

THE PEOPLE,
Plaintiff and Respondent,
v.
Vilas Vishwanath LIKHITE,
Defendant and Appellant.

B193522

Court of Appeals of California, Second Appellate District, Division One.

August 21, 2008.

Not to be Published

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Susan S. Kim, Deputy Attorney General, for Plaintiff and Respondent.

MALLANO, P.J.

Vilas Likhite appeals from the judgment entered following a jury trial in which he was convicted of attempted theft by false pretenses arising from a police sting operation in which defendant attempted to sell a pastel portrait that he falsely claimed had been drawn by Impressionist artist Mary Cassatt. Defendant contends that his trial counsel rendered constitutionally ineffective assistance by objecting on relevancy and hearsay grounds to evidence of certain artworks rather than reminding the court of an in limine ruling limiting evidence of such artworks under Evidence Code section 352. Concluding that defendant is unable to establish ineffective assistance on direct appeal, we affirm.

FACTS

In late 2003 or early 2004, Gary Peterson became acquainted with defendant. Peterson was told by defendant that he was a medical doctor and in the 1980's had been a professor at the Harvard Medical School. (The prosecution did not challenge these assertions.) Defendant further stated that the Maharajah of Baroda, India, for whom his father had worked, gave his father an extensive art collection, which defendant had inherited upon his father's death. Much of the artwork was depicted in a binder that defendant showed to Peterson, which included documentation from an Australian appraiser verifying the authenticity of the artworks. Defendant asserted that his collection was worth about \$1.5 billion and that he needed to sell some of the artworks to raise cash because his health was poor. Defendant asked Peterson if he knew of any prospective purchasers.

At one point, Peterson visited defendant in defendant's Aliso Viejo condominium. The condominium was small and unkempt and did not appear to Peterson to be the type of place where someone with a \$1.5 billion art collection would live. The artwork at the condominium was stored in a manner that appeared inconsistent with its stated value. Peterson became suspicious and arranged to have 11 of the paintings, including works purportedly by Cassatt, Willem de Kooning, and Hans Hoffman, brought to a gallery to be inspected. The gallery owner told Peterson that the paintings were not authentic. Peterson then returned the paintings to defendant but did not tell him of the gallery owner's opinion.

Peterson later contacted Los Angeles Police Detective Donald Hrycyk, who was experienced in art fraud cases. After conducting an investigation, Hrycyk asked Peterson to cooperate in a sting operation in which Peterson would tell defendant that two Korean businessmen were interested in buying some of the artwork and would meet him in a room at the New Otani Hotel in Los Angeles. Peterson agreed to arrange the meeting, which was ultimately set for December 16, 2004. Audio and video recording devices, which were to be monitored by Hrycyk, were set up in the hotel room.

The meeting took place as scheduled. The two Korean businessmen were actually Los Angeles Police Officers John Byun and Tae Hong, working in plain clothes. A binder of photographs of artwork as well as about 20 pieces of actual artwork were in the room. Over the course of nearly two hours, defendant told the same story as he had told to Peterson about his personal background and how he came to acquire the artwork. Various individual pieces were discussed, including works by Hoffman, de Kooning, Cassatt, and Jackson Pollock, a sculpture by Constantin Brancusi, and a large jade Buddha which was depicted in a photograph in the binder.

During the discussions, Byun offered \$30 million for the Brancusi, a de Kooning, a Pollock, and the Cassatt portrait. Defendant declined the offer. Discussions next focused on the purchase of the Cassatt portrait by itself. Byun offered \$600,000. Defendant rejected the offer, Byun countered with \$750,000, and defendant again rejected the offer. Byun then countered with \$800,000, which defendant accepted. After this agreement was reached, Hrycyk entered the room and took defendant into custody.

Following defendant's arrest, his condominium was searched and 64 paintings and a Buddha statue were recovered. A search was also conducted of a storage unit that defendant rented. A large number of artworks were stacked up in the storage unit, of which 34 were booked into evidence. In a statement to the police, defendant claimed he had inherited the paintings from his father, who had acquired them from the Maharajah of Baroda.

Defendant's older brother testified for the prosecution that his and defendant's father had worked in the maharaja's agricultural department in the 1930's. When the maharaja died in 1939, he did not leave any artwork to the father, and when the entire family immigrated to the United States in 1949 or 1950, there was no art collection. The father later died without a will, and defendant and the brother each inherited about \$4,000.

An array of experts was presented by the prosecution. A Cassatt expert testified that he had been involved with a committee formed in 1989 to revise an earlier catalog of Cassatt works. Defendant submitted the Cassatt portrait to the committee in 1991. The committee determined that the portrait could not be attributed to Cassatt and sent a letter to this effect to a representative of defendant's, to be forwarded to defendant. The committee never received a response to the letter. An art dealer familiar with Cassatt's work testified that the Cassatt portrait had been brought to his gallery in 1999 by defendant or a friend of defendant's, and the expert expressed doubts about its authenticity. An expert on the work of Hoffman was of the opinion that defendant's Hoffman artworks were not authentic. An expert on the work of de Kooning was of the opinion that defendant's de Kooning artworks were not authentic. An expert in mineral science testified that the Buddha seized from defendant's condominium was not made of jade.

Scott Levitt, who is the director of the fine arts department of an auction house, testified about how paintings such as the Cassatt are authenticated. He was of the opinion that defendant's Cassatt was not authentic. Levitt also inspected 20 to 40 other works of art at the police station that had been seized from defendant. Levitt was of the opinion that none was authentic. (Prior to Levitt's testimony, Hrycyk testified that the seized artworks included several works attributed to Jane Peterson and David Hockney. Images of the Petersons were sent to a Peterson expert and images of the Hockneys were sent to Hockney's studio. The information Hrycyk received from both sources was consistent with the opinion later rendered by Levitt that none of the Petersons or Hockneys was authentic.)

The prosecution also presented evidence that in the mid-1980s, defendant told certain persons in Boston that he was the owner of valuable artworks, which he had inherited from his father to whom they had been given by the Maharajah of Baroda. Beverly Hurwitz invested in the artworks but was denied permission to have an expert inspect the artworks and never received any profits. Walter Cecil took some of defendant's artworks, including a Cassatt portrait, on consignment. While in his possession, the artworks were insured by Cecil. When Cecil could not get any of the artworks authenticated, he returned all of them to defendant. Later, sometime in 2000, Cecil learned that defendant was pursuing a claim for loss of artwork based on the insurance that had been purchased by Cecil.

In defense, an art history professor testified that the Cassatt portrait at issue in this case had similarities and consistencies with other Cassatt artwork. It was "conceivable" or "possible" that the portrait was authentic. A second art history professor testified that a snap judgment as to the authenticity of a piece of art is not valid.

DISCUSSION

Defendant contends that his trial counsel rendered constitutionally ineffective assistance by objecting on relevancy and hearsay grounds to evidence of certain artworks rather than reminding the court of an in limine ruling limiting evidence of such artworks under Evidence Code section 352. We disagree.

Before the start of trial, defendant filed multiple motions in limine, one of which sought to exclude evidence of all artworks other than the Cassatt portrait under Evidence Code section 352. The prosecution did not file written opposition.

At the hearing on the motion, reference was made to the court having "reviewed the police reports."^[1] Defense counsel stated he had "received photographs of something on the order of 142 artworks" the police had seized, which was far more than the number discussed at the New Otani. The prosecutor responded that Officers Byun and Hong had looked through the portfolio defendant brought to the hotel and that defendant had told the officers "he was in possession of all these Hockneys, de Koonings, also other Cassatts. . . ." The prosecutor also identified some of the expert witnesses she planned to call.

As the hearing continued, the court stated its understanding from the People "that they would intend to call expert witnesses regarding . . . the jade Buddha, the Cassatt, the de Kooning, and the Petersons. . . ." The prosecutor responded that the court's understanding was correct but asserted that it was relevant to show that none of defendant's artwork was authentic. Defendant argued it "would be improper to extend the consideration of artworks beyond the scope of what was present within the New Otani Hotel on December 16."

The prosecutor later argued: "I think I should be able to go into what the detective found when he eventually arrested the defendant and went to his storage place or wherever he was holding the artwork and what the conditions were and all that stuff, even if I cannot go into what were referred to as the specific artwork examined or anything like that."

The court responded: "I certainly think that these items are relevant. Having these items does provide pretty much instant credibility and trustworthiness. They are in the portfolio. These items are discussed at the New Otani Hotel. [¶] *The motion to exclude the jade Buddha, the Cassatt painting mentioned by [the prosecutor], the de Kooning mentioned by [the prosecutor], and the Petersons is denied. Those will be permitted.*" (Italics added.)

A recess was taken after the court made this ruling, following which defense counsel stated: "Your Honor, it just occurs to me that of course the defendant will be reserving objections on other artworks, on relevance, foundational, and possibly on corpus delicti grounds." The court responded: "Okay."

"To prevail on a claim of ineffective assistance of counsel, defendant ` must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217 [.]) Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington* [(1984)] 466 U.S. [688,] 690 [104 S.Ct. 2052, 2066].) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation. . . ." (*People v. Pope* [(1979)] 23 Cal.3d [412,] 426 [], fn. omitted.) Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694 [104 S.Ct. at p. 2068]; *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)' (*People v. Bolin* (1998) 18 Cal.4th 297, 333 []; see also *Strickland v. Washington, supra*, 466 U.S. 668, 689 [104 S.Ct. 2052, 2065] ["A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.']; *People v. Mendoza Tello* [(1997)] 15 Cal.4th 264, 266 [""[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected."]; *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [] [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel `only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission'].)" (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Defendant's assignment of ineffective assistance concerns evidence of artworks seized from the condominium and storage unit that were not present at the New Otani or depicted in the portfolio shown to the undercover officers during the sting operation. In addition, defendant points to Detective Hrycyk's testimony that he sent depictions of artwork seized from the condominium and storage unit to experts on the works of Peterson and Hockney, which experts rendered opinions that none was authentic.

Defendant concedes that during the relevant portions of Hrycyk's and Levitt's testimony trial counsel interposed objections (which were overruled) on relevancy grounds. Trial counsel also interposed several unsuccessful objections and motions to strike on grounds of hearsay and lack of foundation. But, defendant argues, trial counsel "had a further duty . . . to seek to have this testimony stricken by way of a bench conference in which he could have reminded the court of it's [*sic*] ruling at the time of the in limine motion."

Notwithstanding that defendant moved to exclude evidence of all artwork except the Cassatt portrait and that during oral argument on the motion he appears to have conceded the admissibility of artworks directly related to the meeting at the New Otani, we read the trial court's ruling on the motion in limine as being less than directly responsive to defendant's arguments. In making its ruling, the court used language that was phrased as if the court were responding to a request to exclude only a few specific items; that is, the Buddha and Cassatt, de Kooning, and Peterson artworks. One might draw an inference from the court's language, as defendant does on appeal, that all artwork *not* specifically mentioned had been excluded. But almost immediately after the trial court's ruling defendant reserved objections to "other artworks," thereby suggesting the admissibility of other artworks was open to question. And, as we have noted, defense counsel repeatedly made the objections he had reserved.

We further note that the ruling included permission by the trial court to admit evidence of artworks attributed to Peterson. But nothing in the record has been brought to our attention to suggest that any Peterson artwork was brought to the New Otani meeting or included in the portfolio, thereby adding to the ambiguity of the trial court's ruling.

The record on appeal demonstrates that every aspect of the lengthy proceedings in this case was fiercely contested. In addition to witnesses who participated in events giving rise to the New Otani meeting and the meeting itself, the prosecutor presented many expert witnesses and several persons with whom defendant had dealt in the past. The defense was also litigated to the hilt, with defense counsel filing many motions in limine and engaging in extensive and often aggressive cross-examination of the prosecution's witnesses. Mindful that a ruling on a motion in limine may be reconsidered at any point during the trial (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1231), the defense attorney fought hard for his client at all stages of the proceedings and, not relying on the trial court's favorable albeit ambiguous ruling in limine, made numerous objections to the disputed evidence during the course of trial.

Based on the foregoing, defendant has not made a showing in this direct appeal that defense counsel's performance fell below an objective standard of reasonableness. Defendant's argument that counsel did so must therefore be rejected.

DISPOSITION

The judgment is affirmed.

We concur:

ROTHSCHILD, J.

NEIDORF, J.^[*]

[1] Various police reports were attached as exhibits to a defense motion in limine to limit the People's introduction of expert testimony. Defendant also filed motions in limine to exclude evidence of prior criminal records, exclude evidence of suspension of his license to practice medicine, permit authentication of foreign documents under the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents, and exclude evidence of his knowledge that the Cassatt portrait was not authentic.

[*] Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.