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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. THOMAS RYAN HARKER, Defendant and Appellant.	E054052 (Super.Ct.No. FSB902951) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Carla Castillo, 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, Assistant Attorney General, Melissa Mandel, and Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Thomas Ryan Harker stabbed his father 42 times during a rage killing. A jury convicted defendant of first degree murder using a knife. (§§ 187, subd. (a); 12022, subd. (b)(1).[1]) The court sentenced defendant to a prison term of 26 years to life.

The sole issue raised on appeal is whether the court abused its discretion when it admitted unredacted 911 calls made by defendant's father that mentioned defendant's mental illness. We reject this claim of error and affirm the judgment.

II

FACTUAL BACKGROUND

Defendant's parents were divorced when he was a child. Defendant's father, Thomas Charles Harker (Charles), was 63 years old. Charles was a slight man, 5 feet 8 inches tall and weighing 128 pounds. Defendant was six feet tall and weighed 215 pounds. Defendant lived with his father in a mobile home park in Grand Terrace. Defendant did not work but lived on rental income and social security disability benefits. The two men had the only keys to the residence.

Defendant has a bipolar disorder and claimed he was the devil and could control the television. He had been treated repeatedly for mental health problems. Defendant's mother testified defendant was schizophrenic and made bizarre comments but he never fought with his father or threatened him. He did call his father a "dumbass" and resented

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Charles. Defendant's brother, Bryan, testified there was tension between defendant and Charles.

Defendant had threatened to kill Charles. On August 19, 2008, Charles called 911 and reported defendant had been released from "the psycho ward" and was threatening to kill him. Charles told the 911 operator defendant was bipolar and had been hospitalized. When the operator asked if defendant had the means to kill him, Charles mentioned defendant had access to knives.

Charles called 911 again on December 18, 2008. Defendant was laughing and yelling in the background while Charles explained he was concerned because defendant was not taking his medication. Charles reported that defendant was telling him to leave their residence.

Charles was last seen alive on July 12, 2009, between 6:30 p.m. and 7:00 p.m.. He was shirtless and smoking a cigarette in his customary spot on his front stoop. Defendant arrived at the mobile home park at 3:44 p.m., driving a black Cadillac and wearing a white T-shirt. He left at 8:05 p.m., wearing a black T-shirt, and visited a nearby strip club. A video camera recorded the Cadillac leaving the strip club a few minutes after its arrival. At 11:55 p.m., defendant checked into a hospital, claiming he was suffering violent auditory hallucinations. A staff psychiatrist evaluated him as being a danger to himself. When the police contacted defendant in the hospital on July 15, 2009, he responded, "Who told on me?"

At 9:00 a.m. on July 13, 2009, Charles's body was discovered outside the residence, concealed from view. The body, clad in jeans, was found in a pool of blood

with a black-handled serrated knife protruding from the neck. Defendant owned a similar knife. A garden hose was under the upper body. The mobile home was locked and the victim's wallet and keys were inside on top of his dresser. A blood-stained white T-shirt was also in the bedroom. There were no signs of a disturbance or theft inside the residence.

The autopsy report identified 42 sharp-force stab wounds, which were inflicted while Charles was still alive. The injuries were mostly to his back but a few were defensive wounds to his hand and left arm. The knife wounds matched the blade in the victim's neck. Death was caused by multiple stab wounds to the head and neck and particularly the injury to the larynx, which would have prevented Charles from speaking or screaming. The time of death was probably more than 12 hours before the body was found.

The large number of stab wounds qualified as "overkill" because they exceeded the number likely to cause death. Overkill is typical of a "rage killing" or "rage-homicide" where the killer knows the victim.

It was hypothesized that Charles may have been attacked from behind and pursued by his assailant who stabbed him on the ground. In the alternative, Charles may have been attacked from behind while watering plants with a garden hose at the rear of the mobile home and fallen to the ground where the assailant continued to stab him.

The DNA from the blood on the knife matched Charles's DNA. Defendant's DNA matched blood samples taken from the bathroom and the white T-shirt. The police

searched defendant's Cadillac and found a folding knife in the driver's side pocket. No forensic evidence directly linked defendant to the killing.

Charles's neighbor testified as a defense witness that she spotted an intruder at 3:00 a.m. on July 11, 2009, near the victim's residence. The forensic pathologist for the defense questioned whether the time of death was before 8:00 p.m. on July 12, 2009, because lividity of the body had not yet occurred by 1:00 p.m. on July 13, 2009. The defense pathologist concluded the victim was killed after 1:00 a.m. on July 13, 2009.

III

ADMISSION OF THE 911 CALLS

A. Intent and Motive

Defendant contends the trial court abused its discretion by admitting the two 911 calls made by Charles without redacting references to defendant's mental illness. Abuse of discretion requires a showing that the trial court acted in "'an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372-1373.)

Charles made three 911 calls about defendant in August and December 2008. The trial court refused to admit the first 911 call made on August 14, 2008, by Charles at the behest of defendant, in which Charles told the dispatcher that defendant was going crazy and that he had a history of mental illness and violence toward Charles.

In contrast, the trial court admitted the two 911 calls Charles made on August 19 and December 18, 2008. In the second call on August 19, 2008,Charles reported that

defendant had access to knives and had threatened to kill him. Charles also mentioned defendant's psychiatric hospitalization. During the third call of December 18, 2008, Charles reported defendant was not taking his medication and was demanding Charles leave their residence. During that call, defendant was hooting and yelling in the background. The December call also included references to defendant threatening Charles with a kitchen knife, which the trial court ordered should be redacted. The court did not redact Charles's references to mental illness because they were necessary to understanding the context of the calls.

We conclude the trial court did not abuse its discretion in admitting the subject calls because they were relevant to establish defendant's motive and intent and they were more probative than prejudicial. Evidence Code section 1101, subdivision (b), allows the admission of evidence to prove motive and intent: "As Justice Jefferson explained: "'[W]hen the commission of a criminal act [the crime for which defendant is on trial] is a disputed issue, evidence of motive may become relevant to that issue. Motive is itself a state-of-mind or state-of-emotion fact. Motive is an idea, belief, or emotion that impels or incites one to act in accordance with his state of mind or emotion. Thus, evidence, offered to prove motive, that defendant committed an uncharged offense meets the test of relevancy by virtue of the circumstantial-evidence-reasoning process that accepts as valid the principle that one tends to act in accordance with his state of mind or emotion." (Jefferson, Cal. Evidence Benchbook (1978 supp.) Special Problems Related to Relevancy, § 21.4, p. 218.) (Italics added.)' (*People v. Pic'l* (1981) 114 Cal.App.3d 824,

855-856, disapproved on another ground in *People v. Kimble* (1988) 44 Cal.3d 480, 498." (*People v. Spector*, *supra*, 194 Cal.App.4th at pp. 1382-1383.)

The cases cited by defendant–*People v. Cortes* (2011) 192 Cal.App.4th 873, citing *People v. Coddington* (2000) 23 Cal.4th 529–and Evidence Code sections 28 and 29 are not applicable because these cases and statutes pertain to the issue of mental disease as a defense and the use of supporting expert witness testimony. These authorities do not involve the prosecution's burden to establish specific intent.

In the present case, defendant's threats to kill his father, as described by Charles in the August 19, 2008, call, were relevant to prove the killing was premeditated, deliberate, and intentional. In the December 18, 2008, call, defendant's demands for Charles to leave the residence were relevant to the issue of motive. The 911 calls tended to show defendant's intent and motive for the killing, i.e., that defendant was angry at his father and wanted to remove him from their shared residence.

The 911 call documenting defendant's threats were also more probative than prejudicial on the issues of intent and motive. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1027-1028.) Moreover, the references in the 911 calls to defendant's mental illness—his psychiatric hospitalization and his medication—could not be redacted without rendering the calls unintelligible. Furthermore, the jury was well aware of defendant's mental instability because his alibi was that he had checked into a mental hospital before the crime was committed.

B. Spontaneous Statements

As an alternative ground, the 911 calls were also properly admitted as spontaneous statements. (Evid. Code, § 1240.) "'[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance–how long it was made after the startling incident and whether the speaker blurted it out, for example–may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity.' (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588; *People v. Poggi* (1988) 45 Cal.3d 306, 320.)

Defendant contends that Charles's 911 calls displayed a calm reaction to the "routine" occurrence of defendant acting crazily and threatening to kill him. We reject defendant's characterization of the tenor of the 911 calls. According to what Charles told the 911 operator, defendant threatened to kill him in August 2008 and, in December 2008, defendant was acting crazy, threatened Charles with a knife, and hit him. Charles may have been a calm person by nature but the episodes he described cannot reasonably

be described as "routine," even if they occurred frequently. The trial court did not abuse its discretion in allowing Charles's spontaneous statements to be admitted.

C. Harmless Error

Notwithstanding our conclusion that the trial court did not abuse its discretion, we also deem any error harmless. The issue of defendant's mental illness was raised by defendant himself numerous times with lay and expert witnesses. Defendant's alibi depended on his admission to the hospital for mental health treatment. Finally, the jury deliberations lasting 14 hours for a six-day trial does not suggest any significant prejudice was caused by the admission of the 91l calls and their fleeting references to defendant's mental illness.

IV

DISPOSITION

The trial court did not abuse its discretion in admitting the victim's 911 calls. We affirm the judgment.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.