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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HAYWARD LEE MAYHAN, Defendant and Appellant.	F057373 (Super. Ct. No. 07CM7436) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte and Thomas DeSantos, Judges.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Jamie A. Scheidegger, David Andrew Eldridge and Kari L. Ricci, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Hayward Lee Mayhan (appellant) of count 1, attempted murder with premeditation (Pen. Code, §§ 664, subds. (a), (e), (f), 187, subd. (a));[1] count 2, attempted murder of a public official (§ 217.1, subd. (b)); counts 3 and 5, assault with a deadly weapon by a prisoner (§ 4501); count 4, battery by a prisoner on a nonconfined person (§ 4501.5); and count 6, custodial possession of a weapon (§ 4502, subd. (a)). In a bifurcated proceeding, the jury found true the allegations that appellant had suffered three prior strike convictions pursuant to sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d); had served two prior prison terms pursuant to section 667.5, subdivision (b); and had suffered three prior serious felony convictions pursuant to section 667, subdivision (a)(1). The trial court sentenced appellant to an indeterminate term of 104 years to life.[2]

Appellant contends that the trial court erred when it excluded all of his defense witnesses, declined to initiate a competency proceeding, denied his *Marsden*[3] motions, and failed to give necessity defense and attempted voluntary manslaughter instructions. Appellant also contends that counsel was ineffective for having him testify in narrative form. Finally, he argues cumulative error and various sentencing errors. We find error occurred during one of the *Marsden* hearings and remand the matter for further proceedings. We also find several sentencing errors but, in all other respects, affirm.

FACTS

On October 15, 2006, while working in the security housing unit at Corcoran State Prison, Correctional Officers Thom Hieng and Frank Braswell attempted to serve appellant, an inmate, dinner in his cell. Normally, the food tray is passed into the food port and the inmate takes the food tray and eats it at his bunk. But after Officer Braswell

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

[2]The court also imposed a consecutive prison term of 19 years 8 months in two unrelated cases from Los Angeles and Del Norte Counties.

[3]*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

put appellant's food tray on the food port, appellant lunged forward and shoved the tray out of the food port door, bruising Officer Hieng's thumb in the process. Appellant then stuck a "long stick," an inmate-manufactured spear, out of the food port and thrust it several times within an inch or two of Hieng's neck and face. Braswell moved toward Hieng, and appellant then shoved the spear several times towards Braswell's chest area. Hieng ordered appellant to "pull back" several times, but appellant did not comply. Hieng then pepper-sprayed appellant and appellant pulled his arm and the weapon back into his cell.

Officer Braswell closed appellant's food port and called for backup. Another officer instructed appellant to put his hands into the food port so that he could be handcuffed. Appellant did not initially comply. Once he did, he was taken to be decontaminated from the pepper spray.

A search of appellant's cell revealed a spear, about two feet long, near appellant's mattress. The shaft of the spear was constructed of tightly rolled newspaper or magazines and wrapped in cloth or sheet material. The tip of the spear was a state-issued toothbrush that had been sharpened to a point.

The Defense

Appellant testified on his own behalf that "[a]n incident did occur, I guess it was an ongoing incident prior to that lead up to the incident." According to appellant, in the months prior to the incident, he had been treated inhumanely and with disrespect by correctional officers, specifically by Officer Braswell. He had not been fed "for weeks at a time at dinnertime," and rocks and bleach had been put in his food. He had been housed with inmates who had AIDS, HIV, and hepatitis C. He had been beaten and physically abused. His attempts to resolve these problems through the inmate grievance system had produced no result. On the day in question, appellant was "fed up," "tired" and "starving."

Appellant testified that he was "not saying that an incident didn't happen, but [he had] tried to resolve it in so many different ways," including asking to be moved and filing inmate complaints. What he was trying to do on the day of the incident was make the officers stop the harassment. He admitted having made the spear with a sharp point, though he claimed the toothbrush point was not the point he used. He denied trying to kill Officer Hieng during the incident or even trying to stab him. It was Officer Braswell he tried to stab.[4] He explained: "If that is what it took to let him know to stop treating me the way he was treating me then I guess." "As far me trying to premeditate, kill somebody or hurt somebody, you don't think like that when you are put in a position to just—you just don't want to be bothered … and that is just the way life is, that is the way we live."

On cross-examination, appellant acknowledged that he had been in the security housing unit for six-and-a-half to seven years, initially for conspiracy to murder a correctional officer. After he was found not guilty of that offense, he remained because he was a threat to the "safety and security of these officers."

DISCUSSION

1. Did the trial court err when it failed to allow defense witnesses to testify?

Appellant contends the trial court denied him due process, a fair trial, the right to confront and impeach witnesses, and to present a defense when it refused to allow four prison inmate witnesses testify. He contends the witnesses would have supported his testimony that he had been harassed and abused by the correctional officers. He also contends that the trial court's ruling compelled him to take the stand and testify. We reject appellant's arguments.

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[4]Both of the attempted murder counts named Officer Hieng as the victim. Appellant testified he had nothing in particular against Hieng. The prosecutor refrained from seeking to amend either attempted murder count to charge that Officer Braswell was the victim. Instead, he argued that the attempt to stab Hieng in the throat obviously was an attempt to kill.

Procedural background

On October 30, 2008, prior to trial, the court granted a defense motion seeking to transport two inmate witnesses, Curley Broussard and Shawn Fisher, to trial on December 2, 2008. On November 12, 2008, during appellant's second *Marsden* hearing, appellant complained that defense counsel had informed him he was only allowed a limited number of witnesses. Appellant insisted there were four more inmate witnesses, in addition to the five already subpoenaed, he wanted counsel to investigate who were either in the vicinity when the attack occurred or had "had issues" with the officers involved.

On December 1, 2008, defense counsel filed his witness list for trial, consisting of Broussard and Fisher as well as two additional inmate witnesses: Shannon Bell and Elrador Browning. On December 3, 2008, after the court denied appellant's third *Marsden* motion, but prior to the introduction of evidence, the prosecutor made a motion to exclude the testimony of all four inmate witnesses. As argued by the prosecutor and left uncontradicted by the defense, investigative reports regarding the prospective witnesses showed that none of the inmates were percipient witnesses to the attack and their statements contained only hearsay on "how bad the prison is and how they picked on [appellant.]" In addition, the officers named in the investigative reports were not the officers involved in the incident at issue.

Defense counsel acknowledged that none of the inmate witnesses had witnessed the attack, but stated that the witnesses would testify in support of appellant's contention that he had been abused "on a number of occasions by officers which … would [further appellant's] justification [issue] for any actions he may have taken."[5]

[5]Defense counsel also argued that the proposed testimony would support appellant's contention that the officers' abuse had made appellant "fearful and afraid." But appellant never testified that he was fearful or afraid. Neither did he request instruction on any theory of self-defense.

The trial court ruled tentatively that it would not allow the inmate witnesses to testify because their testimony could not provide a legal defense to appellant's actions. The court explained it would reconsider its ruling after it had heard some of the evidence, but warned that "given the nature of the case, given the possible legal defenses the Court does not see how they could be relevant in this matter."

Following appellant's testimony, defense counsel asked the trial court for a "further ruling" based on the evidence presented. The prosecutor argued that the inmate witnesses' testimony was "still not relevant," was hearsay, was vague as to time frame, did not include the officers involved, and had no relevance to the current proceeding. The court again refused to allow the inmate witnesses to testify, finding none of the elements of a necessity defense were present to make the testimony of the proposed witnesses relevant.

Applicable law and analysis

Preliminarily, we note respondent's assertion that appellant failed to raise his Sixth Amendment claim below and has therefore forfeited the issue on appeal. Generally, "questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548.) For present purposes, however, we will assume that appellant preserved the Sixth Amendment issue for appeal by arguing to the trial court that the inmates' testimony was vital to appellant's defense. We will conclude, nonetheless, that the exclusion of the proffered testimony did not violate appellant's constitutional rights. Neither did the trial court prejudicially err in finding the proffered evidence irrelevant.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) As a general matter, however, the application of the ordinary rules of evidence does

not impermissibly infringe on a defendant's due process right to present a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 90.) Indeed,

> "[a] defendant's right to present [even] relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [Citations] A defendant's interest in presenting such evidence may thus '"bow to accommodate other legitimate interests in the criminal trial process."' [Citations.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 308, fn. omitted.)

Evidence Code section 350 provides: "No evidence is admissible except relevant evidence." Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The California Supreme Court has stated evidence is relevant if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, abrogated on another ground as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) "The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

The trial court also has broad discretion to limit the introduction of evidence that, while relevant, is of limited probative value. (Evid. Code, § 352.)

A trial court's determination whether evidence is relevant or has sufficient probative value to be admitted is reviewed for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 554-555; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) We reverse only if the trial court's ruling was "'arbitrary, whimsical, or capricious as a matter of law. [Citation.]'" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

We conclude first that the exclusion of the inmate witnesses' testimony did not violate appellant's constitutional right to present a defense. As we have noted above, the application of ordinary rules of evidence does not impermissibly infringe a defendant's constitutional right to present a defense. (*People v. Snow, supra*, 30 Cal.4th at p. 90.) Appellant was not denied the opportunity to present his defense. He gave his testimony

and his attorney did with it what he could.[6] If the trial court was correct in ruling the proffered additional testimony irrelevant, then obviously no constitutional error occurred. If, instead, the trial court erred in that conclusion, it is nonetheless true that appellant was allowed to present his defense. That he was not allowed to support that defense with the testimony of nonpercipient witnesses simply did not rise to the level of a constitutional violation. (Cf. *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 [excluding defense evidence on minor or subsidiary point does not impair accused's due process right to present a defense].)

Second, we conclude that the trial court was correct in ruling the proffered evidence inadmissible. The gravamen of appellant's defense was that correctional officers at the prison, specifically Officer Braswell, treated him inhumanely and he responded by using force to get them to "leave [him] alone." But appellant did not testify that he acted in self-defense on the day of the attack, or even that anything untoward had occurred to provoke him on that particular day. As we conclude *post*, appellant's necessity defense was ill-founded. His testimony, that is, did not make out a necessity defense. We also conclude *post* that appellant's testimony did not make out a provocation defense. Further, none of the proffered inmate witnesses had actually witnessed the attack and thus, at most, they could have testified in support of appellant's misguided defense.[7]

Neither do we accept appellant's contention, made for the first time here, that the proffered evidence was "relevant on a host of intent issues (including the credibility of

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[6]In argument, for example, defense counsel said, "[E]ven if we consider what [appellant] said on the stand, … he never made reference to Mr. Hieng as being somebody who was giving him a bad time, giving him issues that he was concerned about in the prison."

[7]Respondent argues that appellant's offer of proof at trial was inadequate. For present purposes, we accept appellant's response that the "court and the DA understood the thrust of the proffers, with or without inmate declarations, so as to enable them to argue relevance. Everyone knew these were reports of 'similar' problems with guards from inmates in the *same unit* in a similar time period."

appellant's testimony he lashed out without intent to kill), as well as defenses to felony assault, all of which defense counsel argued [below]." First, appellant did not testify that he did not intend to kill—just that he did not intend to kill Officer Hieng. His testimony about his intent as to Officer Braswell was ambiguous on this question. He did directly admit that he intended to stab Officer Braswell. But, as to attempting to kill him, he said, "No, but I—I was trying to make a statement that, you know, stop him from doing what he was doing to me, you know, I wasn't thinking like that. I mean, I can't tell you at the time how I was feeling." Further, that appellant was upset, even desperate, because of officer abuse simply does not show that he did not intend to kill. (Cf. CALCRIM No. 603 [provocation defense does not negate intent to kill, it merely mitigates offense to attempted voluntary manslaughter and intent to kill is still an element].) And appellant's motivation to make the officers leave him alone and stop the abuse was not sufficient to mitigate his crime to voluntary manslaughter. (§ 192, subd. (a); *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) Finally, as to "defenses to felony assault," we fail to see how the proffered evidence or appellant's testimony, if accepted as true, has any relevance. Appellant makes the assertion that it does, but he does not elaborate. We thus reject his unsupported conclusion. (*People v. Hardy* (1992) 2 Cal.4th 86, 150 [declining to address issue presented by appellant without "either argument or citation to relevant authority"].)

Again for the first time here, appellant's opening brief mentions (almost in passing) that the proffered evidence would have supported his claim that he did not premeditate any attempt to kill Officer Hieng. But appellant made no such claim. He testified not that he did not premeditate but that he did not intend to kill Officer Hieng. His testimony as to premeditation and any intent to kill Officer Braswell was ambiguous. Further, even if the proffered evidence might have had some probative value on the question of premeditation, we believe its exclusion was not prejudicial. It was, after all, only supporting evidence at best. And any inference to be drawn from appellant's testimony, indicating lack of premeditation, was contradicted by the evidence that

appellant made a two-foot long spear out of tightly wrapped paper covered with some sheet-like material, attached a sharp pointed end, waited until a meal was served to him, and then thrust the spear out of a port in his cell door at the face and neck area of the person he thought was Officer Braswell, his enemy. There is, we think, no reasonable probability that allowance of the proffered inmate testimony would have changed the result regarding premeditation. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [test from *People v. Watson* (1956) 46 Cal.2d 818, 836, is proper standard of review for erroneous exclusion of evidence].)

Finally, we reject appellant's claim that the court's ruling compelled him to take the witness stand only to be impeached with an array of prior felony convictions. As noted by respondent, during a *Marsden* hearing on December 3, 2008, even before the prosecutor made the motion to exclude the testimony of the inmate witnesses, defense counsel indicated that appellant had already decided to testify on his own behalf. And at that same hearing, appellant later confirmed on the record that he intended to testify. Thus, the record does not support his contention that he felt compelled to testify once the trial court ruled that the inmate witnesses were not allowed to testify.

We conclude no prejudicial error occurred.

2. Did the trial court err when it failed to initiate competency proceedings?

Appellant contends that the trial court violated his due process rights when it failed to initiate a competency hearing under section 1368. He claims such a hearing was necessary because counsel expressed doubts about appellant's unreasonable fixation with his defense of mistreatment in prison and justification in possessing a weapon, as well as his failure to understand his exposure to a life sentence for admitting he had a weapon. We reject the argument.

Procedural background

In February of 2008, at a trial confirmation hearing, proceedings were suspended after defense counsel stated that, although he understood appellant had had a previous competency proceeding, he believed appellant continued to suffer from a debilitating

paranoid delusional state and cognitive problems. A subsequent evaluation by Dr. Laura Geiger in April of 2008, stated appellant had a mental health history dating back to 2005 when he was diagnosed with a "Delusional Disorder Not Otherwise Specified," hospitalized, and given medication. He was diagnosed in 2007 with a "Mood Disorder Not Otherwise Specified," was depressed, and had a paranoid personality style with polysubstance abuse. According to appellant's medical records, his mental health placement was terminated and he was no longer receiving mental health services as of the end of January of 2008.

In a report of her interview with appellant, Dr. Geiger described appellant as initially unwilling to cooperate. But as rapport was built, appellant "began to answer questions which were cogent and thoughtful." Dr. Geiger described appellant as tending to blame others and circumstances for his problems. Dr. Geiger found that

> "despite his history of head injury and word finding difficulties, [appellant] is able to think logically, rationally, and should be able to work with his defense counsel if he so chooses. His mental faculties appear to be under his own mental and volitional control. In addition, [appellant] was recently removed from the mental health delivery system on which he had been placed. While he carries a past diagnosis of a psychotic disorder secondary to the head from a gunshot wound [*sic*] and has received intensive outpatient psychotherapy services, this [appellant] is no longer exhibiting any psychotic symptoms such as hallucinations or delusional thoughts. [Appellant] does not take any psychotropic medication; he also does not have any medical disorders which would compromise his faculties to function rationally. Overall, this examiner finds that [appellant] is competent to stand trial and he should be able to cooperate with counsel and handle the decisions which he needs to make, weighing choices and consequences if he so chooses."

Dr. Geiger opined that appellant was capable of understanding the nature and purpose of the proceedings against him, was able to comprehend his own status and condition in reference to such proceedings, and was able to conduct his defense and work with counsel "should he choose to do so." Dr. Geiger diagnosed no current psychotic illness and found that appellant "exhibit[ed] no signs of psychosis which would require psychiatric intervention such as medication."

In April of 2008, after submission of Dr. Geiger's evaluation, the trial court found appellant mentally competent, and jury trial was set for August 5, 2008.

After various additional delays, trial began on December 2, 2008. During a *Marsden* motion the next day, defense counsel reported that appellant was unreasonably fixated on his mistreatment defense and his right to possess a weapon, that he failed to understand his exposure to a 25-year-to-life term for admitting he had the weapon, and that he was unable to communicate or assist in a rational defense. The court denied the motion.

Following a recess in which defense counsel spoke to appellant, counsel stated he didn't know whether appellant "continue[d] to suffer from the mental issues that I have previously raised when I raised the [section] 1368 as to [appellant's] obsession with certain issues and inability to communicate. … I just need to make a record as to [appellant's] inability to communicate reasonably to present a defense on his behalf." The trial court confirmed with appellant that he wished to admit possessing the weapon, but took no further action and the prosecution case proceeded.

Applicable law and analysis

A criminal defendant "cannot be tried or adjudged to punishment while … mentally incompetent." (§ 1367, subd. (a).) "A defendant is mentally incompetent" if a mental disorder prevents the defendant from understanding "the nature of the criminal proceedings" or assisting counsel "in the conduct of a defense in a rational manner." (*Ibid.*) Under section 1369, subdivision (f), a defendant is presumed mentally competent unless proved otherwise by a preponderance of the evidence.

State law and federal due process bar the trial or conviction of a mentally incompetent defendant. (*People v. Rogers* (2006) 39 Cal.4th 826, 846.) Both

> "require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.] The court's duty to conduct a competency hearing may arise at

> any time prior to judgment. [Citations.] Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.] But to be entitled to a competency hearing, 'a defendant must exhibit more than … a preexisting psychiatric condition that has little bearing on the question … whether the defendant can assist his defense counsel.' [Citations.]" (*Id.* at p. 847.)

Section 1368, subdivision (a), which sets forth the procedure for implementing section 1367 protections, provides that, "[i]f, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent." If, in response, defense counsel informs the court of a belief that the defendant is or may be incompetent, the court shall order the question of the defendant's mental competence determined at a formal hearing held pursuant to sections 1368.1 and 1369. (§ 1368, subd. (b).) The court may order a competency hearing even if counsel believes the defendant is competent. (*Ibid*.)

"'A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence. [Citations.] Substantial evidence for these purposes is evidence that raises a reasonable doubt on the issue. [Citation.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1163.) "[T]his doubt which triggers the obligation of the trial judge to order a hearing on present sanity is not a subjective one but rather a doubt to be determined objectively from the record." (*People v. Sundberg* (1981) 124 Cal.App.3d 944, 955-956; see also *People v. Tomas* (1977) 74 Cal.App.3d 75, 90.)

When a trial court has ordered a hearing to determine a defendant's competence, it must suspend all proceedings in the criminal prosecution until that determination has been made. (§ 1368, subd. (c).) Failure to do so renders any subsequent judgment a nullity, as an act in excess of jurisdiction. (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 70-71.)

Once a defendant has been found competent to stand trial, "a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence." (*People v. Medina* (1995) 11 Cal.4th 694, 734; see, e.g., *People v. Kelly* (1992) 1 Cal.4th 495, 542-543 [no change in circumstance to justify second hearing]; *People v. Jones* (1991) 53 Cal.3d 1115, 1153-1154 [general assertion of defendant's worsening condition and inability to cooperate with counsel inadequate to justify second hearing].)

> "When defense counsel has presented substantial evidence that a defendant is incompetent to stand trial, the trial court must declare a doubt as to the defendant's competence and suspend proceedings even if the court's own observations lead it to believe the defendant is competent. [Citation.] But when … a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state. This is particularly true when … the defendant has actively participated in the trial." (*People v. Jones*, *supra*, at p. 1153.)

On appeal, a "trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 847.) But the failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence also requires reversal of the judgment of conviction. (*Ibid.*)

Here, we find no changed circumstances or new evidence to cast doubt on the validity of the prior competence finding. In her evaluation, Dr. Geiger found appellant had the ability to conduct his defense and to work with counsel "should he choose to do so." Dr. Geiger found appellant was able to think logically and rationally and he understood the nature of the proceedings against him. Counsel's complaint was that appellant was uncooperative with him, specifically that he wished to testify in his own defense against counsel's wishes. But other than his insistence on testifying, appellant

did not engage in any outbursts or demonstrations of irrational conduct during the trial, and defense counsel expressed no further concern about appellant's mental state.

Based on the record as a whole, we find no abuse of discretion on the part of the trial court in failing to hold a second (or a third) section 1368 hearing, and we reject appellant's claim to the contrary.

3. Did the trial court err when it denied appellant's *Marsden* hearings?

Appellant made five *Marsden* motions, three before trial and two after. Following hearings on each, all five motions were denied. Appellant contends the court abused its discretion in denying each of the motions. We find reversible error in one of the five *Marsden* motions and will remand for further proceedings.

We first set out the content of each *Marsden* motion.

July 21, 2008, *Marsden* motion

Appellant made his first *Marsden* motion on July 21, 2008, at the trial readiness hearing. At the hearing, appellant explained that he had provided counsel with a list of five or six defense witnesses, but that counsel had told him they would "hold no merrit [*sic*] to [his] case" because the witnesses were not present when the incident at issue occurred. Appellant thought they would be beneficial on the issue of motive.

Counsel explained that an investigator met with two of the witnesses, Bell and Browning, both of whom made statements that were consistent with appellant's insistence that he was being harassed and provoked by the officers. Transport orders for the two witnesses had already been prepared and signed by the court. But appellant had not provided sufficient information to be able to identify the remaining possible witnesses, although appellant "has had multiple opportunities" to do so.

Appellant next claimed that he had only been able to speak to counsel in the presence of or near correctional officers, which was uncomfortable since the case involved correctional officers. Appellant thought that "any adequate attorney would know that the attorney/client priveleges [*sic*] should apply to conversations/discussions about cases."

Counsel explained that the proximity of the officers was necessary for security purposes, but that there was an "ongoing agreement" between counsel, the Department of Corrections and Rehabilitation, and the district attorney that the officers were not able to testify to those conversations in court. Counsel also stated that appellant had the opportunity to speak privately with an investigator.

Appellant next complained that he had submitted documents to counsel and asked that he make copies of them and return the originals, but that counsel failed to do so. He had also asked for a copy of his preliminary hearing transcript but had not received it, and counsel had not been to the prison to see him.

Counsel explained that he had had the case since August of 2007. In October, he provided appellant with a tablet and envelopes in order to communicate with his office. At the beginning of November, appellant was provided copies of "all of the discovery." The investigator met with appellant after the preliminary hearing and provided appellant with a copy of the hearing transcript. Counsel again provided appellant with envelopes and paper in June of 2008. Appellant did provide counsel with a number of "602 originals," which counsel had not yet returned because they might be needed if appellant wanted to testify on those issues.

Finally, appellant also complained that counsel did not respond to or inquire about any of the confidential legal mail appellant had written and sent to him.

Counsel explained that he communicated with appellant both through the investigator and in court, and that appellant had had "a dozen opportunities" to speak with counsel. Counsel stated that appellant had sent him an "extensive number" of documents while "1368 proceedings were going on," and that counsel was "well aware" of appellant's theory of his defense.

As for the list of additional witnesses, counsel stated that appellant needed to "make some statement as to how those persons would be relevant to his case." When the trial court specifically asked appellant as to the relevance of each name listed, appellant

made no response. The court then denied the *Marsden* motion. Trial confirmation was set for August 4, 2008, although various delays followed.

November 12, 2008, *Marsden* motion

On November 12, 2008, appellant again asked that counsel be relieved. According to appellant, he passed counsel some notes and counsel "blew a gasket" and "went bonkers." Appellant stated that he had given counsel a list of additional witnesses, but counsel had said he was allowed only a certain number of witnesses.

Counsel explained that, when appellant arrived in court, he handed him a letter and told counsel that if he did not comply with appellant's request, he wanted someone else to represent him. As for the additional witnesses, counsel stated that was "exactly" what appellant did the last time trial was about to begin. According to counsel, five witnesses had already been located and interviewed and that a "parade of 8 or 10 or 12 witnesses is not realistic." Counsel also stated that appellant demanded he get his entire "C File" from the Department of Corrections and Rehabilitation and have it placed into the court's record, which counsel tried to explain was not relevant as well as inadmissible.

Appellant complained that counsel did not know him, didn't have a defense, and was "trying to sabotage" his trial. Counsel explained that he had "several volumes" concerning this case and had spent "probably a hundred plus hours" reviewing it, preparing for trial, and interviewing witnesses.

Appellant then stated he had four additional witnesses he wanted interviewed. Although appellant acknowledged that the investigator had been sent to talk to the potential witnesses, he thought the witnesses wanted to talk to counsel personally and not to the investigator. Counsel then explained that attorneys use investigators to interview witnesses in the event the investigator needs to be called to the stand.

When asked by the trial court what each witness would testify to, appellant stated that each witness was "in the vicinity and/or building" when the incident occurred. He also stated that each has had "issues with one or more of the same COs at or prior to the time of the incident."

Appellant stated that he had also asked counsel to file a *Pitchess*[8] motion to get access to the particular correctional officers' files. Defense counsel stated that he had tried to explain the limited relevance of a *Pitchess* motion to appellant, but that appellant thought such a motion would allow him to bring reports of other incidents into evidence rather than just the names of the complaining witnesses.

In conclusion, counsel explained that he had had the case for more than a year, he had had an investigator speak to appellant on multiple occasions, he had spoken to appellant personally "30 times," and, of the witness names given to counsel, two had agreed to make a statement. The trial court then denied the motion and set trial for December 2, 2008.

December 3, 2008, *Marsden* motion

On December 3, 2008, appellant again stated he was dissatisfied with counsel. He once more complained that counsel had failed to contact four witnesses he wished to have testify on his behalf and had not filed a *Pitchess* motion. He again complained that counsel had told him he had to limit the number of witnesses. He was concerned whether counsel was going to let him "speak about the incident itself or what brought the incident about."

After the trial court told appellant he had a right to testify if he so chose, counsel explained that appellant's concerns about the witnesses and *Pitchess* motion had been discussed at the previous *Marsden* motion. He also stated that he had had numerous conversations with appellant to explain that "even simple possession of the weapon" would get appellant a life term, but that appellant insisted he wanted to testify regarding his mistreatment and the need to arm himself. Although counsel questioned whether he could communicate with appellant, he acknowledged that he was willing to listen to him.

The court then denied the *Marsden* motion.

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[8] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

January 5, 2009, *Marsden* hearing

On January 5, 2009, following conviction, appellant's trial counsel advised the court that appellant wanted a new attorney to investigate a motion for a new trial. Appellant confirmed this request. The court determined that appellant was requesting a *Marsden* hearing.

During the subsequent closed-door hearing, appellant complained that counsel had not called four witnesses "prudent" to his case; he claimed he was suffering from "mental health issues" and "extreme duress" at the time of the incident, which was not brought out at trial; and that he and counsel had communication issues and never agreed on the "direction" of appellant's defense. Specifically, appellant complained at the hearing that he felt "there was no defense help in my case with the exception of him arguing that, that of the weapon. During the time of the incident, I had mental health issues. I was, believe if I'm not mistaken, I was Triple CMS and doing counseling and on psychiatric—." When the court responded, "So," appellant replied, "And none of this came up in my trial during that time and/or before and after [that] I was under extreme duress."

The trial court summarized appellant's concerns as threefold: (1) that counsel did not "come up with" a defense that was satisfactory to appellant; (2) that defense counsel failed to argue psychiatric or psychological issues in the matter; and (3) that appellant had "communication issues" with counsel. The court stated, "As far as [issues (1) and (2)], the Court actually issued a ruling concerning whether or not some of those issues could be brought into play as whether they were relevant, deeming that they were not relevant in the matters. [¶] … [¶] So the court only sees the communication aspect."

When defense counsel was asked to respond to appellant's allegations, counsel submitted on the issues, explaining he had "been through" these issues on more than one occasion with appellant. Counsel also thought the issues raised by appellant were "unreviewable" by him because they involved a review of his own performance during trial, creating a conflict.

The trial court then denied appellant's *Marsden* motion, explaining that appellant had failed to reach the burden required for the court to appoint new counsel for all purposes, but explained that it would address appellant's request for a new trial in open court.

Back on the record, the court stated that defense counsel would not be expected to investigate his own competency during trial with regard to appellant's request for new trial and asked appellant if he wished to pursue the motion on his own. Appellant responded that he wanted another attorney to review the motion. After explaining that a new attorney would take the lead on investigating the merits of such a motion, the court appointed another attorney to do so.

In a hearing two months later, the substitute attorney informed the trial court that she had reviewed the transcripts of trial, the new trial motion, and a declaration provided by appellant and found no legal cause for a new trial. However, neither the new trial motion nor appellant's declaration are a part of the record.

March 20, 2009, *Marsden* hearing

At sentencing, appellant requested his fifth *Marsden* hearing. At this time, appellant complained that he and his attorney had had trouble communicating throughout the case; that counsel had not provided him with a proper defense; and that counsel had not discussed sentencing with him. He again mentioned his request that counsel file a *Pitchess* motion and the fact that counsel had not called the witnesses he wanted him to call. He reiterated his concern about speaking to counsel in the vicinity of correctional officers.

Counsel explained that he had provided appellant with a copy of the sentencing report and that he had spoken to him on two occasions regarding arguments he would make at sentencing. He also stated that appellant was making the same allegations he had made earlier, which appellant now intended to pursue on an ineffective assistance of counsel claim.

The trial court denied the *Marsden* motion.

Applicable law and analysis

"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance." (*People v. Crandell* (1988) 46 Cal.3d 833, 854, abrogated on another ground as stated in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) "The defendant … cannot rest upon mere failure to get along with or have confidence in counsel." (*People v. Bills* (1995) 38 Cal.App.4th 953, 961.)

A disagreement as to tactics and strategy is not sufficient to require a substitution of counsel. (*People v. Stewart* (1970) 6 Cal.App.3d 457, 464-465.) There is "no constitutional right to an attorney who will conduct the defense of the case in accordance with an indigent defendant's whims." (*People v. Nailor* (1966) 240 Cal.App.2d 489, 494.) Neither can a defendant compel substitution of counsel through his own intransigence and failure to cooperate. (*People v. Kaiser* (1980) 113 Cal.App.3d 754, 761.) "[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

Appellant contends that the trial court erred in conducting inadequate inquiries on the conflict and trial issues between appellant and counsel. We disagree, with the exception of appellant's claim that the court erred under *People v. Eastman* (2007) 146 Cal.App.4th 688 (*Eastman*) during the January 5, 2009, posttrial *Marsden* hearing when it failed to address appellant's complaint that trial counsel failed "to present his significant mental health issues at the time of the offenses." In response to this claim, we asked for further briefing and directed the parties to address the following issues:

A. Did *Eastman* error occur?

B. Does the record show the trial court had, prior to the *Marsden* hearing on January 5, 2009, considered appellant's assertion of mental health issues at the time of the offense?

C. Does it make a difference in this case that the trial court conducted a *Marsden* hearing before appointing substitute counsel?

D. If error occurred, was it prejudicial?

E. If prejudicial error occurred, what is the appropriate remedy?

The parties argue the following:

A. Did *Eastman* error occur?

In *Eastman*, the defendant entered a negotiated plea of no contest to two counts of lewd acts on a child. At sentencing, his attorney informed the trial court that the defendant wanted to withdraw his plea and asked the court to appoint substitute counsel to investigate whether a factual or legal basis existed for the defendant to do so. (*Eastman*, *supra*, 146 Cal.App.4th at p. 690.) The court also received a letter, written by the defendant's mother, stating counsel had lied to the defendant in getting him to agree to the plea. (*Id.* at p. 691.) New counsel was appointed and he subsequently stated he would not file a motion to withdraw the plea because his investigation did not disclose any grounds to do so. Original counsel then resumed his representation of appellant. (*Id.* at pp. 692-693.)

On appeal, the defendant claimed that the trial court erred in failing to hold a *Marsden* hearing instead of appointing substitute counsel to determine whether to file the motion to withdraw the plea and in delegating the determination of that motion to substitute counsel. (*Eastman*, *supra*, 146 Cal.App.4th at p. 691.) We agreed, reasoning that the letter from the defendant's mother triggered the duty to hold a *Marsden* hearing and that, by not doing so, the trial court denied appellant the opportunity to state his complaints about counsel on the record and failed to discharge its duty of inquiry under *Marsden*. (*Eastman*, *supra*, at pp. 696-697.) We held that the failure to hold a *Marsden* hearing required a conditional reversal. (*Eastman*, at pp. 691, 697-698.)

In supplemental briefing here, appellant reasserts that *Eastman* error did occur because, although a *Marsden* hearing was held, instead of inquiring of trial counsel and/or

appellant on the issue of appellant's mental health at the time of the incident, the trial court improperly delegated his posttrial complaints of ineffective assistance of counsel to substitute counsel. Respondent contends that the question is not whether there was "'error' in some abstract sense," but whether there was a proper objection to a particular procedure below. And because appellant did not object to the procedure used, he cannot now complain of error. Respondent argues that here, a *Marsden* motion did take place and the trial court, "in an abundance of caution," treated appellant as though he had made the showing necessary to prevail and appointed substitute counsel in order to determine whether to bring an adversary motion for relief. "Just as in *Eastman*, this was not a relegation of the duty to determine whether new counsel should be appointed for future representation, but instead it was a resolution of the issue, in the form of actually appointing new counsel for the future task as to which prior counsel might have been conflicted."

But we note that appeal of a trial court's appointment of substitute counsel without a proper showing does not appear to require an objection to the procedure used. (*Eastman*, *supra*, 146 Cal.App.4th at p. 695; see also *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1086-1087 [substitute counsel appointed when defendant wanted to make new trial motion based on ineffective assistance of counsel]; *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1366-1367 [same].)

B. Does the record show the trial court had, prior to the *Marsden* hearing on January 5, 2009, considered appellant's assertion of mental health issues at the time of the offense?

During the *Marsden* hearing that occurred on January 5, 2009, responding to appellant's assertion that he had failed to pursue "mental health issues" appellant had been suffering from at the time of the offenses, defense counsel said that they had "been through this on more than one occasion." The trial court also indicated it had considered appellant's mental health issues before. Appellant contends that in both the pretrial *Marsden* hearings and the competency proceedings, the focus of the trial court was on

current trial competency and not on defenses based on mental health issues at the time of the offenses. As argued by appellant, his posttrial complaint about failure to pursue any mental health defense raised new questions about defense counsel's performance. Appellant does note that his mental health background was briefly discussed during the November 12, 2008, *Marsden* hearing, when appellant complained that counsel did not respond to his request to have his "C File" and "114A file" (which appellant described as his "mental health folder") copied and admitted into evidence. Further discussion with appellant revealed that appellant did not want to admit the files into evidence but rather have counsel review those files in order to explain what led up to the incident that occurred. Counsel stated that he had "several volumes of this case" and had spent "probably a hundred plus hours in reviewing it," although he did not specify whether the mental health file appellant mentioned was included.

Respondent asserts contrarily that appellant's complaint at the January 5, 2009, *Marsden* hearing that he had mental health issues at the time of the incident must be viewed in the context of all of the proceedings and appellant's constant insistence that trial counsel failed to present a defense that his actions were the result of "extreme duress." As argued by respondent, appellant's attempt to assert the defense of duress, which the trial court found unavailable and which was discussed on numerous occasions throughout the course of the trial, included consideration of the "mental health issues" of which appellant spoke on January 5, 2009. Thus, those issues had been considered before.

We find nothing in the record to show that the trial court ever, either at the January 5th hearing or at any time before, considered or requested defense counsel specifically respond to appellant's assertion that he failed to pursue mental health issues as a defense. Although the trial court, in response to appellant's complaint at the January 5th hearing, stated that it had already ruled on that issue, it is not clear from the record whether the trial court was referring to appellant's assertions, to its earlier ruling in connection with appellant's competency hearing, or if it mistakenly conflated his mental

health issues with the duress defense it had previously ruled on. In any event, counsel was never asked to respond to this particular concern.

As we stated in *Mendez*, *Marsden* requires that the trial court make a record sufficient to show the nature of the defendant's grievances and the court's responses to them. (*People v. Mendez*, *supra*, 161 Cal.App.4th at p. 1368.) This the trial court failed to do.

C. Does it make a difference in this case that the trial court conducted a *Marsden* hearing before appointing substitute counsel?

Appellant contends that it makes no difference that the trial court conducted a *Marsden* hearing before appointing substitute counsel because the court incorrectly assumed that it had already dealt with the mental health issues when it appointed counsel, and therefore ignored the issue appellant complained of. Respondent claims, as stated earlier, that the issue was addressed, and if not, there was no violation of appellant's substantial right in any respect because the trial court treated appellant as though he had made a sufficient showing under *Marsden* by replacing counsel to determine if a new trial motion was warranted.

The problems with respondent's analysis are discussed in *Eastman*. They include the trial court's failure to make an adequate record and the trial court's failure to itself ascertain counsel's effectiveness rather than delegating that function to a temporarily appointed attorney. (*Eastman*, *supra*, 146 Cal.App.4th at pp. 695-698.) We therefore reject respondent's assertion that the trial court's appointment of substitute counsel cured the court's error.

D. If error occurred, was it prejudicial?

Appellant contends the error was prejudicial because the trial court's failure to conduct a proper inquiry did not allow him to develop the record on the matter, and substitute counsel did not offer any specific reports or inquiries regarding the issue of appellant's mental health. Respondent again argues that appellant's substantial rights

were not violated as he agreed to the procedure below and substitute counsel addressed whether original counsel had been ineffective in his representation of appellant.

We have already rejected respondent's assertion that appellant was required to object to the procedure utilized by the trial court. We note in addition that it was not only the appointment of substitute counsel that was the error here. The trial court also erred by failing to conduct an adequate inquiry regarding appellant's alleged "mental issues" during the January 5, 2009, *Marsden* hearing. Respondent cites no case authority for the proposition that a defendant must object during the *Marsden* hearing in order to challenge the conduct of that hearing on appeal.

E. If prejudicial error occurred, what is the appropriate remedy?

Appellant contends that the judgment should be conditionally reversed with directions for the trial court to hold a *Marsden* hearing focused on "all complaints appellant raised after trial, including mental health defenses." Respondent states, "There is no logical answer to this question." As argued by respondent, no matter what the showing is at the *Marsden* hearing, the most a trial court can do is to modify appellant's representation, which is what it did.

But what respondent fails to note is that in the result of the trial court's procedure is the absence of any record regarding appellant's alleged mental health issues and whether defense counsel should have raised them or any one of them. (*Eastman*, *supra*, 146 Cal.App.4th at p. 696.) Also, in effect, the trial court's procedure resulted in a delegation of its duty to decide whether counsel represented appellant adequately to a temporarily appointed counsel who was then called upon to stand up in open court and, without making a record of how she had made the determination, announce that her temporary client had no legitimate complaint. (*Ibid*.)

The appropriate remedy is to remand the case with directions for the trial court to hold a *Marsden* hearing focused only on appellant's complaints that he had mental health issues at the time of the incident. If the court finds that appellant has shown that a failure to replace counsel would substantially impair his right to assistance of counsel, the court

shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make. If newly appointed counsel makes no motion, or any motions made are denied, or if appellant's *Marsden* motion is denied, the court shall reinstate the judgment.

4. Was counsel ineffective for having appellant testify in narrative form?

Appellant argues that defense counsel was ineffective when he requested that appellant testify in narrative form based on the unfounded assumption that his testimony would be perjured. Specifically, appellant contends this decision denied him his right to present a defense and it violated his right to due process and a fair trial. We find no prejudicial error.

Procedural background

During the December 3, 2008, *Marsden* hearing, defense counsel explained his concerns about appellant's desire to testify at trial. According to counsel, appellant was adamant that he was mistreated by the correctional officers for two to three years prior to the incident and wished to convey this to the jury. Although defense counsel advised appellant that mistreatment was not sufficient to obviate the fact that appellant was a prisoner in possession of a weapon in his cell, appellant was convinced he wanted to testify to the mistreatment as the reason for possessing the weapon.

Later during the same hearing, defense counsel again advised the trial court that he believed appellant was going to admit possessing the weapon but felt he was justified because he was mistreated by the officers. Although defense counsel did not believe mistreatment was a legal justification for appellant's actions, he was unable to communicate that to appellant.

The trial court then asked appellant if he intended to testify, and appellant confirmed that intent. The court explained that if appellant testified to "certain admissions such as you actually possessed a weapon while in prison," that would cause him to be found guilty of at least one of the charges against him. Appellant explained that if he did not testify, he would be found guilty of the charges anyway because the officers

stated that they found the weapon in his cell. The court again explained that appellant had the right to testify, that his attorney advised him against it, but that the court would allow appellant to exercise his right. Appellant did not respond, which the court noted on the record.

At trial, before appellant took the stand, an in camera hearing was conducted regarding appellant's decision to testify. Defense counsel then requested that appellant testify in narrative form pursuant to *Nix v. Whiteside* (1986) 475 U.S. 157, because appellant wished to testify against the advice of counsel. Defense counsel explained that he had advised appellant of his right to testify, the fact that it was the People's responsibility to prove its case, and of the "dangers and significant pitfalls" in taking the stand, but appellant still insisted he wished to testify. Appellant agreed that that was the case.

The trial court noted that *Nix v. Whiteside* deals with both a defendant's intent to testify against the advice of counsel and also with perjurious testimony. The court stated it was not asking defense counsel to state explicitly whether he considered appellant's testimony perjurious but assumed this was implicit in the request. Defense counsel explained that he requested narrative testimony because that allowed appellant to "get into areas that I cannot substantiate or corroborate and would be improper for me to lead him through questioning when I know or don't know that those things would be perjurious or not."

The court granted defense counsel's request. Appellant then again stated that he wanted the jury to know "what lead up to this," particularly that he had not been fed, he had been abused, and the officers had tampered with his meals. Defense counsel again stated that appellant's intent to admit possessing the weapon was injurious and against his advice. The court warned appellant that it did not think he had a duress defense, but appellant explained that the jurors would expect an explanation of why the incident occurred.

As appellant began his testimony, the court asked appellant what he wished to tell the court and the jury. Appellant then testified that he did possess a weapon, and that, by his actions, he intended to make the officers leave him alone. On cross-examination, appellant testified that he was trying "to get" Officer Braswell. On redirect examination, appellant denied intending to murder Officer Hieng. And in recross-examination, when asked whether he attempted to murder Braswell, appellant stated, "No, but I … can't tell you at the time how I was feeling."

Applicable law and analysis

It is well settled that a criminal defendant has an absolute right to testify over the objection of trial counsel. (See, e.g., *People v. Frierson* (1985) 39 Cal.3d 803, 813; *People v. Robles* (1970) 2 Cal.3d 205, 214-215; *People v. Harris* (1987) 191 Cal.App.3d 819, 824, 825.) It is equally settled that a defense counsel's refusal to participate in the presentation of perjurious testimony from the accused does not deny the client effective assistance of counsel. (*Nix v. Whiteside*, *supra*, 475 U.S. at p. 171.)

Under such circumstances, the courts have recognized a criminal defendant may testify on direct examination using a "narrative" form, rather than a question and answer form, allowing the defendant to tell the jury, in his or her own words, the defendant's version of what occurred. Courts have adopted this approach to balance the defendant's fundamental right to testify with counsel's ethical obligations. The option of presenting testimony in a narrative form arises directly from these conflicting interests. (*People v. Johnson* (1998) 62 Cal.App.4th 608, 629-631.)

The California cases *People v. Guzman* (1988) 45 Cal.3d 915 (*Guzman*), overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, footnote 13, and *People v. Gadson* (1993) 19 Cal.App.4th 1700 (*Gadson*), in the context of ineffective assistance of counsel claims, have expressly approved the use of the narrative approach.

In *Guzman*, a capital case, defense counsel informed the court that the defendant would be testifying against his advice and in a free narrative form. The court advised the defendant to follow his attorney's advice and warned him of the drawbacks of testifying.

The defendant elected to testify and did so in a narrative form. (*Guzman*, *supra*, 45 Cal.3d at pp. 941-942.) Lead counsel did not argue the defendant's testimony to the jury, although the defendant's second counsel referred to some of the testimony in argument. (*Id.* at p. 942.)

On appeal, the defendant argued use of the narrative approach resulted in a denial of his right to effective assistance of counsel because counsel did not use his version of the facts in argument, his attorney-client privilege was violated, and his attorney's approach was the product of a conflict of interest which was resolved against him. (*Guzman*, *supra*, 45 Cal.3d at p. 942.) The *Guzman* court rejected these arguments, noting first that that neither the United States Supreme Court nor the California Rules of Professional Conduct prohibited use of the narrative approach. (*Guzman*, at pp. 942, 944.) It rejected the defendant's claim that, because he testified in narrative fashion, the jury had notice that his counsel did not believe him. The defendant's testimony was clear and coherent and his attorneys' conduct in no way signaled to the jury that they disbelieved their client. (*Id.* at p. 946.) The court also rejected the defendant's argument that the narrative testimony in essence forced him to unknowingly represent himself. It found that the defendant had been "forced" to represent himself only with respect to his own direct testimony; otherwise, counsel had been available and participated in the trial. The court had expressly advised the defendant of the dangers of testifying in a narrative fashion, but the defendant had elected to do so anyway. (*Ibid.*)

Similarly, in *Gadson*, defense counsel informed the court that the defendant would be testifying against his advice and would call two witnesses. The court advised the defendant he would be allowed to testify in a narrative form and noted the drawbacks of presenting such testimony. The defendant then testified and presented the witnesses. On appeal, he claimed counsel was ineffective for allowing him to so testify. (*Gadson*, *supra*, 19 Cal.App.4th at p. 1709.)

The *Gadson* court rejected the defendant's arguments, noted that a defendant has an absolute right to testify over the objection of counsel but, citing *Nix v. Whiteside*,

supra, 475 U.S. at page 171, also noted that a defense counsel's refusal to participate in the presentation of perjurious testimony from the accused does not deny the client effective assistance of counsel. (*Gadson*, *supra*, 19 Cal.App.4th at p. 1710.) After reviewing the *Guzman* case, the *Gadson* court found the narrative approach properly reconciled the competing interests; the defendant was able to testify on his own behalf and trial counsel refrained from actively participating in the presentation of false testimony. This allowed the defendant the assistance of trial counsel without compromising the integrity of the adversarial system of justice. (*Gadson*, *supra*, at p. 1711.)

> "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1126.)

Appellant contends defense counsel's insistence that his testimony was perjurious led to the use of the narrative approach, which then denied him effective assistance of counsel because counsel avoided appellant's reports of abuse to explain his motive. He also contends that defense counsel failed to argue appellant's testimony in addressing the trial court's refusal to instruct on duress and necessity as a defense.

But whether or not defense counsel's decision to use the narrative approach fell below an objective standard of reasonableness, appellant has failed to show a reasonable probability that, but for the use of the narrative approach, a determination more favorable to him would have been the result. It was appellant who insisted that he testify, despite the fact that he was warned of various negative consequences.[9] While the prosecutor was

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[9]Without citation to authority, appellant seems to contend the absence of an on-the-record warning that defense counsel would eschew appellant's testimony in formulating his request for instructions and his closing argument demonstrates error. Two factors condemn the success of

allowed to cross-examine appellant and point out the weaknesses in his testimony, this would have happened even in a traditional question and answer testimony format. And, as will be discussed in part 5., *post*, the facts did not call for instructions on duress or necessity defenses. Any requests by counsel for those instructions would have been futile.

For the foregoing reasons, we conclude that appellant has failed to show he received ineffective assistance of counsel.

Neither was appellant denied the right to present a defense. Quite literally, he was allowed to explain to the jury what occurred and why. That his explanation did not provide a legal defense to the charges obviously does not establish a constitutional violation.

5. Did the trial court err when it failed to instruct on necessity defense and attempted manslaughter?

Appellant contends that the trial court erred when it failed to instruct on the defense of necessity and the lesser included offense of attempted voluntary manslaughter. Specifically, appellant contends that he presented evidence that met all of the elements required for a necessity defense, and instructions on attempted voluntary manslaughter were required because his testimony provided evidence under a theory of heat of passion. We disagree.

Procedural background

During a hearing outside the presence of the jury, before appellant testified, defense counsel learned that appellant wanted to provide federal case citations to the court based on the defense of duress and necessity. The court stated that it could not perform research on those federal cases while the jury was waiting.

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this argument: the absence of authority and the fact that we do not know what happened off the record.

After appellant's testimony, defense counsel again asked that the court consider its ruling on the four inmate witnesses appellant wished to call. It is within the context of this motion that the court addressed appellant's contention that he had a necessity defense, stating:

> "[T]he court will note that while [appellant] might believe that he has touched on necessity of defense, the testimony is such that, one, the act charged as criminal must have been done to prevent a significant evil. Two, there must have been no adequate alternative to the commission of the act. Three, the harm caused by the act to the harm of avoiding [*sic*]. Four, the accused must entertain a good faith belief that his act was necessary to prevent the greater harm. Five, such belief must be objectively reasonable under all the circumstances. Six, the accused must not have … substantially contributed to the creation of the emergency. [¶] In reviewing the evidence that has been tendered so far the Court finds that it is insufficient even on its face from what the belief of [appellant] was …."

During the next court hearing, the court and counsel discussed jury instructions. At this point, defense counsel indicated that he would not request necessity and duress instructions because the court had ruled that appellant could not call the four inmate witnesses to testify.

Applicable law and analysis

A trial court must instruct on general principles of law that are closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case, including defenses on which the defendant relies or which are not inconsistent with the defendant's theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469; *People v. Salas* (2006) 37 Cal.4th 967, 982.) A court is not obligated to instruct on theories that lack substantial evidentiary support. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267.) """"Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.""" [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) In determining whether an instruction is required, an appellate court does not determine the credibility of the defense evidence, but only whether there was evidence which, if

credited by the jury, was sufficient to raise a reasonable doubt. (*People v. Salas*, *supra*, at p. 982; *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484.) An appellate court independently reviews the question of whether the trial court erred by failing to instruct on defenses and lesser included offenses. (*People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that:

> "'[he] [or she] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under the circumstances in which [he] [or she] did not substantially contribute to the emergency. [Citations.]' [Citation.]" (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1160.)

A defendant is not entitled to a claim of necessity unless, given the imminence of the threat, violation of the law was the only reasonable alternative. (*United States v. Bailey* (1980) 444 U.S. 394, 410-411.) If there was a reasonable alternative to violating the law, the defense will fail. (*Ibid.*) In other words, the necessity defense does not arise from a "choice" of several sources of action, but is instead based on a real emergency. (*United States v. Dorrell* (9th Cir. 1985) 758 F.2d 427, 431.)

Here, the facts presented do not support the defense of necessity. "[A] well-established central element [of the necessity defense] involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent." (*People v. Patrick* (1981) 126 Cal.App.3d 952, 960.) The danger appellant testified to was not immediate or imminent. To the contrary, appellant testified that the abuse he suffered had been going on for months and he had been trying to resolve some of the issues through complaints and inmate appeals. On the day in question, appellant said he was "fed up" and "tired." Evidence at trial was that the attack took place when the officers attempted to give him food through a port in his cell door.

Appellant's own testimony that he had filed numerous appeals relating to his treatment demonstrated that there were reasonable legal alternatives available to him. "'The necessity defense is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile.' [Citation.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164.) While appellant may have been frustrated with the complaint or appeals process, he did have legal recourse.

Finally, appellant's actions of thrusting a spear at the officers created a greater danger than the one he wished to avoid.

> "'As a matter of public policy, self-help by lawbreaking and violence cannot be countenanced where the alleged danger is merely speculative and the lawbreaker has made no attempt to enlist law enforcement on his side. '[T]he defense of necessity is inappropriate where it would encourage rather than deter violence. Violence justified in the name of preempting some future, necessarily speculative threat to life is the greater, not the lesser evil.' [Citation]." (*People v. Miceli, supra,* 104 Cal.App.4th at p. 268.)

Because substantial evidence does not support the defense of necessity, we reject appellant's contention that instruction on that defense should have been given.

We also reject appellant's contention that the trial court erred in not instructing on attempted voluntary manslaughter based on a theory of sudden quarrel or heat of passion. (See, e.g., *People v. Barton* (1995) 12 Cal.4th 186, 201-202 [attempted voluntary manslaughter a lesser included offense to attempted murder].) "Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion …." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) A trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 154-155.)

The provocation which incites a defendant to homicidal conduct must be caused by the victim or by conduct reasonably believed by the defendant to have been engaged in by the victim. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Id.* at pp. 583-584.) "'Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'" [Citation.]" (*Id.* at p. 584.)

But when "'sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter ….' [Citation.]" (*People v. Breverman, supra*, 19 Cal.4th at p. 163.) And, "[h]eat of passion may not be based upon revenge." (*People v. Burnett* (1993) 12 Cal.App.4th 469, 478; see also *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 ["Revenge does not qualify as a passion that will reduce a killing to manslaughter"].)

Appellant contends that his description of "severe, persistent, ignored, and uncorrected abuse" by the corrections officers could support an inference of "immediate and building heat of passion." We disagree. Appellant's contention that he had been mistreated for weeks by certain officers, not necessarily the ones he attacked, was insufficient as a matter of law to provoke a reasonable person of average disposition to attempt to kill Officer Hieng or Braswell. Instead, appellant's testimony demonstrated the he acted out of revenge. He himself testified that he thrust the spear at the officers because he was "fed up" and "tired." Although appellant testified that he went "at it with [the officers]" and that they had "argue[d] over and over and over for minutes," there was no indication that had occurred near the time of the attack. In fact, the evidence was that appellant's only interaction with the officers on the day of the attack was at the time they attempted to serve him his meal.

We therefore reject appellant's claim that the trial court should have instructed on the lesser included offense of attempted voluntary manslaughter.

6. Cumulative error

Appellant argues that the cumulative impact of the alleged errors deprived him of a fair trial. We disagree. We have either rejected appellant's claims or found any errors, assumed or not, to be not prejudicial on an individual basis. Viewing the errors as a whole, we conclude that the errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

7. Sentencing issues

Finally, appellant claims sentencing errors occurred. We agree with several of his contentions, but we first set out the details of his sentencing and then address each contention in turn.

Procedural background

The trial court sentenced appellant to an indeterminate term of 104 years to life, computed as follows:

Count 1: An indeterminate term of 45 years to life (tripled term because of prior strikes), plus a consecutive 15 years (3 five-year terms) for each of the three section 667, subdivision (a)(1) allegations, plus two years total (2 one-year terms) for each of the two section 667.5, subdivision (b) allegations, for a total term of 62 years to life.

Count 2: A stayed indeterminate term of 45 years to life (tripled term because of prior strikes), plus a consecutive 15 years (3 five-year terms) for each of the three section 667, subdivision (a)(1) allegations, plus two years total (2 one-year terms) for each of the two section 667.5, subdivision (b) allegations, for a total of 62 years to life.

Count 3: A stayed indeterminate term of 27 years to life, plus 15 years (3 five-year terms) for each of the three section 667, subdivision (a)(1) allegations, plus two years total (2 one-year terms) for each of the two section 667.5, subdivision (b) allegations, for a total of 44 years to life.

Count 4: A stayed indeterminate term of 25 years to life, plus two years total (2 one-year terms) for each of the two section 667.5, subdivision (b) allegations, for a total of 27 years to life.

Count 5: A consecutive indeterminate term of 27 years to life, plus 15 years (3 five-year terms) for each of the three section 667, subdivision (a)(1) allegations, for a total of 42 years to life.

Count 6: A concurrent indeterminate term of 25 years to life, plus stayed enhancements, for a total of 25 years to life.

Enhancements imposed pursuant to section 667, subdivision (a)(1)

The jury found true the allegation that appellant had suffered three prior convictions pursuant to section 667, subdivision (a)(1), and the court imposed 3 five-year enhancements pursuant to that section on counts 1, 2, 3, and 5. Appellant contends that one of the five-year enhancements imposed on each count must be stricken because it was based on a juvenile adjudication, Los Angeles case No. J111952. Respondent agrees.

Section 667, subdivision (a)(1) provides in part:

> "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state …, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

The parties agree that a prior juvenile adjudication may not be used to enhance an adult criminal offense under section 667, subdivision (a)(1). (See *People v. West* (1984) 154 Cal.App.3d 100, 103, 110 ["defendant's prior juvenile adjudications were not 'prior [convictions]' within the meaning of … section 667, subdivision (a)(1)"], cited with approval in *People v. Garcia* (1999) 21 Cal.4th 1, 24 & *People v. Weidert* (1985) 39 Cal.3d 836, 847-848, fn. 10.) The trial court therefore erred in imposing the section 667,

subdivision (a) five-year enhancement on counts 1, 2, 3, and 5, based upon appellant's prior juvenile adjudication, and they must be stricken.[10]

Enhancements imposed pursuant to section 667.5, subdivision (b)

The jury found true the allegation that appellant had two prior prison commitments pursuant to section 667.5, subdivision (b), and, as stated *ante*, three prior felony convictions pursuant to section 667, subdivision (a). Appellant argues that the trial court erred by imposing both a five-year prior serious felony enhancement and a one-year prior prison term enhancement in counts 1, 2, and 3 based on the same prior conviction, appellant's February 23, 1989, conviction in Los Angeles case No. GA001700. Appellant asks that this court strike one of the one-year prior prison term enhancements on those counts. Respondent concedes the error and agrees that the enhancement should be stricken.

In *People v. Jones* (1993) 5 Cal.4th 1142, the trial court imposed an enhancement under section 667, subdivision (a), and under section 667.5, subdivision (b), based upon one prior felony offense of kidnapping. (*Jones*, at p. 1145.) The Supreme Court in *Jones* determined that "in enacting what is now subdivision (a) of section 667, the voters did not intend that a defendant's sentence would be enhanced for both a prior conviction (under the new statute) *and* the resulting prison term (under § 667.5)." (*People v. Murphy* (2001) 25 Cal.4th 136, 156.) At the time of the *Jones* decision, former subdivision (b) of section 667 provided: "'This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this section to apply.'"[11] (*People v. Jones*, *supra*, at p. 1149.) The court stated that "the most reasonable reading of [former]

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[10]We note that although the court imposed a five-year enhancement for counts 2 and 3, it stayed imposition of sentence for those counts pursuant to section 654. Thus, the five-year term imposed for those counts must be stricken but will not affect the aggregate term imposed.

[11]This language is now contained in section 667, subdivision (a)(2).

subdivision (b) of section 667 is that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.)

The trial court therefore erred in imposing one of the one-year enhancements on counts 1, 2, and 3 and they must be stricken.[12]

Appellant's substantive sentence on counts 3 and 5

The amended information charged appellant in counts 3 and 5 with violating section 4501, assault with a deadly weapon by a prisoner. The jury convicted appellant of both counts. At sentencing, the trial court calculated appellant's term for the substantive offense in each count to be 27 years to life. Appellant argues, and respondent agrees as do we, that the proper calculation for those two counts should be 25 years to life.

Section 4501 provides for a sentencing triad of two, four, or six years. Section 1170.12, subdivision (c), provides, in relevant part:

> "For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] …[¶] (2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [¶] (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or [¶] (ii) twenty-five years …."

Thus, under section 1170.12, subdivision (c)(2)(A)(i), and subdivision (c)(2)(A)(ii), the minimum term of appellant's indeterminate sentence for counts 3 and 5 would be either three times six years, for a total of 18 years, or 25 years. Section 1170.12, subdivision (c)(2)(A), requires that the greater term, in this case 25 years, be imposed.

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[12]We note that although the court imposed the one-year enhancement for counts 2 and 3, it stayed imposition of sentence for those counts pursuant to section 654. Thus, the one-year term imposed for those counts must be stricken but will not affect the aggregate term imposed.

The trial court therefore erred in imposing the 27 years to life sentence of those two counts, and the abstract of judgment should be amended to reflect an indeterminate term of 25 years to life on counts 3 and 5.[13]

Juvenile adjudication

Appellant next claims his 1985 juvenile adjudication should not qualify as a strike under the three strikes law because as a juvenile he was not entitled to a jury trial.

The recent case of *People v. Nguyen* (2009) 46 Cal.4th 1007 addressed the question whether a juvenile adjudication could be used as a strike under California's three strikes law. The issue presented was whether juvenile adjudications could constitutionally be used as strikes given that juveniles are not entitled to a jury trial. Our Supreme Court held that such adjudications could be used as strikes and that such use did not violate federal constitutional principles. Appellant recognizes this court is bound by the decisions of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But appellant makes the argument to preserve any right he might have to address the issue on review of his sentence by a federal court.

We have no authority to revisit the question of the applicability of the three strikes law to qualified adjudications, and therefore reject appellant's claim.

Abstract of judgment

At sentencing, the trial court imposed count 6 as a concurrent term to count 1, as reflected in the reporter's transcript and the minute order. But the abstract of judgment states that the term for count 6 is stayed pursuant to section 654. Appellant contends, and respondent agrees, that the abstract of judgment must be corrected to reflect the oral pronouncement of judgment.

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[13]Because the trial court ordered sentence on count 3 stayed, appellant's total aggregate term will not be affected by the change to his sentence on that count.

We will order that the abstract of judgment be corrected to reflect the oral pronouncement of judgment for count 6 as running concurrent to count 1. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187.)

In addition, respondent notes an additional sentencing error for count 6. The reporter's transcript noted that the court sentenced appellant in count 6 to a term of 25 years to life and that "the enhancements will be stayed," without specifically mentioning the statute under which the "enhancements" were imposed. The minute order states that, in addition to the 25-year-to-life sentence on that count, appellant received ""plus 5 years pursuant to 667.5(b) PC, plus 5 years pursuant to 667.5(b) PC and the both allegations of 667.5(b) PC as to Count 6 are stayed …." (Boldface omitted.) Since the five-year prior serious felony allegation was not alleged as to count 6, the court improperly ordered a five-year term for each of the section 667.5, subdivision (b), enhancements associated with count 6, instead of the additional one-year term authorized by the statute. But because the court stayed imposition of the enhancements, there is no calculation for these enhancements on the abstract of judgment.

Appellant requests that we order the minute order of the sentencing hearing corrected to properly reflect the one-year rather than five-year enhancements on count 6. We will order that the minute order be corrected to reflect that the enhancements attached to count 6 are for a one-year, not five-year, term. (*People v. Mitchell*, *supra*, 26 Cal.4th at pp. 183-185, 188.)

DISPOSITION

The judgment is conditionally reversed with directions for the trial court to hold a *Marsden* hearing focused only on appellant's complaints that he had mental health issues at the time of the incident. If the court finds that appellant has shown that a failure to replace counsel would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make. If newly appointed counsel makes no motion, or any

motions made are denied, or if appellant's *Marsden* motion is denied, the court shall reinstate the judgment.

If the judgment is reinstated, the superior court is directed to prepare a corrected minute order to reflect that the enhancements imposed in count 6 pursuant to section 667.5, subdivision (b) are for a one-year, not five-year, term. In addition, the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation a corrected abstract of judgment showing one of the section 667, subdivision (a)(1) enhancements stricken from counts 1, 2, 3, and 5; one of the section 667.5, subdivision (b) enhancements stricken from counts 1, 2, and 3; the substantive term for counts 3 and 5 corrected to reflect a term of 25 years to life; and the term for count 6 corrected to reflect that it is a concurrent and not a stayed term. Given all of the corrections, appellant's total aggregate term of confinement is calculated at 91 years to life.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.