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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.

DINESH VALIJEEBHAI SHAH,

Defendant and Appellant.

G050945

(Super. Ct. No. 11ZF0120)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Dinesh Valijeebhai Shah of filing a false tax return in 2006, and filing a false return with the intent to evade taxes in 2007 and 2008. The court sentenced him to a term of two years, to be served concurrently with a seven-year term imposed in another criminal case.

Shah challenges the jury instructions and asserts his attorney provided ineffective assistance of counsel. He also claims judicial and prosecutorial misconduct, and disputes the sufficiency of the evidence. We find no error and affirm the judgment.

## **FACTS**

### *1. Prosecution*

In August 2008, Prapapan Higa, a special agent with the Franchise Tax Board (FTB), and investigators from the Orange County District Attorney's Office, executed a warrant for the offices of Anthony J. Azavedo, a certified public accountant and Shah's tax preparer, in connection with suspected loan fraud.

Higa reviewed records from the district attorney's office, and he worked with FTB forensic auditor, Jennifer Sun, to examine bank accounts, financial records, and deposited checks associated with Shah, his wife, and their many companies.

#### *a. Associated Investment Group, Inc. (AIGI)*

One of Shah's companies, AIGI, received special attention. Sun testified that in 2006 Shah deposited about \$166,000 in the AIGI account, and AIGI paid him \$60,000. In 2007, Shah deposited about \$1.7 million in the AIGI account, and AIGI paid him \$144,000. In 2008, Shah deposited about \$1 million, and he received \$60,000.

Shah asserted the transactions were loan repayments. According to Sun, payments between principals and their close corporations can constitute income (taxable), or repayment of a loan (nontaxable). But when she looked for certain loan indicia (e.g. promissory notes, interest payments, maturity dates, and adequate collateral), she found no evidence of loans between Shah and AIGI. Without such evidence, Sun classified AIGI's payments to Shah as income, not repayment of loans.

*b. Refinancing loans*

In 2006, Shah obtained a \$3,737,500 a loan from Washington Mutual Bank to refinance his residence. He used a false Social Security number ending in 2306 to obtain the refinancing. After deducting money for fees, and paying off an existing loan, Shah received \$818,339. Then Shah used his true Social Security number ending in 3253 to file his 2006 tax return, but he did not list the \$818,339 as income.

In 2007, Shah, again, refinanced his residence with Washington Mutual, using the 2306 Social Security number. Washington Mutual paid Shah \$4,320,000, from which he netted \$410,604. Once more he used the 3253 Social Security number to file his 2007 tax return, but he did not list \$410,604 from the refinance as income.

*c. Capital Gains*

In 2007 and 2008, Shah claimed capital gains and losses from the sale of real estate. For instance, in 2007, he claimed capital gains of \$900,808 from the sale of five parcels, but he only owned one. His mother-in-law owned the other four. When Shah filed his 2007 tax return, he applied the \$900,808 capital gains against a reported capital loss carryover of \$1,664,977 from 2006.

Similarly, in 2008, Shah listed capital gains in the amount of \$1,080,939 from the sale of 10 parcels, even though he owned only three. Shah then applied the capital gains of \$1,080,939 against a capital loss carryover of \$1,064,977 from 2007. And, in 2008, Shah claimed a capital loss of \$1,044,657.

Sun explained Shah had created a tax shelter of sorts for himself, his wife, his mother-in-law, and his accountant, among others, by claiming capital gains and losses on properties he did not own. Furthermore, many of the documents underlying these transactions were notarized by Vaaruni Barbosa, Shah's stepdaughter. In Sun's opinion, Barbosa did not always notarize documents in the presence of the signers.

*d. Sun's Opinion*

Sun used a hybrid of the bank deposits and specific items methods to calculate Shah's total income for tax years 2006, 2007, and 2008.

According to Sun, Shah had approximately \$1.6 million in gross taxable deposits and an adjusted gross income of \$1,486,457 in 2006; \$2 million gross taxable deposits and an adjusted gross income of \$766,550 in 2007, and \$2 million in gross taxable deposits and an adjusted gross income of \$747,753 in 2008.

By contrast, Shah reported an adjusted gross income of \$455,554 in 2006, a \$98,962 loss in 2007, and a \$133,625 loss in 2008. Thus, according to Sun, Shah owed state income taxes of \$130,657 for 2006, \$53,951 for 2007, and \$51,652 for 2008, less any amount he had already paid. She also said excluding the Washington Mutual transactions from the total reduced Shah's tax liability by only \$25,000.

*2. Defense*

Shah called Aness Mufti, a long-time friend and certified public accountant, to testify as his expert. Mufti said Shah's tax returns were not only proper, but Shah actually reported more income than necessary. Mufti testified the payments between AIGI and Shah were loan repayments. He said it was common for close corporations to loan money back and forth with their principals on an informal basis.

Mufti also said Shah properly claimed capital gains and losses on properties he did not own because partnerships can have informal distributions of money from the sale of properties owned by the partnership. He called this "constructive" ownership. Because Shah consistently used the same method to report both capital gains and losses, Mufti said there was no intent to hide the gains, or misreport losses. In Mufti's opinion, ownership of the various properties was inconsequential to Shah's tax liability.

As for the Washington Mutual refinancing loans on Shah's residence, Mufti said those should be nontaxable for two reasons: (1) one of the loans was secured by valid collateral; and, (2) the other loan was later repaid.

Mufti could not explain Shah's use of a false Social Security number to obtain the Washington Mutual loans. Furthermore, Mufti did not prepare Shah's tax returns, and he did not know what documentation Shah provided to Azavedo.

### *3. Rebuttal*

Sun disagreed with Mufti's assessment of the transactions between AIGI and Shah. She also disagreed with his categorization of the Washington Mutual refinance loans. Furthermore, Sun pointed out Shah had used one Washington Mutual refinance loan to repay the other. She also emphasized that factoring out the Washington Mutual refinance loans was not enough to wipe out Shah's tax liability.

## **DISCUSSION**

Shah was convicted of violating Revenue and Taxation Code sections 19705, subdivision (a)(1), and 19706. Both statutes prohibit willfully making or filing a false tax return, but section 19705 subdivision (a)(1) requires verification under penalty of perjury, while section 19706 requires proof of the intent to evade taxes. (*People v. Hagen* (1998) 19 Cal.4th 652, 659.)

### *1. Instructions*

Shah did not challenge the court's instructions at trial, nor does he contest the correctness of any particular instruction given. Rather, Shah asserts the court's failure to give certain pinpoint instructions violated his constitutional rights under the fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15 of the California Constitution. We are not persuaded.<sup>1</sup>

An appellate court reviews de novo a claim the trial court failed to give a required instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed

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<sup>1</sup> We address the merits of Shah's arguments because the issues involve his substantial rights, and he alternatively claims ineffective assistance of counsel for the purported instructional errors. (Pen. Code, § 1259)

question of law and fact that, we believe, is however predominantly legal.” (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) The court must instruct on the general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case (*People v. Martinez* (2010) 47 Cal.4th 911, 953), including instructions on any affirmative defense (*People v. Salas* (2006) 37 Cal.4th 967, 982).

In this case, the court instructed the jury Revenue and Taxation Code section 19705, subdivision (a)(1) required the People to prove beyond a reasonable doubt Shah, (1) “made and signed a tax return provided to the Franchise Tax Board,” (2) the tax return “contained or was verified by” a written declaration made under penalty of perjury, (3) the return contained a false or inaccurate material statement, (4) “when the defendant made and signed the tax return, he did not believe that the document was true and correct about every material matter,” and (5) whether Shah acted voluntarily and with the intent to violate a “legal duty known to him.” (CALCRIM No. 2811.)

With respect to Revenue and Taxation Code section 19706, the instruction given stated the People must prove beyond a reasonable doubt, (1) Shah “made, verified, signed or rendered a tax return provided to the Franchise Tax Board,” (2) the tax return was “false or fraudulent,” (3) Shah knew the tax return “contained false or fraudulent information” when he “verified, signed, or rendered” it, (4) Shah voluntarily acted with the intent to violate a legal duty, and (5) Shah signed, rendered, or verified a false tax return “with the intent to evade . . . tax[es].” (CALCRIM No. 2812.)

Because the People relied on the bank deposits method to prove Shah had unreported taxable income, the court explained: “If the People prove that: (a) the defendant engaged in an activity that produced taxable income, (b) the defendant periodically deposited money in bank accounts in his name or under his control, and (c) the money deposited did not come from nontaxable sources, then you may but are not required to conclude that these bank deposits are taxable income. Nontaxable sources of the bank deposits include gifts, inheritances, loans, or redeposits or transfers of funds

between accounts. If you have a reasonable doubt about whether the People have proved (a), (b), or (c) you must find that the People have not proved under the bank deposits method that the defendant had unreported taxable income.” (CALCRIM No. 2843.)

The court also gave six special instructions. One instruction defined the terms “Gross Income,” “Adjusted Gross Income,” “Individual,” “Person,” and “Resident.” Another defined a loan as “a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to what he borrowed.” (See Civ. Code, § 1912.) A third instruction mentioned the requirement every individual subject to California personal income tax file a return if they have specified levels of adjusted gross income. And, a fourth explained that California treats limited liability companies like partnerships for tax purposes, and the individuals involved in limited liability companies are liable for income tax “in their separate or individual capacities.”

Ordinarily, we presume the jury understands and follows instructions from the trial court (*People v. Fauber* (1992) 2 Cal.4th 792, 823), and in our view, the court’s instructions were complete, correct statements of the law, and responsive to the facts. (*People v. Delacerda* (2015) 236 Cal.App.4th 282, 288.) Nevertheless, Shah generally asserts the instructions were inadequate with respect to the AIGI payments, the proceeds from the Washington Mutual refinance loans, and his reported capital gains and losses.

First, with respect to the AIGI payments, Shah repeatedly asserts the court’s failure to give to definition of income in terms of “accessions to wealth” deprived him of due process. But, the court defined the terms “Gross Income” and “Adjusted Gross Income,” which were the definitions of income relevant to the charged offenses. (See Rev. & Tax. Code, §§ 17071, 17072.)

Moreover, the instructions correctly focused on whether the payments by AIGI to Shah were legitimate loan payments. A loan was defined as “a contract by which one delivers a sum of money to another and the latter agrees to return at a future

time a sum equivalent to what he borrowed.” This definition comes from Civil Code section 1912, and it has been found to be correct and complete. (See *Southwest Concrete Products v. Gosh Construction Corp.* (1990) 51 Cal.3d 701, 705.) Mufti disagreed and Shah continues to disagree, but, again, the jury had adequate instructions to properly determine the nature of Shah’s financial relationship with AIGI. (See *United States v. Pomponio* (1977) 563 F.2d 659, 663 [claimed loan repayment rejected because no date was fixed for repayment, and no notes were executed as evidence of indebtedness; neither was any security given, nor was interest charged or paid with respect to the advances].)

Shah also relies on a number of cases to argue the AIGI payments to him were loan repayments. (*Morrison v. Commissioner of Internal Revenue* (2005) 89 T.C.M. 53, (U.S. Tax Court); *Commissioner of Internal Revenue v. Valley Morris Plan* (9th Cir. 1962) 305 F.2d 610, 618; *Newman E. McGee*, T.C.M. 1991-599; *Alterman Foods, Inc. v. United States* (5th Cir. 1974) 505 F.2d 873, 875-876; *Paul A. Schaefer v. Commissioner of Internal Revenue* (1994) 68 T.C.M (CCH) 655.) However, in each of these cases, the taxpayers provided tangible evidence of legitimate loans. Shah presented no evidence he loaned money to AIGI, and no evidence the payments AIGI made to him were loan repayments. According to Sun, those payments were taxable income.

With respect to the Washington Mutual refinance loan proceeds, Shah used a false Social Security number, which is a material misrepresentation (see *United States v. Phillips* (1979) 606 F.2d 884, 886), to obtain these loans, and Sun testified refinancing proceeds obtained on the basis of false information are considered taxable income. Furthermore, proof Shah used a false Social Security number supports an inference he sought to avoid state income taxes by not listing the Washington Mutual refinance loans on his tax returns.

Shah also argues the court should have instructed the jury on partnership allocation rules under the Internal Revenue Code because Mufti testified sometimes partnership rules affect the allocation of capital gains and losses. But there was no

evidence Shah had *any* ownership interest in most of the properties he used to claim capital gains and losses. Thus, no evidence supported giving partnership allocation instructions.

Shah also asserts the court was required to give an instruction on the elements of fraud. But, as the court instructed, “The People do not have to prove that the unreported or under reported income came from illegal activity.” The prosecution had to prove knowing, intentional falsity on Shah’s part, not acts constituting criminal fraud.

Shah also contends the court had a sua sponte duty to instruct the jury regarding a good faith defense. But the court’s duty to give sua sponte instruction on an affirmative defense arises only where substantial evidence supports the defense. (*People v. Petronella* (2013) 218 Cal.App.4th 945, 962, citing *People v. Anderson* (2011) 51 Cal.4th 989, 996-997.) “Evidence is ‘substantial’ only if a reasonable jury could find it persuasive.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

Here, the record reveals nothing more than Mufti’s explanations of how Shah *could have* acted in good faith when he failed to report payments from AIGI and proceeds from the Washington Mutual refinance loans as income, and when he claimed capital gains and losses on properties in which he held no legal interest, in an effort to further reduce his tax burden. Mufti’s testimony was pure speculation, not evidence. And, not even Mufti had a reasonable explanation for Shah’s use of a false Social Security number. In short, Shah’s asserted instructional errors do not exist.

## *2. Ineffective Assistance of Counsel*

Because we have rejected Shah’s challenge to the adequacy of the court’s jury instructions, we also conclude Shah failed to demonstrate deficient performance by his attorney for the failure to request pinpoint instructions. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-695; *People v. Osband* (1996) 13 Cal.4th 622, 700.) At least, nothing cited in his brief, nor asserted at oral argument, overcomes the presumption his

attorney “rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.” (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

### 3. *Prosecutorial Misconduct*

Shah maintains the prosecutor misstated the law on multiple occasions. He waived these claims because he did not object to the challenged remarks below. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*)). Even so, we have reviewed the prosecutor’s remarks and find no misconduct.

In order to prevail on a claim of prosecutorial misconduct, the defendant must establish the prosecutor’s “improper comments . . . “so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process.”” (*Cunningham, supra*, 25 Cal.4th at p. 1000.) If the prosecutor’s conduct does not render a trial fundamentally unfair, a court should affirm the judgment unless the conduct ““involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*Ibid.*)

Shah first asserts the prosecutor committed misconduct by arguing the jury should use their common sense during deliberations. But, in our view, the prosecutor’s invitation to the jury to use “common sense” was not improper, deceptive, or reprehensible. In fact, the court gave CALCRIM No. 226, which admonished the jury to judge the credibility of witnesses using their “common sense and experience.”

In addition, while Shah argued he did not use false information to obtain the Washington Mutual refinancing loans, the prosecutor was free to vigorously argue otherwise. In our view, the prosecutor’s emphasis on Shah’s use of a false Social Security number to obtain those loans was proper. (*People v. Tully* (2012) 54 Cal.4th 952, 1021[“A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as the arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury”].)

Moreover, the court instructed the jury to follow the law as given, not the arguments of counsel. (CALCRIM No. 222; see *People v. Barajas* (1983) 145 Cal.App.3d 804, 809.) And we presume jurors generally understand and follow the instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) Nothing Shah cites to in the record rebuts this presumption.

#### 4. *Judicial Misconduct*

Shah contends the court committed judicial misconduct by exhibiting bias during the trial. We reviewed the record and found nothing to overcome the presumption of judicial honesty and integrity. (See *Withrow v. Larkin* (1975) 421 U.S. 35, 47.)

#### 5. *Sufficiency of the Evidence*

Finally, Shah challenges the sufficiency of the evidence. When addressing such claims, the reviewing court evaluates the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) We accept any logical inferences the jury could have drawn from the circumstantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.) Moreover, “If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury’s findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.)

Shah’s arguments ignore the role of circumstantial evidence. He repeatedly asserts he did not have an “accession to wealth” with respect to the Washington Mutual refinance loans, therefore, the prosecution failed to prove he derived income from the transaction. But the prosecution proved Shah used a false Social Security number to obtain the Washington Mutual refinance loans in 2006 and 2007, and he did not report the refinance proceeds on the returns filed using his true Social Security number.

According to Sun, this type of activity is taxable, and Shah failed to submit any evidence to the contrary. Thus, substantial evidence supports the jury's classification of the Washington Mutual refinance loan proceeds as unreported income.

Likewise, there was evidence AIGI paid Shah \$60,000 in 2006, \$144,000 in 2007, and \$60,000 in 2008. Shah argued the payments were loan repayments, and therefore nontaxable, but he produced no evidence to support this claim. Consequently, the record shows Shah failed to report income on his tax returns in 2006 and 2007.

And, finally, there was no evidence Shah had any interest in the majority of the real estate transactions. When he claimed these capital gains and losses on his personal tax returns in 2007 and 2008, he reduced his adjusted gross income and avoided additional income tax, something Sun described as personal tax shelter.

Based on the record, we agree with the jury's determination circumstantial evidence proved Shah knowingly, willingly, and voluntarily filed a false tax return under penalty of perjury in 2006, and he underreported his income in 2007 and 2008 with the intent to evade state income taxes. Thus, substantial evidence supports the convictions.

### **DISPOSITION**

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.