Appendix A

2024 WL 4164119
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

Daniel COHEN, Petitioner-Appellant,

v.

James HILL, Warden, Respondent-Appellee.

No. 22-15671
|
Argued and Submitted August 23, 2024 San Francisco, California
|
FILED SEPTEMBER 12, 2024

Appeal from the United States District Court for the Northern District of California, Jon S. Tigar, District Judge, Presiding, D.C. No. 4:19-cv-01980-JST

Attorneys and Law Firms

Marc Jonathan Zilversmit Esquire, Marc J. Zilversmit, Attorney at Law, San Francisco, CA, for Petitioner-Appellant.

Victoria Ratnikova, Jill M. Thayer, Esquire, Deputy Attorney Generals, AGCA - Office of the California Attorney General, San Francisco, CA, for Respondent-Appellee.

Before: BERZON, BRESS, and VANDYKE, Circuit Judges.

MEMORANDUM*

***1** Daniel Cohen appeals the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. We review the denial of a § 2254 petition de novo. *Bolin v. Davis*, 13 F.4th 797, 804 (9th Cir. 2021). Cohen's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Because the California Court of Appeals and California Supreme Court summarily denied review of Cohen's request for state post-conviction relief, under AEDPA we "must determine what arguments or theories ... could have supported[ ] the state court's decision" and "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Under AEDPA, we may not grant relief under § 2254 unless the state court's decision denying relief would have been "objectively unreasonable." *Bell v. Cone*, 535 U.S. 685, 699 (2002). We assume the parties' familiarity with the facts. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), and we affirm.

1. The state court's denial of relief was not contrary to or an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d)(1). To establish ineffective assistance of counsel, Cohen must demonstrate deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Cohen argues that his trial counsel was ineffective for failing to investigate and present a defense based on Cohen's poor mental health. We conclude, however, that it would not have been objectively unreasonable for the state post-conviction court to find a lack of *Strickland* prejudice when Cohen submitted medical records without any accompanying declaration from an expert, his trial counsel, or himself. Without adequate context to explain the medical records, which provide limited insight into Cohen's state of mind at the time of the murder, the state court could have reasonably concluded that Cohen did not demonstrate how additional investigation and presentation of a mental health defense by his trial counsel would have affected the outcome of the trial. That is especially so given the substantial evidence of Cohen's intent to kill and premeditation. The state court could have reasonably concluded that the records Cohen provided, standing alone, did not controvert that evidence.

Nor was the state court's denial of post-conviction expert funds contrary to or an unreasonable application of Supreme Court precedent. Cohen identifies no clearly established federal law requiring the provision of a mental health expert in state post-conviction proceedings. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (establishing a right to a mental health expert only at trial).

2. The state court's denial of relief was also not based on an unreasonable determination of the facts. Under 28 U.S.C. § 2254(d)(2), "a petitioner may challenge the fact-finding process itself on the ground that it was deficient in some material way." *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Section 2254(d)(2) precludes relief in this context unless we are "satisfied that *any* appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate." *Gulbrandson v. Ryan*, 738 F.3d 976, 987 (9th Cir. 2013) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.

2004)). Cohen fails to show a material deficiency in the state court's fact-finding process.

***2** *First*, to the extent Cohen claims the state post-conviction court's fact-finding process was unreasonable because he was not provided a state-funded expert, that argument fails. There is no clearly established right to such an expert in state post-conviction proceedings, as we explained above.

Second, Cohen cannot show that the state court was unreasonable in failing to conduct an evidentiary hearing. Given that Cohen provided medical records without any explanatory expert declaration or an executed declaration from trial counsel, and in light of the strong evidence of premeditation, the state court's denial of an evidentiary hearing was not unreasonable.

3. We reject Cohen's argument that the district court should have granted an evidentiary hearing, approved funds for an expert, and appointed counsel. *See Jurado v. Davis*, 12 F.4th 1084, 1101–02 (9th Cir. 2021) ("If a claim has been adjudicated on the merits in state court, a federal habeas petitioner seeking discovery or an evidentiary hearing must first overcome the relitigation bar of § 2254(d)(1) and (d)(2) based solely on the record that was before the state post-conviction court."). Nor does Cohen meet the standard for an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Finally, given that Cohen did not plausibly show how he could prevail under AEDPA, the district court did not abuse its discretion in declining to appoint counsel. *See Duckett v. Godinez*, 67 F.3d 734, 750 n.8 (9th Cir. 1995). Nor can we discern any prejudice when Cohen was ably represented by counsel on appeal.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 4164119

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 17 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DANIEL COHEN, Petitioner-Appellant, v. JAMES HILL, Warden, Respondent-Appellee.	No. 22-15671 D.C. No. 4:19-cv-01980-JST Northern District of California, Oakland ORDER

Before: BERZON, BRESS, and VANDYKE, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Judge Bress and Judge VanDyke voted to deny the petition for rehearing en banc, and Judge Berzon so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. No. 34, is DENIED.

APPENDIX C

2022 WL 1003180
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Daniel COHEN, Petitioner,

v.

Warden Marcus POLLARD, Respondent.

Case No. 19-cv-01980-JST
|
Signed 04/04/2022

Attorneys and Law Firms

Daniel Cohen, San Diego, CA, Pro Se.

Victoria B. Ratnikova, Jill Marietta Thayer, California State Attorney General's Office, San Francisco, CA, for Respondent.

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

JON S. TIGAR, United States District Judge

***1** Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner Daniel Cohen, challenging the validity of his state court conviction. ECF Nos. 1, 2. Respondent has filed an answer to the petition,[1] ECF Nos. 16, 17, and Petitioner has filed a traverse, ECF No. 20. For the reasons set forth below, the petition is DENIED.

I. PROCEDURAL HISTORY

On January 21, 2016, a Santa Cruz County jury found Petitioner and his mother, codefendant Diana Cohen, guilty of first-degree murder with the special circumstance of lying in wait (Cal. Penal Code §§ 187(a), 190.2(a)(15)). The jury also found true multiple firearm use enhancement allegations as to Petitioner. Answer, Ex. 1 ("CT") at 1420-21, 1424-25. On April 21, 2016, 2013, Petitioner was sentenced to life without the possibility of parole for the first-degree murder conviction, with an additional term of twenty-five years to life for the enhancement. CT 1551, 1563-64.

Petitioner appealed. CT 1553. On or about January 11, 2017, Petitioner filed an *ex parte* motion for appointment of an expert psychiatrist and for approval of funds in the California Court of Appeal. The state appellate court denied this motion on January 19, 2017. ECF No. 2-2 at 5-16.

On March 7, 2018, Petitioner filed a petition for a writ of habeas corpus in the California Court of Appeal, which raised the claims presented in the instant petition. ECF No. 2-1 at 43-172.

On October 24, 2018, the California Court of Appeal affirmed the judgement in an unpublished opinion and denied the habeas petition. ECF No. 2 at 4-20, ECF No. 2-2 at 20.

Petitioner filed petitions for review of the appeal and denial of the habeas petition in the California Supreme Court. ECF No. 2-2 at 22-131. On January 30, 2019, the California Supreme Court denied review of both petitions. Ans., Ex. 5; ECF No. 2 at 22; ECF No. 2-2 at 172.

II. FACTUAL BACKGROUND

The following factual and procedural background is taken from the California Court of Appeal's opinion:[2]

> Gordon Smith was found dead on the floor at his office in Capitola on a November morning in 2013. He had been shot four times, including twice in the head. Pooled blood around his body indicated he had been dead for some time.
>
> Police interviewed Smith's administrative assistant, who told them Smith was in the property management business and had recently had some unusually negative interactions with two tenants he was attempting to evict, defendants Daniel and Diana Cohen. The assistant described defendants as "disgruntled" and "threatening" and recounted an incident several weeks before when Daniel came to the office to confront Smith about an eviction notice. Daniel was erratic and angry and told Smith that proceeding with the eviction would be like "murdering his mom," who was in poor health. After the incident, Smith remarked to his assistant that he was relieved Daniel "didn't just come down and shoot" him. The assistant also relayed to police that on the day he was shot, Smith received a phone call from Daniel and became visibly upset during the conversation.

***2** Police obtained a warrant to search defendants' apartment and car.

While waiting for the warrant to be issued, a team of officers maintained surveillance on the apartment. When defendants left in their car, several officers followed. Police conducted a high risk vehicle stop, meaning defendants were ordered out of the car at gunpoint and forced to the ground. While they were detained in the back of a police car, a recording device captured them discussing what to say if asked about their interactions with Smith. They were transported to the police station where they were kept in separate rooms, held overnight, and questioned at length.

The search of defendants' apartment and car yielded four expended bullet casings and an invoice from a storage facility in Santa Cruz. The invoice led police to a storage unit rented to Daniel Cohen. Inside was a .357 caliber revolver. The revolver had six bullet chambers; two bullets remained in the gun, and the other four chambers were empty. Forensic analysis confirmed the bullets that killed Smith were fired from that gun, and that Daniel's fingerprints were on it. DNA from a blood spot on Daniel's shoe was a match to Smith.

Statements from a used car dealer and witnesses at Smith's office, along with surveillance footage and records from the storage facility where the gun was found, chronicled defendants' activities the day of the killing. That morning, they took an SUV from a used car dealership, purportedly for a test drive. After obtaining the SUV—which Diana drove off the lot— they went to the storage facility (arriving at 12:38 p.m.), then left 14 minutes later. They were next seen in the parking lot of Smith's office building at around 5:15 p.m. The borrowed SUV was backed into a parking space with Daniel in the passenger seat. Cigarette butts found in the parking lot had DNA from both Daniel and Diana. Data extracted from an office computer indicated that Smith last used it at 6:42 p.m., at which time he would have been alone in the office. Twelve minutes later, defendants were back at the storage facility (which is about a four-minute drive from Smith's office).

The Santa Cruz County District Attorney charged Daniel Cohen with first degree murder (Pen. Code, § 187, subd. (a)), with the special circumstance allegation that he committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)), and several enhancements for personal use of a firearm. (Pen. Code, §§ 12022.5, subd. (a)(1); 12022.53, subds. (b)–(d); 12022.53, subd. (d)). Diana Cohen was charged with first degree murder under an aiding and abetting theory, with the special circumstance of lying in wait. The jury found both defendants guilty of first degree murder and the special allegations true. The trial court sentenced Daniel Cohen to life without the possibility of parole, with a consecutive 25-years-to-life term for the Penal Code section 12022.53, subdivision (d) firearm enhancement. Diana Cohen was sentenced to life without the possibility of parole.

Cohen, 2015 WL 5096044, at *1-*4.

III. DISCUSSION

A. Standard of Review

***3** A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state courts' adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Additionally, habeas relief is warranted only if the constitutional error at issue "had substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams*, 529 U.S. at 405–06. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts

of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court's jurisprudence. "[C]learly established Federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme Court] is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

The state court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991);[3] *Barker v. Fleming*, 423 F.3d 1085, 1091–92 (9th Cir. 2005). Section 2254(d) applies even where, as here, both the California Supreme Court and the California Court of Appeals summarily denied the state habeas petitions raising these claims. *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011); *Harrington v. Richter*, 562 U.S. 86, 98 (2011). "In these circumstances, [a petitioner] can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the California Supreme Court's decision." *Cullen*, 563 U.S. at 187–88 (quoting *Harrington*, 562 U.S. at 98). In other words, where a state court issues a summary denial, "a habeas court must determine what arguments or theories ... could have supported[ ] the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington*, 562 U.S. at 102. Even if a reviewing court would grant federal habeas relief upon de novo review, Section 2254(d) precludes such relief if there are "arguments that would otherwise justify the state court's result." *Id.*

B. Petitioner's Claims

1. Ineffective Assistance of Counsel Claim

***4** Petitioner alleges that he was denied effective assistance of counsel because trial counsel failed to investigate his mental health defenses. Petitioner argues that trial counsel's consultation with Dr. Dondershine in the course of trial preparation alerted trial counsel to the existence of evidence that Plaintiff suffered from "folie a deux," a mental illness that would have caused his decision-making to be impaired; and that the consultation indicated that Petitioner had symptoms of mental disassociation. Petitioner argues that trial counsel erred in not investigating this mental health defense by obtaining Petitioner's medical and mental health records which would have supported Dr. Dondershine's preliminary diagnosis. Petitioner argues that the presentation of expert opinion evidence that Petitioner killed the victim while in a dissociative state arising out of his folie a deux psychotic disorder would have supported the sole defense theory presented and would also have supported a defense as to the premeditation element of first-degree murder. ECF No. 1 at 2-4; ECF No. 2-1 at 59-86. Petitioner also alleges that trial counsel erred in not investigating a not guilty by reason of insanity defense, and that the failure was due to trial counsel's misunderstanding of the law of insanity and the available mental health defenses. Petitioner alleges that an investigation would have would have supported a valid defense of imperfect defense of another, a valid defense to the premeditation element of first-degree murder as set forth in *Cortes*, and a valid insanity defense as set forth in *Leeds*. ECF No. 1 at 2-4; ECF No. 2-1 at 59-86.

a. Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court held that ineffective assistance of counsel is cognizable as a denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance, of counsel. *Id.* at 686. The *Strickland* framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis. *Daire v. Lattimore*, 812 F.3d 766, 767–68 (9th Cir. 2016); *see also Cullen v. Pinholster*, 563 U.S. 170, 189 (2011).

To prevail on an ineffective assistance of counsel claim, a petitioner must establish two things.

First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at 687–88. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. The relevant

inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689.

Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Ultimately, a petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy" under the circumstances. *Id.* at 689 (internal quotation marks omitted). A federal habeas court considering an ineffective assistance of counsel claim need not address the prejudice prong of the *Strickland* test "if the petitioner cannot even establish incompetence under the first prong." *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Conversely, the court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697.

A "doubly" deferential standard of review is appropriate in analyzing ineffective assistance of counsel claims under AEDPA because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted); *see also Cullen*, 563 U.S at 190; *Premo v. Moore*, 562 U.S. 115, 122 (2011). The general rule of *Strickland*, i.e., to review a defense counsel's effectiveness with great deference, gives the state courts greater leeway in reasonably applying that rule, which in turn "translates to a narrower range of decisions that are objectively unreasonable under AEDPA." *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010). When section 2254(d) applies, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

***5** A defense attorney has a general duty to make reasonable investigations or "to make a reasonable decision that makes particular investigations unnecessary." *See Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020); *Weeden*, 854 F.3d 1063, 1070 (9th Cir. 2017) (investigation must determine trial strategy; not other way around) ("The correct inquiry is not whether psychological evidence would have supported a preconceived trial strategy, but whether Weeden's counsel had a duty to investigate such evidence in order to form a trial strategy, considering "all the circumstances."). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Ramirez v. Ryan*, 937 F.3d 1230, 1245-47 (9th Cir. 2019) (failure to investigate defendant's mental deficiency, which led to "inaccurate and flawed report at sentencing," was deficient performance).

b. Analysis

Petitioner argues that trial counsel behaved unreasonably, in violation of the Sixth Amendment, when trial counsel failed to further investigate Petitioner's mental health after consulting with Dr. Dondershine. To support this argument, Petitioner proffers a declaration by his appellate counsel, Marc Zilversmit. Zilversmit states that Petitioner's trial counsel, Mitchell Page, hired Dr. Harvey Dondershine to evaluate Petitioner prior to trial, and that Page told Zilversmit that after he consulted with Dr. Dondershine, Page concluded that there was not a viable insanity defense and did not investigate further expert testimony regarding mental illness as applied to premeditation, malice, or imperfect self-defense. Zilversmit reports that when he contacted Dr. Dondershine in late 2016, Dr. Dondershine stated that his examination of Petitioner indicated a long history of serious and worsening major mental illness, leading Dr. Dondershine to suspect that Petitioner and his mother had a fused psychological state, and that Dr. Dondershine asked trial counsel to obtain specific medical records, but never heard back from trial counsel. In January 2017, after obtaining and reviewing approximately 500 pages of Petitioner's medical and psychiatric records, Zilversmit contacted Dr. Dondershine and provided a summary of the trial testimony and the medical and psychiatric records. Dr. Dondershine indicated that Zilversmit's summary tended to confirm his initial, tentative diagnosis that Petitioner and his mother had a shared delusion and that Petitioner may have been in a dissociative state. Zilversmit asked Dr. Dondershine to provide a declaration in support of the state habeas petition, but Dr. Dondershine suffered a stroke before he could do so. ECF No. 2-1 at 92-114. To further support his argument that trial counsel's failure to further investigate a mental illness

defense, specifically folie a deux, prejudiced him, Petitioner also provides articles about folie a deux and the 500 pages of medical and psychiatric records obtained by Zilversmit. ECF No. 2-1 at 145-65.

Respondent argues that trial counsel could have reasonably decided that he did not need to obtain Petitioner's medical and psychiatric records because (1) he could reasonably have decided that Petitioner himself was an adequate and convenient source of information about his medical and psychiatric history because, according to Zilversmit's declaration, Petitioner himself informed Dr. Dondershine about his history of mental illness, including his hallucinations and shared mother-son delusion of being poisoned by methamphetamine and because a licensed clinical psychologist reported that Petitioner was a reliable historian after evaluating him on July 30, 2013; and (2) trial counsel was already aware of Petitioner's extremely close relationship with his mother. Respondent further argues that trial counsel's failure to obtain and review Petitioner's medical and psychiatric records cannot be considered deficient absent evidence that Petitioner was uncooperative or his recollection was inadequate to permit trial counsel or Dr. Dondershine to accurately assess the viability of an insanity or mental defense. Respondent also argues that trial counsel could have reasonably decided that there was overwhelming evidence of malice, premeditation and deliberation, and lying in wait, that it would be reasonable to present a defense of imperfect self-defense. ECF No. 16-1 at 12-14.

***6** The Court finds that trial counsel's failure to obtain Petitioner's medical records constituted deficient performance. Respondent's arguments are based on the erroneous premise that medical and psychiatric records are unnecessary where the defendant is aware that he suffers from mental illness and has reported the mental illness to either counsel or the consulting expert. The Court does not consider the unsigned declaration drafted by Zilversmit for Page. Although Zilversmit believes that the declaration accurately reflects his discussions with Page, Page's refusal to sign the declaration casts doubt on Zilversmit's representation of its accuracy. Nonetheless, even without the draft declaration prepared by Zilversmit, there was ample evidence in the record that Petitioner suffered from mental health issues that may have been relevant to his defense: Petitioner's unfounded belief that the neighbors were running a methamphetamine lab, CT 89-90, 132; his unusually close relationship with his mother; his unkempt appearance, RT 6276; his statement to the police officers that his memory of everything after high school was fuzzy, Aug. CT 113; and letters to other neighbors threatening violence, RT 6268-70. Given this evidence, trial counsel could not reasonably have concluded that Petitioner was a reliable historian or that Petitioner's medical and psychiatric records would not support an insanity or mental defense. Given all the circumstances, trial counsel's general duty to make a reasonable investigation included obtaining Petitioner's medical and psychiatric records to determine whether Petitioner's reporting was accurate and whether it was necessary to have these records reviewed by an expert. Without Petitioner's medical and psychiatric records, trial counsel could not make an informed decision about whether further investigation into an insanity or mental defense was necessary. *See, e.g.*, *Avila v. Galaza*, 297 F.3d 911, 924 (9th Cir. 2002) (failure to conduct reasonable investigation, despite virtual certainty that defendant did not commit the crime, constituted deficient performance because the information could have undermined the prosecution's case).

However, Petitioner has failed to demonstrate prejudice. In reviewing the reasonableness of the state court's summary denial of this claim, the Court may rely only on the record that was before the state court. *See Pinholster*, 563 U.S. at 180. Although Petitioner's medical and psychiatric records were before the state court, without the assistance of an expert witness interpreting the medical and psychiatric records, the Court cannot assess whether these records would have been supported an insanity or mental health defense, or otherwise affected the outcome of the underlying state proceeding. In other words, the Court cannot determine from the record before it if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, applying the required deference, the Court cannot say that the state court's summary denial of this claim was contrary to, or involved an unreasonable application of, clearly established Federal law, or that the denial resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. The Court must DENY federal habeas relief on this claim.

2. Ancillary Services Claim

Petitioner argues that the state court's denial of his request for funds for an expert to review his medical, psychiatric and Social Security records and provide an expert opinion denied his federal constitutional right to a mental health expert. Petitioner argues that, in *McWIlliams v. Dunn*, 137 S. Ct. 1790

(2017), and *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985), the Supreme Court held that the right to counsel includes the right to a mental health expert when the defendant's mental condition is relevant to his criminal culpability and potential sentence and the defendant's mental condition at the time of the offense was in question, and that, consequently, the state appellate court's denial of his request for funds to access an expert deprived him of his constitutional right to effective assistance of counsel and ancillary funds. He further argues that there is a reasonable probability of a different result, namely a finding of not guilty by reason of insanity. ECF No. 2-1 at 87-89.

Respondent argues that the Supreme Court's holdings in *McWilliams* and *Ake* only address the right to a mental health expert at trial; and that the Supreme Court has not clearly established the right to a mental health expert on appeal or on collateral review. ECF No. 16-1 at 19-21. The Court agrees.

"If Supreme Court cases 'give no clear answer to the question presented,' the state court's decision cannot be an unreasonable application of clearly established federal law." *Ponce v. Felker*, 606 F.3d 596, 604 (9th Cir. 2010) (quoting *Wright v. Van Patten*, 552 U.S. 120, 126 (2008)). In *McWilliams*, the Supreme Court specified that the right to a mental health expert, as set forth in *Ake*, was in the context of trial, referencing the defense and the prosecution in its summary of *Ake*'s holding:

> ***7** Our decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Id., at 83, 105 S.Ct. 1087.

McWilliams, 137 S. Ct. at 1793. Neither *McWilliams* nor *Ake* can be reasonably read as recognizing a right to a mental health expert at all stages of litigation. Both these challenged the denial of access to a mental health expert during trial and neither case concerned a request for a mental health expert on appeal. Petitioner is asking for an extension of the rule set forth in *Ake* and *McWilliams* to his situation, which is the denial of access to a mental health expert on appeal.

Because there is no clearly established right to a mental health expert on appeal, the state court's denial of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Federal habeas relief is denied on this claim.

C. Certificate of Appealability

The federal rules governing habeas cases brought by state prisoners require a district court that issues an order denying a habeas petition to either grant or deny therein a certificate of appealability. *See* Rules Governing § 2254 Case, Rule 11(a).

A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and the certificate must indicate which issues satisfy this standard. *Id.* § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, Petitioner has not made such a showing, and, accordingly, a certificate of appealability will be denied.

IV. CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a certificate of appealability is DENIED.

The Clerk shall enter judgment in favor of Respondent and close the file.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1003180

Footnotes

1 In accordance with Habeas Rule 2(a) and Rule 25(d)(1) of the Federal Rules of Civil Procedure, the Clerk of the Court is directed to substitute Warden Marcus Pollard as respondent because he is Petitioner's current custodian.

2 The Court has independently reviewed the record as required by AEDPA. *Nasby v. Daniel*, 853 F.3d 1049, 1052–54 (9th Cir. 2017). Based on the Court's independent review, the Court finds that it can reasonably conclude that the state court's summary of the prosecution case and the defense case is supported by the record, unless otherwise indicated in this order.

3 Although *Ylst* was a procedural default case, the "look through" rule announced there has been extended beyond the context of procedural default. *Barker v. Fleming*, 423 F.3d 1085, 1091 n.3 (9th Cir. 2005). The look through rule continues as the Ninth Circuit held that "it is a common practice of the federal courts to examine the last reasoned state decision to determine whether a state-court decision is 'contrary to' or 'an unreasonable application of' clearly established federal law" and "it [is] unlikely that the Supreme Court intended to disrupt this practice without making its intention clear." *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir.), *amended*, 733 F.3d 794 (9th Cir. 2013).

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APPENDIX D

2018 WL 5278696
Not Officially Published
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Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,
v.
Daniel Xane COHEN et al.,
Defendants and Appellants.

H043490
|
Filed 10/24/2018

(Santa Cruz County Super. Ct. Nos. F25855, F25857)

Attorneys and Law Firms

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Opinion

Grover, J.

***1** Daniel Cohen and his mother, Diana Cohen, were convicted of murdering the property manager for the apartment they lived in and were sentenced to life in prison without the possibility of parole. They contend their convictions should be reversed because law enforcement obtained evidence through violations of their constitutional rights. They also contend they received ineffective assistance of counsel and that the trial court incorrectly instructed the jury. Finding no error, we will affirm the judgments.[1]

I. BACKGROUND

Gordon Smith was found dead on the floor at his office in Capitola on a November morning in 2013. He had been shot four times, including twice in the head. Pooled blood around his body indicated he had been dead for some time.

Police interviewed Smith's administrative assistant, who told them Smith was in the property management business and had recently had some unusually negative interactions with two tenants he was attempting to evict, defendants Daniel and Diana Cohen. The assistant described defendants as "disgruntled" and "threatening" and recounted an incident several weeks before when Daniel came to the office to confront Smith about an eviction notice. Daniel was erratic and angry and told Smith that proceeding with the eviction would be like "murdering his mom," who was in poor health. After the incident, Smith remarked to his assistant that he was relieved Daniel "didn't just come down and shoot" him. The assistant also relayed to police that on the day he was shot, Smith received a phone call from Daniel and became visibly upset during the conversation.

Police obtained a warrant to search defendants' apartment and car. While waiting for the warrant to be issued, a team of officers maintained surveillance on the apartment. When defendants left in their car, several officers followed. Police conducted a high risk vehicle stop, meaning defendants were ordered out of the car at gunpoint and forced to the ground. While they were detained in the back of a police car, a recording device captured them discussing what to say if asked about their interactions with Smith. They were transported to the police station where they were kept in separate rooms, held overnight, and questioned at length.

The search of defendants' apartment and car yielded four expended bullet casings and an invoice from a storage facility in Santa Cruz. The invoice led police to a storage unit rented to Daniel Cohen. Inside was a .357 caliber revolver. The revolver had six bullet chambers; two bullets remained in the gun, and the other four chambers were empty. Forensic analysis confirmed the bullets that killed Smith were fired from that gun, and that Daniel's fingerprints were on it. DNA from a blood spot on Daniel's shoe was a match to Smith.

Statements from a used car dealer and witnesses at Smith's office, along with surveillance footage and records from the storage facility where the gun was found, chronicled

defendants' activities the day of the killing. That morning, they took an SUV from a used car dealership, purportedly for a test drive. After obtaining the SUV—which Diana drove off the lot— they went to the storage facility (arriving at 12:38 p.m.), then left 14 minutes later. They were next seen in the parking lot of Smith's office building at around 5:15 p.m. The borrowed SUV was backed into a parking space with Daniel in the passenger seat. Cigarette butts found in the parking lot had DNA from both Daniel and Diana. Data extracted from an office computer indicated that Smith last used it at 6:42 p.m., at which time he would have been alone in the office. Twelve minutes later, defendants were back at the storage facility (which is about a four-minute drive from Smith's office).

***2** The Santa Cruz County District Attorney charged Daniel Cohen with first degree murder (Pen. Code, § 187, subd. (a)), with the special circumstance allegation that he committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a) (15)), and several enhancements for personal use of a firearm. (Pen. Code, §§ 12022.5, subd. (a)(1); 12022.53, subds. (b)–(d); 12022.53, subd. (d)). Diana Cohen was charged with first degree murder under an aiding and abetting theory, with the special circumstance of lying in wait. The jury found both defendants guilty of first degree murder and the special allegations true. The trial court sentenced Daniel Cohen to life without the possibility of parole, with a consecutive 25-years-to-life term for the Penal Code section 12022.53, subdivision (d) firearm enhancement. Diana Cohen was sentenced to life without the possibility of parole.

II. DISCUSSION

A. Probable Cause to Arrest

Before trial, both defendants moved under Penal Code section 1538.5 to suppress evidence of statements they made after being stopped by police and detained for questioning. They argued that in ordering them out of their car, taking them to the police station, and detaining them overnight, the police in effect arrested them and the arrest was not supported by probable cause as required by the Fourth Amendment to the United States Constitution. The trial court denied the motions. At trial, parts of the recorded conversation between defendants in the police car and parts of their recorded interviews were played for the jury. Defendants contend the trial court erred by denying the motions to suppress.

As a threshold matter, we agree with defendants that when they were transported to the police station for questioning and held overnight, they were not merely detained but arrested. Though there is no bright-line rule distinguishing an investigatory detention that does not require probable cause from an arrest that does, we focus on whether the police conducted an investigation designed to dispel or confirm suspicions quickly using the least intrusive means reasonably available. (*People v. Celis* (2004) 33 Cal.4th 667, 674.) Important are the duration, scope, and purpose of the stop. (*Ibid.*) And the brevity of the encounter is significant in determining whether the seizure was " ' "so minimally intrusive" ' " as to constitute only a detention. (*Ibid.*, citing *United States v. Sharpe* (1985) 470 U.S. 675, 685.) We have little difficulty concluding that what occurred in this case—ordering defendants out of their vehicle and into a police car, then taking them to the police station where they were held from that evening until the next morning—was an arrest. (See *Kaupp v. Texas* (2003) 538 U.S. 626, 631 [handcuffing subject and taking him from his home to police station for questioning in the middle of the night was an arrest].) Though the purpose of the stop (to investigate a murder) was important, its scope was broad and the encounter cannot reasonably be viewed as brief. Nor can it be considered minimally intrusive. The seizure therefore had to be supported by probable cause to arrest.

The existence of probable cause for an arrest presents a question of law we review using our independent judgment. (*People v. Thompson* (2006) 38 Cal.4th 811, 818.) Since the operative facts regarding probable cause here are undisputed, our entire review of the order denying the motions to suppress is de novo. (*Ibid.*) The concept of probable cause has been described as "incapable of precise definition." (*People v. Celis*, *supra*, 33 Cal.4th at p. 673.) But that is intentionally so, because " '[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts.' " (*Illinois v. Gates* (1983) 462 U.S. 213, 232.) "Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." (*People v. Celis*, *supra*, 33 Cal.4th at p 673.) The substance of the definition of probable cause is " ' "a reasonable ground for belief of guilt." ' " (*Ibid.*, citing *Maryland v. Pringle* (2003) 540 U.S. 366, 371.)

***3** In this case, the facts known at the time of the arrest are easy to ascertain because a search warrant application for defendants' home and car had been made. We therefore look to the affidavit submitted in support of the search warrant to determine what facts police knew tying defendants to

the crime. Whether the affidavit contains facts establishing probable cause for arrest is a close question. At the time of the arrest, police did not know that defendants were seen in the parking lot of the victim's office around the time he was shot. Nor did they know that defendants owned a gun of the type used in the killing. Even so, law enforcement had information that defendants were upset with the victim because he was attempting to evict them, and Daniel likened the eviction to "murdering" his mother. An office assistant observed both defendants to be disgruntled and threatening. A recent interaction with Daniel was so tense the victim expressed relief Daniel did not shoot him. Shortly before he was killed, the victim was visibly upset during a telephone conversation with Daniel. The question we must answer is whether those facts, viewed in context, provide a strong enough suspicion of guilt to allow for an arrest rather than a brief investigatory detention. We conclude they do. While clearly not enough to convict defendants, the facts known at the time of the arrest meet the significantly lower standard for probable cause: a reasonable basis for belief of guilt.

Defendants argue that the affidavit does no more than establish they were guilty of being bad tenants, since much of it is devoted to facts regarding disputes with neighbors. But as discussed, other facts showed they had an acute animosity toward the victim, had a motive to kill him, and exhibited threatening behavior toward him. Defendants assert that merely because they had a motive to commit a crime does not establish probable cause they did commit it, but that is where context becomes important: after interviewing multiple witnesses who knew the victim, law enforcement did not learn of anyone else with a reason to harm him. Taken together and viewed in context, the facts known at the time of the arrest provided sufficient cause to believe defendants killed the victim. It was not error to deny the motions to suppress defendants' post-arrest statements.

B. Probable Cause For The Search Warrant

Defendants also moved before trial to quash the search warrant and to suppress evidence from the searches of their apartment and car, arguing the warrant was not supported by probable cause so the searches violated the Fourth Amendment. The trial court denied those motions. Defendants renew in this court their arguments regarding lack of probable cause for the search.

We review a magistrate's decision to issue a search warrant using our independent judgment to determine whether the warrant was supported by probable cause. (*People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 203.) But searches conducted under a warrant are preferable to warrantless searches; in line with that preference we give deference to the issuing magistrate's initial determination of probable cause. Marginal cases are resolved by upholding the search. (*Ibid.*) Probable cause in the search warrant context is defined similarly to probable cause for arrest: whether there was "a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (*People v. French* (2011) 201 Cal.App.4th 1307, 1315.)

We have already concluded that the facts stated in the affidavit for the search warrant established probable cause to arrest defendants. It follows that those facts also establish a fair probability that a search of their belongings would uncover evidence of the crime; most significantly, the means of killing the victim. It was reasonable to infer that the gun or other evidence might well be in defendants' apartment or car. (See *Illinois v. Gates* (1983) 462 U.S. 213, 238 [there must be a fair probability that the evidence described in the warrant will be found in the identified places].) We will therefore uphold the magistrate's decision to issue the search warrant and find no error in denying the motions to quash and suppress.

C. Counsel Were Not Ineffective

Both defendants contend their respective attorneys were ineffective for failing to object to evidence that a rifle not used in the crime was found in their apartment, and for failing to object to certain questions posed to witnesses by the prosecutor and to what they characterize as improper closing argument. We review a contention of ineffective assistance of counsel with two questions in mind: whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (*People v. Gray* (2005) 37 Cal.4th 168, 207), and whether "the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*Ibid.*, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694.) It is presumed that an attorney's performance was within the broad range of professional competence and that any inactions were part of a sound trial strategy, so the burden is on defendants to establish ineffective assistance. (*People v. Gray*, *supra*, 37 Cal.4th at p. 207.) We are mindful in reviewing a failure to object "that 'an attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' " (*People v. Avena* (1996) 13 Cal.4th 394, 421, citing *People v. Kelly* (1992) 1 Cal.4th 495, 540.)

1. Other Gun Evidence

***4** Defendants assert that the trial court improperly admitted evidence of a rifle found in their apartment during the search conducted by police. In their view, since that gun was not used in the commission of the crime it was not relevant and therefore inadmissible. They acknowledge no objection was made to the evidence (which means the contention is forfeited), but they urge us to reach the merits of the issue under an ineffective assistance of counsel analysis. Whether analyzed as a direct claim of error in the admission of evidence or as counsel's ineffectiveness for failing to object, the contention fails because the evidence that defendants had a rifle in their apartment was relevant to the special circumstance allegation that the murder was committed while lying in wait. Defendants traveled to their storage unit apparently to obtain a handgun to kill the victim, even though they had another—much more difficult to conceal—firearm available at their residence. That tends to show they sought to conceal their purpose from the victim before killing, as required to prove lying in wait. (See CALCRIM No. 728.) The evidence was also relevant to prove premeditation, because retrieving the handgun from the storage unit in lieu of using the readily available rifle shows planning. There was no error in admitting the rifle evidence nor was counsel ineffective for not objecting.

2. Questions by the Prosecutor

Defendants assert that the prosecutor committed misconduct by using the term "murder" to refer to the killing when questioning witnesses. They argue that by using the word murder more than a dozen times and eliciting responses from witnesses containing the term, the prosecution improperly conditioned the jury to find the homicide was in fact murder (as opposed to a lawful killing in self-defense or voluntary manslaughter). No one objected to any of the questions or references, so the contention that using the word "murder" was prosecutorial misconduct has been forfeited. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [timely objection is generally required to preserve issue of prosecutorial misconduct].) Here again, defendants ask us to analyze the merits of the issue under the standards for ineffective assistance of counsel based on a failure to object.

Defendants cite several cases for the proposition that it is generally improper for a prosecutor to refer to an unadjudicated homicide as a "murder."[2] And we agree that it was inappropriate for the prosecutor to do so in these circumstances, where the nature of the homicide—murder or manslaughter—was a disputed issue for the jury to decide. We see no indication from the record that the prosecutor consciously used the term murder in an attempt to condition the jury to convict. That does not affect our analysis, however, because a claim of prosecutorial misconduct is not defeated by a showing of the prosecutor's good faith. (*People v. Price* (1991) 1 Cal.4th 324, 447.) Prosecutorial misconduct can occur based on statements that are inadvertent or negligent. (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1362.) The question we must ultimately answer, though, is whether the misconduct was prejudicial, since defendants' ineffective assistance of counsel contention cannot otherwise succeed. On that point, we conclude that the prosecutor referring to the homicide as a murder a dozen times over the course of the trial (which spanned several months and featured testimony from at least 37 witnesses), although improper, is not something likely to have affected the outcome. That is our conclusion despite no admonition to the jury to disregard the references. The evidence against defendants was strong, and included eyewitnesses and DNA placing them at the murder scene. Daniel Cohen's manslaughter theory based on imperfect defense of another was legally flawed, as the harm he purportedly believed would befall his mother was future rather than imminent harm. We have no reason to believe the result of the trial would have been different had counsel objected to the improper references to murder.

3. Closing Argument by the Prosecutor

Defendants assert that the prosecutor committed misconduct by misstating the law during closing argument and that their attorneys were ineffective for not objecting. One purported misstatement they identify is the prosecutor's characterization of the requirement that a threat of harm be imminent in order for a killing to be voluntary manslaughter due to imperfect self-defense. The jury was instructed that a killing which would otherwise be murder is reduced to voluntary manslaughter if the defendant killed because of a real but unreasonable belief in the need to use deadly force, and that "[b]elief in future harm is not sufficient, no matter how great or how likely the harm is believed to be." (CALCRIM No. 571.) In arguing the point to the jury, the prosecutor stated, "And you'll see the instruction for voluntary manslaughter says 'future harm is not enough.' And should there be a death that resulted were they to be evicted, that's future

harm, folks. So on its face that instruction doesn't apply. On its face. Period." We are not persuaded that is an incorrect statement of law. It is true the prosecutor summarized the concept by saying " 'future harm is not enough,' " rather than "belief in future harm is not enough." But some latitude must be allowed for attorneys to express legal principles during closing argument in a way they believe will be understandable to the jury (particularly when the argument is prefaced by pointing the jury to the relevant instruction, as was done here). The underlying point—that Daniel Cohen's belief an eviction would result in the death of his mother lacked the imminence required for imperfect defense of another—was entirely correct. Further, even if we were to consider it a misstatement of law, there would be no resulting prejudice because the jury was specifically admonished by the judge that "the actual instruction states 'belief in future harm is not sufficient.' [¶] So you may find minor differences in how the attorneys talk about the instructions and that's why I point out if you're not sure about something look at the written instructions." The jury was also instructed to follow the court's instructions on the law in favor of any conflicting arguments of counsel: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

***5** Defendants next complain the prosecutor's argument misstated the elements of first degree murder. The prosecutor told the jury, "It has to be deliberate, which means you weigh the considerations. Now, a lot of people talk about—it's somebody did it with—it was premeditated and with deliberation. Deliberating is what you folks are going to do. Deliberately is what you intended to do. You did it on purpose. So deliberation has absolutely nothing to do with first degree murder." Viewed in isolation, the statement "deliberation has absolutely nothing to do with first degree murder" is clearly incorrect. Deliberation has much to do with first degree murder since that offense is defined as a killing done "willfully, deliberately and with premeditation." (CALCRIM No. 521.) Taken as a whole though, the prosecutor's argument did not suggest that the jury need not find defendants acted deliberately to convict them of first degree murder. Rather, the prosecutor seemed to be saying that "deliberately" is something of a redundancy since it would be difficult for one to act with premeditation yet not deliberately. Perhaps it was not articulated as the prosecutor had envisioned, but it was not improper to argue that if the jury found defendants acted with premeditation it necessarily must find they acted deliberately. And we are confident that the outcome of the trial was not affected by confusion about the meaning of "deliberately:" during deliberations the jury sent a question asking for clarification of that definition, and the trial court appropriately responded, "The definition of 'deliberately' as used in Instruction 521 [for first degree murder] is contained in that instruction." At most the prosecutor's argument was confusing, but any confusion was remedied by the court's response to the jury's question. There was no prejudice to defendants from the lack of objection to the argument and we reject defendants' ineffective assistance of counsel claim premised on that decision. (See also *People v. Riel* (2000) 22 Cal.4th 1153, 1202–1203 ["Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' [¶] Here, so far as the record shows, trial counsel fought what they reasonably believed were the genuine fights at trial. We cannot find counsel acted ineffectively in selecting which objections to make and which not to make."].)

Defendants also take issue with the prosecutor's argument that their recorded statements undermined their credibility: "each of their interviews was replete with lies. And even lies they couldn't keep straight. [¶ ... ¶] All that[,] completely inconsistent. So when you're trying to, like, match stories, they're lies." Defendants contend the argument invited the jury to compare each of their statements and use the statements of one against the other, in violation of the constitutional right to confront witnesses. (See *Richardson v. Marsh* (1987) 481 U.S. 200, 207 [where two defendants are tried jointly, pretrial statements of one cannot be admitted against the other].) We reject that contention because the argument that defendants lied to police and were attempting to "match stories" did not require the jury to use the statement of one defendant against the other. During a recorded conversation while they were detained in the police car, each defendant made statements suggesting an effort to agree on what they should tell police if asked about what happened when they went to the victim's office: "Diana Cohen: (Unintelligible) two other guys in a dark sedan in there when we went up. [¶] Daniel Cohen: Yeah, really. [¶] Diana Cohen: Mm-hm. [¶] Daniel Cohen: Why aren't they taxing their asses? [¶] Diana Cohen: I don't know. 'Cause they were there when we left. Used the bathroom. [¶] Daniel Cohen: I don't know. Yeah, then we were kicking it at Vallarta [a nearby restaurant.] [¶] Diana Cohen: Mm-hm. [¶] Daniel Cohen: And then he called and was like, "We'll figure out a date later on next week for the pipe thing." Right? [¶] Diana Cohen: Yeah. [¶] Daniel Cohen: Yeah. [¶] Diana Cohen: The only way I'd bring that up is if he did. [¶] Daniel Cohen: Huh? [¶] Diana

Cohen: Only way I'd bring the bathroom thing up is if he does."

Nothing corroborated defendants' claim that "two other guys in a dark sedan" were at the victim's office. Nor was there evidence to corroborate the claim that defendants were at a nearby restaurant at the time of the shooting. So the argument that defendants lied and attempted to match stories was a fair comment on the evidence, supported by statements made by each defendant. The prosecutor did not ask the jury to use one defendant's statement against the other. As the argument was not improper, there was no reason for counsel to object and no ineffective assistance.

D. The Jury Was Properly Instructed

Both defendants contend the trial court erred by not sua sponte instructing the jury regarding the offense of voluntary manslaughter based on killing in the heat of passion, a lesser included offense of first degree murder. The trial court did instruct on manslaughter based on imperfect self-defense, on the theory that Daniel honestly—even if unreasonably—believed that killing the victim was necessary to save his mother's life. But no instruction was given regarding the alternative basis for manslaughter, that the killing occurred "because of a sudden quarrel or in the heat of passion." (CALCRIM No. 570.) We conclude there was no error in not giving the heat of passion instruction because there was insufficient evidence to support that theory.

***6** A trial court must instruct sua sponte on all lesser included offenses that are raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The mere existence of *any* evidence the lesser offense was committed will not require instruction on it; an instruction is required only when there is substantial evidence of the offense. (*Id.* at p. 162.) " '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.' " (*Ibid.*)

Defendants argue the jury could have found that Daniel killed because he was provoked and acted rashly as a result of that provocation, which would meet the elements for heat of passion manslaughter. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) But heat of passion manslaughter has both subjective and objective components—the defendant must subjectively experience the heat of passion, but the circumstances must also be viewed objectively: they must be " 'sufficient to arouse the passions of the ordinarily reasonable [person].' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) As stated in the instruction, "[i]t is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (CALCRIM No. 570.) Under that standard, no reasonable jury could find that being evicted from an apartment—even unfairly and under circumstances that would adversely affect the health of one's mother—would cause a person of average disposition to kill from passion, without judgment. That theory was insufficient as a matter of law to support the objective component required for heat of passion manslaughter. There was no error in not giving the instruction.

Daniel separately argues that the instruction regarding defense of others was incomplete because it did not include optional, bracketed language found in the form instruction. The language he contends should have been used defines when a danger is sufficiently imminent to apply the doctrine of imperfect defense of another: "A danger is *imminent* if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future." (CALCRIM No. 571.)

Trial counsel did not request that language. The contention that the trial court erred by not instructing with the optional language has therefore been forfeited. Daniel advances an alternative ineffective assistance of counsel argument, but that argument has no merit because counsel cannot be deemed ineffective for making a reasonable tactical decision. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 [a conviction will be reversed for ineffective assistance of counsel only if the record affirmatively discloses no rational tactical purpose].) Here, counsel had an excellent reason for not requesting the more specific definition of imminent danger: it would have completely undermined his client's claim of imperfect self-defense. It would already be difficult to prove that harm to Diana Cohen from an eviction which had not yet occurred constituted imminent (as opposed to future) harm; the language Daniel now contends should have been given would have assured the theory did not succeed. The definition makes clear that the danger "may not be merely prospective

or in the near future." Since the purported danger to Diana Cohen (to the extent it existed) was without question in the future, giving the jury the optional language would have led it to conclude that imperfect self-defense did not apply.

E. No Remand Required for Firearm Enhancements

***7** Daniel Cohen asks that we remand his case for resentencing on the enhancement for personal use of a firearm causing death (Pen. Code, § 12022.53, subd. (d)) based on Senate Bill 620 (Stats. 2017, ch. 682, § 2), which amended Penal Code section 12022.53 to give the trial court discretion to strike a firearm enhancement in the interest of justice. (See Pen. Code, § 12022.53, subd. (h).) Though that amendment was not effective until after his sentencing, he contends it applies because his case is not yet final and the trial should decide whether to strike the enhancement. It is correct that the amendment to Penal Code section 12022.53 applies to cases where sentence has been imposed but which are not yet final. (*People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) But we need not remand to allow the trial court to consider whether to exercise its newly created discretion if "the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104; 1110.)

We find just such a clear indication here. At sentencing the trial court stated its view that the facts of the case warranted the longest sentence allowable: "So based on the loss, based on your planning, based on the seriousness, the Court is going to impose the maximum sentence that I can at this time." Consistent with that stated intention, Daniel was sentenced to life without parole and a consecutive 25-years-to-life term for the most serious firearm enhancement, personal discharge of a weapon causing death (the two other enhancements the jury found true carry sentences of 10 years and 20 years). Given the trial court's clear indication that it would not impose a lesser sentence even if allowed the opportunity, no useful purpose would be served by remanding the case, particularly when the base term is life without parole.

The Attorney General notes that sentence was not imposed on either of the two lesser firearm enhancements the jury found true (Pen. Code, §§ 12022.5, subd. (a) and 12022.53, subd. (c)). Acknowledging that if imposed, sentence on those enhancements would have to be stayed under Penal Code section 654 (prohibiting multiple punishments for the same act), the Attorney General asks us to impose and stay sentence on the enhancements. We are a reviewing court, not a sentencing court, so we will not impose sentencing enhancements in the first instance. It is correct that at the time of sentencing, the sentence was unauthorized because the applicable enhancements were mandatory under Penal Code section 12022.53, subdivision (h). But with the recent amendment to that statute, the enhancements are no longer mandatory and the sentence need not be corrected.

III. DISPOSITION

The judgments are affirmed.

WE CONCUR:

Greenwood, P.J.

Premo, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 5278696

Footnotes

1 Daniel Cohen also filed a petition for writ of habeas corpus, which we deny by a separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

2 *People v. Garbutt* (1925) 197 Cal. 200, 204; *People v. Johnson* (1951) 105 Cal.App.2d 478; *People v. Price* (1991) 1 Cal.4th 324, 475; *People v. Hines* (1997) 15 Cal.4th 997, 1045.

APPENDIX E

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re DANIEL XANE COHEN on Habeas Corpus.	H045601 (Santa Cruz County Super. Ct. No. F25857)

BY THE COURT:

The petition for writ of habeas corpus is denied.

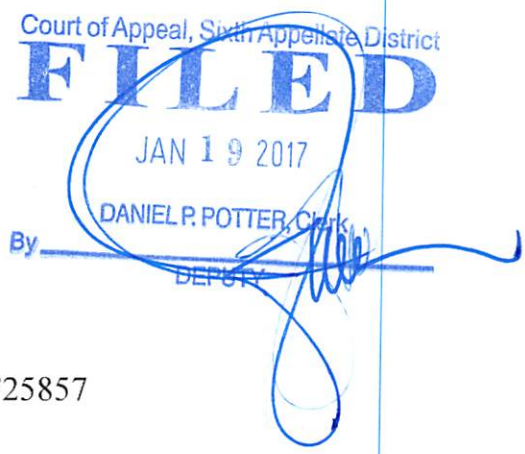
(Greenwood, P.J., Premo, J., and Grover, J.,

participated in this decision.)

Dated OCT 24 2018 _____ P.J.

Appendix F

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT



THE PEOPLE,
Plaintiff and Respondent,
v.
DANIEL XANE COHEN et al.,
Defendants and Appellants.

H043490
Santa Cruz County No. F25855, Santa Cruz County No. F25857

BY THE COURT:

Appellant Daniel Cohen's ex-parte motion for appointment of expert psychiatrist and authorize funds for psychiatrist fees is denied.

Dated JAN 19 2017

P.J.