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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ANDREW D. JOHNSON,
Defendant and Appellant.

/

No.
Court of Appeal
No. A124643
Solano County
Superior Court
Nos. VCR 191129
& VCR 191363

PETITION FOR REVIEW

After Decision of the Court of Appeal, First Appellate District, Division Four,

Affirming the Judgment of Conviction on October 25, 2010

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By appointment of the Court of Appeal under the First District Appellate Project's Independent-case system.

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ANDREW D. JOHNSON, Defendant and Appellant. _____/	No. Court of Appeal No. A124643 Solano County Superior Court Nos. VCR 191129 & VCR 191363

PETITION FOR REVIEW

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

Pursuant to California Rules of Court, rules 8.500 and 8.516, petitioner ANDREW D. JOHNSON, by and through counsel, hereby petitions this Court for review following the decision of the Court of Appeal, First Appellate District, Division Four, filed on October 25, 2010, and appended hereto as Exhibit A, which affirmed the judgment of conviction. In affirming the judgment of conviction the Court of Appeal failed to vindicate petitioner's constitutional rights under the Sixth and Fourteenth Amendments of the federal constitution. Specifically the Court of Appeal failed to find constitutional violations that impacted petitioner's rights to represent himself and his right to a fair and impartial jury at his competency trial.

Until *Indiana v. Edwards* [(2008) 554 U.S. 164] the rule in California was that a defendant competent to stand trial was also competent to waive his right to counsel, and a court could not require that a defendant demonstrate a higher standard of competence to accept the waiver. (*People v. Welch* (1999) 20 Cal. 4th 701, 732 [citing *Godinez v. Moran* (1993) 509 U.S. 389, 400-401].) *Edwards*, as a matter of federal law permits a court to restrict a mentally challenged defendant's right to represent himself. It does not compel such a result. The question for this Court is whether the *Edwards* decision changed the prohibition under state law from interfering with a defendant's absolute right to proceed to trial without counsel if competent to stand trial. As of this date this Court had not.

Under federal constitutional law, where a prosecutor exercises a peremptory challenge without asking the juror any questions and the juror's answers to the judge do not reveal any bias or prejudice, may the reasons given by the prosecutor that have no support in the record be presumed to be pretextual and a violation of the constitution?

Petitioner respectfully requests that this Court grant his Petition for Review and settle essential questions of statewide importance.

QUESTIONS PRESENTED AND NECESSITY FOR REVIEW

Thus, the questions presented by this Petition for Review are:

1) May a court deprive a defendant of his right to represent himself where he was not found to be incompetent in the instant proceeding and where the trial court and the Court of Appeal apply a rule that has never been adopted by this Court; and

2) How can a prosecutor not violate a juror's right to sit on a case and a defendant's right to an impartial jury where he gives a reason for excusal of the juror that is not supported by the record?

STATEMENT OF THE CASE

On July 19, 2007, petitioner, acting as his own lawyer, was arraigned on information VCR191129, which charged him with violating Penal Code[1] section 220, assault with intent to commit rape, sodomy, and oral copulation; section 289, subdivision (a) (1), penetration by foreign object by means of force and violence; section 288a, subdivision (c) (2), forcible oral copulation; section 261, subdivision (a) (2), forcible rape; and section 243, subdivision (d), battery with serious bodily injury. The information also alleged that petitioner had suffered prior convictions under section 667, subdivisions (b) through (i), section 1170.12, subdivisions (a) through (d), and 667, subdivision (a) (1). (1 CT[2] 16-19.) Petitioner entered a plea of not guilty and denied the prior convictions and enhancing allegations. (1CT 20.)

On September 18, 2007, the prosecution filed a motion to consolidate case VCR191129 with case VCR191363. (1 CT 104-111.) VCR191363, at least as a felony complaint, alleged a violation of section 245, subdivision (a) (1), assault with a deadly weapon, to wit, a chair, and a violation of section 243, subdivision (d), battery causing serious bodily injury. (1 CT 199-200.)

On January 30, 2008, the court declared a doubt as to petitioner's competency, suspended criminal proceedings, and appointed counsel to represent petitioner. (1 CT 152-153, 159-161, 300-302; 2 CT 304-306.)

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

2 "CT" refers to the Clerk's Transcript in *People v. Andrew D. Johnson*, No. A124643.

A jury trial on petitioner's competency was had. Petitioner was found to be competent by the jury on October 28, 2008. (2 CT 477-480; 2 RT 568.)

On October 30, 2008, the court revoked petitioner's pro per status because the court did not feel that petitioner would receive a fair trial if he continued to represent himself. (2 CT 513.)

A consolidated information was filed that same day. The information alleged the five counts[3] found in VCR191129, the two counts[4] found in the complaint related to VCR191363, plus an additional count of grand theft from the person, in violation of section 487, subdivision (c). The enhancing allegations remained the same. (2 CT 515-519.)

On December 5, 2008, petitioner entered pleas of not guilty to the consolidated information and denied all special allegations. (2 CT 530.)

Jury trial began on December 15, 2008. Petitioner's section 1118.1 motion was denied. The jury returned with verdicts on December 17, 2008. Petitioner was found guilty of all eight counts. (2 CT 574, 584-591,593-594, 596; 4 RT[5] 965-969, 1048-1050.)

Petitioner also had a jury trial on the prior conviction allegations. The jury found those allegations to be true. (3 CT 645-646, 649-650; 4 RT 1103-1104.)

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[3] Sections 220, 289, subdivision (a) (1), 288a, subdivision (c) (2), 261, subdivision (a) (2), and 243, subdivision (d).

[4] Sections 245, subdivision (a) (1) and 243, subdivision (d).

[5] "RT" refers to the Reporter's Transcript in *People v. Andrew D. Johnson*, No. A124643.

On March 13, 2009, petitioner filed a motion for a new trial. (3 CT 669-676.) The prosecution filed an opposition. (3 CT 677-682.) Petitioner's motion was denied on April 9, 2009. (4 RT 1121.)

Petitioner was sentenced to eighty-five years to life in state prison. As to Count 1, the assault with intent to commit a sex crime, that sentence was stayed pursuant to section 654; Count 2, penetration by foreign object, the court imposed a sentence of twenty-five years to life in state prison; Count 3, forcible oral copulation, the court imposed a sentence of twenty-five year to life in state prison consecutively to Count 2;Count 4, forcible rape, the court stayed that sentence pursuant to section 654; Count 5, battery resulting in serious bodily injury, the court stayed that sentence pursuant to section 654; Count 6, assault with a deadly weapon, the imposed a sentence of twenty-five to life in state prison consecutively to Count 2 and Count 4, Count 7, battery resulting in serious bodily injury, the court stayed that sentence pursuant to section 654; and Count 8, grand theft person, the court imposed a mid term sentence of two years to run concurrently with petitioner's sentence. The court also imposed the two section 667, subdivision (a) (1) priors for a total of ten additional years. (3 CT 683-691; 4 RT 1126-1130.)

A timely notice of appeal was filed on April 16, 2009. (3 CT 694.)

A Petition for Rehearing was filed on November 9, 2010, and denied on November 15, 2010.

STATEMENT OF THE FACTS

Competency Proceedings

Petitioner, who was acting as his own lawyer, had sent some documents to the District Attorney's Office. Those documents were then provided by the District Attorney's Office to the court. After reviewing the documents, the court declared a doubt as to petitioner's competency, suspended criminal proceedings, and appointed counsel to represent petitioner. (1 RT 155-159, 161, 166.)

Two doctors were appointed to examine petitioner. Neither of the doctors spoke with petitioner, and neither had a recommendation. The court then appointed a third doctor. (1 RT 167, 172, 173.)

During jury selection for his competency trial, petitioner expressed his displeasure with the court and claimed that the court was biased against him. Petitioner was then forcibly removed from the courtroom. (1 RT 249-252.)

Petitioner was returned to the courtroom without the jury present. Prior to being forcibly removed from the courtroom in front of the prospective jury, petitioner had been placed in a leg brace. When he returned he was still in the leg brace, and was in shackles, waist chains, and handcuffs. (1 RT 252.) Prior to the jury returning the court ordered the bailiffs to only remove the shackles. (1 RT 257.) Jury selection then continued.

As jury selection continued, trial counsel objected to the manner in which the prosecutor was exercising his peremptory challenges. (1 RT 284-285.) Counsel told the court that the prosecutor had exercised his peremptory challenges

against four (4) African-American women. (1 RT 286.) The court found that the defense had established a prima facie case and asked the prosecutor to state reasons for his peremptory challenges. (1 RT 289.) In denying the defense motion, the court stated the following; "Well, based on the explanation, I'll make a conclusion that the reason for the exclusion is not inherently discriminatory and that the moving party, the defense, has not carried the burden of proving purposeful discrimination. So the request is denied." (1 RT 291.)

Three doctors testified at the trial. One, Dr. Kathleen O'Meara, believed that petitioner was not competent. (2 RT 348, 354, 355, 377.) Two others, Drs. McGrew and Eiland, were unable to give an opinion whether petitioner was competent or not. (2 RT 479, 484, 488, 497, 509.)

The jury found petitioner to be competent. (2 RT 568.)

Two days after the jury had found petitioner to be competent, and had his pro per status reinstated,[6] he was returned to court. There the court told petitioner that in the last few days he had done some research "on the issue of whether or not you continue to have a right to represent yourself because you want to, number one, and that a jury has found that you are competent to stand trial. And the reason I have done this research is because I'm not convinced that you are competent to represent yourself." (2 RT 574.) The court then revoked petitioner's

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[6] On July 5, 2007, petitioner was granted the right to act as his own lawyer. (RT, 7/5/07, 6-14.)

pro per status and appointed a lawyer to represent him.[7] This was all done over petitioner's objection. (2 RT 583-585.)

[7] The court erroneously believed that the defendant in *Edwards* had been granted the right of self-representation. (2 RT 575.) That is not the case. (*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 167-169.)

I

CALIFORNIA HAS NOT ADOPTED THE INDIANA V. EDWARDS STANDARD

The Sixth Amendment to the United States Constitutional guarantees that every person accused of a crime shall be afforded the right to the effective assistance of counsel and no accused may be convicted and placed in confinement without being afforded that right. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) A criminal defendant, though, also has the ability to waive the right to counsel and represent him or herself. (*Faretta v. California* (1975) 422 U.S. 806, 819.)

Here, petitioner entered a knowing, voluntary, and understanding waiver of his right to counsel prior to the preliminary examination and elected to represent himself. (RT, 7/5/07, 6-14.) That was his choice. (See, *People v. Parento* (1991) 235 Cal. App. 3d 1378, 1381; *People v. Windham* (1977) 19 Cal. 3d 121, 128.)

Once a defendant's motion for self-representation has been granted a defendant's pro se status may be revoked under California's interpretation of the federal constitution only for misconduct, not because of mental illness. (*Faretta v. California, supra,* 422 U.S. at p. 835, fn. 46; *People v. Fitzpatrick* (1998) 66 Cal. App. 4th 86, 92-93; *People v. Halvorsen* (2007) 42 Cal. 4th 379, where this Court stated, "The stated basis for the trial court's denial of defendant's motion for self-representation – his supposed mental incapacity not amounting incapacity to stand trial – therefore was invalid." (*Id.*, at p. 433).)

Edwards held that for a defendant seeking to waive his right to counsel in order to litigate [as opposed to entering a plea of guilty or no contest] his case and who had a mental condition falling in the "gray area" exceeding the minimal constitutional standard to stand trial, a court may refuse to accept the waiver [not revoke a waiver already granted], on the ground that the mental condition interferes with the defendant's "capacity to conduct [a] trial defense unless represented." (*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 169-178.)

But, this Court has yet to adopt the *Edwards* standard. This Court's "independent constitutional obligation to interpret" federal law is restricted only by a decision of the federal high court that directly decides the issue to the contrary or "the premise from which it necessarily follows." (*People v. Whitfield* (1996) 46 Cal. App. 4th 947, 957.) Until this Court decides how, or if, it will adopt *Edwards*, the trial court and the Court of Appeal are required to follow the rulings of this Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

Presently, the Courts of Appeal are in disagreement over what the appropriate standard presently is. (Compare petitioner's case with *People v. Anderson*, an unpublished case from the Third Appellate District [2009 WL 3809633], in which a criminal defendant was also on the losing side because the Court of Appeal believed the correct standard was that found in *Halvorsen,* and that the Court of Appeal was required to follow *Halvorsen* unless or until the California Supreme Court indicated that the rule in *Halvorsen* would be changed.)

Additionally, should this Court decide to jettison its prior rulings and follow *Edwards* it needs to assist the lower courts in supplying them with a road map, as to when a presently competent criminal defendant may continue to represent him of herself. *Edwards* itself indicates the road map. The facts of *Edwards* indicate that its holding does not apply to any case in which the defendant has not been found to be incompetent in the proceeding in which he elects self-representation.

Thus, this Court should grant the Petition for Review.

II

WHERE THERE IS ABSOLUTELY NO BASIS ON THE RECORD FOR EXCLUDING AN AFRICAN AMERICAN FEMALE JUROR MAY A PROSECUTOR'S MADE UP REASONS BE CONSTITUTIONALLY VALID

A prosecutor asked to explain his or her conduct must provide a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges." (*Batson v. Kentucky* (1986) 476 U.S. 79, 98, fn 20.) Though it is true that a prosecutor may exclude jurors on the basis of a "hunch," there must be something in the record to support that hunch after a court has found that a prima facie case has been established. Because, according to United States Supreme Court precedent, a prosecutor's failure to ask a prospective juror any question on the subject the prosecutor alleges it is concerned about in excusing an otherwise qualified juror is evidence suggesting that the prosecutor's explanation is a sham and a pretext for discrimination. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246,

250 & fn. 8; see also *Snyder v. Louisiana* (2008) 552 U.S. 472 where the Court indicates that the "failure to question [the perspective juror] more deeply about this matter" must be considered in determining whether a prosecutor properly exercised the challenge. *Id.*, at pp 481-482.)

In areas that are subject to such subtle displays of impermissible racial animus this Court must be ever vigilant to protect the federal constitutional rights of jurors and defendants. As part of this important obligation, this Court must insure that lower courts apply the appropriate standard in this area of great constitutional concern.

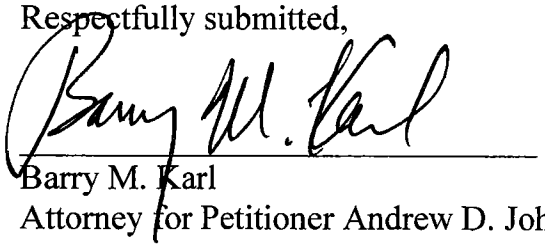
Therefore, petitioner respectfully requests that this Court grant the Petition for Review.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court grant the Petition for Review.

DATED: November 30, 2010

Respectfully submitted,



Barry M. Karl
Attorney for Petitioner Andrew D. Johnson

CERTIFICATE OF APPELLATE COUNSEL

Pursuant to California Rules of Court, rule 8.504, subdivision (d) (1)

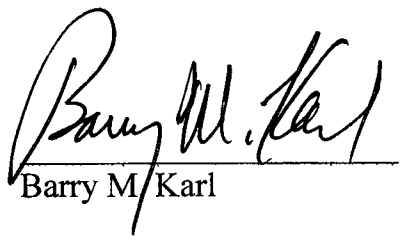
I, Barry M. Karl, certify that:

The length of Petitioner's Petition for Review does not exceed 8, 400 words, including footnotes;

In making this certification I am relying upon the word count of the computer program used to prepare Petitioner's Petition for Review;

The word count states that Petitioner's Petition for Review contains 2, 626 words.

DATED: November 30, 2010



Barry M. Karl

EXHIBIT A

[Opinion of the Court of Appeal]

Filed 10/25/10 P. v. Johnson CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANDREW D. JOHNSON, Defendant and Appellant.	A124643 (Solano County Super. Ct. Nos. VCR 191129 & VCR 191363)

A jury convicted defendant Andrew D. Johnson of multiple sex crimes and battery upon a separate victim. The conviction in the criminal trial came after pretrial proceedings that included a mental competency determination. (Pen. Code, § 1368.) Defendant, through appointed counsel, raises numerous issues on appeal. Concerning the competency trial, defendant argues that (1) the prosecutor improperly exercised peremptory challenges against African-American prospective jurors on the basis of race; (2) the court erred when instructing the jury on the law of competency; and (3) the jury's verdict finding defendant competent to stand trial is not supported by substantial evidence.

Concerning the trial of criminal charges, defendant argues that the court erred in (1) denying defendant self-representation; (2) denying a defense motion to dismiss the venire after defendant became disorderly and was removed from the courtroom in front of the prospective jurors; (3) failing to order a second competency hearing during trial; (4) failing to hold a hearing on defendant's request for substitute counsel; (5) instructing

the jury on sexual penetration with a foreign or unknown object when only a foreign object was alleged in the information; and (6) failing to instruct the jury on lesser included offenses for rape and forcible sexual penetration. Defendant also asserts that insufficient evidence supports the jury's verdict on rape and forcible sexual penetration of one victim, and battery causing serious bodily injury to a second victim.

We have carefully considered each of these claims, as detailed in the discussion below, and find no merit to defendant's contentions. One contention is a matter of some controversy today, and concerns defendant's claim that the trial court violated his constitutional right to self-representation. Defendant contends that a jury's finding that he was competent to stand trial obliged the trial court to find him competent to conduct his defense at trial. We conclude that a trial court does not violate the constitution in denying self-representation at trial to a defendant who meets the minimal standard of competency to stand trial but who suffers from a severe mental illness to the point where he was not competent to conduct trial proceedings by himself. (*Indiana v. Edwards* (2008) 554 U.S. 164, ___, 128 S.Ct. 2379, 2387-88 (*Edwards*).) We affirm the judgment.

I. FACTS

Defendant sexually assaulted a female bartender in the early morning hours of June 23, 2007, and, later that same day, hit a male sandwich shop patron on the head with a metal chair. Defendant was apprehended shortly after the second attack, and his crimes against both victims were tried together in a consolidated trial.

A. Sex offenses

Sheila L. worked as a night bartender at a Vallejo bar in June 2007. Around midnight on June 23, 2007, defendant entered the bar and ordered a beer. Defendant struck up a conversation with Sheila as he sat at the bar drinking. Sheila made small talk with defendant. Sheila did not know defendant. At trial, Sheila explained that it was part of her duties as a bartender to be friendly to the patrons. After about a half hour of small talk, the tone of the conversation changed. Defendant told Sheila she was "sexy and attractive," and "turned him on." At first, Sheila thought defendant was just being

"goofy," because she "was old enough to be his mother." At the time, defendant was 35 years old and Sheila was 61 years old.

Sheila soon grew afraid of defendant and, when it was near closing time and only defendant and another patron remained, Sheila asked the other patron, a woman, to stay at the bar. The female patron did not stay, and Sheila was left alone with defendant. Defendant told Sheila he wanted to buy another beer. It was now about 1:45 a.m., and Sheila told defendant that it was closing time but she could sell him a six-pack of beer to go. Defendant said he wanted the six-pack, and Sheila bagged one and put it on the bar. Sheila asked for the purchase price of the beer, and defendant fumbled around in his pocket, without producing the money. Sheila started her procedures for closing the bar and went to open the restroom doors.

As Sheila stood near the restroom doors, defendant grabbed her, pushed her into the men's restroom, and threw her to the hard tile floor. Sheila struck her elbow and knee on the floor. Defendant told Sheila: " 'I'm gonna fuck you real hard just the way you want it.' " Sheila was terrified. She thought she was going to die. Sheila cried and screamed and told defendant: " 'Don't do this to me. I don't know why you are doing this to me.' " Sheila tried to fight him off but defendant held Sheila against the floor face down on her stomach, grabbed her by the hair, and banged her head against the floor. Defendant removed Sheila's shoes, pants, and underwear.

Defendant tried to insert his penis into Sheila's vagina but he did not have an erection. Defendant was able to insert his penis "somewhat" into the victim's vagina. Sheila testified that "[i]t seemed like the first part" of his penis was inserted into her vagina. Defendant tried several times to insert his penis fully into Sheila's vagina, then turned Sheila over, told her to "suck his dick," and put his penis in her mouth. Sheila bit defendant's penis. Defendant "[j]umped back," fumbled around, and then went behind Sheila again and this time tried to enter her rectum. Sheila could not see what defendant was doing but she felt something enter her rectum, either defendant's hand or penis. Defendant still did not have a full erection. Defendant relented, left the bar, and Sheila telephoned the police.

The bar had a surveillance camera. A videotape was played for the jury showing defendant in the bar and substantiating Sheila L.'s account of the night's events in the public area of the bar. The camera did not record the attack in the men's restroom. Sheila later identified defendant as her assailant from a photographic lineup, and confirmed that identification at trial. A sexual assault examination of Sheila found redness in the vagina, indicating contact. Sheila also suffered a fractured elbow from the attack, had to wear an arm brace for three months, and still had pain in her elbow and knee at the time of trial, which was about 18 months later. Sheila was too afraid to work at the Vallejo bar ever again.

B. Battery

On June 23, 2007, around 1:30 p.m., Ahmed Muse went to a sandwich shop for lunch. Muse was waiting in line to place his sandwich order when he saw defendant bothering a family sitting at a table. The family consisted of an elderly couple and two young children. Muse thought the people were grandparents with their grandchildren. Defendant was asking the family for money and using profanities. The family looked distraught, so Muse went to their aid. Muse asked defendant: " 'Could you please leave?' " Defendant angrily replied: " 'Who the fuck are you?' " Muse did not want to argue with defendant so he stepped back into line and ignored defendant.

Defendant went up to Muse and shouted in his face: " 'Who the fuck are you? . . . Let me see what you can do to me. What you gonna do? What you gonna do?' " Defendant yelled, " '[h]it me,' " then used his buttocks to push Muse several times in the groin. Muse became angry and punched defendant. Defendant retaliated by throwing hard metal chairs at Muse. At one point, Muse turned to look outside because people were gathering there, and defendant hit Muse in the back of the head with a metal chair. Muse lost consciousness and hit the floor. A sandwich shop employee saw Muse collapse onto the floor and defendant get on top of Muse and repeatedly hit him as Muse lay motionless for about a minute. Muse regained consciousness and saw defendant leaning over him with fists raised. Muse kicked defendant away from him. Defendant

picked up Muse's wallet that had fallen out of his pocket and left the store with the wallet. The police responded to the area and apprehended defendant.

C. Pretrial proceedings

Separate complaints were filed charging defendant with crimes against Sheila L. and Muse. The cases were later consolidated. The court appointed a lawyer for defendant when defendant first appeared in court on June 26, 2007, but defendant asked to represent himself on July 5, 2007, and was allowed to do so. Defendant represented himself at the preliminary hearing, arraignment, and other pretrial proceedings through January 2008. A single judge, Judge Allan Carter, was assigned to the case for all proceedings.

D. Competency proceedings

On January 30, 2008, Judge Carter declared a doubt as to defendant's mental competency given defendant's "unusual" behavior in court and the tone and content of letters written by defendant to the court and others. (Pen. Code, § 1368, subd. (a).) The court appointed an attorney to provide an opinion to the court on defendant's competency and to represent defendant at any competency hearing. After meeting with defendant, the attorney said he shared the court's concerns about defendant's legal competency, although he thought it was "a close call." The court suspended the criminal proceedings and appointed experts to evaluate defendant's competency. Defendant refused to meet with any of the three psychiatric experts appointed to evaluate him.

A jury trial on defendant's competency was held in October 2008. A psychologist, Kathleen O'Meara, Ph.D., testified for the defense. Dr. O'Meara said there was "a very strong possibility" that defendant had some type of delusional thought disorder coupled with conspiracy paranoia and, "err[ing] in the direction of caution," concluded that it was "more likely than not" that defendant was not competent. The psychologist said she believed defendant understood the nature and purpose of the proceedings against him, at least to some degree, but that his paranoia might impair his ability to cooperate with defense counsel in a rational manner. Dr. O'Meara's opinion of probable incompetency was based on her review of transcripts of the pretrial proceedings,

defendant's letters, and defendant's medical chart, as well as conversations with correctional staff. Dr. O'Meara acknowledged that it was "very unusual" for her to offer an opinion without having interviewed the defendant and conceded that her opinion was "therefore somewhat speculative." Dr. O'Meara also acknowledged that she had "reservations" about her opinion and conceded that defendant could be malingering.

Two psychiatrists testified for the prosecution. Herb McGrew, M.D., testified that it was not possible to form an opinion on competency without interviewing defendant. Dr. McGrew testified that he, like Dr. O'Meara, reviewed collateral materials including court transcripts and defendant's letters and medical chart. Dr. McGrew said the collateral materials suggested the possibility of mental illness but no conclusion could be reached without interviewing defendant. The psychiatrist observed that one "can be extremely crazy and be competent" so an interview is essential in determining competency. The second psychiatrist, Murray Eiland, M.D., also said an interview was essential and that he could not form an opinion on competency without one.

The jury was instructed, consistent with statutory requirements, that the law presumes that a defendant is mentally competent and that, in order to overcome this presumption, the defendant must prove that it is more likely than not that the defendant is not mentally competent because of a mental disorder. (Pen. Code, § 1369, subd. (f).) On October 28, 2008, the jury returned its verdict finding defendant competent to stand trial. The court reinstated criminal proceedings and defendant resumed self-representation.

E. The appointment of counsel despite a demand for continued self-representation

On October 30, 2008, two days after defendant was found competent to stand trial, the court expressed concerns about defendant's ability to represent himself at trial. The court told defendant: "You may be competent to stand trial, but I'm not convinced that you are competent to represent yourself." The court noted that the United States Supreme Court, in *Edwards, supra,* 128 S.Ct. at p. 2388, held that judges may insist upon representation by counsel for those who are competent to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by

themselves. The court concluded that defendant fit that description. The court catalogued defendant's "bizarre," noncompliant, and disruptive behavior in court and in jail. The court concluded by finding that defendant "has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendant." The court revoked defendant's in propria persona status and appointed an attorney to represent him, over defendant's objection.

F. Trial and sentencing

Jury trial on the criminal charges began in December 2008. The evidence presented at trial included the evidence summarized above concerning the sexual assault in the bar and the battery in the sandwich shop on June 23, 2007.

The jury found defendant guilty of the following crimes: count one, assault with intent to commit a felony (rape, oral copulation, and sexual penetration by foreign or unknown object) of the bartender, Sheila L. (Pen. Code, § 220); count two, forcible sexual penetration by foreign or unknown object (Pen. Code, § 289, subd. (a)(1)); count three, forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); count four, forcible rape (Pen. Code, § 261, subd. (a)(2)); count five, battery with infliction of serious bodily injury upon Sheila (Pen. Code, § 243, subd. (d)); count six, assault with a deadly weapon (chair) upon the store patron, Muse (Pen. Code, § 245, subd. (a)(1)); count seven, battery with serious bodily injury inflicted upon Muse (Pen. Code, § 243, subd. (d)); and count eight, grand theft of Muse (Pen. Code, § 487, subd. (c)).

The jury later returned a separate verdict on prior conviction allegations. The jury found true allegations that defendant suffered a prior conviction in 1990 for kidnapping (Pen. Code, § 207, subd. (a)) and in 1999 for making a criminal threat (Pen. Code, § 422).

A sentencing hearing was held in April 2009. The court imposed three consecutive prison terms of 25 years to life. The life terms were imposed on counts two (forcible sexual penetration), three (forcible oral copulation), and six (assault with a deadly weapon). The court imposed a concurrent two-year term on count eight (grand

theft) and stayed sentence on all other counts. The court also imposed two separate five-year enhancements for defendant's prior serious felony convictions. (Pen. Code, § 667, subd. (a)(1).)

II. DISCUSSION

As noted above, defendant raises numerous issues on appeal. Concerning the competency trial, defendant argues that (1) the prosecutor improperly exercised peremptory challenges against African-American prospective jurors on the basis of race; (2) the trial court erred when instructing the jury on the law of competency; and (3) the jury's verdict finding defendant competent to stand trial is not supported by substantial evidence.

Concerning the trial of criminal charges, defendant argues that the court erred in (1) denying defendant self-representation; (2) denying a defense motion to dismiss the venire after defendant became disorderly and was removed from the courtroom in front of the prospective jurors; (3) failing to order a second competency hearing during trial; (4) failing to hold a hearing on defendant's request for substitute counsel; (5) instructing the jury on sexual penetration with a foreign or unknown object when only a foreign object was alleged in the information; and (6) failing to instruct the jury on lesser included offenses for rape and forcible sexual penetration. Defendant also asserts that insufficient evidence supports the jury's verdict on rape and forcible sexual penetration of Sheila, and battery causing serious bodily injury to Muse. We address each of these claims in turn.

A. Substantial evidence supports the trial court's finding that the prosecutor did not discriminate against prospective jurors on the basis of race during the competency trial

Defendant claims the prosecutor improperly exercised peremptory challenges against African-American prospective jurors on the basis of race during jury selection for the competency trial. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) The prosecutor and defense counsel were

each given 10 peremptory challenges.[1] Near the end of the jury selection process, defense counsel objected that the prosecutor was exercising his peremptory challenges on the basis of race. At that point, the prosecutor had exercised nine peremptory challenges and three of those challenges concerned African-American prospective jurors.[2] There were two African-American prospective jurors in the jury box at this stage of the proceedings, and they were later empanelled as jurors. We note that defendant is African-American, as is the victim Muse.

After defense counsel made his *Batson/Wheeler* motion, the court found that counsel had made a preliminary, prima facie showing of discrimination and asked the prosecutor to respond. The prosecutor stated race-neutral reasons for challenging each of the three African-American prospective jurors, and the trial court accepted the genuineness of those reasons and found no purposeful discrimination. The court denied defendant's motion. On appeal, defendant renews his *Batson/Wheeler* claim.

1. General principles

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 898 (*Hamilton*).)

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1 The parties were actually entitled to only six peremptory challenges each in the competency trial but the court, at defense counsel's insistence and "[f]rom an overabundance of caution," permitted 10 peremptory challenges. (Code of Civ. Proc., § 231, subd. (c); *People v. Stanley* (1995) 10 Cal.4th 764, 807-808.)

2 Defense counsel initially said there were four African-Americans challenged by the prosecutor, but counsel, the prosecutor, and the court could name only three individuals. On appeal, defendant has likewise identified only three individuals. In any event, only one of those individuals was the focus of defense counsel's concern. The same is true on appeal.

The following procedures apply when the defense contends that the prosecutor is using peremptory challenges on the basis of racial bias. " 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." ' " (*People v. Davis* (2009) 46 Cal.4th 539, 582.)

" '[T]he critical question in determining whether [a party] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his [or her] peremptory strike.' [Citation.] The credibility of a prosecutor's stated reasons 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' " (*Hamilton, supra,* 45 Cal.4th at p. 900.) All relevant circumstances may be relied upon in determining whether there has been purposeful discrimination, including disparate treatment of similarly situated panelists. (*People v. Lenix* (2008) 44 Cal.4th 602, 616, 622.) "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241.) "Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons." (*Lenix, supra,* at p. 607.)

"The existence or nonexistence of purposeful racial discrimination is a question of fact. [Citation.] We review the decision of the trial court under the substantial evidence standard, according deference to the trial court's ruling when the court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror. [Citations.] '[T]he trial court is not required to make specific or detailed

comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.' [Citation.] 'We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' A prosecutor's reasons for exercising a peremptory challenge 'need not rise to the level justifying exercise of a challenge for cause.' [Citation.] ' "[J]urors may be excused based on 'hunches,' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." ' " (*Hamilton, supra,* 45 Cal.4th at pp. 900-901, fn. omitted.)

2. Substantial evidence supports the trial court's finding that there was no purposeful discrimination

Defendant claims the prosecutor improperly excluded several African-American women from the jury, although only one prospective juror is discussed in the appellate briefing. In this respect, appellate counsel's claim mirrors trial counsel's concerns. At trial, defense counsel identified three prospective jurors in making his *Batson/Wheeler* motion but stated that his concern truly rested with the last African-American challenged by the prosecution, R.B. Trial counsel conceded that the prosecutor may have had valid reasons for challenging two of the African-American prospective jurors, T.G. and H.C., and that counsel's primary concern was with the later challenge to R.B. Appellate counsel takes a similar position in stating that the prosecutor improperly excluded "jurors" but then limiting his discussion to a single prospective juror, R.B. We discuss all three prospective jurors identified by defense counsel at trial in making his *Batson/Wheeler* motion, to address any suggestion that there was a pattern of discrimination.

a. Prospective Juror T.G.

T.G. was an African-American woman and retired counselor. She worked for over 20 years as a licensed marriage and family counselor. During voir dire, T.G. said

she had a working relationship for several years with Dr. Kathleen O'Meara, the principal defense witness in the mental competency trial. T.G. said she had "a lot of respect" for Dr. O'Meara.

The prosecutor stated two reasons for striking T.G. from the jury panel: T.G. was a mental health counselor, and she knew Dr. O'Meara. Substantial evidence supports the prosecutor's stated reasons for striking T.G., and the trial court reasonably concluded the reasons were race-neutral.

It will be recalled that the credibility of a prosecutor's stated reasons " 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' " (*Hamilton, supra,* 45 Cal.4th at p. 900.) Consideration of a panelist's occupation is a well-established trial strategy. A panelist's occupation and work environment are commonly used by advocates to assess possible bias or predisposition, and "[a]n advocate is permitted to rely on his or her own experiences and to draw conclusions from them." (*People v. Lenix, supra,* at 44 Cal.4th p. 629.) Here, the prosecutor could reasonably conclude that T.G.'s long experience as a mental health counselor would predispose her to accept defendant's claim of mental disability. A prosecutor may also be reasonably concerned that a psychiatric professional will rely too heavily upon her educational and occupational background when evaluating psychiatric testimony. (*People v. Lewis* (2008) 43 Cal.4th 415, 476-477.)

Moreover, T.G. was personally familiar with Dr. O'Meara, the chief defense witness, and T.G. said she had "a lot of respect" for Dr. O'Meara. The prosecutor was reasonably concerned that T.G. might be predisposed to accept Dr. O'Meara's opinion. The case turned on whether the jury credited Dr. O'Meara's opinion that defendant was mentally incompetent. As the trial court noted in addressing the *Batson/Wheeler* motion, Dr. O'Meara was "the most material, relevant and important witness in this trial." The prosecutor reasonably struck T.G. from the jury panel.

b. Prospective Juror H.C.

H.C. was an African-American woman and retired psychiatric technician. She worked for 32 years at the Sonoma Developmental Center, where she interacted with mentally ill patients and mental health professionals on a regular basis. The prosecutor asked H.C. on voir dire if H.C. would be "bringing in some of the things that you've kind of learned throughout your career into what you are going to be doing here in this case, which is deciding the case" on defendant's mental competency. H.C. replied: "Well, because of my background and training, I would think so." H.C. also expressed some initial hesitation when asked if she, as a juror, would disbelieve a psychiatrist or psychologist if the prosecutor could demonstrate that the opinion was based on inaccurate or incomplete facts. H.C. noted that psychiatrists and psychologists are "experts in that field" and she "would like to respect their opinion."

The prosecutor said he struck H.C. from the jury panel because she worked for many years as a psychiatric technician, and she was equivocal when asked about the weight she would give to a psychologist's testimony. As with the prior prospective juror, substantial evidence supports the prosecutor's stated reasons for striking H.C., and the trial court reasonably concluded the reasons were race-neutral. The prosecutor could reasonably conclude that H.C.'s experience as a psychiatric technician would predispose her to accept defendant's claim of a mental disability or otherwise impact her assessment of psychiatric testimony, and she did show signs during voir dire of a heightened deference to psychology experts.

c. Prospective Juror R.B.

R.B. was an African-American woman and retired postal worker who was then working as a realtor. R.B. said she had an autistic nephew and a stepgrandchild with a mental disability.

The prosecutor said he struck R.B. from the jury panel because she had a grandchild with a mental disability, and the prosecutor reasoned that "she would tend to give more credence to psychologists and be more sympathetic to the idea that people may have mental diseases or defects, and for that reason, I eliminated her."

A prosecutor is entitled to consider a prospective juror's pro-defense sympathy. (*People v. Stanley* (2006) 39 Cal.4th 913, 939-940.) Defendant argues on appeal that there was "no evidence to support" the prosecution's theory that a juror with a mentally disabled grandchild would necessarily be sympathetic to someone claiming a mental disability, especially given R.B.'s statement on voir dire that she would put aside her personal experience and be fair to both sides. But a prosecutor's reasons for exercising a peremptory challenge " 'need not rise to the level justifying exercise of a challenge for cause.' [Citation.] ' "[J]urors may be excused based on 'hunches,' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." ' " (*Hamilton, supra,* 45 Cal.4th at p. 901.) The prosecutor's concern about R.B.'s sympathies appears reasonable and genuine, as the trial court found.

A comparative juror analysis does not undermine the trial court's finding that the prosecutor's stated reason for challenging R.B. was genuine. Defendant argues that a White panelist had equal or greater contact with the field of mental illness or disability than did R.B., yet was allowed to serve on the jury. Defendant points to juror number three, whom defendant describes as a White male. The juror's race is actually not clear on this record.

In any event, there is nothing comparable about R.B. and juror number three. Juror number three simply said he was an airline mechanic and his wife a certified nurse assistant at the Veterans' Home in Yountville. There is no suggestion in the record that the juror had any familiarity with psychiatry or with anyone suffering a mental illness or disability. Appellate counsel reaches beyond the trial record in arguing that the Veterans' Home has a mental care unit for residents with dementia. Counsel asks us to take judicial notice of materials showing the existence of a dementia program at the Veterans' Home in Yountville. We grant the request for purposes of this appeal, but the supplemental information does nothing to advance defendant's claim of purposeful discrimination. Counsel uses the supplemental information to embark upon a stream of speculation beginning with the supposition that juror number three's wife "might" have worked with dementia residents, the wife may have conveyed her experiences to her husband, and her

husband may have then formed opinions about mental illness relevant to the competency trial. Appellate counsel then argues that race alone distinguishes R.B., with a mentally disabled grandchild, from juror number three with a wife who may have had contact with dementia sufferers and may have shared that experience with her husband. The argument is unpersuasive. Comparing R.B. to juror number three does not show the prosecutor challenged an African-American panelist who possessed the same characteristics as did a White juror he did not challenge. The two panelists possessed very different characteristics. Substantial evidence supports the trial court's determination that the prosecutor challenged R.B., and the other African-American panelists, for reasons unrelated to race.

B. The court erred when instructing the jury on competency but the error was harmless

The court instructed the jury pursuant to a standard jury instruction but with an addition noted below in italics: "You must decide whether the defendant is mentally competent to stand trial. That is the only purpose of this proceeding. Do not consider whether the defendant is guilty or not guilty of any crime or whether he was sane or insane at the time that any alleged crime was committed. [¶] The defendant is mentally competent to stand trial if he can do all of the following: [¶] 1. Understand the nature and purpose of the criminal proceedings against him; [¶] 2. Assist, in a rational manner, his attorney in presenting his defense *or conduct his own defense in a rational manner*; [¶] AND [¶] 3. Understand his own status and condition in the criminal proceedings. [¶] The law presumes that a defendant is mentally competent. In order to overcome this presumption, the defendant must prove that it is more likely than not that the defendant is now mentally incompetent because of a mental disorder." (CALCRIM No. 3451.)

The addition was made at the prosecutor's request and without defense objection, and appears to have been made because defendant had been representing himself in the criminal proceedings and wanted to continue to do so. The People concede that the court erred in modifying the standard instruction. The competency standard is set by statute. (Pen. Code, § 1367, subd. (a).) By statute, the relevant inquiry for legal competency is

whether defendant is able "to assist counsel in the conduct of a defense in a rational manner." (*Ibid.*) The court erred in departing from that standard.

But the error was harmless beyond a reasonable doubt. The court instructed the jury that a defendant is mentally competent to stand trial if he can, among other things, assist his attorney in presenting his defense in a rational manner *or conduct his own defense in a rational manner*. The ability to conduct one's own defense requires a higher degree of functionality than does the lesser role of a represented defendant. (*Edwards, supra,* 128 S.Ct. at pp. 2386-2387.) The jury, in finding defendant legally competent under the instructions as given, either found defendant able to assist his counsel rationally (the basic, and correct, competence level), or able to conduct his own defense rationally (a higher competence level). If the jury found defendant able to conduct his own defense, it necessarily found him able to assist counsel. Defendant was not prejudiced by the improperly modified jury instruction.

C. The jury properly found defendant competent to stand trial

Defendant argues that the jury's finding that he was competent to stand trial is unsupported by the evidence because Dr. O'Meara opined that defendant was incompetent and there was "no evidence to the contrary." In stating there was no contrary evidence, defendant relies on the fact that the expert witnesses for the prosecution were unwilling to opine on defendant's competency without interviewing him—interviews he refused. Defendant's refusal to submit to psychiatric examination denied the prosecution an opportunity to investigate Dr. O'Meara's opinion, and perhaps to refute it. His refusal to cooperate, however, did not compel the jury to find in his favor.

"The law on competency is well established. *A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence.*" (*People v. Ramos* (2004) 34 Cal.4th 494, 507, italics added; (Pen. Code, § 1369, subd. (f).) The prosecutor was thus entitled to rely upon the presumption of competency and it was for defendant, with the assistance of appointed counsel, to demonstrate an incapacity to stand trial. Defendant attempted to do so with the testimony of Dr. O'Meara. But the jury was free

to reject Dr. O'Meara's opinion, as it is free to reject any witness's testimony. It must also be noted that Dr. O'Meara's opinion of incompetency was not rock solid, as she readily admitted. The psychologist said she erred on the side of caution in concluding that defendant was probably incompetent. Dr. O'Meara acknowledged that it was "very unusual" for her to offer an opinion based on collateral information, without having interviewed the defendant, and conceded that her opinion was "therefore somewhat speculative." Dr. O'Meara also acknowledged that she had "reservations" about her opinion and conceded that defendant could be malingering. On this state of the evidence, and with the presumption of competence applying to the proceeding, the jury could reasonably conclude that defendant was competent to stand trial.

D. The court did not err in finding defendant unable to represent himself at trial

Defendant represented himself for almost seven months of pretrial proceedings, from early July 2007 to late January 2008, when the court expressed a doubt about defendant's mental competency. (Pen. Code, § 1368.) A jury adjudged defendant competent to stand trial but the court questioned defendant's ability to defend himself at trial. The court noted that the United States Supreme Court, in *Edwards, supra,* 128 S.Ct. at p. 2388, held that judges may insist upon representation by counsel for those who are competent to stand trial but who suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves. The court concluded that defendant fit that description. The court catalogued defendant's "bizarre," noncompliant, and disruptive behavior in court and in jail. The court found that defendant "has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendant." The court revoked defendant's in propria persona status and appointed an attorney to represent him, over defendant's objection. Defendant challenges that ruling on appeal as a violation of his constitutional right to self-representation, and contends that the jury's finding that he

was competent to stand trial obliged the trial court to find him competent to conduct his defense at trial. We reject the contention.

The California Constitution does not confer any right of self-representation. (*People v. Taylor* (2009) 47 Cal.4th 850, 871-872 (*Taylor*).) However, the Sixth Amendment to the United States Constitution "implies a right of self-representation" and generally permits a criminal defendant to waive his right to the assistance of counsel and to defend himself. (*Faretta v. California* (1975) 422 U.S. 806, 821.) A defendant must be competent to waive counsel.[3] (*Godinez, supra,* 509 U.S. at p. 396.) Competence to waive counsel and competence to stand trial are identical. (*Id.* at pp. 391, 397-398.) The requirement of competence in both situations has "a modest aim"—basically, it seeks to ensure that the defendant has a rational understanding of the proceedings. (*Id.* at pp. 398, 401, fn. 12, 402; see *Dusky v. United States* (1960) 362 U.S. 402 [establishing trial competence standard].) Applying these principles, the United States Supreme Court in *Godinez* held that no mental competence beyond that necessary to stand trial was required for the defendant to waive counsel and plead guilty. (*Godinez, supra,* at pp. 396-402.) The court rejected the suggestion that a higher competency standard was necessary when a defendant waives counsel because a defendant who represents himself must have greater powers of comprehension, judgment, and reason than a represented defendant. (*Id.* at pp. 399-400.) The court stated that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." (*Id.* at p. 400, italics omitted.) This broad statement led the dissenting justices to interpret the majority's opinion as holding that "a defendant who is found competent to stand trial with the assistance of counsel is, *ipso facto*, competent to discharge counsel and represent himself." (*Id.* at p. 413 (dis. opn. of Blackmun, J.).)

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[3] There are other requirements. A defendant's request for self-representation must be voluntary, knowing, unequivocal, and timely. (*Godinez v. Moran* (1993) 509 U.S. 389, 400 (*Godinez*); *People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*).) None of these matters is at issue here.

Godinez was almost uniformly interpreted in this manner by state courts, which "tended to read *Godinez* as broadly equating competence to stand trial and competence to represent oneself." (Marks, *State Competence Standards for Self-Representation in a Criminal Trial: Opportunity and Danger for State Courts after* Indiana v. Edwards" (2010) 44 U.S.F. L.Rev. 825, 831 (Marks); see *Taylor, supra,* 47 Cal.4th at p. 876, fn. 11 [noting that all but two courts read *Godinez* as equating trial competency with self-representation competency].) The California Supreme Court interpreted *Godinez* in this manner, and accepted the argument that a trial court erred in refusing a defendant's request for self-representation in a jury trial because, "having found defendant competent to stand trial, the trial court erred in imposing upon him a higher standard of competence to waive the assistance of counsel." (*Welch, supra,* 20 Cal.4th at p. 732; see *Taylor, supra,* 47 Cal.4th at p. 876 [explaining its interpretation of *Godinez*].) Lurking in *Godinez*, however, was the fine distinction between the right to waive counsel and the right to represent oneself at trial following a waiver. *Godinez* involved a defendant who waived counsel and pleaded guilty, not a defendant who asked to conduct his own defense at trial. (*Godinez, supra,* 509 U.S. at p. 398.) *Godinez* also involved a state court that had permitted a defendant to represent himself, not one that had denied self-representation. (*Id.* at p. 392.) These distinctions proved pivotal in *Edwards, supra,* 128 S.Ct. at p. 2385, and they are pivotal here.

In *Edwards,* as here, a trial court found a criminal defendant mentally competent to stand trial but not mentally competent to conduct that trial himself. (*Edwards, supra,* 128 S.Ct. at p. 2381.) The *Edwards* trial court was reversed on appeal to the Indiana Supreme Court, which held that a defendant competent to stand trial has a constitutional right to defend himself. (*Ibid.*) The United States Supreme Court rejected that conclusion and held that "the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." (*Id.* at pp. 2385-2386.)

The court contrasted the situation before it with the facts of *Godinez,* where the defendant pleaded guilty rather than defended himself at trial and where self-representation had been permitted rather than denied. (*Edwards, supra,* 128 S.Ct. at p. 2385.) *Godinez, supra,* 509 U.S. 389 was not controlling, the court explained. (*Edwards* at p. 2385.) "[T]he *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue." (*Ibid.*) "For another thing, *Godinez* involved a State that sought to permit a gray-area defendant [trial-competent but otherwise mentally impaired] to represent himself. *Godinez's* constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may deny a gray-area defendant the right to represent himself—the matter at issue here." (*Id.* at p. 2385, italics omitted.)

The *Edwards* court concluded that a state may deny mentally impaired defendants the right to represent themselves at trial. (*Edwards, supra,* 128 S.Ct. at pp. 2385-2386.) The court observed that the ability to conduct one's own defense requires a higher degree of functionality than does the lesser role of a represented defendant. (*Id.* at pp. 2386-2387.) Thus, one may be mentally competent to stand trial yet lack the expanded degree of competence necessary to represent oneself in that trial. (*Id.* at pp. 2387-2388.) In recognition of this fact, the court held that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States, supra,* 362 U.S. 402, because they understand the proceedings and are able to assist counsel rationally,] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Edwards, supra,* at pp. 2387-2388.)

To date, the California Supreme Court has indicated neither acceptance nor rejection of the *Edwards* invitation to apply a higher competence standard to defendants representing themselves at trial than to defendants who are either represented by counsel

or entering guilty pleas. Counsel for defendant argues to the contrary on appeal, and insists that our high court has affirmatively adopted a single competency standard applicable to all situations. Counsel is mistaken. The California Supreme Court has not mandated use of a unitary standard for competence under which competency to represent oneself is the same as competency to stand trial. In cases predating *Edwards*, our high court reasonably interpreted federal precedent to require a single competency standard and complied with that perceived standard. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433; *Welch, supra,* 20 Cal.4th at p. 732; see *Taylor, supra,* 47 Cal.4th at p. 876 [explaining its interpretation of federal precedent].) The United States Supreme Court has since clarified its position in *Edwards, supra*, 128 S.Ct. 2379, and the California Supreme Court has yet to say whether trial courts should, or may, employ a higher competency standard for defendants conducting trials. (Cf. *United States v. Ferguson* (9th Cir. 2009) 560 F.3d 1060, 1066-1070 [adopting *Edwards* standard for federal trials and remanding for discretionary determination as to whether self-representation should have been denied].)

Defendant maintains that our high court has recently decided the matter, and points to *Taylor, supra,* 47 Cal.4th 850. But that case presented a different situation from that presented here. At a 1996 trial that predated *Edwards,* defendant Taylor was adjudged competent to stand trial and the court *granted* defendant's request for self-representation in a capital trial. (*Taylor, supra,* 47 Cal.4th at pp. 856, 868.) On appeal, defendant, represented by counsel, relied upon *Edwards* to argue that self-representation should have been denied or revoked because defendant was mentally incompetent to represent himself at trial, although competent to stand trial. (*Taylor* at p. 866.) The California Supreme Court rejected the argument. The court found no federal constitutional error. (*Id.* at p. 878.) The court observed that " '*Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' " (*Ibid.*, quoting *State v. Connor* (Conn. 2009)

973 A.2d 627, 650; see *Edwards, supra,* 128 S.Ct. at p. 2385 [a state may permit "a gray-area defendant to represent himself"].)

The *Taylor* court also rejected "defendant's further claim that the trial court erred by failing to exercise discretion it assertedly had, under state law, to find defendant incompetent to represent himself." (*Taylor, supra,* 47 Cal.4th at pp. 878-881.) The court rejected "the claim of error because, at the time of defendant's trial, state law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial [*Dusky v. United States*, *supra*, 362 U.S. 402] under which defendant had already been found competent." (*Taylor, supra,* at p. 879.) A court presiding over a trial predating *Edwards* "lacked the power" to deny self-representation to a trial-competent defendant. (*Taylor* at p. 881.)

The question raised by defendant here is distinct: does a trial court now, following *Edwards*, have the power to deny self-representation to a trial-competent defendant? *Taylor*, *supra,* 47 Cal.4th 850 did not decide that issue but "left the question open." (Marks, *supra*, 44 U.S.F. L.Rev. at p. 838 & fn. 57; see *People v. Lynch* (2010) 50 Cal.4th 693, 721 [citing *Edwards*, without elaboration, for the proposition that "a *Faretta* motion may be denied if the defendant is not competent to represent himself"].) Ultimately, the California Supreme Court must decide whether to accept the *Edwards* invitation and apply a higher standard of competence to defendants representing themselves at trial. (*Edwards, supra,* 128 S.Ct. at pp. 2387-2388.) The trial court here made the leap itself, thus forcing the issue. We are thus presented with a somewhat narrower question: does a trial court violate the constitution in denying self-representation to a trial-competent yet mentally impaired defendant who wishes to represent himself at trial? We conclude that a trial court's denial of self-representation to a trial-competent yet mentally impaired defendant does not violate the United States Constitution where, as here, the record establishes that the defendant "suffer[s] from severe mental illness to the point where [he is] not competent to conduct trial proceedings" by himself, which is the standard articulated in *Edwards*. (*Edwards, supra,* at pp. 2387-2388.) We express no opinion on whether trial courts in the future *should*

employ the *Edwards* standard.[4] That is a matter for our high court to decide. We find only that trial courts may employ the *Edwards* standard without offending the United States Constitution.

The record here supports the trial court's conclusion that defendant, although competent to stand trial, was not competent to conduct trial proceedings by himself. A psychologist had testified at the trial-competency hearing that there was "a very strong possibility" that defendant had some type of delusional thought disorder coupled with conspiracy paranoia. Defendant had represented himself for almost seven months of preliminary proceedings during which he filed a number of nonsensical motions and conducted himself in a bizarre and disruptive manner. The trial judge, who had presided over all these matters, was well acquainted with defendant's limitations and reasonably concluded that defendant lacked the mental capacity to conduct his defense without the assistance of counsel. The court found, upon substantial evidence, that defendant "has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety and other common symptoms of severe mental illnesses which can impair his ability to play the significantly expanded role required for self-representation, even if he can play the lesser role of a represented defendant." The trial judge showed great patience in permitting defendant an opportunity to represent himself but chose to deny further self-representation when it became clear that defendant was accomplishing nothing and might, in the court's opinion, be deprived of a fair trial if allowed to continue his self-representation.

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[4] There are dangers in relying upon *Edwards, supra,* 128 S.Ct. 2379 to deny self-representation to a trial-competent defendant. Misapplication of *Edwards* may result in a violation of the Sixth Amendment right of self-representation, whereas granting self-representation to a trial-competent defendant will not. (Marks, *supra*, 44 U.S.F. L.Rev. at pp. 835-838.) But, as this case illustrates, there are also dangers in permitting a trial-competent yet mentally impaired defendant to defend himself at trial as that course may "sacrifice[] other important judicial interests"—"fairness, reliability, and efficiency." (*Id.* at p. 838.)

Appellate counsel for defendant argues that the trial court, having initially allowed self-representation, could not deny defendant continued self-representation. Counsel maintains that once self-representation is granted, it can be revoked only for misconduct, not mental illness. Counsel is mistaken. It is true, of course, that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta v. California, supra,* 422 U.S. at p. 834, fn. 46.) But misconduct is not the exclusive basis for denying self-representation, or for revoking it. The court may also, consistent with the federal constitution, deny self-representation to those who suffer from a mental illness that renders the defendant unable to conduct his or her defense. (*Edwards, supra,* 128 S.Ct. at pp. 2387-2388.) Mental illness varies in degrees and "can vary over time. It interferes with an individual's functioning at different times in different ways " (*Id.* at p. 2386.) It follows that a trial court may permit self-representation but revoke it when later events show defendant mentally incapable of self-representation. Such is the case here. The trial court did not violate defendant's constitutional rights by revoking self-representation when it became clear that defendant was suffering from a severe mental illness that rendered him incompetent to conduct trial proceedings by himself.

E. The court did not err in denying a motion to dismiss the venire

In advance of voir dire in the criminal trial, the court cautioned defendant not to interrupt the proceedings, as defendant had done on prior occasions. The court told defendant: "if you interrupt me, if you act out, if you act inappropriately, if you yell and scream like you did very briefly in front of the competency jury, I am going to stop the proceedings; I will send the jury out, and I will put you in the back. And I will probably make a finding you have voluntarily absented yourself from this hearing and the trial is going to go on without you."

Defendant disregarded the admonition and, a short time later, disrupted voir dire. Defendant yelled out to the court, in front of the venire, that the proceedings were "ridiculous," that appointed counsel was "not his lawyer," and that the court, defendant's appointed investigator, the district attorney, and the police "framed" him. The court

ordered the bailiffs to remove defendant from the courtroom. Defendant resisted the officers and a deputy sheriff, while trying to subdue defendant, suffered a broken nose.

The court ordered a recess and admonished the prospective jurors on the venire to disregard defendant's courtroom conduct. The court amplified its admonition upon the venire's return following the recess. The court explained to the prospective jurors that defendant's "acting out here in court today is no evidence of whether or not he is guilty of the offense that allegedly occurred or the offenses back in June of '07," and that it would be unfair to "hold his inappropriate conduct here in court against him regarding allegations that have occurred way back when." The court then asked the prospective jurors if defendant's courtroom misconduct would influence them in determining defendant's guilt, or if they had anything to say on the topic. No prospective jurors raised any concern. The court denied defense counsel's motion to dismiss the venire and to replace it with another venire.

Appellate counsel on appeal argues that the court erred in denying the motion to dismiss the venire because defendant's disruptive conduct prejudiced the prospective jurors. The argument is untenable. " 'As a matter of policy, a defendant is not permitted to profit from his own misconduct.' [Citation.] . . . Defendants may not complain on appeal about the possible effect on jurors of their own calculated misdeeds. [Citations.] . . . 'A defendant should not be permitted to disrupt courtroom proceedings without justification [citation] and then urge that same disruption as grounds for a mistrial.' " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1030.) The same reasoning applies to a motion to dismiss the venire. Moreover, the trial court here took quick curative action. The court admonished the prospective jurors to disregard defendant's courtroom conduct and queried them on whether defendant's conduct tainted their ability to resolve fairly the issues in the trial. The admonitions prevented any prejudice from the venire's observation of defendant's courtroom conduct.

F. The court properly denied a second competency hearing

Just before the start of voir dire, defense counsel voiced a doubt as to defendant's competency and asked the court to suspend criminal proceedings and to institute a second

competency review. (Pen. Code, § 1368.) The request was made on December 15, 2008, less than two months after a jury adjudged defendant to be competent. The court found that defendant was competent and selectively acted out to delay trial. The court denied counsel's request. Counsel renewed the request following defendant's courtroom outburst and removal. The court again denied the request. The court said of defendant, "I think he is malingering and trying to benefit from his own misconduct and will do just about anything to do that. I don't think he is incompetent."

The next day, defendant was brought to court for in limine motions. The court explained to defendant that he had been removed from the courtroom because he acted out, and defendant responded by accusing the court of having him "beat up" by courtroom officers. The court asked defendant if he would comply with requests not to interrupt the proceedings and to conduct himself appropriately. Defendant blurted out: "I want my discovery, and I want [defense counsel] Mr. Maher gone off my case. He is not my lawyer. He is not my legal representative." The court asked defendant what discovery he meant, and defendant said there was "exculpatory discovery" and mentioned false police reports. Defense counsel renewed his motion for a second competency hearing, which was again denied. In limine proceedings continued for a short period of time but defendant interrupted again, saying, "[t]his is not no motion," and "this is bullshit. Judge Carter, you making up rules I ain't never heard of in court, man." The court ordered defendant removed from the courtroom, and he was not present during the trial.

Appellate counsel for defendant contends that the trial court erred in denying trial counsel's request for a second competency hearing. The court did not err. "When a competency hearing has already been held and the defendant has been found competent to stand trial, . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.)

Defendant had been found competent to stand trial in October 2008, less than two months before defense counsel's request for a second competency hearing. Defense counsel failed to show that there was a substantial change in circumstances or that there was new evidence that cast serious doubt on the pretrial finding of competency. In requesting another competency hearing, counsel stated that defendant had "exhibited some very strange behavior" in recent meetings with counsel and that correctional staff reported that defendant had rolled around in his feces. Counsel said: "I personally don't know whether he is malingering or pretending or cheating or any of those other terms of art. I just know that I see a very different person. And as a lawyer it concerns me, and that's why I am bringing it to the attention of the court." Defense counsel later relied on defendant's courtroom outbursts as additional grounds for renewing his request for another competency hearing.

Defendant's strange behavior and courtroom outbursts did not constitute a substantial change in circumstances or new evidence. Defendant exhibited similar behavior throughout the proceedings and that behavior was evaluated by the jury in determining that defendant was competent to stand trial. Dr. O'Meara, at the pretrial competency hearing, discussed defendant's paranoid tendencies, his conspiracy allegations, and correctional staff's concerns about defendant's behavior. Dr. McGrew, a prosecution witness at the competency hearing, agreed that defendant was sometimes irrational and engaged in seemingly "psychotic ramblings." The question was not whether defendant exhibited signs of mental illness, but whether defendant was genuinely ill and, if so, whether the illness made him legally incompetent to stand trial. The jury considered these matters and found defendant competent.

Defendant's continued outbursts and irrational behavior following the competency hearing were not a change in circumstances or new evidence. It was simply a continuation of behavior already analyzed at length in the pretrial competency hearing. The trial court, which was well-acquainted with defendant's behavior over many months, reasonably concluded that defendant's condition was unchanged from two months previously when a jury found him competent. "[W]hen, as in this case, 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." (*People v. Jones, supra,* 53 Cal.3d at p. 1153.) The court properly denied defense counsel's request for a second competency hearing.

G. Defendant never requested substitute counsel, and thus no hearing was required

Appellate counsel for defendant argues that the trial court erred in failing to hold a hearing on defendant's request for substitution of appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118, 122-124.) "When a criminal defendant seeks substitution of counsel on the ground that appointed counsel is providing inadequate representation, a trial court must give the defendant an opportunity to explain the reasons for the request. [Citations.] Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 156-157.)

Here, there was no indication that defendant wanted a substitute attorney. The alleged *Marsden* request occurred when the court asked defendant, the day after he was removed from court for disruptive behavior, if defendant would conduct himself appropriately. Defendant replied: "I want my discovery, and I want [defense counsel] Mr. Maher gone off my case. He is not my lawyer. He is not my legal representative." Counsel on appeal argues that this statement told the court that defendant was displeased with appointed counsel and wanted substitute counsel. We disagree.

Defendant's statement is a repetition of defendant's request for self-representation. Defendant denied Attorney Maher's status as defendant's lawyer and legal representative because defendant wanted to represent himself and felt entitled to do so. Defendant did not want substitute counsel; he wanted counsel removed so he could represent himself. Defendant's request therefore did not trigger the need for a *Marsden* hearing. "[T]he duty of trial court inquiry into the reasons why a defendant seeks to discharge counsel applies only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective

counsel." (*People v. Molina* (1977) 74 Cal.App.3d 544, 549.) Defendant's complaint with Attorney Maher was not founded on defense counsel's performance but on the presence of any appointed counsel in the trial.

Our conclusion is not altered by the fact that defense counsel, when he heard defendant's remarks about wanting counsel "gone off [his] case," renewed a request for a second competency hearing and said: "I don't know. It sounds like [defendant] wants a *Marsden* motion as well." Courts are not bound by labels assigned by defendants or their counsel—the question is whether a defendant actually sought substitute counsel. (*People v. Carter* (2010) 182 Cal.App.4th 522, 528.) Here, it is plain that defendant sought removal of counsel and self-representation, which had previously and properly been denied, not new counsel.

H. Defendant was not prejudiced by the alleged variance between the information, alleging sexual penetration with a foreign object, and the trial court's instructions, which permitted conviction for sexual penetration with a foreign or unknown object

The law punishes sexual penetration "when the act is accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury." (Pen. Code, § 289, subd. (a)(1).) "Sexual penetration is defined as "the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument or device, or by any unknown object." (Pen. Code, § 289, subd. (k)(1).) " 'Foreign object, substance, instrument or device' shall include any part of the body, *except a sexual organ.*" (Pen. Code, § 289, subd. (k)(2), italics added.) An " '[u]nknown object' " includes "any foreign object substance, instrument or device, or any part of the body, *including a penis*, when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body." (Pen. Code, § 289, subd. (k)(3), italics added.) The statute thus encompasses penetration by both a finger (foreign object) and a penis (as an unknown object when the means of penetration is unclear).

Here, Sheila L. testified that she could not see what defendant was doing when he attacked her and held her on the floor of the bar's restroom but she felt something enter her rectum, either defendant's hand or penis. Count two charged defendant with forcible sexual penetration, and the court instructed the jury that penetration must be accomplished by using a foreign or unknown object and defined those terms consistent with the statute, to encompass body parts that are not sexual organs (foreign object) and all body parts including a penis if it is not known what object penetrated the opening (unknown object). (Pen. Code, § 289, subd. (k)(1).) The prosecutor argued that defendant was guilty of forcible sexual penetration whether he used his penis, his finger, or a vibrator that was seized from defendant when he was arrested. The jury convicted defendant of forcible sexual penetration.

On appeal, defendant, through counsel, argues that the court erred in instructing the jury on sexual penetration with a foreign or unknown object because only a foreign object was alleged in the information. By including reference in the instructions to an unknown object, defendant argues, the jury was free to convict defendant of sexual penetration with his penis when the information alleged only penetration with a foreign object, which excludes the penis. Defendant says he was notified only that he would be required to defend against a charge of digital penetration, not penile penetration.

The claim is meritless. Count two in the information alleged: "On or about June 23, 2007, defendant(s) ANDREW D. JOHNSON did commit a felony namely: SEXUAL PENETRATION BY FOREIGN OBJECT, FORCE & VIOLENCE, a violation of Section 289(a)(1) of the Penal Code of the State of California, County of Solano, in that said defendant committed an act of sexual penetration against the will of S.L. by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury on S.L." The information specifically cited Penal Code section 289, subdivision (a)(1), which encompasses sexual penetration by either a foreign *or unknown* object. (Pen. Code, § 289, subds. (a)(1), (k)(1).) It is true that the information further states "penetration by a foreign object," but this appears to be simply an abbreviated reference to the statute and not a limitation of the statutory charge. (Capitalization

altered.) Notably, the initial, capitalized statement in the information summarily references "FORCE & VIOLENCE" but later lists all means of forcible sexual penetration, including duress, menace, and fear of bodily injury. Similarly, the initial, capitalized statement in the information summarily references "SEXUAL PENETRATION BY FOREIGN OBJECT" but later lists "an act of sexual penetration" and cites the Penal Code section defining sexual penetration that includes both foreign and unknown objects. (*Ibid.*) The information, fairly read, sufficiently apprised defendant that he was charged with forcible sexual penetration, a violation of Penal Code section 289, subdivision (a)(1)—which means sexual penetration by a foreign or unknown object. No one reading the information could reasonably conclude that defendant would be exonerated of the charge in count two if he demonstrated that he forcibly penetrated Sheila L. with his penis but not his finger.

Even if the information was deficient in referring to penetration by a foreign object (rather than a foreign or unknown object), the deficiency was harmless. " 'An accusatory pleading['s] . . . purpose is to provide the accused with reasonable notice of the charges.' [Citation.] Defects in the form of an accusatory pleading are not a ground to reverse a criminal judgment in the absence of significant prejudice to a defendant." (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 132.) The Penal Code expressly provides that "[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (Pen. Code, § 960.) "Under modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information." (*People v. Jennings* (1991) 53 Cal.3d 334, 358.)

Here, a police detective testified at the preliminary hearing that the victim reported forcible sexual penetration of the victim's anus but the victim was uncertain of what object defendant used. The detective said the victim "was not sure if it was his penis, a finger or another object." The victim testified similarly at trial. Sheila L. testified that

she felt something enter her rectum. She said it was either "his hands or his penis" and explained that she was not sure what it was. Any deficiency in the form of the information in failing to advise defendant that he was charged with sexual penetration with a finger *or penis* was cured by the testimony at the preliminary hearing, which notified defendant that the victim was uncertain of what object defendant used and alleged penetration by defendant's "penis, a finger or another object." Sheila's trial testimony, the court's instructions to the jury, and the prosecutor's closing argument were consistent with the facts of the crime presented at the preliminary hearing. Any deficiency in the information did not mislead defendant nor prejudice the preparation of his defense.

The alleged variance between the information and the jury instructions on the crime was immaterial. In a case where the defendant was charged with forcible rape but convicted of statutory rape under the same statute, the California Supreme Court noted that "[t]he decisive question . . . is whether the variance was of such a substantial character as to have misled defendants in preparing their defense." (*People v. Collins* (1960) 54 Cal.2d 57, 60, abrogated by statutory amendment as stated in *People v. Lohbauer* (1981) 29 Cal.3d 364, 372.) The court found no material variance because the preliminary hearing provided notice that the victim was under age. (*Ibid.*)

Similarly, the preliminary hearing provided defendant here with notice that the victim alleged sexual penetration with his "penis, a finger or another object." The prosecution was thus permitted to offer testimony at trial consistent with the facts revealed at the preliminary hearing. Sheila L.'s trial testimony, the prosecutor's closing argument, and the jury instructions concerning sexual penetration by a foreign or unknown object did not take defendant by surprise. Nor was defendant denied the opportunity to present a defense. Defendant learned of the specific facts of the charged crime at the preliminary hearing and was able to present his defense. He never relied upon the distinction between penetration by a finger or a penis, nor could he. In seeking to defend against a charge of sexual penetration by a finger, the way to exoneration did not lie in proving penetration by a penis. As the People note on appeal, had defendant

tried to argue that he penetrated the victim's anus with his penis rather than a finger, the prosecutor would simply have moved to amend the information to conform to proof. Defendant was not prejudiced by the alleged deficiency in the information.

I. The court did not err in refusing to instruct the jury on assault and battery as lesser included offenses to forcible sexual penetration and rape

The jury convicted defendant of forcible sexual penetration (count two) (Pen. Code, § 289, subd. (a)(1) and forcible rape (count four) (Pen. Code, § 261, subd. (a)(2)). On appeal, defendant contends that the trial court erred in denying defense counsel's request to instruct the jury on assault and battery on these counts, as lesser included offenses. (Pen. Code, §§ 240, 242.) We reject the contention. There was insufficient evidence that lesser offenses, and not the greater, were committed.

The "duty to instruct on a lesser included offense arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense." (*People v. Breverman* (1998) 19 Cal.4th 142, 177 (*Breverman*).) Jury instructions on lesser included offenses are not warranted by the bare existence of *any* evidence that the lesser offense occurred. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) The California Supreme Court has repeatedly explained that "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Breverman, supra,* 19 Cal.4th at p. 162, original italics; accord *People v. Hughes* (2002) 27 Cal.4th 287, 366-367.)

There was no substantial evidence that defendant was guilty of assault and battery but not forcible sexual penetration and rape. The victim testified that defendant inserted his penis into her vagina and a sexual assault examination found redness in the victim's vagina, indicating contact. The victim also testified that defendant penetrated her rectum

with his hand or penis. There was no evidence that defendant committed simple assault and battery, and nothing more.

In *People v. Hughes, supra,* 27 Cal.4th at p. 367, our high court found insufficient evidence to instruct on battery as a lesser included offense to sodomy where the pathologist testified that bruises inside the victim's rectum were consistent with penetration by either a finger or penis, and no physical evidence of penile penetration was recovered from the victim's body. The evidence here is likewise insufficient to support an instruction for assault and battery. There was no " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Breverman, supra,* at p. 162.)

Even if the court did err in failing to instruct the jury on assault and battery as lesser included offenses to forcible sexual penetration and rape, the error was harmless. Error in failing to instruct on lesser included offenses that are supported by the evidence must be reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman, supra,* 19 Cal.4th at p. 178.) "A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson, supra*, 46 Cal.2d 818, 836)." (*Ibid.*)

A more favorable outcome was virtually impossible here given uncontradicted evidence of forcible sexual penetration and rape. Moreover, the jury's findings on other counts demonstrate that the jury would have rejected claims of simple assault and battery on the sexual penetration and rape counts had they received instructions on the lesser crimes. It will be recalled that, in addition to being found guilty of forcible sexual penetration (count two) and rape (count four), the jury also returned guilty verdicts on assault with intent to commit a felony (rape, oral copulation, and sexual penetration by foreign or unknown object) (count one), and battery with infliction of serious bodily injury (count five). (Pen. Code, §§ 220, 243, subd. (d).) The jury was instructed on assault and battery on counts one and five, found those counts true, and proceeded to find

defendant guilty of the greater crimes of sexual penetration and rape. Had the jury been instructed on assault and battery as lesser offenses to sexual penetration and rape, there is no reasonable probability that the jury would have convicted defendant of those lesser crimes. The jury had the opportunity to find defendant guilty of aggravated assault and battery alone, without finding him guilty of sex crimes, and did not do so.

J. Substantial evidence supports the jury's verdict

Defendant argues that insufficient evidence supports the jury finding of forcible sexual penetration and rape of Sheila L. and of battery causing serious bodily injury to Muse. The argument fails.

Defendant maintains that the evidence of sexual penetration was insufficient because the sexual assault nurse found no trauma to the rectum and Sheila, in responding to the nurse's inquires about possible rectal penetration, said only that " '[h]e was close.' " Contrary to defendant's claim on appeal, there is nothing inconsistent with Sheila's report to the examining nurse and her testimony at trial that defendant penetrated her rectum, with either his hand or penis. A woman reporting a sexual assault is unlikely to be cognizant of the law of forcible sexual penetration, which criminalizes "penetration, *however slight*, of the genital or anal opening," and therefore say that an assailant without a full erection was only " 'close.' " (Pen. Code, § 289, subd. (k)(1), italics added.) Any ambiguity on the matter was resolved at trial, where Sheila explained that defendant had difficulty achieving a full erection but decisively stated that she felt either his hand or penis enter her rectum.

The rape conviction is also supported by Sheila's testimony. Sheila testified that defendant pushed her to the floor, said "I'm gonna fuck you real hard," took off her pants, and "tried to insert his penis" into her vagina. Sheila said defendant had difficulty entering her vagina because his penis was not erect. The prosecutor asked Sheila: "Did any part of his penis at any time enter any part of your vagina?" Sheila replied: "Somewhat. It seemed like the first part of it did." A sexual assault examination of Sheila found redness in the vagina, indicating contact. This evidence was sufficient to

support the jury's verdict. "Any sexual penetration, however slight, is sufficient to complete the crime" of rape. (Pen. Code, § 263.)

Finally, we reach defendant's claim that Muse, the victim battered by defendant at the sandwich shop, did not suffer serious bodily injury sufficient to support the jury's verdict of aggravated battery on count seven. (Pen. Code, § 243, subd. (d).) Defendant relies upon testimony that Muse did not suffer a concussion, and from this concludes that Muse therefore did not suffer serious bodily injury. But a concussion is not the only kind of serious bodily injury. Loss of consciousness also constitutes serious bodily injury. (Pen. Code, § 243, subd. (f)(4).) Here, both Muse and a shop employee testified that Muse lost consciousness when defendant hit the victim in the head with a metal chair. This evidence amply supports the jury's verdict.

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.

We concur:

Ruvolo, P.J.

Reardon, J.

CERTIFICATE OF MAILING

Re: People v. Andrew D. Johnson, No.
First Appellate District, Division Four, A124643
Superior Court Nos. VCR 191129 & VCR 191363

The undersigned declares under penalty of perjury:

That I am a citizen of the United States; that I am over the age of eighteen years and not a party to the within aforementioned action; that my business address is 620 Jefferson Avenue, Redwood City, California 94063;

That I served a true copy of the attached:

PETITION FOR REVIEW

by placing said copy in an envelope addressed to:

Attorney General, State of California
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102

First District Appellate Project
730 Harrison Street
Suite 201
San Francisco, CA 94107

Andrew Johnson

Superior Court
321 Tuolumne Street
Vallejo, CA 94590

District Attorney
321 Tuolumne Street
Room 205
Vallejo, CA 94590

Court of Appeal
350 McAllister Street
San Francisco, CA 94102

which envelope was then sealed and postage fully prepaid thereon and thereafter was deposited, on the date set forth below, in the United States mail at Redwood City, California.

Executed in Redwood City, California, this day of December, 2010.

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