INTRODUCTION

Appellant's claims of error as to authentication and hearsay fail because the appraisal was not admitted into evidence and Appellant waived any error by failing to properly object. Appellant's motion depended entirely on the testimony of his expert witness and the trial court was within its discretion in finding that the witness lacked credibility. Finally, even if Appellant had proved a difference between the agreed price of the residence and its fair market value, the court was within its discretion in finding that the difference was not a mistake. This Court should affirm.

FACTS AND PROCEDURAL HISTORY

Judgment of dissolution and property agreement.

Following separation, in August 2003, Appellant, FK, prepared a written Agreement Regarding Community Property (CT 11), setting forth agreed values for community assets and the manner of their division, including the community residence, valued at $535,000CT 11). The agreement was incorporated into a judgment filed October 24, 2003CT 4, 9).

The agreement called for Respondent, CK, to receive the residence, refinance it, and buy out Appellant's interest for $30,000. (CT 11, ¶ 1). Respondent agreed to pay Appellant an additional $3500 to equalize the division of certain personal property. (*Id.* ¶ 4). The agreement did not address the parties' respective retirement plans and some other assets. (*Id.*)

Respondent's motion to adjudicate omitted assets.

On May 3, 2004, Respondent filed an order to show cause to adjudicate omitted assets pursuant to Family Code section 2556. (CT 5-12). The parties engaged in discovery and exchanged declarations of disclosure. (CT 14).

At the July 13, 2004 hearing, the parties reached a stipulation. (CT 13, 99-105). They expressly ratified their property agreement and after accounting for the values of the omitted assets, agreed to reduce Respondent's equalization payment to Appellant to $28,000. (CT 71).

The parties further stipulated to retain an actuary to value their retirement plans, to discount to present value any amount necessary to equalize the plans, and to subtract that amount from the $28,000 owed by Respondent to Appellant. (*Id.*)

After the stipulation was recited on the record, the court sought to clarify it by asking, "you expect that . . . that sum will . . . affect the $28,000, increasing it if Wife's pension plan is greater or reducing it if Husband's pension valuation is greater?" Appellant's attorney responded, "that's correct, your Honor." (CT 101). The Judge then confirmed that each party understood and agreed to the stipulation as recited. (CT 104-105). The court set a compliance-review hearing for September 28, 2004. (CT

73). The stipulated order was reduced to writing, approved by counsel, and filed July 30, 2004. (CT 71).

The actuary retained to evaluate the retirement plans calculated that equalization required Appellant to pay Respondent $17,322.08 (CT 109-113) which, when discounted to present value by 27.5%, equals $12,558.51. (CT 114). Respondent therefore offered to pay Appellant $15,441.49 ($28,000 minus $12,558.51) in full and final equalization of the division of community property. (*Id.*) Appellant rejected the offer.

Appellant disputes intent of stipulation.

At the September 28, 2004 compliance-review hearing, Appellant claimed that a buy-out of interests in the retirement plans was not the intent of the stipulation. (CT 118-127). Instead, Appellant wanted to receive the full $28,000 property-equalization payment and to equalize the retirement plans with a qualified domestic relations order ("QDRO"). (*Id.*) Because of the disagreement on the stipulation, the judge advised the parties to obtain a transcript of the July 13, 2004 hearing and to file appropriate motions. (CT 127-129).

Respondent's motion to enforce the July 30, 2004 order.

Respondent filed a motion, with a copy of the July 13, 2004 transcript attached (CT 99-105), seeking an order enforcing the terms of the

July 30, 2004 stipulated order and confirming that $15,441.49 paid by Respondent to Appellant would equalize the division of community property. (CT 137). The hearing was set for December 7, 2004.

Respondent's motion to vacate judgment.

On October 21, 2004, Appellant filed a motion under Family Code section 2122, subdivision (e), to vacate the judgment on the ground that the value he had assigned to the family residence in the settlement agreement was too low due to mistake of fact. (CT 17-67). The hearing was set with Respondent's motion on December 7, 2004. (CT 17).

Testimony of RM.

At the hearing, Appellant called RM, a real estate agent, as an expert witness. (RT 7). No inquiry was made as to Mr. M's qualifications as an expert, but he volunteered that he is "not a licensed appraiser" (RT 17) and that he "didn't prepare an appraisal." (RT 19). He also conceded that he was a former co-worker and personal friend of Appellant. (RT 20-21).

Mr. M referred to a Comparative Market Analysis he had prepared, listing prices for sales between February and December 2002 of seven properties that he deemed comparable to the K residence. (CT 55-66). Based on his analysis, Mr. M opined that the community residence had a present fair market value between $621,479 and $653,350. (RT 8).

On cross-examination, Mr. M claimed that the price for which the parties purchased their house in 2002 ($495,000) was no indication of its fair market value at that time. (RT 12, 26). Mr. M did not know the year—2003—in which the parties had agreed to the value of the property (RT 12) and in arriving at his opinion, he did not consider the price of any homes sold during that year. (RT 12).

Respondent's counsel referred to an appraisal of the home dated July 2003. (RT 15). The appraisal was not marked for identification, not offered into evidence, and not read into the record. (RT 15-20, 24-27). Mr. M did not consider the prices of the three homes listed in Respondent's appraisal, which sold in 2003, and which are located respectively .02, .09, and .76 miles from the K home. (RT 18-19). The "comparable" homes used by Mr. M are all at least two miles from the K home (CT 64; RT 8-9). Some of Mr. M's "comps" are in a more "upscale housing development" than the K property. (RT 9, 54). Some are tri-level homes (RT 11), two have built-in pools (RT 10), and six have three-car garages (RT 10). TheK home has none of these amenities. (*Id.*)

Testimony of Appellant.

Appellant testified that based on reading the newspaper from time to time, he "guessed at" the $535,000 price for the residence stated in the

property settlement agreement. (RT 30-31). Appellant thought that price was fair, but he "just wanted out of the marriage" and Respondent "can have the majority of the money." (RT 31).

Testimony of Respondent.

Respondent obtained the appraisal for the purpose of refinancing the residence, as called for by the property settlement agreement. (CT 11, ¶ 1; RT 33). Respondent believed that the house was worth about $500,000. (RT 33).

Trial court's decision on Appellant's motion.

The trial court denied Appellant's motion to vacate the judgment. (RT 52). The court was "not impressed" by Appellant's expert and did not believe he was qualified to establish property values (RT 53, 55), ultimately finding that Mr. M lacked credibility. (RT 57). Moreover, the court did not believe Mr. M's evidence was relevant because his purported comparables were not in fact comparable to the K residence. (RT 53-54, 57). In sum, the trial court held that Appellant failed "to sustain the burden . . . of proving that there was a material . . . mistake of fact in this case." (RT 54-56).

Noting that Appellant had previously ratified the property agreement, including the value attributed to the residence (RT 55), and that the parties

had relied on the ratification, the trial court found that undoing the agreement would be unfair to Respondent. (RT 56).

Finally, the court observed that Appellant clearly had intended from the outset to give Respondent the benefit of an unequal division of community property. (RT 56). The fact that the degree of the inequality turned out to be greater than Appellant thought did not establish that a mistake was made. (RT 56). The court stated that its reasons for the decision, recited orally on the record, would constitute the statement of decision. (Code Civ. Proc., §632, last sentence; RT 59, 60-61).

Order appealed from.

The court did not direct the preparation of a formal order. Appellant appeals from the minute order of December 7, 2004. (CT 206).

AUTHORITIES AND ARGUMENT

1. Appellant's evidentiary argument fails because the appraisal was not admitted into evidence and Appellant failed to state a proper objection.

A. The standard of review is abuse of discretion.

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639, quoting *People v. Alvarez* (1996) 14 Cal.4th 155, 201). The trial court's "discretion is only

abused where there is a clear showing it exceeded the bounds of reason, all of the circumstances being considered." (*Id*. p. 640, quoting *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32-33).

The standard of review for determining whether a witness may be cross-examined about a document for purposes of impeachment is abuse of discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 530).

B. The appraisal was not admitted into evidence and is therefore not subject to objection under the authentication or hearsay rules.

The hearsay rule (Evid. Code, §1200, subd. (a)) and the authentication rule (Evid. Code, §1401, subd. (b)) operate to preclude the admission of hearsay and unauthenticated documents into evidence. An objection based on hearsay or lack of authentication is inapplicable to a document not offered into evidence. (*Davis* p. 530). Here, the appraisal was not marked for identification and was neither offered nor admitted into evidence. (RT 15-20; 24-27). The reporter's transcript fails to support Appellant's contention that Respondent's counsel "read the appraisal into the record." (*Id*.) Specifically, Respondent's counsel did not mention the property-value opinion stated in the appraisal.

C. Respondent's counsel's reference to the appraisal during cross-examination of Appellant's expert did not constitute prohibited confrontation of the witness with hearsay opinion.

Appellant did not object in the court below, and has not argued in this Court, that Respondent's reference to the appraisal in cross-examining Appellant's expert was improper under Evidence Code section 721, subdivision (b). Nonetheless, Respondent will briefly address the issue.

The trial judge asked that Mr. M be provided with a copy of the appraisal merely for the convenience of the witness. (RT 17). The questions to Mr. M could have been asked without reference to the appraisal or any other document. Respondent's counsel asked the witness about three houses close to the subject property that had sold for certain prices. (RT 16, 18-19). The fact that counsel learned about the three properties from a written appraisal does not mean that the appraisal was "used to cross-examine" the witness.

Evidence Code section 721, subdivision (b), states the conditions under which an expert witness may be cross-examined regarding any "scientific, technical, or professional text, treatise, journal, or similar publication." The purpose of the rule is "to prevent an adverse party from getting before the trier of fact the inadmissible hearsay views of an absent expert . . . ." (*McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 683).

Here, even if the appraisal could somehow be characterized as a "text,

treatise, journal, or similar publication," Respondent's attorney never mentioned the hearsay opinion of value stated in the appraisal. Therefore, Appellant sustained no prejudice from the reference to the appraisal in cross-examination.

D. Appellant waived his objections by failing to raise them in the trial court.

Appellant's counsel objected to the appraisal on the purported ground that "there has been no appraisal, no other evidence submitted in opposition to the market analysis." (RT 15). Counsel made no mention of hearsay or authentication. (RT 15-20; 24-27).

Evidence Code section 353 provides that a finding or decision shall not be reversed by reason of the erroneous admission of evidence unless an objection appears of record that was timely made and so stated as to make clear the specific ground of the objection. In *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, plaintiff objected at trial to the admission into evidence of a release, but failed to state relevancy as the ground for the objection. (*Id*. p. 1261). The court of appeal held that if plaintiff wished to appeal on the ground of relevancy, he must have specifically stated that ground at trial. (*Id*., citing 3 Witkin, *Cal. Evidence* (4th ed. 2000) *Presentation at Trial* §371 pp. 459-460).

Similarly, in *People v. Williams* (1997) 16 Cal.4th 635, our supreme

court held that the defendant's failure to object to the introduction of a transcript of a tape-recorded interview for lack of authentication waived the issue on appeal. (*Id*. p. 768, citing *People v. Sims* (1993) 5 Cal.4th 405, 448).

Here, having failed to raise hearsay or authentication objections at the hearing, Appellant waived those objections on appeal.

E. Appellant suffered no prejudice from Respondent's reference to the appraisal in cross-examination because there was other substantial evidence on which the court could have based its finding that Appellant's expert lacked credibility.

Even if it was error to overrule Appellant's objection to the appraisal, the California Constitution prohibits reversal unless the error results in prejudice amounting to a miscarriage of justice.

> In order to justify . . . reversal . . . on the ground of erroneous admission . . . of evidence, the reviewing court must be of the opinion . . . that the error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4 1/2. The burden rests upon the party complaining not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal. . . .
>
> (*Meyer v. Lindsley* (1941) 42 Cal.App.2d 698, 700).

An appellate court "must accept as true all evidence tending to establish the correctness of the trial judge's findings, resolving all conflicts in the evidence in favor of the prevailing party and indulging in all legitimate and reasonable inferences to uphold the judgment." (*Marriage of Bower* (2002)

96 Cal.App.4th 893, 899). Where a decision is supported by substantial admissible evidence, a reviewing court will presume that the trial court rested the decision on that evidence and ignored any inadmissible evidence. (See, *Valdez v. Clark* (1959) 173 Cal.App.2d 476, 478). Here, the trial court noted Mr. M's lack of qualifications and found that the purported comparables he relied on were not truly comparable to the subject property. (RT 53- 54, 57).

Appellant called Mr. M to prove that the value the parties had given to the residence in their 2003 agreement was too low. Yet Mr. M did not know the year in which the agreement had been signed (RT 12) and did not consider any 2003 home sales in his opinion. (RT 8). And Mr. M insisted that the price the Ks paid for the house was irrelevant to the issue. (RT 12, 26). These deficiencies along with the evidence of Mr. M's bias (RT 20-21) were more than sufficient for a reasonable trier of fact to rule that Appellant had failed to carry his burden of proof, regardless of the appraisal now complained of.

2. The trial court was within its discretion in finding that the value attributed to the residence in the parties' agreement was not a mistake.

A. The standard of review is abuse of discretion.

Appellate courts will disturb trial court rulings only upon a clear showing of abuse amounting to a miscarriage of justice. (*Blank v. Kirwan*

(1985) 39 Cal.3d 311, 331). Any conflict in the evidence or reasonable inferences from the facts will be resolved in support of the trial court's decision. (*Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358).

B. The trial court found that Appellant's expert lacked credibility.

Appellant's expert, Mr. M, conceded that he was not qualified as a real property appraiser. (RT 17). The court found that Mr. M was not qualified to establish property values, observing that "I don't believe that he is to be believed." (RT 53. See also *id*. pp. 55, 57).

Witness credibility is entirely within the province of the trial court. (*Huang v. L.A. Haute* (2003) 106 Cal.App.4th 284, 291 & fn.7). Where the court, sitting as the trier of fact, does not believe a witness' testimony, a court of appeal will not second-guess the court's credibility calls or reweigh the evidence. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 254). Appellant's theory of mistake rested entirely on the testimony of his expert witness. If the court disbelieved that witness, then it had no choice but to deny Appellant's motion.

C. Even if the agreed value of the residence was less than its market value, the court could reasonably conclude that no mistake had occurred.

An order correct on any theory will be affirmed, even if the trial court's reasoning is erroneous. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325,

329-330; *see* Eisenberg, Horvitz, & Wiener, *Cal. Prac. Guide: Civil Appeals & Writs* (Rutter Group 2005) ¶ 8:214). Thus, even if Appellant had proved a difference between the agreed value and the fair market value of the residence, the court was well within its discretion in finding that the difference was not a mistake.

It was clear to the court that Appellant had intended to give Respondent the benefit of an unequal community property division. (RT 56). Appellant "just wanted out of the marriage," even if Respondent got "the majority of the money." (RT 31). The court held that just because that majority turned out to be more than Appellant thought did not prove that it was a mistake. (RT 56).

3. Conclusion.

Nearly a year after he set the value of the community residence, and after ratifying that value in court, Appellant was disappointed by the valuation of the parties' retirement plans. Appellant tried to compensate for the valuation by claiming that the agreed value of the residence had been a mistake. He persuaded a friend to draft a market analysis using comparables that were not in fact comparable to the subject property.

The trial court wisely saw through Appellant's scheme and denied his motion to vacate the judgment. Still dissatisfied, Appellant appeals to this Court grasping at the straw of erroneous admission of evidence, despite

having failed to preserve a proper objection at trial. Substantial admissible evidence overwhelmingly supports the order appealed from and this Court should affirm it.

CERTIFICATION OF WORD COUNT

The undersigned certifies pursuant to Rule of Court 14(c) that the computer count of the number of words in the foregoing brief is 3,071.

Executed August 1, 2005 at Los Gatos, California.

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