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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re ROBERTO APONTE,

on Habeas Corpus.

H037509
(Monterey County
Super. Ct. No. SS082273)

I. STATEMENT OF THE CASE

After a court trial, the court convicted defendant Roberto Aponte of inflicting corporal injury on his spouse and further found that he personally inflicted great bodily injury and had a prior serious felony conviction. (Pen. Code, §§ 273.5, subd. (a), 12022.7, subd. (e), 1170.12, subd. (c)(1), 459.)¹ Under the parties' negotiated agreement, the court sentenced him to four years in prison. It gave him 623 days of presentence custody credit and limited his presentence conduct credit to 15 percent of custody credit, giving him 93 days, for total presentence credit of 716 days. Defendant appealed from the judgment, claiming that counsel rendered ineffective assistance and that the court erred in applying the 15 percent credit limitation (H035701). Defendant reiterated his

¹ Apparently, in a separate case, defendant was charged with knowingly violating a protective order. (Pen. Code, § 166, subd. (c)(1).) The two cases were consolidated, and after trial, the court acquitted defendant of that charge.

All unspecified statutory references are to the Penal Code.

claim for additional credit in a post-judgment motion for additional credit, which the court denied. Defendant also appealed from the denial of that motion (H036822).²

In this petition for a writ of habeas corpus, defendant reiterates the claim of ineffective assistance raised on appeal from the judgment and adds several more claims. In particular, defendant complains that counsel (1) failed to consult a medical expert concerning the combined effect of drugs and alcohol on memory; (2) failed to inform the court that the victim had given false testimony; (3) failed to present the documentation of the victim's medical history in a coherent way; (4) lost the chance to use the victim's medical records to impeach her; (5) failed to ask the prosecution's medical expert factually appropriate questions; and (6) failed to request a limiting instruction concerning the use of hearsay.

We requested an informal response from the Attorney General. (Cal. Rules of Court, rule 8.385(b) &(c); see *People v. Romero* (1994) 8 Cal.4th 728, 741-742.)

We conclude that defendant fails to make a prima facie showing sufficient to warrant habeas relief due to ineffective assistance and deny the petition.

II. BACKGROUND

The Prosecution

Defendant and his wife Jane Doe went to a barbeque on August 31, 2008, and stayed from about 1:00 p.m. to 7:30 or 8:00 p.m. Defendant and Doe were drinkers, sometimes to excess, and both had numerous drinks at the barbeque.³ At the party, Doe

² In a separate opinion in H035701, we affirm the judgment on appeal; in a separate order, we dismiss the appeal in H036822 as moot.

³ Doe testified that she had around 10 to 12 drinks, including four or five alcoholic "jelly shots." However, she said she was not stumbling around or slurring her speech. She also said she was not intoxicated when they left because she stopped drinking an hour or two before leaving.

During this period in her life, Doe was taking several prescription medications. She testified that she did not take her medication when she drank and did not do so the day of the barbeque.

observed defendant flirting with someone. Defendant got angry when a man named Ricky brought Doe a drink. Defendant seemed jealous and exchanged words with Ricky, warning him to stay away from Doe.

Doe testified that when the party ended, defendant drove them home. They stopped on the way at Burger King for some food. At home, Doe lay down on the bed to watch TV. Defendant accused her of flirting at the party and tried to provoke an argument. Doe was not interested in fighting, curled up, and continued to watch TV. Defendant pressed his accusation. Doe told him to “shut up.” She did not want to talk about it and said they could discuss it in the morning. Defendant persisted, and Doe just kept watching TV and dozing a little. Suddenly, without warning, defendant smacked her in the ear with what felt like a closed fist and knocked her to the floor. She grabbed her ear in pain and started screaming. Doe told defendant to get her car. She then took some of her things and left for her parents’ house.

Two days later, Doe complained to the police and filed a formal report seeking defendant’s arrest. The officer did not see any exterior bruising but suggested she go to the hospital to have her ear checked. While Doe was at the police station, defendant called and left her a voice message apologizing, admitting that he was “wrong” and had “stepped out of our boundaries,” and wanting her to know how much he loved her. Doe testified that defendant’s message echoed the kinds of comments he had made after prior incidents of violence against her.

After defendant was arrested, his brother Domingo called Doe and asked her to drop the charges. Doe also received a card and love letters. The return address on an envelope listed the name “Joseph Santos.” However, the letters were not signed by “Joseph Santos.” Rather, on one side of the card were three small hearts that sequentially read “I” “Love” and “you” and were followed by a fourth larger heart that read, “Bobby,” the name she used in referring to defendant at trial. The card was signed “Tu Papi.” One letter was signed “Hubby” and told her to use her maiden name if she wrote him back.

Doe identified defendant's handwriting on the letters. The card and letters were sent from the Monterey County Jail, where defendant was being held.

The handwritten love letters professed defendant's undying devotion to her and their marriage. He talked about being husband and wife and making their marriage stronger; he acknowledged that he was not the easiest person to get along with; he admitted that he had been wrong; he said he was sorry and promised this would never happen ever again; he begged her to forgive him; and he sought reconciliation. He said that only she could pardon him. In addition, he told her that he had accepted God and Christ into his life, was clean and sober, promised to quit drinking and go to AA, and was willing to attend marriage counseling. He pointed out that he could go to prison for eight years but advised her about a "new law" that "if the person doesn't come to court it will be thrown out of court," and therefore "if you don't come I can be set free, but I still have too [*sic*] do my 6 months for the violations of parole. I'm asking you please think of My Kids and you and me! I was wrong and I don't want to loose [*sic*] you" ⁴

A few days after being attacked, Doe went to the hospital because she was experiencing more pain and some hearing loss. She had not had any problems with her ear before defendant hit her. The treating physician said she had a hole in her ear. She was referred to Doctor Mark Vetter, M.D., a specialist. Doe said that she had been struck on the ear and had some hearing loss. Doctor Vetter found two perforations in her eardrum. He could not tell whether the perforations were caused by trauma or infection. However, he saw no signs of infection. He had Doe wait three months to see if her eardrum would heal naturally. It did not, and he surgically repaired it and restored her hearing.

Doctor Vetter testified that it was possible for an old perforation that had healed to spontaneously reappear. He also testified that one could perforate an eardrum twice with

⁴ Defendant denied writing the letters.

a Q-tip. However, he considered such a scenario unlikely because of the pain the first perforation would cause. The more likely cause of multiple perforations would be an abrupt and traumatic change in pressure inside the ear due to, for example, being slapped on the ear with an open hand, although it could also happen with a closed fist.⁵

The Defense

Defendant testified that he saw Doe take medication on the day of the barbeque. He also said she drank heavily during the party and was still intoxicated when they got home. She seemed angry at him. They argued, and at one point, she came at him. He instinctively raised his hands in self-defense but then backed up, turned around, and left the room. He did not touch her. Defendant admitted that when he explained what happened to the police, he gave two stories, and in one, he falsely said that Doe had actually hit him on the head.

Defendant testified that during their relationship, Doe often complained about pain in her ear, and when she was drunk, she would dig in her ear with a Q-tip.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Applicable Principles

To obtain reversal due to ineffective assistance, a defendant must first show “that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney[.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*); *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). Second, the defendant must show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*Cunningham, supra*, 25 Cal.4th at p. 1003.) “A reasonable probability is a probability

⁵ Doe’s medical records revealed that in 1992, there was some old scarring in her ear.

sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

B. Failure to Consult with a Medical Expert

Defendant asserts that despite being aware that the combination of alcohol and prescription drugs Doe consumed may have impaired her memory, defense counsel failed to consult a medical expert to help develop a defense based on impaired memory.

Defendant claims that counsel’s omission reflects ineffective assistance because the defense could have undermined Doe’s testimony about what happened that night.

Defendant further claims that counsel had no legitimate reason not to consult an expert, and counsel’s explanation for not doing so does not reflect a sound tactical analysis.

In support of his claim, defendant submits the declaration of Doctor Samuel I. Miles, an expert in psychiatry, addiction psychiatry, and forensic psychiatry. Given the evidence concerning the amount of alcohol Doe consumed at the barbeque, the types of medication she had been prescribed, and her size and weight, Doctor Miles opines that Doe was intoxicated that evening. He then explains that alcohol intoxication can impair attention and the ability to remember, and those symptoms can be enhanced by the types of medication Doe was taking and that might have been in her system. He further opines that given the alcohol and possible medications that Doe consumed, “her ability to accurately perceive events and to recall them later was impaired.”

In support of his opinion, Doctor Miles referred to a paper by Aaron M. White, Ph.D., entitled “What Happened? Alcohol, Memory Blackouts, and the Brain” in which he discusses at length the specific features of acute alcohol-induced memory dysfunction, alcohol-induced blackouts, and the pharmacological mechanisms underlying them. The article details the physiology and chemistry behind how the brain stores and retrieves

memories and explains how alcohol disrupts the process and excessive consumption can cause partial and complete blackouts and amnesia.⁶

Defense counsel refused to sign a proposed declaration admitting that he had no tactical reason for failing to consult an expert. Rather, he explained that the issue at trial was how Doe sustained the injuries to her ear—i.e., whether defendant hit her. Counsel noted that defendant changed his story to the police and never told them that Doe might have accidentally injured herself trying to clean her ear with a Q-tip. Counsel further opined that defendant admitted his guilt in the letters he wrote. Finally, counsel noted that the court was aware of Doe’s alcohol consumption and was able to view both defendant and Doe to determine their credibility. Under the circumstances, counsel considered an expert unnecessary.

In general, defense counsel has the obligation to investigate possible defenses or make reasonable tactical decisions that render such investigation unnecessary. (*Strickland, supra*, 466 U.S. at pp. 690-691; *In re Hill* (2011) 198 Cal.App.4th 1008, 1016-1017.)

The impaired-memory defense now envisioned by defendant would have been based on Doe’s consumption of both alcohol and prescription medication. However, the evidence that Doe consumed medication that day was circumstantial and murky at best. Doe denied taking medication that day and said she does not usually mix alcohol and medication.⁷ Defendant, on the other hand, reported that Doe had mixed alcohol and her medications on previous occasions; and on that day he saw her take some unspecified pills from what looked like a medicine vial. However, he admitted that he did not look at the vial, know what it contained, or know for a fact that Doe had taken any medication. There was also no medical evidence that Doe had traces of medication in her system that

⁶ Defendant also submits the paper in support of his petition.

⁷ She also said that she did not do so.

day. Doctor Miles said only that some of Doe's medications can remain in the body for more than a day and thus could have exacerbated alcohol-induced memory loss.

In any event, there was strong evidence that Doe was under the influence of alcohol at the barbeque. Doe admitted having 10 to 12 drinks including a number of alcoholic shots. That said, however, we observe that the proposed impaired-memory defense would, ironically, have been based on Doe's unimpaired memory of how much she drank.⁸ Moreover, Doe recounted a number of things that happened after they left the barbeque, things far less memorable than being punched in the head, and defendant corroborated her. For example, both testified that defendant drove the car home; on the way, they stopped at Burger King for some food; at home, there was friction between them, if not argument; and later, Doe told defendant to go get her car. The accuracy and reliability of Doe's memory of these details, which defendant himself confirmed, would tend undermine the probative value of a defense built on expert testimony that drinking may cause memory loss. This is especially so in the absence of undisputed evidence of something that happened after they left that Doe could not remember.

Furthermore, we question whether anyone would need an expert to know that the amount of alcohol Doe admittedly consumed would render a person under the influence and perhaps impair memory. Indeed, although the exact physiological process of how the brain remembers things and how alcohol can interfere with that process are certainly matters beyond the common knowledge and experience of the average person, we doubt that the average person, let alone a trial judge, would need expert testimony to know that a partygoer who drinks excessively over several hours may not later remember, for example, when, where, or how he or she ended up with a new tattoo.

Finally, the probative value of an impaired-memory defense developed from Doctor Miles's declaration and the article would have been circumscribed by its focus on

⁸ Defendant testified that Doe drank excessively, but he did not quantify what that meant.

memory loss. In a nutshell, Doctor Miles and the article make the point that drinking affects the brain's ability to initially retain and later remember what has just actually happened; and excessive consumption may cause partial or complete blackouts and memory loss. Arguably, the defense could have supported defendant's claim that after Doe left defendant's house, she dug around in her ear with a Q-tip, accidentally punctured her eardrum in two places, and was so drunk she does not remember injuring herself.

However, Doe did not testify that she blacked out or could not remember how her ear was injured, and there is no direct evidence. Rather, she clearly remembered being hit by defendant, and whether he did so was the primary disputed issue at trial. The proposed impaired-memory defense would have had little or no tendency to rebut what Doe claimed happened because neither Doctor Miles nor the article suggests that excessive drinking, or even the combination of excessive drinking and prescription medication, may cause a person to confabulate or purport to remember events that never took place. Stated differently, nothing in Doctor Miles's declaration or the article suggests that the amount of alcohol Doe admittedly consumed combined with the medication that she might have taken could have caused her to distinctly remember defendant smacking her hard on the side of the head and the resulting pain when, in fact, he never touched her.

In sum, the court was well aware of how much alcohol Doe had consumed that night. Expert testimony to the effect that the combination of alcohol and prescription medication may cause memory loss would have merely stated the obvious: people who drink too much may later not remember what they said and did the next day. Moreover, the impaired-memory defense as posited by defendant would not explain how alcohol or a combination of alcohol and prescription medication might have caused Doe to invent the memory of being hit and the pain it caused or explain why Doe would accurately

remembered relatively insignificant details of what happened that night but forget the shocking pain of puncturing her own eardrum twice with a Q-tip.

Under the circumstances, defendant fails to convince us that it was unreasonable for counsel to believe that expert testimony was unnecessary or that the failure to consult with a medical expert like Doctor Miles fell below a standard of reasonable competence.

For these and additional reasons, we further conclude that defendant cannot show that the failure to consult an expert was prejudicial. Defendant's credibility was materially impeached when he admitted that he lied to police about Doe hitting him. Defendant's credibility was further undermined when he denied writing the letters to Doe. His denial was rendered highly implausible because Doe identified defendant's handwriting, and defendant did not suggest who else named "Bobby" might have written love letters to Doe hoping to save their marriage and sent them from jail at the same time defendant was there. Moreover, the apologetic content of the letters mirrored the message defendant left on Doe's voice mail. Finally, in admitting that he had been wrong, profusely apologizing, promising never to do it again, begging forgiveness, explaining how he had changed, hoping for reconciliation, and suggesting that she could set him free, defendant's letters exhibited an overwhelming consciousness of guilt. Although he did not expressly apologize for hitting her, his arrest and incarceration for having done so and the content of the letters render that conclusion inescapable.⁹

Under the circumstances, we do not find a reasonable probability that the court would have found defendant to be more credible than Doe, would have had a reasonable doubt concerning whether defendant hit her in the ear, or would have rendered a more

⁹ Given our view of the letters, we reject defendant's claim that defense counsel erroneously believed, and falsely asserted, that defendant admitted guilt in his letters. Defendant notes that he denied writing the letters, they do not admit hitting Doe, and the court acquitted him of violating a protective order by sending the letters. However, counsel's interpretation of the letters was reasonable. And although the court acquitted defendant of violating the protective order, it expressly found that Doe was more credible than defendant and that he was responsible for the letters.

favorable verdict had counsel consulted with a medical expert and presented an impaired-memory defense based the information in Doctor Miles's declaration that the article he cited. (*Strickland, supra*, 466 U.S. at p. 694; *Cunningham, supra*, 25 Cal.4th at p. 1003.)

C. Failure to Report Doe's False Testimony

Defendant claims counsel was ineffective in failing to inform the court that Doe had given materially false testimony. He asserts that Doe's medical records substantially contradicted a number of statements she made at trial. In particular, Doe testified that around the time of the barbeque, she was taking Cymbalta and Clonopin but did not take them that day. However, the evaluation by a doctor when Doe went to the hospital days later lists her medications as "Trazadone, buipropion, clonazepam, Celexa." Doe testified that she previously had no problems with her ear. However, in a 1992 medical report, the doctor observed that Doe's "[l]eft ear reveals old scarring without obvious fluid, injection or abnormality." At trial, Doe denied ever taking Atenolol or Celebra. However, medical records reveal that as of July 2008, she had taken both. Doe could not recall using Valium. However, medical records revealed a history of taking Valium. Doe testified that she drank alcohol regularly, did not "usually" mix alcohol and medication, and did not do so that day. She later said she does not mix alcohol and medication. However, medical records revealed that on a number of occasions she had gone to the hospital after consuming alcohol and medication.

In all, defendant argues that defense counsel failed to present this readily available documentary evidence to the court showing that Doe had testified falsely about her medications, prior ear problem, and mixing alcohol and prescription medication, and had he done so, the impeachment would have substantially undermined Doe's credibility.

The record reveals that counsel sought to use Doe's medical records during cross-examination to establish that she was taking a number of other medications; during this period of time, there were previous instances where she mixed alcohol and prescription medication, and she had had a previous problems with her left ear. However, for a

variety of reasons, counsel's efforts to use the records were unsuccessful because the court repeatedly sustained objections to the questions that counsel asked Doe.¹⁰

We shall assume that counsel should have been more professionally adroit in employing Doe's medical records and could have impeached the accuracy of Doe's statements about the medications he took and her statement that she did not take medication when she drank.¹¹

Doe's medical records show that during the time before the barbeque, Doe had been prescribed, and presumably was taking, more kinds of medication than she identified at trial. The records also show that, contrary to her testimony, she had in the past mixed alcohol and medication. Thus, the records could have impeached Doe's statements about her medications and her denial of mixing alcohol and medication on other occasions. In our view, however, these were collateral matters that had no strong or

¹⁰ We note that in his appeal, defendant does not challenge the propriety of the court's evidentiary rulings.

¹¹ We note that during cross-examination, counsel showed Doe a medical report dated 1992, and she acknowledged that it documented that she had old scarring in her left ear. Doe testified that she was not aware of this old scarring and could not recall whether the examining doctor had mentioned it to her in 1992. Defense counsel also cross-examined Doctor Vetter concerning the existence and significance of old scarring and the possibility that an old perforation that had healed could later reappear spontaneously. Moreover, during his closing argument, defense counsel noted that the records showed old scarring.

Thus, contrary to defendant's claim, the court was made fully aware of the documentary evidence that Doe had had a previous ear problem and that this evidence appeared to contradict her statement that she did not have ear problems before defendant hit her.

We say "appeared to contradict" because the medical report does not establish when Doe suffered the prior ear problem or whether she was old enough to remember. Nor does the 1992 medical report establish that at that time, the doctor discussed the old scarring with Doe or that Doe was aware of it before or after 1992. Under the circumstances, impeachment with the medical report would not necessarily have undermined Doe's credibility.

direct probative value concerning whether Doe was drinking while on medication the day of the barbeque or, more importantly, whether defendant later hit her in the ear.

Nevertheless, the impeachment, even on collateral matters, would have been relevant in assessing Doe's credibility. On the other hand, we note that defendant's credibility was substantially undermined by evidence that he lied to police about what happened that night; and by his implausible denial of having written guilt-ridden love letters to Doe that reiterated the apology in his voice mail to Doe.

Furthermore, the trial court knew how much Doe drank at the barbeque. The medical records did not establish that Doe had mixed alcohol and medication that day, and the lost impeachment did not directly undermine her claim that defendant hit her. Thus, we do not find that Doe's impeachment on these collateral matters would have had a substantial or significant impact on how the trial court viewed Doe's ability to remember and the reliability of her memory of what happened after the barbeque. Again, defendant corroborated aspects of her memory about what they did after leaving the barbeque.

Under the circumstances, we do not find a reasonable probability that the impeachment of Doe's statements about her medications and history of mixing alcohol and medication would have so tipped the credibility scales against her as to change whom the court would have decided to believe or raised a reasonable doubt concerning whether defendant hit her. Nor do we find a reasonable probability that such impeachment would have raised a reasonable doubt concerning whether defendant hit Doe or resulted in a more favorable verdict.¹² (*Strickland, supra*, 466 U.S. at p. 694; *Cunningham, supra*, 25 Cal.4th at p. 1003.)

¹² Given our analysis, we need not specifically address defendant's related claims that counsel was ineffective in failing to present the documentation of Doe's medical history in a logical, coherent, and effective way; and in botching the impeachment of Doe with them because he offered the records under defective legal theories. Even assuming that these alleged failings reflect performance below a standard of reasonable

D. Failure to Ask Pertinent Questions

Defendant complains that defense counsel was ineffective in failing to ask Doctor Vetter a hypothetical question that could have supported his defense.

The defense was that at some time after leaving defendant, Doe aggressively cleaned her ear with a Q-tip and accidentally perforated her eardrum and reopened an old perforation. And because she was drunk and medicated, she could not remember having done this. Doctor Vetter testified that an old eardrum perforation could spontaneously reappear. He also testified that a person could accidentally puncture an eardrum with a Q-tip. When counsel asked about the two perforations in Doe's ear, Doctor Vetter opined, in essence, that it was unlikely a person would accidentally perforate an eardrum twice with a Q-tip because the pain of the first perforation would cause a person to stop.

Defendant faults counsel for not immediately following up Doctor Vetter's response by asking him whether a person who is intoxicated by alcohol and prescription medication would be more likely than a sober person to puncture his or her own eardrum twice by aggressive use of a Q-tip. In support of this claim, defendant cites a web site for the Center for Alcohol & Other Drug Education at George Washington University which contains a list of short-term effects that can be caused by moderate to heavy consumption of alcohol, and the list includes the inability to feel pain.

We conclude that counsel cannot be faulted for failing to ask this question. There is no evidence that Doctor Vetter, like Doctor Miles, was qualified to testify concerning the effects of alcohol and medication on a person in general, how much alcohol one must consume before intoxication can mask pain, or how much pain excessive alcohol can mask. Thus, it is speculation to assume, as defendant implies, that Doctor Vetter would have said that an intoxicated person would be more likely than a sober person to puncture an eardrum twice because the alcohol could mask the pain of the first puncture.

competence, the potential harm was the lost impeachment value and its impact on the court's assessment of Doe's and defendant's credibility and determination of guilt.

Moreover, the information on defendant's web site does not suggest how much pain alcohol consumption can mask or whether alcohol can ever mask the pain associated with puncturing an eardrum.

Counsel also cannot be faulted for the opposite reason. Although the fact that alcohol can mask pain may be beyond the knowledge of the average person, the average person would not need an expert opinion to know that as between a drunk, drug-abusing person and a sober person, the former would be more likely than the latter to injure an eardrum twice while aggressively cleaning it with a Q-tip. In other words, the answer that defendant would have wanted counsel to elicit from Doctor Vetter is, in a sense, obvious and would have been so to the court.

Finally, Doctor Vetter did not say that it was impossible for a Q-tip to cause the two perforations in Doe's ear; just that it was unlikely due to the pain that one puncture would cause. In closing argument, counsel noted the possibility acknowledged by Doctor Vetter and argued that Doe did puncture her eardrum because she was so highly intoxicated. On the other hand, there was no direct evidence that Doe cleaned her ears after leaving defendant's house. Indeed, the whole defense rested on defendant's credibility and testimony that in the past he had seen Doe clean her ears when drunk. Even then, however, he did not suggest that she had ever injured herself. Moreover, although Doctor Vetter acknowledged the possibility of a self-inflicted pair of perforations, he found the more likely cause of such injuries to be a traumatic change of pressure on the eardrum resulting from being hit in the ear.

Under the circumstance, we do not find that counsel's failure to ask Doctor Vetter a follow-up hypothetical question was an omission that fell below a standard of reasonable competence. Nor do we find a reasonable probability that the court would have been more inclined to accept the theory of the defense had counsel asked the question. (*Strickland, supra*, 466 U.S. at p. 694; *Cunningham, supra*, 25 Cal.4th at p. 1003.)

E. Failure to Request a Limiting Instruction

Defendant claims that counsel rendered ineffective assistance in failing to request an instruction limiting the purpose for which the court could evidence that Domingo urged Doe to drop the charges against defendant.

We note that when the prosecutor sought to elicit from Doe what Domingo had said to her on the phone, defense counsel raised a hearsay objection. The prosecutor noted that Domingo was listed as a witness, and therefore the evidence was relevant to show his motive and bias. The court suggested receiving the evidence subject to a motion to strike, opining that “if that witness doesn’t testify or there’s no basis to have it introduced by virtue of that witness’s testimony, that would avoid having to recall [Doe] again to, you know, introduce that.” Counsel agreed to the court’s suggestion, and the court allowed the testimony subject to a motion to strike. Domingo did testify, and counsel did not move to strike Doe’s testimony.

Defendant concedes that the evidence was admissible for some purposes—for example, to explain Doe’s state of mind and credibility in that it could show that she was afraid to testify and feared retaliation and to show Domingo’s bias as a witness for the defense. However, he notes that there was no evidence that defendant authorized, directed, or was otherwise connected with Domingo’s call. Thus, defendant argues that the evidence was not admissible to prove that *defendant* through Domingo attempted to dissuade Doe from testifying or sought to suppress evidence. Accordingly, he argues that counsel should have requested a limiting instruction to put the court on notice that the evidence was not admissible to prove wrongdoing on defendant’s part.

Defendant is correct that there was no evidence that defendant authorized, directed, or was connected to his call in any way or even knew that Domingo intended to and did call Doe and urge her to drop the charges. Nothing Domingo said implied otherwise. Nor did the prosecutor say anything to suggest such a connection. In the absence of such evidence, however, counsel had no reason to request an instruction to

prevent the court from tacitly imputing Domingo's conduct defendant. (E.g., *People v. Gray* (2005) 37 Cal.4th 168, 220 [absent evidence defendant knew that family had called witness, no reason to request limiting instruction].) Indeed, it is clear from the record that the court understood that the evidence was admissible to show Domingo's bias.

Under the circumstances, the failure to request an instruction warning the court not to consider the evidence for a purpose that it was not offered for and for which there was factual support was not an omission reflecting representation below the standard of reasonable competence.

Moreover, even assuming for purposes of argument that counsel should have requested a limiting instruction, defendant cannot show prejudice from the omission.

“ ‘As an aspect of the presumption that judicial duty is properly performed [Evid.Code, § 664], we presume, nonetheless, in other proceedings that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process.’ [Citation.] Stated another way, a trial court is presumed to ignore material it knows is incompetent, irrelevant, or inadmissible. [Citations.]” (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526.) “These presumptions are based on the difference between lay jurors and judges: ‘ “The juror does not possess that trained and disciplined mind which enables him . . . to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge.” ’ [Citations.] Only proof that the evidence actually figured in the court's decision will overcome these presumptions. [Citations.] Clearly, the mere fact that the court heard or read the evidence is not sufficient to overcome the presumptions. [Citations.]” (*Ibid.*)

Because there was no evidence connecting defendant to Domingo's call, it would have been improper for the court to consider the call against defendant. No one suggested such a connection at trial. The call was admissible for a number of relevant purposes. And the record does not suggest that the court considered the call against defendant or that an improper consideration of the evidence figured into the court's determination. Under the circumstances, we presume that the court considered the evidence for a proper purpose. Moreover, it was wholly unnecessary for the court consider Domingo's call against defendant because defendant's own letters urged Doe not to come to court. Accordingly, we do not find a reasonable probability that defendant would have obtained a more favorable result had counsel requested a limiting instruction. (*Strickland, supra*, 466 U.S. at p. 694; *Cunningham, supra*, 25 Cal.4th at p. 1003.)

F. Cumulative Prejudice

Defendant claims that even if no one of counsel's omissions was sufficiently prejudicial to compel reversal, the cumulative effect of all of them was that prejudicial.

As our discussion reveals, the only conduct which, in our view, arguably fell below a standard of reasonable competence involved counsel's handling of Doe's medical records: failing to inform the court he had evidence to show that Doe's testimony that she was only taking a couple of prescription medications and did not mix alcohol and her medication was false; failing to organize the medical record for the court in an orderly and coherent way; and failing to use the documents effectively to impeach Doe's statements. However, the potential prejudice from these alleged failings was the same whether they are considered individually or collectively. In other words, the cumulative prejudice is no greater than the prejudice from any one of these failings, namely, the loss of Doe's impeachment and the influence such impeachment could have had on the court's determination of credibility and guilt. We have previously found no reasonable probability that defendant would have obtained a more favorable result had

Doe's statements been impeached. The claim of cumulative prejudice does not change our analysis or finding.

IV. DISPOSITION

Defendant has failed to make a prima facie showing that he is entitled to habeas relief due to ineffective assistance of counsel. Accordingly, we deny the petition.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

WALSH, J.*

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