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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.

YONGHUA ZENG,

Defendant and Appellant.

A138970

(San Francisco County
Super. Ct. No. SCN219176-02)

Appellant Yonghua Zeng was sentenced to two years in jail after a jury convicted him of grand theft based on his admitted participation in a scam targeting immigrants from rural China. (Pen. Code, §§ 487, subd. (c), 1170, subd. (h)(5)(A).) He and his codefendants presented a necessity defense at trial, predicated on the claim they were victims of human trafficking. Appellant argues the judgment must be reversed because the trial court improperly limited the testimony of a defense expert on human trafficking. He also urges us to strike a presentence investigation fee of \$150, there being no showing he had the ability to pay such fee. We affirm the judgment but order the trial court to amend its minute order to reflect no investigation fee was actually imposed.

BACKGROUND

On the morning of November 10, 2012, Yachang Lei approached Kon Ying Wong at a San Francisco farmers' market and asked her whether she knew of an elderly person selling herbs there. Lei's hand was bandaged and she explained to Wong she needed a doctor who could cure difficult illnesses. Mudi Wu approached and indicated she knew

such a doctor, but he would only see people personally referred by friends or family. Mudi Wu persuaded Wong to accompany her and Lei, and the three women walked away from the market. Along the way, Mudi Wu asked Wong about her family, and Wong told her she had three sons, ages 20 through 41.

As they were walking, Mudi Wu excused herself to make a phone call. Yannu Tan, who had been following close by, approached the group and was introduced by Mudi Wu as the doctor's granddaughter. Tan claimed her ancestors had pushed her to see them because Wong's youngest son would die in three days, possibly in a car accident. She said a ghost wanted to marry this son and when Wong turned 55, she would meet a ghost and her husband would become ill. Wong, who had spent much of her life in a small town in China where people were superstitious about ghosts, believed the prediction completely and was very afraid. Tan told Wong she should retrieve all her money and possessions, wrap them up, and bring them back for a ceremony to prevent the predicted misfortunes from befalling her family. Wong agreed to do so, but once she was alone she recalled reading newspaper reports about similar scams and decided to call the police.

At about noon that same day, after Wong left the farmers' market, Tan approached Susan Yuan while she was shopping for vegetables and asked about an elderly person from England who had a stand at the market. Lei approached and said she knew of an old herbal medicine doctor, and the three women walked together up the hill behind the market to find him. Along the way, Lei asked Yuan how many children she had and Yuan told her she had two sons and one daughter, with the youngest child being 19 years old and the other two being in their twenties.

Appellant, who had been following close by, heard this information. He approached the women and said his grandfather had "yin-yang eyes" and could see into the realm of ghosts. Appellant told Yuan his grandfather had seen a ghost was following one of her sons, who might die within three days in a car accident because the ghost wanted to marry him in the netherworld. Yuan, who had grown up in small farming town

in China and had heard about people with “yin-yang eyes,” was very afraid and begged appellant for help.

After pretending to make a phone call, appellant told Yuan to retrieve as much cash, jewelry and rice as she could for a purification ceremony to prevent the car accident. He said he would return the items after the ceremony. Yuan went home and gathered “several ten thousands” of dollars in cash, along with several pieces of jewelry and some rice. She then went to two banks where she kept safe deposit boxes and retrieved over \$20,000 and several pieces of gold jewelry. Yuan met appellant, Tan and Lei at a vacant lot near the farmers’ market as she had been instructed and gave appellant a package containing her belongings. Appellant placed Yuan’s belongings in a black plastic bag and performed a “ceremony,” during which he exhorted the ghosts to leave Yuan’s son alone. During this ceremony, he switched the bag with another, similar-looking bag after instructing Yuan to face the sun and not look back. Afterward, appellant walked Yuan to the bus and advised her to buy fruit for the gods. He drew a symbol on her back with his finger, saying her son would die if she mentioned the ceremony to anyone.

Meanwhile, plainclothes police officers had stationed themselves around the farmers’ market in response to Wong’s earlier report of the scam. After officers noticed appellant writing on Yuan’s back with his finger, they contacted her on the bus. Other officers noticed Lei and Tan, who matched descriptions given by Wong, pace nervously near a U-Haul trailer and talk on their cell phones for several minutes. Still under observation, Lei and Tan met up with appellant and Mudi Wu, and the four huddled briefly in a circle before splitting up. A taxi cab arrived and the four were arrested when they converged again and entered the cab.

At the time of the arrest, appellant was carrying a wallet with over \$2,300 in United States currency, a key to a room at the Hotel Whitcomb in San Francisco, a luggage key and a Wynn Las Vegas players card. Lei was carrying a pouch with \$1,900 in \$100 bills and a Wynn Las Vegas players card. Yuan’s property was found in a knotted, black plastic bag recovered from the back seat of the cab.

Officers obtained a warrant and searched a room at the Hotel Whitcomb that had been rented to appellant. It contained two beds and a makeshift bed on the floor, and laundry was hanging all over the room. Police found several suitcases, numerous folded plastic bags, Chinese and United States currency, passports and other identification documents for appellant, Lei, Tan and Mudi Wu, a receipt for the Hotel Opal in San Francisco, two business cards of a Jiaping Che, and letters signed by Che welcoming Tan and Lei to the country and inviting them to inspect his company. The bag in which appellant's passport was found also contained jade earrings and a diamond ring.

The driver of the cab at the farmers' market was Henry Tsang, who told police he had picked up appellant, Tan, Lei, Mudi Wu, and a woman identified as Chet Moi Wu (or Chi Mei Wu or Chau Yi Yan) at the Hotel Whitcomb earlier that morning. After he dropped appellant, Tan, Lei and Mudi Wu at the farmers' market, he took Chet Moi Wu to a travel agent to purchase a ticket to Hong Kong departing the following day.¹ Tsang had also driven the group around on other dates (including a trip to Fisherman's Wharf), and though he claimed not to know them, his address was on a receipt from the Hotel Opal with appellant's name. A video recording from the cab on the day of the arrests showed the group was laughing and joking with Tsang, with Tsang urging them to take pictures in a tourist area.

An information was filed charging appellant, Tan and Lei with extortion and grand theft based on the Susan Yuan incident. (Pen. Code, §§ 520, 487, subd. (c).) Additional charges of attempted extortion and attempted grand theft were brought against Tan, Lei and Mudi Wu based on the Kon Ying Wong incident. (Pen. Code, §§ 664/520, 664/487, subd. (c).) At their joint trial before a jury, the defendants admitted committing the scams but claimed they did so out of necessity because they had been victims of human trafficking.

Appellant testified he had run a clothing company and construction business in Canton, China, and he had traveled overseas a number of times, taking trips to Japan,

¹ She did not board that flight.

Malaysia, Indonesia and Hong Kong. His company secured a large construction contract using money borrowed from an organized crime group known as a triad, but when the leadership on the project changed, appellant's company was forced to stop work and he lost a lot of money. The triad demanded repayment of the loan, sending several men to appellant's house who smashed his electronic equipment and beat him and one of his sons. In 2011, appellant was kidnapped by three triad members at gunpoint, who beat him and forced him to sign a promissory note. In 2012, one triad member, Lee Cheng, offered appellant the chance to work in the United States as a means of paying off the debt and arranged for his visa.

According to appellant, he flew from Hong Kong to Los Angeles and was picked up at the airport by a man named Che. Che gave him the name of Chet Moi Wu, whom he met in Las Vegas. In Las Vegas, Chet Moi Wu introduced appellant to his codefendants Lei, Tan and Mudi Wu, but was not given any work as promised. To pass the time, appellant used his passport to obtain a Wynn Las Vegas players card and gambled about \$1,500 in chips at the casino. He met a woman who had suffered gambling losses and bought a diamond ring from her at a good price.

Appellant and his codefendants left Las Vegas with Chet Moi Wu after a few days and traveled by bus to San Francisco, where a taxi driver named Tsang picked them up and drove them around. They booked two rooms at the Hotel Opal, then moved to a room at the Hotel Whitcomb. During their travels, appellant told Chet Moi Wu about his children, where they went to college and worked, and his participation in Falun Gong, a group that was outlawed in China.

Chet Moi Wu taught the group how to do the ghost scam, and though appellant did not want to participate, he agreed to do so because he was worried that if he did not his family would be harmed. Chet Moi Wu told him if he did not participate she would tell her boss to tell the authorities in China about his membership in Falun Gong. Appellant acknowledged he kept his passport with him during his travels, but left it in the hotel room the day they did the scams at the farmers' market.

Appellant’s codefendants also testified and described growing up in rural Canton, China, encountering financial troubles, borrowing money from loan sharks connected to organized crime at exorbitant interest rates, receiving threats to their personal safety and that of their families after defaulting on the debts, having no faith in the local police, being told of work in the United States as a way of repaying the debt, and being forced to commit scams at the behest of their contacts or minders in the United States.

The jury convicted appellant, Lei and Tan of the grand theft of Susan Yuan, and convicted Lei, Tan and Mudi Wu of attempted grand theft of Kon Ying Wong. The remaining charges of extortion and attempted extortion were dismissed after the jury was unable to reach a verdict as to those counts. Appellant was sentenced to two years in jail and appealed from the judgment.²

DISCUSSION

I. Expert Testimony Regarding Human Trafficking

The defendants presented a necessity defense based on the theory their indebtedness to organized crime in China, with the attendant threat to their safety and that of their families, justified their participation in the scams forming the basis for the charges. In support of this theory, they offered the testimony of Annie Fukushima, Ph.D., an expert in human trafficking. Appellant argues the trial court improperly limited the scope of Fukushima’s testimony by forbidding the use of hypothetical questions based on the facts of this case. We reject the claim.

A. The Necessity Defense

The necessity defense “ ‘excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such result would be futile.’ ” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164.) It does not negate the elements of a crime, but “ ‘represents a public policy decision not to punish such an individual despite proof of the crime.’ ” (*Ibid.*) A defendant asserting a necessity defense must prove by a preponderance of the evidence the crime was

² The other defendants are not parties to this appeal.

committed “ ‘(1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he or she] did not substantially contribute to the emergency.’ ” (*Ibid.*; see *People v. Heath* (1989) 207 Cal.App.3d 892, 901; CALCRIM No. 3403.)

B. Expert Testimony—General Principles

A person with “special knowledge, skill, experience, training, or education” in a field may qualify as an expert witness (Evid. Code, § 720) and give testimony in the form of an opinion (Evid. Code, § 801). Expert testimony is admissible when the subject matter is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).)

An expert’s opinion may embrace the ultimate issue to be decided, but it may not encompass matters of common knowledge that jurors could decide as intelligently as the witness. (Evid. Code, § 805; *Burton v. Sanner* (2012) 207 Cal.App.4th 12, 19 (*Burton*).) “ ‘Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.’ [Citation.]” (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.) Along these lines, an expert witness “ ‘may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] “Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact.” ’ ” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).)

C. Evidence Code Section 402 Hearing

At a hearing under Evidence Code section 402 to determine the admissibility and scope of the proffered expert testimony, Fukushima defined human trafficking as occurring “when someone either recruits, harbors, transports a person through force, fraud, or coercion for the purpose of their labor or sex.” She explained that contrary to

popular belief, human trafficking did not require movement, was not limited to sex trafficking, did not necessarily involve isolating or shackling people in one spot, and did not necessarily require physical violence, as psychological coercion could be used as well. Factors tending to show a person was being trafficked included the withholding of identification documents such as passports from the person, threats made against the person or his or her loved ones, an inability of the person to leave the situation, the person's telling of his or her story in a linear, or rehearsed, fashion, and the person's physical affect. China was considered a "Tier 2" country, meaning it was not doing all it could to prevent human trafficking and trafficking victims had limited legal recourse there.

Fukushima described the "seasoning process" for human trafficking victims, similar to the cycle of violence for victims of domestic violence: a "honeymoon" phase in which the trafficker treats the victim well, then the building of tension, followed by threats of violence or acts of violence. A trafficker will break the will of the exploited person, to the point where the person will not leave even if given the opportunity. Typically, threats against trafficking victims from Asia include harm to family members, the stealing or selling of children, revealing facts that will cause shame, organ trafficking, sale for prostitution and threats to divulge membership in Falun Gong. Trafficking often involves situations of "debt bondage," in which the victim incurs a debt at such a high interest rate it would be unrealistic to repay it. Based on her interviews with the defendants and the information about their travels in this case, Fukushima believed Tan was a trafficked person and appellant, Lei and Mudi Wu had strong indicators of being trafficked persons.

During the Evidence Code section 402 hearing, defense counsel collectively argued Fukushima's testimony was necessary for the following purposes: to explain the seasoning process used to get trafficking victims to submit rather than going to the police or flying back home when the traffickers were not present; to explain the means of control used by traffickers; to explain the cultural perceptions of people from other countries and common misperceptions about trafficking; and to explain why appellant

and the others engaged in activities that would appear inconsistent with coercion (gambling, sightseeing in tourist areas).

The trial court noted the issue was not human trafficking per se, but whether the necessity doctrine applied and the relevancy of Fukushima's opinion to the six elements of that defense. As to one element, whether the defendants had a reasonable legal alternative, information about the Chinese legal system was outside the expertise of the average juror. However, the jury was as competent as an expert to determine the remaining five elements: whether the defendants acted in an emergency to prevent a significant bodily harm or evil, whether the crime created a lesser danger than that avoided, whether the defendants subjectively believed the crimes were necessary to prevent a greater harm or evil, whether a reasonable person would have believed the same, and whether the defendants themselves substantially contributed to the emergency.

At the conclusion of the Evidence Code section 402 hearing, the court ruled Fukushima could provide limited testimony about human trafficking and the availability of legal remedies in China. She was not permitted to refer to her interviews with the four defendants or offer an opinion they were trafficking victims, nor could she be asked hypothetical questions to establish that defendants' behavior was consistent with human trafficking "because this isn't a human trafficking case; it's a necessity case."

D. Trial Testimony on Human Trafficking

Consistent with the court's ruling, Fukushima's testimony at trial included a definition of human trafficking and a description of the seasoning process used by traffickers, after which a victim would not leave even when given some freedom. She described the cycle of violence, consisting of a honeymoon phase, a tension-building phase, and a violent episode followed by an absence of violence that lulls the victim into believing the situation will improve. Fukushima opined that because of this cycle, a person could look like she was enjoying herself even while being trafficked. She described several circumstances that might indicate human trafficking, including restricted movement, lack of pay, excessive hours, large debt, high security measures, a

fearful, anxious, paranoid or depressed demeanor, avoidance of eye contact, lack of control over one's identification papers, and lack of health care.

Fukushima's testimony also included a description of the "push-pull" factors that cause the United States to become a destination for trafficking (poverty and gender inequality in the home country, an opportunity for work or education in the United States), and a discussion of common misconceptions about human trafficking (explaining that trafficking does not require movement, its victims might enter the country legally, labor other than sex work might be involved, the victims might get paid something for their work, and psychological rather than physical coercion might be used). She testified trafficking victims might not ask for help even when they have the opportunity to do so due to factors that include a distrust of law enforcement, language barriers, lack of education, lack of community connections, shame about their illegal activities, and a commitment to paying off a debt. Fukushima described the rise of organized crime in China, which was involved in providing cheap labor, and explained China was a Tier 2 country that did not comply with minimum anti-trafficking standards.

D. *No Abuse of Discretion*

Appellant acknowledges the trial court "correctly foreclosed [Fukushima] from testifying directly as to the specific defendants," but claims it should have allowed her to respond to questions about hypothetical human traffickers and hypothetical victims of human trafficking. We review the court's ruling for abuse of discretion and find none. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944-945 (*Gonzalez*).

Generally speaking, an expert may render opinion testimony by answering hypothetical questions rooted in facts shown by the evidence. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) This does not mean the hypothetical questions can be used to elicit an opinion that is not itself a proper subject of expert testimony. As the trial court aptly observed, the issue in this case was not whether the defendants' situation fit the legal definition of human trafficking, but whether their circumstances supported a necessity defense. The court reasonably concluded five of the six elements of necessity

were not a proper subject of expert testimony at all, because the jury was just as competent as an expert to weigh the evidence and draw the necessary conclusions on those elements. (*Burton, supra*, 207 Cal.App.4th at p. 20 [ex-police officer’s expert opinion regarding reasonableness of defendant’s conduct in case where self-defense/necessity were claimed was inadmissible].) Fukushima was permitted to testify generally about the phenomenon of human trafficking and its relevance to the element of the necessity on which expert testimony was appropriate—the availability of legal remedies in China.

Appellant argues the trial court’s ruling was erroneous under *Vang, supra*, 52 Cal.4th 1038, in which the prosecutor asked a gang expert a series of hypothetical questions closely tracking the facts of the case and elicited an opinion that an assault committed under such circumstances would be for the benefit of a criminal street gang. (*Id.* at pp. 1042-1044.) At issue was whether the hypothetical questions were impermissible because they tracked the facts of the case too closely, such that the expert’s answers were essentially an opinion regarding the defendants’ guilt. (*Id.* at pp. 1044-1045.) The court rejected the claim: “Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether the defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case.” (*Id.* at p. 1049, fn. 5.) The court noted, “It has long been settled that expert testimony regarding whether a crime is gang related is admissible” and “We are aware of nothing so distinctive about expert gang testimony that it should be an exception to the general rule permitting the use of hypothetical questions.” (*Ibid.*; see *Gonzalez, supra*, 38 Cal.4th at pp. 946-947 [gang expert properly asked hypothetical questions about intimidation of witnesses by gang members].)

The hypothetical questions at issue in *Vang* were posed on a subject—gangs—that is clearly a proper subject of expert testimony. The same is not true here. The facts supporting Fukushima’s opinion that appellant and his codefendants behaved in a manner consistent with human trafficking (indebtedness to organized crime, violence and threats

of violence) were not a proper subject of expert testimony, as a jury was well equipped to evaluate the effect such circumstances would have on the defendants in connection with their necessity defense.

For similar reasons, we are not persuaded by appellant's attempt to analogize case law regarding expert testimony on battered woman syndrome (BWS). In *People v. Gadlin* (2006) 78 Cal.App.4th 587 (*Gadlin*), on which appellant relies, the court upheld the use of expert testimony regarding BWS to explain the prior recantation of an assault victim and rejected an argument the prosecutor's hypothetical questions regarding the effect of an abuser's behavior on the victim were improperly used to prove the assault. (*Id.* at pp. 589, 595; see Evid. Code, § 1107, subd. (a) [expert testimony regarding evidence of intimate partner battering admissible in criminal case to show its effect on the victim, but not admissible "against a criminal defendant to prove the occurrence of the act or acts of abuse"].) The court commented, "When BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for BWS to be understood. . . . [L]imiting testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct." (*Gadlin*, at p. 595.)

The situation in *Gadlin* is distinguishable because expert testimony on BWS was admissible by statute for the purpose it was offered, and the court simply concluded that hypothetical questions were a proper means of questioning the witness. Human trafficking, which is not a "syndrome" similar to BWS, was only relevant in the case before us to the extent it coincided with the elements of a necessity defense. The trial court correctly concluded that with one exception, the elements of necessity were not a proper subject of expert testimony under the circumstances of this case. As the People observe, "[H]uman trafficking is just a name for a kind of coercion the jury was well-equipped to evaluate as a possible source of duress or necessity."

E. Harmless Error

Even if we assume the court should have granted appellant and his codefendants more leeway in posing hypothetical questions related to human trafficking victims, reversal is not required because it is not reasonably probable a jury who heard this line of questions would have reached a different result. (*People v. Benavides* (2005) 35 Cal.4th 69, 91 [violations of state law reviewable under harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)]; *People v. Vieira* (2005) 35 Cal.4th 264, 308 [exclusion of defense expert on cults harmless under *Watson* standard].) Although Fukushima was not allowed to answer hypothetical questions about the behavior of human trafficking victims, she testified about the phenomenon of trafficking and described the behaviors typical of such victims. She explained why trafficking victims might not leave a situation even though they appeared free to do so, and why they might appear to be enjoying themselves even while being trafficked. The jury had all the information it needed about human trafficking, combined with its own collective common sense, to determine whether the defendants' circumstances, whatever they were labeled, supported a necessity defense.

II. Presentence Investigation Fee

Appellant argues the trial court erred by imposing a \$150 presentencing investigation fee under Penal Code section 1203.1b without making a determination of his ability to pay. As the People observe, no such fee was actually imposed. In the course of ordering appellant to pay various fines and fees, the court stated: "And civil obligations not dependent on his conviction, \$150 for the preparation of a pre-sentence report. Excuse me. *Strike that.*" (Italics added.)

Although the court immediately retracted its reference to the presentencing investigation fee, the minute order for the sentencing hearing states, "Defendant shall pay cost of pre-sentence investigation in the amount of \$150 as determined by the probation officer." Where there is a discrepancy between the oral pronouncement of judgment and the clerk's minute order, the oral pronouncement of judgment controls. (*People v. Farrell*

(2002) 28 Cal.4th 381, 384, fn. 2.) We will direct the trial court to modify the minute order by deleting the reference to the presentence investigation fee.

DISPOSITION

The minute order from the sentencing hearing held May 31, 2013, shall be modified to delete the language “Defendant shall pay cost of pre-sentence investigation in the amount of \$150 as determined by the probation officer.” Subject to this modification, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.