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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KHWAJA MOHAMMAD SIDIQI,

Defendant and Appellant.

D058721

(Super. Ct. No. SCN275106)

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge. Affirmed.

A jury found Khwaja Mohammad Sidiqi guilty of one count of carjacking in violation of Penal Code section 215, subdivision (a) (undesigned statutory references will be to the Penal Code) and found true allegations that he personally used a deadly and dangerous weapon, a knife, within the meaning of sections 12022, subdivision (b)(1), and 1192.7, subdivision (c)(23). The court sentenced Sidiqi to an aggregate prison term of six years, consisting of the middle term of five years for the carjacking conviction plus a consecutive one-year term for the true finding on the personal use of a knife allegation.

Sidiqi appeals, contending he was denied a fair trial and effective assistance of counsel by his trial counsel's (1) failure to "investigate and present evidence of [Sidiqi's] mental illness to defeat the specific intent element of carjacking"; (2) failure both to request that the jury be instructed with CALCRIM No. 225 regarding the use of circumstantial evidence to prove intent and to argue the absence of specific intent based on Sidiqi's "bizarre behavior"; and (3) failure to request that the jury be instructed that voluntary intoxication may negate the specific intent required for the crime of carjacking. We affirm the judgment.

## FACTUAL BACKGROUND

### *A. The People's Case*

Sidiqi, who was 24 years of age at the time of this offense, was born in Afghanistan and legally immigrated to the United States in 2000.

The victim, Jason Schilling, testified that at around 10:30 p.m. on April 5, 2010, he was working as a cab driver in the northern part of San Diego County when he responded to a dispatch call to pick up a fare at an address in the City of San Marcos. Schilling, who identified Sidiqi in court, indicated he had driven Sidiqi to that address about two months earlier.

According to Schilling, when he arrived Sidiqi was standing on the right side of the "real dark" street, waving him down like most customers do. Schilling pulled his cab up so that the rear passenger-side door was near Sidiqi and he could "just jump in."

Sidiqi was holding a beer bottle in his right hand. Sidiqi approached the right rear passenger door, paused, gave a look of "sarcasm," and then went around the rear of the

cab "with a small jogging giggle." Schilling watched as Sidiqi began to "slide up the back side" of the driver's side of the cab to the left rear door, where, giggling and looking uncomfortable, he "fumbl[ed] to get in" by trying to open the door with his right hand that was holding the beer bottle as he held his left hand hidden behind his back. When Sidiqi got the door open, he slid into the rear seat and "turned entirely around."

Schilling turned in his front seat to face Sidiqi, thinking that Sidiqi was "up to no good," and twice asked him what he had behind his back. Sidiqi said, "No-ting, see." Looking scared, Sidiqi shook his left hand while staring at Schilling's face, lifted up a red shirt, and a knife with a 10 to 12-inch blade slid out onto the street. At trial Schilling identified the knife in a photograph the prosecutor showed to him.

Schilling got out of the cab, stood outside the left rear passenger door in the dark, and asked Sidiqi, who was still in the back seat, what he was going to do with the knife. Sidiqi suddenly got out of the cab, picked up the knife with his left hand, and "raged" at Schilling, who was five feet away, with his left hand "up in an attack." As Schilling, who was afraid, quickly retreated, Sidiqi stopped and told him he had "better run" because he (Schilling) "[didn't] want to be a part of what was going on tonight." Schilling then saw the knife was cupped in the palm of Sidiqi's hand near his hip with the blade pointing behind him. Schilling raised his arms in the air and told Sidiqi, "[N]obody [is] getting stabbed tonight."

Sidiqi then giggled, turned to his right, ran "hunched over" back to the cab, the engine of which was still running, shut the back door, and got into the driver's seat. Schilling testified his backpack, paperwork, cell phone, and wallet were on the front seat.

As Schilling watched from less than 10 feet away, Sidiqi had trouble getting the cab in gear, but then sped away with the tires squealing as he turned at the end of the street. Schilling asked a woman looking out her window to call 911. He then approached two people who were changing a tire and called the police using a phone he borrowed from one of them.

On cross-examination, Sidiqi's counsel asked Schilling whether the person who took his cab seemed intoxicated. Schilling replied, "He seemed loose." When defense counsel asked what he meant by "loose," Schilling responded, "Couldn't open the door, and he didn't use his other hand, so he seemed inconsistent with his motion." Schilling indicated that his cell phone and wallet were recovered, and nothing was missing from his wallet, but he never recovered his backback.

San Diego County Sheriff's Deputy Jeffrey Cruz testified that he arrived at the scene in response to a call reporting a carjacking. After speaking with Schilling, Deputy Cruz and another deputy put out a broadcast that gave a description of the suspect and the stolen taxicab. About 30 to 40 minutes later, Deputy Cruz received information that the suspect and cab had been located in Escondido. He drove Schilling to that location and Schilling identified Sidiqi, who was in custody and handcuffed, as the man who took his cab at knifepoint. Deputy Cruz and another deputy searched the interior of the cab. A knife was located in the map pocket in the front passenger door. A beer bottle was also found inside the cab, as well as a blue T-shirt that Schilling said the person who took his cab had been wearing.

On cross-examination, Deputy Cruz indicated that when he spoke with Schilling at the crime scene, Schilling stated his backpack and some other belongings had been inside the cab and the person who got into his cab "looked Hispanic." Deputy Cruz testified he believed that after he and Schilling arrived at the location where the police had stopped Sidiqi and the cab, Schilling told him his backpack was missing. Defense counsel asked Deputy Cruz whether he saw Sidiqi "doing anything that you interpreted as trying to look or act Mexican." Deputy Cruz replied, "No, just acting like a normal person."

Escondido Police Officer Marvin Jabro testified that at around 11:00 p.m. on April 5, 2010, he received a radio call to be on the lookout for a yellow cab that had been stolen. While driving a marked police car, Officer Jabro noticed a yellow cab slowly moving forward toward him from the opposite direction. Officer Jabro stopped his patrol car next to the cab, about 15 feet away from the driver's side door, and noticed the driver matched the description he received in the broadcast. Officer Jabro identified Sidiqi in the courtroom as the person he saw driving the cab. As Officer Jabro got out of his patrol car, Sidiqi got out of Schilling's cab and stood in front of the driver's side door. Officer Jabro pointed his weapon at Sidiqi and told him not to move. When his partner arrived, they took Sidiqi into custody, handcuffed him, and put him in the back of one of the patrol cars. Officer Jabro testified he saw a knife in the map pocket in the passenger door.

#### *B. The Defense Case*

Sidiqi did not testify on his own behalf and presented no evidence.

## DISCUSSION

Sidiqi contends his conviction must be reversed because he was denied a fair trial and the effective assistance of counsel by a series of claimed failures of performance on the part of his trial counsel. We conclude Sidiqi's claims of ineffective assistance of counsel are unavailing.

### *A. Background*

On June 4, 2010, about three and a half months before trial began, the court<sup>1</sup> suspended the proceedings and ordered that Sidiqi undergo a psychiatric examination under section 1368 to determine whether he was mentally competent. In her July 11, 2010 report, examiner Valerie Rice, Ph.D., opined that Sidiqi was competent to stand trial, concluding that although Sidiqi had told her that he had a history of hearing voices and that he was no longer hearing voices because he was receiving antipsychotic medication in jail, he "presented with a relatively normal mental state" and he was able to tell her the roles of the various personnel of the court. Dr. Rice also noted that Sidiqi told her he drank alcohol "a lot" and had one conviction of driving under the influence and that he was arrested in this case on April 4, 2010, but he did not "recall the events" because he "kind of blacked out" and "woke up in [j]ail."

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<sup>1</sup> The Honorable Aaron H. Katz.

## B. *Applicable Legal Principles*

### 1. *Ineffective assistance of counsel*

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422, disapproved on another ground by *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) To show denial of the right to effective assistance of counsel, a defendant must show (1) his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland*, at pp. 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *Pope*, at p. 425.) To show prejudice, a defendant must show a reasonable probability that he would have received a more favorable result had his counsel's performance not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.)

### 2. *Specific intent element of carjacking*

When the definition of a crime refers to a defendant's intent to do some further act or achieve some additional consequence beyond the proscribed act, the crime is deemed to be one of specific intent. (*People v. Atkins* (2001) 25 Cal.4th 76, 82.)

Section 215, subdivision (a) defines the crime of carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and *with the intent to either permanently or*

*temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (Italics added.)*

The five elements of carjacking are set forth in Judicial Council of California Criminal Jury Instructions, CALCRIM No. 1650. That instruction, as given by the court, states: "The defendant is charged in Count One with carjacking. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took a motor vehicle that was not his own; [¶] 2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; [¶] 3. The vehicle was taken against that person's will; [¶] 4. The defendant used force or fear to take the vehicle or to prevent that person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the vehicle, *he intended to deprive the other person of possession of the vehicle either temporarily or permanently.*" (Italics added.)

Carjacking is a specific intent crime because in addition to the proscribed taking of the vehicle by force or fear, it requires that the defendant acted with the specific intent to "either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession." (§ 215, subd. (a); see also CALCRIM No. 1650.)

### *3. Admissibility of evidence of mental disease, defect, or disorder*

Evidence of mental disorder, mental disease, or mental defect is admissible in a criminal case only on the issue of whether a defendant had the requisite specific intent for an offense. (§ 28, subd. (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."]; *People v. Williams* (1997) 16 Cal.4th 635, 677 ["[W]hen our Legislature eliminated the defense of diminished capacity [citation], it precluded jury consideration of mental disease, defect, or disorder as evidence of a defendant's *capacity* to form a requisite criminal intent, but it did not preclude jury consideration of mental condition in deciding whether a defendant *actually* formed the requisite criminal intent."].)

## B. *Analysis*

### 1. *Claim that counsel prejudicially failed to investigate and present evidence of mental illness to defeat the specific intent element of carjacking:*

Sidiqi first claims his trial counsel prejudicially provided ineffective assistance by failing to "investigate and present evidence of [his] mental illness to defeat the specific intent element of carjacking."

Sidiqi asserts the testimony of the victim "describes conduct that strongly indicates [he (Sidiqi)] was not acting with any specific purpose and may not have had the ability to do so." Sidiqi relies on his own pretrial statements to Dr. Rice during her section 1368 psychiatric evaluation that he kind of blacked out and did not recall events until he woke up in jail. He also asserts "[h]is history, known to trial counsel, included the *possible* prior diagnoses of bi-polar or schizophrenia" (italics added); and "[i]t is inexplicable that counsel did not investigate and present this evidence—or even argue to the jurors that

[his] bizarre conduct was inconsistent with any specific purpose—as raising a doubt as to whether [he], at the time force or fear was used, had the requisite intent."

Sidiqi's claim is unavailing because the record does not demonstrate a failure by Sidiqi's counsel to investigate or what any such investigation would have revealed. The California Supreme Court has repeatedly held that if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, a defendant's claim of ineffective assistance on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; see *People v. Wilson* (1992) 3 Cal.4th 926, 936.) In such a case, the high court explained, the claim of ineffective assistance "is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello*, at pp. 266-267; see also *People v. Wilson*, at p. 936.)

Here, the fact that Sidiqi's counsel did not present a mental health expert to testify regarding Sidiqi's mental condition at the time of the carjacking does not establish that counsel failed to investigate the issue. Furthermore, the record shows Sidiqi's counsel was not asked whether he conducted such an investigation and, if he did, what the investigation revealed.

We note that Deputy Cruz testified at trial that when he and Schilling arrived at the scene on the night of the carjacking, Sidiqi was "just acting like a normal person." Also, Dr. Rice made no finding in her section 1368 pretrial report that Sidiqi suffered from mental illness at the time of the carjacking. She merely reported Sidiqi's self-serving statements that he kind of blacked out and could not recall events before he woke

up in jail. and that he had a history of hearing voices and had been receiving medication while in custody.

Given the lack of any evidence in the appellate record establishing a failure to investigate and what such an investigation might have revealed and the fact that a mental illness defense would have been inconsistent with his defense of misidentification (discussed, *post*), we conclude Sidiqi has failed to meet his burden of demonstrating either deficient performance by his trial counsel or prejudice. (See *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)

2. *Claim that counsel prejudicially failed to request that the jury be instructed with CALCRIM No. 225*

Sidiqi also claims his trial counsel prejudicially provided ineffective assistance by failing to request that the jury be instructed with CALCRIM No. 225,<sup>2</sup> which instructs on

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<sup>2</sup> CALCRIM No. 225 instructs: "The People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required. [¶] A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence. [¶] Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

how the jury should evaluate circumstantial evidence when the prosecution substantially relies on such evidence to establish specific intent; and by giving, instead, CALCRIM No. 224,<sup>3</sup> the more inclusive instruction on sufficiency of circumstantial evidence.

In support of this claim, Sidiqi asserts that every element of the crime of carjacking, other than the element of specific intent, was established by *direct* evidence. Citing *People v. Marshall* (1996) 13 Cal.4th 799 and other case authorities, he maintains it was incumbent on his counsel to request that the court instruct the jurors with CALCRIM No. 225, not CALCRIM No. 224, because "the only element that had to be proven by circumstantial evidence was that of specific intent to deprive Schilling of the cab, either temporarily or permanently." He also asserts CALCRIM No. 225 "would have been the platform upon which to build the obvious argument that [his] bizarre behavior, alone and without more, precluded a finding beyond a reasonable doubt that he possessed the requisite specific intent." This instruction, he asserts, "was necessary to focus the jurors' attention [on] the fact that if they found it to be a reasonable

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<sup>3</sup> The court gave CALCRIM No. 224, which instructed the jury: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

interpretation that [he] lacked the intent, he must be found not guilty. Similarly, it was incumbent on trial counsel to so argue."

Sidiqi's claim is unavailing. When the trial court gives the more inclusive instruction on sufficiency of circumstantial evidence, CALCRIM No. 224, there is no need to give the more specific instruction on sufficiency of circumstantial evidence, CALCRIM No. 225, "unless the only element of the offense that rests substantially or entirely upon circumstantial evidence is that of specific intent or mental state." (See *People v. Hughes* (2002) 27 Cal.4th 287, 347 [discussing the analogous circumstantial evidence instructions CALJIC Nos. 2.01 & 2.02]; see also *People v. Marshall, supra*, 13 Cal.4th at p. 849 ["Use of CALJIC No. 2.01, rather than 2.02, is proper unless the only element of the offense that rests substantially or entirely on circumstantial evidence is that of specific intent or mental state."].)

Here, the element of specific intent was not the only element of carjacking that rested substantially upon circumstantial evidence. As shown by his counsel's closing argument, Sidiqi relied on Schilling's testimony and that of Deputy Cruz as circumstantial evidence to present the defense of misidentification by arguing that "some Hispanic guy" stole his taxicab and his backpack. Specifically, counsel argued that Schilling "admit[ted] that the person that carjacked him seemed to him to be an 18-year-old Hispanic guy. He says now that the person even spoke to him with what he perceived to be a Hispanic accent." Counsel then alluded to Schilling's testimony that when he turned around in the driver's seat of his cab and asked the person sitting behind him what was behind his back, the person said, "No-ting, see." Counsel also alluded to Deputy Cruz's

testimony on cross-examination that when he spoke with Schilling at the crime scene, Schilling stated his backpack and some other belongings had been inside the cab and the person who got into his cab looked Hispanic.

We reject Sidiqi's claim that his counsel provided ineffective assistance by failing to request that the jury be instructed under CALCRIM No. 225. The court properly gave CALCRIM No. 224, the more inclusive instruction on sufficiency of circumstantial evidence, instead of CALCRIM No. 225 because Sidiqi's misidentification defense rested substantially on the testimony of Schilling and Deputy Cruz as circumstantial evidence that someone other than Sidiqi carjacked him and stole his backpack.

*3. Claim that counsel prejudicially failed to request that the jury be instructed that voluntary intoxication may negate specific intent*

Last, Sidiqi claims his trial counsel provided ineffective assistance by prejudicially failing to request that the jury be instructed that voluntary intoxication may negate the specific intent required for the crime of carjacking. This claim is unavailing.

*a. Applicable legal principles*

"It is well settled that '[a]n instruction on the significance of voluntary intoxication is a "pinpoint" instruction that the trial court is not required to give unless requested by the defendant.' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 295, quoting *People v. Rundle* (2008) 43 Cal.4th 76, 145, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120.)

A defendant is entitled to a voluntary intoxication instruction "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" (*People v. Williams, supra*,

16 Cal.4th at p. 677, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1119; see also § 22, subd. (b) ["Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought."].)

b. *Analysis*

Sidiqi claims it was incumbent on his trial counsel to request an instruction on voluntary intoxication<sup>4</sup> because substantial evidence supports the giving of such an instruction, and his counsel's failure to do so denied him a fair trial and the effective assistance of counsel because it prevented Sidiqi from presenting the defense that the prosecution failed to meet its burden of proving beyond a reasonable doubt that he acted with the requisite specific intent to permanently or temporarily deprive Schilling of possession of his cab. In support of this claim, Sidiqi asserts "the evidence is uncontroverted that [he] had a beer bottle in his hand; was giggling, fumbling, and behaving in a manner that suggested he was intoxicated; and was initially unable to get the cab into gear and drive it away after forcing Schilling out of it."

Assuming this scant evidence of Sidiqi's voluntary intoxication would qualify as "substantial," there was no evidence at all that such intoxication had any effect on his ability to formulate the requisite specific intent. (See *People v. Williams, supra*, 16 Cal.4th at p. 677.) The prosecution's evidence showed that Sidiqi armed himself with a

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<sup>4</sup> See CALCRIM No. 3426.

large concealed knife. He entered the cab through the driver's-side passenger door in order to seat himself directly behind Schilling, acted "sneaky," and spoke with an Hispanic accent when Schilling confronted him and asked what he had behind his back. He tried to surreptitiously drop the knife, and when Schilling finally exited his cab and came around to the left passenger door, Sidiqi grabbed the knife, lunged at Schilling to force him away from the cab, got into the driver's seat, and drove away. The trial record is devoid of any evidence that the assumed voluntary intoxication had any effect on Sidiqi's ability to formulate the requisite specific intent to permanently or temporarily deprive Schilling of possession of his cab.

In any event, even if counsel had requested an instruction on voluntary intoxication, "such an instruction would have been inconsistent with the defense of mistaken identity." (*People v. Verdugo, supra*, 50 Cal.4th at p. 295.)

#### DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.