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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARSHAE DEWS,

Defendant and Appellant.

F060623

(Super. Ct. No. F09904487)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary Chittick, Judge.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Darshae Dews was convicted of second degree murder in the stabbing death of Arthur Lopez. On appeal, Dews contends that the trial court erred by excluding from evidence statements he made to detectives after he was arrested; he argues the

statements were admissible to show his state of mind and to establish the basis for his expert witness's opinion. In addition, Dews contends that the trial court erred by imposing a probation report fee because there was insufficient evidence of his ability to pay.

We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

In July 2009, Lopez lived in a red house on North Ferger Street in Fresno with his niece Rozanna Gibbs and her two daughters. According to Gibbs, they often left the front door unlocked and usually locked the door when no one was home or when they went to sleep.

Larry and Bertha Flower lived across the street, and Bertha's daughter, Maria Ramos, lived next door to them. Around 12:15 p.m. on July 30, 2009, the Flowers and Ramos were in front of the Flowers' house talking when they saw an African-American man walk out of Lopez's house. He was carrying a big garbage bag, and he left the front door open. Ramos later identified Dews as the man she saw leaving Lopez's house that day.

Ramos thought something was wrong because she had never seen anyone leave Lopez's house without Lopez walking the person out himself. She walked over to Lopez's house, and after calling his name a few times and checking the back of the house, she went to the front door and looked inside. Ramos saw a lot of blood and Lopez lying on the floor. She closed the front door, ran back to her house, and called the police. Meanwhile, the Flowers got in Ramos's van and followed Dews. They followed Dews as he walked south on Ferger Avenue, west on Belmont Avenue, south on Palm Avenue, and then east on H Street. Dews walked down the side of a ditch, and the Flowers lost sight of him. According to Larry Flower, Dews walked at a slow pace and never looked back. A surveillance camera on Palm Avenue recorded Dews walking by. The videotape showed Dews walking with a distinctive gait—his left leg had an outward swing.

A man presumed to be Dews was next spotted in a backyard on North Poplar Avenue near East McKenzie Avenue. Between noon and 12:30 p.m., Eduardo Calles saw an African-American man in his neighbor's backyard; he appeared to be looking for a place to hide or trying to jump the fence. He had no shirt on, was sweating profusely, and looked tired and nervous. Calles saw the man walk to the neighbor's front yard and walk away.

Fresno police arrived at Lopez's house shortly before 1:00 p.m. Officers entered the house and found Lopez lying face down in the living room near a coffee table. He was wearing an undershirt, underpants, and socks. A wallet was found in the front waistband of his underwear; it contained \$202. Lopez had multiple stab wounds to his back and a stab wound to the chest. A paramedic confirmed that he was dead. There was blood on the coffee table and drops of blood in the dining room and in the kitchen—on the floor, cabinets, drawers, and refrigerator. Lopez's house had two stories, and there was blood and broken glass at the bottom of the staircase. Upstairs, blood was found in the master bedroom and the office. There was no sign of struggle in the master bedroom and the bed was made. There were no signs of forced entry into the house.

Around 2:00 p.m., police officers responded to a report of an African-American man causing a disturbance at North Poplar Avenue and McKenzie Avenue. A report from a Fresno County Sheriff's Office helicopter directed the police to 203 North San Pablo Avenue, a large apartment complex, where the suspect was last seen running. Officers found Dews hiding in a tree next to 209 San Pablo Avenue, about a mile from Lopez's house. They commanded him to come out of the tree, but Dews had no reaction and stared blankly. He eventually came down the tree. It appeared to officers that Dews was going to comply with their instructions, but as soon as he hit the ground, he ran. An officer shot Dews with a taser and he fell to the ground.

Dews was taken into custody shortly after 2:00 p.m. His hands were bloody and dirty and he had cuts on his left hand. He was taken to Community Regional Medical

Center. The taser darts were removed from his back and leg, the cuts to his hand were cleaned, and a phlebotomist took blood samples. The blood samples tested negative for drugs and alcohol.

Police detectives interviewed Dews about four hours after Lopez was killed. Asked about what happened at the red house (Lopez's house was red), Dews said he did not know what they were talking about and they were asking the wrong person. The interview was videotaped. (On appeal, the parties agree that the interview could not be admitted in the prosecution's case-in-chief because Dews was not properly advised of his right to counsel.)

Police found several items in an area between G Street and the railroad, near Highway 180. A pair of tennis shoes was at the base of a tree, a belt was hanging from a branch, and boxer shorts and a black hat were in the bushes. A black garbage bag was also found in the area. It contained two pair of jeans, a pair of socks, a white tank top, and a green picnic bag. Inside the green picnic bag were lip balm, deodorant, a picnic blanket and picnic silverware, and a bloodstained kitchen knife. The knife matched knives in Lopez's kitchen. Gibbs recognized the green bag as a picnic cooler from Lopez's house.

On September 30, 2009, the Fresno County District Attorney filed an information against Dews alleging a single count of murder (Pen. Code, § 187, subd. (a)). The district attorney also alleged that Dews personally used a deadly and dangerous weapon, a knife, in the commission of the offense (Pen. Code, § 12022, subd. (b)(1)); the offense was committed while Dews was engaged in the commission of robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(A); and the offense was committed while Dews was engaged in the commission of burglary within the meaning of Penal Code section 190.2, subdivision (a)(17)(G).

On October 15, 2009, at the arraignment on the information, defense counsel expressed doubt about Dews's mental competence pursuant to Penal Code section 1368.

The court suspended the criminal proceedings and appointed two doctors to evaluate Dews. On April 22, 2010, the court found Dews competent and reinstated the criminal proceedings.

In preparation for trial, defense counsel had Dr. A.A. Howsepian, a psychiatrist, investigate and render an opinion on Dews's mental state at the time of the killing. Dr. Howsepian interviewed Dews twice and reviewed police reports, juvenile arrest records, investigation reports based on interviews with Dews's mother and grandmother, and other documents. He also reviewed a videotape of Dews's July 30, 2009, interview with detectives, as well as surveillance footage of Dews. Dr. Howsepian concluded that, "[t]o a reasonable degree of medical certainty," Dews was "LEGALLY UNCONSCIOUS at the time of the offense"

A jury trial began on June 8, 2010. In his opening statement, the prosecutor told the jury the evidence would show that Dews went into Lopez's house to commit burglary. According to the prosecutor, after Dews stabbed Lopez, he went upstairs to look for things to steal, and although he did not take many things of value, he took clothing to change into after he left the house.

The defense did not deny that Dews killed Lopez.¹ Instead, defense counsel told the jury in his opening statement that Dews did not enter Lopez's house to steal anything or do harm. He pointed out that there was no sign of forced entry and Dews was unarmed and took nothing of value from Lopez. Nor did Dews try to conceal his activity. When Dews left the house, he did not leave through the back door to the alley; he walked through the front door and left the door open behind him.

Dews did not claim to be mentally ill, but his attorney suggested he was unconscious at the time of the killing. Defense counsel told the jury that a psychiatrist,

¹The parties stipulated that DNA testing showed the blood found in Lopez's house matched that of Dews. They also stipulated that a fingerprint on the bloody knife found near G Street matched Dews's.

Dr. Howsepian, would testify about Dews's behavior and "go into ... all of the reasons why there are factors that point toward unconsciousness." He concluded, "I will also ask you to consider strongly, despite the inconsistent behavior of the raging killing and the calm walking away, that this is an act under which Mr. Dews may have been unconscious, and that may explain his behavior in not seeming to realize that he was in danger of being arrested for a long time, and wandering around the neighborhood without any reason."

As the trial proceeded, however, defense counsel decided not to call Dr. Howsepian as a witness. The prosecution argued that Dr. Howsepian's testimony could not be used to place inadmissible hearsay before the jury. On June 21, 2010, the court ruled that Dews's interview from July 30, 2009, and statements by his mother and grandmother were all inadmissible hearsay. Further, the court ruled that Dr. Howsepian would not be permitted to testify about Dews's or his relatives' statements to explain the grounds for his opinion. Given the court's limitations on the doctor's testimony, defense counsel decided he was "better off just going with a single defense [that is, the partial defense of no intent to steal] rather than trying to argue two inconsistent defenses." He explained, "[I]f I can't fully justify or explain the justification for the testimony of Dr. Howsepian, I'm better off without it."

On June 23, 2010, the jury found Dews guilty of the lesser-included offense of second degree murder and found true the special enhancement that he used a knife in the commission of the crime.

Dews was sentenced to 15 years to life for the murder conviction, plus one year for the deadly-weapon enhancement, to be served consecutively. The court also ordered Dews to pay a probation report fee of \$296 within 30 days of release.

DISCUSSION

I. Exclusion of Dews's statements to detectives

A. Background

1. Interview with detectives

About four hours after Lopez was killed, detectives Marcus Gray and Jennifer Federico interviewed Dews. The interview was videotaped and a partial transcript was prepared. According to the transcript, Dews did not know his birth date, although he said he was 18. Asked what he did that morning, Dews said he went outside and watered the yard with a hose. Gray asked what he did next, and Dews responded, "I didn't do nothin'." Gray asked if he stayed home all day, and he said, "I woke up at the hospital." The interview continued:

"Q: You woke up at the hospital. What happened before that?

"A: They was pullin' my out back. It was somethin' in there.

"Q: And that was at the hospital?

"A: Yeah.

"Q: Okay, what about when you got tased? Where was you at?

"A: I don't know.

"Q: You don't know.

"A: They was pullin' that outta my back, sittin' at the hospital. I was on (unintelligible). I'd like to see my mama.

"Q: M-kay. Well, you know, ... we're here for some serious shit. We're not here for games, okay?

"A: If you say it is. I don't even know why I'm here.

"Q: You don't know why you're here. What happened with you and that dude at that house today?

"A: What house?

“Q: The red house that you was at. You remember that one. I know you do.

“A: I don’t remember (unintelligible) she call me back.

“Q: Now you gotta know what I’m talkin’ about ‘cause you was there for a while.

“A: Well you know (unintelligible) talkin’ ‘bout.”

Dews said they had him confused with somebody else. The interview continued in this manner:

“Q: I’m trying to find out why this happened today.

“A: I don’t know what happened. I don’t know shit, man. You askin’ the wrong person about that.

“Q: I’m not askin’ the wrong person.

“A: Well I don’t wanna answer no more of them questions, ‘cause I don’t know shit. You talkin’ about some huh other stuff. I don’t know shit, man.”

Dews was asked why his stuff was at the man’s house. He responded, “I don’t wanna get hung up. And I know—know shit I just told y’all and all the shit you keep on askin’ me all these questions, when I don’t know shit. Man, I only wanna go home and go to sleep.” Federico again asked what he did that day besides water the lawn, and Dews said he just woke up with a taser in his back. He did not know who tased him. Federico asked where he was all day, and he said he was at home. Gray suggested that Dews had been provoked, asking if the man touched or kissed him or did something that “pushed you over the edge.” Dews continued to respond that they had the wrong person. Throughout the interview, Dews denied knowledge of the crime and appeared not to remember anything about the day except watering the lawn and having taser darts removed at the hospital.

2. *Dr. Howsepian's opinion*

Dr. Howsepian interviewed Dews twice in April 2010, reviewed about 700 pages of documents, and reviewed video footage of Dews. In a 42-page letter dated June 2, 2010, he offered the following opinion:

“To a reasonable degree of medical certainty, in my professional opinion, Mr. Dews was, in this sense, unaware of his action of killing Mr. Lopez insofar as Mr. Dews’ mental state was so altered, so clouded, and so confused by whatever the underlying medical process is that is, likely, also causing his episodic hemiparesis. His actions, as observed by multiple witnesses, and his self-reports concerning what he recalls and does not recall during that time, what he reports having done on the day of the homicide, his behavior during his visit to Community Regional Medical Center (CRMC) and during his interview with Detectives Federico and Gray, and what he minimizes and rationalizes with respect to these incidents, generally and strongly point to a neuropsychiatric process that resulted in relatively automatic, mechanical, irrational, and disorganized acts for which he is amnesic. His actions on 30 July 2009 evolved throughout the course of the day, and included periods of unawareness, uncommunicativeness, disorganization, agitation and anger, variability in motor activity, and variations in recall.”

Dr. Howsepian wrote that unconsciousness “can be caused by a blackout, a seizure, (in)voluntary intoxication, somnambulism, or similar conditions. Any of these aforementioned conditions can cause a person to be ‘unconscious’ of his actions, i.e., unaware of the actions that he is performing, in spite of his retaining the capacity to move his body.” He noted that Dews’s peculiar gait as shown in the surveillance video suggested mild left hemiparesis, that is, relative weakness on the left side of his body, and one important etiology of hemiparesis with altered mental status is hypoglycemia.

The doctor identified 36 reasons for his opinion that Dews was unconscious when he killed Lopez. Twenty-three of the reasons listed related to the circumstances of the crime and Dews’s conduct after killing Lopez. The state of Lopez’s kitchen, for example,

suggested that Dews was looking for food.² The odd assortment of items taken from Lopez's house indicated that the items were not consciously chosen. ("In my professional opinion, the probability of Mr. Dews' having *consciously* chosen to take from the Lopez residence this apparently random collection of items of trivial value and without significant use to him is very low.") Dr. Howsepian cited the fact that Dews wore a white tank top and no shoes—not "one's first choice of color for clothes to wear to a burglary." He relied on the facts that Lopez was killed "in an apparent explosive, out of control, rage," and after the killing, Dews seemed to walk in a random, directionless manner for approximately one hour. Dews was seen profusely sweating, which was "consistent both with hypoglycemia and with an hypertensive encephalopathy in addition to other forms of autonomic dysfunction that might accompany an altered mental status." Dews drank two bottles of water and ate two Snickers bars in the interview room prior to his interview with Detectives Gray and Federico, which was "consistent with a drive to raise one's blood sugar and to replenish fluids in one who is hypoglycemic."

Six of the reasons identified by Dr. Howsepian related to Dews's conduct in court during various pretrial proceedings. At the preliminary hearing, Dews was agitated, highly irritable, hypervocal, and uncooperative, and he exhibited pressured and loud speech. This behavior was consistent with a manic or mixed mood episode. Dr. Howsepian wrote, "it would not be surprising if Mr. Dews' hemiparesis, his altered mental status at the time of the instant offense, his autonomic symptoms, his alterations in energy, his tremulousness, and his other noteworthy symptoms are the result of a common underlying brain-based cause." Another reason cited by Dr. Howsepian was Dews's behavior in custody.

²Dr. Howsepian suggested that Dews's apparent hemiparesis was attributable to hypoglycemia, which, in turn, is a powerful motivator for food and drink. "It is possible, therefore, that Mr. Dews[']s primary motivation for entering the Lopez residence ... was that he was in search of food or drink"

Two of the reasons were based on statements from Dews's mother, Stephanie Ivory, and grandmother, Dimple Booth-Johnson. According to an investigative report, a friend of Ivory's reported that Ivory had talked with increasing frequency about Dews's unusual and bizarre behavior, including walking around as if one side of his body was not functioning. Ivory told an investigator that her mother, Booth-Johnson, told Ivory that Dews had a physical altercation with his father on July 26, 2009. Booth-Johnson also told Ivory that Dews was at her house on July 27, 2009, and he was acting crazy, walking with a limp, and had one eye closed. On July 29, 2009, Dews showed up at Ivory's house with a pronounced limp, his arm in a position that looked as if he'd had a stroke, and with his left eye closed. Dews asked his mother what was wrong with him. Later the same day, Ivory saw Dews at Booth-Johnson's house. Dews was walking with a pronounced limp. Ivory told an investigator that she and Booth-Johnson both noticed such a dramatic and disturbing change in Dews that they believed he was possessed by the devil.

Dr. Howsepian suggested that the altercation on July 26, 2009, could have triggered or worsened Dews's mental state, "possibly as a result of a traumatic brain injury (TBI) during Mr. [Dews's] altercation with his father or as a result of a vascular event triggered by the autonomic changes that accompanied that altercation." Relying on Ivory's description of Dews's behavior, he concluded, "Clearly, Mr. Dews had undergone a profound change just a few days (or earlier) prior to his having killed Mr. Lopez, and this change—which had both physical and mental/behavioral manifestations—in light of the 'principle of parsimony,' is likely to be the result of a common underlying neurologically[] based cause."

Finally, in a discussion spanning 14 pages of his letter, Dr. Howsepian described the four reasons for his opinion that related to Dews's interview with the two detectives after he was taken into custody on July 30, 2009. The doctor observed that the interview "includes multiple instances of verbalizations by Mr. Dews that very strongly suggest his having been amnesic for the events surrounding the homicide for which he is charged."

For example, Dr. Howsepian opined that when Dews said he was at his mother's house all day, he did not appear to be lying but rather was trying to "piece together his day" because he did not remember what happened that day.

3. *Trial court's ruling*

On June 8, 2010, the prosecutor filed a trial brief, arguing that Dr. Howsepian's testimony should be excluded because the doctor relied on unreliable hearsay and, alternatively, if allowed to testify, Dr. Howsepian could not be used to place inadmissible hearsay before the jury. Defense counsel argued that Dr. Howsepian's expert opinion was admissible because he relied on materials experts of this type commonly rely on. Defense counsel further argued that Dews's statements were admissible to show the basis for Dr. Howsepian's opinion.

In addition, defense counsel asserted that Dews's interview was independently admissible as an exception to the hearsay rule because it was offered to show Dews's state of mind, that is, to show he was unconscious at the time Lopez was killed. (Evid. Code, § 1250, subd. (a)(1).)³ Alternatively, he argued that Dews's statements were independently admissible because they were not hearsay as they were not offered for the truth of the matters stated.

On June 9, 2010, the trial court tentatively denied the prosecution's motion to exclude the doctor's testimony. The court further observed that it was unlikely that the entire videotape of Dews's interview would be admitted because "it seems to the Court, to not be sufficiently reliable to be admissible under 1250." The court stated that it could envision situations in which a defendant's later statement could be probative of an earlier state of mind; for example, evidence that a defendant is drunk during an interview an hour after an incident may be probative of the defendant's state of mind an hour earlier.

³Subsequent statutory references are to the Evidence Code unless indicated otherwise.

In this case, however, it did not seem to the court that Dews's interview four hours after the incident was particularly probative of his state of mind at the time of the killing. The court reserved a final ruling, explaining that it would see how the evidence in the case developed during trial.

After the prosecution rested, the parties revisited the evidentiary issues. The court ruled that Dews's postarrest statements were not admissible under any theory. First, if the statements were not offered as hearsay, the court questioned how those statements were relevant. Second, the statements were not admissible as an exception to the hearsay rule to show state of mind because the statements were made under circumstances that indicated lack of trustworthiness. (§ 1252.) Nor could the statements be admitted to explain the basis for Dr. Howsepian's opinion, again because they were made under circumstances that did not demonstrate trustworthiness. In sum, the court excluded "the statements of Mr. Dews, to the extent [his] statements reflect his assertion that he did not recall."

The court explained: "[I]t just seems to the Court to the extent Dr. Howsepian is expressing reliance on statements of the defendant or other hearsay, most of that is hearsay that the Court doesn't find ... to be particularly reliable, and, therefore, not hearsay that the Court would tend to admit unless there's going to be some testimony underlying it." Consequently, the court would not allow Dr. Howsepian to testify about Ivory's or Booth-Johnson's statements either. "[T]he question is the extent to which the Court is going to allow the doctor to testify about things for which there is no evidence before the ladies and gentlemen of the jury. And the Court has broad discretion in doing that, and the Court is not willing to permit that type of hearsay, particularly from family members who have some level of vested interest in the case."

The court did not rule, however, that Dr. Howsepian's testimony was inadmissible. The court explained there were "significant portions of the doctor's testimony that [it] would be prepared to admit," including nonhearsay aspects of the interview between

Dews and the detectives. Among other things, the doctor referred to Dews's physical demeanor during the interview, the fact that Dews was tired and put his head down, and the fact that he ate two candy bars and drank two bottles of water. Dr. Howsepian would be allowed to testify about these things at trial. Following the trial court's evidentiary rulings, defense counsel chose not to call Dr. Howsepian as a witness.

B. Analysis

On appeal, Dews contends that the trial court erred in ruling that the videotape of Dews's interview was not independently admissible as circumstantial evidence of his state of mind four hours earlier. We are not persuaded.

Hearsay evidence is evidence of a statement made out of court that is offered to prove the truth of the matter stated. (§ 1200, subd. (a).) Unless an exception applies, hearsay evidence is inadmissible. (*Id.*, subd. (b).) Section 1250 provides an exception for evidence offered to show state of mind. “[E]vidence of a statement of the declarant’s then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] ... [t]he evidence is offered to prove the declarant’s state of mind, emotion, or physical sensation at that time or any other time when it is itself an issue in the action” Section 1250, however, is subject to section 1252, which provides that evidence of state of mind is inadmissible “if the statement was made under circumstances such as to indicate its lack of trustworthiness.”

Here, the court excluded Dews's statements, explaining, “[I]t just seems to the Court that [Dews's] state of mind hours later, is not particularly relevant in this case, and even if it were, under 1252 it's completely self-serving. I mean, at that point ... he has a clear motive to be untruthful.”

We review the court's ruling for an abuse of discretion. (*People v. Edwards* (1991) 54 Cal.3d 787, 817, 820 (*Edwards*).) “The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and

deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.’ [Citation.] A reviewing court may overturn the trial court’s finding regarding trustworthiness only if there is an abuse of discretion.” (*Id.* at pp. 819-820.)

Defense counsel offered Dews’s interview statements in order to prove that Dews was unconscious when he stabbed Lopez. He argued, “The fact that somebody doesn’t remember having done something is evidence that they were not conscious of having done it at the time they were doing it, because if they were conscious of it when they were doing it, they’d have a memory of it.” To the extent defense counsel wished to rely on Dews’s statements conveying that he could not remember what happened that day to prove unconsciousness, the court determined these statements were “self-serving” and, as a consequence, inadmissible under section 1252.

The facts of *Edwards, supra*, 54 Cal.3d 787, are instructive. In *Edwards*, the defendant was arrested nine days after shooting two, 12-year-old girls, killing one and injuring the other. (*Id.* at pp. 804, 818.) After the shooting but before his arrest, the defendant wrote in a notebook referring to himself in the third person and writing about having headaches and feeling sick. During an interview after his arrest, the defendant cried, claimed not to remember anything about the shooting, and complained of headaches. He sought to admit the notebook and his interview statements to show his state of mind without testifying himself. The trial court excluded the evidence as hearsay (*id.* at p. 818), finding that the statements were given under circumstances that did not indicate trustworthiness. On appeal, the defendant argued the evidence should have been admitted to show state of mind under section 1250, but our Supreme Court rejected this argument. (*Edwards, supra*, at p. 819.) The court explained:

“Evidence Code section 1250 ... does not aid defendant. Assuming, without deciding, that the statements otherwise qualify for admission, Evidence Code section 1250 ... is subject to Evidence Code section 1252,

which provides, ‘Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness....’”

“... A defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination.’ [Citation.] That rule applies here. To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are “made at a time when there was no motive to deceive.” [Citations.]

“When defendant made the statements, nine days had elapsed since the shooting. He knew he had killed one 12-year-old girl and had wounded a second. He had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for, the shootings. There was ‘ample ground to suspect defendant’s motives and sincerity’ when he made the statements. [Citation.] The need for cross-examination is especially strong in this situation, and fully warrants exclusion of the hearsay evidence. [Citations.]” (*Edwards, supra*, 54 Cal.3d at pp. 819-820.)

In the present case, Dews made his statements hours after stabbing Lopez and soon after being taken into custody. Although Dews arguably did not know that Lopez was dead, he would have been aware that he had injured Lopez seriously. As in *Edwards*, Dews had a compelling motive to deceive or minimize his responsibility. Under these circumstances, it was not an abuse of discretion for the trial court to determine that Dews had a “clear motive to be untruthful” during his interview with the detectives and, as a consequence, to exclude his hearsay statements.⁴ (See also *People v. Jurado* (2006) 38 Cal.4th 72, 130 [upholding exclusion of defendant’s statements where “defendant made his statements during a postarrest police interrogation, when he had a compelling motive

⁴Because we conclude the trial court’s decision to exclude Dews’s statements as unreliable was not an abuse of discretion, we need not address the court’s additional determination that the statements were not relevant to show Dews’s state of mind at the time he killed Lopez.

to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness”].)

We reject Dews’s contention that his interview statements were admissible because they were not offered for their truth and therefore were not hearsay. In particular, Dews claims that his statements were neither express or implied statements that he did not remember what happened during the relevant time frame. He relies on *People v. Allen* (1976) 65 Cal.App.3d 426 (*Allen*), disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 39, footnote 25.

In *Allen*, the appellate court observed that a statement is hearsay evidence even “if such evidence is offered to prove—not the truth of the matter that is stated in such statement expressly—but the truth of a matter that is stated in such statement by implication.” (*Allen, supra*, 65 Cal.App.3d at p. 433.) “An implied statement may be inferred from an express statement whenever it is reasonable to conclude: (1) that declarant *in fact intended* to make such implied statement, or (2) that a recipient of declarant’s express statement would *reasonably believe* that declarant intended by his express statement to make the implied statement.” (*Id.* at pp. 433-434.)

Dews claims that “it is not reasonable to conclude that [Dews], when he told detectives repeatedly that he had watered the lawn and then woke up in the hospital, in fact intended to make an implied statement that he had a large gap in his memory of what happened that day, or that a recipient of his statements would reasonably believe that [Dews] intended to state that he did not remember what happened during the relevant time frame.” We disagree. The obvious import of Dews’s statements that he watered the lawn and then woke up in the hospital—along with his statements that he did not know what the detectives were talking about, he was at home all day, they had the wrong person, he did nothing, he knew nothing, and he did not know who shot him with a taser or where he was when he was shot—is that he did not remember what happened that day. A recipient of these statements would reasonably believe that Dews intended to convey

the implied statement that he did not remember what happened between the time he watered the lawn and when he woke up in the hospital. Indeed, his attorney agreed that was the content of his statements. Arguing that the statements should be admitted to show state of mind, Dews's counsel told the court, "[W]hat he's saying is I don't remember anything for hours today from the time I left the house until the time the tasers are being taken out of my back. For all that time, I don't remember what happened." And, of course, Dr. Howsepian also understood Dews's statements as statements (express and implied) that he could not remember what happened that day.

Dews next contends that the trial court erred by ruling that Dr. Howsepian could not discuss Dews's statements in explaining the basis for his opinion. Again, we are not persuaded.

Generally, an expert may testify about the reasons for his opinions. (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) "However, prejudice may arise if, "under the guise of reasons," the expert's detailed explanation "[brings] before the jury incompetent hearsay evidence." [Citation.]" (*Id.* at pp. 918-919.) Thus, a trial court may "exclude from an expert's testimony any hearsay matter whose irrelevance, *unreliability*, or potential for prejudice outweighs its proper probative value." (*Id.* at p. 919, italics added.)

In *People v. McWhorter* (2009) 47 Cal.4th 318 (*McWhorter*), our Supreme Court recognized that trial courts have broad discretion to exclude expert testimony that is based on unreliable hearsay. "[T]he value of an expert's opinion depends on the truth of the facts assumed." [Citation.] "Where the basis of the opinion is unreliable hearsay, the courts will reject it." [Citations.] It is settled that a trial court has wide discretion to exclude expert testimony, including hearsay testimony, that is unreliable." (*Id.* at p. 362.)

Here, the trial court determined that the hearsay statements on which Dr. Howsepian relied were unreliable and had to be excluded. Dews argues there is no evidentiary basis for concluding that his apparent lack of recall was feigned. As

discussed above, however, the trial court observed that Dews had a clear motive to be untruthful under the circumstances. We discern no abuse of discretion. (See *McWhorter, supra*, 47 Cal.4th at p. 362 [no abuse of discretion where trial court excluded expert’s testimony that was based on defense investigator’s hearsay report recounting interview with wife of defendant].)

Finally, Dews asserts that the trial court’s rulings denied him the right to present relevant, material evidence that he was not guilty in violation of his rights to due process and to present a defense. A similar argument was rejected in *Edwards, supra*, 54 Cal.3d 787. In that case, the defendant argued that admission of his hearsay statements was constitutionally compelled even if the statements could be excluded under the Evidence Code. (*Edwards, supra*, at p. 820.) Our Supreme Court rejected this argument. The court explained, “[T]hese statements were inherently untrustworthy. Defendant was fully allowed to present a defense. He could have testified had he so chosen. [Citation.] Defendant has no right to effectively ‘address the jury without subjecting himself to cross-examination.’” (*Id.* at pp. 821-822.; see also *People v. Lightsey* (2012) 54 Cal.4th 668, 715-716 [rejecting claim that exclusion of hearsay evidence violated defendant’s due process rights, where defendant’s hearsay statements were “self-serving and inherently suspect”]; *People v. Whitt* (1990) 51 Cal.3d 620, 644 [rejecting claim that exclusion of hearsay evidence violated defendant’s constitutional right to fair trial, where hearsay statements were “not inherently reliable”].)

Here, Dews’s statements were made under circumstances that lacked trustworthiness, and the trial court specifically found the statements “completely self-serving.” Furthermore, the trial court did not exclude the testimony of Dr. Howsepian altogether. The court was prepared to admit “significant portions of the doctor’s testimony” For these reasons, we reject Dews’s constitutional claim; Dews was fully allowed to present a defense in this case. (See *Edwards, supra*, 54 Cal.3d at p. 821; see also *People v. Jurado, supra*, 38 Cal.4th at p. 130 [in capital case, defendant “has no

federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination”].)

II. Imposition of fee

The probation officer’s report recommended imposition of a fee of \$296 pursuant to Penal Code section 1203.1b. At the sentencing hearing, defense counsel submitted on the report, and the trial court imposed the recommended fee. Defense counsel did not object.

Penal Code section 1203.1b, subdivision (a), provides:

“In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, ... the probation officer, ... taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost ... of conducting any preplea investigation and preparing any preplea report The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

Dews contends that the trial court erred when it imposed the probation report fee because there was insufficient evidence of his ability to pay. The Attorney General concedes that the statutory procedures were not followed, but since Dews failed to object at the trial court level, he has forfeited this issue on appeal. We agree that Dews’s failure to object forfeits the claim on appeal. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1076 [“To allow a defendant and his counsel to stand silently by as the court imposes a \$250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive”].) The fact that Dews now claims there was no evidence of ability to pay does not change our conclusion. (See *People v. Gibson* (1994) 27

Cal.App.4th 1466, 1468-1569 [“A challenge to the sufficiency of evidence to support the imposition of a restitution fine to which defendant did not object is not akin to a challenge to the sufficiency of evidence to support a conviction, to which defendant necessarily objected by entering a plea of not guilty and contesting the issue at trial”].)

DISPOSITION

The judgment is affirmed.

Wiseman, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.