SUPREME COURT NO. S1[illegible]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES ELMORE, Defendant and Appellant.	Court of Appeal No.: B216917 (Superior Court No.: TA090607)

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

Honorable Arthur Lew, Judge Presiding

PETITION OF APPELLANT FOR REVIEW AFTER THE UNPUBLISHED OPINION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN, VACATING AND REMANDING WITH INSTRUCTIONS THE JUDGMENT OF CONVICTION

SUPREME COURT
FILED

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By Appointment of the
Court of Appeal under the
California Appellate Project
independent case system

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SUPREME COURT NO.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal
	)	No.: B216917
Plaintiff and Respondent,	)	
	)	(Superior Court
v.	)	No.: TA090607)
	)	
CHARLES ELMORE,	)	
	)	
Defendant and Appellant.	)	
______________________________	)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

Honorable Arthur Lew, Judge Presiding

PETITION OF APPELLANT FOR REVIEW AFTER THE UNPUBLISHED OPINION OF THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN, VACATING AND REMANDING WITH INSTRUCTIONS THE JUDGMENT OF CONVICTION

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant, Charles Elmore, respectfully requests this Court grant review in the above-entitled case following the unpublished opinion of the

Court of Appeal, Second Appellate District, Division Seven, vacating and remanding with instructions the judgment of the Superior Court of Los Angeles County.

The opinion of the Court of Appeal was filed on October 27, 2010. A copy of the Opinion is attached hereto as Appendix A.

Pursuant to California Rules of Court, rule 8.500, review is urged to settle an important issue of law.

ISSUE PRESENTED FOR REVIEW

1. Under California law, does the doctrine of imperfect self-defense apply in a case in which the defendant's actual, though unreasonable, belief in the need to defend himself was based on delusions and/or hallucinations resulting from mental illness, without any objective circumstances suggestive of a threat?

STATEMENT OF CASE AND FACTS

Appellant adopts the procedural and factual background as set forth in the Court of Appeal's Opinion. (Appendix A pp. 1-11.)

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ARGUMENT

I

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER UNDER CALIFORNIA LAW, THE DOCTRINE OF IMPERFECT SELF-DEFENSE APPLIES IN A CASE IN WHICH THE DEFENDANT'S ACTUAL, THOUGH UNREASONABLE, BELIEF IN THE NEED TO DEFEND HIMSELF WAS BASED ON DELUSIONS AND/OR HALLUCINATIONS RESULTING FROM MENTAL ILLNESS, WITHOUT ANY OBJECIVE CIRCUMSTANCES SUGGESTIVE OF A THREAT

In *People v. Wright* (2005) 35 Cal.4th 964 ("*Wright*"), this Court previously granted review to determine whether to extend the doctrine of imperfect self-defense to a case in which the defendant's actual, though unreasonable, belief in the need to defend himself was based on delusions and/or hallucinations resulting from mental illness or voluntary intoxication, without any objective circumstances suggestive of a threat. (*Id.* at p. 966.)

However, after examining the record in *Wright*, this Court concluded that it was unnecessary to decide the issue, because the defendant had suffered no prejudice, as he was able to claim imperfect self-defense, the jury heard evidence supporting that defense, and the trial court's exclusion of additional evidence supporting that defense was not prejudicial to defendant. (*People v. Wright, supra,* 35 Cal.4th at p. 966.)

Subsequent to this Court's ruling in *Wright*, one decision from the Court of Appeal addressed this question, and concluded that imperfect self-defense cannot be based on delusion alone. (*People v. Mejia-Linares* (2006) 135 Cal.App.4th 1437 ("*Mejia-Linares*").) The Fifth District Court of Appeal in *Mejia-Linares* held that to trigger application of this doctrine, there must also be some evidence of objectively reasonable circumstances that would support a defendant's belief in the need to defend himself from imminent peril. (*Ibid.*)

The case at bar squarely presents the issue left open by this Court in *Wright*. In this case, appellant was, by all accounts, mentally ill, and there was substantial evidence that appellant experienced a psychotic, delusional episode during which time he committed a fatal stabbing based on the actual, though unreasonable, belief in the need to defend himself, without any objective circumstances suggestive of a threat.

For example, in addition to his history of mental illness including schizophrenia, there was evidence that appellant actually, but unreasonably, believed there was a violent situation at the time of the stabbing, that he was hit in the face and body with a crowbar immediately before the stabbing, that he was "cracked in the head," that he fell to the ground from being struck, and that he responded by stabbing a person at a bus stop who did not present

any objective threat. (See Appendix A pp. 2-11; 6 R.T. pp. 2187, 2190-2191; 7 R.T. pp. 2512, 2514; 8 R.T. pp. 3402-3406.)

Based on this evidence, appellant requested his jury be instructed on voluntary manslaughter based on imperfect self-defense, but the trial court refused. (Appendix A p. 12; 8 R.T. pp. 3325, 3330; 9 R.T. pp. 3609-3613.)

On appeal, appellant urged that the trial court erred in refusing the requested instruction on imperfect self-defense, and maintained that the doctrine of imperfect-defense should apply when a defendant kills in the actual, though unreasonable, belief in the need to defend himself when the mistaken belief is based on delusion and/or hallucination as a result of mental illness, without any objective circumstances indicative of a threat. (Appendix A p. 12.)

The Court of Appeal instead agreed with the decision in *Mejia-Linares*, and held that the doctrine of imperfect self-defense does not apply where the subjective belief in the need to defend oneself arises not from objective circumstances but purely from the defendant's mental illness. (Appendix A p. 12.)

Appellant respectfully requests this Court grant to review to decide this question of law left open in *Wright*. Moreover, appellant notes that unlike in *Wright*, if this Court were to grant review and decide that the defense applies, this case would involve prejudice, as demonstrated by both the

evidence herein and the Court of Appeal's reversal of appellant's first degree murder conviction based on instructional error on the element of premeditation. (Appendix A pp. 13-19.)

Finally, as will be set forth below, appellant respectfully urges that there are numerous reasons why *Mejia-Linares* was incorrectly decided, and that a defendant who kills in the actual, but unreasonable, belief in the need to defend himself purely as a result of delusion or hallucination should be entitled to rely upon the doctrine of imperfect self-defense.

Initially, the plain language of Penal Code sections 28 and 192 support's this conclusion. These sections provide in relevant part:

> "Manslaughter is the unlawful killing of a human being without malice."
> (Pen. Code § 192.)
>
> "Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."
> (Pen. Code § 28.)

Consistent with this plain statutory language, evidence of mental defect, i.e. evidence of delusion or hallucination, may negate the malice aforethought element required for murder. There is nothing in the statutory scheme to require an additional finding that the defendant's subjective belief due to mental defect was supported by some objective circumstances.

Moreover, the Court of Appeal's decision to additionally require objective reasonableness of a defendant's subjective belief in *Mejia-Linares* hinged in part on failing to correctly interpret *Flannel* as having placed the imperfect self-defense doctrine outside the ambit of a reasonableness requirement. As stated by the Court in *Mejia-Linares*:

> "We recognize that *Flannel* states: 'No matter how the mistaken assessment is made, an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously be aware that society expects conformity to a different standard.' ([*People v.*] *Flannel* [1979] 25 Cal.3d [668] at p. 679.) In our view, this statement does not render irrelevant the basis of a defendant's actual belief: it relied on the expanded mental component of malice construed and applied in *People v. Conley* [(1966)] 64 Cal.2d 310, which established the defense of diminished capacity. As the California Supreme Court has since recognized, this portion of *Flannel's* reasoning is no longer valid due to the abolition of diminished capacity. (*In re Christian S.* [1994] 7 Cal.4th 768 at p. 777.)" (*People v. Mejia-Linares, supra*, 135 Cal.App.4th at p. 1454.)

However, this Court in *Christian S.* did not recognize that the above quoted portion of *Flannel's* reasoning was no longer valid because it related to the doctrine of diminished capacity. (See *In re Christian S., supra*, 7 Cal.4th at p. 777.) Rather, in *Christian S.*, this Court recognized that *Flannel's* recognition of the doctrine of imperfect self-defense was based on two independent premises, the prior concept of diminished capacity, and both the common law and statutory requirement of malice. (*Ibid.*) The fact that the Legislature later chose to abrogate the defense of diminished

capacity negated *Flannel's* prior premise, but had no affect on its latter which remains fully intact subsequent to the legislative amendment eliminating diminished capacity. (*Ibid.*)

Thus, the express language in *Flannel* stating that imperfect self-defense applies as long as the belief in the need to defend oneself is actual, "[n]o matter how the mistaken assessment is made," remains fully applicable. (*People v. Flannel, supra,* 25 Cal.3d at p. 679.) Also remaining good law is *Flannel's* express rejection of the Attorney General's argument that an actual belief in the need to defend oneself, if unreasonably held, can be consistent with malice. (*Ibid.*)

There is further support for appellant's position in the *Flannel* decision. As set forth in Justice Brown's concurrence, "in *Flannel* by disconnecting imperfect self-defense from heat-of-passion manslaughter, we arguably disconnected it also from this long-standing reasonableness requirement…." (*People v. Wright, supra*, 35 Cal.4th at p. 982 (conc. opn. of Brown, J.).) "We separated these doctrines because imperfect self-defense by definition involves an *unreasonable* response to the circumstances (for otherwise it would be *true* self-defense), whereas heat-of-passion manslaughter requires a provocation that would arouse the passions of a '"*reasonable* person.' " ([*People v. Flannel, supra*, 25 Cal.3d at p. 678], italics added.) We believed these standards to be mutually

inconsistent. (*Ibid.*)" (*Id.* at p. 980.) Appellant urges that these standards are mutually inconsistent, and a reasonableness requirement should not be grafted upon the doctrine of unreasonable or imperfect self-defense.

The *Mejia-Linares* decision also reasoned that "section 28 has no impact on the imperfect self-defense doctrine. The court in *Christian S.* specifically found that the Legislature intended no change in the doctrine of imperfect self-defense when it enacted the 1981 legislation -- including section 28 -- that abolished diminished capacity." (*People v. Mejia-Linares, supra,* 135 Cal.App.4th at p. 1455, citing *In re Christian S.*, *supra*, 7 Cal.4th at p. 775.) This reasoning if flawed, however, because neither *Christian S.* nor the 1981 legislation rejected the applicability of section 28 to the imperfect self-defense doctrine. The portion of *Christian S.* referenced in *Mejia-Linares* is properly understood as answering in the negative the question of whether Legislative abolition of the diminished capacity defense abrogated the doctrine of imperfect self-defense. (*In re Christian S, supra*, 7 Cal.4th at p. 775.)

Christian S. and the Legislative amendment actually support the opposite proposition, namely, that the Legislature did not intend to require a defendant exhibit some level of reasonableness in order to support a voluntary manslaughter finding based on delusional self-defense. As stated in *Christian S.*, "In abolishing the diminished capacity defense, the

Legislature stated that *except in the delusional self-defense kinds of cases*, there will have to be a showing of provocation, the traditional basis of manslaughter, to reduce murder to manslaughter. (*In re Christian S., supra*, 7 Cal.4th at p. 781, quoting from Letter from Joint Com. for the Revision of the Pen. Code to Governor's Deputy Legal Affairs Sect., Sept. 4, 1981, italics added.) Thus, both *Christian S.* and the Legislature expressly recognized the existence of delusional self-defense without any requisite showing of provocation, which is fully consistent with appellant's position.

The *Mejia-Linares* decision effectively dispensed with this legislative history, explaining that "[t]his statement does not persuade us that the Legislature intended imperfect self-defense to apply to cases where the defendant's actual belief is unsupported by any factual basis, since the legislative history suggests the Legislature did not focus on the question of imperfect self-defense." (*People v. Mejia-Linares, supra*, 135 Cal.App.4th at p. 1455.) Appellant urges that the court's reasoning is unpersuasive in light of a plain reading of the Legislative statement, and the lack of any legislative statements to the contrary.

The *Mejia-Linares* decision further explained that Penal Code section 28 would be fully operable under its ruling because evidence of mental illness, if accompanied by other facts that would lead a reasonable person to perceive the need for self-defense, would still be admissible to

negate malice and support a claim of imperfect self-defense. (*People v. Mejia-Linares, supra,* 135 Cal.App.4th at pp. 1454-1455.) However, the language of section 28 does not state that other objectively reasonable evidence, in addition to an actual belief in the need for self-defense, whether such belief is based on delusion or otherwise, is required to negate malice. It says that evidence of mental illness may negate malice, and it appears that section 28 would be impermissibly altered, rather than effectuated, should the rule set forth in *Mejia-Linares* be allowed to stand.

Indeed, a defendant who kills in imperfect self-defense because of mental illness alone appropriately lacks malice just as a defendant who kills because of mental illness and some other circumstance lacks malice. As the concurrence in *Wright* recognized, "[w]e can cite as a limitation on imperfect self-defense the long-standing objective requirement that it be 'caused by the circumstances,' [Citations] but doing so does not necessarily solve the problem of how, without a statutory provision, we can fictionally impute malice where there is no actual malice in the defendant's delusional inner world." (*People v. Wright, supra,* 35 Cal.4th at p. 986.)

The distinction drawn in *Mejia-Linares* would also arguably produce anomalous results in which more seriously mentally ill individuals who kill are faced with juries that may only choose between murder and exoneration, while the less seriously mentally ill, who kill based on delusion and some

additional objective fact, are aided by the middle road afforded by the imperfect self-defense doctrine.

In support of its position, the *Mejia-Linares* decision also reasoned that "[t]o hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion as the basis of unreasonable mistake of fact effectively permits him or her to use insanity as a defense without pleading guilty by reason of insanity ... If a defendant is operating under a delusion as the result of mental disease or defect, then the issue is one of insanity, not factual mistake." (*People v. Mejia-Linares, supra*, 135 Cal.App.4th at p. 1456.) This particular reasoning is misplaced for two reasons.

First, insanity is a term of art, and a lack of requisite mental state at the guilt phase of a trial is not the same as a finding of insanity at the sanity phase. (See, e.g., *People v. Hernandez* (2000) 22 Cal.4th 512, 520; *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112; Pen. Code, §§ 21, 28, 29.) Second, within Penal Code section 28, the Legislature expressly incorporated mental disease or defect within the guilt phase of a trial. Thus, *Mejia-Linares'* conclusion that such a mental illness question is appropriately reserved only for the sanity phase of a trial is misplaced.

Even if section 28 could somehow be deemed ambiguous, which it appears not to be at least with respect to whether evidence of mental illness

may negate malice in the guilt phase of a trial, it must be construed in appellant's favor. "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*In re Christian S., supra*, 7 Cal.4th at p. 779; *People v. Stuart* (1956) 47 Cal.2d 167, 175.)

The *Wright* concurrence concluded that "the only sensible solution, then," to solve the conflict between the common law principal that reasonableness is an element of voluntary manslaughter and the holding from *Flannel*, "would be to correct the error we made over a quarter-century ago and once again locate imperfect self-defense within the statutory category of heat-of-passion manslaughter. The Legislature could easily correct our 1979 misstep by providing clear definitions of malice and imperfect self-defense, and I urge the Legislature to do so, thereby restoring coherence and common sense to California's homicide law." (*People v. Wright, supra*, 35 Cal.4th at pp. 985-986.)

Considering both the inherently unreasonable nature of imperfect self-defense, and the applicable statutory scheme, appellant respectfully urges that *Flannel* was correctly decided rather than being a misstep.

Indeed, as a matter of policy, equity, and logic, it ultimately would be inappropriate to hold that a person who kills in the actual, but unreasonable belief in the need for self-defense because of a severe mental

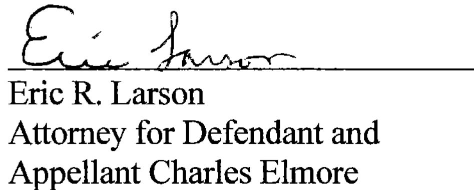
illness that caused him to misperceive reality should be considered to have acted with malice, whereas a person who kills in the actual, but unreasonable belief in the need for self-defense for any other reason that caused him to misperceive reality, such as because he has moderate mental illness and poor physical vision, should be considered not to have acted with malice.

For all of the above reasons, appellant urges this Court grant review to settle this important question of law.

CONCLUSION

For the reasons set forth above and in the interests of justice, appellant respectfully requests that this Court grant his petition for review.

Dated: November 15, 2010

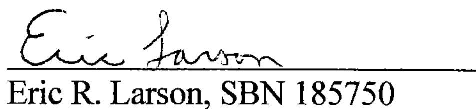


Eric R. Larson
Attorney for Defendant and
Appellant Charles Elmore

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court rule 8.504, I, Eric R. Larson, hereby certify that according to the Microsoft Word computer program used to prepare this document, this Petition for Review contains a total of 3,146 words.

Executed this 15th day of November, 2010, in San Diego, California.



Eric R. Larson, SBN 185750

APPENDIX A

Filed 10/27/10 P. v. Elmore CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ELMORE, Defendant and Appellant.	B216917 (Los Angeles County Super. Ct. No. TA090607)

APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Lew, Judge. Vacated and remanded with instructions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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Charles Elmore stabbed Ella Suggs to death at a bus stop. He appeals his conviction for first degree murder on the ground that the jury should have had the option of convicting him of voluntary manslaughter based on imperfect self-defense arising from psychotic delusions. He further claims that the trial court should have instructed the jury concerning the effects of hallucinations on the elements of premeditation and deliberation. Because there was substantial evidence that Elmore was hallucinating at the time of the killing, we vacate the judgment and remand the matter to the trial court with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Charles Elmore was, by all accounts, mentally ill. He had been institutionalized on several occasions and diagnosed with schizophrenia and psychosis. As of April 2007, Elmore was living in a rehabilitation center. On April 29, he visited his grandmother in the late morning. Witnesses estimated his arrival as occurring between 10:00 a.m. and 12:30 p.m. or between 11:30 a.m. and 12:00 p.m. Elmore was fidgety and anxious. He did not seem like himself and was animated, antsy, and wild. His uncle, Sheldon Daniels, thought that Elmore appeared as if he were on PCP. Daniels' girlfriend observed that Elmore did not sound rational. At one point, Elmore began to crawl under cars when his family and friend were trying to speak with him. Elmore left his grandmother's home at 12:30 p.m. or perhaps as late as 1:00 p.m.

The same day, Ella Suggs was going about her weekend routine: shopping at a local thrift store and a grocery store. When she shopped, she wore a necklace with a charm in the shape of a turtle with a small magnifying glass in the place of the turtle shell; this allowed her to examine closely potential purchases. She also wore reading glasses on a chain around her neck.[1]

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[1] Neither Suggs' turtle necklace nor her reading glasses were recovered from the scene or found among her possessions.

Brandon Wilson was looking out the window in a restaurant around 1:00 p.m. and saw Suggs seated with a bag and a purse at a bus stop across the street. As he watched, Elmore walked past Suggs without stopping. Elmore stopped a distance away and looked in both directions, then returned to the bus stop. Elmore was not walking normally: he seemed to be holding up his pants. He did not appear to be talking to himself or to someone who was not there.

Elmore grabbed Suggs around the chest area and appeared to be pulling on something—Wilson thought he was pulling at a necklace. Suggs put her hands up to defend herself and then stood and tried to walk away. Elmore pushed her back down to a seated position. Elmore raised his hands together over his head and brought them down at Suggs's chest area around the collarbone. After five to 10 seconds of this movement, Elmore fled, with a slow limp, looking around as he ran. Suggs stood, then fell immediately to the ground.

Suggs had been stabbed in the lower neck area with a paintbrush[2] sharpened to a point. The weapon penetrated six to seven inches, perforating one lung, puncturing her aorta, and entering her heart. This injury was fatal. Police responded to a call about the incident at approximately 1:00 p.m.

Wilson called the attention of his sister, Brittany Todd, to the bus stop. Todd saw Elmore running away with a limp in his run. Fifteen to 30 minutes later, they saw Elmore returning to the scene. Elmore approached the area of the bus stop with a puzzled look on his face, then ran in the other direction. Wilson alerted a security officer, who told the police that Wilson had seen Elmore, and Elmore was apprehended. Elmore resisted arrest, requiring four officers to subdue him. As Elmore struggled with the police officers—and before Elmore had been advised of why he was being detained—Elmore said, "I didn't do it."

Elmore's behavior at the time of his arrest was sufficiently bizarre that he was placed on a psychiatric hold for evaluation. He was diagnosed as psychotic. As of early

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[2] Paintbrushes of this sort, although not sharpened to a point, were available to the residents of Elmore's residential program.

May Elmore continued to display bizarre behavior and affect, was uncooperative and illogical, and demanded two lemonades and a pair of dress shoes and socks before he would answer doctors' questions.

Elmore was charged with murder and pleaded not guilty by reason of insanity. At trial, forensic psychiatrist Jack Rothberg opined that Elmore was schizophrenic and was psychotic at the time he stabbed Suggs. Rothberg based this conclusion on the incident itself, an interview of Elmore, and psychiatric records dating back to 2001.

Rothberg believed that Elmore's conduct in committing the crime demonstrated that he was psychotic at the time: "[T]he victim was a complete stranger, someone he had never met before. The attack, by all accounts, was totally unprovoked. [¶] In my understanding, it does not appear that there was any other motive to commit the crime. His behavior subsequent to the stabbing involved him walking [a]way briskly and then kind of wandering back, even though there were people looking for him. He didn't make a rational attempt to flee the scene completely. He went away and came back. [¶] He was very agitated at the time that he was apprehended and appears to have been hospitalized, placed on a hold once he was in custody."

Rothberg also relied on Elmore's psychiatric history in forming his opinion. During a 2001 hospitalization at Olive View Medical Center, Elmore was considered gravely disabled: he demonstrated poor activities of daily living; responded to internal stimuli, meaning that he was seeing and hearing things that no one else could see; was paranoid; was disoriented and confused; and demonstrated impaired judgment. Elmore was medicated at that time with two antipsychotic medications, an anti-anxiety medication, and an antidepressant.

In 2004 and 2005 Elmore was a patient at Patton State Hospital with a diagnosis of schizophrenia, undifferentiated type, and antisocial personality disorder. His insight into his condition and thought processes were impaired, he required sustained psychiatric treatment, and his affect was inappropriate. According to the medical records, he was limited in his ability to provide daily care for himself, his thinking was disorganized, his

speech incoherent, his impulse control poor, and he experienced paranoid ideations. Elmore was delusional.

When Rothberg interviewed Elmore in 2008, more than one year after the incident, Elmore never reported having visual hallucinations; and in all the records Elmore had never claimed to experience visual hallucinations. However, Elmore described the incident to Rothberg by saying, "Two people beat the shit out of me and I killed them." He also stated that these people had fled. Elmore denied hearing voices or being in a blackout at the time.

Elmore's conduct and psychiatric history also included information suggesting that he was at least at times able to try to use his illness to his advantage. It was unclear to at least one doctor at Patton whether Elmore was experiencing the symptoms of mental illness or whether he was exaggerating his impairment to avoid a criminal prosecution. He tended to exaggerate his disability for self-gain. During Elmore's post-arrest hospitalization, the medical records included a note stating that Elmore asked for an evaluation so that he could show it to the judge and be sent to a psychiatric hospital rather than a jail. When asked what his symptoms were, Elmore answered that he heard voices. He asked for a prescription medication to make him "a little crazy." The doctor concluded that Elmore wanted a psychiatric diagnosis to assist him in his case.

Forensic psychiatrist Kaushal Sharma testified to his opinion that Elmore was schizophrenic but that there was no credible evidence that he was psychotic at the time of the stabbing. Sharma testified that there was no evidence that Elmore was hallucinating at the time—Elmore did not report hallucinations to him and there was no indication that he reported hallucinations to the police or to Rothberg. Sharma put great emphasis on Elmore's statements to the medical professionals asking for their help in making him "a little crazy," which Sharma understood as "clearly show[ing] that he was trying to and wanted to fake mental illness." When Sharma interviewed Elmore, Elmore did not make any delusional statements about the victim. Because of their inconsistencies, he did not believe that Elmore's conflicting accounts of the stabbing reflected delusions. Sharma

acknowledged that at other times Elmore had claimed to have heard voices, but Elmore did not claim to have heard voices in the time frame surrounding the stabbing.

Sharma had not been aware of the report of Elmore trying to crawl under cars on the day of the incident. A person with schizophrenia who was engaging in such behavior could be psychotic, Sharma stated. Sharma acknowledged that Elmore had a long history of responding to internal stimuli, which can be evidence of a psychotic state. He also acknowledged that within days of the incident Elmore had been diagnosed as psychotic while on his psychiatric hold. Elmore was placed on an antipsychotic medication but was observed nonetheless possibly to be psychotic, Sharma noted.

Elmore told Sharma that he was sitting at the bus bench when "they knocked the shit out of me with a crowbar," hitting him on the face and body. He did not know who hit him. He said he used the paintbrush to stab the person, but he could not or would not answer Sharma when Sharma asked who "the person" was. Sharma did not understand Elmore to be saying that he was under attack by the victim: Sharma reported that Elmore "never said to me that the person, the woman, was after him or she said to him anything to him in any of the descriptions [of the incident] except he believes one time she said Mr. Elmore owed her money." Sharma said that no matter how he asked about the "they" at the bus stop or what Suggs did—whether she had a crowbar, whether she hit, him, etc.—Elmore never gave a straight answer.

Elmore testified in his own defense. He claimed that he came into the police department for a ticket and was sent to a mental hospital in 2001. When he was at Olive View, they did not tell him what was wrong with him, just tied him down and "shot" him with medication. He described feeling "a little insane" and "messed up in the head" at that time. Elmore said that he went to Patton State Hospital because he had a stalking case, but he said that people lied about him and he was accused of things he had not done. Elmore acknowledged having paranoid schizophrenia, which he defined as "all the parts are crazy up above."

Turning to the stabbing, Elmore testified that he had taken the bus to Compton. He could not remember whether he went anywhere in particular, saying he had blanked

out. He said, "I—went home [meaning his grandmother's house] and got out and walked around and I was just walking around roaming, and then something happened—went wrong out there—out there in the street." Elmore repeatedly said "something went wrong out there in the street."

Elmore consistently failed to describe the events in detail, resorting to conclusory language in response to most questions. When asked what the problem was, Elmore said, "Somebody was saying something violent to me, and I didn't really—it was something violent happening while I was out there." Counsel asked what violent thing happened, and Elmore responded, "Somebody said something. It was just violent." Counsel asked who was violent, and Elmore just answered, "Well, when I was standing out there." Counsel pursued the question of who was violent, and Elmore said "Some person out there," and when asked whether the person was a man or a woman Elmore claimed not to know and to have blacked out: "The only thing I know something went wrong." "What went wrong?" counsel asked. "Something—I mean—it was something wrong."

Elmore's counsel asked if he knew he was being accused of killing someone. Elmore responded, "Yeah, somebody cracked me in the head while I was out there."[3] Elmore's counsel asked, "Did you kill somebody that day?" Elmore answered, "Somebody—it was not intentionally. Somebody had to do something in order for me to just do something intentionally." Elmore denied having the paint brush with him: "I picked it up somewhere after I was—for a person to just do what—I mean I—something happened out there wrong and, you know, I just—I wouldn't just do nobody intentionally."

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[3] Immediately after this statement, the court said it would "sustain the objection on relevancy grounds," but the most recent objection in the record was to the previous question. The court, however, had already sustained an objection to the previous question and stricken the response, which was nearly identical to the question posed here, so although the record is unclear, it may be that an objection is missing from the record or that the court was anticipating an objection that the prosecutor was beginning to make. We simply cannot tell. The court, however, did not strike this answer.

Elmore said that he had seen a black woman about 50 years old (presumably Suggs) come up to him at the bus stop. He said he was about to drink a beer he had "and somebody—somebody said something, and, you know, one word led off to another." When asked what they said to him, Elmore answered, "Take it somewhere else. I don't know." Counsel asked if that statement bothered him, and he said, "It was more than take it somewhere else. It was violent, so you know."

"What was the violence?" counsel asked. "It was just violent. I don't know. I blanked out. I don't know. I just hit the ground somewhere and got up and just got out of anger and did something." He repeated, "Yeah, it was out of anger I did something. I didn't do it intentionally." Counsel asked if the woman at the bus stop did something violent to him, and he said, "Violent—I don't know if violent. It had to be for me to just do what I had to do." "What did you have to do?" said Elmore's counsel. "I mean, I picked something off the ground and just—and did whatever possible." Elmore continued, "I didn't kill nobody intentionally. I mean, I've been lied on, shit."

Counsel turned to the stabbing: "Did you pick that paint brush off the ground?" Elmore said, "Yeah, I made an object." "What was it?" counsel asked. "I made an object after I was out on the ground dazed somewhere. After I was on the ground or whatever. However it happened." Elmore said that he used the object but did not elaborate further on how he used it. When asked if he stabbed someone with it, he responded, "I suppose." Counsel asked who he stabbed and Elmore said, presumably indicating Suggs's daughter who was present in court that day, "They say her mother." Counsel pressed: "Did you?" "I guess," Elmore said.

When asked why he stabbed Suggs, Elmore answered, "Person said something and did something to me, I didn't just go do it to be doing it." Counsel asked what she had done to Elmore, and Elmore refused to answer: "It don't matter. It don't benefit me." Elmore denied taking anything from Suggs.

Elmore also did not appear to believe that he had done anything that merited his arrest, as he complained that when he started to go back to drink his beer, the police picked him up and "lied on me."

Looking at a photograph of Suggs, Elmore denied seeing her on the day of the stabbing, but then said he did not know if she was the lady who said something to him. When asked if he stabbed her, he said, "I mean, I had something said to me—or did for me just to do something, but not intentionally." Counsel asked why he did it, and he answered, "Why did I do it? I was minding my own business where I was at, and somebody said something to me right out there. I mean, it wasn't intentionally. Whatever happened out there. I had to be provoked just to just do something."

Counsel asked if something had provoked Elmore, and he said, "I was scared. I mean, it happened intentionally. I was scared." Counsel asked what Elmore was afraid of, and Elmore said, "I mean, what done happened to me. I was scared and paranoid and just—I was real scared." "Scared of what?" counsel asked. Elmore responded, "What done happened to me after—not me—just being scared." Counsel asked if he was afraid something bad was going to happen to him, and Elmore answered: "Something already did bad happen to me so, you know, I took precaution into my—into my—I took it into—I didn't really—I took it into my hands and it led me in jail, but it wasn't intentionally. Whatever happened to me out there, you know, I was—it wasn't intentionally. I was scared, and I just whatever happened, I did whatever was possibly—I mean, got up and just—was out on the ground somewhere, and I just got up and did something real—real intentionally. It wasn't intentionally." Elmore denied intending to kill Suggs. Counsel asked once more, "Were you afraid of that lady?" and Elmore answered, "Was I afraid? Can't answer the question."

On cross-examination, Elmore was asked about the paintbrush. He said, "After I got into an incident, I seen it on the ground and made one. After I got into it—whatever happened to me out there on the streets." He said he found it by the bus station. When asked whether he was the one who sharpened the brush into a point, he responded that he found the brush. When asked again whether he had sharpened it, he said he could not recall and that he "done blanked out." When the prosecutor began to ask about the day of the stabbing, Elmore began to complain about his attorney not representing him right.

Responding to questions once again, Elmore denied feeling mad for more than a minute when he left his grandmother's house.

The prosecutor was no more successful than Elmore's counsel had been at eliciting a coherent account of the stabbing from Elmore. Elmore said that when he was at the bus stop, "They said something to me." The prosecutor attempted to ask him about his assertion that someone at the bus stop told him to take it—presumably panhandling or bus token sales he was engaged in—somewhere else, and he went back to his assertion that "Someone said something to me violent." Elmore denied asking Suggs for money or trying to sell her a bus token, and he denied being angry that she would not give him money. Elmore said, "Somebody said something—did something to me violent. I got scared, and out of fear, it was reaction. I blanked out." The prosecutor said, "You blanked out, and because you blanked out you can't tell us what you did; is that right?" and Elmore said that he was in fear and traumatized. The prosecutor asked which it was—was he blacked out and unable to recall anything, or did he know that he was afraid? Elmore answered that he was really scared.

Elmore admitted that he made the paintbrush into a weapon "after I got up. I was mad and scared," then said he did not know if he had made it and that he thought he picked it up like that. He admitted that he used it to stab Suggs, but claimed it was not intentional. He denied stabbing her because he was trying to steal her necklaces, stating that he did not steal, at which point he was confronted with his prior conviction for felony grand theft person.

Elmore acknowledged that he understood that stabbing a person with a paintbrush would hurt the person and that the person could die. The prosecutor asked what Elmore meant about not doing anything intentionally—did he mean that he did not intend to kill her, or he did not intend to stab her? Elmore said, "I got into it—in order for me to really just do it—I was out there enjoying myself and somebody said something violent—did something. And I just found it and made it and used it—and used the mother fucker—used the thing." Elmore claimed, "I was provoked. Something happened out there on Sunday . . . ." The prosecutor asked if he was maintaining he was provoked, and Elmore

responded, "Something happened that day to me, and I got violent." He continued, "I was provoked and something happened out there. It was more than just you saying something to me for order for me just to just drive something through somebody's heart. I made it somebody—it wasn't intentionally. I just sit there and go get up and do something."

Elmore said that if he had had a gun, he "probably would have shot the mother fucker." He said he did not know where on her body he stabbed Suggs. "After I was violent and something happened, I just picked it up and got up and did it out of anger. Whatever happened to me out there, I was scared and did it out of anger." He said he was "more than provoked." "The only thing I did," he claimed, "is got violent and stuck the person after what they did to me." The prosecutor tried once more to elicit Elmore's account. After Elmore again claimed that "Something happened to me for me to stab somebody," she responded, "But you can't tell us what it is that happened to you?" Elmore said, "I done been lied on, so I ain't worried about it."

At trial, Elmore's counsel requested that the jury be instructed with CALCRIM Nos. 571 [voluntary manslaughter based on imperfect self-defense], 627 [hallucinations impacting degree of murder], and 3406 [mistake of fact]. The court refused each instruction. The jury was instructed with CALCRIM No. 3428, which told the jury to consider the evidence of Elmore's mental illness for the purpose of deciding whether at the time of the offense Elmore acted with malice aforethought and the intent to permanently deprive Suggs of her property.

Elmore was convicted of first degree murder. After the guilt phase of the trial, against the advice of counsel, he withdrew his plea of not guilty by reason of insanity and proceeded to sentencing on the murder conviction. He was sentenced to 25 years to life in prison. Elmore appeals.

DISCUSSION

I. Absence of Voluntary Manslaughter Instructions

Elmore contends that his conviction should be reversed because the jury was not offered the opportunity to convict him of voluntary manslaughter based on imperfect self-defense due to delusions. The doctrine of imperfect self-defense, however, does not apply where the subjective belief in the need to defend oneself arises not from objective circumstances but purely from the defendant's mental illness. (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437.) Imperfect self-defense "is predicated upon negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact." (*Id.* at pp. 1453-1454; see also *People v. Wright* (2005) 35 Cal.4th 964, 982 [conc. opn. of Brown, J.] [imperfect self-defense must be measured against some minimum objective standard to be consistent with case law requiring objective reasonableness to negate malice].)

The trial court, therefore, properly declined to offer the jury the option of convicting Elmore of voluntary manslaughter based on imperfect self-defense, and properly instructed the jury that it was required to determine whether or not Elmore actually formed the specific intent necessary for murder. (*People v. Saille* (1991) 54 Cal.3d 1103, 1116-1117 [if "a crime requires a particular mental state the Legislature may not deny a defendant the opportunity to prove he did not possess that state"].) The impact of Elmore's mental illness would have been considered by the jury in the trial's sanity phase. Unfortunately, immediately before the sanity phase would have begun, Elmore exercised his right to withdraw his plea of not guilty by reason of insanity. By so doing, Elmore precluded the consideration of the extent of and impact of his mental illness on his ultimate criminal culpability.

II. Failure to Instruct with CALCRIM No. 627

When Elmore requested that the jury be instructed with CALCRIM No. 627, which would have told the jury that evidence of hallucination can negate the elements of premeditation and deliberation that are required for first degree murder, the trial court denied the instruction on the basis that although there was evidence that Elmore may hallucinate at times, there was no evidence that Elmore was hallucinating at the specific time of the crime. A trial court must give a requested instruction concerning a defense if there is substantial evidence to support the defense. (*People v. Mentch* (2008) 45 Cal.4th 274, 288 (*Mentch*).) On appeal, we "ask only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt as to whether" Elmore's killing of Suggs was premeditated and deliberated. (*Ibid.*) We have reviewed the record and conclude that there was substantial evidence from which the jury could have inferred that Elmore was hallucinating and that the trial court should have instructed the jury with CALCRIM No. 627.

CALCRIM No. 627 assists a jury in considering evidence that a defendant was hallucinating when the jury determines whether the defendant acted with deliberation and premeditation. (CALCRIM No. 627.) It potentially negates the premeditation element of first degree murder and reduces a first degree murder to second degree murder. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677 (*Padilla*).) The instruction reads, "A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met that burden, you must find the defendant not guilty of first degree murder." (CALCRIM No. 627.)

Certainly there was evidence that Elmore had a history of hallucinations: his records from the 2001 and 2004-2005 hospital stays were replete with indicia that Elmore was responding to internal stimuli. We agree with the trial court that due to their remoteness in time, these records are not particularly relevant to the question of hallucinations in 2007 beyond revealing the longstanding nature, characteristics, and gravity of Elmore's mental illness. But Elmore also offered substantial evidence of his mental state on the day of the incident. He presented the evidence of those who observed him on that day both shortly before and shortly after the stabbing, as well as expert psychiatric opinion that he was schizophrenic and in a psychotic state at the time he stabbed Suggs.

Defense psychiatrist Rothberg testified that persons who are paranoid schizophrenics "by definition . . . have a paranoid psychosis so that they misinterpret the motives of others and perceive things in ways that are not based on reality." Their judgment, perception, and ability to be rational are impaired. "They may perceive things that we don't see?" asked Elmore's counsel. "*By definition they do*," answered Rothberg. According to Rothberg's testimony, by definition, if Elmore was experiencing paranoid schizophrenia and psychosis, he was experiencing perceptions that were not based on objective reality—the definition of hallucinations in CALCRIM No. 627.

Through the testimony of Elmore's grandmother, uncle, and uncle's girlfriend, Elmore presented evidence from which the jury could have concluded that when those witnesses saw him between 10:00 a.m. or 11:00 a.m. and 12:30 p.m. on the day of the stabbing, Elmore was in the state described above by Rothberg and was responding to internal stimuli rather than to reality. When Elmore visited his family, he was acting bizarrely: he was excited and agitated. Elmore's uncle's girlfriend, Deniece Bonner, said that she thought Elmore was under the influence of a drug or alcohol. (Toxicology reports showed that Elmore was not on drugs at the time of the incident.) Elmore's uncle, Daniels, was more explicit: he thought that Elmore was acting as if he were on PCP, a drug which, Sharma testified, "essentially makes a wild beast of a normal man." Sharma testified that based on his knowledge of how people under the influence of PCP act, that

acting as though were on that drug would "very likely" be evidence of an auditory hallucination.

Elmore's behavior deteriorated during the visit. At one point he left the house and the family chased after him by car and on foot "because he was kind of like being wild" and they were concerned about him. He was speaking, but they could not make any sense of his words: "Just, you know, kind of like talking, not really making much sense that we could make of. [¶] You know, I don't know what was going through his head. But the words that were coming out of his mouth, it didn't sound, you know, rational."

When Bonner and Elmore's grandmother located Elmore, he was in a church parking lot. As they tried to speak with him, Elmore began crawling under the cars in the parking lot. Even the prosecution's expert witness testified that a person who is schizophrenic and described as acting like he is on PCP, acting weird, crawling under cars, could be in the midst of a psychotic episode. Crawling under cars to get away from one's family, Sharma testified, "can be a behavioral manifestation of auditory hallucination."

Elmore's family was able to coax him to return to his grandmother's house, but he left soon after, at 12:30 p.m. or a little later. Within half an hour he had killed Suggs—he was seen stabbing her at approximately 1:00 p.m., and the police responded to a call at about that time.

Elmore was arrested within 15 minutes to half an hour after the stabbing, and the gravity of Elmore's mental impairment became apparent immediately. When Elmore was taken for medical treatment after the April 27 arrest, a doctor noted his "bizarre affect." Sharma conceded this was evidence of psychosis. The notes from the hospital describe Elmore as behaving bizarrely on the day of the incident. Elmore was placed on a psychiatric hold on April 30 and was observed on that day to be gravely disabled and unable to remain linear in conversation, other behaviors that Sharma testified were consistent with psychosis. The May 1 medical notes indicated that Elmore was exhibiting bizarre behavior, claiming that he was suffering from heat stroke and displaying inappropriate affect, also observed by Sharma to be evidence of psychosis. As

Rothberg explained, "It's what he's not complaining of that's critical. He has some other explanation for his bizarre behavior that's not a mental one." On May 2, Elmore was diagnosed as psychotic. Notes concerning the expiration of the psychiatric hold state that during the hold, Elmore was treated with Risperdal, an antipsychotic medication, but may have been psychotic despite this treatment. On May 7, Elmore was observed to be continuing to exhibit bizarre behavior and affect and could not provide logical responses; he was paranoid and delirious.

Although little can be derived from Elmore's testimony and statements, for he rambled, provided no coherent narrative, and relied on conclusory assertions as opposed to describing his perceptions and experiences, there is also some evidence in Elmore's statements that is consistent with his theory of hallucinations. Elmore told Rothberg that what happened was that "'Two people beat the shit out of me and I killed them.'" He also asserted that "[S]omebody cracked me in the head while I was out there." Elmore said he stabbed Suggs because, "Person said something and did something to me, I didn't just go do it to be doing it."

We conclude that Elmore produced evidence which, if believed by the jury, would have permitted the jury to infer that Elmore was hallucinating when he stabbed Suggs: Elmore offered substantial evidence that he was a paranoid schizophrenic and psychotic at the time of the killing, and he also presented evidence that people with this condition, by definition, perceive things that others do not see. Even Sharma, who believed that Elmore was not psychotic at the time of the crime, admitted that a number of Elmore's behaviors on the day of the stabbing were evidence of psychosis and/or indicative of a person responding to auditory hallucinations. Although there was also evidence from which the jury could conclude otherwise, from this evidence of Elmore's behavior and mental state both immediately before and after the crime the jury could have inferred that Elmore was hallucinating when he stabbed Suggs. The jury, therefore, should have been instructed in how to consider hallucinations with respect to the element of premeditation and deliberation that was necessary to convict him of first degree murder. (*Mentch*, *supra*, 45 Cal.4th at p. 288 [the trial must consider the evidence presented in the light

most favorable to the defendant, in determining whether it could establish an affirmative defense].)

The People contend that any error in failing to instruct the jury with CALCRIM No. 627 was harmless because the jury was instructed with CALCRIM No. 3428, which tells the jury that it may consider the defendant's mental defect with respect to determining whether he formed the requisite mental state of malice aforethought, or, because of the felony murder theory here, intent to permanently deprive another of his or her property. CALCRIM Nos. 3428 and 627, however, are not interchangeable or even particularly similar: while both instructions address mental impairments, the similarity stops there. CALCRIM No. 3428 guides the jury in deciding whether the defendant had the requisite mental state: that is, as used here, whether Elmore harbored malice or had the specific intent to commit robbery (for the felony murder theory). This permits the defendant to present the defense that because of his mental impairment, he did not actually form the specific intent necessary for the commission of a crime.

The specific intent to commit an act that is a crime, however, is distinct from the element of deliberation and premeditation that is necessary for a murder to be in the first degree, rather than the second degree. CALCRIM No. 3428 offered no guidance to the jury in evaluating how to consider the evidence of Elmore's "hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation." (CALCRIM No. 627.) Because it covered a separate subject entirely, the fact that CALCRIM No. 3428 was given does not render the instructional error harmless.

In fact, the giving of CALCRIM No. 3428 may have compounded the problem arising from the failure to instruct the jury with CALCRIM No. 627. CALCRIM No. 3428 stated that evidence of Elmore's "mental defect" could be considered "only for the limited purpose of deciding whether" Elmore acted with malice or the intent to rob. This instruction directed jurors that even if they credited the evidence that Elmore was hallucinating, they could consider that evidence for no purpose beyond determining whether he had malice aforethought or the intent to rob Suggs. Therefore, they were not permitted to consider whether Elmore was hallucinating when they decided whether the

murder was of the first or second degree. CALCRIM No. 3428, while properly given for other reasons, did not remedy the problem here.

The People also argue that the error was harmless because Elmore's "intent to kill" was established by the fact that he committed an "unprovoked attack with a sharpened paintbrush on a defenseless woman." Elmore's intent to kill, or malice, relates to whether a killing is murder, manslaughter, or, under the circumstances here where mental illness is involved, not a criminal killing. It is irrelevant to the determination of whether Elmore killed Suggs with premeditation and deliberation. Because evidence that a defendant was hallucinating can "negate deliberation and premeditation so as to reduce first degree murder to second degree murder" (*Padilla, supra*, 103 Cal.App.4th at p. 677), the fact that the jury was not instructed on how it could use that evidence is not made harmless by the People's assertion that Elmore intended to kill.

The People next contend that the error was harmless because the evidence of Elmore's "guilt" was overwhelming. That Elmore killed Suggs was uncontested, but the fact that he committed the killing does not make superfluous a jury instruction that would have guided the jury in determining what crime was committed: whether Elmore acted with deliberation and premeditation. The evidence of whether Elmore was hallucinating at the time of the stabbing was far from overwhelming—and two psychiatrists each arrived at thoroughly reasoned and supported, but opposing, conclusions about his condition based on the same evidence.

The People similarly argue that the error was harmless because "Dr. Sharma said that appellant's prior statements clearly showed that he was feigning mental illness and malingering." The fact that if the jury believed Sharma's testimony it would have rejected Elmore's planned defense that he did not premeditate or deliberate Suggs's killing has no place in this analysis. Provided that the evidence is sufficient to permit a reasonable jury to conclude that the specific facts supporting the instruction exist, we assess a defendant's entitlement to an instruction by taking the proffered evidence as true, regardless of whether it was of a character to inspire belief. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.)

The parties disagree as to whether the error should be judged under a *Watson* or *Chapman* standard for harmlessness, but we need not resolve that question, for under either standard the error cannot be said to be harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.) If the jury had been instructed that it could consider hallucinations in evaluating whether Elmore killed Suggs with premeditation and deliberation, the evidence could well have persuaded the jury to find that his hallucinations resulted in his having committed not a first degree murder but a second degree murder. Therefore, a more favorable result was reasonably probable in the absence of the error and we cannot declare this error harmless beyond a reasonable doubt.

DISPOSITION

We vacate the judgment of conviction of first degree murder and remand the matter to the trial court with directions. If the prosecutor files a written election to try Elmore on a charge of first degree murder within 60 days after the filing of the remittitur in the trial court and if Elmore is "brought to trial within 60 days . . . after the filing of the remittitur in the trial court," the trial court shall proceed accordingly. (§ 1382, subd. (a)(2).) Otherwise the trial court shall enter a judgment of conviction of second degree murder and sentence him accordingly. (See *In re Bower* (1985) 38 Cal.3d 865, 880.)

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.

Eric R. Larson, #185750
330 J Street, # 609
San Diego, CA 92101

Court of Appeal No.: B216917
Superior Court No.: TA090607

DECLARATION OF SERVICE BY MAIL

I, Eric Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 15th day of November, 2010, I caused to be served the following:

PETITION FOR REVIEW

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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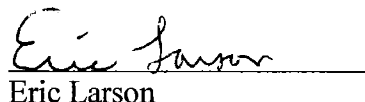
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 15, 2010, at San Diego, California.



Eric Larson