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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OMAR MARES, Defendant and Appellant.	E039762 (Super.Ct.No. RIF121768) OPINION
In re OMAR MARES, on Habeas Corpus.	E042136

APPEAL and PETITION FOR WRIT OF HEABEAS CORPUS from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Appeal affirmed. Petition for writ of habeas corpus denied.

Daphne Sykes Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.110.1, this opinion is certified for publication with the exception of parts III.A-C, E.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-Ladendorf, Supervising Deputy Attorney General, and Kristen K. Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Omar Mares[1] walked into a bank, armed with a car dealership's bank account number, and allegedly asked the bank teller, "Is this my account?" Without verifying that the account actually belonged to defendant, the teller gave him $5,000 from the dealership's account. The teller also gave defendant bank statements showing the account contained $4 million.

Not content with a mere $5,000, defendant continued his escapade by traveling to the car dealership, whereupon he insisted he had a $34,000 credit. He demanded they give him $20,000 of it back and use the remaining $14,000 towards the purchase of a new vehicle. Once the dealership discovered it was *their* $4 million account, and not defendant's, they called the police.

Defendant was arrested and charged with two counts of burglary and one count of possessing a completed check with the intent to defraud. The matter was tried to a jury. After deliberating 10 minutes, the jury convicted defendant on all counts.

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[1] Who does not own, and is not employed by, a car dealership.

Defendant has filed a petition for writ of habeas corpus, which we consider concurrently with this appeal. In his habeas petition, defendant alleged ineffective assistance of counsel. Similarly in his appeal, defendant argues several errors were committed, including ineffective assistance. They are: (1) trial counsel rendered ineffective assistance in failing to present a mental illness defense, (2) the "mistake of fact" instruction erroneously required defendant's belief—that he had a $4 million bank account—be "reasonable," (3) trial counsel rendered ineffective assistance when she failed to object to the mistake-of-fact instruction, (4) a bank withdrawal slip does not qualify as a "check" for purposes of Penal Code[2] section 475, subdivision (c), and (5) instructing jurors that a withdrawal slip qualifies as a check lowered the prosecution's burden to prove defendant possessed a completed check.

We conclude that the trial court erred when it instructed jurors that the mistake of fact had to be actual and reasonable, when in fact an unreasonable belief was sufficient to negate specific intent. However, we find the error was harmless because defendant's planning and sophistication belied his mistake-of-fact defense. Finding no other errors, we affirm the judgment. We also deny the petition for writ of habeas corpus on the merits.

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[2] All further statutory references will be to the Penal Code unless indicated.

II.

FACTUAL AND PROCEDURAL HISTORY

On December 20, 2004, defendant went to an upscale car dealership and test drove a luxury car. In the car-sales industry, when someone wants to pay for a vehicle in full, it is a custom and practice to offer customers the option to wire transfer funds into the dealership's bank account. At this particular dealership, salesmen have on their desks wire transfer forms containing the dealership's name, routing number, and bank account number. They would hand a wire transfer form to a customer to facilitate the transfer of the purchase price of a car from the customer's bank account to the dealership's bank account. Normally, a sales representative would only provide a customer with a wire transfer form if a purchase contract was signed; however, a "laissez[-]faire" attitude amongst the sales staff sometimes caused a salesperson to give a buyer a form without a completed purchase agreement.

Some time before January 20, 2005, defendant withdrew $500 from his brother Daniel Mares's (Daniel) IRA account located at Daniel's credit union. When Daniel went to his credit union on January 20 to withdraw money from his account, the credit union refused the transaction, informing him he was "$500 short." A credit union representative showed Daniel a document containing defendant's signature for a $500 withdrawal made a couple of days earlier. When Daniel confronted defendant about the withdrawal, defendant said he believed that he, too, had an account at the credit union and was trying to withdraw money from his own account.

On January 28, 2005, defendant went to the bank where the car dealership had a $4 million payables account. Defendant presented a teller with a preprinted form folded into fourths, showing the dealership's account number. On the unexposed side of the folded paper was the name of the dealership. Defendant told the teller he "wanted to make a [$5,000] withdrawal." The teller swiped defendant's identification; filled out, for defendant, a withdrawal slip for $5,000; and then handed it to defendant to look over and sign. Since the withdrawal amount exceeded the amount she was authorized to disburse, the teller asked her manager for approval, which he signed without ensuring it was correct. Neither the teller nor the authorizing bank manager verified the defendant's name and signature with those on the account.

Written on the withdrawal slip were a requested $5,000 withdrawal amount, an account number, a date, and defendant's signature. After the withdrawal was approved by the manager, the teller wrote on the back of the withdrawal slip the account balance, the date it was opened, and a printed transaction number. The withdrawal slip was then placed into a computer to validate the withdrawal, and the withdrawn amount was printed on the back as a receipt.

Defendant requested the teller print out the bank statements for that account. She handed him three documents: (1) an instant statement containing the account number, account name, the branch number, various transactions to and from the account, the current balance and the current transaction; (2) an internal branch cash withdrawal printout showing the most recent transaction of funds coming out of the account, which

was to be used solely by the bank; and (3) an internal branch printout for bank use only, listing dates of the account's most recent activity, with deposits totaling $34, 551.83.

After receiving the three statements, defendant took the documents to the dealership. Showing the bank statements to the salesman, defendant claimed he had a $34,000 credit; he wanted to apply $14,000 towards the purchase price and wanted $20,000 refunded to him. The inexperienced salesman asked the sales manager how to process this unusual transaction, and the sales manager immediately became suspicious because there is no such thing as "having credit" at a car dealership. Furthermore, he found it unusual that a customer would hurriedly want to complete a $40,000 car purchase in a matter of minutes.

When the business manager was consulted, it was discovered that the bank account numbers for the funds for which defendant claimed a credit were actually the dealership's accounts. When the dealership's managers refused to return the bank statements to defendant, he become irate and contacted the police. When the officers arrived to conduct an investigation, defendant told the officers that the monies in the bank account came from a church, which donated $4 million to him. He later changed his story by saying he didn't know how the money got into "his" account.

Defendant was charged with two counts of burglary (§ 459) and one count of possessing a completed check with intent to defraud. (§ 475, subd. (c).) The matter went to trial before a jury.

During an Evidence Code section 402 hearing, the prosecution made a motion to exclude any reference to defendant's mental health history on the grounds it was

irrelevant to the issues in the case. Defense counsel stated she was not aware of defendant's mental health history. The only mental health reference she knew of was a statement made by defendant's brother Daniel to a police officer.[3] She informed the trial court she would not ask Daniel any questions regarding defendant's mental health.

At trial, defendant testified as a witness on his own behalf. He stated that he received some paperwork with account numbers on it and went to the bank to see if the account was "his." The teller told him, "'[Y]our name is the only one on [the account].'" Defendant also testified that when he received the statement from the teller showing the $4 million balance, he confirmed that "[i]t looked like an accurate balance to [him]." He then thanked her and said, "'Yeah, that's all mine.'" The teller also informed him the bank had wired $34,551.43 to the dealership. He responded, "[W]onderful. $34,551.43." Defendant then traveled to the car dealership to clear up the issue of whether he had a credit balance. He testified he was not interested in buying a car but wondered where "his" money was.

At the trial's conclusion, the jury found defendant guilty of all charges. The trial judge heard a probation violation hearing concurrently with the trial and found defendant in violation of his probation.

At sentencing, the trial court placed defendant on formal probation; sentenced him to one year in jail; and as a term and condition of probation, ordered a psychological

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[3] Daniel's statement to the officer is not found anywhere in the appellate record.

evaluation. The trial judge believed defendant suffered from a mental health disorder that required treatment; hence, it referred the matter to the mental health court to determine whether defendant's probation terms should be modified to provide appropriate housing and treatment. Defendant objected to the psychological evaluation as a term and condition of probation. In the end, defendant agreed to that term because it avoided his being sentenced to state prison.

In order to provide the court with a mental health evaluation, a clinical psychologist interviewed defendant. The psychologist opined that defendant had a "Delusional Disorder, Grandiose and Persecutory Types."[4]

III.

DISCUSSION

A. Failure to Mount a Psychiatric Defense Did Not Constitute Ineffective Assistance of Counsel

Appellate counsel asserts that trial counsel rendered ineffective assistance because she failed to investigate and present a psychiatric defense. Appellate counsel claims defense counsel should have proffered expert testimony to explain how defendant's delusional disorder: (1) prevented him from forming the specific intent to commit theft

[4] There is a consensus among the psychological community that there is no effective treatment for delusional disorder, although individual therapy and psychotropic medications may help. The nature of the illness prevents the establishment of a therapeutic relationship due to distrust, suspiciousness, lack of insight into illness, and disinterest in the opinion of others.

or to defraud, and (2) caused him to have delusional ideas while at the same time allowed him to act and speak normally.

Appellate counsel maintains defense counsel should have become aware of defendant's mental disability from his erratic behavior: he insisted that a church donated $4 million to him, he had $34,000 in credit at a car dealership, and he accused his public defender of endangering his life by mentioning in front of other inmates that he had a $4 million bank account. Appellate counsel claims trial counsel's failure to present evidence of defendant's delusion was prejudicial because the evidence would have shown his beliefs were implausible and detached from reality, thus preventing him from forming the specific intent to defraud and to commit burglary. (§ 28, subd. (a).)

The federal and state Constitutions entitle a criminal defendant to the effective assistance of counsel. (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) To prove an ineffective assistance claim, a defendant must show (1) "counsel's performance was deficient" *and* (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) A court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." (*Id.* at p. 697.)

When evaluating the adequacy of counsel's performance, a court asks whether counsel's assistance was reasonable "under prevailing professional norms" and in light of all circumstances existing at "the time of counsel's conduct." (*Strickland, supra,* 466 U.S. at pp. 688, 690.)

To prove prejudice, a "defendant must show that there is 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*, *supra*, 466 U.S. at p. 694.) If the record on appeal fails to shed light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of trial counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation. (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.)

To establish counsel as being ineffective for failing adequately to investigate, a defendant must produce the evidence that further investigation would have shown. A claim unsupported by any evidence is insufficient to determine whether it is reasonably probable defendant would have obtained a more favorable result with adequate investigation. (See *People v. McDermott* (2002) 28 Cal.4th 946, 992; *In re Marquez* (1992) 1 Cal.4th 584, 603-609; *In re Fields* (1990) 51 Cal.3d 1063, 1071.) Such is the case with respect to defendant's claim that his counsel was ineffective for failing to investigate the possibility of a psychiatric defense.

To begin with, defendant has failed to specify what viable "psychiatric defenses" could have been discovered if, prior to trial, defense counsel had investigated defendant's mental competence to stand trial. The postsentencing mental evaluation reflects a clinical psychologist's opinion that defendant suffered from "Delusional Disorder, Grandiose and Persecutory Types." However, appellate counsel fails to describe how grandiose and persecutory types of delusions affect specific intent. There is no evidence suggesting that

the psychologist believed the diagnosis would have supported an insanity or mistake-of-fact defense.

Moreover, a defendant "must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense" to succeed on a claim of ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) Where the evidence supporting the verdict is strong, failing to introduce such testimony is not sufficient to support a claim of ineffective assistance of counsel. (*People v. Ochoa* (1998) 19 Cal.4th 353, 431.)

Any evidence of defendant's delusional disorder would not have contradicted the strong evidence that he harbored the specific intent to commit two burglaries and to defraud the bank. Defendant's actions showed planning and sophistication: he visited a car dealership and test drove a luxury car. He obtained a wire transfer form without ever having to sign a purchase agreement for that luxury car. Defendant engaged in a prior bad act when he convinced a teller at his brother's credit union to hand over $500 of his brother's retirement money to him. Brimming with success, he walked into the bank that "happened" to have the car dealership's account to see if he had an account there. He handed the teller a folded piece of paper, displaying only the account number, but neglected to show the teller the dealership's name on the other side of the folded paper. He again convinced a teller to hand him money, this time, 10 times the amount he got from his brother's credit union.

Trial counsel has no blanket obligation to investigate possible mental defenses unless the initial facts known to counsel are such he could reasonably suspect a meritorious defense was available. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1194-1195.) As appellate counsel concedes, defendant was not willing to discuss his case with trial counsel. It is undisputed that defendant affirmatively refused to cooperate with his public defender. Trial counsel cannot be faulted for failing to take steps that require cooperation his client declines to give. (*Id.* at p. 1245.)

In addition, the record is unclear as to what statement defendant's brother Daniel made that would have alerted defense counsel as to the viability of a mental defense. While we note that defense counsel argued in closing that "as crazy as that sounds, he believed that the money belonged to him," it is not enough to say that just because something "sounds crazy," it *is crazy*. There are a myriad of criminal cases where a defendant's actions may *appear crazy*, but that does not make a defendant any less criminally culpable.

Finally, trial counsel's actions were a strategic tactic to mount a mistake-of-fact defense, rather than an insanity defense.[5] Therefore we cannot say that defendant

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[5] In fact, it could be tantamount to malpractice for defense counsel to have advanced an insanity defense. Defendant's exposure on two counts of burglary and one count of possessing a completed check to defraud was potentially six years (midterm) in state prison. Here, defendant was sentenced to one year in county jail. If defendant was found not guilty by reason of insanity, defendant could possibly have been committed for the rest of his life, as the psychological community's consensus is there is no cure for delusional disorder. (Welf. & Inst. Code, §§ 5352.5, 5361; Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2006) § 48.35, p. 1561.)

suffered prejudice by his counsel's failure to conduct an investigation and mount a psychiatric defense prior to trial.

B. The Trial Court's Instruction that Specific Intent Can Only Be Negated by a Reasonable Mistake of Fact was Harmless Error

At defendant's request, the trial court gave a mistake-of-fact instruction to the jury. CALJIC No. 4.35 reads: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." In pertinent part, a comment to CALJIC No. 4.35 states, "In a theft prosecution if a defendant in good faith believes he has the legal right to take the property, even though this belief is unreasonable as measured by the objective standard of a hypothetical reasonable person [,] he or she is entitled to an acquittal."

To establish violations of sections 459 and 475, subdivision (c), the prosecution must prove defendant had the specific intent to steal and to defraud. A mistake-of-fact defense may be established from defendant's good faith belief the property was his, regardless of whether his belief was reasonable. (*People v. Tufunga* (1999) 21 Cal.4th 935, 943, 954, fn. 5; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1426-1427 (*Russell*); *People v. Romo* (1990) 220 Cal.App.3d 514, 518-519; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1, 10-11.) In other words, the defendant must have an actual belief he has a bona fide right to the property. (*Romo*, *supra*, at p. 518.)

Defendant contends that the trial court erred when it instructed the jury that a mistake of fact had to be reasonable in order to negate specific intent. The gravaman of his defense was that he had an honest, but mistaken, belief that he had an account at the bank and was entitled to the money in that account. Because the jury could have found him not guilty if they determined he unreasonably believed the money was his, the court's failure to instruct the jury that his unreasonable belief negated specific intent deprived him of the crux of his defense.

The People concede that the trial court erred when it instructed the jury defendant's mistake of fact that the property belonged to him had to be actual and reasonable to negate specific intent.[6]

Even in the absence of a request, a trial court must instruct sua sponte on general principles of law and defenses. (*Russell*, *supra*, 144 Cal.App.4th at p. 1425.) The court has a sua sponte duty to instruct on mistake of fact if it appears the defendant is relying on such a defense. (*Id.* at p. 1427.) Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *Watson*.[7] (*Russell*, at p. 1432.)

Under the *Watson* standard of review, we find that the trial court's failure to instruct the jury that they had to find defendant not guilty if they determined he had an unreasonable belief that the money was his was harmless error. The result would not

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[6] The prosecution also asserts giving the mistake-of-fact instruction was invited error. We do not reach this claim as we are deciding the issue on the merits.

[7] *People v. Watson* (1956) 46 Cal.2d 818.

have been different because the jury would still have found defendant guilty. Defendant's planning and sophistication, and prior bad act of defrauding the credit union, contradict his assertion that he unreasonably believed the money was his.

Under the pretense of wanting to purchase a luxury car with a wire transfer, defendant obtained the car dealership's bank account number. He presented a folded paper to the bank teller, displaying the account number, but hiding the dealership's name, in order to withdraw money from the account. He obtained additional information regarding the account's debits, credits, and wire transfers to inveigle from the dealership a new car and more money. His prior bad act of withdrawing money from his brother's credit union account, using the same modus operandi, militates against a finding that defendant had an unreasonable belief that the money belonged to him. Therefore, we conclude that the result would not have been different if the trial court had properly instructed the jury on the mistake-of-fact defense.

D. A Withdrawal Slip Qualifies as a "Completed Check" for Purposes of Section 475, subdivision (c)

Defendant contends he cannot be convicted of possessing a completed check with the intent to defraud because a bank's withdrawal slip does not fall squarely within the plain meaning of the term "check." Citing *People v. Norwood* (1972) 26 Cal.App.3d 148 (*Norwood*), defendant argues that he can only be criminally liable for possessing those negotiable instruments listed in the statute: a completed check, money order, traveler's check, warrant or county order. Since the Legislature did not enumerate "withdrawal slip" as a commercial paper prohibited in section 475, that element of the crime has not

been established. He also claims the withdrawal slip was "not in the form of" a completed check: a check is a draft signed by the maker or drawer, drawn on a bank, payable on demand, and has unlimited negotiability. On the other hand, the withdrawal slip is a blank form, accessible to the public, which was completed by the teller and signed by defendant.

Below is a representation of a blank withdrawal slip the teller used to fill out the withdrawal request for defendant:

WITHDRAWAL DATE_____

_____ _____
CUSTOMER NAME SIGNATURE-Please sign in teller's presence for cash received.

AMOUNT_____DOLLARS

BANK NAME	ACCOUNT NUMBER #	AMOUNT $

Section 475, subdivision (c) provides: "Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery."

A "check" is defined as: "(1) a draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's check or teller's check, or (3) a demand draft. An instrument may be a check even though it is described on its face by another term, such as 'money order.'" (Cal. U. Com. Code, § 3104, subd. (f).) A "draft" is an

order to pay upon demand and includes a check. (Cal. U. Com. Code, § 3104, subd. (e) & U. Com. Code Comment No. 4, 23A pt. 2 West's Ann. U. Com. Code (2002 ed.) foll. § 3104, p. 177.) A bank may honor any check, receipt, or order of withdrawal from a commercial account when an authorized person on the account makes a withdrawal. (Fin. Code, § 953.)

We find that the withdrawal slip filled out by the teller at defendant's request was a completed check for purposes of section 475. The withdrawal slip is a standard form supplied by a bank[8] that the public may use as a "draft." It is a preprinted "order" directing the bank to pay the authorized person on the account a sum certain "upon demand," that is, when they sign the slip and hand it over to the teller. It matters not whether the "draft" was in the form of a withdrawal slip or a personal check. In either case, filling out a personal check payable to oneself, or filling out a bank's withdrawal slip, is the same in effect. What matters is that the essential elements of a negotiable instrument are met: it is an unconditional order to pay a fixed amount of money payable on demand to the bearer. (Cal. U. Com. Code, § 3104, subd. (a).) The defendant's signature on the bank's form requesting immediate payment of $5,000 to himself was a "completed check." Since a "check," by definition, is a "draft" (an unconditional order for immediate payment to the bearer), the withdrawal slips satisfies the element that defendant possess a "completed check" for purposes of section 475.

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[8] Pursuant to Evidence Code sections 459, subdivision (a) and 452, subdivision (g), we take judicial notice of ordinary banking procedures.

Norwood, is distinguishable. The court in that case ruled that the county warrant defendants possessed was not considered a completed check under section 475. The county warrant was not a negotiable instrument drawn on a bank directing the depository of funds to make payments to the payee. (*Norwood, supra*, 26 Cal.App.3d at pp. 154-155.) The warrant did not look like a traveler's check, and it was not a money order because no fee was paid by the purchaser to the issuer of the instrument. (*Id.* at pp. 155-156.) Since the county warrant did not fall into any of those three categories of instruments, there was insufficient evidence the defendant possessed a "completed check" with the intent to defraud.

Here, however, the withdrawal slip explicitly ordered the bank to withdraw $5,000 from the car dealership's commercial account and pay it to defendant when he signed the withdrawal slip. It directed the bank, where the dealership's funds were deposited, to disburse funds to the payee—defendant. Therefore the unconditional demand directing the bank to distribute funds to defendant constituted a check.

E. The Trial Court's Substitution of "Withdrawal Slip" in Lieu of "Completed Check" Did Not Relieve the Prosecution of Proving All Elements Beyond a Reasonable Doubt

As we have previously concluded that a withdrawal slip is functionally a "completed check" for purposes of section 475, subdivision (c), we find that the trial court properly instructed the jury on all elements of the crime of possessing a completed check with the intent to defraud.

F. Defense Counsel's Failure to Object to the Insertion of "Withdrawal Slip" in the Jury Instruction, in Lieu of "Completed Check," is Not Ineffective Assistance

As we have previously concluded that a withdrawal slip is functionally a "completed check" for purposes of section 475, subdivision (c), failure to object to the use of the term "withdrawal slip," instead of "completed check" in the jury instruction listing the crime's elements does not constitute ineffective assistance.

IV.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied on the merits.

/s/ MILLER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ KING
J.