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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY SANCHEZ FIGUEROA,

Defendant and Appellant.

F063104

(Tulare Sup. Ct. No. VCF199570)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Charles M. Bonneau, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Jimmy Sanchez Figueroa (defendant) stabbed the operator of a drug diversion prison outreach program in which he was a participant. He was charged and convicted of count I, attempted first degree premeditated murder (Pen. Code,¹ §§ 664/187, subd. (a)); count II, elder abuse (§ 368, subd. (b)(1)); and counts III and IV, criminal threats (§ 422). As to all counts, the jury found he personally used a deadly or dangerous weapon, a knife (§ 12022, subd. (b)(1)), and that he had two prior serious felony enhancements (§ 667, subd. (a)); two prior strike convictions (§ 1170.12), and one prior prison term enhancement (§ 667.5, subd. (b)).²

Defendant pleaded not guilty, and not guilty by reason of insanity. After a jury trial, he was convicted of the substantive offenses. Thereafter, the court conducted two sanity-phase trials, but the jury was unable to reach verdicts and mistrials were declared in both proceedings. After a third sanity trial, the jury found that defendant was sane when he committed the offenses in this case. Defendant was sentenced to 25 years to life for count I, plus two consecutive five-year terms for the prior serious felony convictions, and one year for personal use of the knife.

On appeal, defendant contends the jury was improperly instructed during the guilt and sanity phases; the court incorrectly responded to the jury's question during the sanity phase; and one of his concurrent terms should have been stayed. We will affirm.

FACTS³

On March 4, 2008, defendant lived at a drug diversion prison outreach program. Janice Rice had operated the program in her Porterville home for 15 years. Defendant

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

² The information initially alleged several prior prison term enhancements, and all but one was subsequently stricken by the superior court.

³ The following facts are taken from the guilt phase of the proceedings in this case.

had been placed there through the parole office.⁴ Rice, who was 70 years old, had known defendant since his teenage years. Rice loved defendant “like one of my kids,” and had him accompany her on errands.

On the morning of March 4, 2008, defendant asked Rice about his finances and suggested that Rice had wrongly retained some of his funds. Rice explained to him that the parole office took \$1,200 of his disability pay each month, applied that sum to defendant’s care, and that defendant’s sister handled the rest of his funds, approximately \$50 per month. Defendant thought he should have more money, and thought that Rice had taken his money. Defendant was angry and “[k]ind of” yelling at Rice. Rice told him to cool down, and that he should talk to his sister about the matter. Defendant agreed, and Rice told him that his sister would be there later in the day. Rice also advised him to call his parole officer for an explanation about the money. Rice testified the argument lasted just a few minutes.

Rice and her husband, Jose Pena, left the premises to go grocery shopping. They returned and went inside the back door. Defendant was standing near the washer and dryer of the home. He had placed excessively wet clothes in the dryer, and Pena told him he should not have done so.

Pena testified that defendant went into the house and then emerged within two minutes with a knife. Pena testified defendant went straight to Rice.

Rice testified that defendant was holding a butcher knife over his head. Defendant told Rice, “ ‘I’m gonna kill you’ ” Defendant pulled back his arm in a stabbing motion. Rice threw up her hands in front of her face. Defendant stabbed her with the knife, “and

⁴ At the guilt phase, Rice testified that defendant had lived at the facility for “[c]lose to a year,” whereas Rice’s husband testified he had lived there for about six months. At the sanity phase, Rice testified defendant had lived there for a little over six months.

he cut my hands as it went through” and stabbed her in the right shoulder. Rice testified the knife went into her shoulder, hit the bone, and “blood was everywhere.”

Pena testified that defendant was about to stab Rice again. Pena grabbed defendant’s hand and asked what he was doing. Defendant said, “ ‘I – I want to kill your wife.’ ” Pena told defendant, “ ‘No, you’re not. You kill me first.’ ” Pena grabbed defendant and forced him to sit down. Defendant was angry at Rice, and he was still holding the knife. Pena tried to get the knife out of defendant’s hand but could not do so. Defendant said, “ ‘If you don’t let me, I kill you, too.’ ” Pena replied, “ ‘Okay. You don’t do this to my wife.’ ” After Pena made that statement, defendant calmed down.

Pena held onto defendant and told Rice to call the police. Rice headed into her office to use the phone. She was staggering but did not fall down. She discovered the entire office was in disarray. Rice’s files were on the floor, the telephones had been torn out, and her desk chair had been slashed multiple times. Since the desk phones had been ripped out, Rice contacted Porterville police on her cell phone, gave her address, and said she had been stabbed.

Another resident, Juan Silva, ran next door and summoned a neighbor, Harry Lee Odem. When Odem arrived, Pena was still holding down defendant. Odem put his foot on defendant’s arm and removed the knife out from his hand. Odem testified defendant was not holding the knife very tight, and he did not say anything.

Rice testified that she had known defendant since he was a teenager and said his parole officer had ordered him to take certain medications. Rice said defendant lived in transitional housing because he was unable to live alone due to psychological problems. Around 10 to 12 days before the attack, the parole office took defendant off one of his medications. Defendant started engaging in different types of behavior after the regimen change. Rice said defendant visited the church where she was a pastor and began “scoping” everyone present. He practiced karate for long periods of time, tore up copies of the Bible and many other books, and shoved pages from the torn books into the

ventilation system of the transitional housing residence. Rice said that defendant typically tore things up before going off of his medications and also heard voices.

Defendant's sister testified that she asked her brother why he had stabbed Rice. Defendant acknowledged that he loved Rice but added, " '[T]he voices told me I have to kill her because she's getting too many people saved.' " Defendant told his sister that he heard strange voices. She said he talked about the Mafia and drew pictures of aliens and other bizarre beings.

After defendant was placed under arrest, Porterville Police Officer Mariko Williams transported defendant from the transitional housing residence to the Tulare County Sheriff's substation in Porterville. En route to the substation, defendant told Officer Williams that "she was lucky that he was there because he would have killed her." He also said, " 'I'm going to kill her, she's lucky, she's gonna get her brains blown out.' " Defendant said Rice was lucky that Pena was present because defendant would have killed Rice. Williams also said that defendant mumbled, but Williams could not decipher the mumbling.

PROCEDURAL HISTORY

Competency proceedings

On March 6, 2008, a criminal complaint was filed against defendant in the Superior Court of Tulare County, charging him with the attempted premeditated murder of Rice and other felonies.

On March 17, 2008, defendant's appointed counsel declared a doubt as to his ability to cooperate in his defense (§ 1368). The court suspended criminal proceedings and appointed experts to evaluate defendant.

On May 7, 2008, the court found defendant was not competent to stand trial in this case. Defendant was committed to Atascadero State Hospital for treatment pursuant to section 1368.

On February 11, 2009, the court reviewed a report from Atascadero, found that defendant had been restored to competency, and reinstated criminal proceedings.

Information and pleas

On July 1, 2009, the information was filed which charged defendant with count I, attempted first degree premeditated murder of Rice; count II, elder abuse of Rice; and counts III and IV, criminal threats against Rice and Pena, with the special allegations that he personally used a deadly or dangerous weapon, a knife, and that he had two prior serious felony enhancements; two prior strike convictions, and one prior prison term enhancement.

On July 2, 2009, defendant pleaded not guilty, and not guilty by reason of insanity.

Guilt phase and bifurcated proceedings

On May 4, 2010, defendant's jury trial began on the guilt phase; the court had bifurcated trial on prior conviction allegations and the insanity portion of defendant's case.

On May 5, 2010, the jury found defendant guilty of the charged offenses and found the personal use enhancements true. On the same day, the court began the bifurcated jury trial as to whether defendant was sane when he committed the offenses.

On May 6, 2010, the jurors were unable to reach a verdict and the court declared a mistrial as to the sanity phase. On the same day, the court conducted a bifurcated jury trial on the prior conviction allegations, and the jury found the allegations true – that defendant had two prior strike convictions, two prior serious felony enhancements, and one prior prison term enhancement.

On February 8, 2011, the court began a second sanity jury trial. On February 14, 2011, the jurors were unable to reach a verdict and the court again declared a mistrial.

SANITY PHASE FACTS

On June 28, 2011, the court began the third jury trial as to whether defendant was sane when he committed the offenses in this case.

Rice, the victim, testified that she had known defendant for a long time. At the time of the stabbing, defendant had been living at her facility for a little over six months. Defendant ordinarily behaved himself and appeared happy to be there.

Rice testified that she never had any problems with defendant refusing to take his medication. Defendant's medications were being monitored by Dr. Odi, a psychiatrist, and Dr. Gaab, who were both with the parole department. Rice went with defendant to his appointments with these doctors, and they would advise her about his treatment.

Rice testified that defendant met with the doctors about 10 days before the stabbing, and "I guess they made the decision to [eliminate] one of the medications" that defendant had been taking. The doctor told Rice that she was going to eliminate a medication, and "[the doctor] decided that she was gonna try it and see how he would react without it."

Rice testified that defendant's behavior changed "about ten days, two weeks before he stabbed me" "[H]e was doing really good until the last ten days or two weeks" before the stabbing. Defendant started doing karate chops, he thought he was talking to aliens, he walked out to the street without a shirt, and he acted out at church.

Rice testified that defendant stopped receiving one of his prescribed medications about 10 days before trial. On direct examination, Rice was asked which medications had been eliminated. Rice reviewed some paperwork on the subject, and testified that defendant did not get "the injections for the Risperdal" after "he came to be with us" at the treatment facility. Rice also said that defendant no longer received "Aoxcalbazepine."

On cross-examination, the prosecutor asked Rice if she knew the type of drug which had been stopped. Rice replied: "They use it for people that have epilepsy, I know that, or that have similar problems."

"Q. The medication that they changed was the one, the epilepsy –

“A. And maybe it took that long to wear off what they were doing before, because they didn’t give him any injections that I know of, period.”

Rice testified that a couple of days before the stabbing, she advised defendant’s doctors about his strange behavior and the doctors did not change anything. In Rice’s opinion, defendant was “out of his head” at the time he stabbed her.

Defendant’s testimony

Defendant testified at the sanity trial, and said that he heard voices talking about the programming of computers. He explained “how this whole courtroom’s programmed right now.” As to the stabbing, defendant said he did not hate Rice, he never hit women, and he did not have a record for domestic abuse. Defendant said he received subliminal messages through radio music and “talked to the Mafia” about computers. According to defendant, the Mafia told him that Rice was a spy and white supremacist, and that she was going to kill him. Defendant claimed the Mafia “worked me” and said President Putin in Russia arranged for him to hear the voices.

In response to questioning by counsel, defendant said he did not believe he was insane but did claim a mental defect. Defendant testified he stole a bike when he was 11 years old and stopped attending school after the seventh grade. He said he sniffed paint at that age and began using drugs at age 12. Defendant admitted to using heroin, cocaine, and “crank” and said he first used heroin at the age of 15. Defendant acknowledged that he had been to prison five times. He said he had been briefly employed at an auto parts store and later had his own automotive body business. Defendant said he was familiar with the Bible and the principles of telling the truth, placing God first, not killing others, and not committing adultery.

Defendant testified that he knew he would be “busted” for the attack on Rice because he committed the offense in the open. He said he selected the largest knife in the kitchen because his intent was to kill Rice. He said he was upset, stabbed Rice’s office chair, and threw everything that was on the top of Rice’s desk. Defendant said he was “a

little bit upset” when he talked to Rice about his finances. Defendant admitted that he had a choice as to whether or not to listen to the voices that told him to kill Rice. He further admitted that the voices sometimes told him to do things he knew were wrong. According to defendant, the “beast” computer programmed his mind to stab Rice, and that stabbing her was “part of my obligation.”

Mental health evidence

The parties stipulated that on May 7, 2008, defendant was found incompetent to stand trial after he was arrested in this case. Defendant was transported to Atascadero State Hospital to obtain treatment so that he could regain his competence and eventually stand trial. Authorities later determined that defendant was competent to stand trial, and he was discharged from Atascadero State Hospital on February 9, 2009.

The defense called three experts who testified that defendant was insane when he committed the offenses in this case: Dr. Luis Velosa, a psychiatrist; and Dr. Thomas Middleton and Dr. Stephen Bindler, psychologists.

Dr. Velosa

Dr. Velosa examined defendant in March 2008, and September, October, and November 2009. Dr. Velosa determined that defendant was legally insane at the time that he committed the offenses in this case. Dr. Velosa concluded that defendant suffered from long-term paranoid schizophrenia and was suffering from delusions at the time of the stabbing of Rice. Velosa testified that the interruption in medications made defendant delusional and prompted the attack on Rice. According to Velosa, the issue about the money triggered the delusion. He further testified that defendant had an intent to harm, but that intent was based on a misperception. Dr. Velosa explained that while defendant also had an Axis 2 diagnosis of antisocial personality syndrome, defendant’s schizophrenia was the more important diagnosis because it was a serious disease which required treatment.

Dr. Velosa testified that defendant suffered from delusions and had been diagnosed with schizophrenia for at least 20 years. It was possible that he could still hear voices when he was on medication, but a person on medication might be able to recognize that the voice were delusions. When defendant was at Atascadero, he received large doses of “very potent medicines” to correct his chemical imbalances and reduce the level of his psychosis and delusions.

Dr. Velosa testified that at the time of the stabbing, defendant exhibited “a serious psychiatric illness” and he was “quite delusional. He was not taking – he had not been taking his medications. He had felt that the government was communicating with him, sending him signals and signs. And that, in my opinion, prompted the alleged offense.”

Dr. Middleton

Dr. Middleton testified that defendant was not sane when he attacked Rice, and he suffered from “schizophrenia, paranoid type, continuous, severe.” Defendant could not be tested or evaluated in Atascadero in August 2008, because his symptoms were so pervasive. Defendant’s symptoms were still severe upon his discharge from Atascadero but were being controlled. Nevertheless, Middleton said defendant was still delusional at the time of discharge. Middleton said he administered an M-FAST test to determine whether defendant was malingering. Defendant did not show evidence of any false symptoms of mental disorder.

Dr. Middleton acknowledged that he previously testified that defendant also met the criteria for antisocial personality syndrome. However, Dr. Middleton explained that “schizophrenia excludes antisocial personality disorder.” Dr. Middleton had reviewed “decades” of documentation about defendant’s schizophrenia, his delusions, and his treatment at both Atascadero and Patton State Hospital, where he had been treated numerous times in his life.

Dr. Middleton further explained that defendant’s schizophrenia was the controlling or primary diagnosis. Defendant’s diagnosis was not a particularly close case given his

condition when he was at Atascadero, shortly after he was arrested in this case. “So five months after his arrest he was so incoherent and grossly disorganized that he couldn’t be tested, he couldn’t be effectively involved in treatment in a state hospital in the controlled environment there. If he was incompetent, grossly disorganized five months later, in my opinion, that strongly suggests that his behavior was likewise influenced by his schizophrenia in March of that year [when he stabbed the victim].”

Dr. Bindler

Dr. Bindler similarly testified that defendant was not sane when he committed the offenses. Dr. Bindler explained that he initially concluded that defendant was sane at the time of the offense. However, Dr. Bindler changed his opinion after reviewing defendant’s records from Atascadero and decided that defendant was insane. Dr. Bindler testified that defendant was “significantly mentally disordered at the time of the offense, may or may not have been on his medication, notations from his doctors at Atascadero regarding the course of his behavior when he goes off his medications”

Dr. Bindler evaluated defendant in July 2009 and diagnosed him with schizophrenia at that time. Defendant told Bindler: “ ‘I knew it was the wrong thing to do, but the voices persuaded me to think different.’ ” Defendant also met the criteria for antisocial personality disorder, which could be related to his schizophrenia. However, Dr. Bindler believed that defendant’s schizophrenia was the cause, influence, and motivation for his violent behavior. His opinion was based on the Atascadero report “regarding the severity and length of time of his mental disorder, the types of things that occur when he goes off his medications ... his preoccupation with all of these bizarre beliefs and things, that the overwhelming influence and what motivated him that day was a delusional belief that things had been taken from him, both biological parts of his body and money, and he was acting in response to those beliefs.”

Dr. Cavagnaro – the prosecution’s expert

Dr. Andrew Cavagnaro, a psychologist with the Department of Developmental Services, testified as the prosecution’s sole expert, and gave his opinion that defendant was sane when he committed the offenses, and that he “clearly understood the nature and quality of his actions and knew that the actions were wrong.”

Dr. Cavagnaro read defendant’s reports from Atascadero and met with defendant on three occasions in August and October 2010. When asked about the stabbing, defendant told Dr. Cavagnaro that “he took his medicines that day but could not remember their names.” Defendant said he had been receiving “messages” and “voices” which “persuaded him” to stab the victim. Defendant also said that he was “overpowered by the messages in the computer,” he “did not want to do this act at first and told the voices he would not do it,” and he knew “ ‘The Bible says it’s wrong,’ ” but he “ ‘lost it.’ ” Defendant said that he “wanted to stab [the victim] a few times to kill her.” He initially stabbed a chair “to make sure he would do it.” Defendant never showed any remorse about the stabbing during his interviews with Dr. Cavagnaro.

Dr. Cavagnaro testified that defendant suffered from schizophrenia. He also determined that defendant had antisocial personality syndrome, substance abuse disorder, and “borderline” intellectual functioning. Dr. Cavagnaro considered the diagnosis of antisocial personality syndrome, a mental disorder, as primary to defendant’s schizophrenia. Antisocial personality disorder “best describes his behavior going back to the age of eleven [years old].” A person with antisocial personality disorder could act impulsively and without planning.

Dr. Cavagnaro testified that defendant’s behavior was more consistent with anger than delusions. Defendant understood the nature and quality of actions at the time he stabbed Rice with the butcher knife, because he said that he knew that it was wrong. Defendant had previously told Dr. Velosa that he was upset and angry about money, but he failed to make that statement to Dr. Cavagnaro. Based on defendant’s criminal

history, it seemed “highly probable that he was angry, that that was the motivation. And then to make that even stronger, stabbing the chair prior to stabbing [the victim] clearly seems to be an act of anger.”

Dr. Cavagnaro testified that while defendant described a variety of voices in his interviews with the other experts, his descriptions were not consistent. In his experience, people with schizophrenia usually describe their delusions in a consistent manner. “It just struck me that [defendant’s] description of [the incident] varied greatly to different doctors and also seemed to clash with the police report.” “People who are antisocial are often deceitful and may not be always truthful or they may manipulate situations to their advantage, so it isn’t – it is consistent with his diagnosis of antisocial personality.” Defendant’s failure to show remorse for the stabbing, and insistence that he was innocent when asked about his prior convictions, were consistent with antisocial personality disorder, because such people “have little or no remorse for their actions and take no responsibility.”

SANITY VERDICT AND SENTENCING

On June 30, 2011, the jury found defendant legally sane at the time that he committed the offenses in this case.

On August 11, 2011, the court denied defendant’s request to dismiss his prior strike convictions, and sentenced him to an aggregate term of 11 years plus 25 years to life.

DISCUSSION

I. CALCRIM No. 627

Defendant contends that at the guilt phase, the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 627, about the effect of hallucinations to negate premeditation and deliberation for count I, attempted premeditated murder. Defendant argues the court’s failure to instruct the jury was prejudicial because the instruction would have allowed the jury to find the premeditation allegation was not true.

A. Background

During the instructional phase of the guilt trial, the court asked the parties whether there were any additional jury instructions that needed to be given. Defendant's trial counsel stated, "No." The court then asked the attorneys whether they were "good with these [instructions]?" Each counsel signified agreement by saying, "Yes." Defendant's attorney never asked the court to instruct the jury with CALCRIM No. 627, on hallucinations.

B. Analysis

The trial court has a sua sponte duty to give defense instructions supported by substantial evidence and consistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195 (*Barton*); *People v. Baker* (1999) 74 Cal.App.4th 243, 252 (*Baker*)). However, instructions that relate "particular facts to the elements of the offense charged" are pinpoint instructions that a trial court has no sua sponte duty to issue to a jury. (*Barton, supra*, 12 Cal.4th at p. 197.)

"[E]vidence of a hallucination – a perception with no objective reality – is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677 (*Padilla*)). CALCRIM No. 627, which is based on *Padilla*, states:

"A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

"Like first degree murder, attempted first degree murder requires a finding of premeditation and deliberation." (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223.) Defendant thus contends that the court had a sua sponte duty to instruct the jury with

CALCRIM No. 627, which would have allowed the jury to consider defendant's alleged hallucinations on the issue of premeditation and deliberation for count I, attempted first degree murder.

Padilla, however, did not hold that a trial court had a sua sponte duty to so instruct the jury. Instead, *Padilla* held that the trial court in that case improperly excluded defendant's motion to introduce evidence about his alleged hallucinations at the guilt phase of his trial for first degree murder. (*Padilla, supra*, 103 Cal.App.4th at pp. 677-678, 679-680.)

We believe that CALCRIM No. 627 is in the nature of a pinpoint instruction. “[E]vidence ‘proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt’ may, but only upon request, justify the giving of a pinpoint instruction that ‘does not involve a “general principle of law” as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court.’ [Citation.] ‘Such instructions relate particular facts to a legal issue in the case or “pinpoint” the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.’ [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 674-675 [finding trial court not required to give sua sponte instruction on “complete defense” of accident that would negate the intent element necessary for first degree murder convictions where defense hinged on facts particular to the case and the defendant failed to request the instruction].)

The effect of a defendant's mental disease or disorder on his mental state amounts to a pinpoint instruction, which a trial court has no sua sponte duty to provide. (*People v. Saille* (1991) 54 Cal.3d 1103, 1107; *People v. Ervin* (2000) 22 Cal.4th 48, 91.) In *Ervin*, the defendant was convicted of first degree murder. (*Ervin, supra*, 22 Cal.4th at p. 66.) On appeal, he argued the trial court erred by failing sua sponte to instruct the jury regarding the effect of a mental disease, defect, or disorder on his ability to premeditate

and deliberate. (*Id.* at p. 89.) The California Supreme Court held that instructions regarding the actual effect of the defendant’s mental disease or disorder on his mental state and the ability to premeditate and deliberate were instructions “in the nature of pinpoint instructions required to be given only on request.” (*Id.* at pp. 90-91.)

To the extent defendant maintained that his hallucinations precluded him from manifesting the requisite deliberation and premeditation to be convicted of attempted first degree murder, he was attempting to raise a doubt regarding the intent element of the crime based on facts particular to his case, rather than raising a defense based on a general principle of law. In other words, “hallucination” is not a general defense, but rather a theory that attempts to negate the intent element of the crime depending upon the individual facts attached to a specific case. Thus, the court did not have a *sua sponte* duty to instruct with CALCRIM No. 627 without a specific request to do so.

Defendant points out that the bench note to CALCRIM No. 627 states: “The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant’s theory of the case. [Citations.]” (Judicial Council of Cal., *Crim. Jury Instns.* (2012) *Bench Notes to CALCRIM No. 627*, p. 433, boldface in original.) As to the pattern instructions, however, it is well recognized that we independently assess whether the instructions correctly state the law, and the legal adequacy of a pattern instruction is reviewed *de novo*. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210; *People v. Posey* (2004) 32 Cal.4th 193, 218.) When the correctness of instructions is at issue, an appellate court does not simply defer to the fact that the language was taken from pattern instructions, but instead carefully reviews those instructions to determine whether they correctly state the law. (See, e.g., *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1179-1199; *People v. Chue Vang* (2009) 171 Cal.App.4th 1120, 1129-1131; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.) The same principle should apply to review of the bench notes to a pattern instruction.

The bare assertion in CALCRIM No. 627’s bench note, that it is a sua sponte instruction, cites to two cases – *Baker* and *Barton* – which we have already discussed above. (Judicial Council of Cal., Crim. Jury Instns., *supra*, Bench Notes to CALCRIM No. 627 at p. 433.) Notwithstanding the bench note, these cases address a court’s general duty to instruct on lesser included offenses and defenses, and they do not address *Padilla* or the concerns discussed in *Ervin* or *Saille*. (*Barton, supra*, 12 Cal.4th at pp. 194-195; *Baker, supra*, 74 Cal.App.4th at p. 252.)⁵

II. CALCRIM No. 3450

Defendant next challenges CALCRIM No. 3450, an instruction which was given at the third and final sanity trial, and argues the court had a sua sponte duty to modify the instruction. CALCRIM No. 3450, as read to the jury, stated in relevant part:

“If you find the defendant was legally insane at the time of his crime, he will not be released from custody until a court finds he qualifies for release under California law. Until that time he will remain in a mental hospital or outpatient treatment program, if appropriate. *He may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for ... his crime.* If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime. You must not speculate as to whether he is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.” (Italics added.)

⁵ We note that while the court did not have a sua sponte duty to give CALCRIM No. 627, it might have been obliged to give the pinpoint instruction at the guilt phase if defense counsel had made the request and if the instruction was supported by substantial evidence. (*People v. Ervin, supra*, 22 Cal.4th at p. 91.) We further note that an ineffective assistance claim based on a defense attorney’s failure to request an instruction is more appropriately raised in a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defendant cites to the italicized language of CALCRIM No. 3450, and argues such language was prejudicial in this case and may have led the jury to find he was sane. Defendant notes that he was facing a maximum term of life based on his conviction for attempted murder so that there was no chance of an early release if he was found insane. Defendant argues the court had a sua sponte duty to modify the instruction to so inform the jury of this circumstance. Defendant further argues the court's failure to modify the instruction was prejudicial, and the jury's sanity verdict must be reversed, because the jury may have found him sane simply because of concerns that he would be released early if the jury found he was insane.

Defendant's argument is based on *People v. Moore* (1985) 166 Cal.App.3d 540 (*Moore*), which held that whenever requested by the defendant or jury, the trial court should give an appropriate instruction regarding the consequences of an insanity verdict to ensure the jury does not erroneously believe such a verdict will result in the immediate freeing of the defendant. (*Id.* at pp. 554, 556.)

"California law originally did not provide" for the type of instruction contemplated by *Moore*. (*People v. Kelly* (1992) 1 Cal.4th 495, 538.) As a result of *Moore*, however, CALJIC No. 4.01 was drafted in response and it was "intended to aid the defense by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*Kelly, supra*, at p. 538.) The instruction's intent is to "protect the defense" in an insanity trial. (*Ibid.*)⁶

⁶ *Moore* has been criticized and limited by the California Supreme Court, which has held that an instruction such as CALJIC No. 4.01, the predecessor to CALCRIM No. 3450, is not necessary at a jury trial to determine whether a defendant is competent to stand trial. "Because the outcome of any future efforts at restoring a defendant to competency is uncertain at the time when the jury must make its decision on competency, an instruction patterned after *Moore* and CALJIC No. 4.01 is necessarily speculative." (*People v. Dunkle* (2005) 36 Cal.4th 861, 897-898, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

CALCRIM No. 3450 is the successor instruction to CALJIC No. 4.01. CALCRIM No. 3450, like its predecessor, is designed to protect a defendant in an insanity trial by alleviating the possible fears of the jury that he will be released into the community if he is found not guilty by reason of insanity. (*People v. Kelly, supra*, 1 Cal.4th at p. 538.) The instruction is not limited to the single sentence highlighted by defendant. Instead, it advises the jury about several important facts: if the defendant is found insane, he will not be released from custody until a court finds he qualifies for release under state law; until that time, he will remain in the appropriate treatment facility; and he will remain in that facility for the maximum term available for his convicted offenses. More importantly, the instruction concludes with the admonition: “You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.” Absent evidence to the contrary, we presume the jurors followed the court’s instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Defendant did not object to any portion of CALCRIM No. 3450, the instruction correctly states the applicable law and addresses *Moore’s* concerns, and the court did not have a sua sponte duty to modify the instruction.

III. The jury’s question at the third sanity trial

Defendant contends the trial court incorrectly responded to the jury’s question raised during deliberations at the third and final sanity trial, as to the names of defendant’s medications which had been discontinued in the 10 days to two weeks before the stabbing. As we will explain, defendant waived review of this issue, but the court’s response was not prejudicial given the entirety of the record.

A. The jury’s questions

The jury began deliberations at 2:50 p.m. on June 30, 2011. At 3:13 p.m., the jurors submitted a note to the court asking:

“What specific medication was he not receiving on the date of the incident?
What 2 medications were discontinued the 10 days prior to the incident?”

The court advised the prosecutor and defense attorney: “And my proposed answer is, ‘You are limited to the evidence contained in the record. There was no evidence presented as to what those medications were.’ [¶] And both parties are agreeing to that?” The prosecutor and defense counsel said yes. The court then gave the following written response to the jury:

“You are limited to the evidence contained in the record. There was no evidence presented as to what those medications were.”

At 3:13 p.m., the jury sent another question to the court: “What is the definition of insanity?” The court and parties agreed to refer the jury back to the definition contained in CALCRIM No. 3450. At 3:52 p.m., the court sent the written response to the jury: “The only definition of insanity is contained in Instruction #3450.”

At 4:25 p.m., the jury returned the sanity verdicts.

B. Analysis

Defendant contends the trial court’s response to the jury’s question about defendant’s medication “plainly misstated the evidence” and misled the jury because Rice testified that two of his medications were discontinued before the stabbing.

“When a jury asks a question after retiring for deliberation, ‘[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.’ [Citation.] But ‘[t]his does not mean the court must always elaborate on the standard instructions....’ ” (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882.) While the court “has an obligation to rectify any confusion expressed by the jury regarding instructions, [it] has discretion to determine what additional explanations are sufficient to satisfy the jury’s request for information.” (*People v. Smithey* (1999) 20 Cal.4th 936, 1009.)

When a court decides to respond to a jury’s note, “counsel’s silence waives any objection” under section 1138. (*People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) A

defendant may forfeit an objection to the court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048.) In limited circumstances, however, the reviewing court may retain discretion to review such a claim. (See, e.g., *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

As applied to the instant case, the court advised the parties about its proposed response to the jury's question about defendant's medication. Defense counsel did not object, and the court gave that proposed response to the jury. Defendant has thus waived any error.

Even if we were to address the merits of defendant's appellate contentions, however, we would find that the court's response was not prejudicial under any standard. The court's response, and defense counsel's acquiescence to its response – that there was “no evidence” as to the “specific” medication which defendant was no longer receiving – may have been based on the recollection of the testimony offered by three of the experts. Drs. Velosa and Bindler testified that defendant was not sane, and he was not on his medications at the time of the stabbing, but they did not identify any of these medications by name or description. Dr. Cavagnaro testified that defendant was sane, and that defendant told him that he had taken “his medications that day [of the stabbing] but he could not remember their names.” Dr. Cavagnaro did not further address defendant's medications by name or description.

The court's response to the jury's question, however, was not complete based on the testimony of Rice, the victim. Rice testified that defendant had been at her treatment facility for about six months. She further testified that defendant's doctor eliminated one of his medications about 10 days to two weeks before he stabbed her. On direct examination, Rice testified that defendant did not get “the injections for the Risperdal” after “he came to be with us” at the treatment facility. Rice further testified that defendant no longer received a medication called “Aoxcalbazepine.” On cross-

examination, the prosecutor asked Rice if she knew the type of drug which had been stopped. Rice replied: “They use it for people that have epilepsy, I know that, or that have similar problems.” Defense counsel asked Rice: “Were there any other ones that he stopped receiving ... around the time period that you mentioned?” She replied, “No, just they didn’t give him – I don’t know. You’d have to subpoena his doctor.”

The record suggests the jury’s question may have been referring to Rice’s testimony on this topic. However, the court’s response to the jury’s question was not entirely inaccurate in light of Rice’s testimony. While Rice insisted that certain medications had been stopped about 10 days to two weeks before the stabbing, she hedged on whether those medications consisted of either Risperdal and/or “Aoxcalbazepine.” Rice testified that defendant had lived in her facility for about six months before the stabbing, but that he did not receive Risperdal injections after “he came to be with us.” While she also identified “Aoxcalbazepine,” she did not offer any specific information as to when that medication was discontinued. When further pressed as to the identity of defendant’s medications, she replied that defendant’s doctor should be subpoenaed.

Even though the court’s response to the jury’s question may have been imprecise, the court’s response did not undermine one of the primary evidentiary points presented by the defense – that defendant’s doctor at the parole department had discontinued one or more medications in the period immediately before the stabbing, and defendant’s behavior markedly changed during that period. The court did not advise the jury that there was no evidence that certain medications were *discontinued*, only that there was no evidence as to “what those medications were.” Yet the jury did hear Rice’s testimony on these points. More importantly, none of the experts offered any testimony about the therapeutic effects of either Risperdal and/or “Aoxcalbazepine,” or identified any of defendant’s medications by name. They did not testify how defendant might have been affected by the receipt or withdrawal of any specific medications.

Defendant contends that the jury returned the sanity verdicts because it was misled by the court's response, which prevented the jury from considering the defense theory that defendant was suffering delusions because he was not taking certain medications. At the sanity trial, however, defendant's own testimony seemed inconsistent with this theory. Defendant testified that he knew he would be "busted" for the attack on Rice because he committed the offense in the open; he selected the largest knife in the kitchen because he intended to kill her; he was upset about Rice's dealing with his finances; he had a choice as to whether or not to listen to the voices that told him to kill Rice; and the voices sometimes told him to do things that he said he knew were wrong. Defendant made similar statements to Dr. Cavagnaro.

We thus conclude that even if defendant preserved appellate review of this issue, and the court's response to the jury's question was inaccurate, the error was not prejudicial based on the entirety of the record.

IV. Section 654 and count III

Defendant contends the court improperly sentenced him to a concurrent term for count III, criminal threats to Rice. Defendant argues the term should have been stayed under section 654 because the offense was based on the same intent and objective as count I, the stabbing and attempted murder of Rice.

A. Background

In closing argument, the prosecutor explained that counts III and IV, criminal threats against Rice and Pena, occurred when defendant threatened them with the knife. After defendant stabbed Rice, Pena tried to get the knife away from him but defendant threatened to stab Pena. Rice tried to defend herself but defendant again threatened to stab her, and the prosecutor argued "they're taking away the knife because they feel threatened."

The probation report recommended that the terms imposed for count II, elder abuse of Rice, and count III, criminal threats to Rice, should be stayed pursuant to section

654 “because they involve the same victim and the same criminal actions being punished” in count I, attempted murder of Rice.

At the sentencing hearing, the court denied defendant’s request to dismiss any of his prior strike convictions. As to count I, attempted premeditated murder of Rice, he was sentenced to 25 years to life, plus one year for the personal use of a knife, and two consecutive five-year terms for the prior serious felony enhancements. As to count II, elder abuse of Rice, he was sentenced to 25 years to life, and the term was stayed pursuant to section 654.

As to counts III and IV, criminal threats to Rice and Pena, the court imposed concurrent terms of 25 years to life. The court noted that it could have imposed a consecutive term for count IV since it involved a different victim – Rice’s husband – but it decided to make the term for count IV concurrent instead. The court did not make any comments about whether the term for count III should be stayed under section 654.

B. Section 654

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. [Citation.] Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]” (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) Defendant’s failure to raise a section 654 objection at the time of sentencing does not forfeit appellate review of the potentially unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17, *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.)

Section 654 “itself literally applies only where such punishment arises out of multiple statutory violations produced by the ‘same act or omission.’ [Citation.] However, because the statute is intended to ensure that defendant is punished

‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

“It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] Although the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]” (*Ibid.*)

“Whether multiple convictions are based upon a single act is determined by examining the facts of the case.” (*People v. Mesa* (2012) 54 Cal.4th 191, 196.)

C. Analysis

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) “A violation of section 422 requires: (1) the defendant willfully threatens to kill or seriously injure another person; (2) the defendant has the specific intent that the listener understands the statement to be a threat; (3) the threat and the circumstances under which it was made lead the listener to believe the defendant would immediately carry through on the threat; and (4) the threat causes the listener to suffer sustained fear based upon a reasonable belief the threat would be carried out.” (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1023-1024.) The statute does not require that the violator intend to cause death or serious bodily injury to the victim. (*Ibid.*)

Defendant argues the court should have stayed the concurrent term imposed for count III, criminal threats, because his threat to kill Rice was an indivisible part of count I, attempted murder, when he stabbed her in the shoulder. However, the concurrent term for count III was appropriate under the facts of this case. Defendant's conviction for attempted murder was based on the stabbing of Rice. While defendant's initial statement that he wanted to kill Rice may have been made as he stabbed her, defendant made another threat against Rice after he completed the stabbing. After defendant stabbed Rice, Pena restrained defendant and tried to take the knife away from him. Defendant would not let go of the knife. Defendant again said that he wanted to kill Rice, and threatened to kill Pena if he did not release him. Rice was still present when defendant said he wanted to kill her and refused to let go of the knife. Thus, defendant's threat to kill Rice was independent and not incident to the attempted murder, and the concurrent term for count III did not violate section 654. Defendant's intent and objective was to repeatedly threaten Rice's life, even after he stabbed her, regardless of the temporal proximity of the threat to the stabbing.

DISPOSITION

The judgment is affirmed.

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P.J.

KANE, J.

