2005 WL 1926225
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second
District, Division 5, California.

The PEOPLE, Plaintiff and Respondent,
v.
Stephen Otto REITZ, Defendant and Appellant.

No. B177516.
|
(Los Angeles County Super. Ct. No. NA 049954).
|
Aug. 12, 2005.

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Attorneys and Law Firms

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

Opinion

MOSK, J.

***1** Defendant and appellant Stephen Otto Reitz (defendant) appeals his conviction, following a jury trial, of first degree murder. (PenF.Code, § 187, subd. (a).) The jury also found that defendant had personally used two deadly weapons. (§ 12022, subd. (b)(1).) Defendant was sentenced to 26 years to life in prison, consisting of 25 years to life on the murder charge, plus a one year enhancement under section 12022, subdivision (b)(1).

Defendant contends his conviction must be reversed because he was precluded from presenting at trial certain expert testimony as to whether it was possible for a person, while sleepwalking, to become violent and kill another person. He claims that the limitations on expert testimony imposed by the trial court violated state law, his Sixth Amendment right to present a defense, and his due process rights under the Fourteenth Amendment. Defendant further contends that the admission into evidence of certain hearsay statements by the victim was prejudicial error and violated his Sixth Amendment right to confront witnesses.

We hold as follows: The trial court did not abuse its discretion by precluding defendant's experts from testifying that a person is capable of killing another while sleepwalking. The court also did not err by limiting the scope of expert testimony to sleepwalking incidents the expert had personally observed. The trial court did err by precluding defendant from asking the expert a hypothetical question, based on the facts of the instant case, to elicit testimony concerning acts that a person is capable of committing while sleepwalking. That error, however, was harmless because it resulted in no prejudice to defendant. The trial court also erred by admitting into evidence hearsay statements by the victim that did not come within any hearsay exception under California law. The admission of such hearsay statements did not violate defendant's Sixth Amendment right to confront witnesses, however, nor did it result in prejudice to defendant. We therefore affirm the judgment.

BACKGROUND

A. Defendant's Relationship with the Victim

Defendant and the victim, Eva Weinfurtner, had been involved in a romantic relationship since January 2001. Eva was married at the time, but had at some point separated from her husband. Defendant met Eva through her son, whom defendant had known for some time. During the course of her relationship with defendant, Eva's friends and relatives noticed bruises on Eva's arms, legs, neck, and forehead that she did not have before she met defendant. Eva sometimes explained that the bruises were caused by her own clumsiness

or accidents. At other times, she said that defendant had been too rough while having "fun" with her or while having sex.

Eva told her niece, Lannelle Piro, and her friend, Alana Bast, that one bruise on Eva's thigh was caused by defendant biting her. Eva also told Piro that on one occasion, while watching television, defendant had grabbed Eva by the throat and said, "Stop fucking looking at me like that." Eva told another niece, Annette Mason, that she once woke up in the middle of the night to find defendant on top of her, strangling her. Eva got defendant to stop, and defendant told her that he did it because he thought there was an intruder in the house. Eva told Mason that she was afraid of defendant because of that incident. Eva told Piro, Bast, and her son, Levi Loy, that she was afraid of defendant. Eva told Bast that she knew if she stayed with defendant, he would kill her; however, she explained to Piro and Bast that she could not leave defendant because he was like a drug for her.

***2** On April 18, 2001, Eva called her estranged husband, Karl. She sounded frantic, and told him that defendant had broken through a plate glass window in her apartment, that she had run outside and called the police, and that the police were still looking for defendant. Eva told responding police officer Frank Hernandez that defendant had been in her apartment, that he was upset, and that she had asked him to leave. Eva and defendant exchanged words as defendant left. Some time later, Eva saw defendant on the balcony. Defendant broke the window and entered Eva's apartment, wielding a knife. Defendant told Eva that he would kill someone by gutting the person like a fish and then name that person after her. Eva fled from the apartment and told a security guard to call the police. She told Officer Hernandez that she was in a relationship with defendant, that they had been involved in two prior domestic incidents, and that she was afraid of him.

B. The Crime

Sometime in 2001, Eva moved back in with her husband, Karl, and the couple attempted to repair their marriage. Shortly before October 1, 2001, however, Eva lied to Karl by telling him that she was going to Catalina Island with her friend, Alana Bast, when in fact, Eva went with defendant. According to defendant, going to Catalina was Eva's idea, and she had made the reservations and purchased the ferry tickets.

On October 1, 2001, at approximately 1:00 or 1:30 a.m., defendant called his parents and told them that he was on Catalina Island and that he may have killed Eva. Defendant's father notified the police. Detectives Richard Tomlin and Ken Gallatin of the Los Angeles County Sheriff's Department arrived at the crime scene, a hotel on Catalina Island. Potted plants were located outside the door to each hotel room; however, outside the room in which Eva's body was found, there was only a base for a potted plant, and the plant itself was missing. The detectives found Eva's body lying on the floor of the hotel room, at the foot of the bed, her head facing a sliding glass door. Eva's body was bruised, her right arm appeared to be dislocated, and there were three large, gaping stab wounds on the back of her neck. A pocketknife lay about four feet from her head, and pieces of a plastic fork were on the floor. Dirt and fragments from a broken flower pot were strewn on the floor near Eva's head, and shards of broken pottery were imbedded in her scalp. Based on the physical evidence, it appeared to Detective Tomlin that the attack occurred entirely in the area of the hotel room at the foot of the bed, but not on the bed itself.

An autopsy showed that Eva had sustained numerous blunt force injuries, knife wounds, cutting wounds that appeared to be caused by the broken shards of a flower pot, and puncture wounds that appeared to be caused by a fork. Her right forearm had been dislocated from the elbow joint, her wrist, ribs, jaw, facial bones, and skull were fractured, and there were multiple bruises of the brain.

***3** In a tape recorded interview after defendant waived his *Miranda* [1] rights, defendant told the detectives that he had no memory of the events that caused Eva's death. Defendant later testified at trial, however, that he had "flashbacks" or "visions" concerning the event, and he remembered certain details of the attack, such as being in an "all out struggle" with a male intruder, throwing down a flower pot, and feeling threatened. Defendant said that when he became aware of Eva's body, he noticed the knife wounds on the back of her neck, that the wounds were similar in appearance to the way sharks are killed by commercial fisherman by slicing their spinal cords. Defendant had worked as a commercial fisherman and assumed he had caused those wounds. Defendant also told the detectives that he would sometimes sleepwalk. He recounted an incident in which he walked through a plate glass window while sleepwalking.

Defendant claimed to have had a loving relationship with Eva and denied having had any prior physical altercation with her. When asked about prior physical altercations with other women, defendant mentioned that he had once "bumped into" a female police officer who had arrested him for drunk driving.

C. Defendant's Background

Defendant and his parents testified that defendant had a problem with somnambulance since childhood. As a child, defendant would sometimes get out of bed and speak or yell in his sleep. During these sleepwalking incidents, defendant would often think that somebody was after him and that he needed to protect himself. In 1996, when defendant was 11 or 12 years old, he and his cousin were sleeping at his grandmother' house. Defendant's cousin heard a scream coming from defendant's room, and when the cousin and defendant's uncle went to investigate, they found a hole in the wall and a ceiling fan pulled down with a blanket wrapped around it. Defendant was standing up and appeared to be disoriented. Later, defendant could not remember what had happened.

Defendant's sleepwalking continued into adulthood. One night a few years before the instant crime occurred, defendant's friend, Chris Pickford, was sleeping in defendant's apartment. Defendant woke up in the middle of the night and told Pickford that the devil was chasing him.

Defendant was also diagnosed with bipolar disorder and had a tendency toward angry and violent outbursts while he was awake. These problems got worse as defendant got older. Defendant would become angry easily and would be verbally and physically abusive to family members, although he did not harm anyone. Defendant also had a substance abuse problem that would exacerbate his other problems. As a young adult, defendant once jumped or fell out of a second story window and had no recollection of how it had happened. He told his father that he had been sleepwalking at the time, but he told friends that he did it because he was under the influence of methamphetamine.

***4** Defendant told an acquaintance, Luke Shockley, about an incident in which he was stopped by a female police officer for running through a toll gate on the Coronado Bridge. Defendant threw himself into the officer's shoulder, and explained to Shockley that he did so because he knew he could; she was a female officer and he was bigger and more powerful than she was. Defendant admitted being involved in another incident that occurred while driving in his car with a companion and some "kids" threw an egg at his car. Defendant became angry, drove after them, leaned out the window and bashed their car with a club-like device.

Defendant admitted that he acted "quite bizarre" on April 18, 2001, the night he broke through the window of Eva's apartment. He was agitated because he had been in a physical fight with five people outside a liquor store earlier that night. After arguing with Eva in the apartment, defendant left, but then changed his mind and decided to go back. He knocked on Eva's door, but for reasons he could not explain, he hid from her view by staying out of range of the peephole on Eva's door. Later, he climbed onto Eva's balcony and argued with her through the sliding glass door. When she refused to admit him, he smashed through the glass. He had a knife, and he told Eva that he was going to fillet a person and name that person after her.

D. Expert Witnesses

1. Dr. Daniel Amen

Daniel Amen, a psychiatrist specializing in brain imaging, conducted S.P.E.C.T. scans on defendant in late 2003. S.P.E.C.T scans examine blood flow to various areas of the brain. The results of the scans showed that defendant had significantly decreased brain activity in three areas of his brain. One such area was the prefrontal cortex, which controls judgment, impulse control, organization, planning and forethought. Another area was the left temporal lobe, which controls memory, mood stability and temper control. Low activity in the temporal lobe is associated with seizures, irritability and aggression. Defendant also underwent a P.E.T. scan, which examines glucose metabolism in the brain. The results of that scan were consistent with Dr. Amen's findings of reduced brain activity in defendant.

Based on the test results, Dr. Amen concluded that defendant had significant brain trauma that prevented him from a having a normal life. That brain damage would have caused defendant to have problems with judgment, impulse control, planning and forethought. Dr. Amen could not tell, however, whether defendant was prone to sleepwalking.

2. Dr. William Pierce

Dr. William Pierce, a psychologist, reviewed defendant's history, interviewed defendant and his family and friends, and administered various psychological tests on defendant. Dr. Pierce opined that defendant suffered from sleepwalking and sleep terrors triggered by night time seizures. Dr. Pierce stated that his diagnosis was consistent with Dr. Amen's findings of temporal lobe damage. He explained that during a temporal lobe seizure, a person is unconscious but can perform complex tasks, such as driving a car, without being aware of what he is doing. According to Dr. Pierce, a person cannot plan, reason, or use judgment while unconscious.

3. Dr. Clete Kushida

***5** Dr. Clete Kushida, a neurologist specializing in sleep disorders, and the director of the Stanford University Center for Human Sleep Research, administered a sleep study on defendant. Defendant slept overnight at a clinic and was monitored with electrodes. During the sleep study, defendant sat up, screamed, and jumped out of bed. The electrodes monitoring defendant's brain waves at the time showed that he was in sleep stages three and four-the deepest stages of sleep-when these acts occurred. The incident was also recorded on videotape. The sleep study showed that defendant suffered from various sleep disorders, all consistent with sleepwalking. Dr. Kushida opined that defendant suffered from sleep terrors and was capable of harming others while sleepwalking.

Dr. Kushida also explained that there are seven criteria for determining whether a person who committed a harmful act on another was sleepwalking at the time: (1) whether there was a reason to suspect sleepwalking based on the perpetrator's history or based on a sleep study; (2) whether the duration was compatible with the presumed diagnosis, i.e., whether the perpetrator had a sleepwalking problem at the time of the act; (3) whether the conduct was seemingly senseless and without motivation; (4) whether, immediately afterward, the perpetrator was perplexed and horrified and made no attempt to conceal the act; (5) whether there was amnesia for most of the events; (6) whether the act occurred during the first third of sleep, when most stage three or stage four sleep occurs; and (7) whether there was prior sleep deprivation, which can trigger a sleepwalking episode. Dr. Kushida stated his opinion that all seven criteria were met in defendant's case.

Dr. Kushida further stated that a person can perform complex acts while sleepwalking. He recounted one sleep study in which he observed a patient remove objects from a bedside table drawer and throw the objects at him, even though electrode monitors showed that the patient was asleep at the time. He also cited other incidents, one in which the patient entered a car, started the ignition, and backed out of the driveway while asleep; and another in which the patient hung up imaginary pictures using a hammer and woodshop tools. Dr. Kushida expressed the opinion that it is possible for a person, while sleepwalking, to stab or beat another person, or to break another person's bones.

4. Dr. Samuel George Benson

Dr. Samuel George Benson, Jr., a psychiatrist and pharmacologist, examined defendant and reviewed his history and the results of his various medical and psychological tests. Dr. Benson opined that appellant suffered from bipolar disorder and a sleepwalking disorder with seizures caused by organic brain damage. Dr. Benson stated that during a seizure, a patient is unconscious but is capable of moving and doing unpredictable things. Dr. Benson further opined that people who suffer from partial complex seizures tend to be more violent than other people, and a person who sleepwalks in connection with seizures can be dangerous to himself and to others.

E. Evidentiary Rulings

***6** During the trial, the prosecutor moved to preclude Dr. Kushida and other experts from opining that a person, while sleepwalking, is capable of killing or murdering another person. The prosecutor argued that such an opinion was not based on reliable or trustworthy information, and was not generally accepted in the scientific community, as required by *People v. Kelly* (1976) 17 Cal.3d 24, 30.

In a hearing outside the presence of the jury, Dr. Kushida testified that he had personally observed two incidents in which a person committed acts of violence while asleep. In one incident, the person threw objects at Dr. Kushida, and in another, the person made "threatening gestures." Dr. Kushida further testified that experts in the field of sleep

disorders had concluded, based on studies, that sleepwalkers are capable of committing violence while unconscious. These studies were based in part on personal observations by researchers and in part on statements relayed by others who described sleepwalking incidents. No follow up investigation was conducted to verify the truth or accuracy of the third party accounts of sleepwalking. When asked how he could be sure that the reported incidents of violence while sleepwalking occurred while the perpetrator was asleep, Dr. Kushida stated that there are seven criteria for evaluating sleepwalking claims[2]. Dr. Kushida also expressed the opinion that it is "generally accepted in the scientific community" that a person can commit murder while sleepwalking. He explained, however, that this opinion was based entirely on criminal cases in which the defendants had asserted a sleepwalking defense.

The trial court noted the absence of any "empirical scientific data" to support Dr. Kushida's opinion that a person, while sleepwalking, can kill another person, and expressed doubt as to whether that opinion was generally accepted in the scientific community. The court ruled that Dr. Kushida could not testify that sleepwalkers are capable of killing another person while unconscious, but that he could testify that sleepwalkers are capable of certain specified acts of violence. When the prosecutor objected to the use of the words "violence" or "violent," because those words could be understood to include murder, the trial court precluded Dr. Kushida from using those words. The court made clear, however, that Dr. Kushida could testify as to a sleepwalker's ability to commit particular acts, including stabbing someone with a knife, stabbing someone with a fork, or hitting someone over the head with a flower pot.

Later, during the testimony of Dr. Benson, the prosecutor objected to a proposed hypothetical based on the circumstances of the instant case. The prosecutor argued that defense counsel's proposed line of questioning, which would have focused on whether a person could have committed certain acts while sleepwalking, either sought a conclusion on an ultimate issue in the case, or elicited testimony that the trial court had already prohibited-whether it was possible for a sleepwalker to kill. The trial court sustained the objection on both grounds.

DISCUSSION

A. Expert Testimony

***7** Defendant claims that the trial court's exclusion of proposed testimony by Dr. Kushida and Dr. Benson violated the Evidence Code, defendant's Sixth Amendment right to present witnesses in his defense, and his Fourteenth Amendment right to due process of law. Defendant contends that such testimony was critical to his defense that he was not conscious at the time of the crime. Unconsciousness is generally a complete defense to criminal homicide. (Pen.Code, § 26, subd. (4); *People v. Ochoa* (1998) 19 Cal.4th 353, 423.)

We review the trial court's ruling to exclude or limit the scope of expert testimony under an abuse of discretion standard of review. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 663.) "As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]" (*People v. Page* (1991) 2 Cal.App.4th 161, 187.) A trial court's application of the incorrect legal standard as the basis for excluding expert testimony is an abuse of discretion. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1000 [court abused its discretion by improperly applying *Kelly-Frye* standard as basis for excluding expert testimony].) To constitute reversible error, however, the evidentiary rulings must result in a miscarriage of justice. (Evid.Code, § 354.)

1. Dr. Kushida

The trial court precluded defendant's expert, Dr. Kushida, from testifying that a person is capable of committing murder or "violence" while sleepwalking. The trial court also limited Dr. Kushida's testimony regarding incidents of harmful or dangerous acts by sleepwalkers to his own personal observations. Dr. Kushida was not permitted to discuss sleepwalking incidents he had heard about only by reviewing other criminal cases. Defendant claims the trial court erred by applying the *Kelly-Frye* standard[3] as the basis for limiting Dr. Kushida's testimony. Defendant further contends that the court improperly excluded certain testimony because it was based on hearsay.

We need not decide whether the trial court erred by applying the *Kelly-Frye* standard to the facts of this case, because the court's rulings were also based on the alternative ground that hearsay accounts of sleepwalking are not a sufficiently reliable or trustworthy basis for the expert opinion that sleepwalkers are capable of murder. That determination was within the trial court's discretion. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

Evidence Code section 801, subdivision (b) provides in relevant part: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is ... [b]ased on matter ... that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." A trial court has broad discretion to exclude expert testimony, including hearsay testimony, that is unreliable. (*People v. Carpenter, supra,* 21 Cal.4th at p. 1061.) A trial court also has discretion to exclude unreliable hearsay upon which an expert's opinion is based. (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.) "[T]he value of an expert's opinion depends on the truth of the facts assumed." (1 Witkin, Cal. Evidence (4th ed.2000), Opinion Evidence, § 28, p. 558.) "Where the basis of the opinion is unreliable hearsay, the courts will reject it." (1 Witkin, Cal. Evidence, *supra,* Opinion Evidence, § 36, p. 567; see *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 705 [fire ranger's report on cause of fire he had not witnessed, based on statements of others]; *Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 [rejecting traffic officer's opinion as to point of impact of collision, based on witness statements].)

***8** The court found that anecdotal accounts of sleepwalking incidents relayed to Dr. Kushida by others, and information gleaned from Dr. Kushida's review of criminal cases in which the defendants had asserted a sleepwalking defense, were not sufficiently reliable bases for an expert opinion that sleepwalkers are capable of committing murder. That determination was within the trial court's discretion. (*People v. Carpenter, supra,* 21 Cal.4th at p. 1061; 1 Witkin, Cal. Evidence, *supra,* Opinion Evidence, § 36, p. 567-568.) The trial court did not abuse its discretion by precluding Dr. Kushida from opining that a person can kill while sleepwalking or by limiting Dr. Kushida's testimony concerning acts a person can commit while sleepwalking to those based on his own personal observations. (*People v. Carpenter, supra,* 21 Cal.4th at p. 1061; *People v. Carpenter, supra,* 15 Cal.4th at p. 403.)

The trial court also acted within its discretion by precluding Dr. Kushida from using the words "violence" or "violent" to describe conduct a person is capable of engaging in while sleepwalking. The trial court made clear that although Dr. Kushida could not use the words "violence" or "violent," he had "broad latitude" to describe particular acts a person could perform while sleepwalking, including "picking up a knife ... and stabbing somebody, ... picking up a pot and smacking somebody over the head with it .... picking up a fork ... and stabbing somebody with it .... and taking an arm and twisting it so bad it's dislocated. Somebody pounding somebody within an inch of their life as opposed to the broader term of murder." Dr. Kushida did in fact testify that it is possible for a person, while sleepwalking, to stab or beat another person, or break another person's bones. No abuse of discretion occurred.

2. Dr. Benson

Defendant contends the trial court erred by prohibiting Dr. Benson from giving his opinion based on a hypothetical set of facts. We agree, but find the error to be harmless.

"Within limits, the law permits the examination of an expert witness with hypothetical facts. 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however.' [Citation.] 'A hypothetical question ... may be "framed upon any theory which can be deduced" from *any* evidence properly admitted at trial, including the assumption of "any facts within the limits of the evidence ..." ' [Citations .]" (*People v. Boyette* (2002) 29 Cal.4th 381, 449.) The use of hypothetical questions, however, has been criticized by several authorities. (See 3 Witkin, Cal. Evidence (4th ed.2000), Presentation at Trial, § 194, p. 259; *People v. Bassett* (1968) 69 Cal.2d 122, 143-144, fn. 21 ["Although the hypothetical question

has traditionally been the method used for taking opinion evidence of an expert witness, it has long been damned with faint praise"].)

***9** The field of permissible hypothetical questions is broad, so long as the questioning does not place before the jury facts divorced from the actual evidence. (*People v. Boyette, supra,* 29 Cal.4th at p. 449.) There was no contention that the hypothetical question defense counsel sought to propose to Dr. Benson was not properly founded on evidence in the record. To the contrary, defense counsel stated that the hypothetical facts would mirror the facts of the instant case. The similarity of the proposed hypothetical to the facts of the instant case was not a legitimate ground for exclusion. (See 3 Witkin, Cal. Evidence, *supra,* Presentation at Trial, § 195, p. 260 ["The principal grounds of challenge of a hypothetical question are directed toward its assumptions of fact, e.g., that it improperly assumes facts not in evidence, or assumes inconsistent facts, or does not include all proper matters"].)

That the proposed hypothetical question sought to elicit testimony on an ultimate issue in the case also was not a proper basis for exclusion. Otherwise admissible expert opinion testimony that embraces the ultimate issue to be decided by the trier of fact is admissible. (Evid.Code, § 805.) "There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. 'We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved.... Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.' [Citations.]" (*People v. Wilson* (1944) 25 Cal.2d 341, 349.) The record does not fully disclose the proposed hypothetical defense counsel was precluded from presenting, and we therefore do not know the precise testimony defense counsel sought to elicit. It appears, however, that defense counsel intended to ask Dr. Benson whether a person could have been sleepwalking under circumstances substantially similar to the facts of this case. This line of questioning, and the expert testimony sought, was permissible. (Evid.Code, § 805, *People v. Boyette, supra,* 29 Cal.4th at p. 449; *People v. Wilson, supra,* 25 Cal.2d at p. 349.)

The attorney general argues that the trial court properly excluded the proposed hypothetical because it was simply another way of asking whether a sleepwalker could commit murder, and the court had already prohibited opinion testimony on that subject because it found the bases for that opinion to be unreliable and untrustworthy. Both the hypothetical question and the responding opinion, however, could have been framed within the limitations imposed by the trial court-i.e., without using the words "murder," "violence," or "violent," and avoiding any question as to whether a person could kill while sleepwalking. The trial court erred by precluding defense counsel from asking Dr. Benson a hypothetical question based on the facts of the case. As we discuss, however, defendant was not prejudiced by that error, and reversal of the judgment is not warranted.

3. No Prejudice

***10** Any error regarding the limitations imposed on the expert testimony was harmless, because defendant has failed to establish any resulting prejudice. Under California law, claims of evidentiary error are normally reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Under that standard, defendant must show a reasonable probability of a more favorable verdict but for the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Defendant contends that the claimed errors violated his federal due process right to present a defense, and must therefore be reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the error was harmless beyond a reasonable doubt. Defendant waived his constitutional claim, however, by failing to raise it in the trial court. Even if the claim had been properly preserved for appeal (see *People v. Yeoman* (2003) 31 Cal.4th 93, 117, 132-133), any error was harmless under either the *Watson* or *Chapman* standards.

Defendant was permitted to present extensive expert testimony by five different doctors concerning his mental health problems and sleep disorders, including sleepwalking

and sleep terrors, as well as testimony from family and friends concerning his behavior. Dr. Daniel Amen, a psychiatrist specializing in brain imaging, testified that defendant had significant brain trauma affecting the left temporal lobe that prevented him from leading a normal life and that impaired his judgment, impulse control, planning and forethought. Dr. William Pierce, a psychologist, opined hat defendant suffered from sleep walking and sleep terrors caused by nocturnal seizures. Dr. Pierce further testified that his diagnosis was consistent with Dr. Amen's findings of temporal lobe damage, and that during a temporal lobe seizure, a person could be unconscious yet still perform what appear to be conscious tasks. According to Dr. Pierce, an unconscious person cannot plan, reason, or use judgment. Dr. Kushida testified that there are seven criteria for evaluation sleepwalking claims, and that defendant satisfied all seven criteria. Dr. Kushida further testified that, based on his personal observations and other reported cases, a person who sleepwalks is capable of stabbing, beating, breaking someone's bones, and hurting someone else. Dr. Benson testified that a person with a seizure-related sleepwalking disorder is capable of committing "very dangerous" acts to himself or to others while unconscious. The few limitations imposed by the trial court on the expert testimony did not impair defendant's due process right to present a sleepwalking defense or his Sixth Amendment right to present witnesses.

Defendant suffered no prejudice as a result of the evidentiary rulings. The physical evidence concerning the circumstances of the crime and the nature and extent of Eva's injuries weighed against defendant's claim that he was sleepwalking during the attack. The evidence suggested that Eva was attacked with a flowerpot while she was awake and standing in the room and that a knife was used to cut the back of her neck while she lay on the floor. There was no physical evidence that any part of the attack occurred in the bed. There were no weapons or blood on the bed. The circumstances of the attack were far more complex than anything defendant had previously done while sleepwalking, such as sitting up in bed, punching a hole through a wall, or walking out a window. Multiple weapons were used, including a knife, fork, and a flower pot taken from outside the room, brought inside, and used to strike Eva repeatedly on the head. Although defendant had no recollection at all concerning previous sleepwalking incidents, he testified at trial that he recalled certain details of the attack on Eva, including being in an "all out struggle" with a male intruder, throwing a flowerpot, and feeling threatened. There was overwhelming evidence that defendant had engaged in violent or aggressive behavior toward others while he was conscious and not sleepwalking. In light of the evidence, it is unlikely that the jury would have found defendant's sleepwalking defense to be credible, even absent the few limitations on the expert testimony imposed by the trial court. Any error was harmless beyond a reasonable doubt.

B. Hearsay Statements

***11** Defendant contends the trial court's admission of various hearsay statements made by Eva violated state law and his Sixth Amendment right to confront a witness. He challenges the following statements: (1) Eva's statement to her son, Levi Loy, that she was afraid of defendant; (2) Eva's statement to her niece, Lanelle Piro, that she was terrified of defendant, but that he was like a drug for her and she could not get away from him; (3) Eva's statement to Piro that she was anemic and bruised easily, that one bruise on her thigh was caused by defendant biting her; (4) Eva's statement to another niece, Annette Mason, that her bruises were caused by "rough sex"; (5) Eva's statements to a friend, Alana Bast, that defendant had gone through a plate glass window in her apartment and that Eva left the apartment because she was afraid;[4] (6) Eva's statement to Piro that once, while she and defendant were watching television, defendant grabbed her by the throat and said, "Stop fucking looking at me like that." The attorney general concedes that statements three, four, five and six were hearsay statements that did not meet any exception to the hearsay rule under California law, but argues that their admission was harmless. The attorney general argues that statements one and two were admissible under Evidence Code section 1250 as statements of Eva's then existing mental state. We hold that the trial court erred by admitting all of the challenged hearsay statements, but find the errors to be harmless.

1. Statements of Eva's Mental State

Evidence Code section 1250 states in relevant part: "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation

at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant....” “A prerequisite to this exception to the hearsay rule is that the declarant's mental state or conduct be factually relevant.” (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.) A victim's out of court statements expressing fear of the defendant are admissible under Evidence Code section 1250 only when the victim's conduct in conformity with that fear is in dispute. (*People v. Ruiz* (1988) 44 Cal.3d 589, 608.) It is not admissible to explain the defendant's conduct or to prove guilt. (*Id.* at p. 609.) “[A] victim's prior statements of fear are not admissible to prove *the defendant's* conduct or motive (state of mind). If the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill.” (*Ibid.*)

***12** Here, Eva's mental state or conduct was not at issue, nor was it factually relevant to any element or circumstance of the crime. She was involved in a consensual relationship with defendant, and there was no indication that she was attempting to end that relationship. The evidence showed that Eva went willingly with defendant to Catalina Island, and that she even purchased the tickets and arranged for lodging there. (Compare *People v. Hernandez, supra,* 30 Cal.4th 835 [hearsay statement by victim admissible as relevant to element of an offense, when victim's fear of defendants made it unlikely that victim would voluntarily have associated with them]; *People v. Waidla* (2000) 22 Cal.4th 690, 723 [victim's statement that she was afraid of defendants relevant to lack of consent, a material element in crime of robbery].) Defendant claimed that he was unconscious and sleepwalking during the crime, not that he acted in self-defense or that the killing was accidental. (See *People v. Garcia* (1986) 178 Cal.App.3d 814, 822 [where defendant claims self defense or that the killing was accidental, statements by the victim showing fear of defendant admissible to show that the victim would not likely have been an aggressor against the defendant].) The statements at issue do not fall under the hearsay exception set forth in Evidence Code section 1250, and the admission into evidence of such statements was error. As we discuss, however, that error was harmless.

2.Harmless Error

Admission of the challenged hearsay statements, even if error, was harmless. Eva's statements that her bruises were caused by her own clumsiness, “horseplay,” “playing around,” or “rough sex” were not inculpating. The challenged statements were also cumulative of other direct, admissible evidence concerning Eva's bruises and that those bruises were likely caused by defendant. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1129 [“if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless”].) Piro, Mason, Shockley and Bast all testified that they personally observed Eva's bruises during her relationship with defendant, and that she had no similar bruises before the relationship. Admission of Eva's statements to Bast about the incident in which defendant broke through the plate glass window of Eva's apartment was harmless in light of the admissible statements concerning that incident that Eva made to her estranged husband, Karl, and to Officer Frank Hernandez. Defendant's argument that he was prejudiced by hearsay statements that portrayed him as violent and abusive is outweighed by other admissible evidence of his violent nature, including an incident in which defendant used a club to smash the hood of another car; his involvement in a physical fight with strangers outside a liquor store on the night he broke into Eva's apartment; his “bumping” a female police officer; and his breaking through Eva's window, wielding a knife, and threatening to gut someone like a fish and name that person after Eva. Admission of the challenged statements was harmless beyond a reasonable doubt.

3.Confrontation Clause

***13** Defendant contends that admission of Eva's hearsay statements violated his Sixth Amendment right to confront a witness. As we discuss, admission of these statements did not violate the Sixth Amendment's confrontation clause.

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that in a criminal proceeding ex parte “testimonial” statements are inadmissible under the Sixth Amendment's confrontation clause unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford, supra,*

541 U.S. at p. 68.) The court overruled *Ohio v. Roberts* (1980) 448 U.S. 56, in which it had previously held that the Sixth Amendment does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability." (*Crawford, supra,* 541 U.S. at p. 42.) The court noted, "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability" and concluded that admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. (*Id.* at p. 62.) The Supreme Court in *Crawford* expressly refrained from defining what constitutes a "testimonial statement" (*Id.* at p. 68 ["We leave for another day any effort to spell out a comprehensive definition of 'testimonial' "]); however, it did offer the following guidance: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*)

The scope of *Crawford, supra,* 451 U.S. 36, is presently under consideration by the California Supreme Court. (*People v. Adams,* review granted, October 13, 2004, S127373.) Pending such determination, the Fourth Appellate District Court of Appeal in *People v. Taulton* (2005) 129 Cal.App.4th 1218, and the Second Appellate District Court of Appeal in *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*), have provided additional guidance for determining what constitutes a "testimonial statement." In *Cervantes,* the court focused on the foreseeability of the potential use of a statement as evidence in a trial and held that a statement made by the defendant to his friend was not testimonial because its use at trial was not foreseeable. (*Cervantes, supra,* 118 Cal.App.4th at p. 173.) The court in *Taulton* disagreed with this approach, choosing instead to focus on whether the statements (in that case, contained in documents) were "prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue." (*Taulton, supra,* 129 Cal.App.4th at p. 1225.)

The statements at issue here are not "testimonial" under any of the suggested guidelines. They were not made at a preliminary hearing, before a grand jury, at a former trial, or to police interrogators (see *Crawford, supra,* 541 U.S. at p. 68). The statements admitted were not made for the purpose of providing evidence in a criminal trial or for determining whether criminal charges should issue (see *Taulton, supra,* 129 Cal.App.4th at p. 1225); nor was it foreseeable that such statements would potentially be used at a trial. (*Cervantes, supra,* 118 Cal.App.4th at p. 173 .) The admission of such statements into evidence accordingly did not violate defendant's Sixth Amendment right to confront witnesses.

DISPOSITION

***14** The judgment is affirmed.

We concur. ARMSTRONG, Acting P.J., and KRIEGLER, J.

All Citations

Not Reported in Cal.Rptr.3d, 2005 WL 1926225

Footnotes

1 *Miranda v. Arizona* (1969) 396 U.S. 868.

2 The seven criteria, discussed *supra,* are: (1) whether there was a reason to suspect sleepwalking based on the person's history or the results of a sleep study; (2) whether the person had a sleepwalking problem at the time of the incident; (3)whether the conduct was seemingly senseless and without motivation; (4) whether the person was perplexed and horrified by the conduct and made no attempt to conceal it; (5) whether there

was amnesia; (6) whether the act occurred during the first third of sleep; and (7) whether there was prior sleep deprivation.

3 The *Kelly-Frye* standard is a limitation on the use of expert scientific testimony and evidence, first set forth in *Frye v. United States* (D.C.Cir.1923) 293 F. 1013, and later adopted by the California Supreme Court in *People v. Kelly* (1976) 17 Cal.3d 24. "The objective of the *Kelly-Frye* rule is to preclude the use of untested and developing scientific methods of fact determination. The proof of a fact in issue is not permitted by use of new or novel methods until it can be shown that the new procedure has achieved reliability." (*People v. Cegers, supra,* 7 Cal.App .4th at p. 995.) This determination turns on whether there is "substantial agreement and consensus in the scientific community" regarding the procedure's reliability. (*People v. Kelly, supra,* 17 Cal.3d at p. 31.) There is some question as to whether or not the *Kelley-Frye* doctrine applies to the type of psychological evidence at issue in this case. (*People v. McDonald* (1984) 37 Cal.3d 351, 373, overruled on another ground by *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *Wilson v. Phillips* (1999) 73 Cal.App.4th 250, 255-256; *People v. Cegers* (1992) 7 Cal.App.4th 988, 995-100.)

4 Defendant does not challenge Eva's statements concerning that same incident that she made to her husband, Karl, or to Officer Frank Hernandez, nor did he object to the admission of those statements at trial.

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