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Court of Appeal, Third District, California.
The PEOPLE, Plaintiff and Respondent,
v.
Tressa Joanne MORRISON, Defendant and Appellant.
No. C051991.
(Super.Ct.No. 03F8624).
Feb. 8, 2008.

Office of the State Attorney General, Sacramento, CA, for Plaintiff and Respondent.

Susan D. Shors, Attorney at Law, San Francisco, CA, for Defendant and Appellant.

BLEASE, J.

*1 Defendant Tressa Morrison, a 52-year-old mother and grandmother, went on a shooting spree outside her apartment, killing her 17-year old neighbor and wounding his girlfriend, who was also a neighbor, so seriously that she remained in a coma for four to five days and was not initially expected to survive. Defendant also fired several shots at three people who came to assist the shooting victims.

Defendant blamed the victims and their friends for the death of her 16-year-old grandson, Chance Morrison, who died of a drug overdose approximately two months before the shootings. Moreover, the victims and their friends harassed defendant mercilessly after Chance's death, and threatened her repeatedly.

Defendant was charged with the first degree murder (Pen.Code, §§ 187, 189) of Anthony Hackler, and with the attempted premeditated murder (Pen.Code, §§ 187, 664, & 189) of Rochelle Coccellato. With respect to the attempted murder of Coccellato, defendant was charged with personally inflicting great bodily injury and inflicting great bodily injury causing the victim to become comatose due to a brain injury and to suffer paralysis. (Pen.Code, § 12022.7, subds.(a) & (b).) With respect to the charges of murder and attempted murder, defendant was charged with intentionally and personally discharging a firearm causing great bodily injury or death. (Pen.Code, § 12022.53, subd. (d).) Defendant was also charged with assault with a firearm (Pen.Code, § 245, subd. (a)(2)) on Daniel Hawley, Anthony Duran, and Gina Gilmer. With respect to all of these

acts, defendant was charged with personally using a firearm. (Pen.Code, § 12022.5, subd. (a).)

Defendant pleaded not guilty and not guilty by reason of insanity to the charges, resulting in a bifurcation of the issues of guilt and sanity. At the guilt trial, defendant did not contend that she was not the shooter. Instead, she tried to prove that she acted without premeditation, deliberation and malice aforethought, or that she had an unreasonable belief that she needed to defend herself.

Unfortunately for defendant, the victims were unarmed, Hackler was shot in the back, and there was ample evidence in the form of letters, a videotape, and statements made both before and after the shootings that she contemplated killing the victims. The jury convicted defendant on all counts.

The first sanity trial ended in a hung jury. The second sanity trial ended with a verdict that the defendant had been legally sane at the time of the shootings.

Defendant argues her statement to police, which was videotaped and played for the jury, was not obtained with her voluntary and informed consent because she was led to believe she could not have an attorney until arraignment. She further argues that her mental health expert was erroneously allowed to testify as to her mental state. She claims the prosecutor was guilty of misconduct when he elicited her statements to the psychologists. She argues the trial court abused its discretion when it allowed the admission of autopsy photographs and other evidence during the guilt trial.

*2 As to the sanity trial, defendant argues the trial court gave an erroneous instruction on circumstantial evidence, and that it gave an incomplete instruction on the definition of insanity. Finally, defendant argues the cumulative errors require reversal of the judgment.

We shall conclude that some of the prosecutor's questioning of defendant's mental health expert was improper, and that the instruction on circumstantial evidence was given in error. In neither of these circumstances was the error prejudicial, in part because of the overwhelming evidence of defendant's guilt and sanity.

We shall affirm the judgment and direct modification of the abstract of judgment to correct uncontested technical errors.

FACTUAL AND PROCEDURAL BACKGROUND

The events underlying this tragedy occurred at the Loma Vista Apartment complex in Redding, California. On November 3, 2003, Rochelle Coccellato, who was living in apartment 27, went to her neighbor's apartment to borrow a vacuum cleaner. When the neighbor, Dana DePonte, opened the door, Coccellato gave her a “really awkward strange look.” When DePonte asked what was wrong, Coccellato rolled her eyes to the right. DePonte looked out of the doorway and saw defendant, who lived in apartment 28, sitting so that she was facing them and drinking from a coffee cup. Coccellato went into

DePonte's apartment for about two minutes, then left. Immediately after DePonte locked the door she heard a gunshot, Coccellato's scream, and more gunshots.

Daniel Hawley was visiting his friend Anthony Hackler. Hackler lived in apartment 27 with his mother, his two younger brothers, and his girlfriend, Coccellato. They were in the living room of apartment 27 when they heard two pops that sounded like fireworks. Hackler ran to the door, opened it, and yelled that his girlfriend had been shot. He ran outside, there were two more shots, and Hawley saw Hackler fall. When Hackler was hit, he was running away from apartment 28, defendant's apartment. Hawley crawled out to Hackler. Hackler said, "[t]he neighbor shot me." Hackler also told Hawley his girlfriend had been shot. He asked Hawley to go to her.

Hawley could see Coccellato lying partially on the sidewalk and partially in the parking lot. He went to her, and could see that she had been shot in the head. As he was trying to help her, he heard a screen door open, and looked up to see if someone was coming to help. Instead, he saw defendant holding a gun. He heard three or four more shots, and saw defendant pointing the gun in his direction. Hawley felt a bullet zip past his hair. He ducked behind a car in the parking lot. After the shooting stopped, he heard the screen door open and shut again. He peeked out and did not see defendant.

Another man, Anthony Duran, came and helped Hawley drag Coccellato out of the line of fire. While that man stayed with Coccellato, Hawley went back to Hackler and dragged him between two vehicles in the parking lot. He stayed with Hackler until Hackler died, and was still with him when the police arrived.

*3 Duran testified that while he was with Coccellato and Hawley, he saw the shooter walk up. She said something like, "You killed my son or grandson...." She pointed the gun at them, and they moved out of the way. He heard the gun fire, and felt he would have been shot if he had not taken cover. When defendant went back into her apartment, he went back over to help Coccellato, then he heard the sirens.

Gina Gilmer lived in apartment 30. She went outside on her upstairs balcony when she heard gunshots. Below her she saw a young man stumbling and saying, "I've been shot," and "she shot my girlfriend." She went down to him, but later left to call 911. Afterward, she went back out and saw a girl lying at the bottom of the stairs with her face blown off. A man was with her, so Gilmer went back to the boy. As she was holding his hand, she looked up and saw defendant pointing a gun at her and screaming something about her son. Gilmer moved backwards between two cars. She would have been shot if she had not moved.

Paul Stearns lived close to the Loma Vista Apartments. He heard gunshots and went to investigate. He saw a man lying on the ground and a girl pulling on his arm. Then he saw defendant come out of the apartment with a gun in her hand and say, "Kill my son, will you." She then fired three more shots.

Ray Butts was the apartment manager at Loma Vista Apartments. He ran to his window when he heard the first gunshot and saw Coccellato lying on her right side, her

arm going back and forth. He then saw Hackler come running out the door of apartment 27. He saw Hackler get shot in the back as he was running toward Coccellato. Hackler fell to the ground and said something like, "I think I've been hit." Butts saw the hand and arm of the person doing the shooting coming out of apartment 28, defendant's apartment. Butts saw Duran run over to Coccellato, then heard another gunshot. The person with the gun went back into apartment 28. As defendant was being led to the police car after the shooting she said to Butts, "I told you if you didn't take care of this, I was going to shoot the little motherfuckers."

Hackler was pronounced dead at the scene of the shooting. He had been shot in the middle of his back. Coccellato was taken to the hospital. She had multiple gunshot wounds to the head, chest, and right arm. Initially, the doctors treating her did not believe she would survive due to the extent of her injuries. She was in a coma for several days. She is permanently disabled, suffering from weakness to her left side, decreased vision in her right eye, loss of hearing, and cognitive difficulties.

About two months before the shootings, defendant's 16-year-old grandson, Chance, died of an accidental overdose of Methadone. Kevin Kimple from the Redding Police Department investigated Chance's death. Chance was found in apartment 10 at the Loma Vista complex, which belonged to Elray Pond. Chance had taken the drugs at a different location and had been carried to apartment 10 and left on the couch. When the ambulance arrived, he was blue.

*4 Defendant told investigator Kimple that Anthony Purdom was a possible suspect in her grandson's death. Defendant called Kimple regarding the investigation into her grandson's death about a half a dozen times prior to the shooting. She was anxious for some resolution and was distraught over some events that had been occurring at the apartment complex. She appeared to become more impatient and frustrated as the calls progressed.

Kimple finally located Purdom about two and a half weeks after the shooting incident. Purdom, who was 15 years old, was arrested, charged, and found responsible in juvenile court for providing narcotics to Chance. Purdom was not charged with murder because there was no indication that Chance took the drugs involuntarily.

Defendant blamed the people in apartment 27 for Chance's death. The kids in apartment 27 had come over after Chance's death, pointed to a bottle of aspirin, and said, "This looks like the same stuff we gave Chance."

Defendant was afraid of the people from apartment 27, and told friends they were harassing her. She was afraid to go outside her apartment. Once, someone from apartment 27 came out and cocked a gun at defendant. When she would leave her apartment, Hackler would say things to her like, "You better get back in your house, bitch," or "Why are you coming out here, bitch?"

Witnesses recounted numerous instances of the young people in apartment 27 threatening and harassing defendant. They threatened defendant's daughter when she

would visit her mother, and told her they did not want her there, either. Once after Chance died, defendant was singing along with one of Chance's tapes. One of the neighbors yelled out, “Chance, tell your mom to shut the fuck up.” Another time someone from apartment 27 called out, “Mom, it's me, Chance. It's dark down here....” They also threw food on defendant's truck.

Butts testified that Coccellato had verbally harassed defendant, calling her a bitch. Hackler, too, had harassed defendant. Butts testified defendant was verbally harassed any time she came within speaking distance of the people in apartment 27. She told him she was scared for her life just to go to the laundromat. Defendant had gone to Butts numerous times and asked to be released from her apartment lease. He went to his management and explained to them that defendant was being harassed by other people in the apartment complex, but he never got permission to let her out of her lease.

After the shooting, the police searched defendant's apartment pursuant to a search warrant. There were two firearms in the apartment-a handgun and a .22 rifle. There were three expended casings in the cylinder of the handgun, indicating it had been fired three times with the bullets that were in the cylinder. There were another six expended casings on the stove in the kitchen, indicating defendant had fired six shots, then reloaded the gun in the kitchen.

Also in the apartment was a typewritten letter dated approximately two weeks before the shootings. The letter stated in part, “I would like to request that my grave not be marked for at least a period of two years allowing time for friends of those I killed to pass and therefore lessening chances of any grave desecration.” Another letter, said, “I want to kill.” Yet another said, “I would rather be dead than to let them live.”

*5 Police also discovered a portable video camera in defendant's apartment that contained a videotape entitled, “My Neighbor's Fate.” The video is date stamped November 2, 2003, the day before the shootings. The camera was still running when the officers entered the apartment. The tape was admitted into evidence and played for the jury.

On the videotape, defendant mourns her grandson, complains about the neighbors, and protests that no one went to jail for killing Chance. She says, “Believe me if I had time I'd go kill all the fucking parents for raising off-the-wall people. They need to be dead. Their off-spring need to be dead. They all need to be dead, dead, dead, dead. You know how they party on. They just party on next door.” She tells the camera, “I want to shoot her with the bottle of aspirin in her fucking mouth, so her Daddy will see....”

The videotape shows a telephone conversation in which defendant tells the caller that “they” had hours to call 911, but did not because they “wanted to save their little druggie asses....” Toward the end of defendant's appearance on the tape, and apparently right before the shootings, she says to the camera while showing a handgun, “See what I have.... They got a 9 millimeter, I've tried to tell you that. Thought I'd get me something. Wait'll they get a load of this. Or get a few loads of it. I'm waiting on ‘em to come home.” Then, “Any time now. They're not gone long when they make drug deals....”

Just before a break in the tape, defendant holds an aspirin bottle up to the camera and says, "This is aspirin, this [showing her gun] is Methadone, this is Ecstasy, this is drinking somebody's piss." [FN1] At this point there is a break in the tape during which time defendant apparently committed the shootings. Afterward she tells the camera, "Fool me once, shame on you. Fool me twice, shame on me. All the managers here knew there were drugs, nobody does anything about it. They killed my son, oh my God. All I asked for was justice!"

FN1. Earlier in the tape defendant tells someone on the phone, "You know fucking well they made him drink their fucking piss.... Oh-h, make my son drink their piss."

At this point in the tape defendant begins to get several telephone calls. She tells one caller she needs to call someone very important to her before she will give herself up. She tells another caller named Steve that she "just killed some people."

The trial court found defendant guilty of the first degree murder of Anthony Hackler and the attempted murder of Rochelle Coccellato. The jury further found defendant guilty of assault with a firearm against Anthony Duran, Gina Gilmer, and Daniel Hawley. The jury also found true all of the special circumstance allegations, which involved causing death or great bodily injury and using a firearm.

Because defendant pleaded not guilty and not guilty by reason of insanity, a separate sanity trial was conducted. The first sanity trial resulted in a deadlocked jury, and the court declared a mistrial as to the sanity phase only. After a second sanity trial, the jury found defendant legally sane during the commission of the crimes.

*6 The trial court sentenced defendant to 75 years to life plus 11 years and eight months in state prison.

DISCUSSION

I

Informed and Voluntary Confession

Defendant was given her *Miranda*[FN2] rights after she was arrested. Thereafter she voluntarily spoke to the investigators about the shooting. She now claims that her statement was uninformed and involuntary because she was not informed that if she wanted an attorney and none was available, the questioning would have to stop. Having reviewed both the transcript of the interrogation and the videotape, we conclude the advisement given defendant was proper, and that she was not misled as to her right to have an attorney present at the interrogation.

FN2. *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

Investigator Eric Niver interrogated defendant after the shootings and read her rights to her. The advisement was as follows:

"[Niver]: ... We need to read you your rights. Have you ever been read your rights before?

[Defendant]: Uh, yeah I gotta DUI about like 20 years ago....

.....

[Niver]: Uh, the first one, you have the right to remain silent. Do you understand that? ...

[Defendant]: Yes.

[Niver]: All right. Anything you say may be used against you in court? Do you understand?

[Defendant]: Yes.

[Niver]: You have the right to the presence of an attorney before and during any questioning. Do you understand?

[Defendant]: Yeah. Where do I get an attorney?

[Niver]: Uh, if you cannot afford an attorney, one will be appointed for you free of charge before any questioning, if you want. Do you understand that?

[Defendant]: Yeah. They're railroaders. I'm sorry."

As is evident from this exchange, defendant was advised before any questioning that she had the right to an attorney, and that she had the right to have the attorney present "before and during any questioning." When she asked where she could get an attorney, she was properly advised that if she could not afford one, she would be appointed one before any questioning. After the advisement, defendant did not tell the investigators that she wanted an attorney, but began answering questions.

Defendant made reference to an attorney five other times during her interrogation. She does not now claim that these references amounted to an assertion of her right to an attorney.[FN3] Instead, she argues that the officers' equivocating responses to her inquiries about an attorney indicated to her that she could not have counsel appointed until her arraignment, and did not inform her that if she wanted counsel prior to the arraignment the questioning would have to stop.

FN3. Defendant unsuccessfully made this argument at trial.

Defendant's second reference to an attorney occurred after the investigators informed defendant they needed a blood sample to confirm that she was not taking any

medications. When she expressed her reluctance to giving a blood sample, the investigator told her that she could not refuse the test, or that if she did refuse they would get a warrant. The investigator gave her a permission form to sign, telling her:

*7 “It's just a signature, Tressa. I know you don't really want to do this but we've-we've gotta do it, it just, uh, for our protection and yours to show that, that you're not drugged up. Which obviously you're not. Signing right there is saying that you're not a hemophiliac, and not using any anticoagulant, blood thinner. Sign here, please. You can read it through if you want.”

Defendant told the investigator she needed her glasses, then said, “Well, I'm not even sure-if you're damned if you do, and damned if you don't have a lawyer. I haven't found one in this town that could do anybody right.” The investigators made no comment in reply to this statement. She then signed the consent.

The third attorney reference occurred shortly after the blood draw. Defendant had been allowed to go to the bathroom and to smoke. She said, “I know it's kind of a stupid question, but can I get a lawyer and get bailed out or anything? ... I don't know how this works.” Defendant had already asked about going home that night (she was told she could not) and asked about getting bailed out. The investigator responded:

“[T]he process is you'll get booked into jail. Um, they will tell ya what you're being booked-What kinda charges you're bein' booked on. And then they'll set your, um-You get a court date within 48 hours of booking.... [T]hey'll tell you what the bail is at the time of-of, uh, at the Sheriff's office, at the time of your booking. They'll tell you the charges and the bail amount. And then, um within 48 hours, it could be sooner, ... We have to have what they call an arraignment within 48 hours and that's when you go to court, and you're formally advised by the judge of what your charges are.... And, in that process, that's when they appoint you an attorney. Okay. They'll talk to you all about that stuff.”

The fourth reference to an attorney was with regard to the investigator's request that defendant allow them to search her apartment. Defendant had already told the investigators about the videotape she had been making in her apartment. One of the investigators explained that the consent to search would authorize them to go in and search her apartment. The other investigator told her, “we want to get that tape, but we would-we'd like to get your permission. It kinda sounds like you've told us we could get it, but I just wanna get it in writing that you said we can get it and other evidence. Is that okay?” After the investigators showed her where to sign the consent, she said, “I don't know-I mean, uh-I need a lawyer to look at it first and then I'll just ... I felt so nuts on it [presumably speaking of the videotape], you know.”

The investigators then told her that she could choose not to sign it and “that's fine.” They told her they wanted her consent to be “knowingly ... intelligently and voluntarily made.” They said they did not want to coerce her “in any way shape or form.” When defendant told them she was unable to read the consent, it was read to her. After the

consent was read to her, one of the investigators told her that the consent was, "some formality that, that we need you to sign or, or we ask that you sign but you don't have to."

*8 Defendant then made her fifth reference to an attorney when she said, "I wonder-I mean if I have a lawyer, is he gonna get me outta here sooner, or probably never get me out." One investigator answered:

"Well, we can't answer that question for you really. We just know, we just-we'd sure like to talk [to] you because there's some more things that we-that we need to talk to you about and tell you about that, that I don't think you know that, you know might-"

At this point the other investigator broke in and said, "That's okay, if you don't ... feel comfortable making the decision, that's fine." After this, defendant told the investigators she did not mind them going into the house because she had nothing to hide, and she signed the consent.

Later, Investigator Niver told defendant:

"Okay. We, um, we've asked you a lot of questions over, ... a couple hour time period here, um, there's gonna be a lot of other ... questions that arise. Um, the process which, uh, if, when we're done here is-We're gonna book ya into the Shasta County jail. And some questions may come up between now and tomorrow, um, would you have any, uh-any problems [with] Dwayne and I coming in, coming in and talking to you? And that way, if you have any questions of us, we can answer those as well."

Defendant replied, making her sixth reference to an attorney: "No, I don't have a problem with it but I feel like I'm gonna need [a] lawyer."

The investigators responded:

"Okay, well that's, uh, we will certainly, uh, speak or address that issue, uh, at the time. And, and-And that's you know, part of the court's proceeding, as well-It's, uh, they'll address that as well-[¶] But we'll, we'll speak, we'll speak to that again, okay?"

Of these six instances, defendant's argument on appeal can be based only upon the third, fifth, and sixth, because in the other instances the investigator either told defendant she could have an attorney before questioning (first) or made no comment about the procedure for being appointed an attorney (second and fourth). The investigators' response to the remaining three inquiries did not mislead defendant so as to make her waiver of an attorney involuntary.

Defendant's third reference to an attorney occurred in the context of her questions about going home and getting bailed out. Thus, when she asked about getting a lawyer and getting bailed out, the investigators reasonably assumed she was asking not whether she could get a lawyer before being questioned further, but whether she would be able to get a lawyer to get bailed out of jail. The investigators responded that before she could be bailed out, she would have to be booked and arraigned, and that an attorney would be

appointed for her at the arraignment. In context this was not misleading, and it was a direct answer to the specific question being asked.

The fifth attorney inquiry was again in the context of finding out when she could be bailed out and whether she should sign the consent to search, not whether she could be represented during questioning. To her question as to whether a lawyer could get her out on bail sooner, the investigator honestly said that he could not answer the question. Again, she was not misled into reasonably believing that she was required to talk to the investigators, and that she could not have an attorney for the questioning.

*9 Defendant's final inquiry about an attorney was with reference to future questioning after she was in jail. She told the investigators that she did not have a problem with talking to them in jail, but that she was going to need a lawyer. The reply was that they would address that issue when it came up. There was no reasonable inference that defendant could not presently have a lawyer if she wished one to represent her during the current interrogation. Contrary to defendant's claim, the investigators never said anything to indicate that she would go home sooner if she cooperated. In fact, they told her she would not be going home that night.

The cases cited by defendant are distinguishable from the present circumstances. The defendant in *Duckworth v. Eagan* (1989) 492 U .S. 195 [106 L.Ed.2d 166] challenged the *Miranda* warning itself, which advised him that if he could not afford a lawyer, one would be appointed for him "if and when you go to court." (*Id.* at p. 198 [at p. 174], italics omitted.) He was also advised that if he chose to answer questions, he could stop the questioning at any time. (*Ibid.*) The Supreme Court held that the warning given did not impermissibly link the right to counsel to a future point in time after the police interrogation because the warning specifically advised him that he had the right to counsel before the police asked him any questions and because he was told he could stop answering questions until he talked to a lawyer. (*Id.* at pp. 204-205 [at p. 178].)

In this case, defendant does not claim the initial warning was defective. Instead, she argues subsequent statements by the investigators in response to defendant's queries about an attorney impermissibly linked the right to counsel to the date of her arraignment. However, as shown above, the investigators' comments cannot reasonably be construed to imply that defendant could not be appointed counsel until she went to court, and she was specifically advised she had the right to have an attorney present before and during her questioning.

Missouri v. Seibert (2004) 542 U.S. 600 [159 L.Ed.2d 643], cited by defendant, is also distinguishable. In that case, the defendant challenged the practice of "question-first" interrogations, in which *Miranda* warnings were given only after the suspect had confessed. (*Id.* at pp. 609-611 [at pp. 653-654].) The Supreme Court held that such a strategy was designed to undermine the *Miranda* warnings by getting the suspect to make a confession he would not make if he understood his rights at the outset, and that any confession obtained as a result thereof was inadmissible. (*Id.* at pp. 613, 616-617 [at pp. 655-658].) The investigators employed no such strategy in this case, and there appears no

attempt on the part of the investigators to extract a confession from defendant by leading her to believe she had no right to counsel during questioning.

Defendant also cites *Alvarez v. Gomez* (1999) 185 F.3d 995. In that case, the Ninth Circuit held that when the suspect, who had received his *Miranda* warnings, asked, "Can I get an attorney right now, man", "You can have attorney right now?" and "Well, like right now you got one?" he effectively invoked his right to counsel. (*Id.* at pp. 996-998.) The answer the interrogators gave Alvarez when he asked whether he could get an attorney "right now" was that there was no attorney present now. (*Id.* at p. 997.)

*10 Defendant does not argue that her inquiries, like those of *Alvarez,* were effective invocations of the right to counsel. She admits that her statements regarding counsel were "less direct and more spread out over the course of the interview ...." Instead, she argues that the responses of the investigators, like the responses of the interrogators in *Alvarez,* were "equivocal and misleading...." As we have explained, under the circumstances of the questioning, the investigators' responses did not reasonably mislead defendant.

Defendant also cites *United States v. Garcia* (9th Cir.1970) 431 F.2d 134, a per curiam opinion in which the court held the *Miranda* warning was inadequate because several warnings were given, none were fully compliant, and some were inconsistent. (*Ibid.*) One warning told the defendant that she had the right to be represented when she answered questions, and one said she could have counsel when she appeared in court. (*Ibid.*) The court held she had not been informed of her right to counsel before she said a word. (*Ibid.*) Here, by contrast, defendant was informed she had the right to "the presence of an attorney before and during any questioning" and if she could not afford one, "one will be appointed for you free of charge before any questioning...."

In *People v. Boliski* (1968) 260 Cal.App.2d 705, 718, the defendant was advised he was entitled to an attorney and that one would be appointed to him "if he was charged...." The court held that this advisement was not the substantial equivalent of an advisement that he had the right to have appointed counsel present at the interrogation. (*Id.* at p. 720.) Here, by contrast, defendant was told she could have an attorney appointed for her free of charge before any questioning. The ensuing statements of the investigators regarding procedure occurring after the interrogation did not render the previous advisement a nullity.

In *People v. White* (1969) 275 Cal.App.2d 877, also cited by defendant, the defendant made an unequivocal request for an attorney to be present at the interrogation. When he was informed no attorney would be available until the next morning, he decided to waive his right to assistance of counsel. (*Id.* at pp. 879-880.) The court held that the defendant's later waiver did not negate his earlier assertion of his *Miranda* rights where his consent to be interrogated was based on the premise that no attorney would be available for 15 hours. (*Id.* at p. 882.) The circumstances here are distinguishable because defendant never asserted her right to have an attorney present at questioning.

We conclude that defendant's waiver of her *Miranda* rights was knowing and intelligent because she was not misled into believing that she had no right to have counsel present during questioning.

II

Expert Evidence of Defendant's Intent

Defendant's expert testified on cross-examination that defendant's actions were premeditated and intentional. Such testimony is a violation of Penal Code section 29, which states:

*11 "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."

Defendant claims it was both prosecutorial misconduct in eliciting the testimony from the expert and court error in allowing the testimony. We shall conclude there was no misconduct, and that although it was error to allow the testimony, the error was harmless.

Defendant presented the testimony of Dr. Ray Carlson, a psychologist who performed a court-ordered evaluation on defendant with respect to her sanity at the time of the offenses. On direct examination, Dr. Carlson opined that defendant was suffering from a major depressive disorder that colored her perceptions of reality, and that because of this disorder she was more susceptible to stress and had fewer resources for coping with life's reverses.

On cross-examination, the prosecutor asked Dr. Carlson whether the fact that someone would go back inside, unload the gun, reload it, and come back out would indicate an action that was pre-thought out, assuming defendant fired the first six shots on sudden impulse. Defense counsel objected, and an unreported bench conference was held. After the bench conference, the prosecutor again asked:

"The fact that she fired six shots, then went back into her apartment, went back to the kitchen, you know, opened the cylinder, took out the empties, took a box of bullets, took six out, reloaded the gun, closed the cylinder, went back outside and fired three more shots, would that be more indicative of an act that was previously thought out, and intentional as opposed to a spontaneous, provoked-immediately provoked act?"

In response, Dr. Carlson said that he did not have an opinion on whether the act was pre-thought out, but that such action, "certainly bears out all the marks of being intentional."

The prosecutor asked Dr. Carlson if he thought that the title of the videotape defendant filmed both before and after the shooting, “My Neighbor's Fate,” indicated the act was preconceived. Dr. Carlson answered, “[i]t certainly makes me wonder, yeah.” The prosecutor then asked whether the statement defendant made on the videotape to the effect of, “This is the day,” would lead Dr. Carlson to believe that the act of shooting was pre-thought out. Dr. Carlson replied, “Yes, I think I mentioned that somewhere in my report.”

Later, the prosecutor asked whether other statements made on the videotape, specifically, “If I had time, I'd go kill all the fucking parents who raised these awful, awful people. They need to be dead” and “[t]heir offspring need to be dead,” indicated a pre-thought out intent to kill. Dr. Carlson replied the statements indicated, if not an intent to kill, a desire to have the people dead.

*12 The prosecutor asked Dr. Carlson whether defendant's videotaped message made before the shooting, in which she said, “and when I shoot her, I'm going.. to put a bottle of aspirin in her fucking mouth so her daddy will see,” was consistent with premeditation and intent to shoot somebody. Dr. Carlson replied he thought it was.

The prosecutor asked about certain statements in Dr. Carlson's report where he indicated the victims appeared to have been intentional targets and that the behavior was not random, but “focused and effectual.” The prosecutor asked whether this was another way of saying defendant had a pre-conceived motivation. Dr. Carlson answered that he did not mean to say that her actions were pre-conceived, but that they were intentional as opposed to accidental behavior. He then stated,

“a little while ago you asked me some questions about what I thought in terms of her intent, and whether she had some thoughts beforehand about what she was going to do on that day. And I think I answered in the affirmative several times, that I-in my own mind, I felt that there was some evidence and in statement that she made that she had thought about doing what she had done beforehand. And it was not a completely spontaneous thing. I was simply saying here, in response to your question, that the things you are reading off here, I wasn't meaning to talk about premeditation, mainly about the intentional aspect of it. You know, you can drop a gun accidentally. You can hit its trigger and it will go off accidentally. You can kill someone doing that. That would not be intentional.”

Finally, the prosecutor asked whether it was Dr. Carlson's opinion that the shooting was premeditated. Dr. Carlson answered, “In accordance with the other questions you asked me and with the statements that she made and the things that you had-reviewed previously, yes.”

On cross-examination, Dr. Carlson was asked whether defendant's statements prior to the shootings could also be depicted as someone merely venting. Dr. Carlson replied that they could.

After Dr. Carlson's testimony and in a reported conference outside the jury's presence, defense counsel stated he had objected to allowing the doctor to testify to defendant's state of mind at the time the events occurred, and had been overruled by the court. The trial court responded it had allowed the testimony on the basis of Penal Code section 28, which allows evidence of mental disease, defect, or disorder solely on the issue of whether or not the accused actually formed a required specific intent or premeditation.

The next day defense counsel made a motion for a mistrial based upon prosecutor misconduct and the court's ruling allowing Dr. Carlson to testify to the ultimate issue of fact, i.e., the defendant's state of mind at the time the act was committed. The prosecutor responded that defendant had put Dr. Carlson on the witness stand to elicit testimony that the crime had been spontaneous and that defendant was suffering from a mental condition. He argued he had a right on cross-examination to impeach that testimony and elicit from the expert an opinion based on the facts of the crime that the act was not caused by depression, but was caused by hostility and hatred and a preconceived intent to achieve justice.

*13 The trial court proposed giving a curative instruction, citing the specific language of Penal Code section 29, and telling the jury to disregard the expert's testimony as it related to the defendant's intent. The defense attorney argued that a curative instruction would not prevent the jurors from considering the testimony it heard. The court agreed with defense counsel that the testimony should not have been admitted and determined the error could be cured by a curative instruction.

The prosecutor told the court that he had no intention of violating the court's order that he had not intentionally elicited improper testimony the day before. “I asked those questions after we had a bench conference. I don't intend to do it today.” The prosecutor informed the court he had reviewed his anticipated questioning of the next expert witnesses and had changed and omitted questions he thought might be in violation of Penal Code sections 28 and 29. The court responded, “Just to make the record clear, the Court doesn't find anything anywhere close to prosecutorial misconduct. The three of us had a very deep, intellectual discussion about this issue to some extent yesterday. And, you know, reasonable minds can differ. And I think that the resolution of this issue today is much better reasoned, having gone into great detail with the Smith[e]y [FN4] case.”

FN4. *People v. Smithey* (1999) 20 Cal.4th 936.

Thereafter, the court gave the following curative instruction:

“Yesterday, you heard testimony from Dr. Ray Carlson. Among other issues, he testified as to the intent or lack of intent on the part of the Defendant when she engaged in certain acts. When I use the term “intent,” I would include his comments he made as to premeditation or the lack of premeditation.

After conferring with counsel and doing some more research on that issue, the jury is to disregard that portion of Dr. Carlson's testimony where he discussed intent or lack of intent, or premeditation or lack of premeditation on the part of the Defendant when she

engaged in certain acts. And when I say you are to disregard that testimony, what I mean by that is, you are to treat that testimony as though you had never heard it. As though that testimony had never occurred in this case.

The Court is giving you this instruction after having conferred with both counsel and discussed this in great detail and done some additional research on the issue. And let me explain one reason why the Court is giving you that instruction.

Specifically, there is a Penal Code statute which is one of several bases why the court is-is giving you that instruction. I'm going to read that Penal Code statute to you in its entirety, because it might help you understand why the Court is making this decision.

[Penal Code section 29 was recited to the jury.]

That's your job to decide what the Defendant's mental state was at the time she allegedly engaged in any sort of acts. So, that's why the Court is excluding that testimony.

*14 Now, you have received some testimony from Dr. Carlson and you will continue to receive some testimony from other experts in this case as to the mental-as to mental disease, mental defect or mental disorders. That may be some of the testimony you'll continue to hear in the case. You may find that testimony helpful in determining whether or not a mental disease, mental defect or mental disorder exists or existed at certain moments in time with respect to the Defendant.

However, whether or not those defects, disorders or diseases affected the Defendant's state of mind at the time she engaged or did not engage in certain alleged acts, that's your decision to make in this case. You will-as I've continued to comment throughout this case, you will also receive, after both sides have rested, some more specific instructions from the Court as to the-some of the expert witness testimony and evidence presented in this case. So, you'll get some more instructions about that later on, after both parties have rested."

Subsequently, defendant called Dr. David Wilson, a court-appointed psychologist, who diagnosed defendant as suffering from post traumatic stress disorder, PTSD. On cross-examination, the prosecutor confirmed with Dr. Wilson that he had stated on direct that PTSD could cause someone to react without thinking. Then the following exchange took place:

"[Prosecutor]: Okay. If you were investigating a murder that occurred, and that person who committed the murder made statements weeks prior to the murder having to do with intent to commit the murder, would that affect your opinion as to whether or not that murder was done because of PTSD and spontaneous action?

[Wilson]: That would argue against that being like a flash back or sudden reliving, as if you were in another place and time.

[Prosecutor]: Okay. Let me give you another hypothetical example. If you had a case where someone suffered a loss and rightly or wrongly, attributed that loss to somebody else. And several weeks prior to the shooting, documented her feelings of hatred towards these people, and went out and bought the instrument that was going to be used during the crime and ... for example, a gun. And then a week after that, went out and bought bullets, and then made a video about what she was going to do, and then went out and did what she said she was going to do, would your opinion be that that crime was committed-
"

Dr. Wilson gave no answer to this question because defense counsel objected.

A. Prosecutorial Misconduct

A prosecutor's behavior violates the federal Constitution only if there was a pattern of conduct by the prosecutor that was so egregious that it rendered the trial unfair and made conviction a denial of due process. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Under California law, a prosecutor's conduct does not render the trial fundamentally unfair unless the prosecutor's methods of persuading the court or jury were deceptive or reprehensible. (*Ibid.*)

*15 We agree with the trial court that some of the prosecutor's questions were improper inasmuch as they attempted to elicit Dr. Carlson's expert opinion on whether defendant acted intentionally or with premeditation. On the other hand, a prosecutor may attempt to show intent by focusing on a defendant's acts and asking how a defendant could perform such acts without intending to do them. (*People v. Smithey, supra,* 20 Cal.4th at p. 961.) The line between a proper and an improper question in this area is easily blurred. Here, while some of the prosecutor's questions appear to have crossed the line, most did not.

In any event, the improper questions do not amount to an egregious pattern of conduct, nor did they render the trial fundamentally unfair. Only a few of the questions were improper. There were three conferences between the parties and the trial court over the propriety of the questions, and only after the last one did the trial court decide the evidence was not admissible. Thus, the conduct was not egregious, it did not constitute a pattern, and it was insufficient to render the trial fundamentally unfair.

B. Court Error Was Harmless

The admission of the expert testimony in violation of Penal Code section 29 was error under state law only, and is not reversible unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Davis* (2005) 36 Cal.4th 510, 532 [error under Penal Code sections 977 and 1043 is state law error subject to *People v. Watson, supra*].) The overwhelming amount of evidence in this case regarding premeditation and the intentional nature of defendant's actions convinces us that it is not reasonably probable that a result more favorable to defendant would have resulted in the absence of the error.

First, the videotape entitled, “My Neighbor's Fate,” which was apparently made just before and after the shooting, shows defendant brandishing a gun and, referring to her neighbors, stating, “Wait'll they get a load of this. Or get a few loads of it. I'm waiting on em' to come home.” She also says, apparently referring to Coccellato, “I want to shoot her with the bottle of aspirin in her fucking mouth, so her Daddy will see....”

Also, in a letter found in defendant's apartment dated October 21, 2003 (approximately two weeks before the shootings), defendant wrote, “I would like to request that my grave not be marked for at least a period of two years allowing time for friends of those I killed to pass and therefore lessening chances of any grave desecration.” On another letter, written the same day, she wrote, “I would rather be dead than to let them live.”

Prior to the shooting, defendant obtained a gun, and one week before the shooting she purchased ammunition.

During the shootings, defendant fired multiple shots at the victims, and at one point went back inside her apartment to reload her gun.

*16 After the shooting, defendant told her apartment manager, “I told you if you didn't take care of this, I was going to shoot the little motherfuckers.”

Thus, defendant's words and actions provide abundant evidence of intent and premeditation. Additionally, the court's curative instruction was thorough, and explained to the jury both the statutory reason it was not to consider the expert's statements regarding intent and premeditation, as well as the fact that the jury itself was responsible for determining such factual matters. We assume the jury abided by the court's instructions, avoiding any prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.) It is not reasonably likely the jury would have found she acted without the intent to kill or without premeditation absent the error.

III

Prosecutorial Misconduct

An expert's testimony as to a defendant's incriminating statements may not be used as evidence of the facts contained in the statement. (*People v. Ledesma* (2006) 39 Cal.4th 641, 697.) Where a defendant is examined by a court-appointed psychiatrist without the presence of an attorney, the psychiatrist may not testify at trial unless the defendant puts her mental state at issue. (*Ibid.*) If the psychiatrist does testify, the jury must be instructed that defendant's incriminating statements to the psychiatrist may be considered only as the basis of the expert's opinion, and cannot be considered for the truth of the matter stated. (*Ibid.*)

Defendant argues the prosecutor committed misconduct by eliciting hearsay evidence of her statements to the court-appointed psychologists, and by arguing to the jury that

these statements should be used as substantive evidence of her guilt. She cites three instances.

First, during closing argument, the prosecutor made the following argument regarding defendant's honesty:

"But what did she tell her three psychologists? She has never used illegal drugs and does not use illegal drugs. It wasn't a mistake, you know, that one heard it and the other didn't; all three put in their report, when we asked her if she used illegal drugs, she said no. What do we have here? We have her blood that was taken actually on camera during her interview, and we have the Department of Justice result that says tested positive for the presence of methamphetamine.

If she really had an honest belief that what she did, she had to do, why would she lie about anything in this case? This crime wasn't done out of fear, it wasn't done out of heat of passion. It was done out of revenge."

Outside the presence of the jury, defendant's attorney objected to the closing argument as improper because it argued to the jury that defendant's statement to the physicians should be used as a basis to convict. Defendant moved for a mistrial, or, if not granted, a curative instruction. The prosecutor responded that he had a right to argue to the jury that the medical experts' opinion was wrong because it was based upon an untrue statement to them by defendant.

*17 Defense counsel responded, "[t]he item that [the prosecutor] is discussing is the fact that there was this .02 nanograms of methamphetamine within her system when the defendant said that she did not use illegal drugs."

The trial court then asked defense counsel, "[t]o the extent information provided by the defendant to the experts was untruthful, you would agree that that's highly relevant and certainly fair game for the prosecutor to argue, wouldn't you?" Defense counsel responded, "[a]s to the denial of drugs, yes. The impropriety in this is arguing the fact that she did not show remorse to the psychologists for purpose of having the jury make the leap to premeditation." When the court read the prosecutor's argument set forth above, defense counsel claimed that was not the passage he was concerned about. The prosecutor stated the only time he mentioned a statement by defendant to her doctors was in reference to her drug use. The trial court agreed, and the motion for mistrial was denied.

Defendant now repeats the same quoted language from the prosecutor's closing argument that her trial counsel specifically stated was not the passage to which he was objecting. A defendant may not complain of prosecutorial misconduct on appeal unless he or she made a timely assignment of misconduct on the same ground asserted on appeal, and requested the jury be admonished. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) A defendant will, however, be excused from this requirement if an objection and/or request for admonition would have been futile. (*Ibid.*)

Defendant did not object to this portion of the prosecutor's argument below, and cannot argue it now. To the extent defendant renews the argument made below, that the prosecutor was using her lack of remorse during her evaluations to argue premeditation, we agree with the trial court that the prosecutor's argument in this regard made no mention of any statement to the medical evaluators, thus was not objectionable on the ground asserted.[FN5]

FN5. The prosecutor argued: "If this wasn't a revenge killing, why did she have absolutely no remorse, no tears afterwards, for what she did. No tears for the kids, for the parents, never asked how they were, never said, 'Oh God forgive me for what I did, I couldn't help it.' Why none of that if she did this out of fear of imminent danger?"

The second instance cited by defendant was in the prosecutor's rebuttal argument. The prosecutor said: "What else did we learn from the psychologists? That this defendant hated Rochelle and Anthony, next door. And that hate festered. And we also learned from them that she felt that it was her responsibility to do something to those kids to avenge the death...." At this point defense counsel objected.

Later, in a reported discussion outside the presence of the jury, the defense attorney put his objection on the record. The court explained that, "it did in fact appear to the court that [the prosecutor] was beginning to embark down a road that would be improper, so ... the court sustained your objection, ... and instructed [the prosecutor] to carry on with a different direction with his closing.... The court felt that it stopped [the prosecutor] from going any further into an area that would be improper in time and that no corrective instruction was necessary to give to the jury."

*18 Defendant does not reference exactly which testimony of the expert witness or witnesses to which the prosecutor was referring. Therefore, it is difficult to tell whether the prosecutor was referring to actual statements made by defendant or to the expert witnesses' opinion itself. We will assume for the purpose of this argument that it was the former.

As indicated, *supra,* a prosecutor's conduct does not result in reversible error unless it constituted a pattern of egregious behavior that rendered the trial unfair because of the prosecutor's deceptive or reprehensible methods of persuading the jury. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) This one, brief comment by the prosecutor did not constitute a pattern of egregious behavior, did not render the trial unfair, and was not deceptive or reprehensible. Moreover, the trial court instructed the jury with CALJIC No. 2.10, stating:

"There has been admitted into evidence the testimony of a medical expert of statements made by the defendant in the course of an examination of the defendant, which were made for the purpose of diagnosis. These statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based his testimony-his opinion. This testimony is not to be considered by you as evidence of the truth of the facts disclosed by the defendant's statements."

Any possible prejudice was cured by this instruction.

The third and final instance cited by defendant occurred during the cross-examination of Dr. Carlson. Defendant argues the following portion of the cross-examination, which related to Dr. Carlson's written report, shows the prosecutor elicited evidence of her statements to Dr. Carlson as proof of the matters asserted in those statements.

"[Prosecutor]: [The report] goes on to say, 'She also said she had mounting fear and anger with the neighbors.' Is that a fair rendition of what's in your report?

[Dr. Carlson]: That's correct.

[Prosecutor]: Okay. So that would indicate that her emotions were not just fear, but anger with her neighbors, specifically Shelley and Anthony?

[Dr. Carlson]: That's correct.

[Prosecutor]: And further down, about the middle of the next paragraph, she indicated to you-she was talking about the abuse in the neighborhood. 'This kind of abuse had been going on for some time and that she was, quote, sick of it, unquote.' Is that correct?

[Dr. Carlson]: Yes, it is.

[Prosecutor]: So, that would indicate that there was more anger over this abuse than fear; would that be a fair interpretation?

[Dr. Carlson]: I'm not sure I could rightly apportion it. I certainly feel comfortable in saying there was anger, as well as fear.

[Prosecutor]: Okay.... And then further down, the last paragraph on that page, the first line, she told you that-and this is at the time of the shooting. She told you---or I'll quote. 'She next recalls that Shelley tried to get away from her, moving towards an area where she could get in between two cars.' So, would that indicate to you that, at that time, there was-Shelley was not being hostile towards the Defendant?

*19 [Dr. Carlson]: Getting away certainly doesn't imply going towards."

Later, Dr. Carlson answered the prosecutor's questions as follows:

"What I would answer, based on what I read and heard. Specifically when I was talking with Miss Morrison, we talked about those events, and-and the reason I believe that she gave me herself at the time, was that when she had fired at the first female victim, which she said she intended to fire over her head. She then related that Anthony came out, and that she thought that she had heard him say that he was going to go get a gun. [¶] And so that she said that she then fired at him out of fear that he was going to go get his gun. And I believe when she went inside and reloaded, I think her statement to me was that she was thinking that they might come out of the apartment next door with a gun. And so the

implication was that she'd be prepared for somebody who would come out brandishing a gun to harm her."

Again, a defendant may not complain of prosecutorial misconduct on appeal unless he or she made a timely assignment of misconduct on the same ground asserted on appeal, and requested the jury be admonished. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Defendant did not object to any of this testimony on the ground that the statements were admissible only to show the basis for the expert's diagnosis.

Defendant claims she did not have to object since CALJIC No. 2.10 was being given, citing *People v. Elliot* (2005) 37 Cal.4th 453, 481. In that case, the defendant argued his constitutional rights were violated when the trial court instructed the jury pursuant to CALJIC No. 2.10, improperly removing mitigating facts from the jury's consideration. The prosecution had not objected to the hearsay statements when they were introduced, but asked that CALJIC No. 2.10 be given. On appeal, defendant claimed the prosecution should have imposed a hearsay objection, and the Supreme Court stated the request for a limiting instruction served the same purpose. (*Ibid.*)

Thus, the claim on appeal was that the respondent had an obligation to timely object *in order to keep the jury from considering the hearsay statements as evidence of the matters asserted.* The Supreme Court held that a request for an instruction was sufficient to keep the jury from considering the testimony as evidence of the matters asserted. It did not hold, as defendant suggests, that an appellant claiming prosecutorial misconduct may fail to object to the questioning she asserts is improper, and preserve the matter for appeal merely because the court intends to give CALJIC No. 2.10.

IV

Autopsy Photographs and Teeth and Tissue Evidence

Defendant argues the trial court erred in allowing certain photographic and physical evidence to be admitted. Defendant's arguments concern Coccellato's teeth and tissue that an officer recovered at the scene and autopsy photos of Hackler.[FN6] The teeth and tissue were offered to prove great bodily injury.[FN7] The autopsy photographs were displayed as the pathologist gave her testimony. The autopsy photographs depict the gunshot wounds to Hackler's upper back, arm, and thigh. There were also photographs of probes that had been placed through the gunshot wounds to show the trajectory of the bullets. Some of these photos were taken after the organs from the chest cavity had been removed. The prosecutor argued the autopsy photos showing the trajectory of the bullets demonstrated Hackler was shot in the back, and were relevant to disprove defendant's claim of self defense.

FN6. Defendant raises the same argument with regard to a photograph of the teeth and tissue in a baggie, but this photograph was not admitted into evidence during the guilt phase of the trial.

FN7. The prosecution was required to prove defendant inflicted great bodily injury on Coccellato pursuant to Penal Code sections 12022.53, subdivision (d) and 12022.7, subdivisions (a) & (b).

*20 Defendant does not argue that the evidence was not relevant, but claims that the exhibits were cumulative, were more prejudicial than probative, and should have been excluded pursuant to Evidence Code section 352.

The trial court has broad discretion to admit photographs of victims over a defense claim that the photos are unduly gruesome or inflammatory. (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134 .) "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." (*Ibid.*) Prejudice with regard to Evidence Code section 352 is "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*Id.* at p. 134.)

As previously stated, the challenged evidence was probative to the issues of great bodily harm and to negate self defense. The autopsy photographs helped illustrate the testimony of the pathologist. Having reviewed the photographs, we find them unpleasant, but not unduly shocking or inflammatory. The trial court did not abuse its discretion because it reasonably could have determined that the prejudicial effect of the evidence did not outweigh its probative value. We reject defendant's argument that the photographs were cumulative. They were a visual demonstration of the oral testimony. We likewise find no error in admitting the teeth and tissue.

V

Circumstantial Evidence Instruction-Sanity Phase

Penal Code section 1026, subdivision (a) provides that when a defendant pleads not guilty by reason of insanity and joins it with another plea, the defendant shall first be tried solely on the issue of guilt, with sanity being conclusively presumed. If found guilty, the defendant is then tried on the issue of sanity. The defendant has the burden of proving insanity by a preponderance of the evidence. (Pen.Code, § 25.)

At defendant's second sanity trial,[FN8] the court gave an instruction regarding circumstantial evidence that defendant argues was in error because it unfairly increased her burden of proving insanity. We agree that the trial court erred in giving the instruction, but shall conclude the error was harmless because it is not reasonably probable the result would have been more favorable to defendant in the absence of the error.

FN8. The first sanity trial resulted in a hung jury.

The instruction to which defendant objects was a modified version of CALJIC No. 2.01, properly given when the prosecution substantially relies on circumstantial evidence

for proof of guilt. (*People v. Wiley* (1976) 18 Cal.3d 162, 174-175.) The modified version given by the trial court instructed as follows:

"A finding of insanity may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the Defendant is insane at the time of the commission of the crimes, but two, cannot be reconciled with any other rational conclusion.

*21 Further, each fact which is essential to complete a set of circumstances necessary to establish the Defendant's insane must be proved by a preponderance of the evidence. In other words, before an inference essential to establish insanity may be found to be proved by a preponderance of the evidence, each fact or circumstance on which the inference necessarily rests must be proved by a preponderance of the evidence.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the Defendant's insanity and the other to her sanity, you must adopt that interpretation that points to the Defendant's sanity and reject that interpretation that points to her insanity.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

This instruction, when given during the guilt phase of the trial, is another way of stating the presumption of innocence and reasonable doubt standards. (*People v. Heuss* (1928) 95 Cal.App. 680, 682.) By contrast, no such instruction is appropriate in a civil case because a party relying on circumstantial evidence is not required to exclude all other possibilities. (*Rodela v. Southern California Edison Co.* (1957) 148 Cal.App.2d 708, 714.) In civil cases, a fact is sufficiently established by circumstantial evidence if the inference sought to be drawn is more probable than not, whereas in criminal cases the evidence is sufficient only if it is the only conclusion that can fairly and reasonably be drawn. (*Meier v. Northern Pac. Ry. Co.* (1908) 51 Or. 69, 74-75, cited with approval in *Ley v. Bishopp* (1928) 88 Cal.App. 313, 316.)

Because the defendant has the burden of proving insanity by a preponderance of the evidence, the burden of proof was the same as the civil standard, and we conclude it was error to give the instruction. Likewise, it has been held to be error to give the instruction in a competency proceeding. (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274.) Competency proceedings, like sanity trials, require the defendant to prove incompetence by a preponderance of the evidence. (*Id.* at p. 1273.) The modified version of CALJIC No. 2.01 places on the defendant the "burden of disproving every rational conclusion and reasonable interpretation of the evidence" except that which points to incompetence or insanity. (*Id.* at p. 1274.) This burden is higher than the preponderance of the evidence standard. (*Ibid.*)

Defendant argues the error was structural error entitled to per se reversal, or alternatively that it was fundamental error that was not harmless beyond a reasonable doubt. We disagree.

"[C]ertain fundamental errors in procedure, sometimes referred to as ' "structural," ' 'are not susceptible to the "ordinary" or "generally applicable" harmless error analysis-i.e., the *Watson* "reasonably probable" standard-and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case.' " (*People v. Vasquez* (2006) 39 Cal.4th 47, 66, quoting *People v. Cahill* (1993) 5 Cal.4th 478 at p. 493.) However, the defendant's burden of proof in a sanity trial is not mandated by the federal Constitution or by due process. (*Leland v. State of Or.* (1952) 343 U.S. 790, 798-799 [96 L.Ed. 1302, 1309.) Moreover, the United States Supreme Court has upheld a state law requiring a defendant to prove insanity beyond a reasonable doubt. (*Ibid.*) Thus, assuming the jury understood the instruction to require proof of insanity beyond a reasonable doubt, it would not " 'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " (*Ibid.*) Accordingly, the error in giving the instruction was neither structural nor fundamental.

*22 Instead, the preponderance of the evidence standard in a sanity trial is a matter of state law, mandated in California by statute. (*Clark v. Arizona* (2006) --- U.S. ---- [126 S.Ct. 2709, 2722, 165 L.Ed.2d 842, 862].) Prejudice from a state law error is evaluated under the standard of *People v. Watson, supra,* 46 Cal.2d 818. (*People v. Vasquez, supra,* 39 Cal.4th at p. 66.) Pursuant to this standard we will reverse on appeal only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson, supra,* at p. 836.)

Considering the evidence presented at defendant's sanity trial, it is not reasonably probable that a result more favorable to her would have been reached had the jury not received the circumstantial evidence instruction. The most damaging evidence in support of the verdict that defendant was sane at the time of the shootings was not circumstantial evidence at all, but was the direct evidence presented by the testimony of the court appointed psychologists. All three of them testified that in their expert opinion, defendant was sane at the time of the shootings. Additionally, another psychologist who evaluated defendant the day after the shootings testified that in his opinion, defendant was not insane when she committed the crimes.

Other circumstantial evidence was presented from which no reasonable inference of insanity could be drawn. Defendant's physician, who saw her just a week before the shooting, testified defendant did not exhibit any psychotic behavior during her visit. Niver testified that during his interrogation of defendant, she said she knew what she had done was wrong and that if she could, she would take it all back. He also testified she did not appear to be out of touch with reality. Finally, the videotape, "My Neighbor's Fate" and the videotaped police interrogation portray a defendant who was in touch with reality, was capable of knowing and understanding the quality of her actions, and was capable of distinguishing between right and wrong.

In contrast to the overwhelming direct and circumstantial evidence of defendant's sanity, she presented the testimony of certain friends and family members who testified to defendant's actions prior to the shootings, and testified that they "thought she was becoming insane," was losing her mind, or "was mentally unstable." Given the state of the evidence on the issue of sanity, it is not reasonably probable that defendant would have obtained a more favorable outcome absent the erroneous instruction.

VI

Insanity Instruction Defining "Wrong"

At the sanity trial the trial court instructed the jury with CALJIC No. 4.00 on the definition of legal insanity. The pertinent part of instruction was as follows:

"A person[ ] is legally insane when, by reason of mental disease or mental defect, she is incapable of either, one, knowing the nature and quality of her act; or two, understanding the nature and quality of her act; or, three, distinguishing right from wrong at the time of the commission of the crimes."

*23 Defendant filed a written objection to this instruction, in which she argued that the instruction's definition of insanity was incomplete because it failed to define insanity in terms of both moral and legal wrong. At a reported conference, defendant's trial counsel discussed other issues with CALJIC No. 4.00, and when the court asked whether there was any other basis for his objection, he responded that his only other objections were outlined in the papers. The trial court overruled defendant's objections. Defendant did not submit a proposed instruction to either replace, explain or qualify CALJIC No. 4.00.

Defendant argues the court should have given a pinpoint instruction defining the term "wrong" as used in the instruction to mean moral wrong as well as legal wrong. She does not argue that the instruction given was incorrect as far as it went, only that the instruction was incomplete.

If the trial court gives a correct instruction, a defendant may not claim on appeal that the instruction is too general, lacks clarity, or is incomplete unless she requested an additional or qualifying instruction. (*People v. Welch* (1999) 20 Cal.4th 701, 757.) The burden is on the defendant to request a pinpoint instruction, and it is the defendant's obligation to frame the instruction and request that the trial court give it. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669; *People v. Keyes* (1918) 178 Cal. 794, 798, overruled on another point in *In re Ramon M.* (1978) 22 Cal.3d 419, 426.) We therefore decline to review this claimed error.

VII

Cumulative Error

Defendant argues the cumulative error of the guilt and sanity trials requires reversal of the guilt and sanity verdicts. We reject this contention because we have found no prejudicial error.

VIII

Abstract of Judgment

Contrary to the trial court's oral pronouncement of sentence, the Abstract of Judgment shows two Penal Code section 12022.53, subdivision (d) enhancements for count one and an enhancement pursuant to section 120223.5, subdivision (a). The abstract indicates a total of 50 years imposed as enhancements to count one. The trial court imposed only one 25 year enhancement pursuant to section 12022.53, subdivision (d). Additionally, the second enhancement for count one was pursuant to section 12022.5, subdivision (a), not section 120223.5, subdivision (a). The term of that enhancement was stayed.

The length of defendant's sentence remains unchanged. It is calculated as follows: 25 years to life for count one (murder), plus 25 years to life for the section 12022.53, subdivision (d) enhancement to that count; a life term for count two (attempted murder), plus 25 years to life for the section 12022.53, subdivision (d) enhancement to that count; three years for count three (assault with a firearm) plus four years for the section 12022.5, subdivision (a) enhancement on that count; one year for count four (assault with a firearm), plus one year and four months for the section 12022.5, subdivision (a) enhancement on that count; and one year for count five (assault with a firearm), plus one year and four months for the section 12022.5, subdivision (a) enhancement on that count. All other enhancements were stayed. The total sentence is 86 years and 8 months to life.

DISPOSITION

*24 The judgment is affirmed. The superior court is directed to correct the abstract of judgment to show only one enhancement pursuant to section 12022.53, subdivision (d) on court one; to change the enhancement pursuant to section 120223.5, subdivision (a) to an enhancement pursuant to section 12022.5, subdivision (a), stayed; and to show the total enhancement years for count one as 25 years. The superior court is directed to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

We concur: SCOTLAND, P. J., and RAYE, J.

Cal.App. 3 Dist.,2008.
People v. Morrison
Not Reported in Cal.Rptr.3d, 2008 WL 352356 (Cal.App. 3 Dist.)
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