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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JONATHAN FRANCISCO VALLE,<br><br>Defendant and Appellant. | B279935<br>(Los Angeles County Super. Ct. No. BA408877) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Alliaon H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jonathan Francisco Valle appeals his conviction of second degree murder. Appellant contends: (1) the trial court improperly restricted his expert's testimony with respect to the effect of post-traumatic stress disorder (PTSD); (2) the trial court erred in giving CALCRIM No. 360 and in independently advising the jury midtrial that his expert's testimony repeating statements appellant made during the diagnostic interview should not be considered for the truth of the matters asserted; and (3) the trial court erred in refusing to instruct on self-defense. We find no error in any of the trial court's actions and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant was charged with the willful, deliberate and premeditated murder of Marco Blanco and of personally discharging a firearm in committing the crime.

B. *Evidence at Trial*

1. *Prosecution Case*

Tannia Sanchez and her sister Alicia Sanchez testified on behalf of the prosecution. Tannia testified that on March 10, 2013, she and her sister were visiting a relative in the vicinity of Blanco's home. They left between 7:00 and 8:00 p.m. As they were walking to their car, Tannia saw an unoccupied Taurus that appeared to have crashed into a nearby fence. She also saw two men, one standing inside the fence -- later identified as Blanco -- and one outside it -- later

identified as appellant. Appellant asked the sisters for money for gas. He looked like he was "on something." Blanco walked toward the fence gate, talking on a cell phone. After the sisters got into their car, appellant drew a gun from his pocket and pointed it at the sisters, but then turned and shot Blanco multiple times. Tannia observed no weapon in Blanco's possession.[1]

Blanco was dead when officers arrived.[2] His body was lying approximately a foot from the gate. There was a cell phone near the right side of his body and keys in his left hand. There were no weapons found on or near him. Blanco's children, who were inside the house, told officers that their father had brought home a pizza and then gone back outside.

The day after the shooting, appellant went to the police station where he agreed to be interviewed. The interview was played to the jury. In it, appellant said he had done "the wrong thing to prove a point, to make it right" and that he "took it upon [himself]" to "do[] what [he] thought was right." He also said "my mind was playing tricks on me" and "little

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[1] Alicia's testimony was essentially the same as Tannia's, but she recalled appellant asking if they could take him to get gas rather than asking for gas money. In addition, Alicia did see not appellant pull the gun from his pocket and point it toward her and her sister.

[2] Blanco had four gunshot wounds in his torso, two of which severed his aorta.

things triggered me." He claimed to have heard voices telling him to "break 'em" and "smoke 'em," and to "just bam." Appellant said he had bought the gun and a bag of bullets years earlier for self-protection.

During the interview, appellant made inconsistent statements about his use of drugs. He said he was a regular user of crystal methamphetamine, which he had used the morning of the shooting. He later said he had not used drugs, only alcohol. When directly asked why he shot Blanco, appellant said "because I was on drugs." Moments later, he said drugs had nothing to do with it, and that the shooting occurred because Blanco "tried to call the cops on me for something" and because "some voices . . . told me." Still later, asked if drugs had anything to do with the shooting, appellant said "to tell you the truth, I don't know, I don't think so," and answered affirmatively when the officers asked if the real cause was his concern over "getting [into] trouble because [he] crashed the car and the police were going to come and arrest [him] for drunk driving or being under the influence or something."

Describing the sequence of events, appellant said that when he first saw Blanco, Blanco was walking into his house with his son and a pizza, and that voices told him to wait until "the right time, the right place, at the right time." Appellant said he believed he had scared Blanco and "thought . . . he was reaching for something." Appellant "calmed [him]self down," but then saw Blanco "calling somebody, talking to somebody" and said "what the fuck."

After the shooting, appellant wanted to "get out of there -- to get gone" because he "did something wrong."

During the interview, appellant said he had thrown the gun in his "baby mama's" yard, and that he kept the extra ammunition at her place. After the interview, officers searched the residence and backyard of appellant's girlfriend's house -- located 150 feet from Blanco's -- and found the murder weapon in the yard and a bag of bullets inside the house. They also recovered a set of keys for the Taurus.

2. *Defense Case*

Appellant testified he was in the area visiting his pregnant ex-girlfriend. They argued, and he got into his car to leave. The car rolled backwards into the fence of the house next door. Appellant said that at the time he was homeless, had a substance abuse problem, and regularly used crystal methamphetamine. He had used methamphetamine the afternoon of the shooting. After his car hit the fence, appellant saw Blanco and one of his children enter the house. Blanco was talking on the phone and looking at appellant. Blanco came back out of the house at the same time the Sanchez sisters appeared. As appellant was asking them for help, he saw Blanco walking toward him out of the side of his eye. Blanco looked angry, which scared appellant. Blanco got within two feet of appellant.

Contrary to what appellant told officers in the interview, Blanco was not talking on the phone at the time.[3] They had a "stare-down," and appellant thought he saw Blanco reaching for something in his pocket. Something told him to shoot Blanco.

Appellant testified that he had purchased the gun he was carrying after being the victim in a 2010 incident. In that incident, he was returning home with a former girlfriend. Two men pulled up behind them and "told [him] where [he] was from." The men shot at them, leaving a bullet hole in his car. After that, appellant did not feel comfortable anywhere and believed he had to keep up his guard, "watch [his] back," and keep aware of his surroundings. He slept poorly. The circumstances surrounding the shooting of Blanco, "the way it happened[,] felt like it took [him] back" to the 2010 incident. The drugs he had taken contributed to making him feel paranoid.

The defense expert, Kevin Booker, Ph.D., a trauma specialist, testified that PTSD arises from experiencing a life-threatening incident which induces terror or horror. PTSD is characterized by flashbacks, nightmares and a desire to avoid anything representing the life-threatening event. Sufferers experience "hyper-arousal" or

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[3] Appellant testified he was under the influence of drugs during the police interview.

"hypervigilance," a feeling of always being on edge. They may worry about being attacked from behind. This leads to difficulty in forming interpersonal relationships or being in unfamiliar surroundings. The sufferer may turn to substance abuse as a form of avoidance, to numb his or her emotions related to the traumatic incident. The fear mechanism is activated unconsciously, overriding conscious decision-making, and may lead to a fight-or-flight response.

Dr. Booker interviewed appellant to determine whether he had experienced a traumatic event that led to his developing PTSD. Appellant told Dr. Booker about the 2010 shooting incident, and said he had flashbacks and nightmares about it "for weeks and even years" afterward. Appellant said it had caused worry about his personal safety when in public and led him to purchase the gun. Based on this information from appellant, Dr. Booker diagnosed PTSD.

Defense counsel asked how suffering from PTSD would "affect [appellant's] behavior." Dr. Booker replied that "any patient with [PTSD] may have a very difficult time engaging other individuals publically and, in some cases, even privately," and that PTSD "tends to cause individuals to become very much preoccupied with protecting themselves," interfering with interpersonal relationships and the ability to engage socially. It also causes sufferers to be "on edge" and "very jumpy." Dr. Booker was asked to explain "hypothetically" how "someone who has the symptoms or the diagnosis" of appellant would react "to the perception of a

threat or a threat." Dr. Booker replied that such persons tend to overreact and engage in behavior "that seems to be beyond what you would expect from a person without an experience of trauma in terms of their perception or response to a threat" because the disease "can distort their interpretation of reality or of the world" and "can make them perceive that there is actually [imminent] danger or threat when, in fact, none objectively really exists." In other words, he explained, the disease can cause its sufferers to be "extremely overreactive." Asked how long after the traumatic incident the condition and its symptoms were likely to last, Dr. Book said: "If [PTSD] is untreated, there is a significant chance that the individual may continue to experience these symptoms . . . for the entirety of their lives . . . ."

On cross-examination, Dr. Booker testified that when interviewed, appellant did not mention hearing voices. He acknowledged that not everyone who experiences a traumatic incident falls prey to PTSD. He also stated that malingering was difficult to detect, and that his diagnosis was dependent on appellant's being truthful with him.

C. *Pertinent Jury Instructions and Argument*

The jury was given the instructions on first and second degree murder, manslaughter, and imperfect self-defense.[4]

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[4] The imperfect self-defense instruction was based on CALCRIM No. 571: "A killing that would otherwise be murder is

(*Fn. continued on the next page.*)

The jury also was informed it could consider evidence of appellant's voluntary intoxication to "decid[e] whether the defendant acted with an intent to kill or the defendant acted with deliberation or premeditation" and evidence of hallucinations to "decid[e] whether the defendant acted with deliberation and premeditation." The jury was further instructed that it was the prosecutor's burden to prove beyond a reasonable doubt that the defendant acted with deliberation and premeditation. Pursuant to CALCRIM No. 200, the jurors were told "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in the trial" and "Do not assume because I give a particular instruction that I am suggesting anything about the facts."

In closing, defense counsel urged the jury to take into account that appellant "is a man who suffers from mental conditions, from substance abuse," and to find that appellant

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reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. The defendant acted in imperfect self-defense if: 1. the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; and 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; but 3. At least one of those beliefs was unreasonable. . . . [¶] . . . [¶] . . . The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense."

had committed manslaughter because he actually but unreasonably felt threatened by Blanco's actions. Counsel said that such a finding would not mean appellant would "be exonerated," but would result in his being convicted of "a serious crime." The prosecutor asked the jury to focus on the police interview, in which appellant said he "calmed down" after seeing Blanco reaching for his pocket, and shot Blanco because he appeared to be making a call to the police. The prosecutor argued that in the moments between calming himself down and shooting Blanco, appellant had time for premeditation.

D. *Verdict and Sentencing*

The jury found appellant guilty of second degree murder, and found the allegation that he personally and intentionally discharged a firearm true. The court imposed a sentence of 40 years to life, comprising 15 years to life for the base term and an additional 25 years to life for the enhancement. This appeal followed.

## DISCUSSION

A. *The Court Did Not Improperly Restrict the Expert's Testimony*

1. *Background*

Prior to voir dire, the court asked counsel if there were any drug or mental health issues that counsel might wish to address with the jury. Defense counsel informed the court that there would be PTSD issues, and that he expected to

call an expert witness to testify concerning the subject. The prosecutor stated that he would object to any such expert testimony if appellant failed to submit to cross-examination and the expert attempted to repeat hearsay statements from appellant. Defense counsel informed the court that appellant was "potentially" planning to testify. The court said: "[Y]ou need to . . .make some sort of a decision. Because if he testifies, it would be . . . the most fair to both sides to have him testify and then allow this doctor to use whatever [appellant] is saying as part of his evaluation. [¶] But I can't allow him to get [appellant's] statements into the record . . . and then avoid having [appellant] ever be cross-examined on them if that's the only way he comes to his conclusions." Defense counsel indicated his then current intention to call both appellant and his mother, and said that the expert relied on information from both of them. The prosecutor again expressed concern that others would testify and "paint this picture of [appellant]" without providing the prosecutor an opportunity to cross-examine appellant. The court stated that defense counsel could discuss PTSD with the prospective jurors because the court was "assuming in good faith that you're going to follow my instruction and that [appellant] is going to testify before any . . . other information comes in [through the expert or appellant's mother]."

Immediately after the court made its ruling, the following exchange occurred. Defense counsel stated: "I'm . . . trying to get clarification on it. If [appellant] does not testify, I understand that he can't -- I mean, I understand

[the prosecutor's] position that . . . [the expert] cannot testify as to what exactly was going on in his mind that day. [¶] But I still feel he's within his rights, as an expert, for him to diagnos[e] [appellant] having a condition from a prior incident which could affect his judgment on that day." The court replied: "I suppose he could talk about in general that there is such a thing as PTSD. It can affect somebody who has been shot at in the past. But he can't report that it affected [appellant] or any statements made by [appellant] or [his] . . . mother. [¶] [Also] I don't see . . . how you mitigate the first degree murder without any testimony as to what [appellant's] state of mind was." Defense counsel explained that the interview transcript, which the court had not seen, suggested that appellant believed Blanco was going to pull a gun, but acknowledged "it's hard to talk about it in this type of vacuum." The court responded: "We'll have to see how it plays out."

As indicated above, appellant testified on his own behalf, claiming that he believed Blanco was reaching into his pocket for a weapon. In addition, defense counsel was permitted to question Dr. Booker about statements appellant made that led him to diagnose PTSD, and the expert explained, without objection, how PTSD could affect "someone who has the symptoms or the diagnosis" of appellant when faced with an imagined threat. Appellant contends, however, that the court's ruling improperly limited Dr. Booker's testimony.

2. *Analysis*

Penal Code sections 28 and 29 limit the type of testimony psychiatric experts may provide in a criminal case. Section 28 provides: "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." Section 29 prohibits a psychiatric expert from testifying "whether the defendant had or did not have the required mental states . . . for the crimes charged." It is well-settled that these provisions "do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged." (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908.) For example, it is permissible for a psychiatric expert to opine "that [the defendant], because of his history of psychological trauma, tended to overreact to stress and apprehension," that "such condition could result in [the defendant] acting impulsively under certain particular circumstances," and that a particular encounter "was the type that could result in an impulsive reaction from one with [the defendant's] mental

condition." (*People v. Nunn* (1996) 50 Cal.App.4th 1357, 1365.) On the other hand, the Supreme Court has held that objections were properly sustained to attempts to elicit from the defense expert testimony that (1) "'[defendant] seemed to be [in] a reactive kind of state, rather than . . . cold and calculated'"; (2) "'[At the time of the crimes, defendant] didn't seem to know what he was doing'"; and (3) "'defendant's impairment . . . [was] . . . part of why he couldn't handle the stress he was under [at the time of the commission of the crimes].'" (*People v. Pearson* (2013) 56 Cal.4th 393, 451.) In other words, "'[s]ections 28 and 29 . . . leave an expert considerable latitude to express an opinion on the defendant's mental condition at the time of offense,'" as long as the opinion does not stray from the statutes' prohibitions: "'no testimony on the defendant's capacity to have, or actually having, the intent required to commit the charged crime.'" (*People v. Pearson*, *supra*, at p. 451, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 583.)

In *People v. Herrera* (2016) 247 Cal.App.4th 467 (*Herrera*), the trial court ruled that the PTSD expert could not testify as to "anything related to [the defendant's] mental state at the time of the commission of the offense." Based on that ruling the court sustained objections to questions eliciting the expert's opinion "'as to whether [the defendant] was suffering from [peritraumatic dissociative state],' 'whether he was psychiatrically impaired,' and 'whether he suffered from [PTSD]' on the date of the murder.'" The Court of Appeal found error, concluding that

the relevant authority does not "restrict testimony that the defendant had a particular mental state" at the time of the offense, "only the particular mental state that is an element of the offense." (*Id.* at pp. 475, 477, 480.)

Citing *Herrera*, appellant contends the trial court erred by "unduly limit[ing] Dr. Booker's testimony to preclude him from testifying about appellant's mental state, including his opinion that appellant was suffering from PTSD at the time of the shooting." Respondent contends that, taking the statement in context, the court was merely outlining the potential limitations on the expert's testimony in the event appellant failed to submit himself to cross-examination, and that its statement had no impact on the trial, as appellant did choose to testify. We agree with respondent. The court's statement was in direct response to defense counsel's request for "clarification . . . [i]f [appellant] does not testify." Moreover, the court's followup statement, "I don't see . . . how you mitigate the first degree murder without any testimony as to what [appellant's] state of mind was," and defense counsel's reply that the interview transcript could provide evidence that appellant felt threatened by Blanco make sense only if both parties to that exchange assumed appellant would not take the stand to explain his state of mind to the jury.

Our interpretation is further confirmed by defense counsel's questioning of Dr. Booker at trial. After ascertaining that the expert had made a PTSD diagnosis based on appellant's history gleaned from the diagnostic

interview, defense counsel asked how suffering from PTSD would "affect [appellant's] behavior" and "hypothetically" how "someone who has the symptoms or the diagnosis" of appellant would react "to the perception of a threat or a threat." Dr. Booker was permitted to explain without objection that PTSD "tends to cause individuals to become very much preoccupied with protecting themselves," causing sufferers to be "on edge" and "very jumpy." Dr. Booker further testified that persons suffering from PTSD tend to overreact and to engage in behavior "that seems to be beyond what you would expect from a person without an experience of trauma in terms of their perception or response to a threat" because the disease "can distort their interpretation of reality or of the world" and "can make them perceive that there is actually [imminent] danger or threat when, in fact, none objectively really exists." Dr. Booker also testified that if, like appellant, the sufferer went untreated, he or she would likely never recover from the condition. Dr. Booker's testimony, if believed by the jury, established that appellant contracted PTSD after the traumatic 2010 shooting incident; that the condition existed at the time of his diagnosis and, inferentially, at the time of the shooting; and that the condition could have distorted appellant's perception of reality when Blanco approached him, causing him to overreact. It is difficult to see what further opinion testimony counsel could have elicited while remaining within the bounds of Penal Code sections 28 and 29. Dr. Booker could not permissibly testify that appellant in

fact misperceived reality at the time of the shooting, or was in fact led by the disease to overreact to Blanco's simple gesture of moving his hand toward his pocket, as this was the ultimate question for the jury to decide in determining malice and imperfect self-defense.

We find support for our conclusion in *People v. Nunn*, *supra*, 50 Cal.App.4th 1357, where the defendant, a Vietnam veteran, had shot at a group of men who were standing near the fence of a property he was caring for and, in his view, engaging in threatening behavior. The Court of Appeal found that the expert psychologist was properly allowed to opine that the defendant, because of his history, "tended to overreact to stress and apprehension," that defendant's condition might result in his "acting impulsively under particular circumstances," and that the encounter with the men at the fence "was the type that could result in an impulsive reaction from one with [the defendant's] mental condition." (*Id.* at p. 1365.) "What the doctor could not do, . . . was to conclude that appellant had acted impulsively, that is, without the intent to kill, that is, without express malice aforethought." (*Ibid.*) Here, appellant's counsel was operating in line with applicable authority, not judicial constraint, when he refrained from asking Dr. Booker whether appellant was acting under the influence of PTSD when he drew his gun and pulled the trigger.

Moreover, even assuming appellant's interpretation of the trial court's statement was correct, and that the court intended to impose a restriction on the expert's testimony

regardless of whether appellant testified, its pretrial evidentiary ruling was not binding, but could have been reconsidered or set aside at the appropriate time. (See, e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1174 [trial court's in limine rulings were "necessarily tentative because the court retains discretion to make a different ruling as the evidence unfolds"]; *People v. Karis* (1988) 46 Cal.3d 612, 634, fn. 16 [ruling on motion in limine "is not generally binding on the trial court, which is free to reconsider its ruling at the time the challenged evidence is offered"]; *People v. Campa* (1984) 36 Cal.3d 870, 885-886 [rules allow the trial court to "'reconsider, modify or set aside its order [sustaining an objection to evidence] at any time prior to submission of the cause'"].) At the time of the court's ruling, defense counsel and the court acknowledged that they were discussing evidentiary issues "in . . . [a] vacuum," and that the ultimate determination depended on "how it plays out." As we have seen, defense counsel did not ask the court to reevaluate any perceived limitations when Dr. Booker testified. It was counsel's responsibility to revive the issue if he felt constrained in any way. His failure to do so forfeited the issue. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133 ["A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"] *People v. Karis*, *supra*, at p. 634, fn. 16 [as pretrial

evidentiary ruling was not binding, "the failure to object [when the evidence is offered] normally constitutes a waiver"].) In any event, as noted above, appellant's counsel elicited from the expert the very testimony he was permitted to present regarding appellant's condition and its possible effect.

B. *The trial court did not err in giving CALCRIM No. 360 or in advising the jury midtrial that Dr. Booker's testimony repeating hearsay statements made by appellant during the diagnostic interview should not be considered for the truth of the matters asserted*

1. *Background*

When defense counsel asked Dr. Booker how a person with appellant's PTSD diagnosis would be affected with regard to his or her perception of threat or danger, the prosecutor objected. The court overruled the objection, but took the opportunity to tell the jury: "The doctor is . . . telling us information . . . most of which we have heard before because it was testified to by [appellant], and it was subject to cross-examination. [¶] However, to the extent that there is anything that he is saying that was not exactly testified to by [appellant], you are not to consider this as necessarily something that happened but something that the doctor is considering as part of his opinion. [¶] In other words, because he hasn't been cross-examined on certain things that Dr. Booker is telling us about, it's not to be considered for the truth that these things actually occurred.

[¶] For example, the word 'flashbacks.' I don't remember the word 'flashbacks.' But I'm just giving you an example. But that is something that Dr. Booker took into account, he is saying, from his interview with [appellant]."

Later, the court gave CALCRIM No. 360: "Dr. Kevin Booker testified that in reaching his conclusions as an expert witness he considered statements made by [appellant]. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true." Appellant contends the limiting instructions precluding the jury from considering Dr. Booker's statements about the contents of his interview with appellant for the truth of the matters asserted should not have been given, and that the court's comments about the evidence were erroneous. Appellant asserts the court's instructions and comments on the evidence lightened the prosecution's burden of proof and precluded the jury from properly considering his imperfect self-defense claim. We reject these arguments.

2. *Analysis*

A defendant who believes the court's instructions or comments are incorrect or misleading must raise a timely objection or, if applicable, request amplification. (*People v. Orloff* (2016) 2 Cal.App.5th 947, 958.) Defense counsel did not do so; therefore, this contention is forfeited. (*People v. Chism* (2014) 58 Cal.4th 1266, 1308; *People v. Monterroso*

(2004) 34 Cal.4th 743, 781; *People v. Cash* (2002) 28 Cal.4th 703, 730.)

Moreover, appellant is incorrect on the merits. A psychiatric expert, like any other expert witness, is "entitled to rely upon reliable hearsay, including the statements of the patient" in forming his or her opinion concerning a patient's mental state. (*People v. Campos* (1995) 32 Cal.App.4th 304, 307, 308.) "'However, prejudice may arise if, "'under the guise of reasons,"' the expert's detailed explanation "'[brings] before the jury incompetent hearsay evidence."'" (*People v. Catlin* (2001) 26 Cal.4th 81, 137, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 918.) In *People v. Elliot* (2005) 37 Cal.4th 453, the Supreme Court held that a limiting instruction similar to CALCRIM No. 360 was properly given where the defense expert's opinion that the defendant was manic-depressive and had an antisocial personality disorder was based, in large part, on the defendant's statements to the expert that he had been beaten as a child and suffered from a long-term addiction to alcohol, which the expert recounted without a hearsay objection by the prosecutor.[5] (*People v. Elliot, supra,* at pp. 479-480.) The defendant

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[5] Pursuant to CALJIC No. 2.10, the court in *People v. Elliot* instructed the jurors that they could consider statements the defendant had made to the expert for the limited purpose of showing the information upon which the expert based his opinion, not for the truth of the facts asserted in the statements. (*People v. Elliot, supra,* 37 Cal.4th at p. 480.)

argued that the instruction removed important facts from the jury's full consideration. (*Ibid*.) The court held that the limiting instruction was properly given "to clarify that [the] defendant's statements to [the expert] were to be considered only for the limited purpose of assessing [the expert's] opinion," observing that the defendant's statements were made "in preparation for trial, giving defendant an incentive to prevaricate." (*Id*. at pp. 481-482.) The court explained that failing to advise on the limited purpose of the testimony "would allow defendants to insulate factual assertions and self-serving testimony from any cross-examination simply by having an expert relate them to the jury." (*Id*. at p. 481, citing *People v. Stanley* (1995) 10 Cal.4th 764, 839.)

Appellant specifically objects to the giving of CALCRIM No. 360 on the ground that his statements to Dr. Booker were admissible under the state of mind exception to the hearsay rule. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 700, fn. 15 [CALCRIM No. 360 to be given when statements do not fall within any exception to the hearsay rule].) We need not consider this issue as appellant did not raise this basis for admission of the statements at trial. (See Evid. Code, § 354; *People v. Ervine* (2009) 47 Cal.4th 745, 779.) Moreover, appellant is incorrect. Evidence Code section 1250 provides an exception for 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)" when the statement is offered to prove the declarant's state of mind "at

that time or at any other time when it is itself an issue in the action." This provision does not, however, "make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." (Evid. Code, § 1250, subds. (a), (b).) As the Supreme Court has explained, the exception of Evidence Code section 1250 "is limited to out-of-court statements describing a relevant mental state being experienced by the declarant *at the time* the statements were made." (*People v. Whitt* (1990) 51 Cal.3d 620, 642.) A defendant's statements during an interview on "feelings experienced *before* the interview . . . do not fit this description, and are inadmissible to prove their truth." (*Id.* at p. 643; see *People v. Frye* (1985) 166 Cal.App.3d 941, 950 [because "a statement is hearsay if it directly asserts the declarant's state of mind and is offered to prove the declarant's state of mind," where defendant, after his arrest, told police he entered victim's house "'to look around'" and not to steal, the statement "declar[ed] his previously existing state of mind" and was inadmissible].) Appellant's statements to Dr. Booker concerning how he felt during and after the 2010 incident were statements as to his pre-existing state of mind and were thus inadmissible under Evidence Code section 1250.

Appellant further contends that the court prejudiced the jury by erroneously giving as an example of expert testimony uncorroborated by appellant Dr. Booker's statement that appellant suffered "flashbacks" after the 2010 incident. Article VI, section 10 of the California

Constitution provides that a trial court may "make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." "[J]udicial comment on the evidence must be accurate temperate, nonargumentative and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) The trial court need not, however, "confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness." (*Id.* at p. 768.) The trial court's comments were neither improper nor erroneous. Dr. Booker testified that appellant said he experienced flashbacks in the "weeks and . . . years" after the 2010 incident. Appellant never testified to experiencing flashbacks, although he was asked several times by his counsel how the 2010 incident affected him. Appellant contends he was describing a flashback when he testified "just the way [the shooting and surrounding circumstances] happened felt like it took me back to that," referring to the 2010 incident. That statement did not corroborate Dr. Booker's testimony, which was clearly referring to flashbacks suffered in the intervening period between the 2010 incident and the shooting.

Finally, we note that the trial court instructed the jurors in accordance with CALCRIM No. 200 that they alone

"must decide what the facts are . . . based only on the evidence" and to "not assume just because [the court gave] a particular instruction that [the court was] suggesting anything about the facts." Appellant offers no reason to believe the jury failed to follow this instruction. (See *People v. Monterroso*, *supra*, 34 Cal.4th at p. 784.)

C. *The trial court did not err in refusing to instruct on self-defense*

1. *Background*

As indicated, the trial court gave the jury the instruction on imperfect self-defense. Defense counsel asked the court also to give an instruction on perfect self-defense, contending that although he did not anticipate arguing perfect self-defense to the jury, "[the victim's] action of . . . approaching [appellant] from behind, facing off and then reaching towards or reaching with something towards [appellant] in the dark could create even in a reasonable person the idea that a threat existed, . . . [¶] . . . even though it was later discovered that . . . [Blanco] did not have a firearm." The court denied the request, stating: "I don't see any evidence at all much less substantial evidence of self-defense in this case. . . . [¶] . . . [¶] There's no threat. There's no verbal communication between the two. There's no hostility between the two. Nothing." Appellant contends the evidence at trial warranted giving an instruction on perfect self-defense. We disagree.

2. *Analysis*

"To be acquitted of responsibility for a person's death based on self-defense, the defendant must have acted pursuant to an actual and reasonable belief in the need to defend himself under circumstances that would lead a reasonable person to fear the imminent infliction of death, or great bodily injury. [Citations.]" (*People v. Watie* (2002) 100 Cal.App.4th 866, 877, citing *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) "'The justification of self-defense requires a double showing: that defendant was actually in fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person.'" (*People v. Watie*, *supra*, at p. 877, quoting *People v. Sonier* (1952) 113 Cal.App.2d 277, 278.)

A trial court is required to instruct on self-defense "only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. [Citation.]" (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 581.) Substantial evidence is evidence "'sufficient to "deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable [persons] could have concluded'" that the particular fact underlying the instruction did exist." (*People v. Brooks* (2017) 3 Cal.5th 1, 75.) We review the trial court's determination de novo and independently decide whether there was substantial

evidence in the record to support the requested instruction. (*People v. Nelson* (2016) 1 Cal.5th 513, 538.)

No substantial evidence warranted giving the requested instruction. Blanco's alleged action of reaching toward his pocket while having an angry look on his face was insufficient to justify a deadly attack. (See *People v. Cisneros* (1973) 34 Cal.App.3d 399, 417, 418, disapproved in part on other grounds in *People v. Ray* (1975) 14 Cal.3d 20 [where defendant contended "it was incumbent on the court to instruct the jury that the defense of self-defense was available . . . if he mistakenly perceived that [the victim] was carrying a knife or a handgun," court held: "In the absence of any evidence of a viewable object which a reasonable man would have taken for a knife or a gun it is pure speculation to assume that the defendant could reasonably believe that [the victim] was carrying such a weapon"].) Appellant did not claim to have seen a weapon of any kind and none was found. Up to the point appellant drew his own gun and fired four shots into the victim, he had seen Blanco engage in only innocent actions: delivering a pizza to his family, taking his child inside, and talking on the telephone. As the trial court stated, there was no verbal communication or expression of hostility on Blanco's part. Appellant, by his own testimony, was under the influence of methamphetamine, clouding his perception and judgment. Under these facts, the court did not err in refusing to instruct on perfect self-defense.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.