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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ROY FRANCIS, Defendant and Appellant.	B226748 (Los Angeles County Super. Ct. No. MA044917)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Robert Roy Francis, appeals the judgment entered following his conviction for first degree murder with knife use and prior serious felony conviction findings (Pen. Code, §§ 187, 12022.5, 667, subd. (a)-(i)).[1] He was sentenced to state prison for a term of 86 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

In February 2009, defendant Francis was living on Brittany Lane in Lancaster with Judith Ennis and her 14-year-old daughter Candace. Francis received SSI benefits for a mental disability and Ennis was his caretaker. Francis was also a convicted sex offender who was required to register annually at the Lancaster Sheriff's Station. Ennis had taken Francis to the Sheriff's station for his registration appointments in 2007 and 2008. He was scheduled to register again on February 19, 2009, at 10:30 a.m.

About an hour before Francis's appointment time, the police received a 911 call from the Brittany Lane house. Before anything was said, the caller hung up. Deputy Sheriff Wade Young called back to follow up. Francis answered and said everything was okay. Young said there was an officer outside the house who wanted to speak to him. Francis again said he didn't need any help and hung up.

Deputy Sheriff Jim Jorian, the officer who had responded to the scene, saw the garage door at the house open slightly and then close again. Over the patrol car's public address system, Jorian ordered everyone to come outside but no one responded. Jorian then called the house. Francis answered the phone and "said that he had killed Judy, and that he wanted to kill himself." At Jorian's request, Francis exited the

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

house. He came out carrying a bloody knife; he had blood on his face, neck and hands, and he had injuries on the right side of his head and neck. At Jorian's direction, Francis dropped the knife and then lay on the ground. Francis was subsequently treated by paramedics at the scene and then taken to the hospital. Meanwhile, Jorian entered the house and found Ennis's bloody body on the kitchen floor. She had been stabbed to death.

Dr. Eugene Carpenter, the medical examiner who conducted the autopsy, testified Ennis had sustained about "60 mutilating stab wounds" to her face and head. There were "about 10 stab wounds into the forehead. 10 to 20 stab wounds through the right side of her face . . . some of them coming out the left side of the face. 20 to 30 stab wounds into the left side of her face, some of them coming out the right side of the face. 10 or so stab wounds to the back of the head and neck." Many of these wounds had been lethal, including one to the carotid artery and some of those to the face. The knife Francis had been carrying when he came out of the house, and another knife found inside the house, were both consistent with the type of knife used to inflict Ennis's injuries.

In addition to the stab wounds, Ennis had sustained a blunt force trauma injury to the top of her head. Although not a lethal injury, it could have caused her to lose consciousness. This injury was consistent with having been made by a staple gun found in the dining room. Ennis had sustained apparent defensive wounds to her fingers and hands, some of which were also consistent with her having held a knife at some point during the incident.

Francis gave a formal statement to the police saying he and Ennis argued that morning about going to the Sheriff's station to register. That was because Ennis's daughter, Candace, had accused him of trying to molest her nine years earlier and he was afraid Ennis believed her story. Francis thought Ennis was planning to have him arrested when they went to the station that morning and he didn't want to go back to jail.

Francis threatened Ennis with a knife and hit her on the head a couple of times with the staple gun. They struggled briefly and then he began stabbing her. Ennis ran into the kitchen, grabbed another knife, and they began stabbing each other. As they were fighting, Ennis dialed 911. Francis continued to stab her, sometimes using both knives. Ennis fell to the floor and he kept stabbing her. The last time he stabbed her, he left the knife in her head or neck, washed the blood off his hands, and changed his bloody clothes. That was when the officer called the house in response to Ennis's 911 call.

Francis said he first thought about killing Ennis the night before the registration appointment. He thought if he killed her he "wouldn't have to go back to jail," although he realized he would "end up getting caught" and have to go back to jail anyway. He made the decision to kill her the night before: "I knew that evening. I knew that evening that I was going to stab her." "I was tossing and turning and pacing the floor [that night] and going up and down wondering what to do . . . and I finally came to the conclusion that I'm gonna have to kill her, stab her, 'cause I don't wanna go back."

2. *Defense evidence.*

Dr. Catherine Scarf, a psychologist, interviewed Francis and reviewed medical records dating back to his childhood. Francis weighed four pounds at birth and had some brain impairment. He suffered from attention deficit disorder in early childhood and was a special education student. He received many different diagnoses over the years, including an early diagnosis of latent schizophrenia, a category which does not correlate with any diagnosis currently in use. In 1976 he was diagnosed with inadequate personality disorder; today this would be called borderline personality disorder, indicating an erratic type of personality, very unpredictable and impulsive. Francis had also been diagnosed as suffering from depression, developmental problems and mental retardation. Dr. Scarf, however, did not diagnose him as mentally retarded, which requires an IQ level of 69 or below.

Although Francis had frequently reported auditory hallucinations, including command hallucinations telling him to hurt himself, he did not present as psychotic when Scarf spoke to him. He did, however, exhibit some abnormal behavior, such as rocking back and forth and whispering to himself. According to Scarf, Francis sucks his thumb when he thinks no one is looking, watches cartoons, and engages in odd child-like behavior. Although his thoughts are not illogical, and he can make sense when he speaks, his thinking is childlike: very literal and concrete. Based on his medical history, Scarf diagnosed him as suffering from "[b]orderline intellectual function and psychotic disorder not otherwise specified . . . ." People with borderline intellectual functioning have difficulty with routine daily activities and rarely work.

Scarf opined Francis had been suffering from a mental illness on the day he killed Ennis. Although he may not have been actively psychotic, he was clearly suffering from a chronic mental illness.

CONTENTIONS

1. The trial court erred by excluding evidence of extra-judicial statements Francis made to the police and to Dr. Scarf.

2. The trial court erred by admitting evidence of gruesome crime scene and autopsy photographs.

3. The trial court erred by refusing to strike a Three Strikes prior.

DISCUSSION

1. *Evidence of Francis's extra-judicial statements was properly excluded.*

Francis did not testify. At trial, he attempted to introduce some of his own hearsay statements to establish a less culpable state of mind at the time he killed Ennis. On appeal, Francis contends the trial court erred by excluding this evidence. This claim is meritless.

a. *Background.*

The extra-judicial statements at issue were of two kinds: statements Francis made to the police and statements he made to Dr. Scarf.

The disputed police statements had been made in the presence of deputies who arrived at the Brittany Lane house after Deputy Jorian. While Francis was being treated by paramedics, he said something to the effect that he and Ennis "were fighting because I was trying to commit suicide, I wanted to kill myself and she tried to stop me," and that he had "sustained some self-inflicted knife wounds." Francis also told the officers, "I wanted to kill myself so bad."

The statements to Dr. Scarf were contained in her written report. Francis told her he "was attempting to kill himself by stabbing himself. He further reported [Ennis] tried to get the knife from me. Then I got it back. I told her to kill me. Then we just started stabbing each other. Robert further states he just, quote, snapped, end quote, and appears to have lost behavioral control. Robert stated, quote, I felt I wasn't myself at the time. I don't know what came over me, end quote."

After Scarf initially testified she had considered this entire statement in diagnosing Francis, the trial court asked her: "The part where he said . . . 'she tried to get the knife from me and I got it back. I told her to kill me. We just started stabbing each other,' did that statement play any part in reaching your opinion of psychotic disorder not otherwise specified by history? Or is that separate and distinct as suicide?" Scarf answered: "That is separate and distinct." Scarf gave the same response when the trial court asked the same thing regarding Francis's statements to the police and paramedics about trying to commit suicide. Scarf then agreed with the trial court's statement that "just because a person has suicidal thoughts does not necessarily mean they are mentally ill."

The trial court refused to admit these hearsay statements about Francis having been interrupted while trying to commit suicide. The court concluded the statements did not qualify as evidence of Francis's then-existing state of mind (Evid. Code, § 1250), were not in fact the basis for Scarf's expert opinion and, in any case, were too unreliable: "[Section 1250] talks about the declarant's state of mind at that time and [Francis] is saying what happened before he made the statement. [¶] In addition, the court has to consider [trustworthiness] . . . . It's a somewhat self-serving statement by

Mr. Francis, in essence trying to shift blame to the victim here that she intervened and that's what caused this struggle. Again, if he wants to testify he is more than welcome to. He has elected not to." "[T]hose statements that you seek to elicit based on Dr. Scarf's testimony here clearly had no basis in her ultimate opinion that the defendant suffered from psychotic disorder not otherwise specified by history. Rather, those statements were separate and distinct issues dealing with suicide, which by her testimony does not always indicate a person was mentally ill."

b. *Discussion*.

Francis argues his police statements were admissible under the hearsay exceptions established for statements of then-existing state of mind and for excited utterances. He also argues his statements to Dr. Scarf were admissible for the non-hearsay purpose of demonstrating the basis of her expert opinion regarding his mental condition. These arguments are meritless.

(1) *Hearsay exception for statement of existing state of mind*.

Evidence Code section 1250 (statement of declarant's then-existing mental or physical state) provides, in pertinent part: "(a) Subject to Section 1252, evidence 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: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." Evidence Code section 1252 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."

But here, as the trial court pointed out, Francis's statements to the deputies did not express a "then existing state of mind." Rather, they expressed a *past* state of mind, i.e., his purported state of mind at the time he killed Ennis. These statements were, in effect, a *subsequent* attempt to characterize his prior conduct. Hence,

Francis's reliance on cases involving a declaration of a *current* state of mind when relevant to a past or future event is misplaced. (See, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1114 [statement indicating victim-declarant's fear of defendant admissible to show she would not subsequently have had consensual sex with him]; *Whitlow v. Durst* (1942) 20 Cal.2d 523, 525 [deceased husband's "we'll never be reconciled" declaration admissible to show alleged prior reconciliation with wife never occurred].)

The trial court properly ruled these statements did not fall within Evidence Code section 1250.

(2) *Statements were unreliable*.

Moreover, as the trial court also noted, Francis's statements asserting his struggle with Ennis had ensued when she interfered with his suicide attempt were unreliable. At the time he made these statements, Francis had already killed Ennis and he was essentially offering an exculpatory version of events by suggesting he had not intended to murder her.

Evidence of statements of then-existing state of mind may properly be excluded for unreliability. (See *People v. Smith* (2003) 30 Cal.4th 581, 629 [defendant's statements to his wife, which might have been relevant state-of-mind evidence at penalty phase to show he had remorse for his crimes, were properly excluded as "untrustworthy because [defendant's] primary motivation in making them was to placate her"]; *People v. Cruz* (1968) 264 Cal.App.2d 350, 358 ["admissibility of declarations of a present state of mind is . . . subject to the rule of trustworthiness"].)

Evidence of excited utterances may properly be excluded for unreliability. As we said in *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181, "In the final analysis the issue is whether the [purported excited utterance] has an indicia of reliability so as to permit its admission [as an excited utterance] in the absence of the declarant's testimony." Courts have routinely disallowed alleged excited utterance testimony where the declarant had a reason to lie. (See *People v. Fain* (1959) 174 Cal.App.2d 856, 861 [after accident, defendant-declarant had strong motive to lie

about who was driving because he lost his driver's license for speeding violations and it had been returned only the day before]; *People v. Keelin* (1955) 136 Cal.App.2d 860, 870-871 [victim-declarant's identification of defendant was suspicious because victim had motive to lie]; *Dolberg v. Pacific Electric Ry. Co.* (1954) 126 Cal.App.2d 487, 488-489 [motorman, who had been driving defendant's train when it hit plaintiff's truck, had obvious reason to lie about how the accident happened].)

The same reliability issue arises when considering the admissibility of evidence under Evidence Code sections 801 and 802 for the non-hearsay purpose of revealing the basis of an expert witness's opinion.

"Although an expert may base an opinion on hearsay, the trial court may exclude from the expert's testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value.' [Citation.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.) Hence, a trial court may properly act in order to "avoid putting this potentially self-serving and unreliable hearsay before the jury, without defendant ever having testified and submitted to cross-examination . . . ." (*Ibid.*) "We have explained that '[a]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. [Citations.] On direct examination, *the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if,* " '*under the guise of reasons,*' " *the expert's detailed explanation* " '*[brings] before the jury incompetent hearsay evidence*.' " ' [Citations.] In this context, the court may ' "exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." ' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 137, italics added.)[2]

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[2] In addition, the trial court properly found Dr. Scarf did not actually rely on Francis's suicide comments in reaching her diagnosis.

In sum, the trial court did not err by excluding the evidence of Francis's extra-judicial statements.

2. *Crime scene and autopsy photographs were properly admitted.*

Francis contends his conviction must be reversed because the trial court erred by letting the jury see a series of gruesome autopsy and crime scene photographs. This claim is meritless.

a. *Legal principles.*

"This court is often asked to rule on the propriety of the admission of allegedly gruesome photographs. [Citations.] At base, the applicable rule is simply one of relevance, and the trial court has broad discretion in determining such relevance. [Citation.] ' "[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant" ' [citation], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative [citation]. A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. [Citation.] Finally, prosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. [Citations.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 624.)

"Evidence Code section 352 gives the trial court discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . .' A trial court's exercise of discretion under section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. [Citations.] [¶] . . . 'As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim.' [Citation.] Photographs and other graphic evidence are not rendered 'irrelevant or inadmissible simply because

they duplicate testimony, depict uncontested facts, or trigger an offer to stipulate.' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 806.) " '[V]ictim photographs and other graphic items of evidence in murder cases always are disturbing.' [Citation.] Nevertheless, absent evidence to the contrary, we may assume that the jurors were able to ' "face [their] duty calmly and undismayed." ' [Citation.]" (*Id*. at p. 807.)

" 'When conditions depicted in photographic evidence are relevant to the prosecution's case, it is "not obliged to prove these details solely from the testimony of live witnesses, and the jury was entitled to see how the physical details of the scene and body supported the prosecution theory" of the crimes. [Citations.] "[T]he decision to admit victim photographs is a discretionary matter we will not disturb on appeal unless the prejudicial effect of the photographs clearly outweighs their probative value." [Citation.]' [Citation.]" (*People v. Brents* (2012) 53 Cal.4th 599, 617.)

b. *Discussion*.

Francis contends the trial court should have excluded People's exhibits 6 through 11, arguing: "The photographs, and particularly the close-up photographs taken during the autopsy, were not only gruesome and shocking, but were irrelevant to the People's case. The cause of death was not disputed. Admission of the photographs therefore served no valid evidentiary purpose." The trial court rejected Francis's objections to these photographs, finding them "certainly relevant to mode and manner of death. Just the sheer number and type of wounds inflicted are relevant to the specific intent to kill and/or premeditation and deliberation. So the objections are overruled." Francis again urges on appeal that "[t]he photographs had no probative value, and were inflammatory."

We have viewed the photographs and agree they are extremely grotesque. Nevertheless, the record shows they were relevant to issues in dispute and were not merely gratuitously gruesome.

The prosecutor used the photographs to argue Francis acted with intent to kill, and that he acted with premeditation and deliberation. During closing argument, the prosecutor argued: "This isn't a case . . . where the defendant had one knife, [Ennis] and the defendant are struggling over it and there is one stab wound to her. She falls down and dies. That's not this case . . . . This is a case where the defendant after stabbing her one time stabbed her again and again and again and again and the reason I use this photograph here of [Ennis] as she was at the scene is because this is what the defendant saw. . . . [T]he defendant saw her bleeding from her face, bleeding, and he continued to stab her." "Implied malice, malice aforethought, he is guilty beyond a reasonable doubt, ladies and gentlemen. He is guilty beyond a reasonable doubt whether you see this and you say it's express malice, he intended to kill her . . . or you think it's implied malice theory where the very nature of stabbing someone as the defendant did . . . was an activity that he knew and the photographs show, the autopsy photos show that he knew that he was going to kill her, that those stabs were killing her."

Moreover, the medical examiner testified he needed the photographs because of the nature of Ennis's injuries. Carpenter testified he "ask[ed] for a photographer to come and look at all of the wounds with me. Because of the extent of all of the wounded tissues, it was impossible to make accurate helpful diagrams, and there would be much more information in this case if a photographer photographed all of the wounds that were of most importance, with me there directing the photography and using a scalpel handle to be able to show the viewer the basic general direction and depth of the many knife wounds."

Hence, we conclude the trial court did not abuse its discretion by admitting these death scene and autopsy photographs into evidence.

3. *Trial court properly refused to dismiss Three Strikes priors.*

At sentencing, the trial court imposed a Three Strikes term of 86 years to life, based in part on Francis's Nevada convictions for child molesting in 1977 and 1985. Francis contends the trial court abused its discretion by refusing to dismiss, under the authority of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, his Nevada prior serious felony convictions for Three Strikes purposes. This claim is meritless.

"In [*People v. Williams* (1998) 17 Cal.4th 148], we considered the scope of review applicable to abuse-of-discretion claims of this sort. We described the factors that a trial court should consider when exercising its section 1385 discretion in a Three Strikes case, and we stated that a reviewing court should consider those same factors. [Citation.] Specifically, 'the court in question 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 scheme's spirit, in whole or in part . . . .' [Citation.] We noted, however, that appellate review of a trial court's section 1385 decision is not de novo. We said, '[T]he superior court's order [i]s subject to review for *abuse of discretion*. This standard is *deferential*. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].' [Citation.]" (*People v. Garcia* (1999) 20 Cal.4th 490, 503.)

The Attorney General summarizes Francis's criminal history as follows (a summary whose accuracy Francis does not dispute): "In 1977, appellant was twice convicted of annoying/molesting children. In 1980, appellant was again twice convicted of annoying-molesting children. In 1982, appellant was convicted of lewdness with a minor under 14. In 1984, appellant was convicted of two counts of lewdness with a minor and attempted sexual assault. In 1985, 1998, and 2002, appellant was arrested for sex-related offenses, though the dispositions were unknown."

Francis asserts the trial court improperly relied exclusively on his criminal history, failing to take account of the fact he was 56 years old at the time of sentencing and had been operating under a mental disease or defect at the time of the murder. He argues "[s]entencing discretion requires the trial court do more than merely examine the defendant's prior criminal record." But, contrary to this argument, the record reveals the trial court did do more than just look at Francis's past criminal record.

The trial court expressly acknowledged its duty under *Romero* to determine if Francis fell outside the spirit of the Three Strikes law in whole or in part, and then said: "[E]ven though the defendant certainly is mentally challenged, I have heard all of the evidence in the case. I certainly believe that he was able to distinguish between right and wrong. I think that his criminal history and pattern of recidivism certainly indicates that, and also taken in conjunction with the current offenses, he is a clear and present danger to the community. [¶] I am going to deny the *Romero* motions . . . ."

Given that the jury's verdict essentially discounted Francis's mental disorder defense, we do not see why he believes the trial court should have relied on this factor to dismiss the priors. As for his age and the remoteness of his strike priors as factors in deciding his *Romero* motion, "the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career." (*People v. Strong* (2001) 87 Cal.App.4th 328, 338.) The record shows Francis has a long criminal history and one that has increased in seriousness over time.

In sum, we cannot say the trial court abused its discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 378 [" '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's [*Romero*] ruling, even if we might have ruled differently in the first instance' "].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.