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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

THEOPOLIS POLLARD, JR.,

Defendant and Appellant.

B229745

(Los Angeles County Super. Ct.  
No. GA074222)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed.

John Doyle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Theopolis Pollard, Jr., was convicted by jury of robbery (Pen. Code, § 211),<sup>1</sup> second degree commercial burglary (§ 459), forgery (§ 476), and dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). The trial court found defendant had suffered two prior convictions under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), had two prior serious felony convictions (§ 667, subd. (a)), and had served a prior prison term (§ 667.5, subd. (b)).

Defendant was sentenced to 25 years to life for the robbery, enhanced by 10 years for the section 667, subdivision (a) prior convictions, for a total of 35 years to life. Identical 35 years to life sentences were imposed for the second degree commercial burglary and the forgery, but those terms were stayed (§ 654). A concurrent term of 35 years to life was imposed for the dissuading a witness conviction.

In his timely appeal from the judgment, defendant argues his Sixth and Fourteenth Amendment rights to confront witnesses were violated when the trial court relied on a certificate of competence from the medical director of Patton State Hospital (Patton) in finding that defendant had regained his competency to stand trial. Defendant further argues he satisfied his burden of proving continuing incompetence at the section 1368 hearing after being returned from Patton. Finally, defendant contends the evidence is insufficient to support his forgery conviction.

We hold that competency proceedings are not criminal trials for purpose of the Sixth and Fourteenth Amendments. Substantial evidence supports the trial court's finding that defendant had regained competency to stand trial. The forgery conviction is also supported by substantial evidence. We affirm.

## FACTS

Karina Tapia was working at the Domino's Pizza in La Crescenta on August 9, 2008. Defendant entered the store with a toddler, who he put in a seat, and then placed

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<sup>1</sup> All statutory references are to the Penal Code, unless otherwise indicated.

an order at the counter. Suspicious of defendant, Tapia used the store computer to record the license number from the van defendant had parked outside the Domino's. Defendant handed Tapia a \$50 bill, which she immediately recognized as counterfeit due to its size and color. She asked if defendant would like to pay instead by cash or a credit card. Defendant jumped over the counter, pushed Tapia to the side wall by a telephone and asked for money. With his fists raised to shoulder level, defendant said if she touched the phone he would "kick [her] ass." Defendant opened the cash register, removed money, grabbed the toddler, and drove away in the van. Tapia called the police and provided the license number. When shown People's Exhibit No. 12 at trial, a \$50 bill, Tapia testified it did not look like the one handed her by defendant, because it did not have stamps on it and it was softer that day. She selected defendant's photo out of a photographic lineup, although the photo showed a scar she did not recall from the robbery, and she testified at the preliminary hearing that she did not make an identification. Other than the scar, Tapia was able to recognize defendant. Tapia was taken in a police car to another location that day, where she identified defendant as the person who had committed the robbery.

Deputy Joel Broumley responded to the Domino's Pizza in La Crescenta on August 8, 2008, in response to a reported robbery. He met Tapia, who described what happened and gave him what appeared to be a counterfeit \$50 bill. He booked the bill into evidence under the case number assigned to the Domino's robbery. Deputy Broumley testified that the bill he received from Tapia looked like one presented to him for identification at trial.

Deputy Matthew Fitzgerald heard the radio call regarding the Domino's robbery, which included a suspect description and license plate number for a 1993 Dodge van that was registered to defendant at an address in Pacoima. Deputy Fitzgerald went to the Pacoima address, where he eventually saw defendant driving the van described in the robbery report. Defendant was detained and placed in the field show-up for identification by Tapia.

Detective Frank Diana arranged for the \$50 bill to be transferred to the Secret Service. Secret Service Special Agent Edward Martinez received the \$50 bill booked into evidence under the report number pertaining to the Domino's robbery. The color, face, and security thread on the bill all were incorrect. The bill was a \$5 bill altered to appear to be a \$50 bill. The bill was smoother than a real bill, and it was not genuine currency.

## **DISCUSSION**

### **Competency Issues**

Defendant was initially committed to Patton as incompetent to stand trial pursuant to section 1368 in 2009. He was returned to the trial court in 2010 based upon a Certificate of Competency pursuant to section 1372 from Patton. Defendant argues the Certificate of Competency from Patton was testimonial in nature under the Sixth and Fourteenth Amendments. (See *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*.) From this premise, defendant reasons the California Supreme Court holding that a defendant has the burden to establish that he or she has not regained competency by a preponderance of the evidence (*People v. Rells* (2000) 22 Cal.4th 860, 867-871 (*Rells*)) is constitutionally infirm. Defendant contends the issue was not forfeited despite the failure to object below, but if so, the issue should be addressed in order to avoid a claim of ineffective assistance of trial counsel. Finally, defendant argues that even if he had the burden of proof, he satisfied that burden at the hearing in the trial court upon his return from Patton.

## A. Background

On April 28, 2010, the trial court<sup>2</sup> stated it had received a certification pursuant to section 1372 from Patton indicating defendant had regained competency. Defense counsel indicated a desire to present evidence on the issue of regained competency. Counsel proposed to call two witnesses to testify—a psychiatrist and an investigator.

The trial court ruled, without objection from the defense, that defendant was presumed to be competent and he has the burden of proof by a preponderance of the evidence. Dr. Suzanne Dupee testified, and her current report on competency was marked and received as an exhibit. Dr. Dupee expressed the opinion that the diagnosis of malingering in the report from Patton was not entirely supported, because the report identifies two other mental illness diagnoses. The court asked defense counsel and Dr. Dupee to focus her testimony on current competency, because the doctor's written report concluded that defendant is competent to stand trial.<sup>3</sup>

Dr. Dupee testified she was of the opinion defendant was competent to stand trial, although she had concerns about his mental state and chronic mental illness. Her main questions involved defendant's ability to cooperate with counsel. Defendant does not have a mental illness that is interfering with his competency to stand trial, but his low I.Q. might interfere with the ability to cooperate. Defendant has a long term history of drug usage, and Dr. Dupee believed he has a psychotic disorder but it "is not interfering with his ability to stand trial right at this moment." Defendant understands the charges and the nature of the proceedings. He is a difficult person to interview, and it is hard to get a definitive history from him, which could be due to long term drug use and brain

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<sup>2</sup> The Honorable Teri Schwartz conducted the competency proceedings in this case. The Honorable Dorothy L. Shubin presided over the trial.

<sup>3</sup> The report stated: "Based on my current evaluation, it is my opinion with a reasonable degree of medical certainty that Mr. Pollard is currently competent to stand trial, notwithstanding a diagnosis of a psychotic disorder for which the origins and etiology are unclear."

problems. The trial court again directed defense counsel to focus on the issue of current competency. Dr. Dupee testified defendant is capable of cooperating with counsel, but there may be some issues making cooperation difficult.

The trial court did not have time to hear the second defense witness that day and invited the parties to stipulate to his testimony. The parties stipulated the investigator would testify defendant gave inconsistent information that was not leading to helpful or useful information. The court ruled that defendant has not met his burden of showing he is incompetent to stand trial. The court relied in part on Dr. Dupee's conclusion, reasoning that difficulty in getting useful information does not establish incompetency to stand trial. The court offered to appoint an expert for further examination if necessary.

## **B. Application of the Sixth and Fourteenth Amendments**

“In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .” (U.S. Const., Amend. VI.) “We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.” (*Pointer v. Texas* (1965) 380 U.S. 400, 403.) In *Crawford, supra*, 541 U.S. at page 68, the Supreme Court held, “Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”

We agree with the Attorney General that defendant’s failure to object in the trial court results in forfeiture of the confrontation clause issue. “He did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim.” (*People v. Redd* (2010) 48 Cal.4th 691, 730.)

Assuming the issue had been preserved, it is without merit. A restoration of competency hearing is not a criminal trial that implicates the right of confrontation under the Sixth and Fourteenth Amendments. “We begin our analysis with a discussion of the

legal principles established in *Crawford*. ‘*Crawford* . . . held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at p. 59.) . . . .’” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 290, citing *People v. Geier* (2007) 41 Cal.4th 555, 597.)

All of the post-*Crawford* Supreme Court authority involves admission of testimonial hearsay *at trial*. (See *Bullcoming v. New Mexico* (2011) \_\_ U.S.\_\_ [131 S.Ct. 2705]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Giles v. California* (2008) 554 U.S. 353; *Davis v. Washington* (2006) 547 U.S. 813.) California courts have rejected the application of *Crawford* beyond the confines of a criminal trial. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 55 [sexually violent predator proceedings]; *In re S.C.* (2006) 138 Cal.App.4th 396, 426-427 [juvenile dependency proceedings]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411 [probation violation proceedings].)

Our Supreme Court unanimously held in *Rells, supra*, 22 Cal.4th at pages 867-868 that a defendant is presumed to be competent at a restoration of sanity hearing and the defendant bears the burden of proof on the issue by a preponderance of the evidence. Implicit in the holding of *Rells* is the notion that restoration of sanity proceedings is not the equivalent of a criminal trial. *Rells* effectively resolves the issue of whether the *Crawford* reasoning has any application at a hearing on the restoration of competency.

### **C. Sufficiency of the Evidence of Competency to Stand Trial**

Defendant’s contention that he sustained his burden of proving he was not competent does not require extended discussion. “The trial court’s determination regarding a defendant’s competence must be upheld if supported by substantial evidence. (*People v. Lawley* (2002) 27 Cal.4th 102, 131 [competence to stand trial].)” (*People v. Johnson* (2012) 53 Cal.4th 519 [2012 Cal. LEXIS 600, 22].) The certificate of restoration of competency from Patton, combined with Dr. Dupee’s opinion that

defendant was competent to stand trial, constitute the required substantial evidence to support the finding of the trial court.

### **Sufficiency of the Evidence to Support the Forgery Conviction**

Defendant makes two challenges to the sufficiency of the evidence to support the forgery conviction under section 476.<sup>4</sup> First, he contends there is insufficient evidence he knew the \$50 bill was counterfeit before he presented it to Tapia. Second, defendant argues the evidence does not establish that the bill given to Tapia was the same item determined to be counterfeit by Special Agent Martinez of the Secret Service. We reject both claims.

In determining if sufficient evidence support a conviction, our limited role is to determine, based on the entire record, whether a rational trier of fact could return a verdict of guilt beyond a reasonable doubt. We view the evidence in the light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739 (*Smith*); *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)). The jury determines the credibility of witnesses and resolves conflicts in the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*)). The reviewing court does not substitute its judgment for that of the jury, if the verdict is supported by substantial evidence. (*Smith, supra*, at p. 739; *Ochoa, supra*, at p. 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) The same standard of review applies when the prosecution relies on circumstantial evidence. (*Maury, supra*, at p. 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

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<sup>4</sup> “Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery.” (§ 476.)

Defendant gave Tapia obviously counterfeit currency. When she advised him the \$50 bill was not valid and offered him the chance to pay by cash or credit card, defendant instead jumped the store counter, pushed Tapia, and threatened violence if she called the police. Defendant then opened the cash register, removed cash, and left without his \$50 bill or pizza. A reasonable trier of fact could determine that defendant's intention from the outset was to obtain money by passing a counterfeit \$50. His conduct was inconsistent with that of someone who was unaware he had presented counterfeit currency. Substantial evidence supports the jury's finding of knowledge.

The jury could also reasonably conclude the \$50 bill analyzed by Special Agent Martinez was the same bill passed by defendant to Tapia. Tapia gave the bill to Deputy Broumley, who booked it into evidence under this case number. The deputy testified the bill looked like the currency he had received. Detective Diana had the bill transferred to the Secret Service. Special Agent Martinez received the bill under the case number for the Domino's robbery, and he testified to its counterfeit characteristics. While it is true that Tapia testified the bill she was shown in court did not look or feel the same as the one she received from defendant, her testimony merely created a conflict in the evidence for the jury to resolve. The inference that the bill was the same one tendered by defendant was a reasonable one, taking into account the care given to document the chain of custody, and the possibility that Tapia's recollection of the appearance of the bill was faulty considering the stress she was under from the incident.

## DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.