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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SIRRELL D. MURRAY, Defendant and Appellant.	B255550 (Los Angeles County Super. Ct. No. BA388607)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Sirrell Murray appeals from a judgment following his jury conviction of voluntary manslaughter. He challenges the court's exclusion of evidence of the victim's character for violence, instruction of the jury with CALCRIM No. 361 (witness's failure to explain or deny facts within his knowledge), and refusal to strike a prior strike conviction. We find no reversible error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and the victim, Tam Le, were cellmates at the Twin Towers jail in Los Angeles. Around 3:00 a.m. on August 27, 2011, Le told a deputy making rounds that his stomach hurt. An hour and a half later, he complained his arm hurt. Appellant, who appeared to be asleep on the top bunk, woke up and told the deputy Le was crazy, then told Le to go to sleep. Le did not respond and appeared submissive and unemotional. At about 5:00 a.m., another deputy saw Le sitting on the bottom bunk with his hands on his knees. He was mumbling to himself while appellant appeared to be asleep on the top bunk.

Around 6:00 a.m., an inmate signaled there was a "man down" in appellant's cell. Le was found lying on his back on the floor, in a large pool of blood. He had fractured cervical vertebrae, and fractures to his face and skull. There also were signs Le had been strangled from behind. Blood spatter was found low on the cell walls, door, sink and toilet. Blood was found inside a folded towel on the upper bunk, and a damp towel on the desk was stained with blood. There was blood on appellant's clothes and shoes. No ligature was found in the cell, but any object used as a ligature could easily have been flushed down the jail's powerful toilet.

Appellant initially blocked entry into the cell, but moved away when ordered. He had marks on his hands consistent with having used a ligature. He had numerous old scars, but no fresh injuries, except for a minor bruise on his chest and linear scratch marks under his armpit. He did not complain of pain, nor did he seek medical attention. While being led out of the cell and in a subsequent interview, appellant asked if he was

being released, denied he had been in the cell with Le, and appeared not to know what was happening.

Appellant was charged with murder as a second striker under the Three Strikes law. His first two trials ended in mistrial due to jury deadlock. During the third jury trial, appellant took the stand in his own defense. He testified he had been sent to prison at age 16. While there, he was attacked several times, and saw several people get killed. He was released in 2010, when he was 26 years old. In 2011, he was arrested again. After receiving medical and psychiatric treatment, he eventually was placed in a cell with Le. According to appellant, Le bragged about having killed twice, facing the death penalty, and having nothing to lose. Appellant claimed he was afraid of Le. During the second night in the cell, appellant woke up to find Le grabbing his shoulders and threatening to kill him. He testified that he fought back, but claimed not to remember the details of the fight or the subsequent interview with the detectives.

It was stipulated that Le had been convicted of murder in 1987, and the defense was allowed to introduce evidence of the most recent murder charges against him. A church woman had taken in Le, who was homeless. Because Le appeared to have been drinking, the woman eventually asked him to leave her home. Le responded by stabbing her repeatedly with a knife. He also stabbed a man who happened to be in the woman's house at the time. The man died as a result.

The jury convicted appellant of the lesser included offense of voluntary manslaughter. The court found the prior strike allegation to be true. Appellant was sentenced to 11 years, doubled to 22 years under the Three Strikes law. He was awarded 1,102 days of credits, and ordered to pay fines and fees. This timely appeal followed.

DISCUSSION

I

Appellant argues that the court's exclusion of evidence that Le had attempted to strangle a guard during deportation proceedings in 1999 violated appellant's right to present a defense.

In a homicide case where self-defense is raised, evidence of the victim's violent character is admissible to show that the victim was the aggressor. (Evid. Code, § 1103; *People v. Wright* (1985) 39 Cal.3d 576, 587; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446–447.) The court has broad discretion in assessing whether the probative value of such evidence is outweighed by the danger of undue prejudice, confusion of issues, or consumption of time. (Evid. Code, § 352; *People v. Wright*, at p. 587; *People v. Shoemaker*, at p. 448.) The exclusion of marginally relevant or cumulative evidence under Evidence Code section 352 does not constitute abuse of discretion and does not violate the right to present a defense. (*Id*. at p. 450.)

Before oral argument in this case, defense counsel represented that appellant was prepared to testify Le had attacked him, but his decision to testify depended on the admission of evidence of Le's character for violence. The court explained that its final ruling on admissibility would be based on appellant's actual testimony, but its tentative ruling was to admit evidence of the 1999 attempted strangulation "because it seems to me there is a possibility that strangulation was an issue. I don't know. But if it becomes an issue after [appellant] testifies, then I will allow that to come in."

After appellant testified, defense counsel argued the 1999 attempted strangulation was relevant to whether Le had attempted to strangle appellant. The court explained counsel's argument was more speculative than the court had anticipated because there was no evidence, testimonial or physical, of an attempted strangulation by Le in this case. The court acknowledged that it might have misunderstood defense counsel's initial offer of proof. The defense moved for mistrial on the ground that defendant's decision to testify had been based on the court's tentative decision to admit the 1999 incident. The motion was denied.

Appellant's argument that he chose to testify because of the court's tentative decision to admit the 1999 incident is exaggerated. Appellant had to testify in order to raise the issue of self-defense in the first place. As a result of his testimony, the court admitted evidence that Le had committed two murders; thus, the 1999 incident was cumulative of other evidence of Le's violent character. The jury convicted appellant of

voluntary manslaughter based on a theory of imperfect self-defense, which means it believed appellant had an actual, albeit unreasonable, belief that he needed to defend himself with deadly force.

We are not persuaded that the 1999 incident was relevant to assessing the reasonableness of appellant's self-defense. Appellant did not testify that he knew of the 1999 attempted strangulation, or that he saw a ligature in Le's hand. There were no marks on Le's hands and no other evidence that Le had attempted to strangle appellant. The marks on Le's neck indicated Le had been strangled from behind. The court reasoned that the inference Le had attempted to strangle appellant because he had tried to strangle an immigration guard years before would be speculative. To the extent the 1999 incident gave rise only to a speculative inference that Le approached appellant in this case with a ligature, it was irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) It also was potentially confusing because Le, not appellant, was the victim of strangulation in this case. The court did not abuse its discretion in excluding that incident under Evidence Code section 352.

II

Appellant argues CALCRIM No. 361[1] (failure to explain or deny facts within his knowledge) should not have been given. Appellant did not object, but to the extent the instruction may have affected his substantial rights, we decline to find forfeiture and consider the argument on the merits. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 495.)

"CALCRIM No. 361 rests on the logical inference that if a person charged with a crime is given the opportunity to explain or deny evidence against him but fails to do so

[1] CALCRIM No. 361 provides: "If the defendant failed in (his/her) testimony to explain or deny evidence against (him/her), and if (he/she) could reasonably be expected to have done so based on what (he/she) knew, you may consider (his/her) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

(or gives an implausible explanation), then that evidence may be entitled to added weight." (*People v. Vega*, *supra*, 236 Cal.App.4th at p. 496.) Appellant argues it always has been his position that he could not remember the events that led to Le's death. That is not correct. In the interview taken several hours after the incident, appellant claimed not to have been in the cell with Le at all, while at trial he admitted being in the cell and recalled being attacked by Le, but claimed not to remember anything else. He offered no explanation for his selective and changing recollections.

An unexplained memory gap may justify giving CALCRIM No. 361. (See *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030 [instruction was properly given where defendant gave detailed testimony about events preceding murder, but claimed to have no memory of inculpatory events].) In any event, giving the instruction was hardly prejudicial. CALCRIM No. 361 leaves it to the jury to "decide the meaning and importance" of any failure to explain incriminating evidence. In addition, the jury was instructed with CALCRIM No. 200 that some instructions might not apply, depending on its findings of fact. (See *People v. Vega*, *supra*, 236 Cal.App.4th at pp. 502–503.) In closing, the prosecutor used appellant's changing recollections to argue that appellant had made a conscious plan to avoid responsibility on the day of Le's death, and that after he realized denying his presence in the cell was not going to work, appellant had come up with self-defense as an excuse. The prosecutor urged the jury to reject self-defense as a ploy. Since the jury convicted defendant of voluntary manslaughter on a theory of imperfect self-defense, it must have rejected the inference the prosecutor urged it to draw.

III

Appellant argues the court abused its discretion in denying his motion to strike his prior strike conviction in the interest of justice. (Pen. Code, § 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.)

In deciding whether to strike a prior strike, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside [the spirit of the Three Strikes law], in

whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) To justify striking a prior strike, the defendant's circumstances must be "extraordinary." (*Id.* at p. 378.) The court's decision may not be reversed just because reasonable minds might disagree about the result. (*Ibid.*)

In the trial court, the prosecutor argued appellant was within the spirit of the Three Strikes law because he had not shown he could lead a life free of crime. Appellant had been arrested for domestic violence within 10 months of his release from prison, while still on parole, and two months later, while in custody, he committed the current offense. Defense counsel focused on the fact that appellant had been a minor when convicted of his prior strike, robbery. He had been tried as an adult, without an opportunity for rehabilitation, and sent to prison, where he was repeatedly victimized. Counsel claimed appellant was a different person, who had dealt with his mental health issues and understood the need to change his behavior. The court agreed with the prosecution that appellant should be sentenced as a second striker because he did not fall outside the spirit of the Three Strikes law.

Appellant argues the court should have stricken his prior strike because appellant committed it as a juvenile and because his current offense was the result of being placed in a cell with a violent individual. The court acknowledged these arguments, but weighed the circumstances differently, finding that appellant committed a violent felony, followed by "a really brutal homicide" while still on parole. It did not abuse its discretion in concluding appellant was within the spirit of the Three Strikes law.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.