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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HOWARD LEE,

Defendant and Appellant.

B259895

(Los Angeles County
Super. Ct. No. GA089701)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Cathryn F. Brougham, Judge. Affirmed.

Marleigh A. Kopas, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Victoria B. Wilson and Andrew S. Pruitt, Deputy Attorneys General,
for Plaintiff and Respondent.

INTRODUCTION

After drinking one-third of a bottle of hard liquor, defendant Howard Lee ran a red light and crashed into another car. The other driver was seriously injured. Lee was charged and convicted of driving under the influence of alcohol and causing injury, and driving with a blood alcohol content of 0.08% or higher and causing injury. On appeal, Lee contends he received ineffective assistance of counsel. In particular, Lee argues that his trial counsel should have objected to the prosecutor's closing argument which addressed Lee's toxicologist's testimony, requested the court to admonish the jury not to consider that portion of the prosecutor's argument, and clarified the toxicologist's opinion during the defense's closing argument. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

1. The Car Crash and DUI Investigation

Around 11:00 p.m. on March 31, 2013, Lee was driving approximately 40 miles per hour on Mission Road in San Gabriel when he ran a red light and collided with a car making a left turn into the same intersection. Lee did not slow down as he approached the intersection, and his car left no skid marks on the road in front of the intersection. The driver of the other car suffered fractures in one of his legs, one of his hands, and his pelvis. Lee, who is diabetic, suffered an orbital fracture, a broken nose, swelling around one of his eyes, and a bruised hip. However, a C.T. scan performed several hours after the accident revealed that Lee had not suffered any internal head trauma.

When police officers contacted Lee at the scene of the accident, his eyes were bloodshot and watery and he had the odor of alcohol on his breath. Lee told the officers that he had consumed about one-third of a 750-milliliter bottle of Chinese liquor containing a high volume of alcohol earlier that night, and that he had his last drink around 9:30 p.m. One of the officers asked Lee to perform a series of field sobriety tests. When Lee got out of his car, he had trouble standing on his own, and he stumbled

¹ Lee also filed a petition for writ of habeas corpus raising the same claim of ineffective of counsel. We ordered that writ petition to be considered at the same time as this appeal. We have denied that writ petition in a separate order.

as he walked to the sidewalk where the tests were administered. Lee failed all of the tests.²

The officer then had Lee perform two preliminary alcohol screening breath tests. The first test recorded a blood alcohol content of 0.175% at 11:32 p.m., and the second test recorded a blood alcohol content of 0.187% at 11:34 p.m. After the breath tests were administered, paramedics examined Lee, but he refused any medical treatment. The officer then placed Lee under arrest for suspicion of driving under the influence of alcohol and transported him to the San Gabriel Police Station. At the station, Lee submitted to a second series of breath tests, which recorded a blood alcohol content of 0.21% about an hour and a half after the accident. Around 1:30 a.m. on April 1, 2014, Lee submitted a blood sample which showed that he had a blood alcohol content of 0.24%.

2. The Charges

Lee was charged with driving under the influence of alcohol and causing bodily injury (Veh. Code, § 23153, subd. (a); count one), and driving under the influence of alcohol with a blood alcohol content of 0.08% or higher and causing bodily injury (Veh. Code, § 23153, subd. (b); count two). As to both counts, the People alleged Lee personally caused great bodily injury to the driver of the other car (Pen. Code, § 12022.7, subd. (a)), and as to count two, the People alleged Lee operated a car with a blood alcohol content of 0.15% or higher (Veh. Code, § 23578).

3. The Trial

a. The Prosecution Evidence

Diane Jewell, a criminalist specializing in blood alcohol testing, testified for the People. After the prosecutor presented a hypothetical based on the facts of this case, Jewell extrapolated the results of Lee's breath tests taken at the police station back to the time of the accident and opined that a person with physical features similar to Lee

² Lee attempted to perform five different tests: the one-leg stand; the walk-and-turn; the horizontal gaze nystagmus; the finger-to-nose test; and the Romberg test.

would have had a blood alcohol content between 0.21% and 0.24%. Jewell performed the same analysis with the results of Lee's blood test and opined that a person with physical features similar to Lee would have had a blood alcohol content between 0.24% and 0.29% at the time of the accident. According to Jewell, a person with a blood alcohol content within those ranges would not have been able to safely drive a car.

b. The Defense Evidence

Dr. Marvin Pietruszka, a toxicology expert, testified for Lee. He opined that Lee suffered head trauma and a bruised hip in the accident, which could have affected his balance and ability to perform the field sobriety tests. When asked on cross-examination about the significance of Lee's negative C.T. scan performed shortly after the accident, Dr. Pietruszka testified that it is "not unusual for people to have head trauma and suffer balance problems in spite of a negative C.T. scan."

Dr. Pietruszka also opined that Lee's diabetes could have affected his balance and ability to perform the field sobriety tests. However, when asked how diabetes can affect a person's ability to drive a car, Dr. Pietruszka testified that diabetes would likely not affect the basic senses and skills needed to drive, such as vision and the ability to turn a steering wheel or press the gas and brake pedals.

Dr. Pietruszka testified that Lee could have had a blood alcohol content lower than 0.08% at the time of the accident even though the results of his breath and blood tests suggested that his blood alcohol content was much higher. According to Dr. Pietruszka, Lee may not have absorbed most of the alcohol he consumed by the time of the accident, and the impact of the collision could have caused Lee to regurgitate some of the unabsorbed alcohol. The regurgitated alcohol could have caused Lee to provide a breath sample with a higher alcohol content than the actual content of alcohol in his blood.

Dr. Pietruszka also testified that a person suffering from gastropathy, a condition that causes a person to digest food at a much slower rate than an average person, may not have absorbed any alcohol by the time of the accident. He noted that a person with diabetes may develop gastropathy if he fails to treat his diabetes for a substantial period

of time, such as seven to 10 years. Dr. Pietruszka could not offer an opinion, however, about whether Lee suffered from gastropathy because he was not familiar with Lee's medical history before the accident.

c. Closing Arguments

During her closing argument, the prosecutor argued that the evidence established Lee was under the influence of alcohol when he caused the collision. The prosecutor referenced portions of Dr. Pietruszka's testimony, arguing the testimony failed to establish that Lee was not intoxicated when he caused the collision. With respect to Dr. Pietruszka's testimony that Lee could have suffered head trauma that would have affected his balance during the field sobriety tests, the prosecutor argued: "You can see from his medical record that he had a scan done of his head. Even as the defense witness just testified to and acknowledged, yeah, he did have his C.T. scan done, everything checked out, his head, brain, nothing wrong with it at that time. [¶] Well, I guess he mentioned that perhaps something could have shown up later, weeks later; but that wasn't going on and we have no evidence of that. His injuries, again, are not a defense." Lee's counsel did not object to this portion of the prosecutor's argument.

During his closing argument, Lee's counsel argued that Lee was not intoxicated at the time of the accident. Lee's counsel briefly discussed the possible head trauma Lee may have suffered during the accident, but he did not discuss Dr. Pietruszka's testimony that a person may suffer head trauma even if the results of a C.T. scan reveal no such trauma. Lee's counsel also did not address the prosecutor's comments on that portion of Dr. Pietruszka's testimony.

4. The Jury Verdict and Sentencing

The jury convicted Lee as charged and found true all of the special allegations. The court sentenced Lee to aggregate terms of five years in state prison on both counts, but stayed imposition of the sentence on count one under Penal Code section 654.

DISCUSSION

The only issue Lee raises on appeal is that he received ineffective assistance of counsel. He contends his attorney should have: (1) objected to a portion of the

prosecutor's argument addressing Dr. Pietruszka's testimony; (2) requested the court to admonish the jury not to consider that portion of the prosecutor's argument; and (3) clarified Dr. Pietruszka's testimony during his own argument.

1. Standard of Review

To establish ineffective assistance of counsel, the defendant must demonstrate that (1) counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance was prejudicial--i.e., that it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been more favorable to the defendant. (*In re Crew* (2011) 52 Cal.4th 126, 150; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687.) “ “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ [Citation.] If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient.” (*In re Crew, supra*, 52 Cal.4th at p. 150.) A failure to object to argument or evidence rarely establishes ineffective assistance of counsel. (*People v. Centeno* (2014) 60 Cal.4th 659, 676 (*Centeno*).)

2. Lee's Counsel Was Not Ineffective

Lee contends the prosecutor misrepresented Dr. Pietruszka's testimony about whether he could have suffered head trauma at the time he attempted to perform the field sobriety tests despite the negative results of his C.T. scan. Specifically, Lee argues the prosecutor incorrectly stated that Dr. Pietruszka testified that Lee could have suffered head trauma weeks after the accident, rather than immediately after the accident. Lee contends that without any effort by his attorney to correct the prosecutor's misstatement, the jury likely disregarded all of Dr. Pietruszka's testimony and discredited Lee's defense theory. We reject Lee's claim of ineffective assistance of counsel because he has failed to demonstrate he was prejudiced by any of his counsel's allegedly deficient omissions.

Lee was not prejudiced by his counsel's failure to object to the prosecutor's argument because the prosecutor did not misstate Dr. Pietruszka's testimony or

otherwise err in commenting on that testimony. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119-120 [defendant's claim of ineffective assistance of counsel based on his attorney's failure to object to the prosecutor's argument lacks merit because the prosecutor did not engage in misconduct].) The prosecutor's statement that Dr. Pietruszka "mentioned that perhaps something could have shown up later, weeks later" in a subsequent C.T. scan of Lee's head was a reasonable inference drawn from Dr. Pietruszka's testimony and consistent with Lee's defense theory. During his cross-examination, Dr. Pietruszka testified that a person can suffer head trauma even if no trauma is detected during a C.T. scan. Although Dr. Pietruszka did not testify when, if ever, trauma may first be detected in a C.T. scan, it was reasonable to assume that such trauma could show up in a scan performed weeks after an accident, and here there was no such evidence.

In his reply brief, Lee contends the prosecutor misstated Dr. Pietruszka's testimony because she "emphatically argu[ed] to the jury that [Lee's] inability to complete the [field sobriety tests] were [*sic*] not due to injuries he sustained in the crash that night, because [Lee's] CT scan results were negative." But this is exactly the type of argument the prosecutor is expected and permitted to make. The prosecutor was not required to accept Dr. Pietruszka's theory that Lee was suffering head trauma that caused him to fail the field sobriety tests. In light of the other evidence that Lee was intoxicated at the time he caused the collision, the prosecutor was well within her discretion to argue to the jury that it should reject Lee's theory that head trauma, which the C.T. scan did not detect, caused him to fail the field sobriety tests.

Because the prosecutor did not misstate Dr. Pietruszka's testimony or otherwise engage in misconduct when commenting on that testimony, Lee also suffered no prejudice from his counsel's failure to request the court to admonish the jury to disregard the prosecutor's statement. Further, even assuming the prosecutor did misstate Dr. Pietruszka's testimony, any failure to object to the prosecutor's argument or request an admonition was harmless because the court properly instructed the jury

that the attorneys' arguments do not constitute evidence.³ (See *People v. Friend* (2009) 47 Cal.4th 1, 84 [defendant was not prejudiced by the prosecutor's alleged misstatement of the evidence because "the trial court instructed the jury that the arguments of counsel were not evidence"].)

Finally, Lee suffered no prejudice from his counsel's failure to address the prosecutor's statement and clarify Dr. Pietruszka's testimony during his closing argument. Here, there was overwhelming evidence that Lee was under the influence of alcohol when he caused the collision. Shortly after the collision, Lee told the police officers that he had consumed one-third of a 750-millileter bottle of hard liquor before he drove, and that he had his last drink a little more than one hour before the accident. In addition, Lee's car left no skid marks as it approached the intersection where the collision occurred, indicating that he was intoxicated and failed to react before he ran a red light and collided with another car. Immediately after the accident, Lee's eyes were watery and bloodshot, and his breath smelled like alcohol, additional indicators that he was under the influence of alcohol while he was driving. Finally, using the results of Lee's breath and blood tests, Jewell testified that, based on the facts of this case, a person of similar physical stature to Lee would have had a blood alcohol content between 0.21% and 0.29% at the time of the accident.⁴ Based on this evidence, there is no reasonable probability the jury would have reached a more favorable verdict but for counsel's omissions.

³ Before closing arguments, the trial court instructed the jury with CALCRIM No. 222, which provides in pertinent part: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence."

⁴ Although Dr. Pietruszka testified that diabetes can delay the absorption of alcohol, there was no evidence that Lee's diabetes affected his ability to absorb alcohol. Dr. Pietruszka testified that he knew nothing about Lee's diabetic condition before the accident and could not form an opinion as to whether Lee's condition would have affected his ability to absorb alcohol.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JONES, J.^{*}

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.