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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. FAVIAN EDUARDO ZAYAS, Defendant and Appellant.	B290897 (Los Angeles County Super. Ct. No. MA069954)

APPEAL from judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Conditionally reversed and remanded.

Roberta Simon, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, Noah P. Hill and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant Favian Eduardo Zayas guilty of attempted murder (Pen. Code, §§ 664/187, sub. (a) [count 1]),[1] and aggravated mayhem (§ 205 [count 4]).[2] It found true the allegation that Zayas personally inflicted great bodily injury in commission of the attempted murder (§ 12022.7, subd. (a)), and used a deadly or dangerous weapon in both counts (§ 12022, subd. (b)(1)).

Zayas was sentenced to life in prison in count 4, plus one year for the weapon enhancement. The trial court imposed the middle term of seven years in count 1, plus three years for the great bodily injury enhancement and an additional year for the weapon enhancement, which it stayed pursuant to section 654.

Zayas contends that: (1) his conviction must be conditionally reversed because he is entitled to an eligibility hearing under recently enacted Penal Code section 1001.36, which gives trial courts discretion to grant pretrial diversion

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

[2] The information was amended to strike counts 2 and 3.

for mental health treatment to qualified defendants; (2) his counsel rendered ineffective assistance because he failed to call an expert to testify regarding the impact his mental disorder may have had on his ability to form the specific intents necessary to convict him of murder and aggravated mayhem; and (3) the trial court erred by instructing the jury that it could convict him of assault with a deadly weapon under the invalid legal theory that a box cutter is an inherently deadly or dangerous weapon.

We agree that the trial court has discretion to consider granting pretrial diversion to Zayas under section 1001.36, which may include conducting a hearing to determine his eligibility for mental health diversion, and we conditionally reverse the judgment, so that the trial court may consider whether to exercise its discretion. We further hold that defense counsel did not render ineffective assistance by failing to present expert testimony regarding the impact of Zayas's mental disorder, and hold that although the trial court erred by instructing the jury that it could convict Zayas if it found that a box cutter is an inherently deadly or dangerous weapon, the error was harmless.

FACTS

On November 14, 2016, Zayas and his father, Jose, were helping Jose's friend Victor move his belongings from

his house to a storage unit.[3] At that time, Zayas had been staying with his father for a week while Jose found him a place to live. Jose was looking into the Covenant House in Hollywood to get Zayas mental health and substance abuse treatment. Before that Zayas had been staying with his grandparents, but he moved out after an incident in which the police were called and Zayas was hospitalized. Zayas was schizophrenic and had a history of hearing voices and trying to harm himself. He had been hospitalized pursuant to Welfare and Institutions Code section 5150 on more than one occasion.

During the move, Jose heard Zayas tell Victor that he heard voices. Jose told him not to talk about things like that because he had plenty of other things to talk about. After they moved everything to the storage unit, Jose and Zayas waited for Jose's friend Emiliano to come and pick up the moving truck, which he had lent them. Emiliano got a flat tire on his way to the storage unit, so Jose, Zayas, and Victor and Emiliano's wife went to help him.

Emiliano called for assistance, and AAA driver James Lorner arrived with a tow truck. Just after Lorner arrived, Jose saw Zayas crying inside the truck with the flat tire. Jose told his son to calm down and said they would leave soon. Other than that, everything seemed normal. Victor and Emiliano and his wife left, and Jose and Zayas stayed

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[3] The parties stipulated that Jose was unavailable at trial. His preliminary hearing testimony was read to the jury.

with Lorner to change the flat tire. Nothing appeared out of the ordinary. There was no interaction between Zayas and Lorner. No one argued or got into a physical altercation. Lorner was sitting on the spare tire loosening the lug nuts and talking with Jose when Zayas appeared out of nowhere, pulled back Lorner's head, and slit his throat with a box cutter.

Jose was shocked. He asked Zayas why he did it and Zayas responded that he thought Jose told him to. Zayas looked scared. Jose yelled at him to leave and then called 911 for help.

Lorner testified that prior to the attack he had no interaction with Zayas. When Zayas cut his throat open it felt "[j]ust like cutting open fish, and just a knife pain going on in my whole neck area." He "almost went into shock." He held his neck to try to slow the bleeding. Zayas stood over him, smirking. Lorner asked Zayas why he had cut him. Zayas gave him an "evil look" and smirked at him again. Zayas was holding a box cutter.

Sergeant Daniel Welle of the Los Angeles County Sheriff's Department responded to the scene. When he arrived, Lorner was laying on the ground bleeding with his head propped up on a tire. Sergeant Welle pushed the tire out of the way, causing the wound on Lorner's neck to open up. His esophagus and muscular and venous structures were exposed, and he was bleeding profusely. Sergeant Welle tore off part of Lorner's shirt and wrapped it around

his neck to control the bleeding. Fire personnel arrived soon afterwards and Lorner was taken to the hospital.

Lorner underwent surgery. He suffered long-term effects from the attack, including scarring, pain, impaired neck movement, and changes in his voice.

Jose spoke with law enforcement on the day of the incident. At that time, Jose told the officer that Zayas had told him, "This is the last time you're going to see me." Jose later testified that Zayas had not made that statement to him. Jose explained he had attributed the statement to Zayas because he was worried Zayas was going to harm himself and he wanted the officers to look for him.

Zayas was apprehended by the police later that night and interviewed by Detectives Christopher Dimmitt and Rick Manes of the Los Angeles County Sheriff's Department. Zayas said the voices told him to cut Lorner, but he was not going to do it until he thought he heard Lorner say "I'm gonna blow your head off and some shit." He "snapped" and slit Lorner's throat. Afterwards he took a bus to his grandparent's house. The box cutter was still in his pocket, so he threw it out the bus window somewhere on the freeway.

Zayas said he had been diagnosed with schizophrenia, bipolar disorder, and PTSD. He had been to the "psych hospital" after he tried to hang himself "a few times" when he was fifteen. He used methamphetamine "a lot." He did two "lines" on the day of the attack, and had been "doin it for

like a week straight." He had stopped taking his medication and he had not slept in about three days.

Defense

Jose testified that Zayas has never been a violent person. About five months prior to the attack, Zayas heard voices and cut himself deeply enough to cause bleeding. A week before the attack Zayas was involuntarily hospitalized under a Welfare and Institutions Code section 5150 hold. During one episode, Jose was on the phone with Zayas for five hours urging Zayas not to believe the voices that said they had weapons and were going to get him.

Deputy Sheriff Jesus Valenzuela testified that on July 5, 2016, after responding to a call that Zayas was suicidal, he put Zayas on a Welfare and Institutions Code section 5150 hold, because he believed Zayas was mentally ill and needed treatment.

Zayas introduced medical records reflecting that he had been placed on a Welfare and Institutions Code section 5150 hold July 5, 2016; undergone treatment at Antelope Valley Hospital on November 7, 2016, for mental illness, visual and auditory hallucinations; and had a history of methamphetamine use.

Rebuttal

The prosecution introduced medical records documenting Zayas's violent tendencies.

DISCUSSION

Pretrial Diversion for Mental Health Disorders

In supplemental briefing to this court, Zayas contends that his conviction must be conditionally reversed because he is entitled to a hearing under recently enacted Penal Code section 1001.36, which allows qualifying defendants to participate in pretrial diversion and receive mental health treatment in lieu of prosecution. (§ 1001.36, subd. (c).) Relying on *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), review granted Dec. 27, 2018, S252220,[4] Zayas argues that the Legislature intended for the statute, which provides "ameliorating benefits" to defendants, to apply retroactively in cases like his, in which the judgment was not final at the time the statute was enacted. The Attorney General counters that the language of subdivision (c) of

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[4] See California Rules of Court, rule 8.1115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].

section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

We recognize that the Supreme Court will have the final say on this question. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, we must address the issue while it is pending in the Supreme Court. We hold that section 1001.36 is applicable under the reasoning set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299. We conditionally reverse Zayas's convictions and sentence, and remand to allow the trial court to exercise its discretion to grant diversion or to conduct an eligibility hearing for pretrial diversion, if it deems a hearing is appropriate.

Section 1001.36

Section 1001.36, which became effective on June 27, 2018, provides for pretrial diversion for defendants diagnosed with certain mental disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, in lieu of trial. (§ 1001.36, subds. (a) & (c).) Defendants who are diagnosed with antisocial personality disorder, borderline personality disorder, or pedophilia, are excluded from participation in pretrial diversion (§ 1001.36, subd. (b)(1)(A)), as are

defendants charged with certain enumerated offenses (§ 1001.36, subd. (b)(2)).

"On an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court may, after considering the positions of the defense and prosecution, grant pretrial diversion . . . ." (§ 1001.36, subd. (a).) "'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . ." (§ 1001.36, subd. (c).)

To qualify, the defendant must meet six criteria: (1) the defendant must demonstrate he or she suffers from a qualifying mental disorder "as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders," the evidence of which must include "a recent diagnosis by a qualified mental health expert;" (2) the court must be "satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense;" (3) "[i]n the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment;" (4) with certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial; (5) the defendant must agree to comply with treatment; (6) the court must be "satisfied that the defendant will not pose an unreasonable risk of danger to

public safety . . . if treated in the community." (§ 1001.36, subds. (b)(1)(A)–(F)).

"At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3).)

If a trial court determines that a defendant otherwise qualifies for diversion, it must then determine whether "the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant." (§ 1001.36, subd. (c)(1)(A).) "The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years." (§ 1001.36, subd. (c)(3).) Criminal proceedings may be reinstated under certain circumstances, including when the defendant is charged with a crime, has engaged in criminal activity, or is not performing adequately in the mental health treatment program. (§ 1001.36, subd. (d).)

Once a defendant successfully completes the diversion program, the charges will be dismissed and neither the records of his or her arrest or diversion may be used to deny

the defendant "any employment, benefit, license, or certificate." (§ 1001.36, subds. (e) & (f).) Additionally, with few exceptions, no records relating to the defendant's mental health in connection with participation in the diversion program may be used in any other proceeding without the defendant's consent. (§ 1001.36, subd. (h).)

Retroactivity

In general, there is a presumption that statutes apply prospectively, unless the Legislature has expressed an intent for a statute to apply retroactively. (*Lara*, *supra*, 4 Cal.5th at p. 307.) If the language of a statute is ambiguous, it is construed to apply prospectively. (*Ibid.*; § 3.) In *Estrada*, the Supreme Court created an exception to this general rule, holding that when a new statute reduces the punishment for criminal conduct and its language is ambiguous with respect to whether it is to have retroactive effect, the fact that the statute lessens punishment becomes "one consideration of paramount importance" in its interpretation, and leads to "an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at pp. 744–745.) *Estrada* has been applied in numerous situations in which a new statute lessened or potentially lessened the penalty for a specific crime, but

until recently it had not been held applicable in other contexts. (*Lara*, *supra*, at p. 303.)

Last year, in *Lara*, *supra*, 4 Cal.5th 299, the Supreme Court expanded *Estrada*'s reasoning and held that Proposition 57 applies to all cases in which judgment is not yet final. Proposition 57 amended the Welfare and Institutions Code to require that all cases against juveniles be filed in juvenile court rather than in criminal court. (Welf. & Inst. Code, § 602, subd. (a).) Although prosecutors can request that a hearing be held to determine whether a case is appropriate for transfer to criminal court under certain circumstances, prosecutorial discretion with respect to filing has been eliminated. (*Id.*, § 707, subd. (a).) *Lara* explained that when the Legislature or electorate is silent regarding retroactivity, courts must look to rules of statutory construction to discern whether legislation was intended to be retroactive. (*Lara*, *supra*, at p. 307.) Because nothing in Proposition 57 supported the conclusion that the electorate intended it to apply prospectively only, the Supreme Court looked to other sources of information, specifically the stated purpose of the statute. (*Id.* at p. 309.) It concluded that the statute's stated purpose supported the conclusion that Proposition 57 was intended to be retroactive, but was not itself decisive. (*Ibid.*)

The *Lara* court then considered whether *Estrada's* inference of retroactivity was applicable. It reasoned: "*Estrada* is not directly on point; Proposition 57 does not reduce the punishment for a crime. But its rationale does

apply. The possibility of being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment. Therefore, Proposition 57 reduces the possible punishment for a class of persons, namely juveniles. For this reason, *Estrada*'s inference of retroactivity applies. *As nothing in Proposition 57's text or ballot materials rebuts this inference*, we conclude this part of Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara*, *supra*, 4 Cal.5th at pp. 303–304, italics added.)

Analysis

In his supplemental opening brief, Zayas contends that he is entitled to conditional reversal to afford him a diversion hearing under section 1001.36. Citing *Lara*, and the retroactivity rule set forth in *Estrada*, Zayas reasons that section 1001.36 provides an ameliorative benefit to a class of defendants whose mental illness contributed to the commission of their offenses. Zayas therefore concludes that the *Estrada* rule requires application of section 1001.36 to his case because the judgment against him is not yet final.

The Attorney General disagrees, arguing that subdivision (c) expressly limits the application of section 1001.36 to cases in which there can be a postponement of prosecution prior to "adjudication." Once a criminal

proceeding has been adjudicated, however, the Attorney General reasons that postponement for diversion is no longer available under the plain language of the enactment.

Zayas cites the recent decision in *Frahs* in support of his position.[5] In *Frahs*, the Fourth District, Division Three, was faced with the question of whether newly enacted section 1001.36 applies retroactively to all defendants whose appeals are not yet final. (*Frahs*, *supra*, 27 Cal.App.5th at p. 787.) A jury found Frahs guilty of two counts of robbery. (*Id*. at p. 786.) While Frahs's case was pending on appeal, the Legislature enacted section 1001.36. (*Id*. at p. 787.) On appeal, Frahs contended, among other things, that the mental health diversion program available under section 1001.36 should apply retroactively. (*Id*. at p. 788.) The Court of Appeal agreed. Citing *Lara*, the *Frahs* court likened section 1001.36 to Proposition 57 with respect to retroactivity, because section 1001.36 does not lessen the

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[5] On December 27, 2018, the Supreme Court ordered review of *Frahs* on its own motion to address the following questions: "(1) Does Penal Code section 1001.36 apply retroactively to all cases in which the judgment is not yet final? (2) Did the Court of Appeal err by remanding for a determination of defendant's eligibility under Penal Code section 1001.36?" (*Issues Pending Before the California Supreme Court in Criminal Cases* (Apr. 5, 2019) California Courts <https://www.courts.ca.gov/documents/APR0519crimpend.pdf> (as of Apr. 5, 2019), citing *People v. Frahs*, review granted Dec. 27, 2018, S52220.)

punishment for a specific crime, but has the effect of reducing the possible punishment for a class of persons. (*Id.* at p. 791.) It held that the Legislature intended for section 1001.36 to apply retroactively to cases that were not final on appeal before the statute's effective date. (*Ibid.*)

In reaching this conclusion, the *Frahs* court rejected the Attorney General's textual argument that the Legislature's intent in enacting section 1001.36 was more limited: "The Attorney General argues that: 'Subdivision (c) of the statute defines "pretrial diversion" as the "postponement or [*sic*] prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." This language indicates the Legislature did not intend to extend the potential benefits of . . . section 1001.36' as broadly as possible. We disagree. The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) It held that "although Frahs'[s] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal. Thus, we will instruct the trial court—as nearly as possible—to retroactively apply the provisions of section 1001.36, as though the statute existed at the time Frahs was initially charged." (*Ibid.*)

We agree with *Frahs*'s conclusion that the rule in *Estrada*, *supra*, 63 Cal.2d 740, strongly suggests that section

1001.36 should apply retroactively. Like the amendments to Welfare and Institutions Code sections 602 and 707 discussed in *Lara*, section 1001.36 provides a potential ameliorative benefit to a class of persons—in this case defendants diagnosed with certain mental disorders. And like the amendments in *Lara*, section 1001.36 is silent with respect to retroactivity. While we recognize that the language of section 1001.36 clearly contemplates prospective application of its provisions and does not address their retroactive application, as was the case with Proposition 57, this does not preclude or limit the statute's retroactive application in any way. As the Supreme Court acknowledged in *Lara*, "the appropriate remedy can be somewhat complex . . . [but] . . . potential complexity . . . is no reason to deny [a hearing that may result in ameliorative benefits to the defendant]." (*Lara*, *supra*, 4 Cal.5th at p. 313.) Under the reasoning of *Estrada* and *Lara*, we conclude that the ameliorative benefits of a new criminal statute such as section 1001.36 should be made available to all eligible criminal defendants whose convictions are not yet final on appeal.

With respect to Zayas in particular, the record demonstrates that he was diagnosed with schizophrenia by a mental health professional before sentencing, and that the history the mental health professional reviewed indicated he had been diagnosed with the disorder by other mental health professionals prior to commission of the crimes. The offenses of which Zayas was charged and convicted, although violent

and serious, do not currently exclude him from participation in pretrial diversion, and given that the Legislature has chosen to extend the potential ameliorative benefits of section 1001.36 to defendants charged with attempted murder and aggravated mayhem, we cannot say definitively that these particular crimes were so heinous that remand would be futile. Zayas raised the issue of his mental disorder as a defense at trial and offered significant evidence to support the defense. It is notable that in a hearing outside the presence of the jury, the court stated to the parties, "I think it is undisputed that he had mental health issues. He had some sort of a breakdown five months prior." Given that Zayas was not charged with a disqualifying offense, was diagnosed with a qualifying mental disorder during trial, and presented significant evidence suggesting that his mental disorder may have contributed to his commission of the crimes, we conclude that conditional remand for the trial court to consider whether to exercise its discretion to grant diversion, including whether to hold an eligibility hearing, is appropriate. In remanding the matter, we express no opinion as to how the trial court should exercise its discretion, only the opinion that under these particular facts Zayas has demonstrated that there is a possibility that an eligibility hearing and grant of diversion may be appropriate.[6]

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[6] In light of our conclusion that remand is appropriate, we need not address Zayas's argument that Equal Protection requires that he be afforded an eligibility hearing.

Expert Testimony on Mental State

Zayas contends that counsel rendered ineffective assistance because he failed to call an expert to testify regarding the impact Zayas's mental disorder may have had on his ability to form the specific intent necessary to convict him of attempted murder and aggravated mayhem. Specifically, Zayas argues his counsel could have called an expert to explain Zayas's specific mental health issues and to testify generally about how psychosis and hallucinations may affect perception of reality. We reject the contention, as Zayas has failed to show that counsel's tactical decision fell below an objective standard of reasonableness or that he was prejudiced by counsel's allegedly deficient performance.

Proceedings

Prior to trial, Zayas's counsel had Zayas evaluated by a clinical psychologist, Dr. Stephen Bindman, who prepared a written report of Zayas's mental health history and issues. During trial, counsel discussed with the court issues relating to potential testimony by Dr. Bindman and indicated counsel was consulting with Dr. Bindman. However, counsel ultimately informed the court that he would not be calling Dr. Bindman and instead would be introducing the relevant medical records. Neither Dr. Bindman's testimony nor his report were offered at trial.

In closing argument, Zayas's counsel argued that the jury should acquit Zayas of the specific intent crimes, attempted murder and aggravated mayhem, because the People failed to prove Zayas formed the specific intent to kill or permanently disfigure Lorner. Counsel argued that Zayas's medical records, the testimony of Jose and Deputy Valenzuela established that Zayas suffers from mental illness and that Zayas "snapped," and attacked Lorner because of that illness.

Legal Principles

Generally, we will not reverse a conviction on the basis of ineffective assistance of counsel unless the defendant establishes: (1) "'counsel's representation fell below an objective standard of reasonableness;'" and (2) the defendant was prejudiced by counsel's actions. (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) "'If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' [Citations.]" (*Ibid*.)

"Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington* [(1984)] 466 U.S. [668,] 690.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation . . . .' (*People v. Pope* [(1979)] 23 Cal.3d [412,] 426, fn. omitted.) Finally, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma* [(1987)] 43 Cal.3d [171,] 217–218.)" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

Analysis

In support of his contention, Zayas relies on *People v. Herrera* (2016) 247 Cal.App.4th 467 (*Herrera*) and *People v. Cortes* (2011) 192 Cal.App.4th 873 (*Cortes*). Both cases held that it was prejudicial error for the trial court to exclude expert testimony regarding the defendant's mental disorder—other than the expert's testimony that the defendant did or did not have the mental state required for the charged offense at the time he or she committed it. (*Herrera*, *supra*, at pp. 474–480; *Cortes*, *supra*, at pp. 902–914.) Zayas also discusses sections 28 and 29, which delineate the type of testimony that may be given with respect to a defendant's mental state or mental disorder, to

demonstrate that it is permissible to offer testimony related to the issue.[7]

But whether certain testimony would have been admissible and whether the trial court would have erred in excluding an area of testimony are very different questions than those presented—i.e., could counsel have had any reasonable basis not to present such testimony and would the failure to present the testimony have been prejudicial? This is not a case where counsel appears to have missed an issue, or outright failed to consider calling an expert. To the contrary, counsel sought and obtained a psychological evaluation of Zayas, and discussed with the court the possibility of offering Dr. Bindman's testimony at trial. The fact that counsel elected not to call Dr. Bindman, or any

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[7] "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." (§ 28, subd. (a).) "[A]n expert may not offer an opinion regarding whether the defendant had the capacity to form the intent required for the crime, or whether the defendant actually did form the requisite intent." (*People v. Smithey* (1999) 20 Cal.4th 936, 960; § 29 ["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"]; § 28, subd. (a) ["Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form . . . intent"].)

other expert, instead making arguments from medical records and other trial testimony, suggests this was a tactical decision. Counsel was not asked why he made the tactical decision not to call an expert, and Zayas offers no evidence that an expert's testimony would have assisted his defense.[8] On this record, it is impossible to know what an expert witness would or would not have said or whether the effect would have been helpful or detrimental to Zayas's case. Zayas must "do more than surmise that defense experts *might* have provided more favorable testimony." (*People v. Lucas* (1995) 12 Cal.4th 415, 448, fn. 5; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1004–1005.) The record does not reflect the absence of a satisfactory explanation for counsel's decision to forgo expert testimony, or the probability of a more favorable result for Zayas had such an expert testified. Accordingly, he has failed to establish ineffective assistance.

Assault with a Deadly Weapon Instruction

Zayas contends that the jury was erroneously instructed under CALCRIM No. 3145 that it could find true the allegations that he used a deadly or dangerous weapon in the commission of the crimes in counts 1 and 2 (§ 12022,

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[8] Counsel submitted Dr. Bindman's report to the court in connection with sentencing. On appeal, Zayas makes no argument as to how any specific information in that report would have benefitted him at trial.

subd. (b)(1)) if it found that the box cutter was an "inherently deadly or dangerous weapon," which was not a valid legal theory. Zayas argues that the error was prejudicial and therefore requires reversal. We agree that CALCRIM No. 3145 states an erroneous legal theory, but conclude that the error was harmless in this case.

To consider the two allegations of using a dangerous or deadly weapon, the jury was required to determine whether the box cutter was a dangerous or deadly weapon. It was instructed under CALCRIM No. 3145 that: "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

"An "'inherently deadly or dangerous'" weapon is a term of art describing objects that are deadly or dangerous in "'the ordinary use for which they are designed,'" that is, weapons that have no practical nondeadly purpose. (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.)" (*People v. Stutelberg* (2018) 29 Cal.App.5th 314, 318–319 (*Stutelberg*).) The jury was not instructed regarding this definition.

A box cutter is not an inherently deadly or dangerous weapon as a matter of law. (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1153, review granted July 5, 2018, S248105 (*Aledamat*); *Stutelberg*, *supra*, 29 Cal.App.5th at p. 317.) It was therefore error to instruct the jury regarding this invalid legal theory. (See *Aledamat*, *supra*, at p. 1153 [error to give inherently deadly weapon instruction because

box cutter not inherently deadly as a matter of law]; *Stutelberg*, *supra*, at p. 318 [same].)

The question is whether the error was prejudicial. The correct standard for evaluating prejudice is an issue upon which decisions of the Courts of Appeal conflict. (*Stutelberg*, *supra*, 29 Cal.App.5th at pp. 319–321 [applying the beyond a reasonable doubt standard]; *Aledamat*, *supra*, 20 Cal.App.5th at p. 1154 [requiring affirmative showing that no juror relied on invalid legal theory].) The People advocate applying the beyond a reasonable doubt standard; Zayas argues in support of the more stringent standard requiring an affirmative showing that no juror relied on the invalid theory. Our Supreme Court has granted review to resolve the issue. (*People v. Aledamat*, review granted July 5, 2018, S248105.)

Here, the error is harmless under either standard. The jury was instructed on both a correct and incorrect legal theory, and there can be no doubt that it actually relied on the valid theory that Zayas used the box cutter in such a way that it was capable of causing and likely to cause death or great bodily injury.

At trial, the only contested issue was intent. Defense counsel argued that Zayas had no motive to harm the AAA driver and that he lacked the specific intent necessary to commit either of the charged crimes because he was mentally ill. Counsel conceded that Zayas committed the lesser included offense of mayhem and that the weapons allegations were true: "I'm asking you to convict him of

mayhem, which is a general intent crime which punishes people no matter if they have a mental illness or not. And obviously, the weapon allegation that's attached. That's also a general intent crime. There's no defense to that, and you can't consider mental illness when dealing with those particular crimes." In addition to finding the weapons enhancements true, the jury found true the allegation in count 1 that Zayas personally inflicted great bodily injury.

In light of the complete lack of argument or evidence that Zayas *did not* use the box cutter "in such a way that it [wa]s capable of causing and likely to cause death or great bodily injury" and the jury's finding that Zayas *actually* caused great bodily injury, it is inconceivable that any juror relied on the invalid legal theory.

DISPOSITION

The judgment is conditionally reversed and the cause is remanded for the trial court to consider whether to exercise its discretion to grant pretrial diversion under section 1001.36, including whether to conduct a hearing to determine Zayas's eligibility. If the court grants Zayas pretrial mental health diversion, and Zayas successfully completes diversion, the court shall dismiss the charges in accordance with section 1001.36, subdivision (e). If either of these conditions is not met, the trial court shall reinstate the judgment.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

KIM, J.