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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID LOWDER, Defendant and Appellant.	A131829 (Napa County Super. Ct. No. CR151663)

Michael David Lowder appeals from a judgment imposed following revocation of his probation. He contends that his trial counsel was ineffective because he failed to object to a witness's hearsay testimony. We affirm.

FACTUAL BACKGROUND

On August 30, 2010, defendant was charged with second degree robbery (Pen. Code,[1] § 211) and petty theft with a prior (§ 484, subd. (a)). The charges were based on defendant's theft of some ink cartridges and other merchandise from a Wal-Mart store and his act in resisting arrest when confronted by a store employee. On September 13, 2010, the court suspended proceedings pursuant to section 1368 and set the matter for a hearing to determine defendant's competency to stand trial.

On September 29, 2010, the court found defendant incompetent to stand trial and continued the matter for a placement report. On October 6, 2010, the court ordered

[1] All further statutory references are to the Penal Code.

defendant committed to Napa State Hospital. On January 13, 2011, the court found that defendant had been restored to competency within the meaning of section 1368.

On January 28, 2011, the court ordered that the information be amended to add a receiving stolen property count (§ 496, subd. (a)). That same day, defendant pled no contest to receiving stolen property.

On February 25, 2011, the court suspended imposition of sentence and placed defendant on probation for a period of three years.

On March 14, 2011, the district attorney filed a petition to revoke probation based on defendant's failure to obey the terms of probation in that he falsely reported a criminal offense in violation of section 148.5. A contested revocation hearing was held on March 18, 2011.[2] The following evidence was presented: Police officer Brad Baker testified that on March 1, 2011, he contacted defendant in response to a dispatch call that defendant was the victim of an assault. Defendant told Baker that on Sunday, two days prior to the call, he was at home in the evening when he heard a vehicle pull into his driveway. Defendant responded to a knock on the door and he saw a man dressed in black wearing a hooded sweatshirt, black pea coat, and a mask across his face with a skull on it. The man pulled out a full length black shotgun and ordered him to the ground. Defendant saw that his former girlfriend, Jill Sandbek, was behind the man. The man ordered Sandbek to duct tape and bind defendant's hands behind his back and to tie his feet. When Sandbek bent over him, he heard the "sound of [a] methamphetamine pipe falling out and br[e]aking." The man threatened defendant, telling him to leave or he was going to cut his head off. The man then cut his left pinkie finger, presumably as a threat not to call the police. Defendant's roommate, David Yarlot, who was not home at the time, returned about 30 minutes later and freed him.

Defendant tried to get a restraining order against Sandbek on Monday, the following day. He reported the incident to the police on Tuesday. Baker observed an

[2] The court also had before it defendant's petition to revoke probation in Case No. CR153437, which alleged the same probation violation. We file an opinion in that case, A131831, today, as well.

injury on defendant's left finger which appeared to be a cut, approximately half an inch near the knuckle.

Baker contacted Yarlot, who gave an account of the incident. Yarlot said that he was at home the night of the incident which he said occurred on Saturday morning between 1:00 a.m. and 5:00 a.m. He said he found defendant with his hands taped up in front. Defendant's right finger had been cut. Yarlot said he hadn't heard the incident as it was happening.

Baker concluded that defendant and Yarlot were lying. He based his conclusion on the totality of the circumstances, including that defendant had just been released from jail because he had stalked Sandbek, she had a restraining order against him, and that Sandbek denied the allegations. He testified that had Yarlot been home, he thought that it was improbable that he did not hear the incident since just one wall separated the kitchen area where the incident allegedly occurred from his bedroom. And, there was no blood or any other evidence at the scene.

Baker also interviewed Sandbek and found her denial of the incident credible. Sandbek told Baker that she had witnesses who could account for her whereabouts.

Sandbek testified that she had been in an unhealthy relationship with defendant that had ended about five months prior to the hearing. She initiated the breakup and obtained a restraining order against him when he called her repeatedly. She felt threatened and harassed by his phone calls and statements. She did not know where defendant lived and had not tried to locate his residence or contact him in any way. She denied owning any weapons. She testified that on the Saturday evening and Sunday of the weekend of the incident she was busy moving things from her storage facility in Napa. She denied going to defendant's residence and denied any involvement in the incident.

The court found defendant in violation of probation based on his violation of section 148.5. "Having considered the evidence in this matter, in terms of evaluating the credibility of the witnesses, standard of proof that's appropriate at a probation violation hearing, and also looking at sort of the nature of the story that was presented by the

defendant, I do find sufficient evidence to violate his probation based on [the] 148.5 allegation." The court reinstated defendant on probation on the original terms and conditions.

DISCUSSION

Defendant contends that he was denied the effective assistance of counsel because his defense counsel did not object to Baker's hearsay testimony about his interview with Yarlot. We conclude that the record fails to support defendant's claim.

In order to prove a claim of inadequate representation, a defendant must show that "trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Effective and competent representation requires "counsel's 'diligence and active participation in the full and effective preparation of his client's case.' [Citation.]" (*Id.* at pp. 424-425.) We will reverse a conviction on the ground of inadequate counsel only if the defendant affirmatively shows that the omissions of defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) The defendant must also establish prejudice from counsel's acts or omissions. Ordinarily prejudice must be affirmatively proved; the defendant must establish the reasonable probability that had counsel not been incompetent, the proceeding would have had a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

The burden of showing ineffective assistance of counsel is particularly difficult to meet on direct appeal. We "will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings . . . ." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

Here, as the Attorney General argues, defense counsel likely had a tactical basis for not objecting to Baker's testimony. Counsel utilized Yarlot's testimony on cross-examination and sought to corroborate defendant's version of the incident by probing Baker's account of Yarlot's interview. Hence, defense counsel elicited from Baker that

Yarlot found defendant with his hands and ankles tied with duct tape and that the tape was also around his eyes and head. In addition, Yarlot told Baker that duct tape was missing from the apartment and that there was blood on the linoleum which Yarlot had cleaned up. Further, on cross-examination of Baker, counsel elicited that defendant told Yarlot that he was "ambushed" by Sandbek and "some outlaw." Hence, it is reasonable to conclude that defense counsel did not object to Baker's testimony on hearsay grounds as a matter of tactics since he intended to use the testimony about Yarlot's account on cross-examination to bolster defendant's case.

In any event, the record fails to show any prejudice to defendant. The evidence before the court demonstrated that defendant made a false report of a criminal offense. The court implicitly found that Sandbek, who denied the incident, was a credible witness. It was not convinced by "the nature of the story that was presented by [defendant]." Sandbek also explained her whereabouts on the weekend in which the incident allegedly occurred. Officer Baker, too, found Sandbek to be a credible witness. The evidence showed that defendant's testimony was inconsistent not only with that of Yarlot's recollection, but with yet another version of the incident contained in a declaration he filed in support of a restraining order against Sandbek. In sum, the preponderance of the evidence showed that defendant violated probation based on a section 148.5 offense. (See *People v. Rodriguez* (1990) 51 Cal.3d 437, 446-447 [proof of facts of a probation violation by a preponderance of the evidence is sufficient to support revocation of probation].)

DISPOSITION

The judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P. J.

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REARDON, J.