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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. RICHARD GLEN WILLIAMS, Defendant and Appellant.	C057856 (Super. Ct. No. SF05499)

A jury convicted defendant Richard Glen Williams of first degree murder, found true a lying-in-wait special circumstance, and found he personally used a deadly weapon (a nail gun). (Pen. Code, §§ 187, 190.2, subd. (a)(15), 12022, subd. (b)(1).) The trial court sentenced defendant to prison for "26 years to life without the possibility of parole" and defendant timely appealed.

Defendant contends his trial attorney was incompetent because he failed to object to certain expert testimony about defendant's mental state, the trial court misinstructed the jury

on how to evaluate evidence of oral admissions by the defendant, and the lying-in-wait special circumstance is void for vagueness. We reject each of these contentions. We shall modify an unauthorized sentence and affirm.

FACTS

Defendant admitted that on October 22, 2005, he killed his wife of nearly 30 years, Hendrika "Hetty" Williams. The defense was that he acted in a dreamlike, unconscious, state caused by withdrawal from the drug Paxil. The People argued the planning and execution of the killing, and defendant's clear memory of what he did, showed that he was conscious.

A year or two before the events in question, defendant tried to kill himself after Hetty said she wanted a divorce. He saw a psychiatrist and was prescribed Paxil, which he took for several months and which he characterized as a lifesaver.

In 2005, Hetty wanted a divorce, but wanted to wait until their youngest daughter, Briana, finished high school the next year.[1]

Hetty met Steven Burns, and became romantically involved with him after she filed for separation in July. Hetty moved into the downstairs unit of the family home, although later she switched with defendant and lived upstairs.

In late July or early August, defendant saw a psychiatrist again and was again prescribed Paxil.

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[1] Further unspecified dates are to 2005.

On September 25, Jackie Webber, a longtime family friend who had helped Hetty move into the downstairs unit, was speaking with Hetty by telephone and heard defendant begin screaming. Defendant overheard the conversation and learned that Hetty was seeing Burns, and Webber testified she heard defendant say "Hetty, I'm going to kill you." However, Webber conceded she had not reported this threat until just before trial. Briana testified defendant was screaming and swearing during this incident, saying "things like 'you fucking bitch' and 'you fucking liar' at my mom."

Hetty obtained a restraining order against defendant at about this time.

Defendant called Burns and told him not to see Hetty, and complained to Burns' mother and employer about what Burns was doing.

In October, defendant's psychiatrist increased his Paxil dosage, but defendant testified he thereafter stopped taking the drug, because he was feeling better.

In October, Hetty developed a poison oak rash on her torso and genitals. Defendant had spread poison oak on her sheets and underwear and told a former neighbor, "he was real tickled about that." "He was giggling. He knew it was wrong, but he thought it was just great." Defendant testified that he did this. Hetty then moved into a separate house.

On October 17, the night before a family court hearing, Burns stayed over at Hetty's house. That night, defendant spray painted Burns' truck. He also searched eBay for stun guns.

Defendant had been planning to go kayaking with Hetty, and he became angry when she cancelled and went to Lake Tahoe with Burns.

On October 21, defendant helped his mother by climbing on her roof to clear her gutters. Hetty's sister-in-law, Ena Reynen, spoke on the telephone with defendant that day and he generally sounded upbeat, "jovial, if not euphoric," but there was "hidden darkness" in the call and when he described using poison oak on Hetty, he thought it was funny, and spoke in a sadistic tone. Defendant admitted that he was pleased when he described this event.

On the night of October 21, defendant bought a stun gun on the Internet, although he testified he did not complete the last step necessary for the purchase. Defendant slept badly that night and felt that he wanted to kill Hetty. He went to the garage and took the washers off some of the nails for his nail gun, cut up a towel to use as a ligature and told his dog that he was going to kill Hetty and himself. He testified he felt manic and was on "auto pilot."

When Hetty and Burns returned from Lake Tahoe, Burns spent that night (October 21) with her. Hetty was going to see defendant the next day to discuss property issues, did not fear defendant, and declined Burns' offer to accompany her. When

Burns left Hetty's house the next morning, he found a nail in one of his tires. Defendant denied putting a nail in Burns' tire.

Briana, who had been away on a trip, called defendant because he was supposed to pick her up that morning (October 22), but he told her he had arranged for her grandparents to do so.

Before Hetty arrived that morning, defendant wrote a purported suicide note on his computer, and even corrected minor typographical errors. The note begins: "Dear Friends & family—I Love you all so much—I cannot take the fact that my dear Hetty has chosen to have an [adulterous] secret affair behind my back. I found out the hard way and was blamed for finding out." Later, it says: "Steve Burns will have blood on his hands for this for some time. Jackie Webber will [too], for coaching Hetty away from me and helping to hide all of it." Still later it says "I must go with my dear Hetty, to be [cremated] together as planned and spread in the Bear [V]alley off Highway 20. All my possessions are to be divided among my family, with Jon administering my tools." He also expresses love for his family, including Peter and Ena Reynen, and hopes his daughters will forgive him. In part defendant states "I am of sound mind and body[.]"

Defendant then disconnected all of the telephones and locked up the house.

Although defendant testified he bought his nail gun a couple of months before, there was evidence he bought it days before. In any event, the gun uses .22 caliber blank cartridges to fire hardened nails into concrete. It must be manually reloaded for each shot, with the muzzle pressed down hard—with 35 pounds of pressure—to release a safety lock. The nails come with square collars or washers to prevent them from penetrating completely into the concrete. As stated, defendant removed the washers from a number of nails, allowing them to penetrate further. Defendant testified he did this in the garage and that he wanted to kill Hetty.

Defendant testified he placed the nail gun in the bedroom, placed the towel in his pocket, locked the doors, wrote the suicide note, and killed Hetty, all while feeling "directed" by another person. He attacked Hetty by surprise, strangled her in the hallway for 30-40 seconds, then closed her nose for 15-20 seconds when she was on the floor. Then he got the nail gun and shot her in the head. He reloaded and shot her in the head again, then carried her to the bedroom, reloaded and shot her in the chest. He then shot himself in the chest, twice, tried to shoot himself in the head, then plugged in a telephone, and called 911. He did not feel the nails in his chest.

The 911 call was received at 10:11 that morning. Defendant calmly told the dispatcher, "There's been a shooting at 10655 Alta Street", and to come quickly.

Peace officers had to force their way in. They found defendant and Hetty on the bed, with a nail gun by Hetty's hand. Hetty died at the hospital, and defendant was in the hospital for just over a month.

Dr. Henrikson, the pathologist, described the tracks of the nails and the strangulation marks on Hetty's neck.

Defendant admitted that while he was in jail, he learned about the so-called "Paxil withdrawal" defense and received some written materials about it.

Defendant's mental expert, Dr. Stuart Shipko, is a psychiatrist with expertise in anxiety disorders and the effects of Paxil, an antidepressant, mood-altering drug of the selective serotonin reuptake inhibitor (SSRI) class, and he maintains a website about Paxil. Dr. Shipko formed his opinions in this case by reading police reports, reports by defendant's psychiatrist and Dr. Roeder, a psychologist, and by reading a transcript of defendant's initial trial testimony, but he had never met defendant. Based on this material and his experience, Dr. Shipko testified the killing was "typical of Paxil induced violence." His record review showed that defendant began taking Paxil on August 4, reduced the dosage on September 7, increased the dosage to 20 milligrams, a fairly high dosage, on October 5, then defendant stopped taking the drug around October 10-14. The fact defendant's dosage was increased, causing him to feel better, and then abruptly stopped, was "a very disastrous

event," and the killing occurred at the "peak of the withdrawal delirium[.]"

Dr. Shipko testified defendant's behavior after the increased dosage on October 5—such as using poison ivy against Hetty and spray painting Burns' truck—was "suggestive" of mania. He described four mechanisms that can be caused by Paxil that equate to unconsciousness: Akathisia, or extreme restlessness, emotional blunting, delirium, and a serious sleep disorder. Another drug defendant took, Trazodone, might have increased these effects.

On cross examination, Dr. Shipko conceded that goal-directed actions, such as searching the internet for weapons, modifying the nails and drafting the suicide note, and clear subsequent memory, were inconsistent with delirium. However, he testified defendant may have filled in his memory gaps with after-acquired information. He conceded that defendant had received written materials on the "Paxil withdrawal" defense before he was seen by Dr. Roeder. And Dr. Shipko admitted he could not *diagnose* a patient without seeing him. But Dr. Shipko still maintained that without Paxil, the killing would not have happened.

Defendant then resumed his testimony. He recalled working on the nails, tearing the towel, the details of the killing and that he intended to kill Hetty. He was "numb" and "pretty flat" when he drafted the suicide note, but remembered making coffee that morning. He intended to kill Hetty and himself, but did

not know why, ". . . I was almost directed." He did not know why he put the nail gun by Hetty's hand.[2] Defendant claimed that at some point he became very agitated while driving and although he attributed this to the Paxil, he was vague about the dates his dosage changed and then stopped.

In rebuttal, the prosecution called Dr. Eric Raimo, another psychiatrist. Although he reviewed the same records that Dr. Shipko reviewed, Dr. Raimo also observed defendant's testimony in court, as well as Dr. Shipko's testimony. In his view, it was essential to interview a patient to rule out malingering. He testified Paxil does not cause unconsciousness. Further, a person who is unconscious does not remember details of what he did, and is incapable of step-by-step planning. None of the four diagnoses posited by Dr. Shipko were supported by the materials Dr. Raimo reviewed: Two—akathisia and emotional blunting—are not forms of unconsciousness, and although delirium and severe sleep disorder can be forms of unconsciousness, they would not permit step-by-step planning. Mania can be goal-directed, but there was no sign of mania in the documentation or testimony Dr. Raimo reviewed. Defendant's clear memory of events negated unconsciousness. Because defendant took Paxil successfully in 2004, it was unlikely he would have a severe

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[2] The Attorney General states defendant told a peace officer in the hospital that Hetty shot him. Such testimony was given outside the presence of the jury, and the trial court later excluded it from evidence.

reaction to it in the future. Paxil played no role in the killing and defendant was conscious.

DISCUSSION

I. Incompetence of Trial Counsel

A person who is unconscious by reason of involuntary intoxication—that is, not aware of what he or she is doing—has not committed a crime. (Pen. Code, § 26, subd. Four; see *People v. Chaffey* (1994) 25 Cal.App.4th 852, 855-856.) Defendant's theory was that he could not have anticipated the withdrawal reaction of abruptly stopping his Paxil medication, and he killed Hetty while unconscious due to that involuntary reaction.

Defendant contends that his trial attorney was incompetent because he failed to object to Dr. Raimo's testimony that defendant was conscious when he killed Hetty. We conclude that although a tenable objection might have been made, it would not have diminished the thrust of Dr. Raimo's testimony and would merely have required him to rephrase his opinion in terms of a hypothetical. For this reason, trial counsel may have made a rational tactical decision to refrain from objecting, and the lack of an objection did not cause prejudice.

The rules governing defendant's claim are as follows:

> "'"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof."' [Citation.]

> "'[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel.' [Citation.] If, as here, the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. [Citation] 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.'" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466-467.)

Generally, a person's intent is shown by her or his actions: "'[C]ourts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.'" (*United States v. Williams* (2008) 553 U.S. ___, ___ [170 L.Ed.2d 650, 671]; see *People v. Johnson* (1901) 131 Cal. 511, 514.) "The intent or intention is manifested by the circumstances connected with the offense." (Pen. Code, § 21, subd. (a).)

In the *unchallenged* portions of Dr. Raimo's testimony, Dr. Raimo gave the opinion that a person who executes step-by-step planning and has a clear memory of events is a conscious person.

Defendant's testimony shows that, in advance of the killing, defendant knew he intended to kill Hetty, and was able to alter the nail-gun nails for deeper penetration, tear a towel into a ligature, lock the doors, unplug the telephones, and draft and make minor changes to a suicide note that explained his jealous motivation for killing Hetty, and made clear testamentary provisions. When Hetty arrived, he was able to surprise her, strangle her, shoot her with a nail gun three

times—having to reload each time—then shoot himself with the gun two times, then plug in a telephone and speak to a 911 operator.

What defendant challenges on appeal is Dr. Raimo's testimony about his conclusion: *Because* a person who can implement and recall a detailed plan is a conscious person, and *because* defendant was able to implement and recall a detailed plan, *therefore* defendant was conscious when he killed Hetty.[3]

On appeal, defendant contends that trial counsel should have objected to this testimony. We assume for purposes of this appeal that a tenable objection could have been made. An expert may not testify "as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29; see *People v. Smithey* (1999) 20 Cal.4th 936, 960-961.) Although the Attorney General appears

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[3] In particular, Dr. Raimo testified that, in his opinion, "Mr. Williams was not unconscious the night of the murder, save for as he testified the two hours he was asleep. . . . So with regard to the actual act, acts that led up to the killing and the like, it in my opinion was a fully conscious act. And Paxil had no effect on consciousness in this regard." He later testified: "I believe he was fully conscious, aware, actually reported that he wanted to kill his wife. Even though he didn't know why, he actually remembered that he wanted to do it. And in my opinion that's consistent with being conscious, awake, alert. He dated the suicide note. Wrote his name down on it. He's alert to person, time, made phone calls, told his parents to go pick up his daughter and the like."

to contest the point, we assume for purposes of this appeal that consciousness is a "mental state" as that term is used in Penal Code section 29. (See *People v. Boyes* (1983) 149 Cal.App.3d 812, 819-821 [although consciousness is not an element of a crime, "it is pertinent both to the voluntariness of a defendant's acts and to his capacity to understand and intend those acts and their consequences"]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1156-1160 [suggesting trial counsel could rationally conclude Penal Code section 29 would bar direct testimony about unconsciousness].)[4]

But the fact a good objection is available does not mean it is incompetent to refrain from interposing it. (See generally, *People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1000-1003.)

As explained above, Dr. Raimo gave his opinion that a person who carries out a detailed plan and recalls those details later is a conscious person. Defendant's testimony showed he could carry out a detailed plan and remember it. The jury would know that Dr. Raimo believed defendant was conscious whether or not Dr. Raimo completed his syllogism. Therefore, Dr. Raimo's conclusion did not have "a devastating effect on appellant's

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[4] Defendant also asserts the testimony was objectionable because it was outside the scope of proper expert opinion, as provided by Evidence Code section 801. However, this hinges on his claim regarding Penal Code section 29. Because we accept the view that the testimony was objectionable under Penal Code section 29—at least for purposes of argument—we need not separately analyze Evidence Code section 801.

defense" as defendant maintains on appeal. Instead, it merely stated what ineluctably flowed from Dr. Raimo's predicate testimony. Although Dr. Raimo may have "stepped over the bounds of permissible testimony," as defendant asserts on appeal, it was an insignificant step, given Dr. Raimo's other testimony, and defendant's own testimony.

Therefore, trial counsel could rationally conclude an objection would be futile, because it would not change the jury's understanding of the thrust of Dr. Raimo's testimony. At best an objection would have required Dr. Raimo to rephrase his conclusion in terms of hypotheticals. And the jury might well view the objection as obstructionist, which might unduly emphasize Dr. Raimo's opinion. Because trial counsel was not asked why he did not object, and because there was a plausible tactical basis not to object, defendant cannot show incompetence of counsel on direct appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Nor can defendant show prejudice. There is no challenge to Dr. Raimo's testimony, to the effect that a person carrying out a detailed plan and remembering what he did was not conscious. Defendant's testimony showed he was able to execute a detailed killing plan and recall what he did later. It was not Dr. Raimo's testimony that defendant was conscious that doomed defendant, it was defendant's testimony about his actions and memory that undermined his claim of unconsciousness.

Finally, the jury was properly instructed on the use of expert testimony, and that it was up to the jury to decide the facts. The jury also was instructed that the People had to prove consciousness beyond a reasonable doubt. We presume the jury followed the instructions. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80; *People v. Powell* (1960) 186 Cal.App.2d 54, 59.) Given defendant's testimony, it is unremarkable that the jury had no doubts about defendant's consciousness: As the Attorney General correctly observes, "The defense was weak, verging on non-existent."[5] Had trial counsel interposed the objection posited by appellate counsel, the outcome would have been the same.

II. Instruction on Oral Admissions

Defendant contends the trial court misinstructed on how the jury should evaluate evidence of oral admissions by defendant. We agree that the trial court misinstructed the jury on this point, but we conclude that any error was harmless.

Peter Reynen testified that about two weeks before the killing, defendant said "hey, I've been doing some cocaine. It's really nice. Hadn't done it in a long time. But I really like it." Peter conceded that he did not report this statement until just before trial began. Defendant testified he had not

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[5] The prosecutor, with some justification, unsuccessfully sought an in limine hearing to determine whether, given the circumstances, there was enough evidence to tender the unconsciousness defense to the jury.

used cocaine for many years, and denied telling Peter he used it recently.

Jackie Webber testified that although she had described the September 25th telephone incident before, until just before trial she had not told anyone that during that incident defendant said "Hetty, I'm going to kill you." Defendant admitted he called Hetty a "lying fucking bitch" and became so angry during that incident that he broke some flower pots and expected the police to be called, and that he scared himself, but inferentially denied the threat.

When there is evidence a defendant made inculpatory out-of-court oral statements, the jury must be instructed to view that evidence with caution, and must be instructed to determine whether the defendant actually made those statements before using evidence of those statements against him. (See *People v. Ford* (1964) 60 Cal.2d 772, 799-800.)

The pattern instruction (CALCRIM No. 358), as requested by the prosecutor, was as follows:

> "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements.
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> "You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

The trial court read the instruction to the jury substantially as requested, but left off the second paragraph. This appears to have been inadvertent.

Defendant contends the two statements described above—that he used cocaine and said he would kill Hetty—were damaging, and the absence of the last line of the instruction means the jury would give the evidence of those statements undue weight.

We disagree. The main purpose of the instruction is to ensure the jury determines whether inculpatory statements attributed to the defendant *actually were made*. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) The portion of the instruction that was given told the jury that it had to "decide whether or not the defendant made any of those statements in whole or in part." Therefore the jury knew it first had to find that the statements were made. The absence of the part of the instruction advising the jury to view the evidence of such statements *with caution* would have added little.

Defense counsel mentioned both the threat and the cocaine statements briefly in closing argument, to develop his theme that some witnesses had what he characterized as an "agenda" to speak for the victim. The prosecutor briefly mentioned cocaine in rebuttal argument, to show that Dr. Roeder's reports, relied on in part by Dr. Shipko, failed to mention defendant's valium and cocaine usage. The statements were not central points in any of the arguments. Given defendant's testimony about how he intended to kill Hetty, planned to kill Hetty, and carried out

his plan to kill Hetty, neither statement was significant, and it is not reasonably probable that the jury would have reached a different conclusion had the full instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Defendant acknowledges that the California Supreme Court has held the *Watson* standard of harmless error applies to this kind of error. (See *People v. Dickey* (2005) 35 Cal.4th 884, 905-907.) Defendant believes a different standard of review should apply, and wants to preserve that question for federal review. We are bound to apply the *Watson* standard of harmless error. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456 (*Auto Equity Sales*).)

III. Validity of Special Circumstance

Defendant claims the lying-in-wait special circumstance duplicates the lying-in-wait theory of murder and therefore must be stricken. This claim was raised and rejected several times in the trial court.

Defendant concedes that the California Supreme Court has rejected this claim, and that we are bound by precedent to reject the claim, but he wishes to preserve it for further review in the federal courts.

We agree that the California Supreme Court has rejected this claim. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149; see also *People v. Lewis* (2008) 43 Cal.4th 415, 515-517; *People v. Stevens* (2007) 41 Cal.4th 182, 203-204; *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 309.)

Therefore, we agree we must reject it as well. (*Auto Equity Sales*, *supra*, 57 Cal.2d at pp. 455-456.)

IV. Unauthorized Sentence

Defendant notes in passing that the trial court imposed an incorrect sentence, and in the conclusion of his briefs requests correction. The Attorney General does not dispute defendant's point, which does not aggrieve the People.

The trial court sentenced defendant to "a term of 26 years to life without the possibility of parole. That is 25 years to life for the conviction of Penal Code 187(a) plus one year for the use [of] a deadly weapon pursuant to 12022(b)(1). And no possibility of parole pursuant to Penal Code 190.2(a)(15)." The abstract is in accord.

Although first degree murder is punished by 25 years to life in prison (Pen. Code, § 190, subd. (a)), when a special circumstance has been proven and the defendant is not sentenced to death, the sentence is life without parole, not 25 years to life without parole (Pen. Code, § 190.2, subd. (a)).

The only authorized sentence in this case is life without parole plus an additional year for the weapon enhancement. We modify the sentence to comport with law. (Pen. Code, § 1260.)

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a new abstract of judgment reflecting the modified sentence of life without parole plus one year for the enhancement. The judgment, as so modified, is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.