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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AHKIN RAMOND MILLS, Defendant and Appellant.	A125969 (Alameda County Super. Ct. No. C154217)

After a jury found defendant Ahkin Ramond Mills guilty of first degree murder involving the personal use of a firearm (Pen. Code, §§ 187, 12022.53, subd. (d)), the trial court sentenced him to state prison for a total term of 50 years to life. Defendant contends that reversal is required by reason of: (1) the trial court's failure to hold a hearing to determine if new defense counsel was required; (2) prosecutorial misconduct, and (3) instructional error. We conclude that no reversible error occurred, and thus affirm the judgment.

BACKGROUND

On the afternoon of April 21, 2005, Jason Jackson-Andrade was in the Emeryville Amtrak station waiting for a train that would take him back to Sacramento after celebrating his uncle's birthday. While waiting, he encountered an already agitated defendant, who began uttering racial insults, curses and threats that "You ain't getting on the train." Defendant repeatedly asked Jackson-Andrade whether he had a gun. After listening to this tirade for several minutes, Jackson-Andrade did not respond, but simply walked away. Defendant appeared to calm down, and then followed and shot him

multiple times. Jackson-Andrade was seated when defendant fired the first shot. Jackson-Andrade pleaded "Please don't shoot me," and "Please no more," this after the fourth shot. He tried to crawl away, but the bullets kept coming. At one point in the fusillade, defendant paused when a bystander started to flee; then he heard Jackson-Andrade moan, and resumed firing at him. Jackson-Andrade was shot seven times, once in the chest, and five times in the back, and once in the back of the left thigh, with a six-round .357 Magnum.

Police responded to the scene within minutes. Defendant was apprehended, still in possession of the gun, and repeatedly told the officers, "I'm the only shooter. It's me." Jackson-Andrade's body was on the station floor, approximately 15 feet away from defendant. Jackson-Andrade died at the scene.

This much was undisputed. Defendant did not deny that it was he who shot and killed Jackson-Andrade. As defense counsel told the jury in his opening statement: "This case is not about whether Mr. Mills killed Mr. Jackson-Andrade. The evidence is going to show that in fact he did. This case is about why he killed him." The first question to defendant on direct examination was "Mr. Mills, did you shoot Mr. Jackson-Andrade?", and his answer was "Yes, I shot Mr. Jackson-Andrade." The next question was "Why did you shoot him?" His answer was, "I shot Mr. Jackson-Andrade because of what he said and the things he did. He told me he had a gun. He—when I walked into the station, he reached into his pocket and repeatedly had an argument. He told me he had a gun, told me he was going to kill me."

Defendant's version of events was that he believed he was in peril from men he knew only as "One Shot" and "Tyrone," whom he knew from Merced.[1] Defendant moved from Merced to Alameda County because he feared for his life. He thought he

[1] Defendant's wife testified that her mother married one of Tyrone's "family members." She also testified that defendant thought the FBI, and possibly the Mafia, "were after him." Defendant's wife thought the explanation for his erratic behavior was that "my husband was on drugs."

A Merced police officer testified that Tyrone Johnson was known as member of the Merced Crips gang.

was receiving messages through the radio. He also believed that there had already been "attempts on my life in Merced." He also thought individuals associated with a record label were out to kill him. Defendant got a gun before he left Merced. After he left Merced, defendant thought he was being followed by Tyrone.

On the day of the killing, defendant had not slept for two days. That day he robbed a Sacramento storeowner, Kinh Hang, at gunpoint and carjacked Hang's vehicle. As he drove from Sacramento to the Bay Area, he thought Tyrone's people were still following him. He stopped briefly at the house of his wife and his cousin, but when he heard from his cousin that she thought she was being followed, he insisted she take him to the Emeryville train station. As defendant was walking to the station, "somebody told me that you're going to feel it today," which to defendant meant "I was going to get shot." Inside the station, defendant bought a ticket to Fresno, and loaded his gun.

Defendant was shocked when his wife walked up to wish him goodbye. He told her to leave because "I know they're here." He saw two individuals he thought were "suspicious," and associated with the "hit on me." It was then that Jackson-Andrade "called me over to him." The ensuing discussion quickly became "heated," and Jackson-Andrade told defendant he had a gun and "I'll kill you." Jackson-Andrade walked away. Defendant began singing outloud "Tyrone, you got the wrong guy" because "I wanted his hitman to hear . . . so . . . they can call off the hit." When Jackson-Andrade "got up and I seen like an object on his right side and he put his hand in his pocket, and when he put his hand in his pocket," "I thought he was trying to grab for his weapon," and "I pointed my gun and started to shoot at him." Defendant never heard Jackson-Andrade plead not to be shot. Defendant concluded his testimony by admitting "I feel terrible" about killing Jackson-Andrade.

On cross-examination, defendant further admitted that he reloaded the gun and kept firing while Jackson-Andrade was on the station floor even though "I didn't know if the gun [was] even shooting." In addition, he claimed that Jackson-Andrade ran towards him before he fired the first shot. Defendant further testified that he wasn't aiming his

shots because "I wasn't even looking . . . I was looking away." He had no idea how many shots he fired, and thought he hit Jackson-Andrade only twice.

Several witnesses testified to defendant's reputation in Merced as a non-violent person. Dr. Bruce Smith, a psychologist testified that "in April 2005, Mr. Mills was suffering from a disorder in the paranoid spectrum." An individual with this condition is prone to "non-bizarre delusions," that is, delusions that are not "utterly out of the realm of possibility. . . . They're delusions [of] things that actually happen in real life, such as one spouse is unfaithful or one is being followed by someone or one is being threatened by someone or there's somebody who is out to kill you, that sort of thing." Delusions are not the same as hallucinations, because the deluded person perceives external realities accurately, but "they just interpret them in these idiosyncratic ways." Defendant also has "paranoid personality style." Stress and sleep deprivation would only aggravate defendant's problems, and might also explain his partial recollection of events. After interviewing defendant, Dr. Smith concluded that defendant was suffering paranoid delusions. Answering a hypothetical question based upon defendant' condition on April 21, 2005, Dr. Smith gave his expert opinion that "I would think that if those [factual assumptions] were true that an individual such as I described would be terrified and convinced that he was about to be attacked in some way."

DISCUSSION

There Was No *Marsden* Error

Much of 2008 was devoted to determining whether defendant was mentally competent to stand trial. On October 14, 2008, defendant was declared competent, and criminal proceedings were reinstated. On December 5, 2008, defendant wrote a letter to Judge Jacobson, the supervising criminal judge, concerning a disagreement with his appointed counsel, Deputy Public Defender Lew. Defendant advised the court: "I . . . would like the Record to Reflect Mr. Lew and I have a Conflict of Interest regarding my cases, he at one time said I was not competent to Defend myself regarding my case, was examined and found competent. Mr. Lew also wanted a different plea than I. Your

Honor I would like the Record to Reflect we have a Conflict of Interest on how to go Forward with the cases." Neither defendant nor the trial court subsequently referred to this matter on the record.

Defendant contends that "it constituted error not to address the matters raised in his letter, whether viewed as an assertion of a conflict of interest' or as a request for the appointment of new counsel." Defendant contends that this inaction amounts to prejudicial error under *People v. Marsden* (1970) 2 Cal.3d 118. We do not agree.

It is apparent from the record that what defendant is treating as a conflict of interest was not a true conflict in the ordinary and traditional sense of the term, but rather his dissatisfaction with Mr. Lew having previously advised the court that he had a doubt as to defendant's competency. That was counsel's duty, and thus not "an adequate basis for substitution of counsel." (*People v. Freeman* (1994) 8 Cal.4th 450, 481 [defense counsel fulfilling duty of advising regarding plea offers and possible pleas].) Even now, defendant does not point to any specifics establishing the inadequacy of Mr. Lew's representation.

Under *Marsden,* a defendant is deprived of his or her constitutional right to the effective assistance of counsel when a trial court denies a motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. (*People v. Ortiz,* (1990) 51 Cal.3d 975, 980, fn. 1.) However, "A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief." (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1070.) "The court's duty to conduct the [*Marsden*] inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' " (*People v. Lara* (2001) 86 Cal.App.4th 139, 151, quoting *People v. Molina* (1977) 74 Cal.App.3d 544, 549.) Requests under *Marsden* must be clear and unequivocal. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7.) "Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' "

(*People v. Mendoza* (2000) 24 Cal.4th 130, 157, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

Defendant's letter cannot reasonably be construed as an unequivocal claim for new counsel. Both parties acknowledge in their briefs that defendant never again raised the subject. There is thus a more than plausible basis to conclude that defendant's letter represented nothing more than an entirely understandable moment of exasperation or frustration. The absence of a true and unenduring unhappiness with Mr. Lew is best shown by what happened on December 17, 2008, less than two weeks later. Representing defendant, and with defendant by his side, Mr. Lew succeeded at a preliminary examination in having the carjacking charge dismissed. Mr. Lew then confirmed a trial date, and entered a plea of not guilty by reason of insanity on defendant's behalf—all of this with defendant present and not indicating in any way that he was dissatisfied with Mr. Lew's representation. This is strong proof that defendant was not demanding new counsel. In light of these circumstances, we conclude that the failure to hold a hearing cannot qualify as prejudicial. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 724; *People v. Hart* (1999) 20 Cal.4th 546, 603.)

There Was No Prosecutorial Misconduct

Defendant presents two claims of asserted prosecutorial misconduct. We discuss them separately.

(1)

Defendant argues that the prosecutor committed by cross-examining him as follows:

"Q. Mr. Mills, you want to avoid criminal responsibility for this matter, don't you?

"A. You say criminal responsibility?

"Q. Yes.

"A. I don't understand your question.

"Q. Well, you wan4t the jury to think you're crazy and then go to a hospital, get cured and avoid criminal responsibility and be back out there?

"A. No, ma'am.

"Q. That's not what you want?

"A. I just want to do my justified time.

"Q. Pardon me?

"A. I just want to do my justified time.

"Q. Well, your justified time is your life. You want to get that?

"A. No, ma'am.

"MR. LEW: Objection. It's argumentative.

"THE COURT: Improper area of questioning. Sustained.

"Q. Now, you want your wife to get you off of this by sticking to the script about all your craziness, right?

"A. No, ma'am.

"Q. Actually, let me interpose this, talk about the script. How long have you been practicing your testimony?

"A. Practicing my testimony?

"Q. Yes.

"MR. LEW: Objection. Argumentative. Improper as well.

"THE COURT: Sustained.

"Q. Let's see, you've known Mr. Lew here for four years, haven't you?

"A. Yes.

"Q. And you guys have been talking about this case for four years?

"MR. LEW: Objection to this entire line.

"THE COURT: No, it's proper.

"Q. You've been talking about this case for four years?

"A. We haven't been talking about this case for four years, no.

"Q. You haven't?

"A. No, ma'am.

"Q. You don't talk about this case with Mr. Lew?

"A. We talk about the case, but—

"MR. LEW: I'm going to object at this point. Getting into privilege.

"THE COURT: The fact they talk is not privileged, but you can't get into what they talk about.

"Q. You talk about this case with Mr. Lew, correct?

"MR. LEW: Same objection.

"THE COURT: Overruled.

"Q: You talk about this case, the shooting of Jason, with Mr. Lew, right?

"A. Yes, ma'am.

"Q. And he's been your attorney for four years, right?

"A. Yes, ma'am.

"Q. And you have copies of every piece of paper in this case?

"MR. LEW: Same objection.

"THE COURT: Overruled.

"A. No. I don't have copies of every piece of paper.

"Q. What don't you have a copy of?

"A. I don't have copies of a lot of things.

"Q. Go ahead.

"A. I can't explain to you, but I don't have all my discovery, everything.

"Q. Well, give me three things you think you're missing.

"A. I can't give it to you just right offhand.

"Q. Can you give me one?

"A. I don't have a—

"MR. LEW: Object as to the contents.

"THE COURT: Overruled.

"A. I don't have the copy of certain interviews that you've given to certain witnesses.

"Q. You don't have copies of interviews that I've done?

"A. Yes, ma'am.

"Q. And how is it that you know that you that that you don't have copies of it?

"MR. LEW: It gets into privilege.

"THE COURT: Sustained.

"[THE PROSECUTOR]: I'd ask counsel to stipulate at this time that he has a copy of every interview I have done.

"THE COURT: That doesn't mean that he gave it to his client and that's a privileged area."

"Q. Do you have copies of police reports?

"A. I have copies of some police reports, yes.

"Q. You have copies of transcripts of interviews?

"A. Some transcripts, yes.

"Q. And you had—some of these you've had since you and Mr. Lew sat together at the preliminary hearing back in '05?

"A. No, ma'am.

"Q. No?

"A. No.

"Q. You haven't had some of those?

"A. I had some. The majority of the case work my lawyer has held onto.

"Q. It's important from your perspective that you have copies of what other people are saying so that you can fit your story to what other people in this case are saying, right?

"MR. LEW: Objection. Argumentative.

"THE COURT: Overruled.

"A. No, ma'am.

"Q. That's not important to you?

"A. It's not important to me because I was there. I know what happened.

"Q. Right. So you don't really need what other people had to say because you know what you did?

"A. I know what happened on that day.

"Q. You know exactly what you did?

"A. I know exactly what happened on that day.

"Q. So on April 7, 2008, the phone call to your wife, do you recall saying, 'I still don't have everything. No tapes. I'm missing three transcripts. I need to know for sure if they made a statement or not. The lady made a statement on TV. I need everything. It's like a math problem and I can't solve it without all the numbers. I need all the numbers in order to solve all the problems.' [¶] Do you remember saying that?

"A. I believe so."

"Q. . . . You're a smart guy. You can fit your testimony based on what other facts are around something, right?

"MR. LEW: Argumentative.

"THE COURT: Overruled.

"Q. . . . You're a smart guy?

"A. Yes.

"Q. And you got to fit your testimony around the facts of what the other witnesses are saying, right?

"A. No.

"Q. For example. Just give one example. You have to explain why would have come inside that Amtrak station and chased after Jason, don't you?

"A. Yes, ma'am. I have to explain.

"Q. You have to come up with a reason, an excuse for why you went after a man that was trying to avoid you, right?

"A. I don't agree with the part of avoid[ing] me, but I had to give a reason why I walked in there, yes."

"Q. That's right, you do. [¶] Then you go on to say, do you remember saying this: 'Remember, I don't tell nothing. All the things I told you, I told you because I knew this day was going to come and I need you to tell them to help me get out of jail.' [¶] Do you remember saying that?

"A. No, ma'am.

"Q. Don't remember saying that you knew this day was going to come and you needed her to help you get out of jail?

"A. No, ma'am. I don't remember saying that.

"Q. 'I need to have you verify it, verify it. He was this and that and he kept saying this and that. You know what I mean?' [¶] You were instructing her on how she was supposed to get you out of jail?

"A. No, ma'am."

"Q. . . . Did you meet, without going into the contents of what you said, did you spend a good portion on Friday meeting with your attorney?

"MR. LEW: Objection. Relevance.

"THE COURT: Overruled.

"Q. Did you?

"A. Friday?

"Q. Yes.

"A. Yes, I think we talked.

"Q. How long was he at the jail with you?

"A. I think maybe an hour. I think. I'm not sure.

"Q. One hour on Friday?

"A. I think so, yes.

"Q. That's it?

"A. I think so, yes, ma'am.

"Q. And then how about Saturday?

"A. Saturday, yeah, I think about an hour, I think, yeah.

"Q. An hour on Friday, an hour on Saturday. Did you guys practice on Sunday?

"MR. LEW: Objection.

"THE COURT: Sustained.

"Q. Did you meet on Sunday?

"A. Sunday, I don't think we met on Sunday, no."

The following day, Mr. Lew told the court that the prosecutor's cross-examination amounted to misconduct because it had "the effect of essentially attacking my integrity as defense counsel, implicitly indicating that I have coached the defendant in his testimony." As for a remedy, "I would ask that portion be stricken and I'd ask for a period of instruction and I'd ask that the district attorney be prohibited from making further inquiries in that particular fashion."

The prosecutor opposed the motion, stating, "I did not say anything about coaching. I was talking about him practicing his testimony and how much time he spent doing that. I did not get into any attorney/client privilege. And I think it is perfectly permissible cross-examination to explore how many times he's been practicing his testimony."

The trial court denied defense counsel's motion for these reasons: "Well, I think every time that he got close to attorney/client privilege or anything I thought was unusual, you objected and I sustained your objection. [¶] Other than that, I think it's perfectly proper cross-examination for her [i.e., the prosecutor] to ask him how many times you guys met because there is a certain automatic response to some of his responses. So I think that's perfectly proper for her to inquire as to the reason for that."

The excerpts we have quoted are more extensive than those cited in defendant's brief, set forth to demonstrate that there is no merit to his argument that it was misconduct for the prosecutor to cross-examine him "on a range of matters relating to his relationship with defense counsel, including the length of legal representation, the dates of meeting with defense counsel, and the existence of a 'script' prepared for Mr. Mills's testimony." The extensive excerpts also show that the prosecutor did not actually accuse defense counsel of fabrication. The references to defendant following a "script" are problematic in the abstract, but the full context draws much of any potential sting. If anything, defendant was given far more prominence in the prosecutor's questions. It was defendant who was confronted with proof of what certainly could be argued was an attempt to fabricate favorable testimony. Moreover, it is questionable that a jury would be shocked at hearing that defendant had rehearsed, with or without counsel, what his

testimony at trial would cover. Indeed, it seems common sense, as no person at risk of his liberty would reveal his testimony to his own counsel for the first time at trial. This is obviously the reason defendant is unable to muster a single precedent flatly condemning as misconduct a prosecutor mentioning that a defendant and his attorney have gone over anticipated testimony.[2] In fact, it sounds like guaranteed malpractice if the attorney did not do so. Thus, it certainly was not misconduct for the prosecutor to bring to the jury's attention the fact that defendant's testimony was not spontaneous and unrehearsed, for that would be an obvious and relevant consideration in evaluating defendant's credibility. Of course, if defendant's testimony could be seen as contrived, the pertinence of the prosecutor's approach is even more comprehensible.

(2)

Defendant's second claim of misconduct is based on these comments made during the final part of the prosecutor's closing argument concerning the wallet taken from the carjacking victim Hang:

"Here's a little timeline that's important. In May of 2008, we were getting ready for trial. On May 29, 2008, is when Inspector Brock, God bless him, talks to Mr. Hang. Because this is what was going on, I was working with him to put together a board of a representation of, you know, the other people that were there that day, what they were doing, running for their lives. And as I was doing that with Inspector Brock, one of the items that I was incorrectly going to put on that board was this wallet. I thought that that was some abandoned property. But Inspector Brock was looking at it, it had a lot of serious stuff in it that you wouldn't think—you think somebody would want to claim, credit cards, driver's license. And then when Inspector Brock looked at the photos and he saw that that wallet with all the defendant's property, a light went off. I wonder how this ended up with defendant? So he, on May 29, 2008, he contacted Kinh Hang and asked him when was the last time you saw your wallet. And then shockingly we found

[2] The most relevant California precedent has our Supreme Court merely cautioning that "such locutions as 'coached testimony' are to be avoided when there is no evidence of 'coaching.' " (*People v. Thomas* (1992) 2 Cal.4th 489, 537.)

out, well, the last time he saw his wallet was when somebody came in and at gunpoint threatened to kill his wife, demanded money, demanded his car keys, took his car with the wallet in it. That's how we got to where we are. So here, that's a problem for the defense. May 30, we reschedule the trial. On our witness list for that first trial, there's no Dr. Smith. It wasn't until the Sacramento stuff, all of a sudden, going to get doctor to try to manipulate—

"MR. LEW: No evidence as to when I retained Dr. Smith.

"[THE COURT]: No question whether he's on the witness list or not, certainly public record and it's in the court file.

"[THE PROSECUTOR]: We can tell from the testimony in the trial Dr. Smith was called in June for the first time, first time. An attempt to buy the defendant's walk away from murder."

Defendant argues that "There was no evidence before the jury to support the prosecutor's assertions regarding Inspector Brock"—who "was not called as a witness at trial. The references to the dates of actions by Inspector Brock came from his testimony at a preliminary hearing in relation to the . . . carjacking"—"yet those assertions, in isolation were not damaging to the defense. The problem was there was also no evidence before the jury regarding the defense witness list at the time of the [guilt phase] trial, or with regard to the date Dr. Smith was first retained. . . . The result was a violation of the Confrontation and Due Process Clauses" of the United States Constitution. The claim fails.

Defendant's objection did not mention, and thus did not preserve, the far broader grounds he now wishes to argue. The point is also waived because he did not request that the jury be admonished. (*People v. Gray* (2005) 37 Cal.4th 168, 215; *People v. Prieto* (2003) 30 Cal.4th 226, 259-260.) More substantively, we do not believe that the prosecutor's remarks constituted *prejudicial* misconduct. Their tone might seem snide, and they did obviously refer to factual matters the jury had not heard testimony about during the trial. In the absence of a timely objection by the defense, the prosecutor's remarks can be viewed as simply comment on the state of the theory and evidence behind

the defense. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179; *People v. Cornwell* (2005) 37 Cal.4th 50, 90.) Moreover, the remarks were brief, their subject not intrinsically inflammatory, so any harm could have been cured by the court upon appropriate request by the defense. (*People v. Hinton* (2006) 37 Cal.4th 839, 863; *People v. Wilson* (2005) 36 Cal.4th 309, 337.) There was no federal constitutional violation because the remarks were not " ' " ' "so egregious that it infect[ed] with such unfairness as to make the conviction a violation of due process" ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819), and were not " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " (*People v. Ervine* (2009) 47 Cal.4th 745, 806.)

There Was No Instructional Error

Defendant presents what he characterizes as three "interrelated instructional errors." We address each claim separately.

(1)

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed." (Pen. Code, § 1026, subd. (a).) The jury was instructed that "For the purpose of reaching a verdict in the guilt phase of this trial, you are to conclusively presume that the defendant was legally sane at the time the offense [is] alleged to have occurred."

Defendant acknowledges that our Supreme Court has held that the instruction is legally sound. (*People v. Coddington* (2000) 23 Cal.4th 529, 584 (*Coddington*).) However, he maintains we should follow two decisions of the Ninth Circuit holding that use of the instruction amounts to a conclusive presumption that violates due process: *Stark v. Hickman* (9th Cir. 2006) 455 F.3d 1070, 1076 (*Stark*); and *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959, 966-967 (*Patterson*). Defendant contends that this

instruction violated due process because it lowered the prosecution's burden of proving guilt beyond a reasonable doubt.

The Ninth Circuit in *Stark* appears to have given a logical basis for concluding why *Coddington* is not controlling here: "While the California Supreme Court stated in *Coddington* that the presumption of sanity instruction 'correctly states the law,' [citation], it did not address the exact holding in *Patterson*, *i.e.*, whether instructing the jury of this conclusive presumption violates due process. Specifically, the issue presented in *Coddington* was whether the presumption of sanity instruction given during the guilt phase of defendant's trial was error which prejudicially undermined his guilt phase defense of lack of premeditation of the murders charged. [Citation.] Thus, the *Coddington* court neither addressed the constitutionality of the instruction itself nor rendered a decision with regard to it. Rather, the court merely found, on the facts of that case, that the defendant was not prejudiced by the challenged instruction. Therefore, *Coddington* is not on point because the issue presented in this case was not actually decided there." (*Stark*, *supra*, 455 F.3d 1070, 1076.)

The *Stark* court then summarized the reasoning in *Patterson* that it was applying: "The Ninth Circuit . . . set aside Patterson's conviction, declaring that the California jury instruction on the presumption of sanity violated due process. [Citation.] In so ruling, the court relied upon the federal law established by the Supreme Court in *Sandstrom v. Montana* (1979) 442 U.S. 510 and *Francis v. Franklin* (1985) 471 U.S. 307. Both of these cases involved jury instructions that were found unconstitutional because they shifted the burden of proof to the defendant.

"In *Sandstrom*, the Court considered a jury instruction stating 'the law presumes that a person intends the ordinary consequences of his voluntary acts. [Citation.] The Court held that when given in a case in which the defendant's intent is an element, the instruction is unconstitutional because it has 'the effect of relieving the State of the burden of proof . . . on the critical question of [the defendant's] state of mind.' [Citation.] In *Francis*, the Court, relying on *Sandstrom*, considered instructions stating '[t]he acts of a person of sound mind and discretion are presumed to be the product of a person's will,

but the presumption may be rebutted[,]' and 'a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts[.]' [Citation.] The Court held that because intent was an element of the charged offense, such instructions were unconstitutional 'because a reasonable jury could have understood the challenged portions of the jury instruction . . . as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent.' [Citation.]

"Relying on *Sandstrom* and *Francis*, we declared in *Patterson* that California's instruction on the presumption of sanity was unconstitutional . . . . *Patterson*, 223 F.3d at 962-967. As we explained:

" 'The problem with the instruction given in this case is that it tells the jury to presume a mental condition that—depending on its definition—is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime. . . . If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for [the crime], that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable juror could have had in mind.' *Id*. at 965.

"In so ruling, we construed the legal definition of 'sanity' under California law with the commonly understood definitions of the term. [Citation.] Under California law, '[s]anity is defined using a modernized version of the *M'Naghten* Rule: a person is insane if he or she is "incapable of knowing or understanding the nature and quality of his or her act [or] distinguishing right from wrong at the time of the commission of the offense." ' *Id*. at 964 (quoting Cal. Penal Code § 25(b)). By contrast, the lay definitions of 'sane' include 'proceeding from a sound mind,' 'rational,' 'mentally sound,' and 'able to anticipate and appraise the effect of one's actions.' [Citation.] We explained that 'if a jury is instructed that a defendant must be presumed "sane"—that is, "rational" and

"mentally sound," and "able to anticipate and appraise the effect of [his] actions,"—a reasonable juror could well conclude that he or she must presume that the defendant had no [] mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty [of the requisite intent].' " (*Stark, supra*, 455 F.3d 1070, 1077-1078.)

We are not required to accept the Ninth Circuit's interpretation of federal law but only to consider it only insofar as we find it persuasive. (See *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 352.) While the reasoning in *Patterson* and *Stark* does not seem obviously flawed, neither does it seem unchallengeable. However, there is no need to parse *Patterson* and *Stark*, because we believe the subsequent decision of the United States Supreme Court in *Clark v. Arizona* (2006) 548 U.S. 735 (*Clark*) more or less virtually undermines that reasoning.

Clark involved a defendant accused of killing a police officer. "In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence, [citation] that 'at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.' [Citation.] Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill a law enforcement officer." (*Clark, supra*, 548 U.S. 735, 744, fn. omitted.)

Arizona law held that the evidence of Clark's mental state could be admitted only with respect to the issue of whether he was insane, which under the governing statute apparently was—unlike California's bifurcated procedure under Penal Code section 1026—tried together with the issue of guilt. At a bench trial, Clark was found both guilty and sane. After the Arizona Court of Appeals affirmed, Clark obtained federal review. As the United States Supreme Court framed it, that review "present[ed] two questions: whether due process prohibits Arizona's use of an insanity test stated

solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind)." (*Clark*, *supra*, 548 U.S. 735, 742.)

The court found no due process violation as to the first point: "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. [Citations.] There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity." (*Clark*, *supra*, 548 U.S. 735, 752-753.)

The court also rejected Clark's second due process challenge. The court reasoned that, like the presumption of innocence, "The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility. [Citations.] This presumption dispenses with a requirement on the government's part to include as an element of every criminal charge an allegation that the defendant had such a capacity. The force of this presumption . . . varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength . . . .

"There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider)

evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*. . . . [¶] The second point where the force of the presumption of sanity may be tested is in the consideration of a defense of insanity raised by a defendant. Insanity rules like *M'Naghten* . . . are attempts to define, or at least to indicate, the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility [citations], even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the insanity presumption. A State may provide, for example, that whenever the defendant raises a claim of insanity by some quantum of credible evidence, the presumption disappears and the government must prove sanity to a specified degree of certainty . . . . Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it . . . ." (*Clark, supra*, 548 U.S. 735, 766-769, fns. omitted.)

Most relevant for present purposes is that the court accepted that "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that. . . . And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. . . . [M]ental disease and capacity evidence may be considered only for its bearing on the insanity defense . . . ." (*Clark, supra*, 548 U.S. 735, 770.)

"But if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial." (*Clark, supra*, 548 U.S. 735, 771.) "Are there, then characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue . . . ? We think there are: in the controversial character of some categories of mental disease, in the potential of mental disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it." (*Id*. at p. 774.) "Because allowing mental-disease

evidence on *mens rea* can . . . easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion." (*Id*. at p. 776.)

In light of the foregoing, the court concluded: "Arizona's rule serves to protect the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors. For these reasons, there is no violation of due process . . . and no cause to claim that channeling evidence on mental disease and capacity offends any ' "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. " ' [Citation.]" (*Clark, supra*, 548 U.S. 735, 779, fn. omitted.)

Because *Clark* involved a bench trial, there was obviously no issue or discussion of jury instructions, and it thus it not directly controlling. But it is highly illuminating for our situation.

The instruction defendant challenges—the one which *Patterson* and *Stark* treated as violating due process—is merely one aspect of what the *Clark* court characterized as a state's "power" or "authority" to "restrict" or "channel" how insanity is considered without violating due process. (See *Clark, supra*, 548 U.S. 735, 770-771) California has not gone so far as to abolish or prohibit introduction of evidence on the issue of a defendant's sanity, but it has "curtailed" or "limited" it (*id*. at p. 770) in the sense that insanity is kept out of the guilt phase of a criminal trial.

Just as Arizona did in *Clark*, California has exercised its authority to specify how the issue of insanity is to be addressed in criminal trials. Penal Code section 1026 represents California's decision to keep the issues of guilt and sanity separate. Guilt is to be determined first. Because the issue of sanity is not germane to that determination, it does no harm to instruct the jury of the state's policy that, for purposes of proceedings devoted to that determination, the presumption is one of sanity. If the defendant wishes to challenge that presumption and have the issue of his or her sanity determined, that determination is to be made at a separate, *subsequent* proceeding. Only after the issue of guilt has already been determined adversely to the defendant, can he or she try to

overcome the presumption by a preponderance of evidence. (See *People v. Hernandez* (2000) 22 Cal.4th 512, 521.) But it makes eminent sense for the jury to be told that sanity is not to be considered in the determination of guilt. The challenged instruction does just that, and no more than that. It thus reflects the state's "authority . . . to deny a defendant the opportunity to displace the presumption of sanity . . . when addressing a different issue in the course of a criminal trial." (*Clark, supra*, 548 U.S. 735, 771.) The *Clark* court determined that the exercised of that authority entails no violation of due process. That conclusion fatally undermines the contrary predicate assumption of *Patterson* and *Stark*. We therefore conclude that the error claimed did not occur.

(2)

The jury was then instructed, in language virtually identical to Penal Code section 29, that "In the guilt phase, any expert testifying about a defendant's mental disorder shall not testify as to whether the defendant had or did not have the required mental state. The question as to whether the defendant had or did not have the required mental state shall be decided by the trier of fact, which in this case is the jury."[3] Defendant reframes his *Patterson-Stark* arguments to contend that this instruction violated due process by denying him the right to present a defense. For defendant, this instruction "exacerbate[ed] the error . . . in giving a 'presumption of sanity' instruction,"

[3] "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, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29.) This language in turn restates much of Penal Code section 28, subdivision (a): "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. 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." The two provisions were enacted together in 1984. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112.)

because this instruction told the jury that Dr. Smith "could testify to the contrary." This contention lacks merit.

Although ostensibly an attack on an instruction, the substance of defendant's argument is about the restriction of evidence embodied in Penal Code sections 28 and 29. The argument thus assumes a predicate that the preceding discussion establishes does not obtain. The *Clark* court held that "evidence tending to show that a defendant . . . lacks capacity to form *mens rea*" may be constitutionally restricted or eliminated. (*Clark*, *supra*, 548 U.S. 735, 769-770.) That is all that happened here. And, if more were needed, on this point *Coddington* is dispositive: "We reject . . . appellant's claim that exclusion of expert testimony on the ultimate question of fact as to whether appellant did form those mental states [i.e., of the charged offenses] denied him the right to present a defense and thereby deprived him of rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. All authority is to the contrary. [Citations.] Sections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of the charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." (*Coddington*, *supra*, 23 Cal.4th 529, 583.) *Clark* and *Coddington* compel us to reject defendant's contention.

(3)

Immediately after the jury was instructed with the two instructions just discussed, the trial court further instructed: "A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation. [¶] If you find that a defendant received a threat from a third party that he actually, even though unreasonably associated with the victim, Jason Jackson-Andrade, you may consider that evidence in evaluating the defendant's actions. The weight and significance of such evidence is for you to decide. [¶] The defense of

imperfect self-defense is not available to a defendant whose belief in the need to use self-defense is based on delusion alone."

Defendant acknowledges that the last sentence of this instruction is supported by *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 and *People v. Padilla* (2002) 103 Cal.App.4th 675, which held that imperfect self-defense cannot be based on the perceived need to defend oneself with deadly force against delusional or hallucinated fears. Defendant reasons that a delusion or hallucination has no basis in reality, but his fears—as evidenced by Dr. Smith's testimony—did, and thus it was error to give the instruction. But this misrepresents Dr. Smith's testimony. He testified that defendant could accurately perceive reality, but give that reality a completely unfounded and threatening interpretation. Thus, defendant could accurately perceive the victim's presence at the station, but interpret that he was an assassin dispatched by Tyrone to kill him, in his mind justifying an unprovoked attack on the unarmed Jackson-Andrade that culminated with defendant shooting him six times while he was helpless on the floor. Because that interpretation had no basis in reality[4], it qualified as a delusion, thereby warranting the instruction. Indeed, it was Dr. Smith who repeatedly used the word "delusional" to describe defendant's misperceptions of reality.

In any event, the following excerpt from *People v. Mejia-Lenares*, *supra*, 135 Cal.App.4th 1437, 1456-1457, persuades us that the decision is soundly reasoned:

"Persons operating under a delusion theoretically are insane since, because of their delusion, they do not know or understand the nature of their act or, if they do, they do not know that it is wrong. By contrast, persons operating under a mistake of fact are reasonable people who have simply made an unreasonable mistake. To allow a true delusion—a false belief with no foundation in fact—to form the basis of an unreasonable-mistake-of-fact defense erroneously mixes the concepts of a normally reasonable person making a genuine but unreasonable mistake of fact (a reasonable

[4] Dr. Smith's characterization was that defendant's paranoid beliefs were "contrary to fact." But Dr. Smith refused to equate defendant's delusions with hallucinations.

person doing an unreasonable thing), and an insane person. Thus, while one who acts on a delusion may argue that he or she did not realize he or she was acting unlawfully as a result of the delusion, he or she may not take a delusional perception and treat it as if it were true for purposes of assessing wrongful intent. In other words, a defendant is not permitted to argue, "The devil was trying to kill me," and have the jury assess reasonableness, justification, or excuse as if the delusion were true, for purposes of evaluating state of mind.

"To hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion as the basis of unreasonable mistake of fact effectively permits him or her to use insanity as a defense without pleading not guilty by reason of insanity, and thus to do indirectly what he or she could not do directly while also avoiding the long-term commitment that may result from an insanity finding. If a defendant is operating under a delusion as the result of mental disease or defect, then the issue is one of insanity, not factual mistake. To allow a mistake-of-fact defense to be based not on a reasonable person standard but instead on the standard of a crazy person would undermine the defense that is intended to accommodate the problem."

This logic seems unassailable. In following it by using the instruction quoted above, the trial court did not err.

DISPOSITION

The judgment of conviction is affirmed.

_____
Richman, J.

We concur:

_____
Haerle, Acting P.J.

_____
Lambden, J.