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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO HERNANDEZ
VILLALOBOS,

Defendant and Appellant.

E054012

(Super.Ct.No. FSB1004485)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alejandro Hernandez Villalobos admittedly shot and killed his estranged wife.

After a jury trial, defendant was found guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for personally and intentionally discharging a firearm, causing death (Pen. Code, § 12022.53, subd. (d)). He was sentenced to 50 years to life in prison, plus the usual fines and fees.

Defendant now contends:

1. The trial court erred by excluding expert testimony regarding defendant's mental condition.
2. Defense counsel rendered ineffective assistance by failing to request a jury instruction that provocation can reduce first degree murder to second degree murder.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Case.*

In September 2010, defendant's wife Tania left him, taking their baby daughter with her. She moved into a house with her parents and other relatives. Defendant would come over to the house to visit the baby. He also gave Tania money for the baby.

1. *Prior threats and violence.*

After Tania left defendant, there were a number of incidents in which he was threatening or violent toward her.

Once, defendant took the baby without Tania's permission. As a result, there was a confrontation between them; he pushed her, and she cried.

Another time, defendant followed Tania to a mall; once there, he screamed at her and “made . . . a slashing motion across his neck”

On another occasion, defendant ran his fingers across his throat then kissed his fingers; this meant that he was swearing to kill Tania. At the time, defendant also remarked, “[W]e pay for everything in this life.”

Another time, defendant got into the house when Tania was asleep. At first, “he was just looking at her. Then he started saying a bunch of bad words to her and pulling her by the hair.” When Tania said she was calling the police, he “left running.”

Defendant asked Tania’s mother, “[W]hat day d[o] you want your daughter to die?” Later, he said he was “just kidding,” and he asked her “not to say anything to the police.”

Defendant also showed Tania’s mother a gun. He said that some friends had lent it to him, “for fun.”

2. *The shooting.*

On October 24, 2010, around 7:00 p.m., defendant showed up at Tania’s house. He demanded that she show him receipts for the money he had given her for the baby. She laughed and said she was not going to show him any receipts. Defendant then pulled out a gun and fired six or seven shots, killing Tania. Later, the police found two unfired bullets on the floor.

Tania's brother ran in and asked what happened. Defendant said "he was just tired of [Tania] laughing at him." Family members called 911. Defendant waited at the house until the police arrived. He told them that the gun was on the roof, and in fact it was.

After defendant was arrested, he volunteered that Tania "had messed up."

When the police interviewed him, he said that everything had been fine between him and Tania until she became romantically involved with a man named "Junior." After that, "[s]he would tell [him] that she didn't love [him] anymore." He told her, "[W]hat you have done to me . . . I will not be able to forgive[,] so . . . be ready."

Defendant said that he bought a gun "[o]n the street." It did not come with bullets; he bought bullets a day or two before the shooting.

Defendant admitted taking the gun to Tania's house. As he was walking over there, he knew that, "if . . . someone was there [he] wasn't going to shoot," but if Tania was "by herself," "[he] was going to shoot her."

When he arrived, he asked Tania to show him receipts for the money he had given her for the baby. She said, "[O]kay, I'll give them to you" He then took out the gun and shot her.

At one point, the gun "didn't work right[.]" Defendant pulled the clip back; a bullet (or bullets) fell out. Then he "continued shooting"

B. *The Defense Case.*

Defendant testified that Tania moved out after admitting that she had cheated on him.

Two or three weeks before the shooting, Tania told defendant that she was dating Junior, whom she described as a gang member who sold drugs. When defendant said that he wanted to hit Junior, Tania told him that Junior had a gun and would kill him.

About two weeks before the shooting, Tania started telling defendant “how the[] sex was” with her boyfriend. She pushed him; in response, he pulled her hair. She called the police, and he left.

Once, with Tania’s mother’s permission, defendant took the baby for about 15 minutes. Tania got angry; she pushed him and “kept on hitting [him].” He pushed her back once.

Defendant denied the other asserted instances of threats and violence.

About a week before the shooting, Junior phoned defendant. Junior said “[t]hat he was going to kill [defendant]” and “[t]hat he was going to be with Tania now.”

To protect himself from Junior, defendant bought a gun “[o]n the street.” Defendant also testified, however, that he bought the gun “about a month” before the shooting. About two weeks before the shooting, he bought bullets for it.

About a week before the shooting, defendant lost his job.

On the day of the shooting, defendant brought his gun with him in case he ran into Junior. He asked Tania to show him receipts. She refused. They started arguing. Tania said “she was going to go live with Junior. And that [defendant] wasn’t going to see [his] daughter anymore.” She started laughing and making fun of him. At that point, defendant testified, “. . . I pulled out the gun and I shot her.”

He denied intending to shoot her before he arrived at the house. When the police interviewed him, he said what they wanted him to say, “to make it easy, just to get out of there” and because he felt guilty.

Tania’s mother admitted that Tania knew a man named Junior who lived near her parents’ house.

II

THE EXCLUSION OF EXPERT TESTIMONY

REGARDING DEFENDANT’S MENTAL CONDITION

Defendant contends that the trial court erred by excluding expert testimony regarding his mental condition.

A. *Additional Factual and Procedural Background.*

In discovery, the defense produced a report by Dr. Roberto Flores de Apodaca. The People filed a motion in limine asking the trial court to preclude Dr. Flores from testifying about defendant’s capacity to form any mental state at the time of the crime.

As a result, the trial court held a hearing pursuant to Evidence Code section 402. The only witness was Dr. Flores. Dr. Flores was a clinical psychologist. It was stipulated that he was qualified to testify on “the psychological issues presented in this matter”

Dr. Flores had performed a psychological evaluation of defendant.¹ He found that defendant had an IQ of 83, meaning that it was in the lowest 13 percent of the population. A low IQ “tends to make one a little more prone to reacting [to stressors] emotionally rather than cognitively or rationally”

Dr. Flores had not formed any opinions based solely on defendant’s IQ. However, based on defendant’s impoverished upbringing, lack of education, lack of training, and limited occupational experiences, in addition to his low IQ, Dr. Flores believed that defendant had certain “cognitive limitations.” These included a limited ability “to think sequentially, to think cognitively, to problem-solve, to plan ahead”

At the time of the crime, defendant was suffering “economic distress” as well as emotional distress. He felt “abandoned,” “rejected,” and “disdained.” These were “stressors” that “contributed to his behavior”

Dr. Flores concluded: “The set of events surrounding this incident . . . , in my judgment, overwhelmed his coping capabilities, . . . and he shot his wife.”

He admitted that defendant did not have any “mental disorder.”

He also admitted that it was “plausible” that defendant premeditated, and that defendant “may very well have developed a specific intent to kill”

¹ Defense counsel provided the trial court with a copy of Dr. Flores’s report. However, it was not marked as an exhibit, and it was returned to defense counsel at the end of the hearing. The parties have not attempted to augment the appellate record with the report. We therefore presume that it is not material to deciding any of the issues raised. (See Cal. Rules of Court, rule 8.163.)

The trial court ruled: “. . . I’m going to exclude the doctor’s testimony [I]t goes . . . to irresistible impulse or the ability to control rage, which is an element that is within the hands of the jury to make a determination”

B. *Analysis.*

“The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citations.]” (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) “[A] “[decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.”” [Citation.] . . . [A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.’ [Citation.]” (*Id.* at pp. 429-430.)

An expert may give opinion testimony only if, among other things, the opinion is “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact” (Evid. Code, § 801, subd. (a).) “Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.) However, “[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.’ [Citations.]” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Penal Code section 28, subdivision (a) provides: “Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.”

Penal Code section 29 provides: “In the guilt phase of a criminal action, any expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.”

As the Supreme Court has stated: “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.] [Penal Code 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.” (*People v. Coddington* (2000) 23 Cal.4th 529, 582, fns. omitted, overruled on unrelated grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Defendant relies largely on *People v. Nunn* (1996) 50 Cal.App.4th 1357. There, the defendant had been drinking when he fired into a group of farmworkers, striking one of them. (*Id.* at p. 1360.) The defendant testified that he was drunk, that the men were hostile, and that he only intended to scare them. (*Id.* at p. 1361.) A defense expert testified that the defendant had suffered psychological trauma in the Vietnam War and that this could cause a person to overreact to stressful events. (*Id.* at pp. 1362-1363, 1365, fn. 4.) However, the trial court barred the expert from testifying that the defendant’s inebriation, as well as his tendency to overreact, had caused him to fire “impulsively.” (*Id.* at p. 1362.)

On appeal, the defendant argued that the trial court erred by excluding the opinion that he acted impulsively. (*People v. Nunn, supra*, 50 Cal.App.4th at pp. 1361-1362.) The appellate court found no error. It stated: “[I]t was permissible for [the expert] to opine that appellant, because of his history of psychological trauma, tended to overreact to stress and apprehension. It was permissible for him to testify such condition could result in appellant acting impulsively under certain particular circumstances. [The expert] could have evaluated the psychological setting of appellant’s claimed encounter with the [farmworkers] and could have offered an opinion concerning whether that encounter was the type that could result in an impulsive reaction from one with

appellant's mental condition. What the doctor could not do, and what the defense proposed he do here, was to conclude that appellant had acted impulsively, that is, without the intent to kill, that is, without express malice aforethought. The court acted properly in excluding [the expert]'s opinion that appellant fired his weapon impulsively.” (*Id.* at p. 1365, fn. omitted.)

Defendant argues that the opinions proffered in this case were like the opinions held “permissible” in *Nunn*. There is one crucial distinction, however, between this case and *Nunn*. It must be remembered that, under Penal Code section 28, subdivision (a), “[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent” In *Nunn*, the expert testified that the defendant had suffered psychological trauma in the Vietnam War. In other words, the defendant had a mental “disease,” “defect,” or “disorder,” potentially admissible under Evidence Code section 28. Here, by contrast, Dr. Flores admitted that defendant did not have any “mental disorder” or other “pathological” mental condition. Rather, his cognitive limitations arose out of his “personality characteristics” and “intellectual characteristics.”

Defendant now claims that his “psychological conditions” had “some pathological significance.” He also characterizes “a low IQ with judgment impairment and associated pathology” as “a mental defect or disorder.” Once again, however, Dr. Flores agreed that defendant’s psychological conditions did “not rise to the level of being . . . pathological” He did not testify that defendant was mentally retarded. (See *Atkins v. Virginia*

(2002) 536 U.S. 304, 308, fn. 3 [122 S.Ct. 2242, 153 L.Ed.2d 335] [threshold of mental retardation is IQ of 70].) Rather, his testimony was — essentially — that defendant was a slow-witted guy who had caught some bad breaks in life and who was under a lot of stress. A lay jury would be adequately equipped to evaluate this claim; it did not require any expert testimony.

The same factor also serves to distinguish the other cases on which defendant relies. For example, in *People v. Cortes* (2011) 192 Cal.App.4th 873, the appellate court held that an expert should have been allowed to testify that, as a result of posttraumatic stress disorder, an adjustment disorder, and attachment problems, the defendant was in a dissociative state when he killed the victim. (*Id.* at pp. 910-912.) Similarly, in *People v. McCowan* (1986) 182 Cal.App.3d 1, the appellate court held that an expert was properly allowed to testify that, due to a “major depressive episode,” including “periods of being overtly psychotic” (*id.* at p. 10), the defendant was having difficulty thinking clearly and making judgments when he killed the victims. (*Id.* at p. 13-14.) Here, defendant’s offer of proof lacked any such evidence of any clinical disorder.

Accordingly, the provisions of Penal Code sections 28 and 29 dealing with evidence of a mental “disorder” do not apply. Their only provision that is apt is the portion of Penal Code section 29 that states that “whether the defendant had or did not have the required mental states shall be decided by the trier of fact.” Otherwise, this case is governed by the general rule that expert testimony must tend to “assist the trier of fact” (Evid. Code, § 801, subd. (a).) We need not decide whether the trial court

could have chosen, in its discretion, to admit the evidence. We hold only that it did not abuse its discretion by ruling that the mental element of the crime could properly be left in “the hands of the jury” without the assistance of Dr. Flores’s proposed testimony.

In arguing that the error was prejudicial, defendant alludes to the federal constitutional standard of harmless error. However, he never explains how the federal Constitution was supposedly violated. We deem any claim of federal constitutional error forfeited.

Even if not forfeited, a federal constitutional claim would lack merit. ““As a general matter, the “[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense.” [Citations.]’ [Citation.] Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law [Citation.]” (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.)

III

DEFENSE COUNSEL’S FAILURE TO REQUEST AN INSTRUCTION THAT PROVOCATION CAN REDUCE THE DEGREE OF A MURDER

Defendant contends that his trial counsel rendered ineffective assistance by failing to request a jury instruction that provocation can reduce the degree of murder.

The jury was instructed that provocation can reduce murder to voluntary manslaughter. (CALCRIM No. 570.) It was also instructed on second degree murder. (CALCRIM Nos. 520 & 521.) However, it was not given CALCRIM No. 522.

CALCRIM No. 522, as it relates to second degree murder, would have stated:

“Provocation may reduce a murder from first degree to second degree The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.”

CALCRIM No. 522 is a “pinpoint” instruction, meaning that the trial court is not required to give it except on request. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880 [discussing CALJIC No. 8.73, the predecessor of CALCRIM No. 522].)

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

Defense counsel was never asked to explain his decision not to request CALCRIM No. 522. Thus, the issue before us is whether there could be a satisfactory explanation for this. It could have been a reasonable tactical decision, for two reasons.

First, the evidence of premeditation was strong. Members of Tania's family testified that recently, defendant had made several threats to kill her. He had also purchased a gun. At trial, he claimed that he bought it to protect himself from Junior. However, he also testified that he bought it a month before the shooting, yet Tania did not tell him about Junior until two or three weeks before the shooting, and Junior did not threaten him until about a week before the shooting. Moreover, he told the police that he did not buy any bullets for the gun until a day or two before the shooting. He brought the gun with him to Tania's house. Most strikingly, when interviewed by the police, he admitted that he had a plan: if he found Tania alone, he was going to shoot her; he did not mention her laughing or making fun of him before he shot.

Second, there is a much greater difference in punishment between second degree murder and manslaughter than there is between first degree murder and second degree murder. The penalty for first degree murder (absent special circumstances) is 25 years to life in prison; the penalty for second degree murder is 15 years to life in prison. (Pen. Code, § 190, subd. (a).) Thus, if defendant was convicted of murder at all, regardless of the degree, he was facing the possibility of spending the rest of his life in prison. By contrast, the penalty for voluntary manslaughter is only three, six, or eleven years in prison. (Pen. Code, § 193, subd. (a).) Defendant's trial counsel could have made a

reasonable tactical decision to play down provocation as a basis for second degree murder and to play it up as a basis for voluntary manslaughter.

Defense counsel's closing argument was consistent with this strategy. He argued at some length that defendant did not premeditate or deliberate. However, he also argued that the jury should find voluntary manslaughter based on provocation rather than either first or second degree murder.

Thus, we cannot conclude that defense counsel's decision not to request CALCRIM No. 522 fell below an objective standard of reasonableness under prevailing professional norms.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.