

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO VALACIO HERNANDEZ,

Defendant and Appellant.

E061591

(Super.Ct.No. FWV1400956)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Stanford E.

Reichert, Judge. Affirmed with directions.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland, Kimberley A. Donohue, and Daniel Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury found defendant and appellant, Gustavo Valacio Hernandez, guilty as charged of the attempted murder of Jose Sanchez. (Pen. Code, §§ 664, 187, subd. (a).)<sup>1</sup> The crime occurred while the two men were in the same holding cell at the West Valley Detention Center. The information did not allege that the attempted murder was premeditated. Defendant was sentenced to the upper term of nine years in prison on the conviction, and appeals.

Defendant claims his attempted murder conviction must be reversed because the trial court erroneously failed to suspend the proceedings and order a hearing to determine his competency to stand trial. He claims his refusal to respond to the court's questions at his arraignment, and at an in camera hearing shortly after the arraignment, together with his refusal to speak with his defense counsel, raised a reasonable doubt of his competency and triggered the court's sua sponte duty to suspend the proceedings and order a competency hearing. We reject this claim. As we explain, defendant's mere silence and refusal to speak to the court or his counsel was insufficient, by itself, to raise a reasonable or bona fide doubt concerning his competency to stand trial.

In a supplemental letter brief, defendant also claims the court structurally erred in finding, at the conclusion of the in camera hearing, that he had waived his right to effective assistance of counsel by refusing to speak to his defense counsel. He argues the record is silent, or at least inadequate, to support a finding that his waiver was knowing,

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

intelligent, and voluntary. We decline to address this claim because defendant does not claim his counsel rendered ineffective assistance in any respect. Thus, even if defendant did not knowingly, intelligently, and voluntarily waive his right to effective assistance of counsel, he was not prejudiced by the court's finding that he did. Further, any error in the court's finding was not structural, requiring automatic reversal.

Lastly, defendant claims, and the People and this court agree, that the abstract of judgment must be corrected to reflect that defendant was convicted of attempted murder, but not *first degree* attempted murder as the abstract indicates, because attempted murder is not divisible into degrees. We remand the matter to the trial court with directions to correct the abstract in this regard. In all other respects, we affirm the judgment.

## II. FACTS AND PROCEDURAL BACKGROUND

### A. *Trial Evidence: Defendant's Unprovoked Attack on Sanchez*

During the early morning of March 17, 2014, and shortly after he was arrested, the victim, Jose Sanchez, was placed in a cell with defendant at the West Valley Detention Center. Defendant was the only other person in the cell. Sanchez asked defendant what he was "in here for," but defendant did not respond. Sanchez waited for around an hour and asked defendant the same question, and again defendant did not respond. Sanchez denied having an argument with defendant or doing anything else to antagonize him. Sanchez admitted he was "extremely intoxicated" when he was arrested around 12:00 a.m. on March 17, but at some point the effects of the alcohol wore off and he denied he was "buzzed" when he was interacting with defendant in the holding cell.

Sanchez fell asleep on a bench inside the cell, and awoke to find defendant on top of him, choking him with a bed sheet or a towel wrapped around his neck. Defendant was also hitting Sanchez in the head with a closed fist. As he choked Sanchez, defendant had an angry expression on his face, which Sanchez described as “like mad-dogging,” and said “ya estuvo,” which means “it’s over” or, in the context of an argument, “I’ve had it, I’m done,” in Spanish. Sanchez was dizzy and having difficulty breathing, but he was able to get defendant off of him with the help of two guards who soon arrived.

Around 5:15 a.m. on the morning of March 17, two guards at the jail heard “gagging” or “gurgling” noises, and one of them also heard “the sound of flesh being struck or slapped.” The guards ran to the holding cell, where they saw defendant straddling Sanchez and choking him with a bed sheet. Sanchez was blue in the face and not moving. One of the guards, Deputy Samuel Silva, thought Sanchez was dead. Defendant was angry, sweaty, and breathing heavily. Defendant would not let go of Sanchez when the guards arrived and ordered him to stop. He did not stop choking Sanchez until the guards were able to enter the holding cell. Deputy Silva did not see or hear anything that may have provoked defendant to attack Sanchez. Defendant did not testify.

#### *B. Relevant Pretrial Proceedings*

On April 2, 2014, at the end of the preliminary hearing, the trial court ordered defendant to appear on April 16 for his arraignment on the attempted murder charge.

When the court asked defendant whether he understood he was ordered to return on April 16 for his arraignment, defendant responded, “Yes, I did.”

At his arraignment on April 16, 2014, defendant refused to speak to his court-appointed counsel and refused to answer the court’s questions after his counsel entered his not guilty plea to the attempted murder charge. The court asked defendant whether he understood he was ordered to return to court on May 9, 23, and 27 for the pretrial hearing, trial readiness hearing, and trial. Defendant did not respond to the court, and the court noted that defendant was “sitting there in silence and nonresponsive,” even though defendant ostensibly did not “have a hearing problem” and must have heard the court. Defense counsel then asked the court to conduct an in camera hearing with only defendant and counsel present, and the hearing was conducted later during the morning of April 16.

During the in camera hearing, defense counsel told the court that defendant was refusing to speak to him about the present case and another pending case, and that counsel had advised defendant he was “to some extent” waiving his right to effective assistance of counsel by refusing to speak to counsel. Counsel did not ask the court to allow him to withdraw from his representation of defendant, but instead “invit[ed]” the court to inquire of defendant. The court asked defendant why he was not speaking to his counsel, but defendant refused to answer the court and, as the court observed, defendant just sat “in stony silence.” The court then asked defendant whether he had a hearing problem and waved at defendant, but defendant still refused to answer, wave back, or

otherwise communicate with the court. The court advised defendant that his counsel could not effectively represent him if he would not talk to his counsel. The court found it was “clear” that defendant did not have a hearing problem, but was nonetheless being “completely and totally nonresponsive.” Thus, the court found that defendant had waived his right to effective assistance of counsel.

During trial in June 2014, defendant verbally responded to the court on three separate occasions. First, when the court asked defendant whether he was waiving his right to be present during jury instructions discussions, defendant responded, “Yes.” Later during trial, when the court asked defendant whether he was exercising his right not to testify and remain silent, defendant responded, “That is correct.” Finally, when the court had to discuss jury instructions with defense counsel and the prosecutor a second time, it asked defendant whether he would again waive his right to be present, and defendant said, “That’s fine.”

### III. DISCUSSION

#### *A. The Trial Court Did Not Abuse Its Discretion in Failing to Suspend the Proceedings and Order a Competency Hearing*

Defendant claims his attempted murder conviction must be reversed because the trial court erroneously failed to suspend the proceedings and order a hearing to determine his competency to stand trial following his April 16, 2014, arraignment and the in camera hearing. He claims his steadfast silence during these proceedings, and his refusal to communicate with the court or his defense counsel, constituted substantial evidence that

he was incompetent to stand trial. Thus, he argues, the court erroneously failed to suspend the criminal proceedings and order a competency hearing sua sponte, based on his refusal to speak to the court or counsel on April 16.

We disagree. As we explain, defendant's mere silence in the face of the court's questions and his refusal to speak to his defense counsel were insufficient to raise a reasonable doubt concerning his competency to stand trial. Thus, the court did not abuse its discretion in failing to suspend the proceedings and order a competency hearing.

“Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with *substantial evidence* of incompetency, that is, evidence that raises a *reasonable or bona fide* doubt concerning the defendant's competence to stand trial.’ [Citations.]” (*People v. Howard* (2010) 51 Cal.4th 15, 45, first italics added.) “Only when the accused presents ‘substantial evidence’ of [his or her] incompetence does due process require a full competency hearing.” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047.) The court is required to order a competency hearing at any time “prior to judgment” if it reasonably doubts the defendant's competency to stand trial. (§ 1368, subd. (a).)

“Competency [to stand trial] under federal law requires sufficient present ability to consult with one's lawyer with a reasonable degree of rational understanding and a rational and factual understanding of the proceedings against one.” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 401; *Dusky v. United States* (1960) 362 U.S. 402.) Similarly, a defendant is mentally incompetent to stand trial under state law “if, as a result of mental

disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (§ 1367, subd. (a); *People v. Halvorsen, supra*, at p. 401.)

“Evidence of incompetence may emanate from several sources, including the defendant’s demeanor, irrational behavior, and prior mental evaluations. [Citations.] But to be entitled to a competency hearing, ‘a defendant must exhibit more than . . . a preexisting psychiatric condition that has little bearing on the question . . . whether the defendant can assist his defense counsel.’” (*People v. Rogers* (2006) 39 Cal.4th 826, 847; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 464-465.)

As a reviewing court, we generally give “great deference” to a trial court’s decision whether to hold a competency hearing, because the court had the opportunity to observe the defendant. (*People v. Marshall* (1997) 15 Cal.4th 1, 33; *People v. Howard, supra*, 51 Cal.4th at p. 45.) As our state Supreme Court has said: “““An appellate court is in no position to appraise a defendant’s conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.””” (*People v. Marshall, supra*, at p. 33.) Thus here, we defer to the court’s observation that defendant was able to hear and understand the court, at his April 16, 2014, arraignment and the in camera hearing, held shortly after the arraignment.

In deference to the trial court’s observation that defendant was able to hear and understand the court, it is apparent defendant’s mere silence and refusal to speak to the court and his counsel *did not* indicate that he was or may have been incompetent to stand

trial—that is, *unable* to understand the nature of the proceedings and rationally assist his counsel in his defense. (§ 1367, subd. (a); *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 401.) Thus, defendant’s silence and refusal to speak was insufficient to raise a reasonable doubt concerning his competency to stand trial.

Indeed, in addition to the trial court’s observation on April 16, that defendant was able to hear and understand the court, the record includes objective evidence that defendant was able to hear and understand the court both before and after the April 16 proceedings. At the conclusion of the preliminary hearing on April 2, 2014, defendant answered, “Yes, I did,” when the court asked him whether he understood he had just been ordered to return to court on April 16 for his arraignment. The same judge presided at the April 2 preliminary hearing, the April 16 arraignment and in camera hearing, and at trial in June 2014. And, as noted, on three separate occasions during trial, defendant responded to the court’s questions to him by saying, “Yes,” “That’s fine,” and “That is correct.”

Additionally, defendant presented no evidence whatsoever that he was suffering from any “mental disorder or developmental disability” including one that adversely affected his ability to understand the proceedings or rationally assist his counsel in his defense. (§ 1367, subd. (a).) And defense counsel never indicated to the court that he believed defendant was mentally incompetent to stand trial; rather, counsel only “invit[ed]” the court to inquire of defendant in the in camera hearing, because defendant

was refusing to speak with him and counsel was concerned about his ability effectively to represent defendant under those circumstances.

Lastly, we observe that courts have found insufficient evidence of incompetency on far less evidence than defendant presented here. (E.g., *People v. Lewis* (2008) 43 Cal.4th 415, 525 [defense counsel’s declaration of doubt that the defendant was able to rationally assist in his defense, the opinion of a defense psychologist that the defendant’s brain functioning was abnormal, and the defendant’s irrational and counterproductive behavior, did not amount to substantial evidence of incompetence to stand trial].)

*B. We Decline to Address Whether the Record Supports the Trial Court’s Finding That Defendant Waived His Right to Effective Assistance of Counsel*

In his supplemental letter brief, defendant claims the court “structurally erred” in finding, at the in camera hearing, that defendant had waived his right to effective assistance of counsel by refusing to speak to his counsel. Defendant claims the court made the wavier finding based on a “silent record,” or at least an inadequate one, because the record does not indicate that his waiver was knowing, intelligent, and voluntary. Thus, defendant argues, the judgment of conviction must be reversed.

We decline to address this claim because it is not justiciable. “Generally, courts decide only ‘actual controversies’ which will result in a judgment that offers relief to the parties. [Citations.] Thus, appellate courts as a rule will not render opinions on moot questions . . . . The policy behind this rule is that courts decide justiciable controversies

and will normally not render advisory opinions. [Citations.]” (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178-1179.)

Importantly, defendant does not claim his counsel rendered ineffective assistance in any respect. Thus, even if, as defendant claims, the record is inadequate to support a finding that defendant knowingly and intelligently waived his right to effective assistance of counsel, this court can grant defendant no effective relief based on the inadequately supported waiver finding. Stated another way, because defendant does not claim he received ineffective assistance of counsel, he cannot show he was prejudiced by the court’s erroneous waiver finding. Further, any error in the court’s waiver finding was not structural, requiring automatic reversal of defendant’s conviction, because the error, if any, did not affect the reliability of the trial in any way. (*People v. Anzalone* (2013) 56 Cal.4th 545, 554 [structural errors require automatic reversal because they “go to the very reliability of a criminal trial as a vehicle for determining guilt or innocence . . . .”].)

### C. *The Abstract of Judgment Must be Corrected*

The crime of attempted murder, whether premediated or not, is not divisible into degrees. (*People v. Favor* (2012) 54 Cal.4th 868, 876-877.) Yet the abstract of judgment indicates that defendant was convicted of attempted murder in the first degree, because it states he was convicted of “1<sup>st</sup> Attempt Murd” on June 16, 2014.

Defendant claims, and the People and we agree, that the abstract must be corrected to eliminate the “1<sup>st</sup>” notation, or the erroneous indication that defendant’s attempted murder conviction was in the first degree. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185

[courts have inherent authority to correct clerical errors in court records].) We therefore remand the matter with directions to correct the abstract in this respect.

#### IV. DISPOSITION

The matter is remanded to the trial court with directions to correct defendant's abstract of judgment to eliminate the notation that erroneously indicates he was convicted of attempted murder *in the first degree*, and to show simply that he was convicted of attempted murder. The court is further directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
\_\_\_\_\_ J.

We concur:

RAMIREZ  
\_\_\_\_\_ P. J.

SLOUGH  
\_\_\_\_\_ J.