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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JERET THOMAS NEEDHAM,

Defendant and Appellant.

D066616

(Super. Ct. No. SCD251078)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine Jr., Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jeret T. Needham was severely beaten by his friend Robert Colegrove at Colegrove's home. The beating caused Needham to defecate and Colegrove rubbed

Needham's face in his excrement. Shortly after the beating, Needham returned to Colegrove's home with a gun, heard Colegrove behind a fence and shot Colegrove once in the chest. Colegrove died.

At his murder trial Needham testified he had suffered a concussion, which affected both his ability to communicate with police after the shooting and remember details at trial. Needham was permitted to present evidence from a neuropsychologist with respect to concussions and their symptoms, such as memory loss. The neuropsychologist did not examine Needham and was not familiar with his medical records.

On appeal Needham argues the trial court abused its discretion in excluding testimony from the neuropsychologist with respect to Post Traumatic Stress Disorder (PTSD), and excluding evidence of his history of head trauma. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. January Sexual Assault

Needham and Colegrove had become acquainted through a shared interest in high school wrestling. In January of 2013, Needham was at the garage apartment Colegrove and his girlfriend, Tera Jones, shared. Needham was, by his own admission, drunk. While Jones was making the bed, Needham grabbed at her crotch; she reacted violently and Colegrove escorted Needham off the premises. After Needham left, Jones was upset with Colegrove because he did not do more than escort Needham.

2. Beating

Eight months later, on September 24, 2013, at approximately 1:30 in the afternoon, Needham was in Colegrove's neighborhood again and called Jones and Colegrove to see if he could drop by for a visit. Jones told him it was okay, and Needham went back to the garage apartment. According to witnesses Needham was again drunk, and he and Colegrove got into a fight. As we have indicated, Colegrove beat Needham so severely that Needham defecated in his pants and Colegrove rubbed Needham's face in the excrement.

Colegrove told Needham to leave and as Needham was leaving, Colegrove said: "Make sure you tell your wife and your kids why your face looks like that. Don't ever touch my wife again." For his part, Needham was heard repeating, in a monotone voice, at least four times: "Shouldn't have done that."

3. Killing

About one half hour later, Needham returned to the alleyway in front of Colegrove's garage. Colegrove was standing behind a fence near the garage and a neighbor was outside as well. The neighbor saw Colegrove near the gate and heard a shot. According to the neighbor, before he heard the shot he did not see Colegrove holding a knife, and he did not hear either Needham's or Colegrove's voices.

Needham had returned with a gun and shot through the gate of the fence, hitting Colegrove in the chest, then fled. Colegrove died at the scene; a knife sheath was on a lanyard around Colegrove's neck and a knife was found beneath him. Needham was arrested at his home after a three-hour standoff with police. Following his arrest, police

asked him if Colegrove had anything in his hands when Needham shot him. Needham responded: "I couldn't even see him."

4. Trial

According to Needham, when he initially went to Colegrove's home early in the afternoon of September 24, 2013, he went into the garage area and was struck on the head with a blunt instrument. He fell down and Colegrove kept hitting him with the instrument. Needham testified that he believed he suffered a concussion after the assault.

At trial Needham testified he returned to Colegrove's home after the beating to retrieve his glasses and his cell phone. He testified that he brought a gun because he was afraid Colegrove, a former Navy Seal, would attack him again. At trial Needham testified that as he was standing near the garage door he saw Colegrove on the other side of the gate, Colegrove pulled his knife out and told Needham he was going to kill him. According to Needham he fired his gun because he thought Colegrove would come through the gate and kill him.

Needham testified he was not drunk and denied telling any witnesses he was drunk. Needham also testified that because he had suffered a concussion it made it difficult for him to communicate with police at the time of his arrest or remember specific details, in particular the fact that Colegrove had pulled a knife and threatened to kill him. Needham's expert neurologist testified that a concussion will cause memory loss. The expert conceded that he did not examine Needham and was not familiar with all of Needham's medical records.

The jury acquitted Needham of first degree murder and found him guilty of second degree murder. The jury also found that he had personally used and discharged a firearm causing death. The trial court sentenced Needham to an aggregate term of 40 years to life.

DISCUSSION

As we indicated at the outset, on appeal Needham challenges the trial court's rulings excluding portions of proffered testimony from his expert and testimony from friends and relatives about his history of head trauma. As we explain, we find no error in the trial court's rulings, which in any event were not prejudicial.

I. Expert Testimony

A. Trial Court's Ruling

At trial, Needham offered the testimony of Michael Perrotti, a forensic psychologist, as an expert in brain injuries and concussions. Prior to trial, Perrotti provided the parties with a list of 22 issues he was prepared to discuss during the course of his testimony. Seven of those issues related to PTSD.

Prior to Perrotti's testimony and in response to the trial court's inquiry about the expert's testimony, Needham's counsel stated: "It is my understanding that [the expert] might also talk about [PTSD] related to the . . . beating that Mr. Needham took about an hour before that but sort of all intertwined with concussion. How to fix memory, things like that." Counsel conceded that the expert did not examine Needham, but instead reviewed the preliminary hearing transcript, a video of Needham's police interview, and the medical records from Needham's treatment at UCSD hospital following his arrest.

Counsel also conceded that nothing in UCSD medical records indicated that Needham was suffering from PTSD.

The prosecution initially objected to the expert's testimony as to both concussions and PTSD on the grounds that there was no evidence that Needham suffered either a concussion or PTSD, and that in the absence of any direct evaluation by Perrotti, Perrotti was not able to offer either diagnosis. The trial court permitted Perrotti to offer testimony about the characteristics of concussions and their impact on memory. The trial court did so because, without objection, Needham had testified that, as a result of the beating he believed he had suffered a concussion. The court stated: "[I]f there had been an objection to speculation or lack of foundation to diagnose himself with a concussion, I would have sustained the objection. But he has so testified." The trial court found that Needham's concussion testimony was relevant as an explanation for his failure to tell police about the knife Colegrave pulled, as well as his inability to remember other details about the shooting. The court found that the expert's concussion testimony would be relevant with respect to the credibility Needham's claim that he suffered from a concussion and its impact on his memory.

However, following counsel's concession that nothing in the UCSD medical records indicated that Needham was treated for or diagnosed with PTSD, the trial court excluded any testimony related to PTSD.

B. Analysis

Our reading of the trial court's ruling on the expert's testimony makes it plain it permitted expert testimony about concussions because Needham's testimony established a foundation sufficient to support a finding Needham suffered a concussion on the day of the killing, and excluded expert testimony about PTSD because the trial court did not believe there was a sufficient foundation in the record with respect to the occurrence of PTSD. We find no error.

"The foundational requirements governing expert testimony are reasonably and rationally formulated to ensure the relevancy of such evidence. (See Evid. Code, §§ 801-803.) They are not "applied mechanistically to defeat the ends of justice." [Citations.] Trial courts exercise broad discretion in these matters, consistent with constitutional principles." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1176 (*Ramos*).

"[U]nder Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As we recently explained, "[T]he expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" " (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 770.)

In *Ramos*, the defendant in a prison murder case proffered a prison expert who would testify that conditions in the defendant's cell block explained why a prisoner, such

as the defendant, would need a weapon as a means of self-defense. Because the expert had no personal knowledge about conditions in the defendant's cell block during the period defendant was known to have a weapon, the trial court excluded the expert's testimony. The Supreme Court found no abuse of discretion: "Only after considerable voir dire by both counsel as well as its own questioning of the witness did the trial court conclude Irwin lacked both sufficient personal knowledge of conditions in C section during June and July 1984 and an adequate basis for formulating a relevant expert opinion notwithstanding his general qualifications. [Citation.] It is clear from the record he could only interpolate the likely conditions while defendant was housed in C section, a time he admitted was somewhat unstable. Although the court could have admitted this evidence, leaving its weight to the jury, exclusion was also within the range of discretion." (*Ramos, supra*, 15 Cal.4th at p. 1175.)

The trial court here faced an analogous situation with respect to the proffered PTSD testimony. Perrotti never observed or examined Needham and in particular did not observe or examine him near the time of the killing and his questioning by detectives. There were no medical records which mentioned PTSD. Any PTSD diagnosis or discussion by Perrotti would necessarily be based on Needham's description of the beating he suffered and a great deal of conjecture on the expert's part. Given these circumstances, like the trial court in *Ramos*, here, the trial court could have permitted the expert to testify about PTSD, but it was in no sense required to do so.

II. Relatives' Head Injury Testimony

A. Trial Court's Ruling

Prior to trial the prosecution moved in limine to exclude evidence from Needham's family members about his medical history. In opposing the motion, Needham's counsel explained that Needham suffered a number of concussions as a child, but that medical records of those early injuries were no longer available. In the absence of medical records, counsel stated: "So obviously I was going to try to either bring the records in or bring the treating physicians in for that. Looks like I won't be able to do it. [¶] "What I was hoping to do, though, was have the family members testify not necessarily that he sustained a concussion because I think that would probably be a medical conclusion that only a doctor or maybe physician's assistant could reach. But at least have the family members testify that Mr. Needham had hit his head on several occasions in the past and had gone to the doctor. Sort of leave it at that."

Counsel argued that a history of concussions was relevant because Perrotti was prepared to testify that someone with such a history was more likely to experience a concussion from head trauma, and the concussion would be more severe than mild. Counsel stated: "[T]here's no doubt that Mr. Needham had a concussion. For Dr. Perrotti to come to that conclusion, he looked at the medical records from UCSD, the statements made by Mr. Needham, some other statements made by other percipient witnesses who were at the Colegrove residence that day, and he helped—based it on the fact that Mr. Needham had had concussions in the past.

"That's not the major basis for his opinion that he had a concussion that day, but he goes into it. Because, like I said, if someone has had a concussion in the past, it's easier to get them in the future." (Italics added.)

The trial court agreed that evidence of a concussion which Needham experienced on the day of the killings might be relevant with respect to Needham's perception that he needed to defend himself. However the trial court excluded evidence of prior concussions because they did not assist in analyzing how a reasonable person would have acted on the day of the killing.

B. Analysis

Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" It is axiomatic that we review the trial court's decision to admit evidence under section 352 for abuse of discretion (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737), and we will not disturb that decision on appeal except "on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, the proffered evidence from family members described decades old events and, as counsel conceded, was not proof that Needham had suffered prior concussions. As counsel also conceded, the history of concussions, such as could be inferred from the family's recollection, was not the main basis of the expert's opinion that Needham had

suffered a concussion on the day of the killing. Because the proffered evidence was only of very indirect relevance to the questions of whether Needham acted in lawful or imperfect self-defense, the trial court in no sense abused its discretion in excluding it.

III. Prejudice

As the Attorney General points out, any abuse of discretion in failing to permit either the PTSD evidence of head trauma evidence from family members was not prejudicial. Here, notwithstanding the trial court's rulings, Needham was permitted to present evidence of his concussion and its impact on his mental faculties. The trial court's rulings in no sense deprived Needham of the ability to present his defense theory. Thus, any trial court error in excluding the PTSD and head trauma history evidence, is reviewed under the familiar standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires that we affirm unless it appears that, in the absence of any errors, a more favorable verdict was probable.

Here, the critical issue was Needham's credibility with respect to his convenient and tardy recollection that Colegrove pulled his knife and threatened him before Needham shot him. Needham's trial testimony on this issue was not only contradicted by Colegrove's neighbor, but it was inconsistent with what he told police after he was arrested. Although Needham testified as to the earlier beating, his belief he had suffered a concussion and his lack of memory, and Perrotti corroborated the impact a concussion would have on Needham, the jury plainly did not credit Needham's version of events. The excluded evidence was at most cumulative of the evidence Needham did present and was not likely to have altered the jury's conclusion as to Needham's credibility.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.