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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN MARVIN BONADIE,

Defendant and Appellant.

G050684

(Super. Ct. No. FWV900303)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County, Jon D. Ferguson, Judge. Affirmed in part, reversed in part, and remanded.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Adrian Marvin Bonadie of two counts of second degree murder for slaying his parents (Pen. Code, § 187, subd. (a); all further statutory references are to this code), three counts of attempted murder of a peace officer (§§ 664, subd. (e); 187, subd. (a)), and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The jury found penalty enhancement allegations true on the murder and attempted murder counts, including that Bonadie personally used and personally and intentionally discharged a firearm (§ 12022.53, subds. (b), (c)), and on the murder counts that Bonadie personally discharged a firearm proximately causing great bodily injury or death (§ 12022.53, subd. (d)). In a bifurcated proceeding, the trial court found true the allegation that Bonadie had a prior conviction for robbery within the meaning of the Three Strikes law. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

During the sanity phase of Bonadie's trial, the same jury found Bonadie was insane (not guilty by reason of insanity, or NGI) when he killed his parents, and sane when he committed the attempted murders. At the sentencing hearing, the trial court ordered Bonadie confined in a state mental health facility until his sanity was restored (§ 1026), and fixed his maximum commitment term on the NGI murder counts at 110 years to life. On the remaining counts, the trial court imposed a consecutive, aggregate prison term of 102 years to life once his sanity was restored.

Bonadie challenges the sufficiency of the evidence to support his conviction for attempted murder of one of the peace officers, and he contends the trial court erred in failing sua sponte to instruct the jury on involuntary manslaughter as a lesser included offense of murder. Bonadie also argues the prosecutor misstated the law in the guilt phase of the trial by suggesting repeatedly that the jury could consider evidence of his delusional mental state *only* in determining whether he committed premeditated and deliberate first degree murder and *not* in assessing whether he had the requisite mental state to commit second degree murder of his parents or attempted murder

of the police officers. Bonadie also raises other claims of prosecutorial misconduct in the sanity phase and asserts several sentencing challenges.

As we explain, Bonadie’s challenge to the sufficiency of the evidence is without merit, and recent decisions in *People v. Elmore* (2014) 59 Cal.4th 121 (*Elmore*) and *People v. McGehee* (2016) 246 Cal.App.4th 1190 (*McGehee*) preclude his instructional claims. But the prosecutor’s misconduct requires a retrial of the affected portion of the sanity phase, and the necessity of a new sanity trial and resentencing renders Bonadie’s sentencing contentions moot. Accordingly, we affirm the judgment in part, reverse in part, and remand for a new trial on whether Bonadie was sane when he shot at the officers and, after the verdict, a new sentencing or commitment hearing.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Shootings*

In the months leading up to February 6, 2009, Bonadie’s family noticed his mental condition deteriorated drastically. His brother Marlon¹ explained that while Bonadie had never been violent with a family member, Bonadie began to “disassociate” and act “paranoid” about six or seven months before the shootings. He told Marlon about “seeing things” and “strange occurrences,” including that “sometimes he would be walking in the living room, and it would feel like somebody was underneath the house using some kind of gravity force to keep him from being able to move around the room.” Bonadie complained “about things being in his room” and about “seeing” things, including “giants outside of the house.”

In late November 2008, the family took Bonadie to the San Bernardino County Department of Behavioral Health, where doctors prescribed antipsychotic medications, but did not hospitalize him. A caseworker informed Marlon, “Your brother

¹ Because many of Bonadie’s family members share his last name, we use their first names for clarity and intend no disrespect.

is totally psychotic right now.” Bonadie took his medication only once, describing it as “poison” because of the way it made him feel.

Bonadie became increasingly withdrawn. Marlon sometimes saw him expressionless, “staring off into space like he was looking at something.” Bonadie complained a helicopter followed him and he believed he was in danger. A short time before the shootings, Marlon found his brother “burning candles in his room and holding [them] up to the ceiling because he was hearing things and hearing movement in the ceiling and underneath the house.” The family owned guns, but stored them in a locked closet and planned to move them out of the house.

A neighbor, Kenyatta Andrews, saw Bonadie outside his home the day before the shootings, running up and down the street as if someone were chasing him. He would run, stop, resume running, and then run back again, looking frightened.

Early on the morning of the shootings, February 6, 2009, Bonadie appeared as promised at his sister Andrea Cox’s home to help her and her children after she suffered an injury. She previously had noticed his strange behavior, and her mother had called on an earlier occasion to say Bonadie did not recognize her as his mother. But that day, while Bonadie was dressed somewhat oddly, he otherwise acted normally and left after 20 minutes. Andrea thought he was going to the unemployment office.

Sometime that morning, Bonadie spoke by telephone with another sister, Chenelle Nelson. Bonadie was at home with his parents. He whispered to his sister during their conversation, and sometimes fell silent. He seemed to be hallucinating about their parents, saying he was seeing things that could not possibly be real. At times he did not believe Chenelle was his sister and thought he was someone other than himself. He selected a biblical passage and asked Chenelle repeatedly to pray by reciting the text. To Chenelle, Bonadie sounded “tormented.”

A third sister, Heidi Bonadie, received a call around 8:15 a.m. from their mother, Angela Bonadie. Angela asked Heidi to pray for Bonadie because he was “struggling with his mental health issues.”

Around 8:45 a.m., Angela called Bryant Vaughns, a longtime family friend whom all, including Bonadie, regarded as a member of the family. Bryant and Angela discussed removing the guns from the home and the possibility of taking Bonadie to the mental health medical center again. Bonadie returned at some point during the telephone call, and Bryant overheard Angela say to Bonadie, “Marv, do you want to talk to Mommy, Honey?” Bryant heard Bonadie say he was going to use the bathroom, but a few seconds later, Bryant heard Angela’s husband, Earl Bonadie, exclaim, “Hey. Hey, man,” followed by what sounded like gunshots. After that, no one responded to Bryant, and his calls to Angela’s and Earl’s cell phones went unanswered. He drove to the residence, and when he saw both Bonadie’s and his parents’ cars in the driveway, he called the police.

Heidi had also called 911 to request a safety check on Bonadie and her parents. Officers Ashlee Westall, Gloria Mireles, and Shannon Juarez from the Montclair Police Department arrived in marked patrol vehicles around 10 a.m., shortly after Bryant called.

Officer Westall approached the front door with Officer Mireles positioned near her but behind her to one side, west of the front door, while Officer Juarez remained back and to the other side (east) by the garage and driveway, where she could see the front of the house. When Westall knocked and Bonadie asked who it was, she responded, “Police department” or “Montclair Police Department.” Westall and Mireles heard a faint sound like the racking of a shotgun, so they started to move away from the door towards the west. As Westall cleared a side window by the front door, she tapped the glass with her flashlight and immediately five or six nine-millimeter rounds burst through the window. Cut on her face and hands by the flying glass, Westall returned two shots

and retreated behind a retaining wall in the yard. Officer Mireles also fired a round at the residence and took cover by the retaining wall.

Meanwhile, Bonadie had moved eastward into the living room, where he took a position and fired four shots at Officer Juarez, who had retreated near a car in the driveway. The bullets just missed her, shattering the car's window. The officers summoned a SWAT team.

Heidi, Bryant, a family friend named Chrashawn Jackson, and a police officer were each able to reach Bonadie by phone during the ensuing standoff. Pleading with Bonadie, "What's going on?" Heidi told him, "We can't get to the house. It's surrounded by police." He told her to "call the media," and when she asked about their parents, he responded, "[T]hey are in heaven." Speaking with Bryant, Bonadie confirmed, "Mom and Dad are in heaven," and he accused Bryant of trying to hurt or sabotage him. He demanded, "B, how could you do that? How could you do that to me? How could you put voodoo in my food?" Bonadie seemed to converse coherently at times, and at other times maintained he was not actually part of the family, but rather a Muslim by the name of Alfar Kadafi. He denied he had two sons.

When Jackson spoke to Bonadie, he was "in a manic state. He was crying. . . . He was changing voices. He would put the phone down. I could hear prayers in the background and moaning." To Jackson, "It sounded as though it was a manic crazed state. The voice, I never heard before. At some point, I didn't even know if it was [Bonadie]. He didn't respond to the name when I kept saying 'Marvin.'" Jackson explained, "I told him that he had shot at a cop or cops. He — initially, I kept having to repeat myself. No, they were cops, because based on his response, I just kept having to repeat myself. 'No. No, Marv. Those were cops. They're not there to hurt you. They're not demons. [¶] If you want the demons to leave you alone, you've got to let somebody come in and help you. We can get the demons off your back' — because

he kept — it sounded like he was scratching at something. I said, ‘If you want the demons off your back, if you don’t want them to get you, you have to let us come in.’”

Using a family member’s phone, Officer Elizabeth Jolin also spoke to Bonadie, who was distraught and crying. He told Jolin, “I don’t trust you guys. I want the media there.” He also asked, “Is the lady officer okay? Is she alive?” When Jolie responded that “she was able to walk away and . . . she was really upset,” Bonadie asked how badly she was hurt or injured. At other points in the conversation, he complained he had a “a microchip in his head” and “[t]hat it was a mark of a beast.” Jolin ended the call when Bonadie asked to speak to a family member.

Bonadie remained in the home for several hours before he emerged through the front door in the early afternoon. He wore an orange “do-rag” on top of his head and a blue bandana around his neck, partially covering his face. He also had a nine-millimeter handgun in each hand, pointed towards the ground. The SWAT officers ordered him to drop the guns and to get down. For a tense half hour, Bonadie scanned the scene, looking at the helicopter hovering overhead and peering at the officers’ faces. Finally, he complied, and the officers took him into custody.

They found two folding knives clipped to his belt, four shotgun shells in a back pocket, and 14 rounds of ammunition in his other pockets. When asked if anyone in the home needed medical attention, he responded, “You’re going to have to go in and check for yourself.” Asked if he needed medical attention or any aid for himself, he answered, “After this, I’m going to need a shower and a priest.” As he was transported from the scene to a medical center, he asked a policeman in the ambulance, “Are your officers all right?” When the officer responded, “Thank God everybody is okay,” Bonadie agreed, “Yes, thank God.”

Inside the home, the police found the bodies of Bonadie’s parents. Earl had been shot twice in the chest, once in the left side of his head, and six times in the back. Angela had been shot once in the chest, once in her neck, once above her hip, and once in

the back of her head. All the wounds were caused by nine-millimeter bullets. The officers collected 10 additional firearms inside the house, including a shotgun, five rifles, and four handguns. Many of the guns had been piled on Bonadie's bed. Officers also collected 26 expended rounds of nine-millimeter ammunition and a large quantity of live ammunition scattered on the floor throughout the residence.

A file cabinet had been moved so that it partially blocked the entrance to the victims' bedroom. The victims' bodies were in the living room and laundry room. Bonadie had leaned his bed mattress against the window in his room. He had plugged the kitchen and bathroom sinks and left the faucets running. The home was flooded with a large pool of water after the sinks overflowed.

Booked at the West Valley Detention Center, Bonadie gave appropriate answers to booking questions. He expressed enthusiasm about the standard blood draw procedure because he wanted to make clear he was not crazy or under the influence of drugs or alcohol. When the nurse asked if he were being treated for any psychiatric conditions, he responded, "Nah, I'm not crazy."

B. *Guilt Phase*

1. Witness Testimony

The bifurcated trial included a guilt phase followed by a sanity phase. At the guilt phase, Bonadie's friends, neighbors, and family members detailed his strange mental state and behavior in the weeks and months leading up to the shootings. He sometimes peeked over fences, walked in the rain while wearing sunglasses, and patrolled the area around his home while carrying a bible and a gun. He wore his sunglasses at the dinner table and would not eat food prepared for him. On at least one occasion he was convinced helicopters were following his car. He also complained he was under surveillance by people sitting in cars parked outside the house. Other witnesses had noticed nothing odd about Bonadie.

As noted, Jackson spoke with Bonadie on the telephone during the incident and also visited Bonadie the day after the shootings. During the incident, she felt like she “was talking to a different person” because Bonadie “kept going in and out of these different voices.” Jackson summarized the disturbing experience: “The best I can describe it is it’s almost like when you see a movie, and you hear a person who’s possessed, their voice changes. That’s how he sounded.” The next day during her visit, Bonadie still sounded both “manic” and “[v]ery distressed,” and he did not “look like himself,” but instead kept praying, chanting, and referring to Jackson by a different name. Jackson felt compelled to prove “that it was me” talking to Bonadie, while his eyes were glazed and darting around the room and he held his body “paranoid and tense.”

Three doctors testified concerning Bonadie’s mental condition. Dr. Marjorie Graham-Howard, a psychologist, interviewed Bonadie in March 2009, shortly after the shootings. She testified, “I assessed Mr. Bonadie as being one of the most ill individuals I had evaluated in quite some time. And why I say that is the severity of his symptoms, the level of paranoia that he had that [he] expressed repeatedly, the number of delusions that he expressed. He said many things to me that were very bizarre and nonsensical.” She classified Bonadie’s mental condition as “severely psychotic,” based on his paranoia, disorganized speech and thought, and delusional beliefs, including a somatic delusion that his brain was burning. He displayed poor insight and failed to grasp he was ill, itself a measure of the severity of his condition. Having reviewed his medical history in light of her clinical assessment, she concluded Bonadie was suffering from a mental condition at the time of the shootings that affected his perception of reality, rendering him delusional.

Dr. Robert Suiter, a court-appointed forensic psychologist, interviewed Bonadie two years later in March 2011 and testified at the January 2012 trial. He diagnosed Bonadie as schizophrenic, paranoid type, and after reviewing his history and

reports of the fatal shootings, he opined that Bonadie suffered a mental disorder at the time and his delusions and hallucinations affected his actions.

Dr. Dennis Walstrom, a psychologist, also interviewed Bonadie in March 2011, and similarly concluded he suffered from schizophrenia, paranoid type. Walstrom testified he believed Bonadie suffered at the time of the shootings from Capgras Syndrome, which manifests itself in “psychotic disorders such as schizophrenia where the belief essentially is that someone who is close to the person, a loved one, has been replaced, that the loved one is no longer present but that someone — could be some evil force or some alien force — is substituting for the loved one.” Walstrom explained that a person suffering from a severe psychosis could misperceive the nature of events occurring around him and misinterpret the actions of others.

2. Prosecutor’s Argument Limiting Delusions to Issue of Premeditation

In closing argument in the guilt phase, the prosecutor told the jury Bonadie’s hallucinations, if any, were only relevant to the first degree murder charges on counts 1 and 2 involving his parents, based on the prosecutor’s interpretation of CALCRIM No. 627.

The prosecutor told the jury: “Okay. There’s a jury instruction that you might have noticed. It’s called Hallucination Effect on Premeditation. A hallucination is a perception not based on objective reality. The jury instruction tells you, ‘You may consider evidence of hallucination, if any, in deciding whether Bonadie acted with deliberation and premeditation.’ [¶] If you decide that he did not act with deliberation and premeditation because of a hallucination, *the only thing* it does is make him not guilty of first degree murder. *So if hallucinations have anything to do with it*, then that would *only* affect a verdict of first degree. He may still be found guilty of second degree murder because premeditation and deliberation only exists in first degree.” (Italics added.)

The prosecutor explained, “So first degree murder is with express[] malice with intent to kill, premeditation, and deliberation. Second degree murder doesn’t require premeditation and deliberation. So the hallucination thing *would not have any effect on second degree murder*. I just told you that. It *only* negates first degree murder. [¶] Okay. So did he? You know that’s the elephant in the room. Did the defendant hallucinate so as to *entitle him to be convicted of second degree* as opposed to first degree?” (Italics and bold added.)

Defense counsel shared the prosecutor’s view the hallucinations were not relevant to determining whether Bonadie’s mens rea included the malice necessary to constitute second degree murder in slaying his parents (counts 1 & 2) or attempted murder in shooting at the police officers (counts 3-5). Defense counsel noted simply in closing argument, “You get to apply the hallucinations to the first and second count,” apparently referring to the first degree murder allegations attached to those counts.

After defense counsel concluded her closing argument, the prosecutor in her rebuttal again stressed the limited relevance of the hallucination evidence. She emphasized, “Okay. Hallucination. Let’s talk about it again. Perception not based on objective reality, it *only* applies to deliberation and premeditation. *If he acted under the hallucinations, all it does is reduce the first degree*. He could still be found guilty of second degree. So don’t get confused. We’re not in the sanity phase. This is not the sanity phase. [¶] The sanity phase is a whole different phase. We’re not talking about that. We’re talking about did he do it? And *the only thing that hallucinations, delusions, or any of that stuff would do is knock out first*.” (Italics and bold added.)

The jury convicted Bonadie in the guilt phase of second degree murder of his parents and attempted murder of the three officers, as noted at the outset.

C. *Sanity Phase*

1. Defense Witness Testimony

In the trial's sanity phase, several of the mental health experts and lay witnesses again testified, and an additional court-appointed expert, psychiatrist Mendel Feldsher, also testified. The witnesses from the guilt phase restated much of their testimony based on the legal standard for insanity, i.e., the *M'Naghten* test reinstated by Proposition 8. Specifically, “[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know *the nature or quality of the act*, or if he did know it, that he did not know he was doing *what was wrong*.” (Original italics.)” (*People v. Skinner* (1985) 39 Cal.3d 765, 772 [upholding Proposition 8's reinstatement of the *M'Naghten* test].)

Dr. Suiter opined that Bonadie “was suffering from a severe mental disorder and was not able to appreciate the wrongfulness of his actions that day.” He explained that Bonadie believed the two people he shot inside the home were not his parents, nor were they human, but instead were supernatural demons that looked like his parents. His real parents had been “removed from the home and were being kept against their will at some unknown location.” According to Suiter, Bonadie suffered from a delusional belief the two demons were trying to poison him and he acted in response to kill the demons so his true parents would be freed and return to the house. Once he killed the demons, he continued waiting inside the house for his real parents to return.

Similarly, Suiter explained Bonadie thought the police were “shadowed demons”; however, he had no recollection of discharging a gun after killing his parents, neither towards a police officer nor anywhere else outside the house. Suiter explained Bonadie's delusions were “ongoing in terms of his perceptions of demons and [his belief that] the demons [were] trying to harm him . . . extended to the police.” But according to

Suiter, later in the standoff, despite “some generalized fear” of the SWAT officers, the delusions somehow subsided or Bonadie “let go” of them, though they later resurfaced.

Bryant described Bonadie as “Tormented,” “Erratic,” and “highly abnormal” on the day of the shooting, failing to “recognize that he had a family.” Heidi echoed that Bonadie “didn’t sound like my brother. . . . He was not coherent, and he was extremely afraid. His voice changed. He wasn’t sure who I was.” She believed he had “decompensated mentally.” Chrashawn Jackson added that Bonadie thought the police were demons, but she explained to him in their telephone conversation, “They’re not there to hurt you. They’re not demons.”

Dr. Wallstrom opined that at the time of the shootings Bonadie was in the “active phase of paranoid schizophrenia,” marked by “a clear break from reality” in which “the symptoms are very obvious and evident, and the person is in deep distress from them.” As a result, Wallstrom concluded, “I don’t believe that he knew the nature and quality of his actions or their wrongfulness.”

Wallstrom explained more specifically in a colloquy with defense counsel:

“[Q]: And did you find that Mr. Bonadie was able to determine a difference [between right and wrong]. [¶] . . . [¶] [A]: Well, yes, he was able to determine right and wrong. He believed his actions were right. [¶] [Q]: And his actions [of] killing the demons were correct? [¶] [A]: Yes, I asked him specifically about that, what do you think about what you did? What did you think about at the time. He believed that he was killing demons, and this would be a way to get his real parents back. And he said that he thought that he would be considered a hero for his actions. [¶] [Q]: For bringing his parents back? [¶] [A]: And for killing the demons. That his actions — he considered them heroic. [¶] [Q]: Now — now, do you — would you say — is it fair to say that he appreciated the wrongfulness of his actions in regards to this? [¶] [A]: He did not appreciate the wrongfulness as you and I and most people would in a situation like that. [¶] [Q]: So it could be because it was based on the delusion he was suffering from? [¶]

[A]: Yes. . . . So the reality that Mr. Bonadie was living in, we would consider highly delusional. But within that reality, his actions were right.”

Wallston similarly explained that “even the police, when the police arrived, [Bonadie] thought they were shadows that were a demonic presence coming to get him.” Wallstrom acknowledged that while Bonadie continued to maintain his deluded view he had shot demons instead of his parents, soon after the incident he had “given up” his delusion the police officers were demonic. Wallstrom attributed the disparity to “the inconsistency that psychosis and delusions can have in the same person. A person is grasping to try [to] get ahold of reality. They don’t always maintain a consistent position.”

2. Dr. Feldsher’s “Bifurcated” Testimony

Only Dr. Feldsher expressed the view that Bonadie *may* have regained his sanity by the time he shot at the police officers. Feldsher agreed Bonadie was not in touch with the nature or quality of his actions in slaying his parents, and that Bonadie did not understand the killings were wrong. Feldsher explained Bonadie believed “that his parents had been replaced by demons or clones and that those clones were poisoning him.” Consequently, Bonadie did not grasp that his actions were wrong, nor did he understand the true nature and deadly consequences of discharging a firearm at his parents.

Feldsher’s view was more nuanced, or in his words “bifurcated,” concerning the police officers. Feldsher testified Bonadie told him he thought the police were demons coming to retaliate against him, but at another point in the interview, Bonadie explained that “he didn’t know who it was and that he didn’t know what they were going to do to him.” Feldsher’s “bifurcated” view of Bonadie’s sanity when he shot at the police officers turned on whether the jury believed Chrashawn Jackson’s testimony that in her telephone conversation with Bonadie during the standoff, Bonadie clearly

believed the officers were demons. Feldsher explained that “if the jury were to conclude that the information that was provided to me from the December 21, 2011, interview with Ms. Jackson — if that’s accepted as true, then I would conclude that [Bonadie] met the NGI standard for shooting at the officers.”

Feldsher earlier had testified the remorse about shooting the officers that Bonadie expressed upon being taken into custody and his concern for the officers’ well-being was inconsistent with a delusional state. Feldsher expressed some doubt a person would so quickly change from a delusional mindset believing the officers were demons to a nondelusional state of contrition, but he acknowledged it was possible. He therefore highlighted the importance of Jackson’s contemporaneous telephone conversation with Bonadie that, if credible, “would trump the remorse piece” as “powerful evidence that he didn’t know the wrongfulness” of his actions because he believed the officers were demons.

But as we discuss below in relation to Bonadie’s claim of prosecutorial misconduct, Feldsher openly doubted Jackson’s account, which surprised defense counsel because it contradicted his pretrial position.

3. Prosecution Evidence in the Sanity Phase

After Feldsher completed his testimony and the trial court denied a mistrial based on the defense allegation the prosecutor improperly suggested to Feldsher the false notion that Jackson may have previewed Feldsher’s and the other experts’ reports before testifying herself, the prosecution presented the testimony of only two witnesses during the sanity phase. Bonadie’s employer from October 2006 through July 2008 testified that Bonadie interacted appropriately with other workers, but was terminated in July 2008 for absenteeism and leaving his workstation.

Sergeant Brandon Kumanski interviewed Bonadie around 5:30 p.m. the day of the shootings, and the jury viewed a videotape of the interview. Bonadie stated during

the interview that he had “no history” and claimed that because of an absence of childhood photographs of himself, “I basically don’t exist to a point.” He expressed suspicion of supposed family members who were practicing “witchcraft” by wiping “oils on the walls that make you ill.” He explained, “Like I said, what I know to be my [real] family doesn’t practice in any witchcraft or wiping any[] oils on the walls that make you ill, and that type of stuff.” Rather, his real family was “very supportive,” but “today I was looking for my family earlier today [and] I couldn’t find anybody. And the the the [sic] one house I did go to. You know — said I’ll talk to you later.”

II

DISCUSSION

A. *The Evidence Supports Bonadie’s Conviction in the Guilt Phase for Attempted Murder of Officer Juarez*

Bonadie concedes the evidence supports his conviction for two of three counts of attempted murder of a peace officer because he “knew or should have known that Westall was a peace officer because she announced her presence” at his door, and Officer Mireles “was standing right next to Westall in plain view when gunfire erupted.” But he challenges the sufficiency of the evidence to support his conviction for attempted murder of Officer Juarez. We reject his challenge and conclude substantial evidence supports the attempted murder conviction.

An appellant challenging the sufficiency of the evidence “bears an enormous burden.” (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) The reviewing court must view the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict (*People v. Johnson* (1980) 26 Cal.3d 557, 577; *Jackson v. Virginia* (1979) 443 U.S. 307, 318), not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Accordingly, we must presume in support of the judgment the existence of facts

reasonably drawn by inference from the evidence. (*Ibid.*; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

Bonadie asserts the evidence does not support the jury's verdict concerning Juarez because "when [the] shots were fired Juarez had not verbally announced her presence as a police officer, she was in a defensive position by a private vehicle parked in the driveway, and she was not near Officers Westall and Mireles." He also observes that Officer Jolin related that after the shooting, Bonadie only asked, "Is the lady officer okay?" But a fine distinction in his use of the singular or plural is not dispositive because on the way to the medical center, he asked Officer Blyther, "Are your officers all right?"

Similarly, the jury reasonably could infer Bonadie could see Juarez at her position in the driveway. After all, Juarez was wearing her police uniform when he fired four shots at her, including a near miss that shattered the car window close to where she stood, which supports the inference Bonadie targeted her rather than firing a random shot. She testified she could see the front of the house from her location, and another officer who entered the residence after the shooting explained there was a clear trajectory from the living room window to "the end of the garage towards the driveway." The officer testified, "If somebody were standing by the vehicle, I probably could see them." Bonadie cites Juarez's testimony that she stood "behind" the Toyota, but she also testified her "body was not behind the garage or behind a car," and we must view this evidence in the light most favorable to the verdict, which supports the jury's conclusion.

B. *No Sua Sponte Duty to Instruct the Jury on Involuntary Manslaughter*

Bonadie contends that because he presented evidence he "did not subjectively understand that Earl and Angela Bonadie were human beings at the time of the shooting" the trial court erred in failing sua sponte to instruct the jury on involuntary

manslaughter as a lesser included offense of murder. *McGehee* addressed an identical contention and explained it is foreclosed under *Elmore*. We agree *Elmore* is controlling.

The trial court must instruct on general legal principles relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*)). The court's instructional duty therefore includes matters "closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*Id.* at p. 154.) Bonadie argues an involuntary manslaughter instruction was necessary to avoid placing the jury "in the unwarranted all-or-nothing situation of either convicting [him] of murder or acquitting him of the charges." He raises the risk the jury "convicted him of second degree murder because it did not want to acquit a delusional man who had killed his parents."

Instructions on lesser included offenses, where warranted by the evidence, protect the jury's "truth-ascertainment function." (*Breverman, supra*, 19 Cal.4th at p. 155.) "A jury instructed on only the charged offense might be tempted to convict the defendant "of a greater offense than that established by the evidence" rather than acquit the defendant altogether, or it may be forced to acquit the defendant because the charged crime is not proven even though the "evidence is sufficient to establish a lesser included offense." [Citation.] Instructing the jury on lesser included offenses avoids presenting the jury with 'an "unwarranted all-or-nothing choice"' [citation], thereby 'protect[ing] both the defendant and the prosecution against a verdict contrary to the evidence' [citation]." (*People v. Eid* (2014) 59 Cal.4th 650, 657.) Because the pressure of an all-or-nothing verdict can lessen the prosecutor's burden of proof and "thereby undermine the reasonable doubt standard," due process may require instruction on lesser included offenses. (*People v. Geiger* (1984) 35 Cal.3d 510, 520, overruled on another point in *People v. Birks* (1998) 19 Cal.4th 108, 136.) The option "of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." (*Beck v. Alabama* (1980) 447 U.S. 625, 634.)

Accordingly, a trial court's obligation to instruct on lesser included offenses arises "when the evidence raises a question as to whether all of the elements of the charged offense were present, [citations] but not when there is no evidence that the offense was less than that charged." (*Breverman, supra*, 19 Cal.4th at p. 154.) The trial court must instruct on lesser included offenses, even in the absence of a request, "whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration.'" (*Id.* at p. 162.) Whether lesser included instructions are required is a question of law. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

We begin our analysis with the relevant law of homicide. (*Elmore, supra*, 59 Cal.4th at pp. 132-134; *McGehee, supra*, 246 Cal.App.4th at pp. 1207-1208.) "Involuntary manslaughter is the 'unlawful killing of a human being without malice aforethought and without an intent to kill.' [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 884; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 ["Involuntary manslaughter is . . . inherently an unintentional killing"].)

A key difference between murder and involuntary manslaughter turns on whether the defendant acts with malice. "Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) The malice necessary to constitute murder may be express or implied. (§ 188.) Express malice consists of a defendant's "deliberate intention unlawfully to take away the life of a fellow creature." (*Ibid.*) Implied malice is reflected in committing an act one knows will endanger others, with conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) In other words, implied malice murder is committed when the defendant subjectively appreciates the risk his actions pose to others, but proceeds anyway with a conscious disregard for life. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1008 (*Butler*).)

In contrast, a defendant commits involuntary manslaughter when a reasonable person objectively "would have been aware of the risk" inherent in the defendant's actions, but the defendant did not grasp the risk. (*Butler, supra*,

187 Cal.App.4th at p. 1008.) This culpable lack of awareness is sometimes described as criminal negligence. “[C]riminal negligence” exists when the defendant engages in conduct that is “aggravated, culpable, gross, or reckless”; i.e., conduct that is “such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.”” (*Ibid.*) Thus, “if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of [involuntary] manslaughter, whereas if he realized the risk and acted in total disregard of the danger, he is guilty of murder based on implied malice.” (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 378 (*Cleaves*).

Elmore involved voluntary rather than involuntary manslaughter, specifically, whether a defendant is entitled to unreasonable self-defense instructions “based solely on a defendant’s delusional mental state.” (*Elmore, supra*, 59 Cal.4th at p. 132.) *Elmore* held the answer is “no” based both on case law (*id.* at pp. 135-139) concerning voluntary manslaughter and, as relevant here, California’s statutory scheme governing the insanity defense. As *Elmore* explained, evidence of “a belief in the need for self-defense that is purely delusional is a paradigmatic example of legal insanity,” a question reserved by statute for a trial’s sanity phase, and therefore not a basis for voluntary manslaughter instructions in the guilt phase. (*Id.* at pp. 135, 139-146.)

In *Elmore*, the mentally ill defendant stabbed a woman to death at a bus stop with a sharpened paint brush handle. He claimed at trial that unspecified delusions made him actually, although unreasonably, believe he needed to defend himself, and requested voluntary manslaughter instructions based on imperfect self-defense. (*Elmore, supra*, 59 Cal.4th at pp. 130-132.) “Two factors may preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion and unreasonable self-defense.” (*Id.* at p. 133.) “[U]nder the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but

unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.” [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, original italics.)

The Supreme Court in *Elmore* held the trial court properly refused the defendant’s instructional request under governing case law because the imperfect self-defense theory, “‘a form of mistake of fact,’ has ‘no application when the defendant’s actions are entirely delusional.’” (*Elmore, supra*, 59 Cal.4th at pp. 136-137.) Tracing the theory’s “long development . . . in California courts,” *Elmore* concluded “unreasonable self-defense entails a reaction that is “‘caused by the circumstances.’” [Citation.]” (*Id.* at pp. 135, 138.) The court observed, “A defendant who makes a factual mistake misperceives the objective circumstances. A delusional defendant holds a belief that is divorced from the circumstances.” (*Id.* at p. 137.) Because case law demonstrated “[t]he phrase ‘caused by the circumstances’ denotes a motivation arising from objective facts, not delusions” (*id.* at p. 138), *Elmore* held: “Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant’s mind.” (*Id.* at p. 137.)

More pertinent to our inquiry, *Elmore* also addressed the statutory basis the defendant asserted for his instructional claim, which Bonadie also asserts here. Like Bonadie, the defendant in *Elmore* relied on section 28, subdivision (a) (hereafter, section 28(a)), which provides that evidence of mental disorders is admissible “on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.” (Italics added.) As *Elmore* noted, section 28(a) rests on a conception of mind or cognitive “theory sometimes referred to as ‘diminished actuality.’ [Citation.]” (*Elmore, supra*, 59 Cal.4th at p. 139.) *Elmore* further noted, “Section 28(a) bars evidence

of the defendant's *capacity* to form a required mental state, consistent with the abolition of the diminished capacity defense." (*Elmore*, at p. 139, original italics.)

The defendant in *Elmore* argued "the plain language of section 28(a) permits him to introduce evidence of the mental disorder that gave rise to his belief in the need for self-defense, and precluded him from actually harboring malice." (*Elmore*, *supra*, 59 Cal.4th at p. 139.) The defendant premised his instructional request on evidence he was suffering delusions when he stabbed the victim at the bus stop. (*Id.* at pp. 131-132.)

Bonadie similarly attempts to ground in section 28(a) his claim that involuntary manslaughter instructions were required *sua sponte*. He argues evidence of his delusional state in which he did not recognize his mother and father as human beings supported the instructions because he did not intend to kill his parents; instead, he believed their human forms had been supplanted by demons and killing the demons would bring his parents back to life. Consequently, he did not harbor the requisite intent to kill for express malice murder, nor the conscious disregard for human life necessary for implied malice murder. To the contrary, though it was delusional, he fired bullets at their human forms not to hurt them, but to restore them and drive away the demons. In particular, he argues the instructions were required because the jury reasonably could conclude on this evidence that he did not subjectively appreciate the risk his actions posed to others, and therefore did not act with the conscious disregard for life necessary for implied malice murder, while also properly finding "involuntary manslaughter culpability based on criminal negligence [because his] belief was objectively unreasonable." (*Butler*, *supra*, 187 Cal.App.4th at p. 1009.)

Put another way, Bonadie relies on "the essential distinction between second degree murder based on implied malice and involuntary manslaughter" founded in "the subjective versus objective criteria to evaluate the defendant's state of mind — i.e., if the defendant commits an act which endangers human life without realizing the

risk involved, he is guilty of manslaughter, whereas if he realized the risk and acted in total disregard of the danger, he is guilty of murder based on implied malice.” (*Cleaves, supra*, 229 Cal.App.3d at p. 378.) Bonadie points out that an involuntary manslaughter instruction would have mitigated the jury’s all-or-nothing choice between murder and acquittal because the objective basis for criminal negligence assures a defendant claiming to suffer from delusions may be convicted of *at least* involuntary manslaughter, rather than being acquitted altogether.²

In *Elmore*, the court acknowledged as “logically defensible,” if “viewed in isolation,” the defendant’s claim that “the plain language of section 28(a) permits him to introduce evidence of the mental disorder that gave rise to his belief in the need for self-defense, and precluded him from actually harboring malice.” (*Elmore, supra*, 59 Cal.4th at p. 139.) But the court rejected the defendant’s instructional request as “unsustainable when [section 28(a)] is considered in light of the statutory scheme governing evidence of mental illness, and the legislative history of section 28.” (*Elmore*, at p. 139.)

Elmore explained: “Under California’s statutory scheme, ‘[p]ersons who are mentally incapacitated’ are deemed unable to commit a crime as a matter of law. (§ 26, par. Two.) Mental incapacity under section 26 is determined by the *M’Naghten* test for legal insanity provided in section 25, subdivision (b). (*M’Naghten’s Case* (1843) 8 Eng.Rep. 718, 722; [citations].) Under *M’Naghten*, insanity is established if the defendant was unable either to understand the nature and quality of the criminal act, or to

² Bonadie acknowledges the jury’s choice was not as stark as murder or acquittal because the court also instructed on voluntary manslaughter based on imperfect self-defense. But he suggests imperfect self-defense was an illusory, unlikely option because his parents presented no imminent danger and the doctrine cannot be invoked by a defendant whose aggressive acts create the danger. Of course, under *Elmore*, imperfect self-defense was not properly an alternative for the jury’s consideration, nor as we explain is involuntary manslaughter. Consequently, the law limits a jury’s choice in the case of a defendant who may be delusional to either murder or acquittal.

distinguish right from wrong when the act was committed. (§ 25, subd. (b); [citations].)” (*Elmore, supra*, 59 Cal.4th at p. 140.)

Furthermore, in section 1026, the Legislature “set[] out the applicable procedure when, as in this case, the defendant pleads both not guilty and not guilty by reason of insanity. The trial is bifurcated, with the question of guilt tried first. The defendant is presumed innocent, of course, but in order to reserve the issue of sanity for the second phase of trial the defendant is also *conclusively presumed* to have been legally sane at the time of the offense. (§ 1026, subd. (a); [citation].)” (*Elmore, supra*, 59 Cal.4th at pp. 140-141, italics added.) Consequently, “the scope of the diminished actuality defense” recognized in section 28(a) “is necessarily limited by the presumption of sanity, which operates at a trial on the question of guilt to bar the defendant from claiming he is not guilty *because he is legally insane.*” (*Elmore*, at p. 141, original italics.)

Elmore described the conceptual origins of section 28(a) in a case that predated the statutory provision by more than 30 years, *People v. Wells* (1949) 33 Cal.2d 330 (*Wells*). *Wells* focused on a distinction between evidence showing a defendant *could not* form the requisite mental state for a criminal offense and evidence he or she *did* or *did not* form that mental state. *Wells* held: “As a general rule, on the not guilty plea, evidence . . . tending to show that the defendant, who at this stage is conclusively presumed sane, either *did* or *did not*, in committing the overt act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible. Thus, if the proffered evidence tends to show not merely that he *did* or *did not*, but rather that because of legal insanity he *could not*, entertain the . . . essential mental state, then that evidence is inadmissible under the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity. . . . Evidence which tends to show legal insanity (likewise, sanity) is not admissible at the first stage of the trial because it is not pertinent to any issue then being litigated; but competent

evidence, other than proof of sanity or insanity, which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible.” (*Wells*, at pp. 350-351, original italics; *Elmore*, *supra*, 59 Cal.4th at p. 142.)

Elmore detailed “in a brief historical review” how “[t]he *Wells* distinction was eroded in subsequent cases,” but later the Legislature and the electorate restored its holding. (*Elmore*, *supra*, 59 Cal.4th at pp. 142-143.) Specifically, the Supreme Court in *People v. Wetmore* (1978) 22 Cal.3d 318 expressly disavowed *Wells*, holding its distinction “cannot be supported” because “[a]s a matter of logic, any proof tending to show that a certain mental condition could not exist is relevant and should be admissible to show that it did not exist. And, of course, proof that something could not exist is the best possible evidence that it did not exist.” (*Wetmore*, at p. 324.) But the Legislature three years later in 1981 “codified, in section 28(a), the distinction between capacity and actuality that was drawn in *Wells* and disparaged in *Wetmore*.” (*Elmore*, at p. 143.) And similarly “[t]he following year, the voters adopted an initiative that again abolished the diminished capacity defense” (*Ibid.*)

Elmore thus explained that “the current state of California law on the insanity defense and proof of the defendant’s mental state is generally consistent with the principles set out in *Wells*.” [Citation.] Accordingly, the provisions of section 28(a) allowing evidence of diminished actuality are ‘qualified’ by the caveat that at a trial on the question of guilt, ‘evidence tending to show lack of mental capacity to commit the crime because of legal insanity is barred’ (*Wells*, *supra*, 33 Cal.2d at p. 350.)” (*Elmore*, *supra*, 59 Cal.4th at p. 144.) But as noted in *People v. Mills* (2012) 55 Cal.4th 663, 672 (*Mills*) and other cases, “a defendant may suffer from a diagnosable mental illness without being legally insane under the *M’Naghten* standard.” Consequently, “[a]ll relevant evidence of mental states *short of insanity* is admissible at the guilt phase under

section 28(a), including evidence bearing on unreasonable self-defense, as in *Mills* and *Wells*.” (*Elmore*, at p. 146, italics added.)

Rejecting the defendant’s claim of instructional error, *Elmore* concluded that in requesting voluntary manslaughter instructions based on evidence of his delusional mental state, the “defendant attempted . . . to assert a claim of legal insanity at the guilt phase of his trial.” (*Elmore, supra*, 59 Cal.4th at p. 140.) In other words, “A claim of unreasonable self-defense based solely on delusion is quintessentially a claim of insanity under the *M’Naghten* standard of inability to distinguish right from wrong. Its rationale is that mental illness caused the defendant to perceive an illusory threat, form an actual belief in the need to kill in self-defense, and act on that belief without wrongful intent.” (*Ibid.*) “But defendants who contend they killed in self-defense because of a purely delusional perception of threat must make that claim at a sanity trial.” (*Id.* at p. 146.) Because the “defendant’s claim of unreasonable self-defense was based entirely on a delusional mental state that amounted to legal insanity,” the trial court “properly denied his request for” a voluntary manslaughter instruction based on unreasonable self-defense. (*Ibid.*)

This brings us to *McGehee*, which, based on *Elmore*, recently rejected the same claim Bonadie makes here, namely, that evidence the defendant experienced delusions at or near the time of the slaying required the trial court sua sponte to instruct the jury on involuntary manslaughter as a lesser included offense of murder.

In *McGehee*, the defendant “stabbed his mother 10 times in the neck, chest, and abdomen. Eight of these stab wounds were independently fatal.” (*McGehee, supra*, 246 Cal.App.4th at p. 1208.) The jury found the defendant guilty of second degree murder and rejected his insanity claim. On appeal, the defendant argued involuntary manslaughter instructions were necessary during the guilty phase because a properly instructed jury reasonably could conclude he lacked the mental state necessary for murder. In particular: “If [he] believed, due to a hallucination or delusion, that he was

being tormented and attacked by a demon, as he had had hallucinated in the past, the killing would be without express or implied malice, because he did not believe that he was acting against a human life.” (*Ibid.*) Based on this evidence, the defendant’s legal theory was that “the killing (assuming there is no implied malice) can be no greater than involuntary manslaughter.” [Citation.]” (*Ibid.*, original parentheses.)

The court in *McGehee* held, “This argument is foreclosed by the reasoning of *Elmore*” (*McGehee, supra*, 246 Cal.App.4th at p. 1208), and we similarly agree we are bound by *Elmore*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Simply put, just as the *Elmore* defendant’s voluntary manslaughter instructional request “based solely on delusion [wa]s quintessentially a claim of insanity” (*Elmore, supra*, 59 Cal.4th at p. 140), so too in *McGehee* the defendant’s theory for sua sponte involuntary manslaughter instructions rested on his claim “he hallucinated an attack by a demon, and therefore did not intend to kill *a human being*,” which “is quintessentially a claim of insanity.” (*McGehee*, 246 Cal.App.4th at p. 1210, original italics.) “Its rationale is that because of defendant’s mental illness, he was unable to understand the nature and quality of the criminal act, i.e., he was killing a human being rather than a demon.” (*Id.* at pp. 1210-1211.)

Bonadie’s identical claim is similarly foreclosed here. Like the defendant in *McGehee*, he asserts he was entitled to an involuntary manslaughter instruction because, based on his delusion that his parents were demons, the jury could conclude he lacked the required intent to kill a human being that is necessary for express malice murder. And like the *McGehee* defendant, Bonadie argues an involuntary manslaughter instruction also was required because in the absence of implied malice his offense could be no greater than involuntary manslaughter. In other words, an involuntary manslaughter instruction was necessary because the jury could conclude based on his delusional state that he did not appreciate the risk his gunshots posed to his parents as humans, and he therefore did not act with the conscious disregard for human life

necessary for implied malice murder. But as *McGehee* explained, “Such a claim may be made, but must be made during the sanity phase of the trial.” (*McGehee, supra*, 246 Cal.App.4th at p. 1211.)

Bonadie contends *McGehee* misapplied *Elmore* because he asserts *Elmore* is limited to its voluntary manslaughter context, and specifically to the necessity of an “objective correlate” underlying a theory of voluntary manslaughter based on imperfect self-defense. In contrast, Bonadie emphasizes that the issues for the jury to decide in assessing whether a defendant committed involuntary manslaughter are entirely subjective rather than objective, namely, whether the defendant harbored a subjective intent to kill (express malice) or acted with the subjective mental state of a conscious disregard for human life (implied malice). We are not persuaded by Bonadie’s attempt to distinguish *Elmore*.

True, *Elmore* involved voluntary rather than involuntary manslaughter instructions, and held the former are not required where a defendant’s belief in a need for self-defense is purely delusional rather than a mistaken “respon[se] to objective circumstances.” (*Elmore, supra*, 59 Cal.4th at p. 146.) Upholding precedent “that unreasonable self-defense, as a form of mistake of fact, has no application when the defendant’s actions are entirely delusional,” *Elmore* drew a “line between mere misperception and delusion” based on the presence or absence of “an objective correlate.” (*Id.* at pp. 136-137.) Using a stick as an example of an objective correlate, the court explained: “A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One who sees a snake where there is nothing snakelike, however, is deluded.” (*Id.* at p. 137.) Based on prior case law, the court held that absent any possible objective correlate for a claimed threat, “[u]nreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant’s mind.” (*Ibid.*) Consequently, voluntary manslaughter instructions based on

imperfect self-defense are not required when the only evidence of a threat rests in the defendant's delusional mental state. (*Id.* at pp. 136-139.)

Bonadie's attempt to distinguish *Elmore* is not persuasive for two reasons. First, the purported objective-subjective distinction he draws between voluntary and involuntary manslaughter does not hold because voluntary manslaughter, like involuntary manslaughter, is based on the defendant's subjective state of mind. A defendant guilty of voluntary manslaughter must ““actually, but unreasonably, believe[] he was in imminent danger of death or great bodily injury.”” (*Manriquez, supra*, 37 Cal.4th at p. 581, original italics.) In other words, the defendant forms an “actual,” subjective belief in the need for self-defense. *Elmore*'s analysis that a purely delusional subjective state of mind, detached from any objective correlate, is not a basis for voluntary manslaughter instructions, applies with equal force for involuntary manslaughter. To hold otherwise would destroy the guilt phase's conclusive presumption of the defendant's sanity (*Elmore, supra*, 59 Cal.4th at p. 141, citing § 1026, subd. (a)), and would eviscerate the difference between the sanity and guilt phases of trial (*Elmore*, at pp. 140-141).

Second and related, contrary to Bonadie's suggestion, the Supreme Court's analysis in *Elmore* was not restricted merely to a line of cases concerning voluntary manslaughter or the concept of an objective correlate. To the contrary, the court in *Elmore* undertook an extensive analysis of California law governing the *M'Naghten* test for legal insanity (§ 25, subd. (b)), the admissibility of evidence of mental disorders (§ 28(a)), bifurcation of the guilt and sanity phases of trial (§ 1026, subd. (a)), and the presumption of sanity during the guilt phase (*ibid.*). The court explained that “it is improper for the jury to weigh the presumption of sanity during deliberations on the question of guilt” and that “it is equally improper for the jury to consider whether the defendant was legally insane under *M'Naughten*.” (*Elmore, supra*, 59 Cal.4th at p. 141.) Instead, “[w]hether mental disease or defect prevented the defendant from understanding

the nature and quality of the criminal act, or appreciating its wrongfulness, are questions relevant only at a sanity trial.” (*Ibid.*, citing, e.g., §§ 25, subd. (b), 1016, 1020, 1026.)

Elmore explained the defendant’s request for voluntary manslaughter instructions based solely on his delusional mental state was, in essence, “a claim of legal insanity at the guilt phase of his trial. This is not allowed under our statutes.” (*Elmore, supra*, 59 Cal.4th at p. 140 [“claim . . . based solely on delusion is quintessentially a claim of insanity”].) We agree with *McGehee* that the same is true for involuntary manslaughter instructions based on a defendant’s delusions. These instructions may not be given because they raise what is quintessentially a claim of insanity: the defendant committed only involuntary manslaughter because in acting under a delusional belief that his victims were demons, he lacked malice because he did not intend to kill human beings, nor acted with conscious disregard for human life because he did not grasp the danger his actions posed to human beings, as opposed to demonic targets. In essence, defendant bases his instructional claim on an assertion that he did not understand the nature and quality of his actions, but that claim is reserved for the sanity trial.

To hold otherwise would be to revive *Wetmore*’s rationale that evidence a delusional defendant could not harbor a particular mental state “‘is the best possible evidence’” he did not (*Wetmore, supra*, 22 Cal.3d at p. 324), requiring the jury to evaluate “‘the same evidence twice, once to determine diminished capacity and once to determine insanity.’” (*Elmore, supra*, 59 Cal.4th at p. 143.) As *Elmore* explained, however, the Legislature and electorate have long since overruled *Wetmore*. (*Ibid.*) Instead, a claim that a delusional belief mitigates a defendant’s criminal responsibility “‘is reserved for the sanity phase, where it may result in *complete exoneration* from criminal liability. [Citations.] It may not be employed to *reduce* a defendant’s degree of guilt” in the guilt phase. (*Id.* at p. 145, original italics.)

McGehee did not consider the due process component implicit in the necessity of lesser-included offense instructions, which Bonadie expressly argues here.

As noted, he contends the all-or-nothing nature of a guilt phase without lesser-included offense instructions can distort “the reliability of the fact-finding process” concerning his actual mental state when the state alleges he killed his parents with malice — and nothing short of malice. (Citing *People v. St. Martin* (1970) 1 Cal.3d 524, 533 [due process may require lesser-included offense instructions because “courts are . . . forums for the discovery of truth”].) But *Elmore* observed that the federal high court “has confirmed that state law does not violate due process by ‘restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged.’ [Citation.]” (*Elmore, supra*, 59 Cal.4th at p. 144, quoting *Clark v. Arizona* (2006) 548 U.S. 735, 742 (*Clark*).)

In *Clark*, a majority of the high court held a state may “channel” or limit a defendant’s claims bearing “on mental disease and capacity” to a trial’s sanity phase. (*Clark, supra*, 548 U.S. at pp. 778-779.) Specifically, Arizona did not “violate[] due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind).” (*Clark*, at p. 742, original parentheses.) Accordingly, the court upheld Arizona Supreme Court precedent under which the “testimony of a professional psychologist or psychiatrist about a defendant’s mental incapacity owing to mental disease or defect was admissible, and could be considered, *only* for its bearing on an insanity defense; such evidence could not be considered on the element of *mens rea*, that is, what the State must show about a defendant’s mental state (such as intent or understanding) when he performed the act charged against him.” (*Id.* at pp. 756-757, first italics added, original parentheses.)

Based on *Clark*, *Elmore* held that just as a defendant’s evidence of insanity may be channeled to the trial’s insanity phase without violating due process, a

defendant's right under section 28(a) to present evidence of his or her mental disease or defect "short of insanity" (*Elmore, supra*, 59 Cal.4th at p. 146) does not entitle the defendant to manslaughter instructions based on a view of the evidence tantamount to asserting legal insanity. As *Elmore* explained, "If section 28(a) were applied to allow the defendant to make that claim at the guilt phase, the burden would shift to the prosecution to prove beyond a reasonable doubt that the defendant was not insane. The statutory scheme would be turned on its head." (*Id.* at p. 145.) Consequently, "given California's statutory requirement that guilt and sanity be tried separately," such instructions may not be given and "restricting consideration of defense evidence of mental illness" in this manner does not violate due process. (*Id.* at p. 144.) Bonadie's due process claim therefore fails.

In supplemental briefing, Bonadie cites two recent cases authorizing defense evidence of mental disease or defect on all charges in the guilt phase, but these cases do not aid his claim his delusional state warranted an involuntary manslaughter instruction. In *People v. Townsel* (2016) 63 Cal.4th 25 (*Townsel*), the Supreme Court reversed the jury's true finding on a special circumstance for murdering a witness and a conviction for the offense of attempting to dissuade a witness because the jury was not instructed it could consider evidence of the defendant's intellectual disability on the specific intent elements of these counts, but rather only on the specific intent necessary for murder. And *People v. Herrera* (2016) 247 Cal.App.4th 467 (*Herrera*) held the trial court erred by prohibiting expert testimony regarding the defendant's diagnosis of posttraumatic stress disorder (PTSD).

But *Townsel* and *Herrera* are inapposite because neither case involved delusions. No evidence suggested the defendants in either case suffered from insane delusions, nor was there any issue of providing a manslaughter or other instruction based solely on delusions that put the defendant's sanity in question. Instead, the PTSD and intellectual disabilities the defendants suffered in *Herrera* and *Townsel*, respectively, fell

well short of insanity. As *Elmore* anticipated and recognized, in such cases “[o]ur construction of section 28(a) has no effect on evidence of mental disorders that do not amount to legal insanity.” (*Elmore, supra*, 59 Cal.4th at p. 145.) In sum, like the court in *McGehee*, we conclude *Elmore* is controlling in its rationale and discussion of California statutory law, and therefore precludes the claim that a delusional defendant is entitled to involuntary manslaughter instructions. Bonadie’s contrary claim therefore fails.

C. *The Prosecutor Did Not Misstate the Law Concerning the Effect of Bonadie’s Delusions on the Charges of Second Degree Murder and Attempted Murder*

Bonadie next contends the prosecutor misstated the law by telling the jury that evidence of his delusional mental state was relevant “only” to the first degree murder charge, specifically whether he premeditated and deliberated killing his parents as charged in counts 1 and 2. The prosecutor is duty bound to state the law accurately during argument to the jury. (*People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21; *People v. Otero* (2012) 210 Cal.App.4th 865, 870.) Bonadie asserts the prosecutor’s statements likely misled the jurors to believe they could not consider evidence of his hallucinations on the lesser-included charge of second degree murder on counts 1 and 2, nor on the attempted murder charges in counts 3, 4, and 5 concerning the police officers. The prosecutor did not misstate the law in stating or suggesting that evidence of Bonadie’s delusional state had no bearing on those charges. To the contrary, her statements were consistent with the law as later articulated by *Elmore*.

Bonadie concedes the trial court’s instructions to the jury based on CALCRIM No. 627 accurately stated the law. But Bonadie argues the prosecutor erroneously seized on the specificity of CALCRIM No. 627 to argue that Bonadie’s misperceptions of reality, if they were genuine, meant only that he was not guilty of first degree murder. The prosecutor dwelled on this claim repeatedly, stating several times: “So if hallucinations have anything to do with it, then that would *only* affect a verdict of first degree,” “th[e] hallucination thing *would not have any effect on second degree*

murder. I just told you that. It *only* negates first degree murder,” “Perception not based on objective reality, it *only* applies to deliberation and premeditation. *If he acted under the hallucinations, all it does is reduce the first degree,*” “[a]nd the **only** thing that *hallucinations, delusions, or any of that stuff would do is knock out first.*” (Italics and bold added.)

The trial court instructed the jury with CALCRIM No. 627, as follows: “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.*” (Italics added.)

The Attorney General contends the prosecutor accurately stated the law based on *People v. Padilla* (2002) 103 Cal.App.4th 675 (*Padilla*). There, the court explained that the test for provocation or heat of passion that reduces murder to voluntary manslaughter is *objective*. (*Id.* at p. 678.) In other words, the facts and circumstances provoking the defendant must be “sufficient to arouse the passions of the ordinarily reasonable [person.]” (*Ibid.*) Accordingly, a defendant allegedly experiencing hallucinations is not entitled to a voluntary manslaughter instruction based on heat of passion or provocation aroused by delusion or hallucination because “[a] perception with no objective reality cannot arouse the passions of the ordinarily reasonable person.” (*Id.* at p. 679.)

In contrast, however, the *Padilla* court suggested that “nothing in the law necessarily precludes *Padilla*’s hallucination from negating deliberation and premeditation so as to reduce first degree murder to second degree murder, *as that test is*

subjective.” (*Padilla, supra*, 103 Cal.App.4th at p. 679, italics added.) In supplemental briefing, the Attorney General suggests this latter portion of *Padilla* has been “impliedly overruled by *Elmore*, and that evidence of hallucinations and delusions cannot reduce the degree of murder from first to second.”

It may be that in contrast to expert testimony on mental disease or defect, “observation evidence” concerning a defendant’s delusional or “unusual” behavior is admissible, as the United States Supreme Court contemplated in *Clark, supra*, 548 U.S. at pp. 757, 760-761. And as *Elmore* held, evidence “short of insanity is admissible at the guilt phase under section 28(a)” (*Elmore, supra*, 59 Cal.4th at p. 146), which conceivably could include evidence tending to suggest the defendant was acting in a manner the jury might consider delusional.

We need not reach the issue of *Padilla*’s continuing viability, however. The parties have not addressed whether evidence other than that “based solely on a defendant’s delusional mental state” (*Elmore, supra*, 59 Cal.4th at p. 132) may have supported giving CALCRIM No. 627 based on evidence of Bonadie’s mental state. It is enough to observe that Bonadie is incorrect in arguing the prosecutor misstated the law. In light of *Elmore*, the prosecutor did not misstate the law by arguing any delusions Bonadie may have suffered did not, on their own, prevent a second degree murder conviction, or by implying they did not prevent a conviction on the attempted murder counts. Bonadie’s reliance on his delusional mental state was tantamount to an insanity defense, which *Elmore* explained is precluded in the guilt phase. The prosecutor did not err in this regard.

D. *The Prosecutor’s Error Requires Reversal of the Sanity Phase*

Bonadie contends the sanity phase of his trial concerning his attempted murder of the three officers must be retried because it was tainted by prosecutorial misconduct, even if it was unintentional or inadvertent. (See *People v. Hill* (1998)

17 Cal.4th 800, 823, fn. 1 (*Hill*) [observing that “‘prosecutorial ‘misconduct’ is somewhat of a misnomer. . . . A more apt description of the transgression is prosecutorial error”].) A prosecutor’s lack of bad faith or wrongful intent is not the issue. (*People v. Price* (1991) 1 Cal.4th 324, 447.) “What is crucial to a claim of prosecutorial misconduct is not good faith *vel non* of the prosecutor, but potential injury to the defendant.” (*People v. Benson* (1990) 52 Cal.3d 754, 793.) We agree and conclude this portion of the sanity phase must be reversed.

1. Relevant Background

As noted above, at the sanity phase of the trial, only Dr. Feldsher expressed a view contrary to the two other experts that Bonadie *may* have regained his sanity by the time he shot at the police officers. Feldsher agreed Bonadie was not in touch with the nature or quality of his actions in slaying his parents, and that he did not understand the killings were wrong. Feldsher’s view was more nuanced, or in his words “bifurcated,” concerning the police officers. Feldsher testified Bonadie told him he thought the police were demons coming to retaliate against him, but at another point in the interview, Bonadie explained that “he didn’t know who it was and that he didn’t know what they were going to do to him.”

Feldsher’s “bifurcated” view of Bonadie’s sanity when he shot at the police officers turned on whether the jury credited Chrashawn Jackson’s testimony that, based on her telephone conversation with Bonadie during the standoff, Bonadie clearly believed the officers were demons. Feldsher explained that “if the jury were to conclude that the information that was provided to me from the [recent] December 21, 2011, interview with Ms. Jackson — if that’s accepted as true, then I would conclude that [Bonadie] met the NGI standard for shooting at the officers.”

Feldsher testified that, absent Jackson’s account of her phone conversation with Bonadie during the standoff, the remorse Bonadie expressed upon being taken into

custody about shooting at the officers and his concern for the officers' well-being were inconsistent with a delusional state. Feldsher expressed some doubt a person could so quickly change from a delusional mindset believing the officers were demons to a nondelusional state of contrition, but he acknowledged it was possible. He therefore highlighted the importance of Jackson's contemporaneous telephone conversation with Bonadie, which he testified "would trump the remorse piece" as "powerful evidence that he didn't know the wrongfulness" of his actions because he believed the officers were demons.

Feldsher, however, openly doubted Jackson's account, which surprised defense counsel. Defense counsel later explained to the trial court that Feldsher had assured her that morning that he intended to testify defendant was insane when he shot the officers, based on Jackson's account of her telephone conversation with Bonadie, which Feldsher learned of the day before he testified. But on the stand, Feldsher expressed misgivings about Jackson's truthfulness because she did not give her account until December 2011, the month before Feldsher testified and long after the homicides. The defense elicited testimony explaining investigators did not locate Jackson until that time because of a falling out with the family unrelated to the shooting.

On redirect, defense counsel revisited the issue with Feldsher, only to receive another surprise: Feldsher testified Jackson's testimony was untrustworthy because he believed Jackson had reviewed Feldsher's report concerning Bonadie's sanity and tailored her testimony to support an insanity finding. Feldsher explained, "Well, *the key reason* why I am not able to accept as very credible the statements . . . of Ms. Jackson, a key piece that differentiates her statements from the [other witnesses'] earlier statements — it's not just about time [i.e., the delay]. It's also about *the fact that she had a chance to read and review my report before she made those statements.*" (Italics added.)

Defense counsel asked Feldsher, “You understand that the reports that you do are confidential, correct?” When he answered affirmatively, she probed further, “Now, if there was a person who was not the defendant [who] asks for a report — police report, psych report — you know that that’s against the policy of a legal office to provide that?” Feldsher retreated, noting, “I didn’t think that issue through. It was — I had the understanding that that individual [i.e., Jackson] had the opportunity to review the report. That was wrong. That’s wrong, but that was my understanding.”

Suspecting the prosecutor had planted with Feldsher the notion that Jackson had reviewed his report, which led to Feldsher’s “bifurcated” opinion and his attack on Jackson’s credibility, defense counsel asked: “Dr. Feldsher, without disclosing who, was there someone that you talked to that gave you the impression that the confidential report was released to Chrashawn Jackson?” Feldsher answered, “Yes.”

Defense counsel moved for a mistrial or in the alternative to strike Feldsher’s testimony, noting that without his “bifurcated” notion, all the experts would have testified that Bonadie was insane both when he shot his parents and when he shot at the police. At the hearing on the mistrial motion, defense counsel complained the jurors “are not going to trust me when I speak, when I do a closing,” given the implication she or the defense had provided Jackson with Feldsher’s report. More generally, she described as “witness tampering” the suggestion to Feldsher that Jackson “had access to this confidential report which, of course, was completely untrue.” Counsel demanded to know “why that [suggestion] was provided to Dr. Feldsher, what information exactly was provided to Dr. Feldsher, when that information was provided to Dr. Feldsher, and what the intent was o[f] the party that provided that information to him.”

The prosecutor disclosed that in a conversation with Feldsher the day of his testimony, “I pointed out to him, you know, the date of that report [i.e., the investigative report documenting Jackson’s account of her telephone conversation with defendant during the standoff] is December 2011. Actually, December 21st, 2011, after we started

this trial. The jury had already been selected and seated.” The prosecutor observed that Feldsher had been wavering on his proposed opinion, intending at first based on defendant’s remorse to opine defendant was sane when he shot at the officers, but then changing his mind when he learned of Jackson’s account.

The prosecutor admitted she then “told [Feldsher] in our conversation — I said this report [i.e., Jackson’s interview] was not taken until the end of December of 2011, after all other reports had been filed in this case, including the psychiatric reports. *And I said, ‘For all we know, she could have seen any and all the reports.’*” (Italics added.) The prosecutor protested that she had no idea “how [Feldsher] interpreted *that* into [‘she saw his report[’] . . . nor did I ever intend to elicit that from him,” but rather defense counsel had. (Italics added.)

The trial court denied the mistrial motion and the motion to strike Feldsher’s testimony. The court noted “it’s still fair comment on a statement that’s not provided until — that, you know, is written in December. I think [Feldsher] can still consider that [delay in Jackson’s account].” The court agreed with defense counsel: “[W]ell, to the extent that it was suggested that maybe the report had been provided [to Jackson] that would be inappropriate,” and emphasized it was “inappropriate to give that witness that impression.” But the court saw no viable remedy or sanction because “I don’t believe that that was a question from the prosecution that brought that out, anything that would have impu[g]ned anybody’s integrity.” The court concluded “there’s nothing in the evidence to suggest that anybody gave a report over.” The court offered to consider a curative jury admonition or instruction. But once defense counsel recalled Jackson and elicited her testimony that she never reviewed copies of any reports related to the case, the court concluded no admonition or instruction was necessary.

2. Feldsher's Admission in Front of the Jury that "Someone" Told Him Jackson Reviewed His Report Requires Reversal

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*Hill, supra*, 17 Cal.4th at p. 820.) A prosecutor's misconduct is prejudicial and requires reversal only if it infects the trial with such unfairness as to result in a denial or due process, or if the prosecutor uses deceptive or reprehensible methods to mislead the court or jury. (*Id.* at p. 819.)

Here, defense counsel suspected the prosecutor was responsible for Feldsher's about-face on his proposed testimony. Defense counsel's suspicion prompted her to ask, "Dr. Feldsher, without disclosing who, was there someone that you talked to that gave you the impression that the confidential report was released to Chrashawn Jackson?" When Feldsher answered, "Yes," the only reasonable inference for the jury to draw was that the prosecutor gave him this impression. Indeed, the prosecutor admitted at the mistrial hearing outside the jury's presence that she had told Feldsher, "For all we know, [Jackson] could have seen any and all of the reports," but protested she had no idea "how he interpreted *that* into [']she saw his report[']" (Italics added.) The prosecutor's attempt to disclaim responsibility is not convincing when she directly planted with Feldsher the suggestion Jackson "could have seen any and all of the reports."

The trial court declined to grant a mistrial because it "was [not] a question from the prosecution that brought that out," i.e., Feldsher's open distrust of Jackson based on her seeing his report. But the fact defense counsel worked to uncover misconduct that the prosecutor failed to disclose is hardly the point. While Jackson denied seeing the experts' reports, her credibility was severely impacted because "someone" said she had seen them, and the jury reasonably would infer it was the prosecutor. As Bonadie explains, and we agree, "By giving Dr. Feldsher 'the [false] impression that th[e] confidential report was released to Chrashawn Jackson' . . . , the prosecutor also

improperly used the prestige of her office to improperly influence the opinion of a defense expert witness, which in turn influenced the jury to view Jackson's statements with distrust. [A]fter speaking with the prosecutor, Dr. Feldsher testified that he viewed Jackson's statement [that Bonadie told her the officers were demons in their phone conversation during the standoff] as having 'questionable truthfulness.'"

Impugning Jackson's credibility in this manner was severely prejudicial. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "unfairness as to make the resulting conviction a denial of due process." [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29, 97.) Here, the prosecutor's actions require reversal. As Bonadie observes, "If Dr. Feldsher had not changed his opinion after speaking with the prosecutor, then the three medical experts — Drs. Suiter, Wallstrom, and Feldsher — would have unanimously agreed that appellant was insane when committing all of the charged offenses, and there would have been no countervailing evidence to suggest otherwise." There was no evidence Jackson had seen Feldsher's report or any others, and the prosecutor's contrary suggestion to Feldsher, which he in turn relayed to the jury, rendered that portion of the sanity phase of the trial fundamentally unfair.

E. *Sentencing Contentions*

Bonadie asserts the trial court failed to recognize it could impose concurrent rather than consecutive terms for the attempted murder convictions. He also contends the court erred in concluding his murder conviction in the guilt phase rendered him statutorily ineligible for good conduct credits under section 2933.2. The Attorney General opposes resentencing on the attempted murder convictions as unlikely to result in

concurrent rather than consecutive sentences. The Attorney General also contends the trial court correctly determined Bonadie was ineligible for good conduct credits because the Legislature made no express exception for defendants convicted of murder but found not guilty by reason of insanity. Bonadie points out that the NGI verdict absolved him of criminal liability for the murders. (See § 26 [deeming “mentally incapacitated” persons unable to commit a crime as a matter of law]; accord, *Elmore, supra*, 59 Cal.4th at p. 145 [no criminal liability where defendant acted under delusional beliefs].) We need not resolve these sentencing claims because retrial of the sanity phase concerning the attempted murder counts requires a new sentencing or commitment hearing.

III

DISPOSITION

The judgment is affirmed in part and reversed in part as noted herein, and remanded for further proceedings consistent with this opinion, including a new sanity trial on the attempted murder charges involving the police officers and the felon-in-possession firearm charges and, thereafter, a new sentencing or commitment hearing.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.