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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ALVAREZ,

Defendant and Appellant.

B230405

(Los Angeles County
Super. Ct. No. BA330270)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald H. Rose, Judge. Affirmed in part, reversed in part and remanded.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Alvarez appeals from the judgment entered after a jury convicted him of first degree murder and second degree robbery and found true a criminal street gang special circumstance related to the murder and firearm use and criminal street gang allegations as to both offenses. Alvarez does not challenge his second degree robbery conviction or the special allegations related to that offense. He, however, contends the judgment with respect to his first degree murder conviction should be reversed because the trial court prejudicially erred in limiting the testimony of his psychologist's expert testimony regarding his history with attention deficit hyperactivity disorder (ADHD). We agree and thus reverse the judgment with respect to the first degree murder conviction and attendant special circumstance and allegations.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information, dated October 3, 2008, charged Alvarez with the murder of Erwin Escobar (Pen. Code, § 187, subd. (a))¹ and the second degree robbery of Alberta Diaz (§ 211). As to the murder count, the information alleged a special circumstance under section 190.2, subdivision (a)(22), that Alvarez intentionally killed Escobar while an active participant in a criminal street gang and the murder was carried out to further the activities of the gang. It included firearm use allegations under section 12022.53, subdivisions (b) and (d), and criminal street gang allegations under section 186.22, subdivisions (b)(1)(C) and (4).² As to the robbery count, the information contained a firearm use allegation under section 12022.53, subdivision (b), and a criminal street gang allegation under section 186.22, subdivision (b)(1)(C).

¹ Statutory references are to the Penal Code.

² The information also included an allegation as to the murder count of firearm use under section 12022.53, subdivision (c), which the People dismissed before jury instructions and deliberation.

2. *The Evidence Presented at Trial*

a. *The People's evidence*

On September 24, 2007, Escobar, then 14 years old, accompanied his brother, a friend and the friend's cousin in a white car to purchase a vehicle for his brother. Between 9:00 p.m. and 10:00 p.m. that evening, the group, two in the white car and two in the car purchased by Escobar's brother, returned to the apartment building where Escobar lived. They planned to attend a birthday celebration for Escobar's mother that night. The apartment building was in territory claimed by the 18th Street gang, a rival of the Rockwood gang, although neither Escobar nor any of the others in his group was an 18th Street member.

As the group stood outside talking to Escobar's mother, who was on the balcony looking at the vehicle just purchased, Alvarez, a Rockwood gang member known as "Baby Shadow" with prominent Rockwood tattoos,³ approached with another man, known as "Little G," screaming "18th Street, are you guys down with the 'E,' you guys down with the neighborhood." Alvarez walked three times around the white car in a "gang-affiliated way," which some said resembled dancing, but served the purpose of "pump[ing] fear into other people." Alvarez repeated the comments about 18th Street in a tone that was "accelerat[ed]," "energized," as though he were under the influence, but did not slur his words or talk fast. Alvarez then pointed a gun at Escobar and fired five rounds. He and his companion ran from the scene. Escobar died of multiple gunshot wounds.

About an hour later, Alvarez and his companion appeared at a taco truck operated by Diaz in territory claimed by Rockwood, approximately two miles from the scene of the shooting. Diaz recognized Alvarez and his companion. Alvarez ordered Diaz to give him food and showed her the gun in his waistband. Alvarez spoke in a loud voice, saying bad words, asking Diaz "do you know who I am" and showing her his Rockwood tattoos. He mentioned the name "Shadow" and said Rockwood was in charge. Diaz thought

³ According to the probation report, Alvarez was 21 years old on September 24, 2007.

Alvarez was drunk and on drugs, and he acted “very angry” and excited, but not crazy. Diaz told Alvarez to calm down because she feared for her life and the life of her daughter, who was in the truck, and gave him food, although he did not pay for it. About that time a marked police car approached. Alvarez became nervous, said “I killed a fucker” to Diaz and tried to hand her the gun. When Diaz did not take the gun, Alvarez tossed it, and it landed inside the taco truck. Four casings found at the scene where Escobar was shot were of the same caliber as those recovered from Escobar’s body during an autopsy, and all of the casings were fired from the gun that landed inside the taco truck.

After tossing the gun, Alvarez, holding a burrito, walked away from the taco truck at a quick pace. The police directed him four or five times to stop, and Alvarez yelled back at them in a loud and aggressive tone, using bad language. Alvarez finally turned around and stopped. The police arrested him. During the arrest, Alvarez was calm and did not appear to be under the influence of drugs or alcohol.

A police officer testified as an expert on the Rockwood gang, describing the 18th Street gang as one of its principal enemies. Rockwood members engaged in murders, attempted murders, robberies and drug sales. A Rockwood member was convicted of an attempted murder in January 2005, and another Rockwood member was convicted of assault with a deadly weapon in September 2007. Alvarez, based on his tattoos and admissions to the police, was a Rockwood member. Given a hypothetical based on the evidence of Escobar’s death, the officer opined that the shooting of Escobar was committed for the benefit of, at the direction of or in association with Rockwood. According to the officer, going into enemy territory, “hunting” for victims and then killing an innocent boy would put fear and intimidation into the rival gang’s territory and elevate the status of both Rockwood and the individual gang member. Given another hypothetical based on the events at Diaz’s taco truck, the officer opined that the taking of food from the truck also was for the benefit of, at the direction of or in association with Rockwood. The officer explained that the taking intimidated the community by commanding control of Rockwood territory.

b. *The defense's evidence*

Dr. Deborah Miora, a clinical psychologist, testified that she had been hired to determine whether Alvarez suffered from a mental disorder. To make that determination, Dr. Miora interviewed Alvarez, performed certain psychological tests on him and reviewed his psychological reports, educational evaluations and associated records, foster care records, child dependency court records, records from the Department of Children and Family Services, and arrest reports relating to this case. She was unable to complete the psychological testing of Alvarez because he was malingering and not being honest in some respects. Dr. Miora, however, concluded that Alvarez suffered from ADHD, which contained an element of impulsivity.

Dr. Miora explained that “[c]hildren or adults diagnosed with hyper attention deficit hyperactivity disorder, the impulsive type, tend to blurt things out, to respond without thinking before taking action. They are often described as running like a motor and not being able to be turned off. They’re often described as restless and they often blurt things out in inappropriate ways and thus are experienced as intrusive and not contained” “Behaviorally, these are the kind of children who might come up and touch other kids impulsively and they don’t get a positive reaction in that way. Socially it can be problematic. Also in group settings, if they’re blurting things out and interrupting others, that’s not a good thing. So, yes, behaviorally it’s the idea of not having a mediator between an impulse to do something and actually doing it, so no thought interceding between wanting something or being inclined to do something and actually doing it.” Dr. Miora said that impulsivity “could interfere with deliberation to the extent that [an individual with ADHD] might not . . . sit back and consider should I do it, what might happen if I do it and do that kind of thinking that most of us do when we’re about to do something, not all things.” According to Dr. Miora, that type of impulsivity possibly could impair the ability to deliberate, premeditate and act willfully before shooting someone.

On cross-examination, Dr. Miora testified that between three to five to eight to ten percent of the general population has been diagnosed with some level of ADHD. In her

report, she documented one incident from her interview with Alvarez that supported her characterization of him as impulsive, namely, his irate reaction to and inability to focus after receiving a lunch that did not have cookies in it. Dr. Miora explained that she could not say with certainty that Alvarez suffered from ADHD, partially because she had been unable to complete testing of him, but said that it is more likely than not that he has the disorder and that it is severe. She acknowledged that a person with ADHD, even a severe case, could form intent to take action and have a motive for a shooting. She also stated that, with respect to a shooting, “[i]f the scenario is . . . where there was intention from let’s do this, let’s go into a neighborhood” with another person, “that is quite possible” that the actions of the individual with ADHD point toward thoughtfulness and deliberation and away from impulsivity.

3. *The Jury’s Verdict and Sentencing*

The jury found Alvarez guilty of first degree murder and second degree robbery. As to the murder, the jury found true the special circumstance under section 190.2, subdivision (a)(22); the criminal street gang allegations under section 186.22, subdivision (b)(1)(C) and (4); and the firearm use allegations under section 12022.53, subdivisions (b) and (d). As to the robbery, the jury found true the criminal street gang allegation under section 186.22, subdivision (b)(1)(C), and the firearm use allegation under section 12022.53, subdivision (b).

The trial court sentenced Alvarez to state prison for life without the possibility of parole for the first degree murder, plus 25 years to life for firearm use under section 12022.53, subdivision (d).⁴ For the second degree robbery, the court imposed a consecutive term of 25 years, consisting of the upper term of five years, plus 10 years for firearm use under section 12022.53, subdivision (b), and 10 years for the criminal street gang enhancement under section 186.22, subdivision (b)(4).

⁴ The trial court stayed execution of sentence on the 10-year firearm use enhancement under section 12022.53, subdivision (b), and the life term, with a minimum parole eligibility date of 50 years, on the criminal street gang allegation under section 186.22, subdivision (b)(4).

DISCUSSION

At trial Alvarez did not contest that he shot Escobar, but maintained only that he did not possess the requisite intent to kill, in particular the premeditation, deliberation and willful conduct necessary for a first degree murder conviction. On appeal he contends that the trial court prejudicially erred by limiting Dr. Miora's testimony to prevent her from describing his childhood circumstances and behavior documented in the reports that she reviewed and that supported her opinion that Alvarez suffered from ADHD. We agree that the court's limitation of Dr. Miora's testimony warrants reversal of the judgment as to the first degree murder conviction.

“Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state. An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed [defendant] actually harbored those mental states at the time of the killing.” (*People v. Coddington* (2000) 23 Cal.4th 529, 582-583, fns. omitted, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Cortes* (2011) 192 Cal.App.4th 873, 908 [“sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged”].)

An expert testifying on direct examination regarding a defendant's mental illness may state the "reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion." (*People v. Campos* (1995) 32 Cal.App.4th 304, 308.) "[E]xperts should generally be allowed to testify to all facts upon which they base their opinions (citations). "An expert may generally base his [or her] opinion on any 'matter' known to him [or her], including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon' for that purpose." [Citations.] Although an opinion may be predicated on hearsay, the trial court has discretion, to 'exclude from the expert's testimony "any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper or probative value.'" [Citation.] "[P]rejudice may arise if, "under the guise of reasons," the expert's detailed explanation "[brings] before the jury incompetent hearsay evidence."'" [Citations.]" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324-1325.)

Under this authority, the trial court properly allowed Dr. Miora to testify to her conclusion that Alvarez suffered from ADHD and to list the reports from Alvarez's childhood on which she relied, including psychological, educational, juvenile dependency court, foster care and Department of Children and Family Services records, to reach that conclusion. The court correctly precluded Dr. Miora from testifying to conclusions reached in those reports. (See *People v. Campos, supra*, 32 Cal.App.4th at p. 308.) Nevertheless, given their relevance and reliability, the court erred by precluding Dr. Miora from testifying to notes in those reports regarding Alvarez's childhood behavior and circumstances, which included "head banging," "problems controlling behavior," learning difficulties, hospitalizations and medication, all of which supported her opinion that Alvarez suffered from ADHD. (See *People v. Bordelon, supra*, 162 Cal.App.4th at pp. 1326-1327 [psychologist expert should have been permitted to testify about notes of what defendant said during an interview with the parole psychologist because it was a basis for his opinion that defendant suffered from a psychotic disorder not otherwise specified]; *People v. Cortes, supra*, 192 Cal.App.4th at p. 910 [psychiatric expert "should have been permitted to testify about defendant's

upbringing and traumatic experiences as a child and/or adolescent, inasmuch as defendant's prior traumatic experiences informed [the doctor's] opinion, and explained the connection between defendant's diagnoses, his mental state and his behavior"].⁵

The trial court's limitation of Dr. Miora's testimony prejudiced Alvarez's case. Alvarez's defense to the first degree murder charge was that, given his condition of ADHD, he acted impulsively in shooting Escobar and thus did not form the mental state of premeditation and deliberation necessary for a first degree murder conviction. The limitations on Dr. Miora's testimony prevented Alvarez from fully developing his defense, as the jury was unable to evaluate his childhood circumstances and behavior to the extent they supported Dr. Miora's opinion that he suffered from ADHD. Moreover, hearing testimony about Alvarez's childhood circumstances and behavior, as support for Dr. Miora's opinion, would have provided the jury with a means to connect her ADHD diagnosis with his mental state and conduct on the night of the shooting. Given that witness descriptions of Alvarez's behavior before and after the shooting ranged from "accelerat[ed]" to "energized" to "excited" to "very angry," it is reasonably probable that the limitations on Dr. Miora's testimony precluded the jury from properly considering the ADHD diagnosis in relation to the premeditation and deliberation necessary to convict him of first degree murder. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Coddington*, *supra*, 23 Cal.4th at pp. 582-583; *People v. Cortes*, *supra*, 192 Cal.App.4th at pp. 912-913.)

⁵ Alvarez also maintains that the trial court erred by preventing Dr. Miora from testifying that Alvarez was diagnosed with ADHD before he was seven years old. We disagree. That diagnosis was a conclusion in a report from a nontestifying expert and thus inadmissible. (*People v. Campos*, *supra*, 32 Cal.App.4th at p. 308.)

DISPOSITION

The judgment is affirmed with respect to the conviction for second degree robbery and special allegations related to that offense. The judgment is reversed with respect to the conviction for first degree murder and attendant special circumstance and allegations. The matter is remanded to the trial court. The People may elect to retry Alvarez on the first degree murder charge and attendant special circumstance and allegations. If they do not make such an election, the court shall reduce the first degree murder conviction to second degree murder, reinstate the jury's true findings on the firearm use and criminal street gang allegations attendant to the murder charge and sentence Alvarez accordingly.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.