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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH THOMAS HARRIS, Defendant and Appellant.	B278284 (Los Angeles County Super. Ct. No. BA423611)

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

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kenneth Thomas Harris appeals[1] from the judgment entered following his convictions by jury on count 1 – second degree robbery (Pen. Code, § 211)[2] and count 2 – annoying or molesting a child under 18 years of age (§ 647.6, subd. (a)(1))[3] with findings he suffered two prior felony convictions (§ 667, subd. (d)) and two prior serious felony convictions (§ 667, subd. (a)(1)). He was sentenced to 25 years to life, plus 10 years. We affirm.

FACTUAL SUMMARY

1. PEOPLE'S EVIDENCE.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at Harris's retrial (see fn. 3, *ante*) established that on April 13, 2014, 15-year-old Michelle H. (Michelle) boarded a Metro Rail Expo Line train. The seat next to Michelle was empty. Harris, whom Michelle had never met, sat in the empty seat. He told her he had a gun and to open her backpack. Afraid, Michelle opened her backpack.

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[1] On July 24, 2017, Harris filed a petition for writ of habeas corpus (case No. B283951) and this court ordered that this appeal and the petition be considered concurrently. The petition will be the subject of a separate order.

[2] Subsequent section references are to the Penal Code.

[3] As discussed *post*, Harris was convicted of annoying or molesting a child under 18 years of age at his first trial and convicted of second degree robbery at a retrial.

Michelle testified that "[Harris] told me that he wanted to lick my pussy and that I was good looking, and then he told me if I wanted my stuff, to write down his number and to meet up to get it back." Michelle added, "He took my phone and charger and a bag that I had which had my makeup, and then he took my underwear." Michelle wrote down a phone number. Harris told her she miswrote it and told her to write it correctly. Michelle complied. Harris appeared to be calm and Michelle did not have a hard time understanding him.

Harris exited the train at the next stop. He was arrested by Los Angeles County Sheriff's Deputy Shane Parks shortly thereafter. Harris complied with Parks's commands and was not combative. He was also in possession of Michelle's property, which he initially claimed belonged to him. Parks found neither phencyclidine (PCP) nor "paraphernalia to ingest PCP" on Harris.

Parks put Harris in the patrol car and Harris spontaneously stated, "I didn't do nothing to that bitch. I only fucked her. Her folks don't know she was fucking with a black dude. She's my girlfriend who's fucking some other bitch." Harris said he had "breakfast with the victim at the Lucky Strike L. A. Live Area." Harris added that he was "having sexual encounters with her." Parks replied, "So you've been having sexual encounters with a 13-year-old girl?" Harris immediately stopped, denied everything, and said, "Oh, no, I'm just – we're holding hands. We're just talking about school." Harris no longer cooperated with Parks.

While perspiring in the back of the patrol car, Harris alternated between yelling at the deputies and acting calmly. Parks did not remember whether Harris told him he had used drugs, though he admitted it was possible. Parks did not conduct any field sobriety tests (FST's) to investigate Harris's possible drug usage. However, he tried to examine Harris's eyes for symptoms of drug usage but Harris looked away and was uncooperative, though not erratic. According to Parks, the odor of PCP on a person was extremely strong. However, Parks smelled no odor of PCP emanating from Harris. Parks did not request that Harris submit a urine or blood sample.

Harris provided a written statement after waiving his *Miranda*[4] rights. Referring to the victim as "Stephanie," he stated, "I had Stephanie's pants, purse in my possession, the cell that she claimed hers [*sic*]. . . . I did not have a gun like Stephanie said I had. She was upset with me, because I would not have sex with her, a minor. And she told me she was 24 years old. We had a relationship. We never had sex before, only held hands, and she told me story about school. [*Sic*.] I have known her for two years. I did not take anything from her. She is upset because I will not have sex with her, but I do care for her." Before Harris made the written statement, Parks had said nothing to him about a gun.

Parks had taken three 40-hour narcotics courses, which covered narcotics sales, packaging, and symptomology. He had also participated in 2 eight-hour training periods from a drug recognition expert regarding symptomology.

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4 *Miranda v. Arizona* (1966) 384 U.S. 436.

As a sheriff's deputy for over 16 years, Parks had contacted "hundreds of people in custody and on patrol." He had conducted at least 100 FST's on people under the influence of various drugs, including PCP. Informants talked to Parks about drug sales, packaging, and being under the influence.

Parks opined that Harris was not under the influence of PCP when he was arrested. In the past, whenever Parks had arrested persons for being under the influence, the persons were initially lethargic and had a "scary stare." Rapid movements, loud noises, or lights shining in the persons' faces would make them highly agitated, resulting in a major altercation. Parks initially based his opinion that Harris was not under the influence on the fact that during Parks's initial contact with him, he was coherent and complied with Parks's commands. This was not consistent with Harris being under the influence.

During cross-examination, Parks conceded that yelling and screaming, rage, and perspiring can each be a sign or symptom of PCP intoxication. Speech "going up and down, changing tone" can also be a symptom of PCP intoxication, depending on the totality of the circumstances. Still, if a person ingested PCP by smoking it, Parks could smell it, especially if the person were perspiring.

2. DEFENSE EVIDENCE.

In defense, Dr. Ettie Rosenberg testified as follows. Rosenberg was a doctor of pharmacy and trained in clinical pharmacy, which involved the assessment and evaluation of the effects of drugs on the human body. PCP is a dissociative anesthetic because it causes patients to not feel pain and to "not really be in touch with their surroundings."

Absent other factors, PCP is eliminated from the system in about one and one-half to seven days. PCP is stored in fat cells, and an obese person had a higher likelihood of storing PCP for some length of time. Harris, who weighed 240 pounds and was five feet nine inches tall, qualified as obese.

PCP can be stored "up to months" in fat tissue, and it "leaches out, so you have sort of a flashback effect" that can happen. Reports and studies refer to patients with PCP intoxication months after ingestion. A person who ingested PCP could show symptoms up to two weeks later. When Harris's counsel asked whether it was reasonable for a person to experience symptomology almost two weeks after the original ingestion, Rosenberg replied, "It would be reasonable to consider it."

Harris's medical records from Gardena Memorial Hospital reflected that on March 30, 2014, Harris was brought to the hospital twice. The first time, he appeared to be lucid and coherent, and he was discharged. Fifteen to 20 minutes later, Harris was brought back and "it indicates banging his head on a manhole cover and yelling." Rosenberg opined this conduct was consistent with PCP intoxication.

Indeed, on March 30, 2014, Harris tested positive for PCP. The report reflected symptomology consistent with PCP intoxication, i.e., incoherent yelling, agitation, elevated blood pressure and pulse, and positive urine toxicology.

Harris was also restrained which was consistent with how medical staff are trained to handle someone "suffering from PCP." The hospital discharged Harris on March 31, 2014. His discharge diagnosis was PCP intoxication with an altered state of

consciousness. A person with an altered state of consciousness experienced things differently than people in the "outside world."

In response to a hypothetical question based on what happened on April 13, 2014, Rosenberg opined the behavior "could be" consistent with a person under the influence of PCP. If the hypothetical included the additional facts that the person had consumed PCP about two weeks earlier, had manifested symptoms, and was hospitalized for symptoms, "it would be reasonable to test for it." Also, jail records reflected Harris showed symptoms of combative, bizarre behavior from April 13 through April 18, 2014.

During cross-examination, Rosenberg testified that there were numerous reasons, having nothing to do with PCP intoxication, why a person could be perspiring and agitated. Being arrested and accused of a crime could cause agitation. High blood pressure and an elevated pulse could have many sources. Calmness when committing a robbery, being articulate, and walking with coordination would be factors inconsistent with being under the influence.

Rosenberg had never seen anyone under the influence of PCP. She was an expert regarding how PCP affected the body, but detecting whether someone was under the influence of PCP involved a physical assessment and she did not have as much experience in that area. A police officer in the field with 15 years of experience who had arrested people for being under the influence of various drugs and narcotics, including PCP, would be in a better position to determine if a person was under the influence.

Harris's March 30, 2014 screening test confirmed only the possible presence of a drug. Because Harris was not given a confirmatory test, Rosenberg was not opining Harris was under the influence from March 30, 2014, to April 13, 2014. Even if one had been performed, Rosenberg's opinion as to whether Harris had been under the influence would have depended on multiple factors, including Harris's metabolism, drug history, and medical condition.

Thus, it was "possible" that Harris ingested PCP on March 30, 2014, and experienced a "flashback" on April 13, 2014, but Rosenberg was not sure that that happened. Harris "could possibly" have experienced a "renewed exposure to PCP originally ingested weeks before."

ISSUE

Harris was tried twice for crimes arising out of the April 13, 2014 events. After a jury deadlocked at the first trial on the robbery charge, a second jury found him guilty of that offense. Harris claims he received ineffective assistance of counsel at his second trial when his trial counsel failed to cross-examine Parks concerning the reason he failed to test Harris for drugs.

DISCUSSION

NO INEFFECTIVE ASSISTANCE OF COUNSEL OCCURRED.

1. Pertinent Facts.

a. The First Trial.

At the first trial, Michelle and Parks were the People's only witnesses. John Treuting, a toxicologist, was the only defense witness.

Parks, during cross-examination, indicated as follows. Harris's (1) perspiring in the back of the patrol car, and (2) yelling and screaming in the back of a car, were possible signs of drug use. Rage, elevated pulse and blood pressure, perspiring, and speech that went "up" and "down" are symptoms of PCP use. When Harris's counsel asked if Harris told Parks that Harris had used drugs, Parks replied, "I believe he did." The following then occurred (and we italicize below the testimony Harris claims his trial counsel ineffectively failed to elicit from Parks during the retrial): "Q So he told you he used drugs. You have all of these other possible possibilities of him being under the influence, and yet you came to the conclusion, because you couldn't smell anything on him, that he wasn't under the influence. Is that correct? [¶] A *The reason we didn't conduct the FST's initially is because we had too much going on with the investigation, contacting the victims,*[5] *and there were more important things to do at that time than conduct FST's*." (Italics added.)

During the final charge to the jury at the first trial, the court instructed on first degree robbery of a transit passenger, including the element that Harris had to have "the specific intent permanently to deprive that person of the property." (CALJIC No. 9.40.)

The jury asked for a readback of Parks's testimony. After the readback, the jury resumed deliberations. On June 17, 2015, the jury deadlocked on the robbery count but reached a verdict on the child molesting count. The foreperson explained, "The only testimony that we ever questioned and had wanted was that of

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5 Parks was handling an unrelated call when he received the call pertaining to the present case.

[Parks] which we had done yesterday. And even at that point it helped make a few changes, but . . . whether or not intent was there, that is the stumbling block that we have is the intent." The jury's first vote was eight for guilty, three for not guilty, and one undecided. After the readback, the vote was 10 for guilty and two for not guilty. After further deliberations, the vote was 11 for guilty and one for not guilty.

The jury convicted Harris of child molesting (count 2). The court declared a mistrial on the robbery count. The prosecutor indicated he wanted to talk to the jurors and the court indicated it appeared jurors were very interested in talking with counsel.

b. The Retrial on the Robbery Count.

The retrial occurred before a different trial court. The prosecutor at the first trial was the prosecutor at the retrial. Harris had new counsel at the retrial. Witnesses testified at the retrial as reflected in the Factual Summary.

During the final charge to the jury, the court instructed on second degree robbery and told the jury the People had to prove Harris "intended to deprive the owner of [the property] permanently or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property." (CALCRIM No. 1600.)

On June 29, 2016, the jury retired to commence deliberations. On June 30, 2016, the jury found Harris guilty of robbery (count 1). We will present additional facts concerning the first trial and retrial where pertinent below.

2. Analysis.

Harris claims he received ineffective assistance of counsel when his trial counsel at the retrial failed to cross-examine Parks on a "key issue." During the first trial, Parks testified, "The reason we didn't conduct the FST's initially is because we had too much going on with the investigation, contacting the victims, and there were more important things to do at that time than conduct FST's." Harris argues that "the officer testified that 'the reason' they did not test [Harris] for drugs was not because [Harris] did not seem to be under the influence (since all signs certainly seemed to point in that direction), but rather because they were too busy." Harris thus argues, "Counsel's failure to cross-examine Parks concerning 'the reason' he failed to test [Harris] for drugs constituted ineffective assistance of counsel," because the evidence that Harris was under the influence of PCP would negate intent. We reject Harris's claim.

We resolve Harris's claim under familiar principles. " 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id.* at p. 217.)

As *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1259-1260 (*Musselwhite*) has observed, prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Id.* at p. 1260.) *Musselwhite* has also observed a reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*) Moreover, in assessing an ineffective assistance attack on trial counsel's adequacy mounted on direct appeal, competency is presumed unless the record affirmatively excludes a rational basis for the trial counsel's choice. (*Ibid.*) Further, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

The failure to impeach a witness is a matter which usually involves a tactical decision on counsel's part and seldom establishes a counsel's incompetence. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1140.) " ' " 'In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel. . . .' " ' " (*Ibid.*; *People v. Williams* (1997) 16 Cal.4th 153, 217.)

a. No Constitutionally Deficient Representation Occurred.

The record sheds no light on why Harris's counsel at the retrial failed to act in the manner challenged. However, Harris's counsel reasonably could have believed, based on the evidence at

the retrial, Harris's actions with Michelle, his conduct at the time of his initial detention, and his conflicting statements to Parks concerning what had happened, that Harris demonstrated purposeful conduct inconsistent with PCP intoxication.

Moreover, Parks's testimony at the retrial established he possessed substantial training, experience, and expertise, from courses and field experience, in determining whether someone was under the influence of a controlled substance. Parks opined Harris was not under the influence of PCP when he was arrested, and Parks explained the basis for his opinion. Parks testified that while various behaviors and conditions *could* be signs of PCP intoxication, they were far from conclusive. Although Harris told Parks that he (at an unspecified time) used drugs, Parks definitely doubted that statement.

Parks testified the odor of PCP was extremely strong, but Parks smelled no such odor emanating from Harris. Moreover, Parks testified that if a person ingested PCP by smoking it, Parks could smell it on that person. Furthermore, if a person was under the influence and "sweating it out"—implying prior PCP use—Parks typically could smell the chemical odor in the person's perspiration. Parks found neither PCP nor PCP paraphernalia on Harris. While Parks did not conduct FST's, he did attempt to examine Harris's eyes to look for symptoms of drug use, but Harris's lack of cooperation thwarted those efforts.

Harris's counsel reasonably could have concluded Parks had ample reason to believe Harris was not under the influence of drugs or PCP, so Parks properly moved on to other investigatory tasks because any further drug testing would have been pointless. Stated otherwise, counsel reasonably could have concluded that based on the abundant evidence that Harris was

not under the influence of PCP, it would have been unhelpful to challenge Parks's stated motivation for not conducting further tests on Harris for PCP intoxication. On this record, we will not second-guess Harris's counsel on a matter of trial tactics. We hold no constitutionally deficient representation occurred at Harris's retrial on the robbery count.

b. No Prejudice Occurred.

Moreover, any constitutionally deficient representation does not warrant reversal of Harris's robbery conviction. Harris asserts "[t]he robbery case against [Harris] rested entirely on whether he was under the influence of drugs at the time of the incident, and was therefore unable to form the specific intent permanently to deprive [Michelle] of her property." However, even if Harris's counsel at the retrial had questioned Parks as Harris urges, it is not reasonably probable Parks would have contradicted his stated belief that Harris was not under the influence of PCP or any other drug.

As we have noted above, Harris's counsel reasonably could have refrained from cross-examining Parks regarding the reason he failed to test Harris for drugs because of how Parks viewed the other evidence in the case showing that when the robbery occurred Harris was not intoxicated and, even if he were, his intoxication did not negate the requisite mental state for robbery.

Finally, we consider that the ultimate vote on the robbery charge in the first trial was 11 for guilty and one for not guilty; this diminishes the significance of the previous hung jury. (See *People v. Christensen* (2014) 229 Cal.App.4th 781, 799.) It is not reasonably probable a different result would have occurred absent the alleged constitutionally deficient representation.

None of Harris's arguments compels a contrary conclusion. Harris argues "[o]nly one important distinction can be identified" between the first and second trials, i.e., the alleged constitutionally deficient representation of Harris's counsel at the retrial by failing to elicit from Parks that he was too busy to test Harris for intoxication. We reject the argument.

The jury in the first trial asked for a readback of the testimony of one witness: Parks. The readback apparently caused movement in the jurors' votes; the votes were eight for guilty, three for not guilty, and one undecided vote before the readback, and 10 for guilty and two for not guilty after the readback but before the final vote. The prosecutor clearly indicated he wanted to talk with the jurors after they were discharged, which might explain why his tactics changed in significant ways between the first and second trials. That is, at the retrial, the prosecutor preemptively introduced evidence that Harris was not under the influence of drugs.

Parks never testified about drugs, PCP, or whether Harris exhibited indicia of being under the influence of any drug on direct examination at the first trial. Instead, the jury first heard evidence about whether Harris was under the influence during cross-examination of Parks. However, at the retrial, the prosecutor, during direct examination of Parks, elicited testimony that Harris was not under the influence.

Also, during the first trial, Parks never testified about his background, training, and experience in determining whether someone was under the influence of a controlled substance, nor did he offer an expert opinion as to whether Harris was under the influence of PCP. At the retrial, the prosecutor elicited this testimony from Parks on direct examination.

Further, at the first trial, Parks never testified whether "PCP" or "paraphernalia to ingest PCP" was found on Harris on April 13, 2014. At the retrial, the prosecutor elicited such testimony from Parks.

At the first trial, Parks never testified that when a person was under the influence and "sweating it out," Parks typically could smell the chemical odor in the person's perspiration. At the retrial, Parks gave such testimony.

We have discussed in the Factual Summary that Rosenberg was cross-examined at the retrial on certain matters ranging from why a person could be perspiring and agitated to the fact a person behaving or walking with coordination would be consistent with a person not under the influence of PCP. In contrast, Treuting was not cross-examined on those matters in the first trial.

Finally, and unlike the case at the retrial, the court during the first trial never instructed the jury that the People could prove Harris "intended . . . to remove the property from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property" as an alternative to proof Harris intended to deprive the owner of the property permanently. Therefore, the difference in the results of the two trials was likely not the result of Harris's counsel's alleged failure to elicit testimony from Parks regarding his decision not to have Harris perform FST's, but rather the instructional changes and the improvements to the prosecutor's presentation of evidence the second time around.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

LAVIN, 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.