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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK ALAN ANDREWS,

Defendant and Appellant.

2d Crim. No. B264530  
(Super. Ct. No. 14C-41402)  
(San Luis Obispo County)

A jury convicted Mark Alan Andrews of first degree murder (Pen. Code, §§ 187, subd. (a), 189),<sup>1</sup> and found true an allegation that he personally and intentionally discharged a firearm while committing his crime (§ 12022.53, subd. (d)). In bifurcated proceedings, the jury determined that Andrews was sane at the time of the murder. The trial court sentenced him to a term of 25 years to life in state prison on the murder charge, and a consecutive term of 25 years to life on the firearm

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

allegation. It calculated that Andrews was entitled to 724 days of actual custody credits.

Andrews argues that the trial court: (1) erroneously excluded his proffered expert testimony on impulsivity during the guilt phase of trial, (2) should have given his requested instruction on motive during the sanity phase of trial, and (3) miscalculated his custody credits. We agree with Andrews's third argument, modify the judgment to correct the trial court's custody credit calculation, and affirm.

### BACKGROUND

In May 2013, Andrews shot and killed his neighbor, Colleen Barga-Milbury. Two days later, Andrews let police search his residence. Inside his bedroom was a cabinet containing 10 firearms. On a table near his bed were a rifle shell casing, a plastic baggie containing several rifle cartridges, and a nutcracker figurine. Officers found similar figurines in Barga-Milbury's house. After completing the search, police arrested Andrews for Barga-Milbury's murder.

DNA from both Andrews and Barga-Milbury was on one of the rifles found in Andrews's room. The rifle was in working order and had been fired recently. The shell casing in Andrews's bedroom was fired from the rifle. A shell casing and bullet fragments in Barga-Milbury's house were also fired from the rifle.

Andrews suffers from schizophrenia. He has a history of drug and alcohol abuse. He believes that he can transform into a werewolf. He claims that he killed Barga-Milbury because she was a demon or vampire, and that God commanded him to do so.

## DISCUSSION

### *Exclusion of Expert Testimony*

Andrews first contends that the trial court erred when it excluded expert testimony on the definition of malice under section 188 and whether a person in his condition could possess the mental state of malice. We disagree.

Evidence of mental disease, defect, or disorder is not admissible on the question of whether a defendant had “the capacity to form” the specific intent to commit the crime charged. (§ 28, subd. (a).) While this evidence is admissible on the question of whether the defendant “actually formed” that intent (*ibid.*), whether the defendant did so is a question for the jury (§ 29). Thus, an expert may not opine on the ultimate question of whether the defendant had the required mental state at the time he or she committed a crime. (*Ibid.*; see *People v. Mills* (2012) 55 Cal.4th 663, 672.)

Pursuant to these statutes, an expert is permitted to testify that a defendant’s mental condition may cause him or her to act impulsively (i.e., without malice or premeditation and deliberation) in certain situations. (*People v. Nunn* (1996) 50 Cal.App.4th 1357, 1365 (*Nunn*).) Such an opinion is “relevant to the existence *vel non* of the mental states of premeditation and deliberation . . . .” (*People v. Coddington* (2000) 23 Cal.4th 529, 583, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) But the expert may not testify that the defendant actually acted impulsively at the time he or she committed a crime. (*Nunn*, at p. 1365.) Nor can an expert testify whether a hypothetical person in the defendant’s situation would have acted impulsively. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327.) Section 29 “does not simply forbid the

use of certain words[;] it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time [he or she] acted.” (*Nunn*, at p. 1364.)

Prior to trial, the court conducted an Evidence Code section 402 hearing regarding the expert testimony Andrews sought to introduce on his mental status. Dr. Carolyn Murphy testified that schizophrenics may have delusions that make them act violently or impulsively. That impulsivity may lead to behavior that is “not clearly thought through,” is “not analyzed or deliberated upon,” and has “not necessarily been exposed to or been a part of any deductive analytical reasoning.” Such impulsivity may also prevent a person from forming malice before acting.

Dr. Murphy testified that Andrews is a schizophrenic, and that some aspects of his illness are ever present while others wax and wane. He suffers from delusions that can increase when he does not take his medication. One of those delusions is that he is a werewolf and that Barga-Milbury was a vampire—his “mortal enemy.” Andrews told Dr. Murphy that he killed “the vampire” on God’s orders. He used a gun instead of mauling her to death because he had not taken the form of a wolf at the time of the murder. In Dr. Murphy’s opinion, a person in Andrews’s condition operates under a delusion strong enough to obviate malice aforethought as defined in the Penal Code.

Based on the proffered testimony, the trial court permitted Dr. Murphy to testify about Andrews’s diagnosis as a schizophrenic, his delusions, his belief that he is a werewolf, his belief that Barga-Milbury was a vampire, and his belief that God told him to kill her. Dr. Murphy could also opine that Andrews’s

schizophrenia may lead to impulsive behavior. But Dr. Murphy could not opine whether Andrews harbored malice aforethought at the time of the murder. Andrews thus could not ask Dr. Murphy questions about section 188's definition of malice and about whether a person in his condition can possess the mental state of malice.

The trial court's limitations were proper. Dr. Murphy's proposed testimony on a schizophrenic's impulsivity and its effect on the ability to form malice aforethought is precisely what is barred by section 28. This testimony does not go simply to whether schizophrenia can lead to impulsive behavior; it goes a step further, presenting an opinion on whether the defendant's impulsiveness affects his or her capacity to form a specified mental state. Limiting Dr. Murphy's proposed testimony on Andrews's specific intent at the time of the murder was also proper. It is barred by section 29.

*Nunn* supports our conclusions. The *Nunn* court held that a psychologist could opine that the defendant's mental condition could lead him to act impulsively in certain circumstances. (*Nunn, supra*, 50 Cal.App.4th at p. 1365.) The psychologist could also opine that a certain scenario "was the type that could result in an impulsive reaction from one with [the defendant's] mental condition." (*Ibid.*) But the psychologist could not opine whether the defendant acted impulsively and without malice aforethought at the time of the crime. (*Ibid.*)

Here, as in *Nunn*, the trial court allowed Dr. Murphy to testify that Andrews's schizophrenia may lead to impulsive behavior. Here, as in *Nunn*, the court allowed Dr. Murphy to testify that certain situations may increase the risk of Andrews's delusions, hallucinations, and impulsive behavior. And here, as

in *Nunn*, the court restricted Dr. Murphy from opining whether Andrews acted without malice at the time of the murder.

Our decision in *People v. Herrera* (2016) 247

Cal.App.4th 467 (*Herrera*) is not to the contrary. In *Herrera*, the trial court did not permit the defendant to ask the psychologist whether he suffered from a mental disease, whether he was psychiatrically impaired, and whether he suffered from a mental disease when he killed his victim. (*Id.* at p. 475.) We held that the trial court erred: “[S]ections 28 and 29 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.” [Citation.]” (*Id.* at p. 476.)

Unlike the trial court in *Herrera*, the trial court here permitted Andrews to ask Dr. Murphy whether he suffered from schizophrenia; whether his schizophrenia can lead to impulsivity, delusions, and hallucinations; and whether his impulsivity, delusions, and hallucinations affect him at all times. She simply could not “cross the line” and opine whether Andrews could possess the malice aforethought required for a murder conviction. There was no abuse of discretion.

#### *Refusal to Instruct the Jury on Motive*

Andrews next argues that the trial court should have given his requested jury instruction on motive during the sanity phase of trial. We disagree.

The trial court must give pinpoint instructions on the theory of defense upon the defendant's request. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) But the court can refuse to give pinpoint instructions if they highlight specific evidence. (*Ibid.*; see also *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Such instructions "invite the jury to draw inferences favorable to one of the parties" and are thus considered "argumentative." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1276, disapproved on another ground by *People v. Edwards* (1991) 54 Cal.3d 787, 835.) They should not be given. (*Ibid.*) Whether the trial court properly instructed the jury is a question subject to our independent review. (*People v. Leeds* (2015) 240 Cal.App.4th 822, 830.)

During the sanity phase of trial, Andrews requested that the court instruct the jury with a modified version of CALCRIM No. 370: "In reaching your verdict, you may consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is sane and not having a motive may be a factor showing the defendant is insane." The court refused. The court instead permitted Andrews to discuss his motive for killing Barga-Milbury in his arguments to the jury.

The trial court correctly refused to give Andrews's proposed instruction. The instruction would direct the jury's attention to a specific type of evidence. Motive was but one type of evidence for the jury to consider when it deliberated the issue of sanity. Highlighting such evidence is not the function of a pinpoint instruction. (Cf. *People v. Daniels* (1991) 52 Cal.3d 815, 870-871 [trial court properly refused defendant's proposed instruction that jury may consider motive when deciding issue of premeditation and deliberation because it asked jury to consider impact of specific evidence].) Andrews's motive and the weight to

be given it was a matter of argument properly left to the jury.  
(*People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

*Miscalculated Custody Credits*

Andrews claims, and the People concede, that the trial court miscalculated the actual number of days he spent in custody. We agree.

A defendant is entitled to actual custody credits for all days spent in county jail. (§ 2900.5, subd. (a).) This includes partial days. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Credits are earned from the day of the defendant's arrest up to and including the day of sentencing. (*Ibid.*) The miscalculation of a defendant's custody credits may be corrected at any time. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.)

Police arrested Andrews on May 24, 2013. The trial court sentenced him on May 19, 2015. That is 726 days. The trial court awarded 724 days. Andrews is entitled to two more days.

DISPOSITION

The trial court is directed to amend the abstract of judgment to award Andrews 726 days of actual custody credits. The clerk of the superior court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.



John A. Trice, Judge

Superior Court County of San Luis Obispo

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