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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW PAUL SCHEIDT, Defendant and Appellant.	A130574 (Humboldt County Super. Ct. No. CR993465S)

Defendant Matthew Paul Scheidt tried but failed to kidnap an 11-year-old girl for purposes of sex. He was found not guilty by reason of insanity and committed to a state mental hospital. At the People's request, the trial court extended defendant's commitment pursuant to Penal Code section 1026.5. Defendant challenges the extension by arguing his trial attorney was ineffective for failing to object to expert testimony regarding hearsay statements and to request an appropriate limiting instruction. Because the record shows there may have been a rational tactical purpose for counsel's omissions, defendant cannot raise this issue on direct appeal and must seek relief by a petition for writ of habeas corpus. Accordingly, we affirm.

I. FACTS

In August 1999, defendant attempted to kidnap an 11-year-old girl from a Humboldt County campground. His purpose was to have sex with the girl, because he believed having sex with her would "fix" his "halo." The victim screamed and her mother saw the attempted abduction and approached defendant, causing defendant to release the girl. He told the mother, "[T]hey should have shot me a long time ago." The

police were called and defendant was arrested. He sang the "Mr. Ed" theme song to the arresting officer. A pornographic magazine called "Barely Legal" was found in his possession.

It is undisputed defendant was psychotic at the time of the incident. The parties stipulated that in 2001 defendant was found not guilty by reason of insanity of kidnapping a child under the age of 14, and committed to a state mental health facility for a period of 11 years. Defendant concedes he has a long history of "varying mental health diagnoses throughout his insanity commitment."

In anticipation of defendant's expected release on August 2, 2010, the People petitioned in May 2010 to extend his commitment for two years. (Pen. Code, § 1026.5.) At the jury trial on the petition, four mental health experts testified that defendant met the requirement for a commitment extension under Penal Code section 1026.5: namely, that he suffered from a mental disease, defect, or disorder and posed a substantial danger of physical harm to others if released due to his difficulty in controlling his dangerous behavior.[1] Defendant countered with no expert testimony. The sole defense witness was defendant himself, who testified about his drug abuse, his history of psychotic episodes, and his frustration with the California mental health system and its alleged inadequate treatment of him.

The trial court granted the petition to extend defendant's commitment until August 2, 2012.

II. DISCUSSION

The sole issue on appeal is whether defendant's trial counsel was ineffective for failing to object to expert testimony regarding hearsay evidence of defendant's violent and assaultive institutional behavior, and to request an appropriate limiting instruction regarding the hearsay evidence.

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[1] Because defendant does not challenge the sufficiency of the evidence in support of the trial court's extension order, we need not detail the various mental health diagnoses or the testing methods described in the testimony of the People's mental health experts.

The standard for ineffective counsel is well known. To establish a claim of ineffective counsel, a defendant must show (1) that counsel's performance was deficient; and (2) that the deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Anderson* (2001) 25 Cal.4th 543, 569 (*Anderson*).)

To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonable competence. (*Strickland, supra,* 466 U.S. at pp. 687−688; *Anderson, supra,* 25 Cal.4th at p. 569.) If a defendant has made such a showing, he must then demonstrate that the deficient performance has been prejudicial—i.e., that but for counsel's deficient performance it is reasonably probable that the result of the trial would have been different. (*Strickland, supra,* at p. 694; *Anderson, supra,* at p. 569.) "A reasonable probability is a probability [that is] sufficient to undermine confidence in the outcome." (*Strickland, supra,* at p. 694.) The defendant must show prejudice by affirmative proof. (*Id.* at p. 693.)

Defendant's claim of ineffective trial counsel arises from the testimony of the People's experts. Defendant argues counsel was ineffective for failing to object to expert testimony relating inadmissible hearsay statements, and for failing to request a limiting instruction precluding the jury from considering the hearsay statements for the truth of the matter asserted.

Evidence Code section 801, subdivision (b) provides that an expert may rely on any matter known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" in the forming of his expert opinion. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*)*; People v. Montiel* (1993) 5 Cal.4th 877, 918 (*Montiel*).) "Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.]" (*Gardeley, supra,* at p. 618.) "And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the

material that forms the basis of the opinion. [Citations.]" (*Id.* at pp. 618−619; see *Montiel, supra,* at p. 918.)

But prejudice may arise from an expert's testimony bringing otherwise incompetent, inadmissible hearsay evidence before the jury and giving it the imprimatur of independent proof under the impressive mantle of expert testimony. (See *Gardeley, supra,* 14 Cal.4th at pp. 618−619; *Montiel, supra,* 5 Cal.4th at pp. 918−919.) "[A] witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. [Citations.]" (*Gardeley, supra,* at p. 619.)

Accordingly, the trial court has considerable discretion to control the questioning of the expert to prevent the jury from learning of incompetent hearsay. This includes weighing the probative value of the hearsay evidence against the possibility of prejudice by the jury improperly considering it as independent proof. (*Gardeley, supra,* 14 Cal.4th at p. 619; see *Montiel, supra,* 5 Cal.4th at p. 919.) "Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]" (*Montiel, supra,* at p. 919.) But there are times a limiting instruction would be insufficient and the trial court should exclude the evidence under Evidence Code section 352. (*Ibid.*)[2]

At defendant's extension trial, which was held in October 2010, the People were required to prove that defendant suffered from a mental disease, defect, or disorder and posed a substantial danger of physical harm to others if released. Under controlling decisions of the United States and California Supreme Courts, "substantial danger of physical harm" requires a showing that the defendant has a serious difficulty controlling his potentially dangerous behavior. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159−1165.)

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[2] Defendant accurately sets forth the controlling law, consistent with our discussion, but places too much reliance on *People v. Campos* (1995) 32 Cal.App.4th 304. *Campos* involved the more pernicious situation of an expert testifying on direct examination to the opinions of other experts who did not testify and thus were not subject to cross-examination. (*Id.* at pp. 307−308.)

Against this backdrop of required proof, defendant points to expert testimony of hearsay evidence, gleaned from state hospital records including progress reports, of defendant's violent or assaultive behavior while institutionalized.

Dr. Nolan testified that defendant posed a substantial risk of physical harm to others and had serious difficulty controlling his potentially dangerous behavior. In support of this assessment, Dr. Nolan cited examples of defendant's recent institutional behavior. In June 2009, he took a fellow patient "down to the floor" because the patient supposedly woke him during the night. Also in June 2009, defendant threw lettuce across the dining room. On November 6, 2009, defendant loudly cursed and threw a clipboard at a member of the hospital kitchen staff. On November 26, 2009, he yelled at a fellow patient who bumped him in line in the dining room. On February 9, 2010, defendant kicked and punched the nursing station window because a loud television was keeping him awake. On April 12, 2010, he yelled at a fellow patient and then kicked the door of the nursing station. Dr. Nolan had no personal knowledge of any of these incidents, but took his information from hospital progress reports.

Dr. Zinchenko testified that defendant "lacks the ability to contain strong impulses and emotions." As examples of defendant's inability to control his impulses, Dr. Zinchenko cited defendant's pattern of making loud noises, hitting the nurse's station window, and throwing trays in the dining room. He referred to a recent incident where defendant tried to gouge out the eyes of a fellow patient. Dr. Zinchenko did not observe this incident—or, presumably, the others to which he testified—but testified from hospital records. To the extent the witnesses were testifying from hospital medical records that constituted business records under Evidence Code section 1270, the matters may have been admissible as a record of an act or event entered in the regular course of business near the time of the occurrence.

However, as discussed above, an expert may not testify on the details of matters even if they are brought under the guise of reasons for the opinion that contain incompetent, hearsay evidence. (*People v. Coleman* (1985) 38 Cal.3d. 69, 90−93.)

Trial counsel did not object to any of this hearsay information testified to by the two experts. Nor did counsel request a limiting instruction, CALCRIM No. 360, which would have told the jury that the hearsay statements in the expert testimony could be considered "only to evaluate the expert's opinion[]" and could not be considered "as proof that the information contained in the statement[s] is true." (Judicial Council of California Criminal Jury Instructions (2011) CALCRIM No. 360.)

In facing a claim of ineffective counsel, a reviewing court must view counsel's performance with considerable deference, keeping in mind that counsel's performance may be the product of sound trial strategy or deliberate trial tactics. (See *Strickland, supra,* 466 U.S. at p. 689; *People v. Dickey* (2005) 35 Cal.4th 884, 925.) When a claim of deficient performance is made on direct appeal, the defendant bears the burden of showing that counsel's performance was not tactical. (See *People v. Stewart* (2004) 33 Cal.4th 425, 479.) Where the record on appeal does not show the reason for counsel's challenged failures of performance, we must affirm unless "there could be no satisfactory explanation." (*Anderson, supra,* 25 Cal.4th at p. 569; *People v. Pope* (1979) 23 Cal.3d 412, 426.) Stated another way, we can reverse for ineffective counsel on direct appeal " 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omissions.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979−980, overruled in part on unrelated grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Absent such a situation, the proper way to raise a question of ineffective trial counsel is in a habeas corpus proceeding, not direct appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266−267.) A verified petition for habeas corpus would allow defendant to allege facts outside the appellate record to show that counsel's failure to object was not justified by a tactical choice or other legitimate reason, and thus might constitute ineffectiveness. (See *People v. Michaels* (2002) 28 Cal.4th 486, 526.)

For present purposes we may assume without deciding that, upon proper objection, the trial court might have exercised its discretion to exclude some or all of the hearsay statements. We may further assume without deciding that, upon request from

defense counsel, the trial court might have given CALCRIM No. 360. But we can only find that counsel was ineffective if the record on appeal shows no rational tactical purpose for his omissions. And this record does show such a rational tactical purpose.

Counsel's theory of defense was that defendant was no longer the person he was when he kidnapped the child. He moved in limine to exclude the facts of the kidnapping. He established on the cross-examination of at least one expert that defendant had not had a psychotic episode in the previous nine years. And, most significantly, in his closing argument to the jury he painted a picture of three defendants: "I think there's three people here. There's who Mr. Scheidt was as a young man, there is who Mr. Scheidt was during his psychotic period, and there's the individual who Mr. Scheidt is today. Three very distinct people, in my view, and I think the witnesses and the evidence has played out to create those profiles very clearly. And I want to touch on those."

Counsel argued the People were trying to present the defendant is just as psychotic today as he has been, but argued that defendant had changed and the defendant as psychotic was "a separate entity from who he is today." Counsel noted the absence of psychotic episodes during defendant's institutionalization. Counsel *specifically referred* to defendant's violent institutional behavior, as described in the hearsay statements, but characterized it as not psychotic or aggressive, but the product of frustration from being in a confined space with fellow patients not of his choosing, some of whom yell and scream and keep him awake at night, or "chafing under the constrictions of this heavy administrative system that's the Department of Mental Health." Counsel also argued that "Anything that he does, anything that would be considered acceptable behavior or predictable behavior for somebody outside on the street is looked at as somehow symptomatic of something wrong with him."

Thus, the record shows counsel could easily have had a rational tactical purpose of allowing the testimony of the institutional behavior—which is somewhat trivial—into evidence. This decision allowed him to bolster his distinction between defendant as psychotic and defendant today, and paint a sympathetic picture of a patient chafing at the

constricted regimented life of a state mental hospital. In short, counsel may well have taken advantage of the evidence for his own reasonable tactical purposes.

Moreover, any error from admitting the hearsay statements or failing to give the limiting instruction would be harmless beyond a reasonable doubt. Four mental health experts testified in detail as to their diagnoses of defendant, and to the various testing that defendant had undergone, while defendant presented no countering expert testimony. All four experts agreed defendant met the standard of Penal Code section 1026.5: that defendant suffered from a mental disease, defect, or disorder and posed a substantial danger of physical harm to others if released due to his difficulty in controlling his dangerous behavior. The admission or jury consideration of the hearsay statements, most of which involve relatively minor institutional transgressions, would not have affected the result in light of the other strong evidence.

III. DISPOSITION

The order extending defendant's commitment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Dondero, J.