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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARTH BINNS,

Defendant and Appellant.

B282506

(Los Angeles County
Super. Ct. No. BA445852)

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

Lenore De Vita, 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, Senior Assistant Attorney General, Roberta L. Davis and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Leonarth Binns¹ of first degree burglary, assault with a deadly weapon, and resisting a peace officer. The court sentenced her to 13 years in state prison. On appeal, Binns contends there was insufficient evidence to support the burglary and assault with a deadly weapon convictions, the trial court erred in allowing testimony from a surprise witness, and the trial court erred in refusing to allow testimony of a witness's statement made to a 911 operator. Binns also contends her trial counsel provided ineffective assistance. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The evening of April 13, 2016, Hayley H. was in the front yard of her house with her two daughters, 11-month-old R.H. and six-year-old N.H. Hayley's 12-year-old son, J.H., was inside the house doing homework.

Hayley saw Binns walking down the street acting strange and throwing up, and told N.H. to go inside. Binns walked up to Hayley's car—which was parked across the street from her house—opened the door, and stepped inside. Hayley yelled at Binns to get out of her car, and Binns started running toward Hayley. Hayley ran inside her house carrying R.H. and locked the security screen door behind her.

Binns ran onto the raised porch of Hayley's house and began yelling and banging on the screen door. Binns was mumbling to herself and saying things that were nonsensical. Binns referred to Hayley as "S.," and demanded she let her in the house. Hayley thought Binns was "out there" and not "thinking right."

¹ Binns is male and identifies as a woman. We refer to her by her preferred pronoun.

Hayley called 911 and told Binns to leave. Binns responded by kicking in the bottom portion of the door and reaching her hand inside to try to open it. While trying to gain entry to the house, Binns repeatedly stated in an aggressive tone that she was going to “fuck” everyone inside. Hayley threatened to let her dog outside, to which Binns responded that she would fuck the dog. At one point, Binns looked at N.H., who was standing beside Hayley, and told her in a seductive tone of voice that she had “very pretty eyes.” Immediately after saying this, Binns licked her lips. She then lay on the porch and took off her pants.

After removing her pants, Binns attempted to rip the door frame off the stucco while stating she was going to “fuck everybody in there.” Binns eventually removed a portion of the door frame and partially entered Hayley’s home. Hayley grabbed Binns by the neck and pushed her out of the house. Binns did not resist or touch Hayley.

Around this time, Hayley’s neighbor approached and told Binns to leave or he would get a gun. The neighbor was standing about 10 to 12 feet from Binns. Binns grabbed a child’s bike from the porch, which weighed around 10 to 15 pounds, and used both arms to throw it at the neighbor. The neighbor ducked, and the bike missed his head by about a foot.² Binns then partially entered the house again. Hayley grabbed her by the throat and pushed her out the door.

² Hayley testified at the preliminary hearing that there was no chance the bike would hit the neighbor. At trial, she testified the bike “nearly” hit the neighbor’s head.

Several Los Angeles Police Department (LAPD) officers, including Officer Timothy Estevez, responded to Hayley's 911 call. When the officers arrived at the house, Binns began walking quickly toward them with clenched fists, stating "kill me." The officers shot her with a beanbag and a taser, which caused her to fall to the ground. Binns got up and ran toward the porch, and an officer shot her again with a beanbag. Two officers grabbed Binns, forcefully put her to the ground, and attempted to handcuff her. As they were doing so, Binns tried to stand up and repeatedly buried her arms under her body. Eventually, four officers were able to restrain and handcuff Binns.

Hayley was interviewed by numerous police officers shortly after the incident. She was asked whether Binns made any verbal threats, to which she responded that Binns repeatedly said the word "fuck." Hayley stated she was uncertain precisely what else Binns was saying.³

Criminal Case

In May 2016, the People filed an information charging Binns with first degree burglary (Pen. Code, § 459; count 1),⁴ assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and resisting a peace officer (§ 148, subd. (a)(1); count 3). It was

³ At trial, Hayley testified she told the police a "played-down" version of events because she did not want Binns to be sent to jail, she was concerned Binns was unwell, and she did not want her children to overhear her and relive the experience. Hayley also expressed concerns about being called a "snitch" by her neighbors.

⁴ All further section references are to the Penal Code unless otherwise specified.

further alleged that Binns had suffered a prior strike conviction (§§ 667, subds. (b)–(j), 1170.12, subds. (a)–(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b).)⁵

The case was tried to a jury in February 2017. The prosecution presented evidence establishing the facts summarized above. The prosecutor argued Binns committed an assault with a deadly weapon when she threw the bike at the neighbor. With respect to the burglary charge, the prosecution’s theory was that Binns entered Hayley’s home with the intent to commit rape or a lewd act upon a child.

Binns’s primary defense to the burglary charge was that she did not have the requisite mental state. Specifically, she argued she was under the influence of phencyclidine (PCP) and entered Hayley’s home because she had a delusion that her son was inside.

In support of this defense, Binns’s counsel elicited testimony from Officer Estevez that he believed Binns was under the influence of PCP at the time of the incident.⁶ Officer Estevez also agreed that individuals under the influence of PCP often get hot and strip naked, something he had personally witnessed on numerous occasions.

⁵ The court dismissed two additional prior conviction allegations.

⁶ Officer Estevez testified that, in his role as a peace officer, he had contact with numerous individuals under the influence of PCP.

Binns additionally presented expert testimony from Terence McGee, who is a former police officer and a medical doctor with a specialty in addiction medicine. McGee testified that people under the influence of PCP are often fearless, display extreme strength, and are delusional. In addition, they often become hot, and when they do, they usually take off their clothes.

In preparation for his testimony, McGee examined medical records indicating that on the day of the incident, Binns was hyperactive, clearly intoxicated, mumbling, and talking out of context. McGee also reviewed a document suggesting S. was the name of Binns's minor son. McGee testified it was difficult to determine whether Binns was actually under the influence of PCP. However, when presented with a hypothetical mirroring the facts of this case, McGee testified the individual's behavior was consistent with that of someone under the influence of PCP.

The jury convicted Binns as charged. In a bifurcated trial, the court found true the prior conviction allegations. The court sentenced Binns to an aggregate term of 13 years in state prison.⁷ It imposed various fines and fees, and awarded 442 days of

⁷ On count 1, the court imposed the mid-term of four years, which it doubled for the prior strike. It imposed an additional five years for the prior serious felony conviction. On count 2, the court imposed the mid-term of three years, which it doubled for the prior strike, to be served concurrent to count 1. On count 3, the court imposed one year to be served concurrent to count 1. The court also imposed three years for the prison priors, which it then struck for sentencing purposes.

presentence custody credit, consisting of 385 credits for actual time served and 57 conduct credits.⁸

Binns timely appealed.

DISCUSSION

I. There Was Substantial Evidence to Support the Burglary Conviction

Binns contends there was insufficient evidence to support the burglary conviction. We disagree.

A. Standard of Review

When an appellant challenges the sufficiency of evidence supporting a jury’s verdict, the reviewing court examines whether there was substantial evidence, considered as a whole, to permit a reasonable trier of fact to find the defendant guilty of the charged crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319; see also *People v. Smith* (2014) 60 Cal.4th 603, 617; *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The court’s standard for determining what is “substantial evidence” is whether the evidence is “credible and of solid value.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) One witness’s testimony can be sufficient evidence to sustain a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

The reviewing court presumes every fact the jury could have reasonably deduced from the evidence in support of the judgment. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212–1213; see also *People v. Lewis* (1990) 50 Cal.3d 262, 277.) “[T]he

⁸ The court additionally found that, in light of her convictions and sentencing, Binns violated the terms and conditions of her probation in a prior case, Case No. SA091052. The court sentenced Binns in that case to three years, to be served concurrent to her 13-year sentence.

relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Staten* (2000) 24 Cal.4th 434, 460.) Therefore, the reviewing court will not reverse a judgment for insufficient evidence unless “‘it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’” (*People v. Hughes* (2002) 27 Cal.4th 287, 370.) This standard of review applies to claims involving both direct and circumstantial evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*).)

B. Analysis

To prove a defendant has committed burglary, the prosecution must establish the defendant entered a building with the intent to commit theft or any felony. (§ 459.) Here, the prosecution’s theory was that Binns entered Hayley’s home with the intent to commit rape or a lewd act upon a child. Binns concedes that she entered Hayley’s home, but maintains there was insufficient evidence that she did so with the intent to commit either of these felonies.

Contrary to these contentions, there was substantial evidence that Binns intended to commit a felony upon entering Hayley’s home. Both Hayley and J.H. testified that while Binns was attempting to open the screen door, she repeatedly stated, in an aggressive tone, that she was going to “fuck” everyone inside. According to J.H., Binns looked at N.H., who was six years old, and complimented her eyes in a seductive tone of voice and then proceeded to lick her lips. Hayley further testified that at one point during the incident, Binns removed her pants. She then resumed trying to force her way into the home, while repeating

that she was going to “fuck” everyone inside. This was sufficient evidence from which the jury could reasonably infer Binns intended to commit rape or a lewd act upon a child. (See, e.g., *People v. Peckham* (1965) 232 Cal.App.2d 163, 168 [“Appellant’s statement that he wanted the victim and that he had come to rape her in broad daylight were sufficient to establish his intent to rape.”].)

Binns maintains it was unreasonable for the jury to conclude her statements were sexual in nature. She insists that, when viewed in the context of her other odd behavior and comments—such as referring to Hayley as S., threatening to fuck the dog, and mumbling incoherently—the statements were merely proof of a “deeply troubled and disturbed human being.” It is not, however, mutually exclusive that a person be deeply disturbed and have the intent to commit rape or a lewd act upon a child. Indeed, we suspect the two are often correlated.

Moreover, as detailed above, Binns’s statements were not the sole evidence of her intent. Rather, there was also evidence that she acted in ways that could reasonably be construed as sexual, such as licking her lips and removing her pants. Such behavior was itself probative of her intent. It also provided support for interpreting her threat to “fuck” everyone as sexual in nature.

Binns discounts this evidence by positing numerous non-sexual explanations for her behavior. For example, she asserts she may have removed her pants because she was overheated as a result of using PCP. Similarly, she contends she may have licked her lips because they were dry from yelling, throwing up, and physically exerting herself. While we do not dispute that these are possible explanations for her behavior, “[w]here the

circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]' [Citation.]" (*Manibusan, supra*, 58 Cal.4th at p. 87.) Here, it was reasonable for the jury to conclude that Binns's comments and behavior were sexual in nature and evinced an intent to commit rape or a lewd act upon a child.

We also do not agree with Binns that her other behavior proves she lacked the intent for burglary. When reviewing a judgment for substantial evidence, we do not reweigh the evidence or substitute our judgment for that of the trier of fact. (*People v. Brown* (2014) 59 Cal.4th 86, 106 (*Brown*).) Moreover, none of the evidence cited by Binns is necessarily incompatible with a finding that she possessed the intent to rape or commit a lewd act upon on child. Binns, for example, relies on evidence that she did not resist when Hayley grabbed her by the neck and pushed her out of the house. According to Binns, if she truly intended to commit rape or a lewd act, she would have made some attempt to touch Hayley in a sexual manner. The jury, however, could have reasonably concluded N.H. or J.H., rather than Hayley, was the target of Binns's crime. Alternatively, it may have reasonably concluded Binns failed to react because she simply did not anticipate Hayley's sudden use of force.

Binns also maintains her actions were not those of a "true burglar" because she did not wear dark colored and non-descript clothing, or make other efforts to avoid exposure. According to Binns, sex crimes are inherently secretive in nature, and it is illogical to infer she intended to commit such crimes while drawing significant attention to herself. We do not agree.

Burglars and sex offenders do not uniformly dress in particular colors or act in a similar manner. Further, the jury could have reasonably concluded Binns was intoxicated and acting impulsively, which would explain her failure to make an effort to avoid detection.

We are also not persuaded by Binns’s various arguments related to weaknesses in Hayley’s and J.H.’s testimony. Binns, for example, asserts J.H.’s testimony sounded “practiced,” and it was possible he misinterpreted her tone of voice. She also points out that Hayley’s statements to the police shortly after the incident differed from her testimony at trial. These arguments are essentially invitations to reevaluate the witnesses’ credibility and reweigh the evidence, which we decline to do when considering a challenge to the sufficiency of the evidence. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

We further reject Binns’s contention that no rational juror could have found she committed burglary because her use of PCP “rendered her incapable of forming the requisite specific intent.” “Evidence of voluntary intoxication is admissible solely on the issue of whether the defendant actually formed a required specific intent” (§ 29.4, subd. (b); see *People v. Saille* (1991) 54 Cal.3d 1103, 1112.) It may not be used to “negate the capacity to form any mental states for the crimes charged” (§ 29.4, subd. (a).) Therefore, contrary to Binns’s suggestion, the jury was not permitted to consider whether her use of PCP rendered her incapable of forming the requisite intent for burglary.

Moreover, the jury could have reasonably concluded that Binns both was under the influence of PCP and formed the intent for burglary. Indeed, while there was considerable evidence that Binns was heavily intoxicated, there was also evidence

suggesting she maintained some ability to think rationally and control her actions. For example, Hayley testified that when the neighbor threatened to get a gun, Binns paused what she was doing, grabbed a bike, and threw it at him. Hayley further testified that Binns attempted multiple methods to gain entry to the house. At first, she demanded that Hayley let her inside. When Hayley refused, Binns kicked in a portion of the door, and reached her hand inside to try to unlock it. When that was unsuccessful, Binns resorted to ripping the door frame off the stucco. That Binns responded to people around her and displayed some ability to problem solve suggests that, even if she was intoxicated, it was not so severe as to preclude a criminal intent.⁹

II. There Was Sufficient Evidence to Support the Assault With a Deadly Weapon Conviction

Binns maintains the evidence that she threw a bike at the neighbor was insufficient to support an assault with a deadly weapon conviction. We disagree.

Assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another with a deadly weapon. (§§ 240, 245, subd. (a)(1).) Assault is a general intent crime without a requisite specific intent to injure the victim. (*People v. Williams* (2001) 26 Cal.4th 779, 784 (*Williams*); *People v. Colantuono* (1994) 7 Cal.4th 206, 214 [“the prosecution need not prove a specific intent to inflict a particular harm”].) “[A]ssault only requires an

⁹ We do not consider Binns’s brief contention that the police should have drawn her blood to determine whether she was under the influence of PCP. Binns forfeited this argument by failing to assert it below. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1300.)

intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*Williams, supra*, at p. 790.)

Binns concedes the bike constituted a deadly weapon. She maintains, however, that the evidence adduced at trial was legally insufficient to establish that throwing it would have probably and directly resulted in the application of force to the neighbor. Binns contends that in order to strike the neighbor, she had to throw the bike a significant distance and through a narrow opening in the patio. As a result, she argues, it was not physically possible to strike the neighbor and her actions were, at most, reckless. She further contends the only reasonable interpretation of the evidence is that she intended to scare the neighbor away by throwing the bike *near* him, rather than *at* him.

Contrary to these assertions, there was substantial evidence from which the jury could find that a violent injury to the neighbor was a direct and probable result of Binns’s actions. Officer Estevez testified the distance between Binns and the neighbor was at most 12 feet, which was well within striking distance. In addition, Binns threw the bike from a raised porch, making it even easier to strike the neighbor standing below. While the patio opening through which the bike had to travel appears to have been relatively small, it was clearly not so small as to make such a throw impossible. Indeed, Officer Estevez and Hayley testified that the neighbor had to duck out of the way of the bike, which nearly struck him in the head. Moreover, because assault is a general intent crime, whether Binns actually intended to strike the neighbor is irrelevant. (See *Williams*,

supra, 26 Cal.4th at p. 790 [“assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur”].) There was sufficient evidence to support the assault with a deadly weapon conviction.

III. The Trial Court Did Not Err in Allowing J.H. to Testify and Refusing to Instruct the Jury With CALCRIM No. 306

Binns argues the trial court abused its discretion and violated her constitutional rights by allowing J.H. to testify, even though the prosecutor disclosed his intention to call him as a witness in the midst of trial. Binns further contends the trial court erred in refusing to instruct the jury with CALCRIM No. 306, which concerns the untimely disclosure of evidence. We find no merit to these arguments.

A. Background

On the morning of the third day of trial, which was a Friday, the prosecutor informed the court for the first time that he would be calling J.H. as a witness. The prosecutor stated, “[I] spoke to defense counsel this morning about a piece of evidence that I . . . thought was going to come in through [Hayley] and that I thought was in the police report already, and come to find it was not. [¶] But after speaking with the victim and her son, the son told me over the phone that he saw the defendant licking [her] lips while saying all these sexual things, and so I provided counsel with that piece of information today. I found it out as I was arranging travel for them over the last day or two.” The prosecutor subsequently explained he had not originally planned to call J.H. as a witness because he anticipated his testimony would be cumulative of Hayley’s. He changed his mind, however, after learning J.H. would also

testify to witnessing Binns lick her lips and speak in a seductive tone. The prosecutor insisted he did not previously know J.H. would testify to these facts.

Defense counsel requested the court preclude J.H. from testifying. Counsel argued the prosecution failed to timely disclose J.H. in violation of section 1054.1, and it would be unfair to allow him to testify on such short notice. Counsel conceded that J.H.'s name was disclosed in the arrest reports as a possible witness,¹⁰ but was nonetheless concerned that he would not have sufficient time to prepare for the testimony. Counsel also questioned whether the prosecutor had disclosed all reports related to J.H.

The court ruled the prosecution could call J.H. as a witness. The court found the prosecutor did not act in bad faith, and J.H.'s identity was not a surprise to defense counsel given he was identified as a witness in a police report. Nonetheless, the court ordered a short continuance to give defense counsel the weekend to prepare. In the meantime, the court allowed the parties to question J.H. under oath, outside the presence of the jury. In addition, the court ordered that the prosecutor facilitate efforts by defense counsel to interview J.H., and provide to defense counsel a written summary of his conversations with J.H. The court further ordered that the prosecutor make available Hayley and an LAPD officer, whom defense counsel indicated he may need to call for impeachment purposes. Finally, the court ordered the prosecutor verify with the police department that there were no written statements by J.H.

¹⁰ The police report indicated Hayley told police that during the incident, J.H. was standing nearby, appeared to be frightened, and heard Binns threaten to rape everybody.

Prior to J.H.'s testimony, defense counsel requested that the court instruct the jury with CALCRIM No. 306, which provides in relevant part:

“Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose: <describe evidence that was not disclosed> [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.”

When defense counsel initially requested the instruction, the prosecutor had yet to verify that the police department had no written statements by J.H. The court indicated it was inclined to give the instruction if the prosecutor was unable to do so. The prosecutor subsequently reported that a detective searched the case file and did not find any written statements related to J.H. Based on the prosecutor's representation, the trial court refused defense counsel's request for the instruction. The court explained it is common for police officers to speak with witnesses without reducing the conversations to writing. The court also noted that Binns suffered no prejudice because her counsel had sufficient time to prepare for J.H.'s testimony.

The prosecutor called J.H. as a witness on Monday. J.H.'s testimony largely mirrored Hayley's. In addition, he testified that Binns complimented N.H.'s eyes in a “seductive tone” and then licked her lips.

B. Legal Authority

California's reciprocal discovery law requires both sides in a criminal case reveal their witnesses and evidence. (See § 1054 et seq.) In particular, section 1054.1 mandates that the prosecution disclose to the defense certain materials and information "in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies." (§ 1054.1; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1133, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Among other things, the prosecution must disclose the names and addresses of persons it intends to call as witnesses at trial, which includes all witnesses it reasonably anticipates it is likely to call. (§ 1054.1, subd. (a); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375–376, fn. 11.) Absent good cause, such information must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.)

"Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court 'may make any order necessary to enforce the provisions' of the statute, 'including, but not limited to, immediate disclosure, [contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence,] continuance of the matter, or any other lawful order.' (§ 1054.5, subd. (b).)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.) The court may prohibit the testimony of a witness only if all other sanctions have been exhausted. (§ 1054.5, subd. (c).) The court may also "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Id.*, subd. (b).)

We review a trial court's evidentiary rulings for an abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

C. Analysis

We do not agree with Binns that the prosecutor willfully violated the discovery rules by failing to timely disclose his intention to call J.H. as a witness. The prosecutor represented to the trial court that he did not initially intend to call J.H. because he anticipated his testimony would be redundant.¹¹ When arranging for Hayley's travel, the prosecutor learned for the first time that J.H. would testify to having witnessed Binns lick her lips and speak in a seductive tone. Only then did the prosecutor reasonably anticipate calling J.H. as a witness, at which point the prosecutor complied with his obligation to immediately disclose the witness to defense counsel.¹² (§§ 1054.1, subd. (a); 1054.7.)

In any event, even if we were to find a discovery violation, Binns has failed to show she suffered any prejudice. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1103 [“ ‘ It is defendant's

¹¹ The trial court implicitly accepted the prosecutor's representations when it found he did not act in bad faith.

¹² Binns asserts various arguments as to why the prosecutor's disclosure was untimely. Specifically, she contends the prosecutor improperly waited one to two days to make the disclosure, the prosecutor was aware of the specific nature of J.H.'s testimony far earlier than he represented to the court, and the investigating officers' knowledge of J.H.'s testimony should be imputed to the prosecutor. Binns forfeited these arguments by failing to assert them below, and we decline to consider them for the first time on appeal. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 674 [failure to object on same ground at trial forfeits argument on appeal].)

burden to show that the failure to timely comply with any discovery order is prejudicial’ ”].) Binns vaguely argues that, by virtue of the late disclosure, she did not have the opportunity to investigate, prepare an effective cross-examination, subpoena additional witnesses, or produce evidence rebutting J.H.’s testimony. She insists this resulted in the denial of a fair trial and the only reasonable remedy was to preclude J.H. from testifying.

Binns’s contentions are unpersuasive. As she concedes, the primary concern with the prosecutor’s late disclosure was that defense counsel would not have adequate time to prepare for J.H.’s testimony. The court recognized this concern and ordered a short continuance to allow counsel the weekend to prepare. To assist in those preparations, the court allowed the parties to question J.H. outside the presence of the jury. Because J.H. gave his answers under oath, defense counsel had a potent means to impeach him in the event he changed his testimony at trial. To further assist defense counsel in this regard, the court ordered the prosecutor make available two witnesses who could potentially impeach J.H.’s trial testimony. The court also ordered the prosecutor to facilitate interviews between defense counsel and J.H., and mandated the prosecutor produce a written record of his conversations with J.H.

We think these measures were more than sufficient to ensure defense counsel had the opportunity to meaningfully prepare for J.H.’s testimony, especially given his testimony largely mirrored Haley’s. (See *People v. Verdugo, supra*, 50 Cal.4th at p. 281 [no prejudice where court provided continuance to remedy a discovery violation].) Binns fails to point to any additional preparations her trial counsel would have made had

he been given additional time. Nor does she provide any specific reasons why an order prohibiting J.H.'s testimony was necessary.¹³ (See *People v. Jenkins* (2000) 22 Cal.4th 900, 951 [court not required to exclude evidence as a sanction for a willful violation of a discovery order]; § 1054.5, subd. (c) [court may prohibit witness testimony only as last resort].) The court did not abuse its discretion in allowing J.H. to testify.

We also reject Binns's contention that the trial court abused its discretion by refusing her request to instruct the jury with CALCRIM No. 306. The court must give the instruction only if there is evidence of a prejudicial violation of the discovery rules. (See *People v. Bell* (2004) 118 Cal.App.4th 249, 255.) As discussed above, we do not think the prosecutor violated the discovery rules, and, even if he did, there was no evidence of resulting prejudice. As a result, the court was not required to instruct the jury with CALCRIM No. 306.

IV. The Trial Court Properly Excluded Hayley's Statement to a 911 Operator and Defense Counsel Did Not Provide Ineffective Assistance

Binns argues the trial court erred in excluding testimony regarding a statement Hayley made to a 911 operator expressing an opinion that Binns was under the influence of PCP. She further contends her trial counsel was ineffective in failing to pursue other grounds for admission of the statement and the opinion expressed in it. We find no error or ineffective assistance of counsel.

¹³ For the same reasons, we reject Binns's associated claims of constitutional error. (See *People v. Burgener* (2003) 29 Cal.4th 833, 873 [denying constitutional claims related to evidence found to be properly admitted].)

A. Background

Prior to Hayley's testimony, the prosecutor informed the court it would object to questions from defense counsel about whether Hayley believed Binns was under the influence of PCP. The prosecutor asserted the line of questioning was improper because Hayley lacked the expertise to determine whether Binns was under the influence of a drug. The court indicated it would not decide the issue until defense counsel had the opportunity to lay a proper foundation for such testimony.

On cross-examination, defense counsel asked Hayley whether she reported to a 911 operator that Binns appeared to be under the influence of PCP. The prosecutor objected on hearsay and relevance grounds, and further argued a lack of foundation that Hayley could identify a person under the influence of PCP. Defense counsel responded that no foundation was required and the statement stood on its own.

The trial court sustained the hearsay objection. Defense counsel then continued his cross-examination. He did not ask any further questions about Hayley's statement to the 911 operator. Nor did he question Hayley as to whether she believed Binns was under the influence of PCP or some other drug.

B. Analysis

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless it qualifies under an exception to the hearsay rule. (*Id.*, subd. (b).) "Evidence of an out-of-court statement is also admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay

purpose is relevant to an issue in dispute.” (*People v. Davis* (2005) 36 Cal.4th 510, 535–536.)

Binns contends the court erred in excluding Hayley’s statement on hearsay grounds because it was offered for a nonhearsay purpose. According to Binns, the statement was not offered for its truth, but rather because it reflected Hayley’s thoughts and beliefs during the incident. Specifically, she maintains the statement helps explain why Hayley called 911, why she was alarmed by Binns’s behavior, and why she took defensive actions to protect her and her children.

Hayley’s state of mind and the motivations for her actions, however, were not at issue. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 819 [victim’s state of mind generally irrelevant unless dispute as to whether victim acted in accordance with her state of mind].) As such, her statement was irrelevant and inadmissible if offered for such purposes. (*People v. Davis, supra*, 36 Cal.4th at pp. 535–536.) To the extent Hayley’s statement had any relevance, it was to show Binns was, in fact, under the influence of PCP. If used for that purpose, the statement was offered for its truth and the court properly excluded it under the hearsay rule.

Hayley contends that, to the extent the statement was offered for its truth, her trial counsel was ineffective for failing to argue it was admissible under certain exceptions to the hearsay rule.¹⁴ Alternatively, she suggests counsel should have

¹⁴ We do not consider Binns’s argument that the trial court erred by failing to admit the statement under an exception to the hearsay rule. Binns did not make this argument in the trial court and has therefore forfeited it on appeal. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 778.)

separately elicited from Hayley her opinion as to whether Binns was under the influence of a drug. We disagree.

“To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.’” (*People v. Johnson* (2015) 60 Cal.4th 966, 979–980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) “‘If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.’” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

Based on the record before us, we cannot say defense counsel’s representation fell below an objective standard of reasonableness. As Binns acknowledges, Hayley’s belief that she was under the influence of a drug constitutes a lay opinion. Although lay opinion regarding drug intoxication is generally admissible, the party eliciting the evidence must establish a foundation for the opinion. (*People v. Navarette* (2003) 30 Cal.4th 458, 493; Evid. Code, § 800.) Here, Binns fails to point to anything in the record suggesting defense counsel could have established that Hayley is capable of identifying whether an individual is under the influence of a drug. Absent such a foundation, Hayley’s opinion—whether introduced through her statement to the 911 operator or as testimony at trial—would be

inadmissible. (See *People v. Navarette*, *supra*, 30 Cal.4th at pp. 493–494 [witness who had not “ ‘seen people on drugs before’ ” could not testify to whether the defendant looked like he was on drugs].) This is true even if Hayley’s statement to the 911 operator fell within a hearsay exception. (See *People v. Miron* (1989) 210 Cal.App.3d 580, 584 [hearsay exceptions may not be used to “bootstrap admissibility” of improper lay opinion].) Because Hayley’s statement and opinion were not admissible, defense counsel’s failure to try to admit them did not violate Binns’s constitutional right to effective assistance of counsel. (See *People v. Collins* (2010) 49 Cal.4th 175, 204 [counsel not ineffective for failing to make meritless objection].)

Even if Hayley’s statement and opinion were admissible, counsel’s failure to introduce them at trial was not prejudicial. Binns contends such evidence was vital to show she was under the influence of a drug, which was relevant to whether she had the specific intent for burglary. The jury, however, convicted Binns despite the introduction of evidence far more probative of this issue. Multiple witnesses, for example, testified to Binns’s bizarre behavior and statements. McGee, in turn, opined that such behavior was consistent with that of someone under the influence of PCP. In addition, Officer Estevez testified that, based on his personal observations of Binns at the time of the incident, he believed she was under the influence of PCP or some other narcotic. Unlike Hayley, Estevez and McGee testified to their extensive knowledge and experience relevant to determining whether an individual is under the influence of a drug. Given Binns was convicted despite such evidence, we are confident there is no reasonable probability the result would have

been more favorable to Binns had her counsel introduced Hayley's far less probative lay opinion.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We Concur:

GRIMES, J.

ROGAN, J.*

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