

"(c) often does not seem to listen when spoken to directly.

"(d) often does not follow through on instructions.

"(e) often has difficulty organizing tasks and activities.

"(f) is often easily distracted by extraneous stimuli.

"(g) is often forgetful in daily activities.

"(h) often blurts out answers before questions have been completed.

"(i) often has difficulty awaiting turn.

"(j) often interrupts or intrudes on others."

The court further instructed the jury: "When we were here Friday, I explained how certain of the information on the examination was going to be taken off your plate. We all agreed that we will follow that instruction. We have had a discussion about it and I think now we are prepared to give you what, from [exhibit 317] is going to be admissible and what is not. So keep in mind what I said about what it takes to be a good judge. It takes self-discipline. You have to discipline yourself to consider only things and not certain . . . other things . . . for a limited purpose and if it means pretending that you never heard something, it means you must wipe that from your memory bank and take it off your plate. It's no longer part of this case. We on the same page? Okay. Everybody nod in the affirmative." The court noted that the jurors so nodded.

Defense counsel proceeded to question Reading about the unredacted statements on page five of exhibit 317.

During Chen's counsel's redirect, Reading testified that exhibit 317 did not change his opinion that Chen's psychiatric problems arose after his termination from the UCLA fellowship.

C. *Motion for New Trial and Evidence of Jury Misconduct*

The jury deliberated for two days and returned special verdicts finding that UCLA had not discriminated or retaliated against Chen, and that neither UCLA nor Pelkey harassed Chen. The vote on each cause of action was nine-to-three in favor of defendants. As is relevant here, Juror No. 5 found in favor of Chen, and Juror No. 3 and Juror No. 7 found in favor of defendants on each cause of action.

In April 2018, Chen moved for a new trial based on the use of exhibit 317 and alleged juror misconduct. He supported the juror misconduct claim with a declaration by Juror No. 5. That juror stated that Juror No.7, "an African American man, discussed his personal experiences with discrimination and informed the jury that what . . . Chen suffered 'was nothing compared to what [he] had gone through.' " Based upon Juror No. 7's "statements and conduct," Juror No. 5 concluded that Juror No. 7 "would only find discrimination if [Juror No. 7] felt the conduct was the same or worse tha[n] what he had experienced in his life rather than the standard set forth in the jury instruction."

Juror No. 5's declaration also discussed Juror No. 3. According to Juror No. 5, Juror No. 3 "stated that after being selected as a juror in this case, she booked a plane ticket to Taiwan for [the] Chinese New Year and was scheduled to depart on Friday, February 9, 2018 [two days after jury deliberations began]. During deliberations, it became clear that [Juror No. 3] was not English proficient and had significant trouble understanding English and what had been presented during the trial. When [Juror No. 3] was

asked straightforward questions, she appeared confused and had trouble appropriately answering 'yes' and 'no.' [¶] . . . During the deliberations, [Juror No. 3] repeatedly stated that she needed to leave for Taiwan. As it came time to vote on the verdict form, [Juror No. 3] was the last to vote. The other jurors were rushing [Juror No. 3], telling her that it was going to be 4:00 p.m. and that they needed to be done for her to take her trip. Multiple people told [Juror No. 3], 'let's be done, so we can leave.' From where I was situated in the jury room, some of the other jurors forced [Juror No. 3] to vote because they wanted to leave and she acquiesced to the other juror's [*sic*] demands rather than considering the evidence presented at trial."

The court sustained objections to Juror No. 5's opinion that Juror No. 7 would only find discrimination if he felt the conduct was the same or worse than the discrimination he experienced. The court also sustained objections to Juror No. 5's opinion regarding Juror No. 3's English proficiency and confusion, as well as the statement that " 'jurors forced [Juror No. 3] to vote because they wanted to leave and [Juror No. 3] acquiesced to the other jurors' demands rather than considering the evidence presented at trial.' " In addition to rejecting Juror No. 5's assertion about Juror No. 3's English proficiency as an improper opinion, the court noted that jurors who were not proficient in English were excused from jury service in this case, and that Juror No. 3 "never said anything about not being proficient in English." Moreover, the court recalled "carr[ying] on voir dire with [Juror No. 3]," and saw no indication that she had difficulty understanding English. If she had, the court "would have stopped immediately and excused her."

Based on what remained in the declaration after sustaining the objections, the court concluded that there was "no reason to believe that . . . there was any misconduct by the jury."

Regarding exhibit 317, the court stated: "I admit I was wrong" and "apologize[d] for not snapping to immediately, but I did the best I could and I was convinced that . . . the jury, in fact, unrung the bell . . . [and] were following my instructions." The court then denied the motion for new trial.

Chen timely appealed.

DISCUSSION

A. *Exhibit 317*

Chen contends that the court erred in two ways with respect to exhibit 317: (1) by allowing the jurors to see and hear portions of the unredacted version of the exhibit; and (2) by admitting into evidence the statements on page five of the redacted version of exhibit 317.

We review evidentiary rulings for abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 585.) If error is shown, we will reverse the judgment only if the appellant establishes that the error resulted in a miscarriage of justice. (§ 353, subd. (b).) Under that standard, we must determine whether, "after an examination of the entire cause, including the evidence, . . . it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

We first address the admission into evidence of the redacted version of exhibit 317.

The list of Chen's symptoms in exhibit 317 constitute out of court statements by Delshadi, and defendants offered them, at

least in part, for the truth of the matters stated.[2] They are thus inadmissible hearsay unless they come within an exception to the hearsay rule. (§ 1200, subds. (a) & (b).) The business records exception allows for the introduction of "a writing made as a record of an act, condition, or event . . . when offered to prove the act, condition, or event." (§ 1271.) To qualify under the exception, the writing must be made in the regular course of a business, at or near the time of the act, condition, or event, and under circumstances indicating its trustworthiness. (§ 1271, subds. (a), (b) & (d).) A witness must also testify as to its identity and the mode of preparation. (§ 1271, subd. (c).) This last requirement can be satisfied by a declaration by a custodian of records that satisfies the requirements of sections 1560 and 1561. (§ 1562; *People v. Yates* (2018) 25 Cal.App.5th 474, 486 (*Yates*); 1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2019) Business Records, § 4:11, pp. 4-8 to 4-9 (Jefferson).) The authenticating custodian of records need not be the person who prepared the document. (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 798.)

Trial courts have "wide discretion to determine" whether the requirements of the business records exception apply, and we will not overturn its decision unless there is "a clear showing of abuse." (*Conservatorship of S.A.* (2018) 25 Cal.App.5th 438, 447.)

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[2] Defendants argue that Exhibit 317 was not a hearsay document because it was offered to impeach Reading by showing that Reading's opinions were based on incomplete information. The record, however, reveals that defendants also used the exhibit for the truth of the statements made therein as evidence of Chen's psychological condition prior to and during his UCLA fellowship. As discussed below, the statements were admissible.

Chen does not dispute that Delshadi, the author of exhibit 317, is a licensed psychologist who operates a business for purpose of the business records exception (see § 1270), or that she "evaluated" Chen and prepared the report in the regular course of that business. According to the report, Delshadi met with Chen on four dates in January 2014, and the report is dated about three weeks after their last meeting; Chen does not contend that this span of time is outside the time frame required by the exception. (See § 1271, subd. (b) [writing must be made "at or near the time of the act, condition, or event"].) The use of Delshadi's business letterhead, the report's form, content, and signature by a licensed psychologist who conducted the evaluation and whom Chen admits he saw professionally, support the court's implied finding that the document meets the indicia of trustworthiness requirement. (See Jefferson, *supra*, § 4.9, pp. 4-6 to 4-7 [court's ruling admitting the document into evidence implies the finding that the trustworthiness requirement is met].)

There thus appears to be two genuine issues in this case concerning the admissibility of the Delshadi report under the business records exception to the hearsay rule. First, under section 1271, a "custodian or other qualified witness" must testify to the document's "identity and the mode of its preparation." (§ 1271, subd. (c).) This requirement can be fulfilled by a declaration that satisfies the requirements of section 1561. (*Yates*, *supra*, 25 Cal.App.5th at p. 486.) Under that statute, the declarant must state: (1) that he or she "is the duly authorized custodian of the records or other qualified witness and has authority to certify the records"; (2) that the records "were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event"; (3) the identity of the records; and (4) a "description of the mode of preparation of the records." (§ 1561, subd. (a)(1), (3) & (5).) The fact that the subpoena was

issued to a medical provider other than Delshadi suggests the possibility that the production of the report by the subpoenaed party might not be properly authenticated. (See *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039, 1045 [subpoenaed party cannot supply section 1561 declaration for documents it did not prepare or generate].)

Here, our record reveals that, after Chen objected to the Delshadi report, defendants produced to the court a custodian of records declaration in support of it, and the court found that it satisfied the statutory requirements. Chen did not challenge this finding or the adequacy of the declaration in his opening brief on appeal, but does assert in his reply brief that the requirements of section 1561 were not satisfied. Chen did not provide any citations in his reply brief to the record to support this point, and the custodian of records declaration is not included in our record on appeal. Even if we ignore the general appellate rules that we need not consider arguments raised for the first time in a reply brief or arguments that are not supported by citations to the record (see *Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1149; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453), we have no basis for rejecting the court's finding in the absence of the declaration. As the appellant, Chen has the burden of providing us with a record permitting review of a claimed error, and his failure to do so requires that we resolve the issue against him. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

Second, the writing, if offered to prove "an act, condition, or event," must be "a record of [such] act, condition, or event." (§ 1271.) Whether a report by a medical provider is "a record of an act, condition, or event" (*ibid.*) within the meaning of the business records exception depends whether the doctor is "reporting a patient's symptoms and the medical diagnosis . . . based upon

the doctor's firsthand observations of the patient." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2019) ¶ 8:1621, p. 8D-163 (italics omitted), citing *Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 809–810; see *Conservatorship of S.A.*, *supra*, 25 Cal.App.5th at p. 448 [reports by psychiatric technicians of their observations of patient were within business records hearsay exception].) By contrast, as Chen points out, a physician's diagnostic opinions, when formed not from direct observation but by reasoning and " 'the consideration of many different factors' " (*People v. Beeler* (1995) 9 Cal.4th 953, 981), do not qualify as acts, conditions, or events under the business records exception. (See also *People v. Reyes* (1974) 12 Cal.3d 486, 503; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 184.)

Here, the challenged statements on page five of exhibit 317 are a list of the "symptoms [Chen] demonstrates," which appear to be based upon Delshadi's firsthand observations while examining and testing Chen. Although the report also includes Delshadi's explicit diagnostic impressions, that portion of the report was redacted from the exhibit that went to the jury. Allowing the redacted document into evidence, therefore, was not an abuse of discretion. (See *Conservatorship of S.A.*, *supra*, 25 Cal.App.5th at p. 448; 1 Jefferson, *supra*, § 4:10, p. 4-8.)

With respect to the statements from the report that were read or shown to the jury prior to the court's withdrawal of the unredacted document and the court's admonitions to the jury to disregard it, the following four statements are also based on Delshadi's firsthand observations: " 'His attention seemed to fluctuate and he had difficulty holding on to information at times' "; " '[h]e also had difficulty staying focused on tasks that demand mental effort for long periods of time' "; " '[h]e seemed to tire quickly and he would often yawn and scratch his head' "; and " '[Chen] [o]ften fails to give close attention to details or makes

careless mistakes.' " Although the court eventually redacted these statements from the version of exhibit 317 that went to the jury, to the extent they may have been considered by the jury, there was no error under the principles stated above.

Two other statements from the unredacted report arguably involve a second layer of hearsay: (1) " '[Chen] has been having difficulties in [his] residency [in pathology] and his supervisors indicate that they suspect he has ADHD or a learning disability' "; and (2) Chen "reports a longstanding history of difficulties in attention and organization," which " 'is currently affecting his ability to progress at his residency program.' " These statements appear to be not what Delshadi observed directly, but what Chen told Delshadi, i.e., that he was having the "difficulties" described in the statements.[3] The court could thus have reasonably allowed these statements to be introduced as party admissions or as evidence of Chen's mental state a few months prior to beginning his UCLA fellowship—a fact relevant to, at least, the issue of damages. (See §§ 1220, 1250, subd. (a).) Allowing the jury to hear and see these statements, therefore, was not an abuse of discretion.

Even if allowing these last two statements to be used at trial was error, the error was harmless. These statements were redacted from the version of the report admitted into evidence and the court admonished the jury not to consider any statements not included in the redacted report. In the absence of a contrary indication in the record, we presume the jury followed the admonition. (*Cassim v.*

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[3] Delshadi did not explicitly state the source of the information that Chen was having the noted difficulties. The only sources of any information noted in the report, however, are Delshadi's four meetings with Chen. The court could thus reasonably conclude that the noted difficulties were reported by Chen.

Allstate Ins. Co. (2004) 33 Cal.4th 780, 803; *People v. Burgener* (2003) 29 Cal.4th 833, 870.) Moreover, the statements were introduced during cross-examination of Chen's damages expert for the primary purpose of discrediting or modifying the expert's opinion that Chen's emotional distress arose after UCLA's termination of Chen's fellowship. As defendants point out, the jury never reached the issue of damages because they found the defendants did not discriminate, harass, or retaliate against Chen. The statements, therefore, could have had no impact on the issue of damages. To the extent that the statements may have also supported the defense theory that Chen was terminated because he performed poorly—and not because of his national origin—our review of the record reveals no reasonable probability that the verdict would have been more favorable for Chen if the statements had never been disclosed; the statements were isolated and brief, and the evidence of Chen's poor performance is compelling. Any error in allowing the statements to be read and shown to the jury, therefore, does not require reversal. (See § 353, subd. (b).)

Chen devotes a significant portion of his brief to discussing our Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665. In *Sanchez*, the 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.) *Sanchez* was extended to the cross-examination of an opponent's expert in *People v. Malik* (2017) 16 Cal.App.5th 587. Thus, a prosecutor could not impeach a defense expert by asking the expert to assume the truth of case-specific hearsay that had not been independently proven or covered by a hearsay exception. (*Id.* at pp. 597–598.) Chen's reliance on *Sanchez* and its progeny is, for the most part, misplaced because the challenged statements " 'are covered by a hearsay exception' " as explained above. (*Conservatorship of S.A.*, *supra*, 25 Cal.App.5th at

p. 448.) Thus, *Sanchez* did not preclude the use of the statements. (See *ibid*.) To the extent counsel's use of the two statements that were arguably not within an exception to the hearsay rule violated the *Sanchez* rule, the error was harmless for the reasons given above.

Lastly, Chen contends that exhibit 317 should have been excluded because its probative value was substantially outweighed by the danger of undue prejudice, of confusing the issues, or misleading the jury. (See § 352.) Although Chen does not explain how the report "highly prejudiced" him, he is probably referring to the report's potential to weaken his case. Prejudicial evidence, however, is "evidence which uniquely tends to evoke an emotional bias against the party as an individual and which has very little effect on the issues—it is not synonymous with 'damaging' " evidence. (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1081.) Chen makes no argument that the evidence was prejudicial in this sense. Nor has he offered a persuasive argument as to how the evidence confused issues or misled the jury.

For the foregoing reasons, we reject Chen's contentions the court prejudicially erred with respect to its rulings regarding exhibit 317.

B. *Juror Misconduct*

Chen argues that the court erred by denying his motion for a new trial on grounds of juror misconduct. We disagree.

" 'In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. (§ 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct

was prejudicial.' " (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.) The court " 'has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion.' " (*Ibid.*; accord, *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.)

As to the first step, Chen contends generally that the court erred in sustaining the defendants' objections to Juror No. 5's declaration "on a near-blanket basis." He does not, however, address any particular objection, ruling, or excluded statement. Nor does he cite to the record to point out which rulings he believes are erroneous. These failures forfeit the issue on appeal. (See *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.) Even if the issue was not forfeited, our review of the court's evidentiary rulings reveals no abuse of discretion. The declarant's statement that, "[f]rom [Juror No. 7's] statements and conduct, [he] would only find discrimination if [he] felt the conduct was the same or worse than what he had experienced," was properly stricken as the declarant's opinion; the statements regarding Juror No. 3's English proficiency was an improper opinion and belied by the court's observation of her performance during voir dire; and the statements regarding Juror No. 3 being "forced" to vote and failing to consider the evidence was also properly struck as improper opinion.

After excising the portions of the declaration to which objections were sustained, the substance of what remains consists of evidence that: (1) Juror No. 7 "discussed his personal experiences with discrimination and informed the jury that what . . . Chen suffered 'was nothing compared to what [he] had gone through' "; (2) Juror No. 3 repeatedly stated that she needed to leave for Taiwan; and (3) Juror No. 3 was the last to vote and "[m]ultiple people told [her], 'let's be done, so we can leave.' "

Regarding Juror No. 7's statements regarding discrimination, *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728 (*Moore*), and *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803 (*Iwekaogwu*) are instructive. In *Moore*, a jury found that the plaintiff, who had been disfigured by the defendant's medical malpractice, had suffered $733,000 in damages. (*Moore*, *supra*, 178 Cal.App.3d at p. 735.) The defendant moved for a new trial based in part on evidence that the jury foreperson "became very emotional" (*id.* at p. 741) in discussing her own undisclosed physical deformity and told the other jurors that "she knew about pain and suffering, and [that] no amount of money could compensate her." (*Ibid.*) The Court of Appeal, in affirming the denial of the motion, explained that "[j]urors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself. Jurors are expected to be fully functioning human beings, bringing diverse backgrounds and experiences to the matter before them." (*Id.* at pp. 741–742.)

In *Iwekaogwu, supra,* 75 Cal.App.4th 803, an African-American from Nigeria sued his employer, the City of Los Angeles for discrimination on the basis of race and national origin. (*Id.* at p. 807.) After the jury found in plaintiff's favor, the City of Los Angeles moved for a new trial based in part on evidence that a juror "gave emotional descriptions of instances of discrimination he had seen as a reserve police officer." (*Id.* at p. 819.) The trial court rejected the claim and the Court of Appeal affirmed. Relying on *Moore*, the court explained that a "juror does not commit misconduct merely by describing a personal experience in the course of deliberations. [Citation.] There is no evidence that any juror decided the case based on the juror's description of his own experiences rather than on the basis of the evidence presented at trial. We find no basis for concluding that misconduct occurred." (*Ibid.*)

Here, Juror No. 7 described his personal experiences of discrimination and expressed his view that Chen's experience was less serious than his own. Like the jurors in *Moore* and *Iwekaogwu*, Juror No. 7 was not required to erase his personal history and retain only the experience of the trial itself. And, as in *Iwekaogwu*, there is no evidence that any juror decided the case based on Juror No. 7's comments. Although Juror No. 5's declaration included the further statement that Juror No. 7 "would only find discrimination if [he] felt the conduct was the same or worse tha[n] what he had experienced," the court properly struck that statement as Juror No. 5's opinion.

Regarding Juror No. 3, Chen contends that she was "unable to participate and perform her duties as a juror." The evidence does not support this claim. According to Juror No. 5, Juror No. 3 stated that she needed to leave to go to Taiwan, was the last to vote, and that other jurors told her, " 'let's be done, so we can leave.' " Nothing in these statements suggest that Juror No. 3 failed to deliberate. (See *People v. Cleveland* (2001) 25 Cal.4th 466, 486.)

Because the court did not abuse its discretion in sustaining defendants' objections to Juror No. 5's declaration or in determining that the evidence did not constitute misconduct, it did not err in denying Chen's motion for new trial on that ground.

DISPOSITION

The judgment is affirmed. Defendants and respondents, Regents of the University of California and Jennifer Pelkey, are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

WEINGART, J.*

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