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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRI LIVINGSTON,

Defendant and Appellant.

A131946

**(San Mateo County
Super. Ct. No. SC069526A)**

Defendant Kerri Livingston (appellant) was convicted by a jury of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)),¹ and the trial court found true allegations that she suffered three prior convictions pursuant to Penal Code section 1203, subdivision (e)(4)), suffered a prior strike conviction (*id.*, § 1170.12, subd. (c)(1)), and served three prior prison terms (*id.*, § 667.5, subd. (b)). The court struck the prior strike conviction allegation (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), suspended imposition of sentence and placed appellant on three years’ probation with various conditions. On appeal, she contends the court abused its discretion and violated

¹ Vehicle Code section 10851, subdivision (a) provides: “Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense”

her constitutional right to present a complete defense by excluding psychiatric testimony regarding her mental disorder. We find no reversible error and affirm.

BACKGROUND

On September 1, 2009, gardener Misael Oseguerra Llamas was working in the backyard of a residence on Pacific Street in Pacifica. When he went to retrieve a tool from his pickup truck, which had been parked in front of the residence, he discovered the truck missing. The keys had been left inside the truck but Oseguerra Llamas had not given anyone permission to use it. The owner of the Pacific Street residence called the police to report the truck stolen.

Between noon and 1:00 p.m., Pacifica Police Officer Mostasisa received a dispatch regarding a stolen silver Dodge pickup truck. He located the truck at the end of Francis Avenue, approximately a half mile from where it had been taken. Nothing had been taken from inside the truck. Mostasisa spoke with Christine Duncan, a resident of Francis Avenue, who had observed a woman drive the truck “too fast” and then quickly stop and park it. Mostasisa broadcast Duncan’s description of the woman.

Pacifica Police Captain Tasa and Officer Serrano heard the radio description of the stolen truck and the truck’s subsequent recovery. Around 1:35 p.m., they each responded to an area about a half mile from where the truck was found and saw a woman, later identified as appellant, walking up Gypsy Hill Road. When Tasa asked her what she was doing in the area, she said her car had broken down and she was out for a hike. When Serrano asked her if she had recently driven a vehicle without the owner’s permission she said “no.” After talking with the officers, appellant was released.

After further investigation, Tasa determined there was probable cause to detain appellant. Around 3:45 p.m., he found her walking on Palmetto Avenue. Serrano joined Tasa at that location. Serrano noted that the soles of appellant’s shoes matched footprints near where the stolen truck was found. When Serrano asked appellant why she had lied to him about having driven the truck, she said she had had some problems in previous years with people who were haunting or following her. She told Serrano that, while she was walking, she saw a red vehicle with tinted windows following her. When she saw

the keys were in the truck's ignition she entered it and drove away. She said that after driving the truck for a couple of blocks, she parked it and began walking up Gypsy Hill Road. Appellant was arrested and transported to the police station.

At 4:00 p.m., appellant was interviewed by the police. She explained her car had broken down the night before and that morning she could not get to her "rehab," so she went for a walk. While walking she saw the red car, "freaked out" and "got scared." She walked by the gardener's truck, saw the keys in the ignition and "thought I could just get a little bit away. You know so I did that. I jumped down. I tried to get a little bit away. I came to the spot where I was at and I just took off up the mountain." She said she did not take the gardener's truck "to steal" it; she took it because she was afraid. She conceded she took a vehicle that did not belong to her, but said, "I didn't steal it. I just needed to get a lift to my destination."

The Defense

Tara Clemmons testified she had known appellant for 10 or 11 years; they had used methamphetamine together about 9 years before. Clemmons described appellant as "real paranoid" and said appellant exhibits paranoid delusions. Clemmons also said that people who have been awake for 4 or 5 days after using methamphetamine often have paranoid delusions due to sleep deprivation. She said in recent years, appellant repeatedly talked to her about a red pickup truck.

Lorrie Shook described herself as appellant's best friend and said they used methamphetamine together in the mid-1990's. Shook said appellant has "paranoid thinking" and is afraid that people are "after her," are tapping into her phones and computer and are turning her lights on and off. She said that after talking with defense psychiatrist Dr. Pablo Stewart, she believes appellant may suffer from methamphetamine-induced psychosis.

Testifying in her own defense, appellant admitted suffering prior convictions in 2005 for residential burglary and receiving stolen property. She said she believes that Jose Zamora, with whom she was involved years ago, bears a grudge against her, is chasing her daily, and wants to kill her. As to the September 1, 2009 incident, appellant

testified that, while out walking she noticed a red Mustang with tinted windows revving its engine and entering the highway. As she continued walking she saw the red Mustang four more times and started to panic because she believed Zamora was coming back to kill her. She walked by the parked gardener's truck, which she knew did not belong to her, and believed she could use it to "get out of the situation that [she] was in." She entered the truck and drove it several blocks until she entered a cul-de-sac. She then exited the truck and started hiking up the hill. Appellant testified that, although she had been told by Dr. Stewart and her rehabilitation counselor that her ideations are not real, she still believes they are.

Appellant conceded she had no claim of ownership to the truck or permission to drive it. She said she made a spontaneous decision to take the truck to "get[] away from the situation" after seeing the red car five times and fearing for her life. She admitted that when she was first contacted by Serrano, she was untruthful because she was afraid she would be charged with stealing the truck, which had not been her intention, and she did not think he would believe her explanation. Appellant said she smoked a half to a whole gram of methamphetamine the night before the incident, smoked marijuana about 45 minutes before the incident, and was under the influence of methamphetamine at the time of the incident. She conceded she told the police she had not used methamphetamine for two days.

Rebuttal

San Mateo Police Officer Kurt Rodenspiel testified as an expert in identifying individuals under the influence of methamphetamine and marijuana. He opined that a person with an 11-year history of methamphetamine use, who last ingested a half to a whole gram of methamphetamine, would not be under the influence 30 hours thereafter. He also opined that subsequent marijuana use does not renew the effects of methamphetamine. Instead, marijuana will "bring [the user] down," slow the user's thought process and cause paranoia.

Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends the trial court erred in excluding Dr. Stewart's expert testimony regarding her methamphetamine-induced psychosis. We review a trial court's decision to admit or exclude evidence for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the exercise of discretion is arbitrary, capricious, or patently absurd, and results in a miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, overruled on other grounds in *People v. Rundle* (2006) 43 Cal.4th 76, 151.)

In Limine Motion

Prior to trial, appellant moved in limine to permit Dr. Stewart to testify regarding methamphetamine-induced psychosis, his diagnosis of that illness in appellant, the delusions she suffered as a result of that illness, and her mental state at the time of the charged incident.

At the March 1, 2011 hearing on appellant's in limine motion, the court stated: "The court has indicated in chambers and I'll indicate on the record that I'm going to allow Doctor Stewart to testify . . . along the lines of the court case; so for example, he can give [an] opinion as to what he thinks the diagnosis of the defendant is assuming that his opinion is that she had that condition at the time of the event in this case. And he can give reasons as to why he believes that is the diagnosis, which are presumably based on the interview or interviews he's had with the defendant and other people and anything else he bases his diagnosis on. [¶] He obviously, as we all know, can't give an opinion as to whether or not the defendant had the specific intent at the time of this offense or whether she had the capacity to form the specific intent at the time of this offense. These are legal issues that are not appropriate for a psychiatrist or psychologist to give an opinion on." The court ordered an Evidence Code section 402 hearing.

At the March 2, 2011 evidentiary hearing, the court qualified Dr. Stewart as an expert in psychiatry, specifically, substance-related mental disorders. Dr. Stewart explained that methamphetamine-induced psychosis is a psychotic state in which

psychotic symptoms can occur during a period of intoxication and persist months or years after the person has last used methamphetamine. Typical symptoms include auditory and visual hallucinations, paranoia, and delusional thought content. People suffering from methamphetamine-induced psychosis generally do not think they are having delusions; their delusions “become their reality.” Dr. Stewart opined that, on the date of the charged offense appellant was suffering from methamphetamine-induced psychotic disorder and had a delusional belief that a red Mustang was following her and her life was in danger. On cross-examination, Dr. Stewart conceded appellant knew the truck was a vehicle, its doors were open and its keys were in it, it did not belong to her, and she did not have permission from its owner to use it. He testified that appellant’s taking the truck was motivated by her delusion that she needed to get away from an impending threat against her life. Dr. Stewart said that when appellant was interviewed by police following the incident and told she would be returned to Redwood City, she “started freaking out” and did not want to be taken there because she was still operating under a delusion that her life was in danger.

Following the evidentiary hearing, the trial court ruled that Dr. Stewart could testify regarding appellant’s voluntary intoxication and history of methamphetamine use, but precluded his testimony regarding her methamphetamine-induced psychosis because it did not “negate” her specific intent to unlawfully take the truck. The court reasoned that Dr. Stewart did not establish the “nexus that you need to have in terms of the mental impairment being the reason why she did what she did.”²

At trial, appellant testified that at the time she took the gardener’s truck she was feeling the physical or mental effects of methamphetamine intoxication, including paranoia.

In closing argument, defense counsel argued that appellant’s specific intent in taking the truck was the “intent to escape,” not the intent to deprive Oseguerra Llamas of possession or title to his truck.

² Dr. Stewart was not called to testify.

Following the jury's guilty verdict, appellant unsuccessfully moved for new trial on the ground the court erred in excluding Dr. Stewart's testimony that she suffered methamphetamine-induced psychotic disorder, that she suffered delusions as a result of the disorder, and that she legitimately believed her delusions.

Analysis

Penal Code sections 25 and 28³ prohibit "the admission of evidence of the defendant's 'intoxication, trauma, mental illness, disease, or defect' if its purpose is 'to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged' (§ 25, subd. (a)) or 'with which the accused committed the [crime]' (§ 28, subd. (a)), or 'required . . . for the crimes charged' (§ 29).^[4] . . . [¶] . . . [S]uch evidence is admissible for the sole purpose of showing . . . 'whether or not the accused actually formed a required specific intent, premeditated, deliberated or harbored malice

³ All undesignated section references are to the Penal Code.

Section 25 provides in relevant part: "(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged."

Section 28 provides in relevant part: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

⁴ Section 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

aforethought, when a specific intent crime is charged’ (§ 28, subd. (a)), except that an expert who testifies ‘about a defendant’s mental illness, mental disorder, or mental defect’ . . . ‘shall not testify as to whether the defendant had or did not have the required mental states . . . for the crimes charged.’ (§ 29.) . . . [S]ections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged.” (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908 (*Cortes*); accord, *People v. Larsen* (2012) 205 Cal.App.4th 810, 826 (*Larsen*).

A violation of Vehicle Code section 10851, subdivision (a) requires a driving or taking of a vehicle with the specific intent to deprive the owner permanently or temporarily of title or possession of the vehicle. (*People v. Moon* (2005) 37 Cal.4th 1, 26.)⁵ The specific intent to deprive the owner of possession of his vehicle “ ‘ “may be inferred from all the facts and circumstances of the particular case.” ’ [Citation.]” (*People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1577 (*O’Dell*).

The thrust of Dr. Stewart’s proffered testimony was that, at the time of the instant offense, appellant knew the truck did not belong to her and she did not have permission from its owner to use it. However, she suffered from methamphetamine-induced psychosis and was motivated to take the truck based on her delusional belief that she needed to get away from a red car that was following her and endangering her life.

⁵ Here, the jury was instructed pursuant to CALCRIM No. 1820 regarding the elements of unlawful taking or driving a vehicle: “The defendant is charged . . . with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. To prove that the defendant is guilty of this crime, the People must prove that; one, the defendant took or drove someone else’s vehicle without the owner’s consent; and two, when the defendant did so, she intended to deprive the owner of possession or ownership of the vehicle for any period of time. A taking requires that the vehicle be moved for any distance, no matter how small. A vehicle includes a passenger vehicle or truck.”

Appellant contends Dr. Stewart's testimony regarding her methamphetamine-induced psychosis was relevant to corroborate her claim that, as a result of her delusions and fears, she did not specifically intend to deprive Oseguerra Llamas of his title to or possession of the truck. She asserts that her admission to taking Oseguerra Llamas's truck without his consent did not necessarily establish she did so with the requisite specific intent, and did not preclude her from raising the defense that, as a result of her methamphetamine-induced delusions, she never formed that intent. Appellant concedes the court instructed the jury on voluntary intoxication and permitted evidence regarding her methamphetamine use. However, she asserts that, absent Dr. Stewart's testimony regarding her methamphetamine-induced psychosis, it is "very possible" the jury mistakenly believed she fabricated her claim that she suffered delusions due to her alleged methamphetamine use.

The People argue appellant's specific intent may be inferred from her admission that she entered the truck knowing it did not belong to her and drove it without the owner's consent. They argue that Dr. Stewart's testimony regarding appellant's methamphetamine-induced delusional belief of impending harm did not tend to negate her specific intent because Dr. Stewart did not testify that appellant's mental disorder prevented her from being aware of her actions or from understanding that she was taking another person's truck without permission. The People assert that while Dr. Stewart's testimony was relevant to appellant's *motive* to take the truck, it was not relevant to her *specific intent* in doing so. Therefore, the court properly precluded his testimony regarding methamphetamine-induced psychosis.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) Evidence is relevant if it tends logically, naturally, and by reasonable inference to establish a material fact, such as identity, intent, or motive. (*People v. Lee* (2011) 51 Cal.4th 620, 642.) Evidence is relevant if it tends to prove an issue before the jury, even though it may be

weak. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) “Except as otherwise provided by statute, all relevant evidence is admissible.” (Evid. Code, § 351.)

Motive and intent are not synonymous. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1322 (*Bordelon*)). “Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) Stated differently, “Motive is the emotional urge that induces a particular act. It is different from intent, for a person may intend to steal property, or to injure or kill another, and will be guilty of the crime regardless of his or her motive (e.g., need, avarice, revenge, jealousy, fear). [Citation.]” (1 Witkin, Cal. Crim. Law 4th (2012) Elements, § 4, p. 263.) With few exceptions, not relevant here, motive itself is not an element of a criminal offense. (*People v. Smith* (2005) 37 Cal.4th 733, 740.) However, motive is not entirely unrelated to intent. (See *Bordelon*, at p. 1322.)

In *Bordelon*, the defendant, newly paroled after years of incarceration for bank robbery, returned to the same bank and robbed it. He was arrested two or three blocks away and two minutes after leaving the bank with the money taken from it. (*Bordelon, supra*, 162 Cal.App.4th at pp. 1315-1316.) His defense at trial was that he took the money because he wanted to get arrested and returned to custody. He argued that, given that motivation, he could not be convicted of robbery because he did not intend to keep the stolen money. (*Id.* at p. 1317.) A defense psychologist opined the defendant exhibited behavior consistent with “institutionalization,” which he described as a “gradual psychological change in which the individual becomes dependent upon the institution,” which might be a prison or a hospital. (*Ibid.*)⁶ In his opening statement, defense counsel argued that because of the defendant’s institutionalization, he did not have the requisite specific intent to permanently deprive the bank of its money. (*Id.* at

⁶ The defense psychologist also opined that the defendant suffered from a “psychotic disorder not otherwise specified,” whose primary symptoms were auditory hallucinations, delusions, and paranoid thoughts and feelings. (*Bordelon, supra*, 162 Cal.App.4th at p. 1317.)

conflicting reasons for taking the truck. Moreover, based on her admission that in 2005 she was convicted of residential burglary and receiving stolen property, the jury could properly discredit her testimony that she lacked the requisite specific intent. (See *O'Dell, supra*, 153 Cal.App.4th at p. 1578.) In addition, defense witness Clemmons told the defense investigator that appellant “has come to have an excuse for everything.”

Further, the probative value of Dr. Stewart’s testimony relating to whether appellant had the specific intent to temporarily deprive the owner of possession was slight. Given his concession that appellant was aware she was taking the vehicle without the owner’s permission, it seems highly unlikely the jury would have concluded she was “so consumed by her delusions and fears” as to block the requisite intent.

Finally, the substance of Dr. Stewart’s proffered testimony was presented to the jury through other defense witnesses and the court permitted evidence and instructed the jury regarding appellant’s voluntary intoxication.⁸ Shook, appellant’s friend, described appellant’s methamphetamine use, paranoid thinking and delusions and said that after talking with Dr. Stewart, she believed that appellant may suffer from methamphetamine-induced psychosis. Clemmons also testified to appellant’s methamphetamine use and paranoid, delusional behavior. Clemmons said that appellant talked a lot about a pickup truck associated with people that were coming to get her.

With no citation of legal authority, appellant argues the jury’s 12 hours⁹ of deliberation over a three-day period and three of its questions¹⁰ suggest the case was

⁸ As we noted previously, although the court permitted Dr. Stewart to testify regarding appellant’s voluntary intoxication and methamphetamine use, the defense chose not to call him as a witness.

⁹ Our review of the record reveals that the jury spent approximately nine hours deliberating over the course of three days.

¹⁰ The questions cited by appellant are: (1) “Is there a further definition or direction regarding ‘intent to deprive?’”; (2) “Is the phrase ‘intent to deprive’ used in other crimes involving the taking of things” and “What is the legal difference between taking, driving with intent to deprive, and auto theft?”; and (3) “Do we need to assume the defendant was mentally fit at the time of the incident, or is it the prosecutor’s job to convince us of that?” The court’s answer to the third question stated, “I have received [the question] and

close on the issue of her specific intent and, had Dr. Stewart testified regarding her mental disorder, the deliberations “could easily have been swayed towards acquittal.”

In *People v. Houston* (2005) 130 Cal.App.4th 279, 301 (*Houston*), Division Two of this court recognized, “the length of a jury’s deliberation is related to the amount of information presented at trial. . . .” “Additionally, we [must] assume that the jury spent time going over their instructions to make sure that they were properly carrying out their duties.” (*People v. Walker* (1995) 31 Cal.App.4th 432, 438.) Here, given that the jury heard testimony from 11 witnesses over the course of three days, and at no time indicated it was having trouble reaching a verdict, its nine-hour deliberation suggests it was conscientiously performing its duty, not having trouble reaching a decision. (*Houston*, at p. 301.) Similarly, the jury’s questions do not necessarily indicate the case was a close one. The questions may be seen as the jury’s attempt to diligently perform its duty and understand the law. In any case, even if the jury’s actions indicate this was a close case on the issue of appellant’s specific intent, contrary to appellant’s assertion, the record does not establish a reasonable possibility she would have been acquitted had Dr. Stewart been permitted to testify to her mental disorder. As we have concluded, given the overwhelming evidence in favor of the judgment, any error was not prejudicial.¹¹

have discussed it with the attorneys. The defendant has not entered a plea of ‘Not Guilty By Reason of Insanity.’ Therefore, the defendant is presumed to be sane. [¶] In addition, you have not heard any expert testimony with regard to the defendant’s mental status. You have also not received any jury instructions with regard to mental disease or defect. Again, you have the discretion to evaluate all the testimony that has been given as you deem appropriate.”

¹¹ Appellant also summarily argues, with no reasoned analysis, that although two witnesses testified regarding her paranoid delusions and methamphetamine use, these factors did not significantly mitigate the prejudice resulting from the court’s exclusion of Dr. Stewart’s testimony regarding her methamphetamine-induced psychosis. Because this assertion is unsupported by legal citation of authority and any reasoned argument, it is waived. (*T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1440, fn. 12, citing *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [“absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived”].)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.