

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS A. MORENO,

Defendant and Appellant.

A107670

(Contra Costa County
Super. Ct. Nos. 02-273914-2
& 05-031322-1)

In action No. 05-031322-1, a jury found defendant Jesus Moreno guilty of the attempted murder of a peace officer with a deadly weapon (Pen. Code, §§ 187, 664, 12022, subd. (b)(1)),¹ assault with a deadly weapon on a peace officer (§ 245, subd. (c)), and second degree burglary (§§ 459-460). It was alleged that during the commission of each of these offenses defendant inflicted great bodily injury (§ 12022.7), and that he had suffered convictions for serious felonies (§§ 667, 1170.12). The trial court found true the prior allegations, revoked defendant's probation in action No. 02-273914-2, and sentenced him to state prison for an aggregate term of 23 years to life. Defendant filed a timely notice of appeal. We conclude that some instances of error occurred. The conviction of assault in action No. 05-031322-1 is reversed. The judgment is further

¹ Unless otherwise noted all further statutory references are to the Penal Code.

ordered to be modified to reflect that the 18-month sentence for the grand theft conviction in action No. 02-273914-2 is stayed pursuant to section 654. In all other regards, the judgment is affirmed.

BACKGROUND

In his opening statement defendant's counsel told the jury that defendant did not contest the burglary or the assault charges against him. Defendant did contest the attempted murder charge on the ground that he lacked the requisite intent. Much of the evidence introduced at trial may therefore be abbreviated into the following summary:

In the early morning of April 11, 2003, defendant broke into the Downer School in San Pablo. He ransacked a classroom and took some school supplies. Defendant's entry apparently triggered a silent alarm, and Cris Grunseth, an officer with the West Contra Costa Unified School District, was dispatched to investigate. Grunseth discovered defendant hiding behind a filing cabinet in the classroom. Grunseth told him he was under arrest for burglary. He placed a handcuff on only one of defendant's wrists, because, he testified: "I cuffed his right hand, and . . . I tried to cuff his left. He was complaining that his arm was hurting him and it was stiff, and he was a big person. So I—because he wasn't giving me any grief, I said, Okay, fine, . . . I will just hold on to the cuff and we will walk out to my car." "I still had my gun on him."

At his car, Officer Grunseth moved the gun from his right hand to the left, in order to get his car keys with his right hand; his left hand was now holding the weapon and the single handcuff on defendant. It was at this point that defendant "grabbed [the officer's] gun handle" and "got into a wrestling match" with the officer for control of the gun. Defendant struck Grunseth a number of times with his fist, driving the officer to his knees. Defendant then produced a knife and began stabbing Grunseth. Finally breaking free of the bleeding Grunseth, defendant fled.

San Pablo police were summoned, and Grunseth provided a description of the suspect. The officers described Grunseth as "completely soaked in blood." Grunseth was taken to the hospital, where he was treated for 10 stab wounds on his back, chest, knuckle, and one "by my eye." Grunseth also suffered a collapsed lung and was in the

hospital for four days. Fingerprints recovered from the scene led to discovery of defendant's identity and his subsequent arrest.

Defendant did not testify. Lori Clendenin testified that at the time of the incident she was defendant's girlfriend and living with him. For several weeks before April 10, defendant had been smoking methamphetamine. He was doing so on the night of the 10th, and Clendenin thought he was "a little more hyper than normal"

Douglas Tucker, M.D., testified as an expert on the effects of methamphetamine use. He explained for the jury how the euphoria of continuous methamphetamine usage can easily go from euphoria to paranoia. It can also lead to "impulsivity," which Dr. Tucker described as actions taken "without adequate reflection or consideration." Methamphetamine "impairs judgment" and the ability to make reasoned decisions, including the consequences of specific actions.

REVIEW

I

Pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, defendant asked the trial court to conduct an in camera examination of Officer Grunseth's personnel file to determine if there were any recorded allegations of undue force. The court did so. He requests this court to review the sealed transcript of the trial court's in camera examination to determine whether appropriate disclosure was made. We have done so and found no error in the trial court's ruling.

II

The trial court conducted a hearing pursuant to Evidence Code section 402 concerning what testimony the jury would hear from Dr. Tucker. Dr. Tucker testified at the hearing as follows:

He has offered testimony as an expert in forensic psychiatry and the effects of methamphetamine usage. He described at length the effects of methamphetamine usage, the means of its absorption, and how long is its "half life" (i.e., the amount of time the drug retains its potency to intoxicate) once in the system. One of the effects was

“impulsivity,” which Dr. Tucker characterized as having to do “with actions[] which are taken without . . . adequate consideration of consequences, which are done usually close to or as soon as the idea of the behavior occurs to the person without much consideration for the consequences.” “ ‘Impulsivity’ is a symptom of a variety of psychiatric disorders” “Impulsivity is a hallmark of intoxication with methamphetamine.”

Based upon a hypothetical “fact pattern” indistinguishable from the events at the Downer School on April 11, defense counsel then posed this question: “Do you have an opinion as to how the man having ingested methamphetamine would affect his reaction to that set of facts?” Dr. Tucker responded: “What you are describing sounds like a situation where maybe an impulsive decision to act, to grab the cop or wrestle or escape or make your move, would be something that methamphetamine could certainly influence. [¶] . . . [¶] Methamphetamine increases impulsivity. It increases arousal. And it’s what is called a fight or flight reaction. People often feel the heart pounding, adrenaline r[ising] . . . experiencing the methamphetamine intoxication. [¶] And in that context of that heightened arousal, people often do things suddenly and impulsively, including violent things which is a function of their methamphetamine use. [¶] So the situation that you have described there with seemingly sudden opportunity presented impulsive behavior ensuing, would be a fairly typical situation . . . methamphetamine would engender.” Defense counsel then asked: “Do you have an opinion as to how that set of facts would affect the person who had ingested methamphetamine, that person’s ability to weigh options and make choices?” Dr. Tucker replied: “Methamphetamine intoxication definitely reduces the ability to weigh options and make choices. In fact, poor judgment is one of the . . . criteria for making the diagnosis of methamphetamine intoxication. If they have good judgment, that calls into question that diagnosis.”

On cross-examination, the prosecutor questioned him about any difference between “mere [methamphetamine] intoxication and methamphetamine psychosis,” and whether the latter condition would impact upon a person’s ability to premeditate. The prosecutor then inquired of Dr. Tucker: “As far as this hypothetical that you have been asked, . . . [¶] . . . [¶] [y]ou said that under the fact pattern given that maybe that person

was—maybe the decision to act was impulsive. How confident are you . . . by this ‘may be?’ ” Dr. Tucker answered: “[N]ot very confident at all. I have not interviewed the defendant. I have not read much in the way of records on this case or learned much about it other than the very brief information that I reviewed, as I mentioned, and what I was given in the hypothetical.” The prosecutor then “pose[d] some additional facts” to defense counsel’s hypothetical; Dr. Tucker replied: “I wouldn’t say from that that I would necessarily think about premeditation or deliberation” and “The stabbing sounds to me like it could be quite impulsive despite the behavior you described.”

The trial court ruled that Dr. Tucker could testify subject to the following limits: “I guess the problem is that it appeared to the Court that the hypothetical is directly involved with section[s] 21 and 26 of the Penal Code. And by eliciting the various facts of the crime, you are, in fact, eliciting an opinion as to whether or not this person had the intent. And I don’t believe that I have sufficient foundation for him to opine regarding that. [¶] I think tentatively as his testimony unfolded at the very end of the cross-examination, I believe it’s appropriate for him to testify about what methamphetamine is, it[s] effects on the human body, how he is defining various things [¶] But as soon as we get into things that are fact specific to our case, I think, in effect, he is expressing an opinion regarding this man’s intent at the time or his capacity to form certain intent . . . [¶] So, No. 1, I don’t believe the foundation is there. [¶] No. 2, I don’t even know if it would be legal for a psychiatrist after the fact . . . say what sort of reaction it has, that doesn’t appear to the Court to be . . . appropriate [¶] I think it is appropriate for him to testify about what the effects of methamphetamine are. But as soon as you get into facts, specific hypos, I believe Mr. Butts’ [the prosecutor] objection is well taken, that we are going right into the meat of Sections 26 and 21 of the Penal Code, which says he can’t do that. He can’t talk about diminished capacity and those seem to be exactly those sorts of questions.”

Defendant’s counsel told the court “at this point, I am prepared to accept the Court’s ruling if before Dr. Tucker testifies I have an opportunity to try to find a very recent Supreme Court case.” The trial court responded: “Absolutely. I would certainly

be willing to revisit it .” Dr. Tucker was to avoid legal terms like “premeditation,” but “[o]ther than [that] the testimony appears to be germane and appropriate dealing with generally what is methamphetamine . . . effects and uses. [¶] But to the extent it attempts to apply to our particular case or alleged hypos apply to our case seems to cross over the line . . . , but I am certainly willing to look at any case that you have that suggests the contrary.” Defense counsel apparently did not find the “very recent Supreme Court case,” nor was the court asked to change its ruling.

Defendant contends this ruling was error. Before addressing the merits of this argument, there is one point that is salient to appreciating the trial court’s ruling. Defendant was originally charged with committing the attempted murder of Officer Grunseth “deliberately, with premeditation, and with malice aforethought.” Although the jury ultimately found that the offense was not committed with premeditation, the issue of defendant’s mental state was very much at issue at the time the trial court made its ruling.

Section 28, subdivision (a), states two principles. It 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.” (See also §§ 22 and 25.) Section 29 states a related principle: “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 . . . for the crimes charged.” Together, sections 28 and 29 do not preclude offering evidence to support a defense that a “mental illness, mental disorder, or mental defect,” including drug intoxication, could prevent actual formation of a mental state required for conviction, but they do prevent an expert from offering an opinion on whether a specific defendant

personally and actually possessed that mental state. (E.g., *People v. Coddington* (2000) 23 Cal.4th 529, 582-583.)

As respondent points out, the effect of the hypothetical question defendant intended to pose to Dr. Tucker—whether a person using methamphetamine would react with a “fight or flight” response when apprehended under the specific facts of the current case—so mirrored the current case that it in essence would have conveyed the message that Dr. Tucker was testifying about this defendant’s mental state. Section 29 precludes an expert witness from testifying on that issue. (E.g., *People v. Aris* (1989) 215 Cal.App.3d 1178, 1198.) Additionally, as the trial court noted, there were gaps in the underlying foundation of Dr. Tucker’s proposed testimony: he did not know how much methamphetamine defendant consumed or the effects on this individual defendant due to his particular sensitivity to the drug and history of abuse.

The trial court’s ruling will require reversal only if it amounts to an abuse of discretion. (E.g., *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) The court’s ruling did not entirely foreclose testimony from Dr. Tucker; the court ruled he could testify about the general effects of methamphetamine and that methamphetamine use could increase impulsivity, and Dr. Tucker did so testify. The trial court did not totally preclude the use of hypothetical questions. We find no abuse here.² Finally, defendant’s claim that the ruling deprived him of his constitutional right to present a defense and receive due

² Even if the rulings were an abuse of discretion, the error was harmless. Dr. Tucker specifically testified that he was addressing only the issue of whether the act was premeditated when he spoke to the impulsivity that methamphetamine use can cause. As he explained, “I’m thinking clinically he’s not considering, planning, weighing, executing. That is what I mean when I say impulsively, that the stabbing was impulsive in that way. [¶] In terms of intent, I am not addressing intent when I talk about that.” As the jury did not find defendant acted with premeditation, and given Dr. Tucker’s testimony that he was not addressing intent, it is not reasonably probable that the proffered testimony would have changed the result. (*People v. Sanders* (1995) 11 Cal.4th 475, 510 [applying standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 to issue of alleged error in exclusion of expert testimony]; *People v. Coddington, supra*, 23 Cal.4th 529, 583 [exclusion of expert testimony that defendant did not harbor requisite intent not denial of constitutional right to present a defense].)

process has been rejected by our Supreme Court (*People v. Coddington, supra*, 23 Cal.4th 529, 583) and must therefore fail here. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

Defendant presents two claims of error concerning the instructions given the jury on the lesser offense of attempted voluntary manslaughter to the murder charge.

The trial court instructed the jury with CALJIC No. 8.40 that “Every person who unlawfully attempts to kill another human being without malice aforethought but either with an intent to kill, or with conscious disregard for human life, is guilty of attempted voluntary manslaughter [¶] . . . [¶] The phrase . . . ‘conscious disregard for life,’ as used in this instruction, means that an attempted killing results from a doing of an intentional act, the natural consequences of which are dangerous to human life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” Defendant contends the instruction was erroneous because the offense of attempted voluntary manslaughter cannot be based on the theory that the defendant acted with a conscious disregard of life.

The Attorney General responds that any error was waived because defendant requested CALJIC No. 8.40, thus inviting any error. This claim is based entirely on a written version of the instruction (which was substantially modified from voluntary manslaughter to attempted voluntary manslaughter) the court noted was “requested by Defendant” and “given as modified.” This is not sufficient: Invited error will be found *only* if counsel expresses a deliberate tactical purpose that excludes ignorance or mistake. (E.g., *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; *People v. Wickersham* (1982) 32 Cal.3d 307, 330-333.) There is no such express decision in this record. We therefore turn to the merits of defendant’s contention that attempted voluntary manslaughter cannot be founded on the defendant acting with a conscious disregard for life.

Defendant is correct. “An *attempt* to commit a crime requires a specific intent to commit the crime. [Citation.] This is true ‘even though the crime attempted does not [require a specific intent].’ [Citation.] Thus, for example, it has been the rule for more

than a century ‘that implied malice cannot support a conviction of an *attempt* to commit murder. [Citation.] [¶] Similarly, attempted voluntary manslaughter cannot be premised on the theory defendant acted with conscious disregard for life, because it would be based on the ‘internally contradictory premise’ that one can intend to commit a reckless killing. [Citation.] Since implied malice cannot support conviction of an attempt to commit murder [citation], it would turn logic on its head to allow implied malice to support conviction of attempted voluntary manslaughter.” (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710, italics in original; accord, *People v. Montes* (2003) 112 Cal.App.4th 1543, 1551-1552.) The Attorney General concedes the instruction was erroneous, but argues that any error was not prejudicial because the trial court was not required to instruct on attempted voluntary manslaughter. We agree that if there was error, it was harmless.

The need for the instruction was, at best, problematic. (See *People v. Roman* (1967) 256 Cal.App.2d 656, 660 [as a matter of law, resisting arrest is not sufficient provocation to reduce murder to manslaughter].) In any event, its use did not prejudice defendant. On the contrary, it favored him because it gave the jury the option of convicting defendant of attempted manslaughter if they found that he had acted with a conscious disregard of life. This was a far more lenient standard than the malice required for a conviction of attempted murder. Nevertheless, the jury found that defendant had acted with malice and was therefore guilty of murder. The error thus did not result in a miscarriage of justice. (Cal. Const., art VI, § 13; *People v. Breverman* (1998) 19 Cal.4th 142, 178.)

The trial court further instructed the jury with CALJIC No. 8.40 that “There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion.” The jury was also instructed with CALJIC No. 8.42 on the principles concerning the nature of quarrel or heat of passion that would reduce the charge of attempted murder to attempted manslaughter. The court did instruct the jury with CALJIC No. 17.10 that they could convict defendant “of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime” but

not guilty of the charged offense. Defendant contends that this was not enough, that the court should have sua sponte specifically instructed the jury (1) with CALJIC No. 8.72 that if they had any reasonable doubts as between attempted murder and attempted manslaughter, they should find for attempted manslaughter, and (2) with CALJIC 8.50 “the burden is on the People to prove . . . that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.”

We disagree. Pursuant to CALJIC No. 17.10, the jury was told: “If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of attempted voluntary manslaughter . . . [is] the lesser to that of attempted murder” If there was error in not using CALJIC No. 8.72, the use of CALJIC No. 17.10 renders it harmless.

“CALJIC No. 17.10, when its blanks are filled in for murder and manslaughter, is logically equivalent to CALJIC No. 8.72. If a jury is convinced beyond a reasonable doubt that a defendant is guilty of either a greater or a lesser offense, this can only be because it has a reasonable doubt about elements of the greater offense and no reasonable doubt about any elements of the lesser. Under these circumstances, CALJIC No. 17.10 instructs the jury to convict of the lesser offense. CALJIC No. 8.72 does the same [¶] [¶] . . . Since the court gave CALJIC No. 17.10, it did not err in failing to give CALJIC No. 8.72 sua sponte.” (*People v. Barajas* (2004) 120 Cal.App.4th 787, 793-794.) This was our conclusion in *People v. St. Germain* (1982) 138 Cal.App.3d 507, 521-522 & fn. 9, and we adhere to it here.

As for CALJIC No. 8.50, “in a murder case, unless the People’s own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant’s* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder.” (*People v. Rios* (2000) 23 Cal.4th 450, 461-462, italics in original.) The only evidence concerning the circumstances of defendant’s knife attack on Officer Grunseth came in the form of Officer Grunseth’s

testimony, which furnished no basis for concluding the attack was provoked. There simply was no evidence of sudden quarrel or heat of passion, nor was that argued as a theory of the case below. There was consequently no need for CALJIC No. 8.50 and no error. Even if there was error, it would qualify as harmless for the reasons stated previously. The jury rejected the defense of provocation reducing the crime to attempted manslaughter. There is no discernible probability that use of CALJIC No. 8.50 would have caused the jury to come to a different conclusion.

IV

In his opening brief defendant contends the trial court violated his constitutional jury trial right as construed in *Blakely v. Washington* (2004) 542 U.S. 296 when it imposed an aggravated term for the assault count. By the time he filed his reply brief, however, defendant realized his contention had become untenable in light of our Supreme Court's decision in *People v. Black* (2005) 35 Cal.4th 1238, but he "continues to assert the claim in order to exhaust state remedies." We are compelled to reject defendant's contention in light of *Black*. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455.) In any event, the point is moot in light of reversal of the assault count. (See part V, *post*.)

V

Defendant's final contention is that the abstract of judgment should be corrected in two particulars.

The first deals with the sentences imposed in action No. 02-273914-2. There, defendant had entered pleas of no contest to charges of burglarizing a home (§ 459) and committing grand theft by taking property from that house (§ 487). The trial court sentenced defendant to two years for the burglary and 16 months for the theft. Defendant argues that section 654 permits imposition of only one sentence if there are multiple offenses but only a single criminal objective; accordingly the sentence for the theft count must be stayed. (E.g., *People v. McFarland* (1962) 58 Cal.2d 748, 762-763.) The Attorney General agrees. So do we.

Defendant's second argument is that the conviction for assaulting Officer Grunseth is merged in the greater offense of attempting to kill the officer, requiring that the assault conviction must be reversed. Again the Attorney General concurs.

The conviction of assault in action No. 05-031322-1 is reversed. The judgment is further ordered to be modified to reflect that the 18-month sentence for the grand theft conviction in action No. 02-273914-2 is stayed pursuant to section 654. In all other regards, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a certified copy of it to the California Department of Corrections.

Sepulveda, J.

We concur:

Reardon, Acting P. J.

Munter, J.*

* Judge of the San Francisco Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.