

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLE A. STEWART,

Defendant and Appellant.

2d Crim. No. B232998
(Super. Ct. No. KA087674)
(Los Angeles County)

Nicole A. Stewart pleaded not guilty to first degree murder and not guilty by reason of insanity. The jury found her guilty of first degree murder (Pen. Code, §§ 187, subd. (a)/189),¹ and subsequently found that she was sane at the time of the offense. Stewart appeals her conviction for first degree murder but not the determination of her sanity. She contends she received ineffective assistance during the guilt trial because defense counsel failed to offer medical evidence which could have convinced the jury that the murder was not premeditated or deliberated. She also contends that there was insufficient evidence to support a finding of premeditation or deliberation. We affirm.

FACTS AND PROCEDURAL HISTORY

¹ All statutory references are to the Penal Code unless otherwise stated.

In July 2009, Stewart was a resident and patient of Hamilton Villa, a residential facility for chronic psychiatric patients. Hamilton Villa is an "open" facility where patients are permitted to freely leave and return. Psychotherapy is offered to residents on an optional basis.

During the guilt phase of trial, evidence was offered that on July 23, 2009, Dr. Joseph Pruitt, a clinical psychologist, conducted a group therapy session attended by his patient Robin Ridgeway and others. Stewart was not Dr. Pruitt's patient and did not attend the session. After the session, Dr. Pruitt met with Ridgeway and another patient in the courtyard of the facility. Dr. Pruitt was sitting on a bench and Ridgeway was standing and facing him. Stewart walked into the courtyard and circled around Ridgeway. Stewart approached Ridgeway from behind and stabbed her in the back. As she stabbed Ridgeway, Stewart stated: "Take that, bitch." Stewart twisted the knife while it was in Ridgeway's back, then pulled the knife out and, after brandishing the knife for a moment, she stepped towards Ridgeway, who was still standing, as if to renew her attack.

A staff member and Dr. Pruitt assisted Ridgeway to the facility office. Stewart remained standing in the courtyard holding her knife. When another staff member asked Stewart for the knife, Stewart walked away to her room keeping the knife in her possession. When police arrived, Stewart left the facility walking at a fast pace. She was seen by police and arrested. Ridgeway died from her wound.

During the sanity phase of trial, the prosecution offered testimony from psychiatrists Stephen Mohaupt and Kaushal Sharma. Dr. Mohaupt testified that Stewart suffered from schizophrenia which included hallucinations and paranoid concerns that caused her to "misinterpret situations." He also testified that Stewart's hallucinations and paranoid concerns did not rise to the level of a delusion or a "fixed false belief."

Dr. Mohaupt testified that Stewart told him that Ridgeway was sexually involved with, and pregnant by, Stewart's boyfriend. This angered Stewart and made her jealous. Stewart found a knife in a garage, hid it in her room for a period of time, and stabbed Ridgeway during what she believed was an opportune moment. Dr. Mohaupt

had no information as to whether Stewart's belief that Ridgeway was having a sexual relationship with her boyfriend was factually accurate but it was established that Ridgeway was not pregnant.

Dr. Mohaupt opined that Stewart did not meet the legal criteria for insanity because she understood the nature and quality of her act. She had obtained the knife before the offense, understood that her goal was to stab Ridgeway, and understood that stabbing Ridgeway would result in injury or death and would cause her to go to jail.

Dr. Sharma testified that, at the time of the offense, Stewart suffered from schizophrenia but understood the nature and quality of her act of stabbing Ridgeway and that the stabbing was morally and legally wrong. Dr. Sharma opined that the stabbing was motivated by jealousy and was not a product of Stewart's mental illness.

Forensic psychologist Haig Kojian testified for the defense. Dr. Kojian testified that Stewart suffered from severe mental illness which included auditory hallucinations, paranoia, depression and delusions. Dr. Kojian believed that Stewart was operating under the delusion that she could kill Ridgeway because Ridgeway was sleeping with her boyfriend and could not perceive that such a killing would be morally wrong.

DISCUSSION

No Showing of Ineffective Assistance of Counsel

Stewart contends that she received ineffective assistance of counsel when counsel failed to call Dr. Kojian as a witness during the guilt phase of the trial. She asserts that Dr. Kojian could have testified, as he did during the sanity phase, that Stewart had a severe mental illness and acted on the basis of hallucinations. Stewart argues that such testimony may have convinced the jury that the murder was committed in a heat of passion induced by a hallucination rather than with premeditation or deliberation. If so, she would have been convicted only of second degree murder.

To prevail on a claim of inadequate assistance of counsel, a defendant must establish that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that he or she was prejudiced by the deficient

representation. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Prejudice requires that the record show a reasonable probability that the defendant would have received a more favorable result without counsel's deficient performance. (*Vines*, at pp. 875-876; *Strickland*, at p. 694.)

An attorney's decision whether to call a witness or present or omit evidence is inherently a matter of trial strategy and tactics and we defer to counsel's reasonable tactical decisions presuming that his or her conduct falls within the wide range of reasonable professional assistance. (*People v. Hinton* (2006) 37 Cal.4th 839, 876; *People v. Stanley* (2006) 39 Cal.4th 913, 955; *People v. Bolin* (1998) 18 Cal.4th 297, 334.) We assess counsel's acts or omissions based on the circumstances at the time and will not "second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) A conviction will be reversed due to inadequate representation only if the record affirmatively discloses that counsel had no rational tactical purpose for his or her actions. (*Mendoza Tello*, at pp. 266-268.)

Stewart claims her trial counsel was ineffective because he did not offer testimony from Dr. Kojian during the guilt phase of trial regarding her mental illness and its effect on her ability to premeditate the murder. We conclude that the record shows that counsel made a reasonable tactical decision to delay testimony by Dr. Kojian until the sanity phase of trial. Counsel's action did not fall below an objective standard of reasonableness.

When a defendant pleads both not guilty of the offense and not guilty by reason of insanity, guilt of the offense is tried first and, if the jury finds the defendant guilty, the issue of the defendant's sanity is tried thereafter. (*People v. Hernandez* (2000) 22 Cal.4th 512, 520; § 1026, subd. (a).) Although tried separately, the evidence regarding guilt and sanity may overlap. (*Hernandez*, at p. 520.) As relevant to the instant case, expert medical evidence is admissible during the guilt phase regarding the effect of mental illness on whether the defendant acted with the required intent and mental state in committing the offense. (*People v. Coddington* (2000) 23 Cal.4th 529, 582-583,

overruled on another point in *People v. Price* (2001) 25 Cal.4th 1046, 1049, fn. 13; *People v. Smithey* (1999) 20 Cal.4th 936, 969; *People v. Padilla* (2002) 103 Cal.App.4th 675.)

Although admissible, defense counsel reasonably could have concluded that presenting expert medical testimony during the guilt phase of trial would have allowed the prosecution to present damaging evidence from its experts which may have increased the likelihood that the jury would find the murder to have been premeditated and deliberated. Dr. Kojian's testimony during the guilt phase would have resulted in the introduction of evidence regarding Stewart's acquisition and concealment of the knife, and her calculated actions in approaching Ridgeway from behind immediately prior to the stabbing. This and other evidence could be interpreted adversely to Stewart. Trial counsel's decision to focus on deficiencies in the prosecution's evidence of premeditation and deliberation apart from the medical evidence was at least reasonable in light of the dangers of presenting disputable expert opinion evidence.

In *People v. Weaver* (2001) 26 Cal.4th 876, a first degree murder case, our Supreme Court addressed a similar situation. There was expert opinion evidence regarding defendant's mental condition which might have aided his defense that there was no intent to kill, but defense counsel made a tactical decision to reserve that evidence for the sanity phase of the trial. The Supreme Court held that the decision to postpone introduction of evidence of the defendant's mental condition constituted a tactical decision which did not constitute ineffective assistance of counsel. (*Id.* at pp. 925-929.)

Weaver relied on an earlier case, *People v. Miller* (1972) 7 Cal.3d 562, as posing the same question of whether counsel was "ineffective for deciding to forgo presentation of mental incapacity evidence at the guilt phase and to reserve it instead for the sanity phase." (*People v. Weaver, supra*, 26 Cal.4th at pp. 927-928.) Our Supreme Court concluded that counsel's tactical decision was not unreasonable, explaining: "We touch here on a difficult tactical problem facing every defense counsel who possesses psychiatric evidence bearing on his client's condition at the time of the crime. . . . [T]his evidence is usually admissible at both the guilt phase and the sanity phase. Counsel's

dilemma is, therefore, at which phase should he introduce this evidence? . . ." (*Id.* at p. 928, fns. omitted.) The court stated that when counsel concludes his client may have a persuasive insanity case, it might be unwise to prematurely expose that evidence to the scrutiny of the trier of fact. (*Ibid.*) At worst, counsel's decision to delay introducing evidence of a defendant's mental state until the sanity phase is a debatable trial tactic, but "debatable trial tactics" do not constitute ineffective assistance of counsel. (*Miller*, at p. 573.)

Stewart relies on *People v. Padilla*, *supra*, 103 Cal.App.4th 675. In *Padilla*, the defendant pleaded not guilty and not guilty by reason of insanity to a charge of murder. The defendant sought to introduce medical testimony during the guilt phase of trial that the killing resulted from a delusional belief the victim had killed family members of the defendant. (*Id.* at pp. 677-678.) The trial court excluded the evidence, and the appellate court reversed. The court applied a subjective test to determine "whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder," and concluded that, under the circumstances of that case, the evidence was admissible during the guilt phase because the jury could have concluded that the defendant's hallucination could have reduced the murder from first degree to second degree. (*Id.* at pp. 678-679.)

The admissibility of the medical evidence, however, does not persuade us that failure to offer the evidence constitutes ineffective assistance of counsel. As we have stated, the tactical decision concerned the risks of offering the evidence, not a mistaken belief regarding its admissibility. Stewart speculates that defense counsel may have been unaware that the evidence was admissible, but there is nothing in the record to support this speculation or indicate that the decision by defense counsel was not based on knowledge of the facts and applicable law. (See *People v. Bess* (1984) 153 Cal.App.3d 1053, 1060; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

Substantial Evidence Supports First Degree Murder Conviction

Stewart contends that there was insufficient evidence to support the jury's finding that the murder was premeditated or deliberated.

In reviewing a sufficiency of the evidence claim, we consider the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Gonzalez* (2012) 54 Cal.4th 1234, 1273.) We presume the existence of facts favorable to the judgment that could reasonably be deduced from the evidence, and will uphold a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Farnam* (2002) 28 Cal.4th 107, 142.)

A murder in the first degree is one that is "willful, deliberate, and premeditated." (§ 189.) An intentional killing is premeditated and deliberate if it occurs as the result of preexisting thought and reflection rather than unconsidered or rash impulse. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Deliberation requires the careful weighing of considerations in choosing a course of action, and premeditation requires a decision to kill before completing the act. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Such reflection, however, need not occur over an extended period of time, and a calculated decision may be arrived at quickly. (*Stitely*, at p. 543.)

"Appellate courts typically rely on three kinds of evidence in resolving the question raised here: motive, planning activity, and manner of killing." (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) All of these factors need not be present in any particular combination or given any particular weight to find substantial evidence of premeditation and deliberation. (*Ibid.*; *People v. Halvorsen* (2007) 42 Cal.4th 379, 420.)

Here, substantial evidence supports the jury's finding that appellant's murder of Ridgeway was premeditated and deliberate. There is evidence of planning activity. Stewart obtained the knife prior to the stabbing and kept it in her room waiting for an opportune moment to attack Ridgeway. She approached Ridgeway surreptitiously from behind when Ridgeway was distracted by conversation with Dr. Pruitt. Stewart also carried her knife in a concealed manner so as not to arouse the attention of anyone in the

area. Moreover, immediately before stabbing Ridgeway, Stewart voiced her intent by stating, "[t]ake that, bitch."

The manner of the attempted killing also indicates deliberation and premeditation. Stewart plunged the knife into Ridgeway's back and, after removing the knife from Ridgeway's back, Stewart prepared herself for another attack if the first stabbing appeared to be insufficient to cause death. These facts indicate that the stabbing was calculated and not the result of a spontaneous act of violence. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1253.)

There is limited evidence of motive because Stewart's real or perceived belief that Ridgeway was having a sexual relationship with Stewart's boyfriend was not presented during the guilt phase of trial. Nevertheless, Stewart's reference to Ridgeway as a "bitch" prior to the stabbing indicated the existence of some animus towards Ridgeway.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Douglas Sortino, Judge
Superior Court County of Los Angeles

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.