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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.

SOCORRO SIERRA,

Defendant and Appellant.

A132876

(Sonoma County
Super. Ct. No. SCR-591098)

Following a jury trial, appellant Socorro Sierra was convicted as charged of assault with a deadly weapon and violation of the personal liberty of another, but was acquitted of attempted murder. The jury also found that he personally inflicted great bodily injury. The trial court found true the allegations that appellant suffered two “strikes” and had served four prison terms. The court sentenced appellant to 15 years in prison plus 25 years to life. This appeal followed.

I. FACTS

Appellant lived with his parents, Octavio and Dorothy Sierra. Octavio worked at Rodney Strong Winery, about a mile and a half from their house. Dorothy would take Octavio to work around 6:45 a.m. before going to work herself at Montemaggiore Winery. Sometime she would return home before going to work.

Appellant worked in a winery helping with the harvest during the summer and fall of 2010. His parents provided a white Mustang for him to drive to and from work. At some point in the fall of 2010, appellant was laid off or lost his job. At that time Octavio asked his son to return the keys; he did.

On October 15, 2010, Dorothy dropped Octavio off at the winery around 7:00 a.m. Later that morning appellant and Dorothy came to the winery. Appellant told his father that his mother had fallen. Octavio drove the three of them to the hospital. Octavio did not talk with his wife and was not concerned for her health. Rigoberto Canchola-Pena, a coworker at the Rodney Strong Winery, noticed that Dorothy was holding a towel up to her neck.

Joanne Chapman, an emergency room nurse at Healdsburg District Hospital, was on duty that morning. Dorothy entered the hospital at 8:02 or 8:03 a.m., accompanied by two men. She was holding a kitchen towel visible with fresh blood to the left side of her neck. All three came into the treatment room with Chapman. When asked what happened, Dorothy said she fell in the kitchen. She was vague with her answers, visibly upset, shaking, crying, and experiencing difficulty speaking. Chapman testified that “something didn’t feel right,” so she asked the men to wait in the waiting room. As soon as they left, Dorothy said she and appellant argued in the kitchen, he was on drugs, and cut her neck with a razor blade. Dorothy identified the men as her husband and son. Concerned for her own safety as well as the safety of Dorothy and the staff, and to fulfill her duty as a mandated reporter to report possible abuse or assault, Chapman asked the “ER tech” to contact the police.

Chapman observed an inch and a half laceration to the left side of Dorothy’s neck, with visible fat tissue and some oozing. The wound was “very superficial” but was in the area of the carotid artery and jugular vein. The carotid artery is an inch or inch and a half deep; if severed, the person is likely to bleed to death. Dorothy received seven stitches.

Officer Nadia Mohamed and Corporal Tanya Potter of the Healdsburg Police Department were dispatched to the hospital to investigate a report of a woman with a cut on the side of her neck. The dispatcher advised that the victim’s son was a possible suspect, and he had taken her to the hospital. Officer Mohamed saw appellant sitting on a bench outside the emergency room. Appellant said he brought his mother to the hospital. When asked to take his hands out of his pockets, appellant did so, revealing a razor blade. Officer Mohamed told him to drop it; he tossed it toward her feet. Appellant asked why

he was not being handcuffed. The officers responded that they were trying to figure out what was going on, and asked him to remain seated on the bench.

Corporal Potter went to check on appellant's mother. Dorothy was on a hospital bed with an open laceration on her neck "approximately 3 to 4 inches by about an inch wide." The officer stayed for the stitching. After talking with Dorothy, Corporal Potter returned to the waiting area. Appellant asked "if his mom way okay." The officer responded that she was getting stitches. Appellant's response was: "Stitches, that's it? . . . [¶] . . . Well, she was cut bad and she could have died."

Sonoma County Deputy Sheriffs Jeff Toney and Jose Acevedo, assigned to the Town of Windsor, were dispatched to the hospital. Toney took possession of the razor blade and contacted Dorothy.

Deputy Toney conversed with Dorothy for 20-25 minutes and described her demeanor as "very emotional." She was crying during the interview and Toney had to pause to allow her to "gather herself." Dorothy told Toney that they loaned one of their cars to appellant on the condition that he was gainfully employed. After appellant was fired from his job, Octavio took the keys back. That morning appellant confronted his mother about the keys. When she indicated she did not have the keys, appellant continued to badger her and a small argument ensued. As she started to leave for work, appellant said, "You're not going anywhere." He lunged at her with a razor blade. Dorothy did not have time to react. When appellant came at her a second time, she had backed up. Dorothy felt blood weeping from her neck, grabbed a towel and held it to her neck. Dorothy was scared and knew she was badly injured. She asked appellant for help getting to the hospital.

Deputy Acevedo spoke with Octavio at the hospital. He said appellant told him Dorothy cut herself with some scissors.

Deputy Toney located appellant in Acevedo's patrol car. Appellant immediately asked how his mother was doing. Toney said she was badly injured and received seven sutures. Appellant responded, "That's it?" Toney saw a scratch on the bridge of appellant's nose and found a small amount of blood on his nail bed. Toney took swabs of

blood from appellant's nail bed. Appellant tensed up, closing his hand and fist to conceal his thumb.

Octavio drove Dorothy home and then returned to work. He said she only had a little Band-Aid on her neck. When confronted with a photograph of his wife with a "white bandage and tape around the left side of her neck that comes across the front of her neck," Octavio said he thought it was a Band-Aid and did not notice it at the time. Octavio said he never spoke with his wife about the incident after she returned from the hospital. He did not want to testify and only did so because of the subpoena.

Dorothy took the stand and at the outset said several times that she did not want to answer any more questions. She did acknowledge that she lived in Windsor, was married to Octavio Sierra and worked at a winery. Appellant lived with them and they provided him with a car to get to work. When he lost his job, her husband took back the car keys.

Dorothy refused to answer questions about her injury and going to the hospital. The court cited her three times for contempt. Dorothy said she was not afraid of her son but admitted obtaining a restraining order against him in October 2010. She said she spoke truthfully with the police since October, and had a conversation with at least one officer while at the hospital. Although Dorothy refused to say what type of injury she received at that time, she acknowledged the photograph of herself with the white bandage on her neck. She did not cause the injury, nor did her husband. When asked if she knew the person who caused the injury, she replied, "I didn't say anybody caused it to me."

Searching the Sierra home in Windsor, the police found faint bloodstains and drops of blood on the kitchen floor; a towel with blood; and blood on Dorothy's shirt, which soaked through to the bra. A criminalist identified the substance on the razor blade as human blood. The swabs taken from appellant's nail bed also contained human blood.

II. DISCUSSION

A. The Trial Court Properly Admitted Dorothy Statement to Nurse Chapman

1. Background

During trial, the prosecutor alerted the court to his intention to introduce Dorothy's statement to Nurse Chapman while at the hospital, specifically that she and

appellant argued and he assaulted Dorothy with a razor blade. The prosecutor offered the statement as a spontaneous declaration under Evidence Code¹ section 1240.

Thereafter Chapman testified at a hearing under section 402, to determine the preliminary fact as to whether Dorothy's statement was a spontaneous declaration. Chapman testified that she saw Dorothy at 8:05 a.m. Dorothy was holding a towel to the left side of her neck; fresh blood was oozing from it. She came with two males, and was very upset, agitated and anxious. Dorothy said she had fallen in the kitchen and cut her neck. Chapman asked more questions; Dorothy was hesitant to answer questions and was still upset—she was crying, shaking, stuttering and having a hard time speaking. Chapman thought Dorothy was too upset for the injury sustained and “something else [was] going on,” so she asked the two men to wait in the waiting room. This occurred within two minutes of Dorothy saying she had fallen.

Immediately after the men left, Dorothy told Chapman that she and her son had argued, her son was on drugs and cut her on the neck with a razor; Dorothy had not fallen in the kitchen. Dorothy made these comments before the police were contacted.

Following the hearing, the court found that Dorothy's statement to Nurse Chapman was spontaneous and allowed it to be introduced against appellant. Appellant now challenges this ruling.

2. *Legal Framework*

A statement is a spontaneous declaration, not made inadmissible by the hearsay rule, under these circumstances: The statement “(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception.” (§ 1240.) Whether the requirements of the exception are satisfied in a particular case is largely a question of fact, although in making this determination the trial court necessarily exercises an element of discretion. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) We uphold the court's determination that the requirements are satisfied

¹ All statutory references are to the Evidence Code.

in a given case if substantial evidence supports the court's resolution of factual matters, and we review its ultimate decision to admit the evidence for abuse of discretion.

(People v. Stanphill (2009) 170 Cal.App.4th 61, 73.)

Our Supreme Court has laid out the following conditions that render statements admissible under the spontaneous declaration exception: “ ‘(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.’ [Citation.]” *(People v. Poggi, supra, 45 Cal.3d at p. 318.)*

The second requirement is most closely related to the peculiar facts of the case and thus the trial court's discretion is at its broadest when deciding that this requirement is met. *(People v. Poggi, supra, 45 Cal.3d at pp. 318-319.)* As to this second requirement, “ ‘[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*’ ” *(Id. at p. 319.)*

“Spontaneous” as used in section 1240 refers to an action undertaken without reflection or deliberation. *(Melkonians v. Los Angeles County Civil Service Com. (2009) 174 Cal.App.4th 1159, 1169.)* The mental state of the speaker is the crucial element in determining whether a statement is admissible as a spontaneous declaration. *(Ibid.)* Statements admitted under this exception are deemed reliable because their spontaneity ensures that the declarant did not have time to reflect and fabricate. *(People v. Pensinger (1991) 52 Cal.3d 1210, 1266.)*

3. Analysis

Appellant urges that Dorothy had approximately an hour to reflect and fabricate, and points out that she first told Chapman she had fallen in the kitchen, but then changed her story. Further, he argues there was more than enough time between the incident and

the statement to permit Dorothy's excitement to abate and her reflective powers to take over, and the statement was not unconsidered because it was made in direct response to questioning.

The amount of time is not the key; the mental state of the speaker is. Here, Dorothy made the statements within minutes of arriving at the emergency room. She was agitated and very upset, shaking, crying, stuttering and having difficulty speaking. Appellant had been with her the entire hour since the time of the assault to the time Chapman asked him to leave. As soon as appellant left, Dorothy blurted out what happened. She made the statement at the earliest opportunity outside appellant's presence, and while she was still visibly distraught. Even if Chapman had asked Dorothy again what happened—she did not recollect—Dorothy immediately declared what had happened. Substantial evidence supports the court's conclusion that Dorothy made the statement without reflection and while nervousness or excitement and perhaps sheer fear and terror were still present. The court did not abuse its discretion in admitting the statement under the spontaneous declarations exception to the hearsay rule.

B. The Trial Court Properly Admitted Dorothy's Statement to Deputy Toney

1. Background

Appellant also challenges the admission of Dorothy's statement to Deputy Toney as a prior inconsistent statement. Some background is in order.

During the course of the prosecution's examination of Dorothy, she first refused to answer questions after being asked for her husband's name. The court explained that she would be held in contempt if she did not respond, and thereafter Dorothy answered several more questions but again refused to answer a question about an occasion when she went to the hospital. The court cited her for contempt. Dorothy returned to the stand and again answered some questions but refused to respond to questions about an injury in the fall of 2010. The court again found Dorothy in contempt.

Back on the stand, Dorothy answered questions about conversations with law enforcement officers and said she never said anything that was not true. One conversation occurred when she was lying down on a bed and at the time she had an

injury. When asked what type of injury, Dorothy said she did not want to answer. The court ordered her to answer the question, but Dorothy said she would disregard the order and was again held in contempt.

When shown a photograph of herself with a bandage on her neck, Dorothy admitted the picture was of her, and said she did not cause the injury nor did her husband. The prosecutor asked if she knew who caused the injury, to which she replied: "I didn't say anybody caused it to me." The court advised Dorothy about her right against self-incrimination and cautioned that if she intentionally lied under oath, she could be sentenced to prison. Dorothy conferred with her attorney. The attorney explained to Dorothy that conceivably she could be prosecuted for making a false police report if she made a prior statement to a police officer that was not correct. Thereafter Dorothy invoked her right against self-incrimination and not to answer the question, at which point the prosecutor withdrew the question and granted Dorothy use immunity from prosecution for any false or misleading statements she previously made to the police. The prosecutor had no further questions, nor did the defense attorney. The court excused Dorothy, subject to recall by the prosecution.

Thereafter the prosecutor proposed to introduce Dorothy's statements to Deputy Toney that appellant assaulted her with a razor blade, asserting it was admissible as a prior inconsistent statement under section 1235. The court admitted the statements, observing that (1) this was not a matter of failure to recollect or feigning recollection; rather, Dorothy intentionally suppressed evidence because she did not want to testify against her son; and (2) her testimony on the stand was "totally inconsistent with what she previously reported as to how this incident occurred."

2. Analysis

Section 1235 excepts from the rule against hearsay evidence of a witness's prior statement that is inconsistent with his or her testimony in the present trial, when the

statement is offered in compliance with section 770.² (§ 1235.) Appellant urges that Dorothy's statement to Deputy Toney was not inconsistent with her testimony at trial. Not so.

After Dorothy denied that she or her husband caused the injury to her neck, the prosecutor asked: "Did you know the person that caused that injury to you?" Dorothy responded: "I didn't say anybody caused it to me." In contrast, Deputy Toney related that Dorothy said she and appellant argued about the car, he confronted her at home, and lunged and cut her in the neck with a razor blade. Her testimony that she didn't say anybody "caused" her injury was clearly inconsistent with her prior statement to Deputy Toney. Furthermore, the section 770 prerequisites for admission were met. Although Dorothy was excused after she invoked her Fifth Amendment right against self-incrimination, she was subject to recall as a witness by the prosecution. According to the Law Review Commission comments to section 770, this statute "permits the judge to exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement and he has been unconditionally excused and is not subject to being recalled as a witness." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll. § 770, p. 444.)

Moreover, Dorothy's testimony amounted to a deliberate evasion to avoid truthful answers. Normally a witness's testimony that he or she does not recall an event is not inconsistent with that person's prior statement describing the event. However, courts will imply inconsistency when the witness's claimed lack of memory amounts to deliberate evasion. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.) Having the opportunity to view the witness's demeanor, the trial court is in the best position to assess the witness's credibility on the issue of claimed lack of recall. (*Ibid.*) The test for

² This statute states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

admitting a witness's prior inconsistent statement is inconsistency in effect, rather than contradiction in express terms, and this principle governs the case of a forgetful witness. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219.)

In the case at hand, instead of saying she did not remember what happened, when the questions honed in on her October 15, 2010 injury and visit to the hospital, Dorothy simply refused to answer. The effect is the same as if, under the guise of forgetfulness, Dorothy willfully evaded giving truthful answers. The trial court would have none of this and characterized the situation as "more egregious than someone who has announced they don't have the ability to recall or simply feigns recollection." Substantial evidence supports the lower court's determination that Dorothy was willfully evasive. (*People v. Arias* (1996) 13 Cal.4th 92, 152.)

Citing *Crawford v. Washington* (2004) 541 U.S. 36 and the Sixth Amendment to the United States Constitution, appellant further argues that admission of the statement violated his right to confrontation. Acknowledging that trial counsel failed to so object, he asserts ineffective assistance of counsel on appeal.

Although Dorothy refused to answer some questions, she took the stand and testified and was available for cross-examination. Defense counsel made the decision not to cross-examine Dorothy and the record provides no clue as to why he did not object to introduction of the prior inconsistent statement on confrontation grounds. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) counsel's performance was deficient, using an objective standard of professional reasonableness; and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Huggins* (2006) 38 Cal.4th 175, 248.) We accord a high degree of deference to trial counsel's tactical decisions, and thus counsel's failure to object rarely provides grounds for finding counsel incompetent. (*People v. Jones* (2009) 178 Cal.App.4th 853, 860.) We reject such claims on appeal if the record does not affirmatively show why counsel did not object and the circumstances suggest counsel could have had a valid tactical reason for declining to object. (*Ibid.*)

Again, appellant was not denied the opportunity to cross-examine Dorothy; he instead chose not to exercise the opportunity. Further, the record is silent on the failure to object on confrontation grounds to introduction of the prior inconsistent statement. Moreover, counsel could reasonably conclude there was no legitimate basis for an objection because he had already objected to admission of the statement under sections 1235 and 770, and although Dorothy was excused, she was subject to recall by the prosecutor. Appellant has failed to establish ineffective assistance of counsel.

Appellant also calls our attention to *People v. Morgain* (2009) 177 Cal.App.4th 454, 463, and in particular the following: “A defendant’s confrontation rights may be violated where a prosecutor examines a recalcitrant witness and poses questions that relate to prior statements made by that witness, in circumstances where the witness’s recalcitrance effectively prevents cross-examination concerning those prior statements.” (*Ibid.*) This passage is not pertinent. Here, the prosecutor did not ask leading questions relating to prior statements that Dorothy made. Rather, the prosecutor merely asked Dorothy if she knew who caused her injury, to which Dorothy replied that she did not “say anybody caused it to me.” That response opened the door for introduction of the prior inconsistent statements she offered to Deputy Toney.

III. CONCLUSION; DISPOSITION

Appellant urges cumulative error in the face of the two purported evidentiary errors. There was no error, and hence no cumulative error. We affirm the judgment.

Reardon, Acting P.J.

We concur:

Rivera, J.

Sepulveda, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.