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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOSHUA NATHAN HERNANDEZ,** **Defendant and Appellant.**	**A111239** **(Humboldt County Super. Ct. No. CR040354S)**

Defendant Joshua Nathan Hernandez appeals his conviction by jury trial of three counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a)),[1] five counts of assault with a deadly weapon (§ 245, subd. (a)(1)), first degree burglary (§§ 459, 460, subd. (a)), infliction of unjustifiable physical pain or mental suffering on a child (§ 273a, subd. (a)), and second degree burglary (§§ 459, 460, subd. (b)). The jury found true the great bodily injury enhancement allegations charged in connection with the three attempted murder counts and four of the assault with a deadly weapon counts, and found that defendant was sane at the time the offenses were committed.[2]

Defendant contends the sanity finding was not supported by substantial evidence, defense counsel provided ineffective assistance, the court's insanity instruction was

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1 All undesignated section references are to the Penal Code.

2 Defendant was sentenced to 22 years in state prison.

erroneous and the court committed *Blakely* error (*Blakely v. Washington* (2004) 542 U.S. 296). We agree that *Blakely* error was committed and remand for resentencing.

BACKGROUND

Bay Street Attack

On the evening of January 13, 2004, Brett Butler went to visit his ex-girlfriend Rebecca Hamline at her Bay Street home in Eureka. As Butler turned onto Bay Street, he saw defendant sitting on a wall about 100 yards from Hamline's house. Butler and defendant made eye contact but did not converse. About 10 minutes later, while Butler was seated on Hamline's porch with Hamline, Michael Wade, and Wade's girlfriend "Misty," defendant walked by the house. Hamline's dog began barking and defendant said, "Hey, foxy." Believing that defendant was referring to Hamline, Butler told him to "shut up," and defendant said something Butler could not hear and continued walking.

Sometime later that evening, while in a bedroom in Hamline's home with Misty, Wade, Hamline and an infant, Butler heard the front door open and shut. Defendant then entered the bedroom, shut the door, walked past Misty and jumped on top of Wade, who was sitting on the bed. Defendant put his knees on Wade's shoulders and began punching him in the head. After Butler punched defendant in the face to get him off of Wade, defendant stabbed Butler in the face. Hamline screamed and hit defendant, and, then, defendant stabbed Butler in the torso, hitting his liver and ribs. Butler fell into the TV, defendant turned back toward Wade, and Butler fled.

At the time defendant entered Hamline's home, Lucretia Prabhu was visiting her elderly grandmother, who resided there. Prabhu, her sister and her 14-year-old niece were with the grandmother in another room in the house when Prabhu heard her cousin, Wade, and Misty screaming. Prabhu pushed her grandmother back and saw defendant pulling Wade out of the room by his hair and holding a knife to his scalp. Defendant then punched Prabhu's 16-year-old nephew, Christopher. When Prabhu told defendant to stop, he slit her throat and stabbed her between the ribs. Prabhu asked defendant why he was stabbing her and said, "I don't even know you." Defendant did not reply.

When defendant moved toward Prabhu's sister and grandmother, Prabhu tried to pull him away and he stabbed her again, nearly severing her thumb. Thereafter, while defendant was standing in front of Prabhu, Butler stumbled in the back door, struck defendant with a pitchfork, and defendant fled.

Alder Bay Attack

The next morning, on January 14, 2004, Virginia Williams was working as a caregiver at the Alder Bay Assisted Living facility in Eureka (Alder Bay). She was in the basement monitor room updating a resident's chart when she felt a blow to the right side of her head, causing her to be thrown to the ground. She then sustained repeated blows to the head, causing her to go in and out of consciousness. When she tried to get up from the floor, Williams saw the naked defendant trying to close and lock the exterior door. When she tried to flee, defendant pulled her back into the room. After unsuccessfully trying to pull her into the bathroom, defendant threw her to the floor, climbed on top of her, pinned her arms with his knees and tried to choke her.

Maintenance worker William Hatton heard Williams screaming and found the naked defendant sitting on Williams's chest. Williams's face was bloody. Hatton and another Alder Bay employee tackled defendant and restrained him until the police arrived. While being restrained, defendant's demeanor was "pretty wild." It took police about five minutes to restrain him so that he could be transported to the hospital. Thereafter, police found defendant's fanny pack and clothes on a walkway in a wooded area behind the facility.

Expert Testimony Regarding Defendant's Sanity

Three expert witnesses testified for the defense.[3] Clinical psychologist Michael Ramirez examined defendant for about 30 to 40 minutes on February 6 and 10, 2004, to determine whether he was competent to stand trial, not to form an opinion as to his sanity at the time of the offenses. Dr. Ramirez reviewed available records and talked with jail staff. Thereafter, Dr. Ramirez diagnosed defendant as suffering from a psychotic

[3] The prosecution presented no expert testimony on the sanity issue.

disorder, nonspecified, based primarily on his perceptual distortions, i.e., auditory and visual hallucinations. Dr. Ramirez noted that defendant's symptoms included thought processes involving persecution and paranoia, anxious and agitated affect, and lability.

On cross-examination, Dr. Ramirez stated that during the evaluation defendant's intelligence level appeared average to above average, he exhibited no signs of hallucination, and did not report having any hallucinations. Dr. Ramirez said that defendant's statement that people in the jail were "out to get him" was an example of delusional-type thinking, but conceded that there could have been people in the jail that really were "out to get" him. Although Dr. Ramirez believed that defendant had a psychotic disorder, he did not have enough information to make a specific diagnosis, and conceded he did not ask defendant to perform any quantifiable tests with regard to defendant's mental state.

Forensic and clinical psychologist Otto Vanoni evaluated defendant in March 2005 to determine whether he was not guilty by reason of insanity (NGI). Dr. Vanoni opined that defendant was legally insane at the time of the incident based on his finding that at the time of the incident defendant was unable to recognize the moral or legal wrongfulness of his behavior. Dr. Vanoni diagnosed defendant as suffering from paranoid schizophrenia with traits and features of a personality disorder, including narcissism. Dr. Vanoni noted that at the time of the evaluation defendant was on psychotropic medication for psychosis and showed no behavioral signs of paranoid schizophrenia. Aside from interviewing and evaluating defendant, Dr. Vanoni reviewed the police incident reports, May 2004 records from Atascadero State Hospital (ASH), a prior hospitalization in Alaska and defendant's writings. Dr. Vanoni noted that at age 18, defendant was receiving SSI (supplemental security income) for a mental disorder. Dr. Vanoni administered a Rorschach test, a Rogers Criminal Responsibility Assessment Scale, and a Millon personality test. He described defendant's psychosis as "so flagrant and so obvious, it's a no brainer."

On cross-examination, Dr. Vanoni stated that although his legal insanity conclusion was also based on defendant's lack of comprehension of the nature and

quality of his criminal behavior, he did not include that factor in his report and conceded that "[he] left open a vague possibility that that [factor] may not have been totally accurate." He also conceded that he did not receive any reports from Alaska, made no attempt to assess whether defendant's treatment in an Alaska psychiatric facility ever occurred, and relied on defendant's self-reporting about the prior Alaska treatment and his receipt of SSI for a serious psychiatric disorder. Dr. Vanoni also conceded that the police reports following the incident made no mention of defendant's hallucinating, and referred to him only as violent, uncontrollable and disorganized, and stated defendant "could not be understood."[4] Dr. Vanoni said his opinion of defendant's lack of sanity primarily applied to the Alder Bay incident, and that the Bay Street incident had little impact on his opinions. He conceded that it would have been helpful to seriously review the Bay Street incident, which occurred hours before the Alder Bay incident. He also conceded that a mental health professional can be fooled as to the existence of a person's hallucinations and delusions, particularly if the professional has limited data and if the person's history is flawed, incomplete, or untrue. In addition, the person's intelligence level and sophistication as to the mental health system factor into his ability to fool the mental health professional.

Forensic psychiatrist Robert Soper evaluated defendant in April 2005 and determined that at the time of the offenses defendant was legally insane, showing signs and symptoms of psychosis. In particular, Dr. Soper noted that defendant was delusional, had hallucinations and had disordered speech. He diagnosed defendant as suffering from schizo-affective disorder. His conclusion was based on interviews with defendant, defendant's writings, the police reports, the ASH discharge report, Dr. Vanoni's report and two interviews by Dr. Soper's associate, a licensed clinical social worker. Dr. Soper noted that defendant's biological father apparently had severe delusions and that hallucinations and chronic psychosis is typically an inherited disorder. Dr. Soper testified

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[4] The police officer reported that he did not think defendant was coherent enough to be advised of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436).

that defendant's writings two weeks after he was incarcerated described classic chronic psychotic behavior, including hallucinations and delusions in which he was a god and needed to please other gods by attacking humans. Dr. Soper stated that defendant's writings were the most contemporaneous description of what was going on in his mind at the time of the offenses. Dr. Soper said he saw no signs or symptoms that defendant was malingering or "faking" the delusions, and defendant's writings were consistent with his statements to Dr. Soper during the July 2005 trial. Dr. Soper opined that defendant's coherent behavior during the jail interviews was due to successful medication treatment.

On cross-examination, Dr. Soper conceded that while at ASH, defendant watched a video which provided some information about how psychosis affects one's judgment in determining right and wrong, and presumably learned that there were legal implications. Thereafter, defendant wrote a letter to Drs. Vanoni and Soper stating, in part: "A year ago . . . I saw a video at [ASH], which showed a paranoid schizophrenic male who killed his mother with a sword and did not think it was wrong at the time, I immediately felt that I had something in common with this male because I knew at that time and still do, . . . that I did not think at the time of the crime what I was doing was wrong." Dr. Soper conceded that another statement written by defendant was at least an indicator that before being interviewed by him, defendant had a rudimentary knowledge of paranoid schizophrenia and how a finding of that disorder might affect his legal case. Dr. Soper admitted that at the time defendant was interviewed, defendant was hoping that he would be found insane at the time of the offenses. He also conceded that although "highly unlikely," it was "theoretically possible" that defendant's writings were manufactured for "faking" an NGI defense. He also admitted that science fiction fantasy novels and the game "Dungeons and Dragons" often have bizarre descriptions of god-like individuals and dragons and "fights to the death."

DISCUSSION

I. *Substantial Evidence Supports The Jury's Sanity Finding*

The insanity defense "shall be found by the trier of fact only when the [defendant] proves by a preponderance of the evidence that he or she was incapable of knowing or

understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) "Because the burden was on the defense to show by a preponderance of the evidence that [defendant] was insane, before we can overturn the trier of fact's finding to the contrary, we must find as a matter of law that the [jury] could not reasonably reject the evidence of insanity. [Citations.]" (*People v. Skinner* (1986) 185 Cal.App.3d 1050, 1059.) The fact that the prosecution presented no expert testimony does not compel the trier of fact to accept defendant's experts' opinions. (*Ibid.*) Expert testimony is circumstantial, not direct evidence, and the expert's credibility is for the jury to evaluate. (*People v. Gentry* (1968) 257 Cal.App.2d 607, 611.)

Defendant contends that the uncontradicted defense expert testimony established that he was insane at the time he committed the instant offenses; and, therefore, the jury's sanity verdict was not supported by substantial evidence. He concedes that his experts "did less than [a] perfect job in their evaluations of [defendant], especially in failing to obtain reports or records to verify his past history." However, he argues that the experts found that his psychosis was "overwhelming and classic," concluded he was not malingering, and believed his written statements could not have been produced by someone lacking a sophisticated understanding of psychiatry. He asserts that no rational trier of fact could have concluded that he concocted an elaborate scenario of hallucinations and delusions sufficient to convince three experienced doctors of his insanity at the time of the instant offenses.

Based on the record before us, the jury could reasonably have rejected the defense experts' opinions and found defendant was sane at the time of the offenses. First, the jury could reasonably have disregarded Dr. Ramirez's testimony because he did not evaluate defendant's sanity at the time of the offenses, and instead evaluated only his competency to stand trial. Second, the jury could have rejected the insanity finding by Dr. Vanoni because it was based only on the Alder Bay assault despite Dr. Vanoni's concession that it would have been helpful to review the Bay Street incident since it occurred only hours before the Alder Bay incident. Third, as defendant concedes, his experts failed to obtain

relevant reports, relying instead on defendant's own statements about his mental health history. Given defendant's express desire to have the experts find him insane, the jury could have reasonably disregarded the self-serving information defendant provided to the experts. Fourth, the jury could have concluded that defendant possessed above average intelligence, a sophisticated knowledge of the mental health system, and an understanding of the legal ramifications of a paranoid schizophrenia diagnosis. Relying on that conclusion, the jury could properly reject the experts' conclusions that defendant was not malingering and could reasonably have found him sane at the time he committed the offenses.

II. *There Was No Prosecutorial Misconduct*

Defendant notes that his failure to raise a prosecutorial misconduct objection and request an admonition when such could have cured any error constitutes a waiver of a prosecutorial misconduct claim. He contends his trial counsel was ineffective in failing to object to the prosecutor's misconduct in making "contemptuous remarks" about the defense experts' testimony.

"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when 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. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

"An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) We thus examine each instance of alleged misconduct in determining defendant's incompetence of defense counsel claim.

A. *Remarks Regarding Forensic Psychiatry and Psychology*

Defendant contends the following comments by the prosecutor constituted misconduct:

In rejecting defense counsel's argument that a change in defendant's Axis 1 diagnosis did not matter, the prosecutor stated, "I submit to you, it matters a great deal because it shows that, frankly—I'll talk about this more—forensic psychology cannot answer the question that is being asked in this case."

In arguing that the testimony of Drs. Soper and Vanoni was "not worthy of credibility," the prosecutor stated, "the science—and I put quotes around that—on which it is based is not science at all."

"[N]ot only is forensic psychiatry or psychology useless and misleading, it's counterproductive, because this field, forensic psychology, forensic psychiatry, the interaction of psychology and psychiatry with the court system is not science. It's incapable of answering the crucial question in this case. What's his mental illness? It can't answer that question because in the forensic realm, particularly psychology and psychiatry, is not a true science."

"This isn't science. . . . There was no scientific test that can tell you whether he was psychotic, whether he had a personality disorder. They cannot do that."

"You don't have to accept [the defense experts'] opinion just because they've got letters after their name or they went to school no more than you have to accept a snake oil salesman's opinion of what his product will do for you. That's what this is. This is snake oil."

In discussing the defense experts' diagnoses of defendant, the prosecutor stated, "Once again, [this] is not a scientific procedure. . . . You can look at any criteria you want in order to make the diagnosis. That's the problem with all of this. It's so subjective on the part of the examiner."

"In any event, of course, they're applying a . . . procedure that . . . has nothing scientific about it anyway."

"But it just shows you sort of the very subjective nature of this whole thing. It's really kind of a shoot by the hip, this is what I think sort of procedure. It is not the scientific method. . . . This is not science."

"You have [this] flawed procedure incapable of producing a consistent result, incapable of truly distinguishing one mental illness from another."

Defendant contends the prosecutor's remarks about science were impermissible because they were not based on any evidence presented, and improperly implied that the prosecutor was privy to superior knowledge from sources unavailable to the jury. He also contends the remarks improperly sought to persuade the jury to disregard the court's ruling qualifying the defense psychiatrist and psychologists as experts, and to substitute a more rigorous standard of expert qualification based on "the scientific method."

"A prosecutor may vigorously urge his points as long as he does not act unfairly and may use appropriate epithets where warranted by the nature of the case and the evidence adduced." (*People v. Babbitt* (1988) 45 Cal.3d 660, 700.) In *Babbitt*, relied on by defendant, the court found that the prosecutor's comments were not directed to the evidence of the defendant's mental state at the time of the offenses or to the weight of the expert's testimony, but instead, to challenging the "entire system of permitting psychiatric testimony on behalf of criminal defendants." (*Ibid*.) The court stated, "[t]he courtroom is not the proper forum to challenge the propriety of this system," and therefore the comments were improper. However, the court found the error harmless, in part because the jury was instructed that the law permitted expert testimony on the issue of the defendant's mental capacity and that the jury should give that testimony the weight it found it deserved. (*Ibid*.)

We reject defendant's assertion that the prosecutor's remarks did not rest on the evidence presented. In discussing the Rogers Criminal Responsibility Assessment Scale Dr. Vanoni utilized to determine defendant's legal insanity, he testified that rating the 25 elements of the scale "doesn't mean this is a . . . scientific standard." He testified that instead, "you take all of these questions and you cogitate, you examine, and you throw it

up against the [M'Naghten] standard."[5] Dr. Soper testified that he relied on the testing performed by Dr. Vanoni. In addition, Dr. Soper testified that psychiatrists rarely get training in how to administer the Rorschach test and there is controversy about the efficacy or accuracy of the different methods of test administration.

A prosecutor may urge, in colorful terms, that defense witnesses are not entitled to credence. (*People v. Earp* (1999) 20 Cal.4th 826, 863.) The prosecutor's disparaging comments regarding forensic psychiatry and psychology not being science were based on the evidence presented. In addition, contrary to defendant's assertion, nothing about the prosecutor's comments suggested the prosecutor was privy to superior knowledge from sources unavailable to the jury. Moreover, we reject defendant's claim that the prosecutor's comments sought to persuade the jury to disregard the court's expert witness determination. At no time did the prosecutor argue that the expert witnesses were not properly qualified as experts or should be disqualified.

Because the challenged statements were not improper, defense counsel was not ineffective in failing to object to them.

B. *Misstatement of the Evidence*

Defendant next contends the following remarks by the prosecutor "seriously and significantly" misstated the testimony of Drs. Soper and Vanoni: "Now, [defense counsel] talked about how all the doctors said, hey, this was an easy one. I think Dr. Vanoni even said it was a no brainer. That's too easy. I'm not going to go there. But you know what I mean. He also used the word 'obvious.' Folks, this isn't easy. It's not obvious. And it's not supposed to be. It's not supposed to be easy to make a determination as to whether someone is not guilty by reason of insanity. You heard Dr. Soper testify that . . . it's a pretty strict standard, particularly in this state. It's hard in California for whatever . . . people in other states like to make fun of California and the criminal justice system. For whatever they say, it's not easy to be found not guilty by reason of insanity in this state. It's a restrictive standard. Burden's on the defense. They

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[5] *M'Naghten's Case* (1843) 10 Clark & Fin. 200, 210 [8 Eng.Rep. 718, 722].

have to show he didn't know right from wrong. They have to show specific type of mental illness. It's not easy to do. It shouldn't be. It shouldn't be easy to absolve someone of criminal responsibility for [11] serious felony offenses. That shouldn't be easy. And the people giving you the opinion shouldn't approach this like it is easy or it is obvious. . . ."

Defendant argues that Drs. Soper and Vanoni did not testify it was easy to meet the California standard for criminal insanity and the prosecutor's argument improperly misrepresented their testimony to undermine their credibility. We disagree. The prosecutor did not argue that Drs. Soper and Vanoni testified it was easy to meet the California standard of criminal insanity. Instead, his argument was directed at Dr. Vanoni's testimony that the evidence of defendant's psychosis was "so flagrant and so obvious, it's a no brainer." The thrust of the prosecutor's argument was that arriving at a mental health diagnosis and a finding of legal insanity was not easy and obvious, and the methods used by the experts in this case were deficient, rendering their conclusions suspect. Such argument was proper and not misconduct. Consequently, defense counsel was not ineffective in failing to object to it.

C. *Personal Attack*

Defendant also contends the prosecutor committed misconduct during closing argument by making the following insulting and derogatory remarks about Drs. Soper and Vanoni including: (1) their work was "sloppy," "terrible," "unconscionable," "not true," "inadequate," and "slipshod"; (2) Dr. Soper "couldn't be bothered to take the time to spend any particular amount of time with the defendant"; (3) Dr. Soper's arrogance was "stunn[ing]"; (4) they were "sloppy in their approach" and "cavalier in their attitudes"; and (5) they applied a "fatally flawed procedure" in a "lazy, haphazard, inconsistent manner every step of the way." Defendant also asserts that the prosecutor derided the Rorschach test administered by Dr. Vanoni. He contends the prosecutor's remarks constituted a personal attack "not worthy of his office," were not based on the evidence, and were therefore an improper expression of his personal beliefs. Again, we disagree.

"Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie. [Citation.] Although defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 253 [suggesting mental health expert's testimony was "so poorly founded that it amounted to malpractice" was permissible argument].) "Ultimately, the test for misconduct is whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury. [Citation.]" (*Dennis*, at p. 522.) The thrust of the prosecutor's argument and the challenged comments in particular, was that the experts' testimony was "not worthy of credibility." Although his lengthy argument was harsh and strident, it did not employ deceptive or reprehensible methods to persuade the jury to reject the testimony of the experts as lacking in credibility. Consequently, defense counsel cannot be faulted for failing to object.

D. *Reference to Facts Outside the Record*

Finally, defendant argues that the following comment by the prosecutor encouraged the jury to rely on matters outside the record: "With all due respect to Dr. Soper, maybe he should play Dungeons and Dragons every once in awhile. Maybe he should go down to the fantasy book section of Borders. Maybe he should play video games. None of you do that, not before you reach your decision in this case. You can't. I'm not asking you to check anything. But for Soper to say that no one could have made this up who hadn't experienced it is ridiculous. Any [12] year old could have written some of that stuff. Any beat poet from the [1950's] could have come up with some of this crap about the bird in the tree and it's talkin' to me and the spring and the -- come on."

Defendant's argument lacks merit. The prosecutor's argument was directly related to his cross-examination of Dr. Soper as to whether Dungeons and Dragons, and fantasy novels and computer games could have informed defendant regarding demons, vampires,

and demi-gods enabling defendant to "fake" his psychosis. Dr. Soper rejected the assertion, but admitted it was theoretically possible for someone who was not psychotic or delusional to have written the types of things written by defendant. The prosecutor's argument was a fair comment on the evidence and defense counsel was not ineffective in failing to object to it.

III. *There Was No Instructional Error*

The court instructed the jury, in relevant part, on legal insanity pursuant to CALJIC No. 4.00: "A person is legally insane when by reason of mental disease or mental defect he was incapable of distinguishing right from wrong at the time of the commission of the crime." Defendant contends the court's insanity instruction was erroneous because it did not address whether defendant knew his specific criminal acts were wrong, and failed to clarify that the term "wrong" includes both moral and legal wrong.

Preliminarily, we address the People's assertion that defendant waived this instructional issue by failing to object to the instruction given or request a clarifying instruction below. Defendant concedes that generally, a claim of instructional error is waived if an appellant failed to object or request a clarifying instruction in the trial court. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) However, he argues that where the instructional error affects an appellant's substantial rights, failure to object does not bar appellate review. (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) He asserts that the instruction given required him to prove the additional element that he could not distinguish right from wrong in the abstract, the effect of which was to lessen the prosecution burden of proof and thereby constitutes structural error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282.) He also asserts that the court's failure to instruct that "wrong" includes legal and moral wrong permitted his conviction without mens rea or wrongful intent and also rises to the level of structural error. Alternatively, defendant argues that defense counsel's failure to object was ineffective assistance of counsel.

Even assuming the failure to object or request a clarifying instruction below constituted waiver, we address the merits of defendant's instructional error claim as an aspect of his assertion of incompetence of counsel.

In *People v. Kelly* (1973) 10 Cal.3d 565, 574, our Supreme Court stated, "Insanity, under the California [M'Naghten] test, denotes a mental condition which renders a person incapable of knowing or understanding the nature and quality of his act, or incapable of distinguishing right from wrong in relation to that act. [Citation.]" More recently, in *People v. Jablonski* (2006) 37 Cal.4th 774, 831, the court considered the argument that CALJIC No. 4.00, as given here, erroneously failed to inform the jury that a defendant's incapacity to distinguish right from wrong must be in relation to the crime committed, and not a general inability to do so. As in the instant case, prior to being instructed with the CALJIC No. 4.00, the trial judge in *Jablonski* instructed the jurors, " 'You may consider evidence of [defendant's] mental condition before, during and after the time of the commission of the crime as tending to show the defendant's mental condition *at the time the crime was committed*.' " Following the CALJIC No. 4.00 instruction, the court instructed, in part: " 'If *during the commission of the crime* the defendant was incapable of understanding that his act was morally wrong or was incapable of understanding that his act was unlawful, then he is not criminally liable.' " (*Jablonski*, at p. 831.) In rejecting the defendant's argument, the court reasoned, "[e]ven if we assume that defendant's strained reading of CALJIC No. 4.00 is plausible, any ambiguity in that instruction is resolved when it is considered in context of these further instructions because they clearly focus the jury's attention on defendant's capacity to distinguish right from wrong at the time of the commission of the crimes." (*Jablonski*, at pp. 831-832.)[6]

Defendant argues that the trial court in this case did not give an instruction like that given in *Jablonski*, which followed the CALJIC No. 4.00 instruction, and the

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6 We note that effective January 1, 2006, the California Judicial Counsel adopted CALCRIM No. 3450 to replace CALJIC No. 4.00. CALCRIM No. 3450 provides in part, the defendant is legally insane if he or she "did not know or understand that (his/her) act was morally or legally wrong."

instructions given included no language as to whether defendant understood that "his act" was wrong. Thus, he argues that based on the instructions given, the jury could have found him sane if they concluded he had the capacity to distinguish right from wrong "in general" at the time of his offenses. Defendant's argument has strained the interpretation of the instructions given beyond the bounds of reason. Despite the fact that the instructions given do not refer to "this act," as in *Jablonski*, the instructions clearly focus the jury on defendant's capacity to distinguish right from wrong at the time his crimes were committed.

Next, defendant contends that the version of CALJIC No. 4.00 given in this case erroneously failed to denote whether "wrong" referred to legal or moral wrong. The parties appear to agree that the term "wrong" as used in section 25, subdivision (b) includes both moral wrong and legal wrong. (*People v. Coddington* (2000) 23 Cal.4th 529, 608; *People v. Torres* (2005) 127 Cal.App.4th 1391, 1402.) However, CALJIC No. 4.00 is a standard instruction which correctly states the law. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 535; *Torres*, at p. 1402.) Where, as here, the instruction given was legally correct and responsive to the evidence, defendant cannot complain that the instruction was incomplete if he failed to request an appropriate amplifying or clarifying instruction. (*Kelly*, at p. 535.)

Moreover, nothing in the record or in the other instructions given excluded from the jury's consideration defendant's ability to distinguish moral right from wrong. Dr. Vanoni expressly found that defendant was unable to distinguish legal and moral right from wrong. In addition, neither the evidence nor the arguments of counsel distinguished between defendant's ability or inability to distinguish the legal wrongfulness of his acts from the moral wrongfulness of those acts, and defense counsel did not rely on a theory of moral wrong in urging that defendant be found legally insane. Defense counsel was not ineffective in failing to request additional instructions clarifying the defendant's capacity to differentiate right from wrong; the word "wrong" denotes both moral wrong and legal wrong.

IV. *There Was Sentencing Error*

Finally, in reliance on *Blakely v. Washington, supra*, 542 U.S. 296, *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *United States v. Booker* (2005) 543 U.S. 220, defendant contends the trial court's imposition of the upper term on counts 1, 2, 4, 6, 7, 8, and 11 was erroneous because it was based on facts not admitted by him or found true by a jury in violation of his Sixth Amendment right to jury trial and his Fourteenth Amendment right to due process. In *Apprendi*, the United States Supreme Court applied the Sixth Amendment and held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi*, at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by defendant. When a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely*, at pp. 301-305.) In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 860], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham*, at p. 860, overruling on this point *People v. Black* (2005) 35 Cal.4th 1238.)

Finally, in *Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546, 2551-2553], the United States Supreme Court held that *Blakeley* error was not structural error, but instead subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. (Accord, *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) Thus, any error the trial court made in considering an aggravating circumstance is harmless under *Chapman*, if we conclude, beyond a reasonable doubt, the jury would have found that circumstance true.

The trial court decided to impose the aggravated term after balancing three aggravating factors against one mitigating factor. In aggravation, the court found the

following factors: (1) the victims' vulnerability (Cal. Rules of Court, rule 4.421(a)(3)); (2) the imposition of concurrent terms where consecutive terms could have been imposed (rule 4.421(a)(7)); and (3) the defendant was on probation for assault, a crime of violence, at the time he committed this offense (rule 4.421(b)(4)). Against these aggravating factors, the court treated defendant's mental illness as a mitigating factor.

The trial court's reliance on the first aggravating factor to impose the upper term was inappropriate under *Cunningham*. Even if we were to find that the other two factors relied upon were valid under *Cunningham* or harmless under *Recuenco*, we are unable to find under *Chapman* that we are satisfied beyond a reasonable doubt the trial court would have imposed the upper term even if it had not considered the first factor. Thus, imposition of the upper term was inappropriate, and we vacate the sentence and remand for further proceedings on this issue.[7]

[7] We reject the People's argument that appellant waived this issue by failing to raise it below. Unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089, 1103, who waived a *Blakely* challenge by failing to raise it at his sentencing, which occurred after *Blakely* but before *Black*, appellant was sentenced after *Black*, at which point a *Blakely* objection would have been futile under controlling law that the court was compelled to follow. Under these circumstances, appellant did not waive the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

DISPOSITION

The sentence is vacated and the matter remanded for resentencing. In all other respects, the judgment is affirmed.

SIMONS, Acting P.J.

We concur.

GEMELLO, J.

MILLER, J.*

* Judge of the San Francisco County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.