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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LORENZO MICQUELL LATIMER, Defendant and Appellant.	B232280 (Los Angeles County Super. Ct. No. KA085849)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles Horan, Judge. Affirmed.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Lorenzo Micquell Latimer, appeals his conviction for premeditated attempted murder, aggravated mayhem, inflicting corporeal injury on the mother of his child, arson, hit and run driving, and the unlawful driving or taking of a vehicle, with deadly weapon, great bodily injury and prior prison term enhancements (Pen. Code, §§ 664, 187, 205, 273.5, 451, 12022, 12022.7, 667.5; Veh. Code, §§ 20002, 10851).[1] Latimer was sentenced to state prison for life plus 11 years and two months.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Guilt phase of the trial*.

a. *Prosecution evidence.*

(1) *The motel attack.*

Defendant Latimer and Darlene Diaz started dating in 2007 and Diaz soon became pregnant. When their child was a year old, Diaz and Latimer began living together in Covina along with Diaz's two other children. In November 2008, because they were having financial problems, they decided to relocate to Georgia to take advantage of a rent-free living situation arranged by Latimer's father. On the night they were to leave, however, they apparently argued and Latimer went to Georgia by himself. When he returned to California in late January 2009, he and Diaz resumed living together. They again made plans to move to Georgia.

On January 26, 2009, Diaz, Latimer, their baby son and Diaz's two older sons checked into the Valley Inn Motel in the City of Industry. Diaz testified that sometime after midnight Latimer woke her and told her to give him oral sex.

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[1] All further references are to the Penal Code unless otherwise specified.

When Diaz refused, because the children were in the room, Latimer became upset and threatened violence if she did not comply. When she still refused, Latimer punched her in the face. They argued and Diaz said she would not go to Georgia with him. Latimer left the motel room. When he returned, around 3:15 a.m., he grabbed Diaz from behind and threatened to kill her if she did not accompany him to Georgia. Latimer then left again, taking the keys to Diaz's SUV. Diaz stayed in the motel room and fell asleep.

When Diaz awoke two or three hours later, Latimer was next to her on the bed. She dressed and walked outside. Latimer followed and asked her for a hug, which Diaz refused. Latimer then came up behind her, put one hand over her mouth and the other on her neck. Diaz tried to break free. When another motel guest walked by, Latimer let her go.

Diaz noticed there was blood on her fingers and she realized her neck was bleeding. She went to the motel office and asked the male employee to call the police, but he told her to leave. After a shift change, a new employee came into the office. This woman also asked Diaz and Latimer to leave.

Diaz and Latimer continued to argue in front of the motel office, Diaz insisting she would not go to Georgia because Latimer had punched her. Then all of a sudden Latimer attacked her. Diaz wasn't sure exactly what he did to her, but she ended up on the ground. She tried to use her hands to defend herself and she thought she was going to die. Eventually, her 15-year-old son, Jeffrey, came up and screamed at Latimer, who stopped assaulting Diaz for a moment but then kicked her in the head. Latimer ran to Diaz's SUV. He had to replace a fuse in order to get the SUV started, but he did this and then drove off. Diaz testified she was bleeding heavily. Three razor blades were later recovered from the scene.

At the hospital, Diaz had surgery on her cheek, hand, finger, neck and chest. Among other injuries, she had sustained a two-and-a-half inch cut from the corner of her mouth straight across her inner lip, and a five-to-six inch cut

across her throat. She was also left with multiple scarring to her fingers and hand.

(2) *The freeway collision*.

Later that morning, between 8:00 and 8:30 a.m., Sandra Byers was driving on the 57 Freeway when Latimer, in Diaz's SUV, hit her from behind. It was a minor collision and Byers was not injured. She pulled over to the side of the road. Latimer parked in front of Byers and walked over to her car. He had blood on his arms, fingers and shirt. Latimer explained the blood by saying he had cut his finger while working at a construction site and he was trying to get to the hospital. He asked her to come over to his car so they could exchange insurance information, but Byers refused to leave her car because the situation "didn't feel right." When Byers said she wanted to call the police, Latimer "started to panic" and said, "Don't do that." When Byers called 911 anyway, Latimer drove off.

(3) *Latimer's apprehension*.

Around 9:30 a.m., passers-by noticed Latimer sitting in an SUV on the side of the road in Lake Elsinore. There was smoke coming from the vehicle. Latimer left the SUV and walked to a bus stop across the street. When the police arrived, the SUV was on fire and Latimer was still sitting at the bus stop. The fire had been caused by arson.

b. *Defense evidence.*

Chien Wang testified she started her work shift at the Valley Inn Motel office around 7:30 a.m. that day. Latimer and Diaz were inside the office, arguing about taking their children to Georgia. Wang told them to calm down and ushered them from the office. Diaz did not ask for any help at that time. Diaz and Latimer continued arguing in front of the motel office. Around 8:00 a.m., Diaz screamed for help. Wang was scared, so she locked the door and called 911. Latimer was moving his hand in a stroking motion at Diaz's neck, but Wang could not tell if he was holding anything.

Latimer testified in his own defense. He and Diaz began living together in September 2008. They had planned to move to Georgia in December 2008, but that fell through and Latimer went without her. He returned to California, but then on January 1, 2009, he again went to Georgia alone because Diaz "punched me in the face and began abusing me." When he returned to California on January 25, he, Diaz and the children went to stay at the Valley Inn Motel.

That night, Latimer and Diaz slept in a bed with their 14-month-old son. Latimer and Diaz had consensual intercourse and oral sex. While Diaz was orally copulating Latimer, the baby reached out to touch Latimer's penis. This upset Latimer and he hit Diaz in the face. Latimer testified: "It upset me for my son to be reaching for my genitalia, as I spoke with Miss Diaz about many times before." Diaz continued to orally copulate Latimer, but then she stopped and said she would not go to Georgia with him. This caused Latimer to get "extra upset." They argued and Diaz called Latimer mean names. He left the motel room around 3:00 a.m. and sat in Diaz's SUV. He was starting to lose his mind. He felt like a failure as a father and he felt suicidal. He went to a store, purchased razor blades and thought about killing himself.

Latimer returned to the motel room a few hours later and began arguing with Diaz again. They went outside, so the children could sleep, and argued about going to Georgia. When Latimer tried to give her a hug, Diaz pushed him away coldly. In doing so, she happened to put her hand into the pocket containing his razor blades and nicked her finger.

When Diaz started calling him names, Latimer put his hand over her mouth and asked her to listen to him. At that point, they went into the motel office and continued to argue. After Wang told them to leave, Diaz kept calling Latimer names and swearing at him while he tried not to argue with her, but then

he lost his mind, considered suicide, and then he attacked Diaz.[2] Latimer acknowledged it was the argument that triggered his assault on Diaz, although he could not recall all the details of the attack:

"Q. [By the prosecutor]: When you were attacking her with the blades, you were aiming for her throat, neck, and face area, correct?

"A. I can't recall exactly my aiming. I just started slashing. I just started going.

"Q. At that time Miss Diaz was on the ground, wounded, as you were standing over her and slashing her; is that correct?

"A. In my attack, I'm pretty sure that's what happened. I didn't realize any of those moments until her son called my name.

"Q. At that time Miss Diaz was screaming for help; is that correct?

"A. Honestly . . . I wasn't coherent to most of that until my name was called."

He did recall kicking Diaz in the face *after* Jeffrey yelled at him: "I realized what had taken place . . . and what I got pushed to, and I just lashed in anger at that point."

Latimer insisted he never intended to kill Diaz. He denied having grabbed her by the hair or threatening to kill her if she didn't go to Georgia with him: "My intentions were actually to comfort Miss Diaz. That is the only reason why I came back to the motel that morning, was to comfort her and to assure her I just wanted her to go to Georgia and get away from the problems that were

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[2] Latimer testified Diaz "continued to call me all kinds of stupids and things and such. I'm stupid for coming here, this, that, and the other. I was trying not to argue." "And from there, she started calling me all sorts of names. And I just really lost my mind from there, as I went through a dilemma of suicidal moments before coming back to her." "[Diaz] was just standing there, calling me aggressive, stupid names and cuss words and things as I tried to plead her to just allow us to leave from the trouble in California."

surrounding us. And so she could live with me comfortably without the problems surrounding my life."

After kicking Diaz in the head, Latimer drove off in her SUV. He remembered colliding with Byer's vehicle, pulling over and talking to her. He acknowledged falsely telling Byers he had cut his hand in a construction site accident and that the SUV belonged to his sister. He then drove off and kept driving until he ran out of gas. He thought he was in Georgia. He did not recall setting the SUV on fire because he "was really in a big blatant state of blur."

Latimer acknowledged having been convicted of two felonies. In 2002 he pled guilty to attempted forcible sexual abuse in Utah. In 2004 he was convicted in Los Angeles County for lewd and lascivious acts upon a child.

2. *Sanity phase of the trial*.

a. *Defense evidence.*

(1) *Latimer's testimony.*

Latimer testified he has been diagnosed with delusional disorders, paranoid schizophrenia and depression, and that he has taken medication for these conditions on and off since 2004. He hears voices in his head every day. They are the voices of family members, particularly two male cousins who say things like "I'm fucking your daughter" and "you are a punk." He avoids these voices by answering them in his mind, but when they become too aggressive he moves around, making hand gestures and talking aloud as if the speakers were actually present. Latimer stopped taking his schizophrenia medication in September 2008 because he could not afford the cost after completing his parole term. He then resorted to self-medication with marijuana. Without his prescription medicine, the voices became more aggressive and he heard them almost daily from 2006 through the date of the attack.

After he and Diaz had sex at the motel that night, Latimer heard the voices saying "You ain't pimping" or "You ain't pimping shit." He left the motel the next morning "because the pressure of the argument, pretty much. And then Miss Diaz saying that she wasn't going to go to Georgia with me was pretty much the point." While sitting in Diaz's SUV, Latimer heard his cousin's voice saying Diaz was not going back to Georgia with him, that she was his cousin's whore, and that things were going to be done to Latimer's children.

Latimer again heard the voices when he tried to hug Diaz in the motel parking lot. The voices did not tell him to hurt her, just that they were taking control of her. Latimer testified he was able to ignore the voices: "[P]retty much I was just ignoring [the voices] at that point. When I attempted to, they were really oblivious [*sic*]. They didn't matter too much at all." "I can't really remember paying too much attention to the voices at that point at all. Just the things that [Diaz] was saying is what I was paying attention to."

(2) *Testimony of Latimer's mother*.

Latimer's mother, Deanna Wright, testified that when the military discharged Latimer in the 1990's, after he was diagnosed with paranoid schizophrenia, he moved in with her. During this time he angered easily, did not take responsibility for himself, and engaged in bizarre behavior like talking to people who were not there. He spent time at two mental hospitals from 2003 to 2005. The last time Wright saw Latimer before the attack he looked like a "homeless bum."

On the afternoon before the attack, Latimer and Diaz came to Wright's house to pick up the children. Latimer was wearing strange clothes, had a "villainous look on his face," and seemed to be "off in his own world."

In the hours before the attack, Latimer called Wright. He sounded afraid and said Diaz and her ex-husband were trying to kill him. Wright said no one was going to hurt him and that he should come over to her house if he was scared. Wright could tell something was wrong by the sound of Latimer's voice: "His voice always is changed when he's not himself. When he's a different person, when voices are speaking to him, he's not the person that we know."

(3) *Darlene Diaz's testimony.*

Diaz testified Latimer never told her he had mental health issues, a psychiatric diagnosis, or that he was taking medication. Prior to the attack, Diaz had twice seen Latimer talking to himself while waving his hands; each time was after Latimer had been smoking marijuana. When Diaz asked about this, Latimer said his cousins were talking to him. During their relationship, Latimer would accuse Diaz of sleeping with her employer, the maintenance man for their apartment, and her former husband.

When Latimer returned to the motel room on the morning of the attack, he told Diaz she "wouldn't have to worry about [her former husband] anymore, that I would be free of him." Although Latimer appeared to be agitated and upset during the attack, it did not seem to her that "he felt like he was beginning to lose his grip." That night and during the attack, Latimer was not talking to himself.

(4) *Testimony of Deputy Brooks.*

Deputy Sheriff Donald Brooks testified he and his partner responded to the report of a car fire in Lake Elsinore. When they arrived at the scene, Latimer complied with their command to lie prone on the ground. After they arrested him, Latimer kept saying, over and over again: "I told them at the Christmas party they put that shit in my mouth. I told them they don't live here, they were just visiting." The deputies then left Latimer alone in the patrol car for 10 or 15 minutes with an onboard audio recording device turned on. When the deputies were out of earshot, Latimer did not speak at all. Once the deputies

returned to the patrol car, however, Latimer again started repeating, "I told them they were just visiting."

(5) *Defense expert*.

Dr. Marshal Cherkas testified Latimer had been diagnosed with paranoid schizophrenia: "He mis-viewed things, and maybe hallucinations, delusions, but also with a definite emphasis on paranoia. He projected his fears of life on to other people. He may have hated people, so he assumed they hated him and were out to get him." In Cherkas's opinion, Latimer had been insane at the time of the charged crimes. This conclusion was based on Latimer's long history of mental illness, his claimed history of bizarre sexual abuse by his cousins,[3] his failure to remember setting the SUV on fire, and the termination of his prescribed medications.[4] Cherkas testified it was common for schizophrenics to have "selective amnesia."

Cherkas acknowledged there was evidence tending to show Latimer knew his actions were wrong: he stopped attacking Diaz in the parking lot when someone walked by; he told the motel employee not to call the police; he stopped and talked to Byers after the freeway collision and tried to convince her not to call the police.

Cherkas testified Latimer knew and understood the nature and quality of his acts. For example, he knew he was slashing Diaz's throat. However, "at least during the time that he was angry with his wife, and hearing voices, and

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[3] Latimer "gave a history of being sexually abused in bizarre ways. And [he] had a history of paranoid ideas about his cousins and his family who abused him sexually and were following him."

[4] Cherkas testified "there was a kind of internal consistency with this man that made me believe that he was just psychotic as hell." Cherkas cited: "The prior hospitalizations. The prior aggressiveness. No evidence of remorse. Feeling of paranoia, people out to get him. Acting aggressively with minimal rationale."

talking crazy stuff about his son touching him and the cousins . . . . [h]is ability to use judgment, his moral thinking was gone. He was in such a state that he wasn't thinking right or wrong. He just acted impulsively." Cherkas conceded that impulsivity did not constitute insanity, and that people who reacted violently during domestic arguments might be mentally ill without being legally insane.

(6) *Prosecution expert.*

Dr. Sanjay Sahgal testified Latimer had "a history of psychotic symptoms consistent with schizophrenia," which he defined as " a severe mental illness characterized by a combination of either delusions, hallucinations, or disorganized thinking." Sahgal opined there is no relationship between schizophrenia and selective amnesia, although schizophrenics can experience memory problems. Asked if the "types of memory problems that [Latimer] exhibited through his testimony" was "something that you would see in schizophrenic people?", Sahgal replied, "No." He explained: "[I]f someone were to have complete amnesia, it wouldn't wax and wane according to the context of events in a couple-hour period. And it wouldn't be consistently and conveniently surrounding events that would affect guiltiness or culpability. [¶] So amnesia is rare enough as it is, but in this particular case . . . not remembering a stabbing, but completely remembering a certain car model, that's inconsistent with any sort of amnesia, let alone amnesia from schizophrenia."

Sahgal opined Latimer had not been insane when he attacked Diaz. The quality and nature of his actions demonstrated organization and logic. Based on their interview, Sahgal concluded Latimer did not subjectively believe he had been acting in a morally correct way: "He told me that he believed that the victim was going to kill him or harm him, and he therefore struck her in self-defense. [¶] Well, I asked him, if you really felt like you were defending yourself, why didn't you just run away? Or alternatively, given that you are a man and she's a woman, why . . . did you feel threatened in the first place. I also asked . . . why he may have come up from behind her. And all those questions

were answered with an 'I don't know.' " After attacking Diaz, Latimer fled the scene, lied to Byers about his injuries, and then set the SUV on fire to destroy evidence. And while Latimer had made "some very strange statements to the police when he was arrested and that might suggest something of a motive that wasn't rational," those statements "were not consistent with all the other behaviors."

Sahgal concluded that "even if [Latimer] was grossly psychotic through the whole thing, his behaviors were one [*sic*] of somebody who would then be grossly psychotic but aware of what they were doing and that it was morally wrong." Regarding the voices in Latimer's head, there was this colloquy:

"Q. Did he indicate to you that at the time of the event, that these thoughts about his cousins were coming into his head?

"A. [Dr. Sahgal:] He did not.

"Q. Did you ask him . . . if he had thought about his cousins in his head at the time of the event?

"A. I did, because of his comments to the police, which were of that theme, I did ask him.

"Q. What was his response?

"A. His response was he could not recall anything relating to some of the swaths of time during the course of events.

"Q. Now, his inability to recall certain periods of time at the event, could that be a result of the voices that he hears in his head?

"A. No."

CONTENTIONS

1. The trial court erred by refusing to admit evidence of Latimer's police statements when he was arrested.

2. Latimer was denied effective assistance because defense counsel failed to present mental impairment evidence at the guilt phase.

DISCUSSION

1. *Trial court did not err by excluding evidence of Latimer's police statements.*

Latimer contends the trial court erred during the guilt phase of his trial by excluding evidence of the statements he made to deputies when he was arrested at the scene of the SUV fire. This claim is meritless.

a. *Background*.

In the guilt phase of the trial, during the cross-examination of Deputy Brooks, defense counsel sought to ask about statements Latimer made when he was detained at the scene of the burning SUV. The following colloquy occurred:

"The Court: What did he say? What is the offer?

"[Defense counsel]: The statements he made were, 'I told them at the Christmas party they put that shit in my mouth. I told them they don't live here, they were just visiting.' That was his statement. And according to the police report, he kept on repeating that, repeating that.

"The Court: And therefore, what?

"[Defense counsel]: It's just very odd behavior.

"The Court: Want to be heard?

"[Prosecutor]: I would just say it's hearsay at this point in the case-in-chief. . . . It's irrelevant and hearsay.

"The Court: I am going to sustain the objection."

b. *Discussion*.

Latimer asserts this testimony would have been relevant because his "defense at the guilt phase was that he did not premeditate or deliberate the attack, did not intend to kill [Diaz] and did not intend to permanently disfigure her." He argues these "repeated nonsensical comments at the time of his arrest supported the argument that he did not have the ability to plan and premeditate the attack or form the requisite specific intent. Brooks' testimony would have explained the depth of appellant's delusion and despair, suggesting that his

proffered testimony about his intentions and actions before and during the attack were truthful and provided the jury with insight into appellant's state of mind during the rampage."

The Attorney General argues this evidence was properly excluded because it constituted implied hearsay. That is, the statements "were offered for the truth of their implied assertions that [Latimer] was speaking to whomever he thought was there, and that appellant honestly believed" what he was saying. The Attorney General asserts Latimer's "words were potentially relevant only if they were truthful, that is, if appellant actually believed he was truthfully speaking with people who were not present rather than to the deputies who were arresting him. If appellant was lying during his statements – e.g., if he did not really believe he was talking to people who were not there about truthful matters – then his statements could not possibly be relevant to show any contested issues of fact." We agree.

"A declarant's express words that are offered to prove the *truth* of an *implied* statement to be inferred from such express words constitute a hearsay statement . . . . (See Jefferson, Cal. Evidence Benchbook (1972) Express Statement Offered for Truth of an Implied Statement, § 1.4, pp. 11-22.)" (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 885, disapproved on other grounds by *People v. Kimble* (1988) 44 Cal.3d 480, 496, fn. 12; see *People v. Perez* (1978) 83 Cal.App.3d 718, 726 ["Any proposed relevancy of these two statements [that declarant Lopez told the witness they were going to buy heroin and that he was looking for a particular car] is to the effect that Lopez was stating that he was looking for *defendant* as the source of his purchase. As such, Lopez was making an implied hearsay statement that defendant was a supplier of heroin."].)

In *People v. Morgan* (2005) 125 Cal.App.4th 935, an officer executing a search warrant for evidence of drug trafficking answered the telephone and heard someone ask to buy drugs. This was held to be hearsay: "[W]hen the man on the

phone told Detective Ashworth that 'he was bogeying' and then asked him if he 'had any,' *the relevance of this statement is the implication taken from the spoken words*. While the ultimate fact the statement is offered to prove is not the matter stated, the truth of the implied statement is a necessary part of the inferential reasoning process. The statement is relevant only if the caller actually wants drugs as he states. If he does not want drugs, and is asking for them only to cause trouble for the defendant or as a crank call, then the call has no relevance because it is not circumstantial evidence that defendant is selling drugs. *It is the caller's genuine desire for drugs and his belief that he can obtain them by calling the defendant's number that creates the inference that defendant's drugs are possessed for purposes of sale*." (*Id*. at p. 943, italics added.)

In *People v. Garcia* (2008) 168 Cal.App.4th 261, defendant Ojito's cellmate Thompson wrote two jailhouse notes, the first threatening prospective witnesses and the second, addressed to Ojito, saying: "Do you remember that kite that I wrote . . . they are tripping in court that I'm doing or did you a favor on that. . . . So if my attorney Gretchen goes over there, tell her that someone else wrote it, not us or me." (*Id*. at p. 287.) *Garcia* held that although these statements from the second note normally would not constitute hearsay, because they were merely "requests or directions to make particular representations to a third person," the "statements reasonably can be viewed as *implied* hearsay." (*Id*. at p. 289.) "The implied hearsay assertions reasonably inferred from [the second note] are that Thompson wrote [the first note] as a favor to Ojito, and that Ojito requested, authorized or participated in the writing of [the first note]." (*Ibid*; see *People v. Pic'l, supra,* 114 Cal.App.3d at p. 884 [witness's statement – "Pic'l got busted. Kerbulas screwed us." – was "intended to convey . . . he and Pic'l were engaged in a criminal conspiracy plan which had been thwarted by the victim"]; *Stoddard v. State* (2005 Md.) 887 A.2d 564, 582 [young child's question, "Is Erik going to get me?" – as evidence child had seen defendant

assault the victim – was implied hearsay because jury "needed to infer first that [the child] meant those words to convey a sincere inquiry as to whether Erik Stoddard was going to harm her"].)

Similarly, Latimer's statements to the deputies were relevant as circumstantial evidence of his state of mind only if they were truthful, i.e., only if those seemingly unconnected and contextually inappropriate statements had been sincerely uttered. If Latimer had only been feigning craziness in order to avoid criminal responsibility, then his statements were not relevant to show his state of mind.

Alternatively, Latimer argues his statements were admissible under the state-of-mind exception to the hearsay rule (Evid. Code, § 1250).[5] Not so. Given the evidence showing Latimer made these statements only when he thought the deputies could hear him, the statements would have been properly excluded as having been " 'made under circumstances such as to indicate [their] lack of trustworthiness.' " (Evid. Code, § 1252; see *People v. Smith* (2003) 30 Cal.4th 581, 629 [defendant's statements to his wife, which might have been relevant state-of-mind evidence at penalty phase to show remorse for his crimes, were properly excluded as "untrustworthy because [defendant's] primary motivation in making them was to placate her"]; *People v. Cruz* (1968) 264 Cal.App.2d 350, 358 ["admissibility of declarations of a present state of mind is . . . subject to the rule of trustworthiness"].)

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[5] Evidence Code section 1250, subdivision (a), provides: "Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

This evidence was properly excluded.

2. *Latimer has failed to demonstrate ineffective assistance of counsel.*

Latimer contends defense counsel was ineffective for failing to present evidence of his mental impairment during the guilt phase of the trial. This claim is meritless.

a. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [146 L.Ed.2d 389].) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

"Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence, we have held that the conviction should be affirmed." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [decision whether to put on witnesses is "matter[] of trial tactics and strategy which a reviewing court generally may not second-guess"].) "[T]he choice of

which, and how many, of potential witnesses [to call] is precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Floyd, supra,* at p. 709.)

" 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

b. *Discussion*.

"Under California law, if a defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and sanity are tried separately. Penal Code section 1026, subdivision (a), provides that in such circumstances, 'the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried . . . . In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed.' [¶] Although guilt and sanity are separate issues, the evidence as to

each may be overlapping. Thus, at the guilt phase, a defendant may present evidence to show that he or she lacked the mental state required to commit the charged crime. [Citations.] A finding of such mental state does not foreclose a finding of insanity. Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong. [Citations.]" (*People v. Hernandez* (2000) 22 Cal.4th 512, 520-521.)

Hence, "[a] defendant who elects to plead both not guilty and not guilty by reason of insanity may have the opportunity to employ mental state evidence in two different ways. At the guilt phase, the People must prove all elements of the charged offense, including mens rea. The defense may not claim insanity. It may, however, produce lay or expert testimony to rebut the prosecution's showing of the required mental state. If found guilty, at the next phase of trial the defendant bears the burden of proving, by a preponderance of the evidence, that he was legally insane when he committed the crime. [Citations.]" (*People v. Mills* (2012) 55 Cal.4th 663, 672, fn. omitted.) "The presumption of sanity is not pertinent to any issue at a trial on the question of guilt. The matter of the defendant's sanity is not before the jury, and evidence of insanity is inadmissible. [Citations.] (*Id*. at p. 681.)

Because Latimer has proceeded by way of direct appeal, rather than by means of a habeas corpus petition, the records fails to disclose the reason defense counsel decided to withhold certain evidence until the sanity phase. Our Supreme Court has recognized there is a standard reason for making this kind of decision: "[T]rial counsel could well have believed that if he were to disclose his evidence of mental incapacity at the guilt phase, 'it would lose much of its impact on the [trier of fact] during the insanity phase.' [Citation.] We touch here on a difficult tactical problem facing every defense counsel who possesses

psychiatric evidence bearing on his client's condition at the time of the crime. Since the development of the *Wells-Gorshen*[6] line of cases, this evidence is usually admissible at both the guilt phase and the sanity phase. Counsel's dilemma is, therefore, at which phase should he introduce this evidence?" (*People v. Miller* (1972) 7 Cal.3d 562, 572-573, fn. omitted.) "It is no solution to this dilemma for us to engage in the perilous process of second-guessing whichever of the alternatives counsel chooses." (*Id*. at p. 573.)

The record in *Miller* did not support a claim of ineffective assistance of counsel: "Nothing is seen more clearly than with hindsight. The most that can be fairly said on this record, however, is that counsel's decision to delay introducing his evidence of defendant's mental state until the sanity phase was a debatable trial tactic." (*People v. Miller, supra,* 7 Cal.3d at p. 573.) We come to the same conclusion here.

Latimer asserts there was substantial evidence showing he "suffered from paranoid schizophrenia at the time of the offense, had not been taking his medication in the months preceding the attack, and was suffering from hallucinations or delusions prior to, during and after the attack." He argues "there could have been no tactical reason for failing to introduce evidence in support of his claim that he did not premeditate and or harbor the requisite intent," and that defense counsel could have shown he "was suffering from paranoid delusions and ideations in the moments before the attack and that he was suffering from auditory hallucinations during the attack. Deputy Brooks would confirm that appellant was acting bizarrely in the hours after the attack."

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[6] *People v. Wells* (1949) 33 Cal.2d 330; *People v. Gorshen* (1959) 51 Cal.2d 716.

But this argument ignores the substantial countervailing evidence undermining Latimer's theory he attacked Diaz because of the voices in his head. There was copious evidence showing Latimer lashed out at Diaz in anger during an extended domestic squabble involving both the on-again/off-again move to Georgia and the fight over having oral sex that night in the motel.

The evidence showed Latimer and Diaz had been having major difficulties in their relationship in the months leading up to the assault. There had apparently been several attempts to move with the children to Georgia; each time, however, the trip was aborted and Latimer went by himself. According to Latimer's testimony, he went to Georgia alone on January 1, 2009, after Diaz punched him in the face and abused him. Diaz testified Latimer was jealous during their relationship, accusing her of sleeping with various men. Diaz testified that on the night of the assault Latimer was angry because she refused to have oral sex in the presence of the children. After he hit her in the face, she said she wasn't going to Georgia. Latimer himself testified he became upset when the baby reached out to touch his penis, something he had complained about to Diaz in the past. Although Latimer testified he heard voices before and during the attack, he also testified the voices did not direct him to harm Diaz, and that what he reacted to was the way Diaz had been treating him, e.g., her mean comments to him and her refusal to go to Georgia. Dr. Sahgal testified Latimer did not tell him the cousins' voices were active during the attack. The evidence from Deputy Brooks would not have "confirmed" Latimer was acting delusionally because Brooks's testimony tended to demonstrate Latimer was faking.

In sum, it appears defense counsel may have had legitimate reasons for saving the mental impairment evidence until the sanity phase.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.