Filed 1/8/20 P. v. Larson CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIK LARSON, Defendant and Appellant.	B292764 (Los Angeles County Super. Ct. No. BA452474)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, and William H. Shin, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Erik Larson of theft of over $950 from Susan Wood, an elderly or dependent victim, in violation of Penal Code section 368, subdivision (d).[1] The trial court sentenced Larson to an aggregate four-year term, suspended execution of sentence, and placed him on one year of mandatory court supervision. The trial court further ordered Larson to make restitution of $12,239.96 and imposed a restitution fine and various assessments.

On appeal, Larson seeks reversal of his conviction, claiming there is insufficient evidence to support the conviction, trial testimony was erroneously admitted, he received ineffective assistance of counsel, and the prosecutor committed misconduct. Larson also contends the trial court erred in assessing statutory fines and assessments without determining his ability to pay.

We conclude Larson's claims of error related to his conviction either have no merit, or are harmless based on the strong evidence of guilt. We further reject Larson's argument that he is entitled to an ability-to-pay hearing before the trial court can assess statutory fines and assessments.

FACTUAL BACKGROUND

Larson is a licensed funeral director. He met Wood, who was then 71 years old, when he provided funeral services for Wood's twin sister. The People contended Larson stole at least $26,814 from Wood—$8,014 through electronic transfers from her checking account, and $18,800 through billing falsified expenses

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

for the funeral. Larson claimed Wood voluntarily paid him the $26,814, as well as other expenses, as compensation for caregiving and assisting Wood with unforeseen trust and estate issues prompted by inept attorneys.

A. Prosecution Evidence

1. *Larson Meets Wood*

Larson owned and operated the Larson Family Mortuary. In February 2016, Wood hired him to arrange the funeral of her twin sister Julie Ray. Wood was deeply traumatized by her sister's death. By all accounts, she was at times confused and forgetful. It was later determined that Wood was suffering from Alzheimer's-related dementia and was mentally incapable of making her own financial decisions.

Larson introduced Wood to Goldfarb & Luu (the Law Firm), which specialized in estate planning.

Larson and the Law Firm referred business to one another. After some investigation, the Law Firm concluded Ray had died intestate and agreed to probate Ray's estate.

Wood also engaged the Law Firm to handle her estate planning. Wood wanted to keep her life savings secure from loss and protected from mismanagement. Her most significant asset was her residence, a duplex which she and her sister had jointly owned before Ray died. By one estimate, the property was worth $2.5 million.

In March 2016, the Law Firm appointed a professional fiduciary to assist Wood in handling her finances. The Law Firm also drafted a will, a living trust and related documents for Wood. Wood designated certain animal charities to receive all her

assets. In March or April 2016, the Law Firm paid Larson in full for Ray's funeral arrangements from Wood's trust account.

In April 2016, Larson began experiencing financial difficulties. After losing the lease to his apartment, Larson and his family moved into Wood's residence, taking over the upper floor previously occupied by Ray. In May 2016, Larson asked the Law Firm to appoint him Wood's caregiver at an hourly rate of $25 plus housing and an inheritance. The Law Firm informed Larson that a caregiver could not inherit. Larson then abandoned the idea of a caregiver appointment.

2. *Larson Drafts New Documents for Wood, Naming Himself a Primary Beneficiary*

In May 2016, Wood was sent a grant deed for the duplex, which named the professional fiduciary as trustee. Larson questioned the need for the fiduciary's name on the grant deed, believing it meant the fiduciary now owned the property.

In June 2016, Larson drafted a new will for Wood, naming himself executor and specifying that he was to receive her duplex, automobile, and household and personal effects as well as half the proceeds from any subsequent sale of the duplex.[2] An animal charity was to receive the remaining half of the proceeds upon the sale of the duplex. Larson also created a power of attorney over Wood, as well as a handwritten document that purported to revoke the 2016 living trust drafted by the Law Firm, remove the

---

[2] Larson was not an attorney. He relied on online information and templates to create the documents for Wood.

fiduciary as trustee, and revert all trust assets to Wood. These new documents were signed by Wood.

Upon receiving the documents, the Law Firm became concerned about Larson's relationship with Wood and consulted an attorney on how to proceed. In July 2016, the Law Firm sent Larson a cease and desist letter.

In the meantime, Larson learned from another attorney, John Ronge, that the sisters had each made a will and living trust in 1999. Larson found the 1999 trusts inside the duplex and delivered them to the Law Firm. Wood's 1999 living trust gave all her assets to an animal charity. On June 30, 2016, Larson amended the trust to give himself 50 percent of Wood's assets "as compensation for handling [Ray's] estate . . . ." The amendment further stated Larson "and his beneficiaries" could stay in the duplex indefinitely, but if it were sold, Larson would retain 50 percent of the proceeds. The remaining 50 percent would be donated to an animal charity.

3. *Larson Transfers Funds from Wood's Checking Account into His Own Account*

Wood had a checking account at Bank of America. In January 2016, the account had a balance of over $100,000. Larson had a Wells Fargo checking account. After he moved in with Wood, Larson opened a second checking account at Bank of America.

In early June 2016, Larson wrote Wood a check on his Wells Fargo account for "temp[orary] rent" in the amount of $777.00. Days later, Larson drafted an agreement to pay Wood $1,600 in monthly rent. On July 2, 2016, Larson wrote Wood a $6,400 check covering his rent from July through October 2016.

The check was written on his Bank of America account, which had a balance of $91 at the time. Using access he had obtained to Wood's account, Larson made three electronic fund transfers totaling $5,657 from Wood's account to his Bank of America account before the $6,400 check cleared.[3] Larson made a fourth electronic transfer of $2,360 from Wood's account to his Bank of America account in late July 2016. Wood testified she wrote checks to pay her bills and never used online banking.

4. *Larson Charges Wood an Additional $18,800 for Her Sister's Funeral Arrangements*

Larson billed Wood three times for her sister's funeral. As noted above, the expenses were first paid by the Law Firm in March or April 2016 from Wood's trust account. Larson thereafter sent an invoice dated June 30, 2016 from the Larson Family Mortuary directly to Wood in the amount of $18,800. This invoice billed Wood at an hourly rate of $236 for 80 "additional hours of work by owner." A notation on the invoice read, "paid in full," "July 2, 2016." Wood wrote a corresponding check for $18,800 on July 2, 2016. On the memo line, she noted the check was for "funeral expenses." The check was deposited into Larson's Wells Fargo account on July 5, 2016.

Larson sent a third invoice to Wood dated July 6, 2016, which reflected a balance due of $34,126.00. This July 6, 2016 invoice is not in the record. The testimonial descriptions of it at trial indicated the invoice was not on Larson Family Mortuary letterhead. The July 6, 2016 invoice referenced the earlier $18,800 invoice, noting this time it had been for "four months of

---

[3] Bank of America later reversed these transfers.

personal assistance, loss of income, time and effort."[4] It listed numerous charges at an hourly rate of $236, including charges concerning the Law Firm's cease and desist letter to Larson and potential responses to it, retaining counsel to protect Larson from liability, and creating video recordings with Wood that purported to show her wishes.[5] The invoice referenced the four electronic transfers totaling $8,014.00, and included charges for Larson's lodging and entertainment while on vacation, an iPhone and Apple Watch purportedly for Wood (which she denied using), and caregiver assistance such as transportation, cleaning, and cooking.

5. *Larson Is Forced To Leave Wood's Home*

In July 2016, Wood told the professional fiduciary she had concerns about Larson living so close to her. The Law Firm contacted the police, who launched an investigation. The Law Firm also obtained a temporary restraining order for elder abuse, which required Larson to move out of the duplex in August 2016.

---

[4] These descriptions were not on the prior June 30, 2016 invoice. The People contended these after-the-fact descriptions were crafted to make it appear the payment of that prior invoice was for services different than funeral expenses, and to provide cover for the amounts misappropriated from Wood.

[5] Larson made two video recordings with Wood in July 2016 in response to the cease and desist letter, in which she agreed with Larson's statements about her wishes. The prosecution played these recordings for the jury to show Wood's vulnerability and Larson's efforts to control her.

B. Defense Evidence

Larson testified in his own defense. He acknowledged he was currently on probation for a misdemeanor offense and was convicted in 2001 of battery on a police officer, a felony.

Larson explained that he and Wood developed a special bond. Wood invited Larson and his family to live with her rent-free following a Las Vegas vacation. They all lived together like a small family. After deciding to stay with Wood, Larson wrote the check for four months rent in advance.

Larson testified Wood had agreed to online banking, and he helped her set it up. Wood then consented to each of the four electronic transfers. Larson either made the electronic transfers himself, or guided Wood in making them. The transferred funds paid for services Larson performed for Wood while he was on vacation in Reno, Nevada and Wood remained at her home. Larson acknowledged having withdrawn $10,000 from his Wells Fargo account on July 14, 2016 for his Reno vacation. He also acknowledged it was "possible" he needed the funds transferred to cover his $6,400 rent check.

Larson testified he drafted the new will and living trust for Wood at her behest. She thought the Law Firm's documents were too complex and was dissatisfied with the explanation for the fiduciary's name being on the grant deed. Larson was

concerned about designating himself as a beneficiary, but Wood said she would make an audio recording of her wishes. [6]

Larson testified the Law Firm ignored his repeated telephone calls and e-mails. The attorneys also ignored the existence of Ray's 1999 will and living trust, and continued to probate Ray's estate. Larson believed the attorneys were not working in Wood's best interest. In June and July 2016, Larson became "totally consumed" with helping Wood and had no time for his mortuary business. Wood agreed to the $236 hourly rate, which, Larson acknowledged, was higher than his $75 hourly rate in 2015. Wood approved the invoices.

Larson testified Wood mistakenly wrote "funeral expenses" on the memo line of the $18,800 check; he admitted all the costs for Ray's funeral arrangements had already been paid. Larson said that while he was not present when Wood wrote the check, he accepted it from her and marked the invoice "paid in full."

Larson noticed Wood's mental state fluctuated during this time, but she did not have any memory loss. Instead, Wood seemed "spacey" or "out of it" or "a bit off" at times, although she could still drive and take care of herself. Wood had atrial fibrillation, and her mental state seemed to improve when she took her prescribed medication.

---

[6] While the two video recordings in which Wood purportedly expressed her wishes were played for the jury, no audio recording was introduced into evidence.

DISCUSSION

A. Substantial Evidence Supports Larson's Conviction

Larson first asserts there was insufficient evidence to convict him of financial elder abuse under section 368, subdivision (d).[7] The prosecution argued the case (and the jury was instructed) on three alternative theories: theft by larceny (CALCRIM No. 1800), theft by false pretenses (CALCRIM No. 1804) and theft by trick (CALCRIM No. 1805). Relevant to all three theories was the question of whether Wood consented to giving the funds at issue to Larson.

As we find the evidence sufficient to support the People's principal theory, theft by larceny, we address only that theory. There is no unanimity requirement as to the theory of theft. (*People v. Vidana* (2016) 1 Cal.5th 632, 643; see *People v. Dimitrovich* (1961) 194 Cal.App.2d 710, 718—719 [facts supported a conviction under all three theories of theft].) A theft conviction must be affirmed if there is sufficient evidence to support any

---

[7] Section 368, subdivision (d) provides: "A person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud . . . with respect to the property . . . of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable . . . (1) By a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in a county jail not exceeding one year, or by both that fine or imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars ($950)."

theory of theft as to which the jury was properly instructed. (*People v Kagan* (1968) 264 Cal.2d 648, 658.)

1. *Standard of Review*

The standard of review for assessing the sufficiency of the evidence to support a criminal conviction is "highly deferential." (*People v. Lohtefeld* (2000) 77 Cal.App.4th 533, 538.) Our task is to review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence of the defendant's guilt. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) "Although we must ensure the evidence is reasonable, credible, and of solid value" (*People v Jones* (1990) 51 Cal.3d 294, 314), reversal is not warranted unless ""'upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment].'"" (*People v. Cravens* (2012) 53 Cal.4th 500, 508; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

2. *Theft by Larceny*

Theft by larceny is committed by (1) taking possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass, (5) with intent to steal the property, and (6) carrying the property away. (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 626.) "The act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property." (*People v. Davis* (1998) 19 Cal.4th 301, 305, fns. omitted.) "Though never adopted in California, the Model Penal Code sets out a definition of ineffective consent in criminal cases, including theft, that is instructive. After noting that the law on ineffective consent 'is neither difficult nor controversial,' the [Model Code's]

commentary provides: . . . [C]onsent is vitiated in those situations where it is given by one who, by reason of youth, mental disease or defect, or intoxication, is manifestly unable, or known by the actor to be unable, to make a reasonable judgment as to the harm that would be incurred by virtue of the consent." (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1276 [citing Model Pen. Code & Commentaries (1985) com. 3 to § 2.11, pp. 398–399, fns. omitted].)

The People argued that Larson committed theft by larceny because Wood was unable to make a reasonable judgment of the harm that would be incurred by virtue of her consent, and therefore was incapable of giving effective consent to the financial transactions at issue. Geriatrician Dianna Homeier evaluated Wood and rendered an opinion at trial. Dr. Homeier testified she evaluated Wood in September 2016. At the time, Wood's memory, reasoning ability and judgment were impaired by Alzheimer's disease. In Dr. Homeier's opinion, Wood lacked the mental capacity to make informed financial decisions. She would not have been able grasp the rational for making those decisions or to understand their consequences. Wood would also have been easily manipulated or influenced in making financial decisions.

Dr. Homeier further opined Wood had lacked this capacity for at least one year, which meant she lacked the mental capacity in February 2016 to make informed financial decisions. Other witnesses (including Larson) testified that from February through July 2016, Wood seemed periodically "spacey," "out of it," confused and forgetful, with intermittent days of lucidity. Dr. Homeier testified this was typical of someone afflicted with Alzheimer's disease.

The testimony of a single witness, including an expert witness, is sufficient to constitute substantial evidence of a particular fact unless the expert's testimony is purely speculative. (*People v. Wright* (2016) 4 Cal.App.5th 537, 545—546.) Larson contends the evidence Wood was incapable of consenting to the charged financial transactions was insufficient because Dr. Homeier's opinion was "nothing short of pure conjecture." We disagree. Dr. Homeier based her opinion on her understanding of the progression of Alzheimer's disease and her own diagnosis of Wood's mental impairment after an interview, a battery of cognitive tests, analyzing the two video recordings of Larson and Wood, and a review of a neuropsychologist's July 2016 evaluation of Wood. Dr. Homeier's opinion testimony was accompanied by a reasoned explanation of how she used her knowledge and training to reach her conclusions. The testimony was sufficient to support the finding that Wood was mentally incapable of consenting to give Larson money from her bank account.

B. Any Error In Admitting Attorney Luu's Testimony Was Not Prejudicial

Larson next argues the trial court erroneously admitted improper opinion evidence from attorney Dinh Luu of the Law Firm. Luu testified she was concerned about Wood's new will naming Larson a beneficiary. The prosecutor asked Luu why she was concerned. Luu answered, "Because it was unnatural." The prosecutor then asked Luu what she meant by "unnatural" and Luu answered, "Well, a lot of red flags, right? [¶] This person who she didn't know before February who she hires to bury her dead sister eventually moving into . . . the home of her dead sister, then changing her will. *That to me is clearly elder abuse*."

(Italics added.) The trial court overruled defense counsel's objection to the italicized statement as improper opinion evidence. Larson claims this was prejudicial error requiring reversal.

1. *Standard of Review and Applicable Law*

Generally, witness testimony is limited to matters of which the witness has personal knowledge. (Evid. Code, § 702, subd. (a).) Lay opinion testimony is admissible if it is both "[r]ationally based on the perception of the witness" and "helpful to a clear understanding of [the witness's] testimony. (Evid. Code, § 800; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83.) A trial court's admission of lay opinion testimony is reviewed for abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) Where testimony has been erroneously admitted, "[w]e must examine the entire cause, including the evidence, and determine whether it is reasonably probable that a result more favorable to appellant would have been reached had this evidence not been admitted." (*People v. Sergill* (1982) 138 Cal.App.3d 34, 41.)

2. *Any Error Was Harmless*

Larson argues Luu's statement, "That to me is clearly elder abuse," was inadmissible opinion testimony regarding his guilt or innocence of the charged crime. (E.g., *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47 ["a witness cannot express an opinion concerning the guilt or innocence of the defendant"].) Luu did not opine, however, that Larson had committed theft. Nor did she testify as an expert on elder abuse or any other topic. Instead, to explain why she was concerned and took action related to her concerns, Luu testified that it appeared to her Larson was taking unfair advantage of Larson. While her choice of words may have

been suboptimal, that type of lay opinion testimony is proper. (*People v. Leon* (2015) 61 Cal.4th 569, 601 ["A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.)"].)

Even if we assume the admission of Luu's statement was an abuse of discretion, the error was not prejudicial given the overwhelming evidence that Larson did in fact prey upon a grieving elderly woman with dementia. Larson ingratiated himself into Wood's home, gained access to her bank account, and stole money from it. He repeatedly billed her for numerous improper charges to which Wood did not consent. Larson campaigned intensely to make himself a beneficiary of Wood's home and assets upon her death. The prosecutor's closing focused on these facts, and made no reference to the challenged statement from Luu. Accordingly, there is no reasonable probability that a result more favorable to Larson would have been reached had the challenged testimony been excluded. (*People v. Weaver* (2001) 26 Cal.4th 876, 968; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Defense Counsel Did Not Provide Ineffective Assistance

Larson maintains multiple instances of ineffective assistance of counsel prejudiced his trial defense. Before examining these arguments, we pause to note that several of Larson's assertions argue his trial counsel was ineffective for not advancing positions that would have contradicted positions Larson in fact took at trial. For example, Larson defended his conduct at trial by arguing Wood was either competent to

consent, or at least appeared competent enough that Larson could rely in good faith on her apparent consent. Larson maintains this argument on appeal, claiming we should reverse his conviction because there was insufficient evidence Wood could not effectively consent. In arguing ineffective assistance, however, Larson claims his counsel should have sought to establish Wood was in fact incompetent. In other words, Larson weirdly suggests his counsel was ineffective for not taking up the slack from the prosecutor and trying to prove up the very fact as to which Larson claims there was insufficient evidence to convict him.[8]

---

[8] Larson's appellate counsel recognizes this disconnect, and claims arguing incompetence was a " 'win-win' " because either Wood would be found incompetent to testify (in which case her testimony would have been excluded), or Wood would be found competent in which case the court's competency ruling would establish his defense that Wood was competent to consent to the financial transactions. As explained below, Larson misunderstands the test for a witness's competency and it is not reasonable to expect the motion would be granted. In any event, rather than win-win, the outcome was far more likely to be "lose-lose." If Wood had been found incompetent to testify, the People still could have presented their case given the financial documents showing the suspect transactions. Larson's efforts to establish consent then would have been limited to impeaching a medical expert who had already opined Larson was incapable of effective consent, instead of also questioning a victim who was highly suggestible to agreeing she consented—an arguably worse position. If Wood was found competent to testify, that would not necessarily mean she was similarly competent to consent to the financial transactions with Larson. Any argument suggesting competency to testify and competency to consent were equivalent

Larson also takes his counsel to task for not asking several lay witness their opinions of Wood's competency, despite the fact such questions would directly undermine Larson's argument at trial that a lay person such as himself was not capable of telling whether someone is competent to consent. Capable counsel avoid such conflicting arguments. Good trial tactics typically demand candor with the jury instead of talking out of both sides of one's mouth, and " 'we cannot equate such candor with incompetence.' [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 612.)

1. *Standard of Review*

" '[W]here counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.) And even where there is no conceivable reason for an act or omission, reversal is still unwarranted if a more favorable outcome is not reasonably probable absent the act or omission. (*People v. Carter* (2005) 36 Cal.4th 1114, 1152.)

2. *Wood's Competency To Testify*

Larson contends his defense counsel was constitutionally ineffective for failing to request either an evidentiary hearing on Wood's competency to testify or the exclusion of her testimony. Generally, "every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."

---

would have been improper, and resulted in a sustained objection as well as a potential instruction to the jury highlighting the impropriety of the defense contention.

(Evid. Code, § 700.) "A person is incompetent and disqualified to be a witness if he or she is '[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him' (Evid. Code, § 701, subd. (a)(1)), or is '[i]ncapable of understanding the duty of a witness to tell the truth.' (Evid. Code, § 701, subd. (a)(2).)" (*People v. Lewis* (2001) 26 Cal.4th 334, 360.)[9]

In arguing Wood was disqualified as a witness, Larson points to her failure to identify the investigating officer in court, her belief she had known Larson as a longtime neighbor, her failure to recall attending the Las Vegas Cirque du Soleil Beatles show with Larson, her difficulty remembering the professional fiduciary and their relationship, and her failure to recognize a quitclaim deed with her name on it.

This argument, however, conflates Wood's competency under Evidence Code section 701, which relates to her capacity to communicate and to understand the obligation to tell the truth, with Wood's capacity to perceive and recollect certain facts. The capacity to perceive and recollect are *not* pre-conditions for a witness to testify. " '[U]nder the Evidence Code, *if there is*

---

9 "[T]he burden of proof is on the party who objects to the proffered witness, and a trial court's determination will be upheld in the absence of a clear abuse of discretion." (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) The challenging party must establish a witness's incompetency by a preponderance of the evidence. (*People v. Farley* (1979) 90 Cal.App.3d 851, 868—869.)

evidence that the witness has those capacities [under Evidence Code section 701 to express herself, and to understand the duty of a witness to tell the truth], the determination whether [s]he in fact perceived and does recollect is left to the trier of fact.' [Citations.]" (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 573—574; accord *People v. Dennis* (1998) 17 Cal.4th 468, 525—526.)

Defense counsel was not required to object to Wood's competency to testify, or to request an evidentiary hearing on her competency, when there was no reasonable ground to exclude her testimony under Evidence Code section 701. (*People v. Lewis, supra*, 26 Cal.4th at p. 361 ["Where 'there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance of counsel'"].) By the time of trial, the effects of Wood's dementia were obvious. Her testimony was disjointed and at times nonresponsive. But the fact a witness has a mental affliction, is difficult to comprehend, and answers in "incomplete, sometimes nonsensical sentences" does not support the finding that a witness is "incapable of communicating so as to be understood, pursuant to Evidence Code section 701, subdivision (a)(1)."[10] (*People v. Lewis*,

---

[10] The jury was instructed: "In evaluating the testimony of a person with a mental impairment, consider all the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a mental impairment may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness. [¶] You should not discount or distrust the testimony of a person with a

supra, 26 Cal.4th at pp. 360—361; see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 574 [no substantial evidence that witness, who delusionally believed imaginary son was present during murder, lacked capabilities under Evid. Code, § 701, subd. (a)(1) & (2); *People v. Jones* (1968) 268 Cal.App.2d 161, 165—166 [prosecution witness characterized as a 'mental defective' by trial judge was not incompetent despite his conflicting and inconsistent testimony]; *People v. Scaggs* (1957) 153 Cal.App.2d 339, 354 [record did not disclose that witness was incompetent as a matter of law]".) Instead, Wood's confusion, lack of recollection and sometimes incoherence were questions "of credibility for the jury and not relevant to the issue of [Wood's] competency." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 361.)

3. *Defense counsel was not constitutionally ineffective for failing to cross-examine prosecution witnesses, to subpoena a witness, and to pose certain questions of a defense witness*

(a) *Allegedly inadequate cross-examination*

Larson next asserts his counsel failed to adequately cross-examine attorney Luu and Dr. Homeier. Our Supreme Court has observed that "normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make." (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.) "'As to whether certain witnesses should have been more rigorously cross-examined, such matters

---

mental impairment solely because he or she has such an impairment. (CALCRIM No. 331.)

are normally left to counsel's discretion and rarely implicate inadequacy of representation.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 334; see *People v. Cudjo* (1993) 6 Cal.4th 585, 618 ["failure of defense counsel to cross-examine more vigorously may be explained as a tactical decision"].) Moreover, "'[s]uch claims must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. [Citations.] We cannot evaluate alleged deficiencies in counsel's representation solely on defendant's unsubstantiated speculation.'" (*People v. Bolin, supra*, at p. 334.)

Larson faults his trial counsel's failure to cross-examine Luu about the Law Firm's practices regarding mentally incompetent clients signing complex end-of-life financial documents. Larson asserts Luu would have stated in response to such questions that the Law Firm would never knowingly permit a client who lacked the capacity to make financial decisions to sign testamentary documents. Larson claims such cross-examination would have bolstered the defense claim that Wood was competent to make financial decisions.

Assuming that Luu would in fact give such an answer, the testimony elicited at trial shows counsel made a reasonable tactical decision not to make such an inquiry. Luu testified her law partner Goldfarb was exclusively involved in working with prospective clients, while Luu would typically remain behind the scenes. Luu also testified she was not present in the initial client meeting with Wood and Larson. Given such testimony, while Luu may have been able to explain the firm's policy concerning financially incompetent clients, she could not have testified concerning Wood's mental capacity in particular. In addition,

Wood's capacity to retain professionals like an attorney and a professional fiduciary to handle matters outside her expertise does not necessarily equate to her capacity to consent to multiple, more complex financial transactions with a self-interested party. Finally, without knowing the Law Firm's policy and what steps it may have involved, such questioning could have demonstrated Larson ignored safeguards followed by the Law Firm and highlighted other ways in which Larson took unfair advantage of Wood.

Larson also claims defense counsel should have cross-examined Dr. Homeier more thoroughly to expose the weaknesses of her expert opinion. In particular, Larson contends his counsel should have asked Dr. Homeier whether Wood had taken her medication for atrial fibrillation or had eaten before the evaluation, because if Wood had not done those two things the evaluation may have been skewed. Based on Dr. Homeier's testimony, and the extent of Wood's Alzheimer's-related dementia, it is unlikely her responses to those questions would have aided the defense, regardless of how she answered. It is not reasonable to expect, as Larson seems to suggest, that if Wood took her medication and ate something her dementia would somehow disappear.

Larson further contends defense counsel should have asked Dr. Homeier whether she had consulted the neuropsychologist on whose report she relied in assessing Wood, or talked to Wood's friends, neighbors and physicians. Here, too, the defense would not likely have benefitted from the answers. Had Dr. Homeier answered, "Yes," the answers either would have been

unfavorable,[11] or the prosecutor would have asserted a hearsay objection to prevent further questioning on the substance of those discussions. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685.) A "no" response would have done little to undermine the extensive analysis that Dr. Homeier in fact did and may have enabled the prosecution to buttress its position on redirect that Larson had isolated Wood from anyone she knew who could have helped her.

Defense counsel instead pursued the sounder strategy of having Dr. Homeier acknowledge the mental deterioration of an individual with Alzhiemer's disease may not be noticeable to a lay person (like Larson). Counsel also established in cross-examining Dr. Homeier that at the time of the evaluation, Wood was aware of how much money she was making, the cost of her duplex, and was able to write. Defense counsel also elicited testimony from Dr. Homeier that grief can make a person appear more impaired than the person actually is. The cross-examination of Dr. Homeier did not fall below constitutionally mandated norms.

(b) *Failure to subpoena a witness*

Larson contends defense counsel improperly failed to subpoena Luu's law partner, Rebecca Goldfarb, who would have provided exculpatory evidence on his behalf. When a defendant's assertion of ineffective assistance of counsel is based on a failure to call particular witnesses, "there must be a showing from which it can be determined whether the testimony of the alleged

---

[11] For example, Dr. Homeier testified she had interviewed the professional fiduciary, who said she had noticed Wood's confusion and day-to-day problems with recollection.

additional defense witness was material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him." (*People v. Hill* (1969) 70 Cal.2d 678, 690.) The court can also consider whether the testimony was sufficient to create a reasonable doubt. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1101.) Further, the court can consider whether counsel took reasonable steps to procure the witness, and whether the witness would have been helpful to the defense. (*People v. Williams* (1980) 102 Cal.App.3d 1018, 1031—1032.)

Larson argues that because attorney Goldfarb worked with prospective clients and handled the meeting with Wood and Larson, she should have been called to testify about Wood's ability to make financial decisions. Larson asserts Goldfarb would have testified that Wood had the mental capacity to make financial decisions. In making this claim, Larson overlooks evidence that Wood had expressed her concern about the safety of her life savings and the firm had appointed a professional fiduciary to help Wood manage her assets, who later became her trustee. Given such evidence, defense counsel faced the real possibility that Goldfarb would have testified not as Larson claims but instead that Wood needed help in making any financial decisions. This testimony would have hurt, not helped, Larson's defense.

(c) *Alleged inadequate questioning of a defense witness*

Larson also challenges the adequacy of defense counsel's direct examination of attorney John Ronge, who specialized in trusts and estates. Ronge discovered the sisters' 1999 trusts

while meeting with Lawson and Wood. Ronge testified he determined the existence of the trusts from a title company website that generally could be accessed for a fee. Other common sources of the same information were the county recorder's website and title officers. Ronge noted that attorneys with a trust and estate practice typically obtain the information from title officers.

Larson argues defense counsel was constitutionally ineffective in failing to elicit Ronge's lay opinion of Wood's "capacity and her communicative ability." Again, it was Wood's mental capacity to consent to financial transactions that was at issue, not her mental capacity to make any decisions. In any event, because Ronge was not a mental health expert, defense counsel could rationally have decided the more effective strategy was to focus the jury's attention—as counsel did—on the ease with which Ronge had located the 1999 trusts in contrast to the firm's failure to do so.

Larson additionally argues defense counsel should have asked Ronge to opine on whether the Law Firm committed malpractice. Ronge was not a designated expert. Assuming the question was even proper, his answer—including whether he had sufficient facts to render an opinion—was unknown. Among the possibilities were "yes," "no," "I don't know," or even something like "Any malpractice exposure would have arisen out of claims the Law Firm failed to protect Wood from Larson taking advantage of her." In other words, the answer was just as likely to be counterproductive or neutral as it was to be helpful. The record fails to establish that defense counsel lacked any rational basis for forgoing or limiting this line of questioning.

D. Prosecutorial Misconduct Claims

Larson contends the prosecutor committed multiple instances of misconduct during closing and rebuttal argument. To the extent defense counsel failed to object, Larson seeks to preserve his claims for review by arguing defense counsel was constitutionally ineffective in not objecting.

A prosecutor commits misconduct that violates due process under federal and California law if, respectively, the conduct "'"infects the trial with such unfairness as to make the conviction a denial of due process"'" (*People v. Adams* (2014) 60 Cal.4th 541, 568) or the conduct "'"involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury"'" (*ibid.*). "Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

We examine the challenged argument in the context of the whole argument and the instructions. (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) A prosecutor's actions may be deemed harmless where the nature of the misconduct and the surrounding circumstances of the case provide no reasonable probability of prejudice that one or more jurors were actually biased. (*People v. Seamanu* (2015) 61 Cal.4th 1293, 1344.)

1. *Closing argument*

The first instance of alleged misconduct is the prosecutor's description of the circumstances in which the $18,800 check was written by Wood and received by Larson. The prosecutor told the

jury: "And [Larson] himself [said] during his testimony, 'Yes, I was there with her. I received that check from her. I was the one that—'" Defense counsel objected that the prosecutor had misstated the evidence. The trial court overruled the objection, stating, "It's up to the jury to make the factual determination so I'll allow the jury to make that."

Larson argues this was misconduct because "the evidence established [he] was not in [Wood's] presence when she wrote the check." However, the prosecutor did not argue Larson was present when Wood wrote the check. Rather, the prosecutor argued Larson was in Wood's presence when he *received* the check. There was evidence on precisely this point. Larson testified, "I wasn't present when [Wood] wrote the check," but he acknowledged that Wood "handed it to me." The prosecutor's remark was fair comment on this testimony. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Next, Larson contends the prosecutor erred in stating his opinion of Wood's demeanor on cross-examination. The prosecutor first reminded the jury of Dr. Homeier's opinions regarding Wood's mental capacity and then stated the questioning of Wood at trial demonstrated how easily she could be "influenced and manipulated" in her current state. The prosecutor referred to Wood's answers to defense counsel's questions about a Las Vegas Cirque du Soleil "Beatles" show. The prosecutor stated, "At one point [Wood] agreed that she had seen the Beatles perhaps. I thought that was heartbreaking. I could kind of—I'm watching her and I could see how confused she is saying, 'I've never gone to see the Beatles in concert,' whatever it might be."

Larson contends the prosecutor's comments impermissibly injected his personal opinion and evoked sympathy for Wood. "A witness's demeanor is 'part of the evidence' and is 'of considerable legal consequence.' [Citations.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1358.) There is nothing improper in arguing inferences to be drawn from a victim's demeanor and manner of testifying. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 705.) It is improper, however, to appeal for sympathy for a victim (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130), or to vouch for a witness (*People v. Stewart* (2004) 33 Cal.4th 425, 499).

Applying these strands of case law to the prosecutor's comments here, we perceive no misconduct. The prosecutor's statement was a fair comment on Wood's testimony. It did not vouch for her credibility—indeed, the prosecutor was making the opposite point that her trial testimony showed how easily should could be influenced and manipulated in a conversation. While the prosecutor expressed sympathy for Wood, that sympathy was related to her confusion while testifying and did not, for example, ask jurors to put themselves in Wood's place as a victim of Larson's criminal conduct. (See *People v. Lopez* (2008) 42 Cal.4th 960, 969–970; *People v Farnam* (2002) 28 Cal.4th 107, 167.) Finally, the prosecutor's comments were brief, touched on a fact already before the jury (that Wood suffered from dementia), and jurors were able to assess Wood's demeanor and testimony themselves. There was not a reasonable likelihood the jury would have understood or applied the prosecutor's comments in an improper or erroneous manner.

2. *Rebuttal argument*

(a) *Comments on evidence*

Larson claims the prosecutor committed misconduct during rebuttal argument by stating, "You're told that [Larson] is now I guess receiving letters and opening letters on behalf of [Wood]. That's how much he had involved himself in her life. She's not opening her own mail."

The prosecutor's statement that Wood was not opening her own mail was a reasonable inference the jurors could have drawn from the evidence. On cross-examination, Larson testified twice that Wood had received a letter and a quitclaim deed in the mail and had shared them with him. In the video recordings, Larson stated twice that he and Wood had "puzzled through" the cease and desist letter together. In one recording, Larson offered to continue to act as Wood's "pit bull" in response to the firm, and Wood agreed.

"At closing argument, a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Moreover, even assuming the prosecutor misstated the evidence, any error was harmless given the overwhelming evidence against Larson and the triviality of whether she was opening her own mail in contrast to that evidence. (*People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Jackson* (1996) 13 Cal.4th 1164, 1240.)

The prosecutor also stated during rebuttal argument (apparently while referring to terms of the caregiver appointment Larson proposed to the Law Firm after moving in with Wood), "[Larson] tells you . . . 'When the time comes, if she becomes

bedridden or is unable to walk, feed herself, or change her, care for her grandmother, we cannot provide 24/7 care.' And then [Larson] says, '[Wood] asked that I oversee the faithful completion of her wishes upon passing.'" [¶] "This is two years ago. May 31st of 2016." The prosecutor continued with the following comments, which Larson asserts were misconduct: "You met Ms. Wood. Yes, she had dementia, but she's just fine. She's happy. She's in her home. She still has her estate and property."

Larson claims these comments were unsupported by the evidence and a ploy for the jury's sympathy. We find these comments a fair comment on the evidence, underscoring Larson's thwarted plan to control the disposition of Wood's assets. (*People v. Young* (2005) 34 Cal. 4th 1199, 1222.) In any event, it wholly improbable that the jurors wrongly used the comments in reaching their verdict.

(b) *Comparison to Rape*

Larson lastly focuses on the prosecutor's statements during rebuttal argument likening Larson's treatment of Wood to the act of rape. In response to defense counsel's closing argument that Larson could not have discerned Wood's financial incompetence because he was not a "geriatrician", the prosecutor argued the following: "But we're here because the decisions made by [Larson] to take advantage of somebody in Ms. Wood's position. [¶] It's the equivalent of . . . and I don't believe this analogy is too strong. It's that situation where you have a rape victim and that victim of rape has been given an intoxicating substance—"

Defense counsel interposed an objection, which the trial court overruled. The prosecutor continued, "A ruffie or that

victim of the rape is in some way incapacitated mentally, special needs or a minor, and the person who took advantage of that victim says something like, 'Well, when I gave them [sic] that intoxicating substance. I'm no expert so I didn't know what the symptoms were going to be, right? I don't know what dementia is. I'm no expert.' [¶] "Well, you don't have to be an expert to know that somebody was conditioned that's going to be willing to do or agree to or consent to."

Larson contends the prosecutor's statements were highly inflammatory and fundamentally unfair. A prosecutor has great latitude when making a closing argument. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1330.) But while a prosecutor " ' " 'may strike hard blows, he [or she] is not at liberty to strike foul ones.' "' ' " (*People v. Armstrong* (2019) 6 Cal.5th 735, 797.) We find the prosecutor's comparison of Larson's actions to drugging and raping someone, or sexually assaulting a child or special needs individual, inappropriate and inflammatory. The argument should not have been made, and the objection should have been sustained. (*People v. Redd* (2010) 48 Cal.4th 691, 742 [improper to present " ' "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response" ' "].)

However, we also conclude the prosecutor's error in making this analogy was harmless. The evidence of Larson's guilt was overwhelming. The jury was instructed that it must "not let bias, sympathy prejudice or public opinion influence [its] decision." (CALCRIM No. 200) The jury was advised that "nothing the attorneys say is evidence," including their opening statements and closing arguments. (CALCRIM No. 222.) We assume the jury followed these instructions. (*People v. Stitely* (2005) 35 Cal.4th

514, 559.) The prosecutor's use of the rape analogy—viewed in the context of the entire record—did not render the trial fundamentally unfair or otherwise infect the trial with such unfairness as to violate Larson's constitutional rights. (*People v. Morales*, supra, 25 Cal.4th at p. 44.)

E. The Trial Court Did Not Err in Imposing a Restitution Fine and Court Assessments

At the July 24, 2018 sentencing hearing, the trial court imposed, without objection, the statutory minimum restitution fine of $300 (§ 1202.4, subd. (b)(1)), a court operations assessment of $40 (§ 1465.8, subd. (a)(1)), and a criminal conviction assessment of $30 (Gov. Code, § 70373).[12] Larson requests that we reverse these amounts because the trial court did not first ascertain his ability to pay them, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We decline to do so.

The People argue that Larson's failure to object below to the fines and assessments, or to raise the issue of inability to pay, caused him to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154—1155 [same].) We find it unnecessary to weigh in on this debate because in our view *Dueñas* was wrongly decided. (*People v. Kingston* (2019) 41

---

[12] The court also ordered Larson to pay $12,239.96 in victim restitution. Larson does not challenge the restitution order.

Cal.App.5th 272 (*Kingston*); see also *People v. Caceres* (2019) 39 Cal.App.5th 917, 926.)[13]

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks*, *supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, "due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant's incarceration." (*Kingston, supra*, 41 Cal.App.5th at p. 279, citing *Hicks, supra*, at pp. 325—326.) Here, the "imposition of the [restitution fine] and fees in no way interfered with [Larson]'s right to present a defense at trial or to challenge the trial court's rulings on appeal . . . . " (*Kingston, supra*, at p. 281.)

Larson still has one year on court supervision to make bona fide efforts to repay the restitution fine and assessments. At this point in time, due process does not deny Larson the opportunity to try to satisfy these obligations. (*People v. Hicks, supra*, 40 Cal.App.5th at p. 327.) The trial court accordingly did not violate Larson's due process rights by imposing the restitution fine and assessments without first ascertaining his ability to pay them.

---

[13] Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) 41 Cal.App.5th 312, 326, petn. for review pending, petn. filed Nov. 22, 2019; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067—1068; *People v. Kopp* (2019) 38 Cal.App.5th 47, 93—98, review granted Nov. 13, 2019, S257844.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

---

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