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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY MICHAEL SLASKI,

Defendant and Appellant.

G046165

(Super. Ct. No. 09CF1910)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne M. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jeffrey Michael Slaski of battery with serious bodily injury (Pen. Code, § 243, subd. (d))¹ and aggravated assault (§ 254, subd. (a)(1)). The court sentenced him to seven years in prison for aggravated assault and an associated great bodily injury enhancement.² Defendant contends he received ineffective assistance of counsel because his attorney failed to introduce evidence the victim had drugs in his system. We disagree and affirm the judgment.

FACTS

On July 4, 2009, many teenagers attended Kelsey P.'s party at her mother's home. Defendant was Kelsey's mother's boyfriend at the time.

That night, Kelsey told people to leave because things were getting out of control. For example, in the cul de sac outside Kelsey's home, Scott G. was revving the engine of his car, "burning his tires," driving in reverse, and making noise.

In response to Kelsey's request, people headed to their cars. But in the middle of the street, a few cars pulled up alongside each other so the occupants could decide where to go. These cars blocked the street. One was driven by Owen H. Another was driven by Spencer L. with Matt L. in the front passenger seat.

Defendant aggressively told people to leave. He went up to Scott's window and told him to get out of the street. He moved to Spencer's car and argued with him. He went around to the passenger side of Spencer's car, lunged his upper body through the

¹ All statutory references are to the Penal Code.

² The court sentenced defendant to the two-year low term for aggravated assault and a consecutive five-year term for the great bodily injury enhancement. The court also sentenced him to three years in prison on the battery count, but stayed execution of sentence under section 654.

open window at Matt, and put his hand around Matt's throat. Two teenage girls tried to pull on defendant's shirt and get him away from the car.

Spencer and Owen got out of their cars to help Matt. Defendant moved away from Matt, walked "around like an angry drunk," and screamed at all of them. Spencer squared up with defendant, punched or pushed defendant, and ran away.

Defendant pushed Owen. Owen, a "skinny" 17-year-old, pushed defendant back and said, "Touch me and I'll sue." With his fist, defendant punched Owen in the lower jaw. Owen's arms went limp and he fell straight backward to the ground.

Spencer came back, pushed or punched defendant, and ran away again. Defendant chased him. Another teenager got out of a car and started walking toward defendant. Defendant approached him and told him to get back in the car or he would "knock [him] the fuck out." Defendant jogged back to the house.

A teenager phoned 9-1-1. Officers searched Kelsey's mother's house, but did not find defendant there. They soon found him, however, at a different home in the same city. An investigator spoke with defendant, who smelled strongly of alcohol. The investigator observed some boxing equipment at the residence, including a punching bag. Defendant admitted he had been boxing for years. He was 39 years old at the time, six foot one inch tall, and weighed 180 or 190 pounds.

Defendant gave the investigator his account of what happened at Kelsey's mother's house. He had taken out the trash, saw Kelsey trying to get people to leave, and asked her if she needed help. Kelsey said she did need help. Defendant walked up to a car and asked the driver to leave. The passenger acted smart with him and asked "how" they should leave. Defendant walked to the passenger side. The car's three occupants got out. The driver took a fighting stance, lunged at him, and punched defendant's jaw. Defendant turned around and saw another boy in a fighting stance. Defendant punched him and the boy fell to the ground.

Meanwhile, an ambulance had transported Owen to a hospital. There, he looked pale and sickly and vomited. He was taken into surgery, where a neurosurgeon performed a craniectomy to remove part of his skull and relieve the pressure on his brain. Owen was then placed in medically-induced hypothermia (an unconscious state) for seven days. After that, Owen had to relearn how to walk, talk, eat, and go to the bathroom. He was in the hospital for almost two months.

Defense Case

A teenage girl who had attended the party testified that when Kelsey asked people to leave, the guests were uncooperative. Defendant came out to help Kelsey. Some vehicles were lined up waiting to leave, but they were blocked by a few cars whose occupants refused to go. Defendant went to the first car and told the driver to leave. The occupants made remarks like, “Well, how do I leave?” Defendant said, “Put your foot on the gas and drive away.” Spencer and Matt got out of the car, circled around, and tried to hit defendant. Defendant tried to back away from the situation. Owen tried to hit defendant. Defendant hit Owen. Owen struck the ground and “started convulsing and foaming from the mouth.”

Kelsey testified that when she asked people to leave, they talked about finding another party and were disrespectful to her. Scott backed up his car very fast and almost hit Kelsey. Defendant went to Spencer’s car and politely asked the occupants to leave since the car was blocking the street, but they argued with him and refused to move. Defendant did not reach in and grab Matt, but rather was pushed from behind by Hailey H. and someone else. Spencer and Matt got out of the car and swung at defendant. Defendant backed away. Owen charged at defendant. Defendant hit Owen, who fell back and struck his head.

DISCUSSION

Defendant claims he received ineffective assistance of counsel because his lawyer failed to present evidence at trial that Owen had marijuana and Valium in his system upon his admission to the emergency room. In a pretrial motion in limine, the People sought to exclude evidence Owen tested positive for T.H.C. (cannabinoids/metabolite of marijuana) and benzodiazepines (Valium) at the hospital. Defense counsel sought a ruling the evidence was admissible. He argued the evidence was relevant to show Owen was the aggressor in attacking defendant because Owen's judgment was impaired by marijuana use. The court ruled the evidence was admissible, but cautioned that the presence of these particular drugs in Owen's system could potentially help the People's case on the issue of whether Owen was the physical aggressor. The court noted that both drugs are central nervous system depressants, which can impair judgment, but also "tend to take the teeth out of the lion [and] lay people out on the sofa while they contemplate the universe" In other words, the drugs could have a mellowing or sedating effect, causing a person to be less aggressive.

On appeal, defendant claims his counsel could have easily elicited the evidence of Owen's drug test results by cross-examining Owen's treating physician (the People's final witness). Defendant contends his counsel's failure to do so constituted ineffective assistance. He argues "a reasonable interpretation of the evidence" is that he was surrounded by many teens (some taking physically combative stances) and punched Owen out of fear that Owen was about to assault him. He asserts the evidence of drugs in Owen's system was critical to explain why Owen joined the fray and attacked defendant.

To prove an ineffective assistance claim, a defendant must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). A court need not "address both components of the inquiry if the defendant makes an insufficient

showing on one.” (*Id.* at p. 697.)

As to the first prong, i.e., the adequacy of an attorney’s performance, a court asks whether counsel’s assistance was reasonable “under prevailing professional norms” (*Strickland, supra*, 466 U.S. at p. 688) and in light of all circumstances existing at “the time of counsel’s conduct” (*id.* at p. 690). Because defense counsel face a “variety of circumstances” and an array of “legitimate decisions” (*id.* at p. 689), a court must “accord great deference to counsel’s tactical decisions” (*People v. Lewis* (2001) 25 Cal.4th 610, 674) and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” (*Strickland*, at p. 689). Furthermore, “[i]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’” (*People v. Kipp* (1998) 18 Cal.4th at p. 367.)

Defendant concedes that the absence of a nontactical reason for his counsel’s action is fatal to an ineffective assistance claim. But he suggests a nontactical explanation for his attorney’s lapse is that his counsel simply forgot to elicit the evidence from Owen’s physician. He stresses that his counsel fought for and obtained a favorable pretrial ruling on the admissibility of the evidence. He concludes his attorney clearly believed the evidence would be helpful to the defense.

But it is just as likely that defense counsel simply wanted *the option* to introduce the evidence. Even if defendant is correct that his counsel firmly believed (prior to trial) that the evidence would help the defense case, his attorney may have subsequently changed his mind. At the time of the pretrial hearing, it was unclear: (1) whether the T.H.C. was an inactive metabolite that had been in Owen’s system for a long time; and/or (2) whether the benzodiazepines were administered to Owen as a medical treatment at the hospital. Furthermore, as the court warned, a risk existed that the depressive effects of both drugs might undercut defendant’s self-defense theory more

than it bolstered it. Thus, tactical reasons can be posited for defense counsel's declining to introduce the evidence. The record contains no explanation for counsel's behavior nor was he asked for one. Consequently, we reject defendant's ineffective assistance claim.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.