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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

JERMAINE JAMES,

Defendant and
Appellant.

B283547

(Los Angeles County
Super. Ct. No. PA082584)

APPEAL from judgment and order of the Superior Court of Los Angeles County, David B. Gelfound, Judge.
Affirmed.

Meghan A. Blanco, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Steven D. Matthews,

Supervising Deputy Attorney General, Chung L. Mar,
Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Jermaine James guilty of first degree murder (Pen. Code, § 187, subd. (a)),¹ and found true the allegation that he used a dangerous and deadly weapon in commission of the murder within the meaning of section 12022, subdivision (b)(1).

James was sentenced to a total of 26 years to life, comprised of 25 years to life in the murder count plus one year for the firearm enhancement.

James contends the trial court abused its discretion in denying his motion for new trial on the basis of his counsel's ineffective representation. Specifically, he alleges counsel failed to: (1) object to admission of his wife's testimony regarding confidential marital communications; (2) investigate whether a plea of not guilty by reason of insanity (NGI) was appropriate; (3) raise the issue of James's competency; and (4) interview a defense witness prior to trial. James further contends the trial court abused its discretion by excluding evidence of third party culpability, and failing to hold an evidentiary hearing regarding whether jurors observed James wearing a stealth belt, resulting in a violation of his right to a fair trial.

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

We affirm the judgment and the trial court's order denying the motion for new trial.

FACTS

The victim, Rodrigo Garcia, was James's brother-in-law. James and his wife, Yareni, lived in an apartment across the street from California State University, Northridge where Yareni attended school.² Garcia, his girlfriend, and their infant son lived with James's mother-in-law.

Yareni testified that James and her brother did not get along. She tried to keep them apart because when they were together "something [bad] always happened." However, because she and James often visited her mother, James and Garcia saw each other approximately 50 times each year.

A few years before Garcia's death, Garcia physically assaulted James's mother-in-law, who was ill. James spat in Garcia's face, and Garcia chased him out of the house. When they returned, Garcia's face was injured and James's knuckles were bleeding. On other occasions, James had told Yareni that he did not like Garcia and that Garcia was a "low life," "loser," and "abuser."

The week before the murder, James purchased a 4-inch, serrated hunting knife. When James first bought the knife, Yareni took it from him because she wanted to keep

² Because James and his wife share the same last name, we refer to her by her first name throughout this opinion.

him out of trouble. Yareni returned the knife to him the day before the murder after James told her he needed it to protect himself “from the outside world.”

James visited Garcia at his mother-in-law’s house multiple times in the week before his death. The first time, he stuck his head in through an open window and demanded that Garcia come outside. James was “jittery” and seemed like he was “in a rush.” Garcia complied, and James repeatedly insisted that Garcia take a walk with him. When Garcia said he would have to bring his son with them, James got angry and left. James came to the house to talk to Garcia again later, but Garcia was not home. On the evening of the murder, James came to the house a third time, and Garcia left to take a walk with him. James was acting “jittery.”

When Garcia and James did not return from their walk, Garcia’s mother and his girlfriend searched the neighborhood. A few blocks away from the house, they encountered paramedics treating a stabbing victim, who the women later learned was Garcia. They could not see the victim’s face or body, and were unable to discover his identity. They became concerned, and tried to reach Yareni, who was at school finishing her exams.

When Yareni began receiving phone messages from family asking if she knew where James and Garcia were, she had a bad feeling about the situation and went back to her and James’s apartment.

James called Yareni while she was on her way home. She asked if he had been to her mother and brother's house that evening. James initially denied going to her mother's house, but then admitted that he had, and that he and Garcia had gone for a walk. Yareni asked James to meet her at their apartment.

Yareni arrived before James. She was becoming increasingly worried about the situation. She began searching for the knife James had just purchased, but was unable to find it, so she went to the front entrance of the apartment complex to wait for James. She saw James running toward the rear of the building, which was strange because James normally entered the building from the front.

When Yareni met James she asked if he had been to her mother's house again. James said he had. Yareni asked if he had recently changed his clothes. James said he had not. Yareni called Garcia's girlfriend to ask if she knew what James had been wearing when he was at the house. Garcia's girlfriend had not seen James, but asked other people with her who had seen him, and gave Yareni a description of the clothing. James was no longer wearing the clothing she described. James said he had changed clothes, and told Yareni the clothes he had worn were dirty, so he put them in the laundry hamper. Yareni searched the hamper, but the clothes were not there.

Yareni asked James where the knife was. He told her that she must have it and she probably "hid it from [her]self." James became anxious and flustered, and called

his mother. He drove away in his car, which was a black Volkswagen Jetta.

Juan Rodriguez³ was building a deck for a church near the murder scene when a volunteer yelled for him to help. He followed her to the sidewalk where a man later identified as Garcia was lying in a pool of blood. Rodriguez told the woman to run and call the police. Garcia was still alive, but unable to communicate. He had been stabbed multiple times. Garcia died while Rodriguez was still with him. There were many people gathered at the scene, but Rodriguez did not remember seeing James there.

Dr. Timothy Dutra performed the autopsy. He determined that Garcia had been stabbed 27 times and died from wounds to his chest and abdomen. Based on the type of injuries Garcia suffered, Dr. Dutra opined that the knife blade used to stab him was about four or five inches long, sharp on one edge and blunt on the other.

A few days after the stabbing, law enforcement officers searched the black Jetta James drove from his and Yareni's apartment on the night Garcia was murdered. Two drops of a dried blood were collected. One drop was taken from the driver's-side door panel and the other was collected from the steering wheel. The DNA profiles from both of these samples matched Garcia's.

³ Rodriguez testified for the defense.

DISCUSSION

After the verdict, James retained new counsel who filed a motion for new trial. James challenges the trial court's denial of the motion.

“We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] “A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

Ineffective Assistance of Counsel

In part, James's new trial motion was based on trial counsel's alleged ineffective assistance. James specifically contends that counsel failed to (1) object to admission of his wife's testimony regarding confidential marital communications; (2) investigate whether a plea of not guilty by reason of insanity (NGI) was appropriate; (3) raise the issue of his competency; and (4) interview a defense witness prior to trial. James contends the trial court abused its discretion in denying his motion for a new trial. The contentions are without merit.

A defendant is entitled to a new trial if he or she received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036; *People v. Watts* (2018)

22 Cal.App.5th 102, 117.) “A criminal defendant’s federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) includes the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel’s inadequacy. To satisfy this burden, the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel’s reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance [A] conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Confidential Marital Communications

“Evidence Code section 980 . . . provides, subject to exceptions not relevant here, that one spouse may prevent another spouse from disclosing a communication that ‘was

made in confidence between him and the other spouse while they were husband and wife.” (*People v. Cleveland* (2004) 32 Cal.4th 704, 743 (*Cleveland*).)

“[T]he privilege applies only to oral or written verbal expression from one spouse to the other, and acts of the spouses committed in each other’s presence do not constitute *communications* between them’ [Citations.]” (*Cleveland, supra*, 32 Cal.4th at p. 743.) “To make a communication “in confidence,” one must intend nondisclosure [citations], and have a reasonable expectation of privacy [citation].’ [Citation.]” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 420 (*Bryant*).) “While a communication between a husband and wife is presumed to be confidential, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged.” (*People v. Gomez* (1982) 134 Cal.App.3d 874, 879; see Evid. Code, § 917, subd. (a).)” (*Cleveland, supra*, at p. 744; see also *Bryant, supra*, at p. 420.)

At the motion for new trial, James argued that *trial counsel* was ineffective for failing to object to his wife’s testimony, which was essentially identical to testimony she gave in the preliminary hearing. The court ruled that trial counsel did not render ineffective assistance because an objection would have been futile. James’s wife’s testimony had already been admitted at the preliminary hearing and was no longer confidential. On appeal, James argues that *pre-trial counsel* was ineffective for failing to object to his

wife's testimony at the preliminary hearing—a contention he did not raise at the motion for new trial hearing.

Generally, a defendant may raise the issue of counsel's ineffective assistance for the first time on appeal. (*People v. Carrasco* (2014) 59 Cal.4th 924, 982 (*Carrasco*), citing *People v. Fosselman* (1983) 33 Cal.3d 572, 581.) However, a defendant who brings a motion for new trial forfeits any claims not raised in the new trial motion. (*Carrasco, supra*, at p. 981.) James's ineffective assistance of counsel claim at the motion for new trial hearing was closely related to the issue he raises now, and could have easily been raised with the trial court.⁴ It is therefore unclear whether James has forfeited the issue for failure to raise it below. However, we need not resolve the issue of forfeiture because we conclude that his contention lacks merit. (See *id.* at pp. 981–982 [declining to decide whether defendant forfeited ineffective assistance of counsel claim by failing to raise it in motion for new trial because arguments failed on the merits].)

James has not established that pre-trial counsel's performance was deficient. The record contains no explanation for his failure to object to Yareni's alleged disclosure of marital communications, and there are objectively reasonable reasons that counsel may have decided not to object. "Ineffective assistance claims based upon the failure to make evidentiary objections are routinely

⁴ The same trial judge presided over the preliminary hearing and the trial, and had the opportunity to observe counsel in both proceedings.

denied on the bases that the unasserted objection was nonmeritorious and would have been overruled” (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140.) Here, much of the challenged testimony does not meet the requirements for privilege such that counsel would have no basis for objecting. We discuss the specific portions of the challenged testimony individually:

The marital communications privilege did not bar Yareni’s testimony regarding her own observations and actions, or her communications with persons other than James. (See *Cleveland, supra*, 32 Cal.4th at p. 743.) Only Yareni and James’s statements and writings to each other could qualify as marital communications. (See *ibid.*) Thus, there was no basis for excluding Yareni’s testimony that the day before the murder she gave James the knife he had recently purchased and that she had temporarily taken from him; after the murder, she looked for and was unable to find the knife; and she asked her brother’s girlfriend what James had been wearing, searched for James’s clothing, and was unable to find the clothing. Nor did marital privilege bar Yareni’s observations that James was anxious and evasive.

The evidence rebuts any presumption that Yareni’s statements and questions to James regarding the knife, his presence at her mother’s house, and the clothes he was wearing were intended to be confidential. Yareni called her brother’s girlfriend to ask what James wore when he came to the house. The logical implication was that she believed

James was involved in the murder. Her conversation with her brother's girlfriend openly revealed her suspicions to a third person and demonstrated that she did not intend to keep her questioning of him private. Yareni's statement that her brother wasn't home yet and that the family was worried because a dead body had been found nearby was simply an articulation of her concerns, which she shared with her family.

The record demonstrates that James's statements to Yareni that "he didn't like [her brother]," called her brother a "low life, loser, abuser," and Yareni's testimony that James had "nothing good to say about [her brother]," were not intended to be confidential, either. Yareni's testimony regarding her own observations of the relationship strongly indicated that James had no concerns about keeping his feelings regarding Garcia private. The men were openly hostile to one another, and engaged in a physical altercation in public. Yareni tried to keep them apart, because "something [bad] always happened" if she did not. James's animosity toward Garcia was no secret.

There is no logical reason for James to have intended his denials of wrongdoing or involvement to be confidential. The statements were exculpatory: James said he needed the knife to protect himself. James said that he went to his mother-in-law's house to talk to Garcia, nothing happened, and he went home. He said he knew nothing about the whereabouts of the knife—Yareni must have hidden it herself—and that he didn't know what Yareni was talking

about when she broached the subject of his involvement in her brother's murder. There was no reason for James to want or expect Yareni to keep his self-serving explanations and denials of wrongdoing secret, as they only strengthened his position that he was innocent.

Regardless, James cannot establish any prejudice from the admission of any of the testimony that could conceivably qualify as privileged marital communications.

James bases his prejudice argument on the jury's quick verdict following read back of a portion of Yareni's testimony and the prosecutor's comments in closing argument. With respect to the read back, the jury informed the court that it could not agree on a verdict. The court asked it to continue deliberating, which it did. Subsequently it requested "a recount of the fight between Rodrigo [Garcia] and Jermaine [James] from Mrs. James testimony during the defense on 8/4." The court informed the jury that it would not provide a written copy of Yareni's testimony, but that it could request a read back. The jury continued deliberating at that time, but later requested the read back. The relevant testimony was read back and the jury went into deliberations shortly thereafter. The case was called for verdict seven minutes later, and the jury found James guilty.

In the portion of the transcript at issue, Yareni relayed her personal observations of a fight that had taken place between James and her brother. Neither James's inconsistent statements nor his statement that he purchased a knife to protect himself from the outside world was

included in the passage. Even if the jury's quick verdict following the read back could be attributed to Yareni's testimony, the purportedly privileged marital communications were not part of that testimony and could not have adversely affected James as he alleges.

James argues for the first time on appeal that the jury was influenced by the prosecutor's reliance on privileged statements. He has arguably forfeited the argument by failing to raise it in the motion for new trial. (*Carrasco, supra*, 59 Cal.4th at p. 981.) Even if we assume the argument was presented, it fails, however. James provides a range of pages in the transcript rather than specifying the exact language to which he objects, but we assume that he is challenging the prosecutor's comments that Yareni "told us the defendant had made some remarks, negative remarks about Garcia, about not liking Garcia." As we have discussed, these particular statements were not confidential and therefore not privileged; counsel was not ineffective for failing to object to them. The prosecutor also argued that James had responded inconsistently to Yareni's questions regarding whether he had gone to her mother's house and whether he had changed clothing afterward. Even assuming the statements were privileged, neither of these inconsistencies is likely to have had much impact on the jury. Although they evidence a consciousness of guilt, the salient facts are that James was at Yareni's mother-in-law's house just prior to Garcia's murder, that after the murder he was not wearing the same clothing he had worn to the house,

and that Yareni could not find the clothing James had been wearing when he was last seen with Garcia. All of these facts were established by properly admitted witness testimony based on personal observation. There is not a reasonable probability that the outcome of the trial would have been different if James's inconsistent statements had been excluded.

Evaluation for Purposes of NGI Plea

In California, the defense of NGI “shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.” (§ 25, subd. (b); *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1431.) There must be an element of causation between the mental condition and the defendant's criminal acts. (*People v. Ceja* (2003) 106 Cal.App.4th 1071, 1089.)

Here, trial counsel notified the court that he intended to have James evaluated for a possible NGI defense and requested that the court appoint a panel psychiatrist to evaluate him. Counsel never engaged a psychiatrist to perform the evaluation, however.

James raised the issue of whether trial counsel was ineffective for failing to go forward with the evaluation in the motion for new trial. The trial court denied the motion

reasoning that the plea must be personally entered by the defendant, and the decision is often strategic. The court further ruled that the defense would not have had merit in James's case, due to the evidence of premeditation and planning. On this record, we cannot conclude that the trial court abused its discretion. James has not demonstrated that trial counsel's performance was deficient or that he suffered prejudice as a result of counsel's inaction.

The record does not reveal counsel's basis for abandoning James's psychological evaluation to determine the appropriateness of an insanity plea, and we cannot conclude that there could be no reasonable basis for his inaction, tactical or otherwise. As the trial court noted, a defendant must personally enter a plea of NGI. (*People v. Henning* (2009) 178 Cal.App.4th 388, 397.) Counsel has no ability to compel a defendant to seek an insanity plea, even if he disagrees with entering such a plea on tactical grounds. (*Ibid.*) James does not claim that he was not advised of the possibility of pleading NGI, nor does he argue that he would have entered the plea if he understood the defense was available to him. The record does not reveal whether counsel decided not to pursue an NGI plea for strategic reasons or if James refused to plead NGI regardless of its availability. An NGI plea can result in de facto commitment in a state hospital for life, which James may not have found preferable to a 26 years to life sentence in prison.⁵

⁵ A defendant found not guilty by reason of insanity is committed to a state hospital or other appropriate facility for a

Additionally, “[a] defendant who pleads not guilty by reason of insanity . . . voluntarily places his mental condition in issue, agrees to submit to a prosecution mental examination, and contemplates testimony by prosecution mental health experts to rebut testimony by defense experts.” (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1295.) James may have preferred to avoid these consequences. Without information as to who made the choice not to go forward with a psychiatric evaluation or why, we cannot say that counsel’s performance fell below an objective standard of reasonableness.

Even if counsel’s performance was deficient, “a defendant alleging ineffective assistance based on counsel’s failure to obtain favorable evidence must . . . demonstrate the evidence which would have been obtained and, to the extent possible, its effect.” (*People v. Geddes* (1991) 1 Cal.App.4th 448 454.) This is why the proper vehicle for an

maximum term of commitment “equal to the longest term of imprisonment for the crimes which could have been imposed had the defendant been convicted *and* sentenced rather than found not guilty by reason of insanity.” (*People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1237.) The prosecution may petition to have the term of commitment extended. If it is proven that the defendant “represents a substantial danger of physical harm to others” commitment may be extended for two years, and multiple extensions may be requested. (§ 1026.5, subds. (b)(1) & (b)(8).) As a consequence, a defendant found not guilty by reason of insanity “is subject to possible confinement in a mental institution for the rest of her natural life.” (*People v. Lomboy* (1981) 116 Cal.App.3d 67, 72.)

ineffective assistance of counsel claim is a writ of habeas corpus. (*Ibid.*) James has neither demonstrated that favorable evidence would have been obtained nor demonstrated what its effect may have been. He has failed to establish prejudice.

James's argument that following a post-trial evaluation of him, Dr. Goodwin opined he "was likely experiencing a psychotic episode that distorted his judgements and impacted his ability to distinguish the morality of his behavior due to the presence of active psychosis," mischaracterizes the doctor's report, which as post-trial counsel admitted "did not contain all of the facts [she] expected it to." The report stated that "James presented as guarded and concerned about being interviewed. He allowed some questioning regarding his family history but abruptly discontinued the interview, stating, 'I'm good. I don't need your help.' This examiner made several attempts to engage James in the interview process but he continued [to] deny a need for a mental health evaluation and terminated the interview." The doctor concluded that based on a review of James's other medical records and evaluations, "*one can presume* that James was likely experiencing a psychotic episode that distorted his judgement and impacted his ability to distinguish the morality of his behavior due to the presence of active psychosis." (*Italics added.*) None of the records upon which this evaluation was based indicate that James did not know the difference between right and wrong at the time that he murdered Garcia, nor did Dr. Goodwin

conclude this was the case. The statement that “one c[ould] presume” his mental condition “impacted his ability to distinguish the morality of his behavior” when he killed Garcia reveals nothing concrete about James’s mental state at the time—the nature and extent of the “impact” is unspecified. Additionally, the report indicates that James, who would have had to personally enter an insanity plea, had no interest in doing so.

James’s arguments that he has “an authentic diagnosis of schizophrenia” and was not compliant in taking his medication are unavailing. Evidence that a defendant is schizophrenic, operating at a low level of intelligence, hearing voices directing him to hurt others, experiencing visual hallucinations, had suffered a bullet wound to the frontal lobe, could not remember committing the crime, and rocked back and forth after the crime in a manner typical of someone suffering a schizophrenic episode has been held insufficient to support an insanity defense, where “‘there was no evidence about what [the] defendant believed or did not believe’ with respect to the moral rightness or wrongness of his actions at the time of the [crime].” (*People v. Blakely* (2014) 230 Cal.App.4th 771, 780.) There was no indication that James was unable to distinguish right from wrong at the time of the murder. His schizophrenia diagnosis and possible noncompliance with medication were insufficient to support an insanity defense.

There is nothing in the appellate record to demonstrate that James “was legally insane at the time of the offense, or

that counsel's asserted lack of diligence amounted to a denial of effective assistance of counsel." (*People v. Montiel* (1985) 39 Cal.3d 910, 923.) The trial court did not abuse its discretion.

Competency to Stand Trial

"A defendant who, as a result of mental disorder or developmental disability, is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,' is incompetent to stand trial. (§ 1367.) When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing.

[Citation.] Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial.

[Citation.] The court's duty to conduct a competency hearing arises when such evidence is presented at any time 'prior to judgment.' [Citations.]" (*People v. Jones* (1991) 53 Cal.3d 1115, 1152–1153 (*Jones*); see also *People v. Frye* (1998) 18 Cal.4th 894, 951–952.)

"When a competency hearing has already been held and the defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding. [Citations.]" (*Jones, supra*, 53 Cal.3d at p. 1153; see

also *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Medina* (1995) 11 Cal.4th 694, 734.) Although normally a trial court's personal observations or beliefs about a defendant's competency are irrelevant, such that the court must hold a section 1368 hearing regardless of such beliefs if the defendant presents substantial evidence of incompetence (see *People v. Pennington* (1967) 66 Cal.2d 508, 518–519; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1415), “when . . . a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state.” (*Jones, supra*, at p. 1153.)

On April 13, 2015, prior to the preliminary hearing, James was found incompetent to stand trial and committed to Patton State Hospital. On July 28, 2015, the court found him competent to stand trial following a competency hearing.

In the motion for new trial, James argued that trial counsel was ineffective for failing to declare a doubt regarding his competency. James claims his behavior at trial indicated that he was no longer compliant with his medication, which was essential to his continuing competency. Mental health experts who had evaluated James prior to trial agreed that with medication he was well adjusted and high functioning, but that his condition rapidly deteriorated when he was noncompliant. Post-trial counsel cited to the following in support of her argument that James

was no longer compliant with his medication: James had repeated unspecified outbursts during trial; James said, “I hear voices in my head. Excuse me. Excuse me;” the trial court had placed James in restraints; and the trial court had admonished James for “spontaneously kneeling.” Post-trial counsel’s cites to the record were incorrect or absent in each instance.

The court concluded that trial counsel’s performance was objectively reasonable. Although James had made one “somewhat unusual statement,”⁶ it concluded this was an insufficient basis to declare a doubt regarding his competency. The court stated, “Watching the defendant throughout the trial proceedings, he appeared to be fully engaged in the process, appeared to understand what was going on, appeared to be able to communicate with counsel and able to interact.” “Even if the court was asked to declare a doubt, the court would not have declared a doubt during the pendency of the trial since there was no substantial evidence to support declaration of a doubt.”

On appeal, James relies on the same incidents that he relied upon in the new trial motion to demonstrate that he was noncompliant. He again fails to specify the nature of his “repeated outbursts,” referring only to the single instance when he purportedly stated “I hear voices in my head. Excuse me. Excuse me,” for which he provides no record cite. With respect to the incidents for which record cites are

⁶ The trial court did not clarify what James stated when he made such an “unusual statement.”

included, James fails to demonstrate a link to mental illness or lack of competency. James states that he was placed in restraints, but the record indicates the court's order was based on prison altercations, and not due to any concerns regarding his mental health. He points to an instance in which he dropped to one knee in front of spectators—not the jury—while a deputy was attempting to remove him and was admonished not to communicate with the audience despite the fact that he “had a lot of support here.” The record demonstrates that the court believed James had control over his actions, and suggests that it attributed the incident to James's desire to interact with supporters. James has not shown that his behavior was caused by mental incompetence.

Nor was there any prejudice. The trial court, which was in a position to observe James before, during, and after trial, stated that based on its own observations it would not have declared a doubt if requested, and it does not appear from the record that the trial court would have erred if it had refused to declare a doubt. The record shows that the outcome was not affected by counsel's failure to declare a concern regarding James's competence.

Failure to Thoroughly Interview a Witness

James contends trial counsel was ineffective for failing to thoroughly interview Rodriguez prior to calling him to the stand. As we discuss in more detail *post*, there was

confusion regarding whether Rodriguez heard two suspicious men at the murder scene say, “[Let’s] get out of here,” which trial counsel intended to use as the basis for a third-party culpability defense. Trial counsel made an offer of proof that Rodriguez heard this statement personally, but later, outside the presence of the jury, Rodriguez testified that a neighbor had relayed the statement to him. James faults trial counsel for failing to discover that Rodriguez had not heard the statement prior to direct examination. He complains that as a result Rodriguez’s testimony was “redundant and irrelevant,” and he “was deprived of the ability to effectively use any of it.”

James did not raise this contention at the motion for new trial, but we need not address the possible forfeiture issue in this instance, because we conclude that counsel’s performance was not deficient.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” (*Strickland v. Washington* (1984) 466 U.S. 668, 691 (*Strickland*); *In re Jones* (1996) 13 Cal.4th 552, 565.)

The record demonstrates that trial counsel reviewed Rodriguez’s recorded statement to police and spoke with him on two occasions. Counsel was not asked to explain why he

did not speak further with Rodriguez. The prosecutor, who also listened to the recorded interview, stated his belief that it was unclear from the recording whether Rodriguez directly overheard two suspicious men leaving the scene saying “[Let’s] get out of here,” which explained the confusion over this point at trial. Under the circumstances, and in light of the “heavy measure of deference [we afford] counsel’s judgments,” we cannot say that trial counsel’s performance was deficient. (*Strickland, supra*, 466 U.S. at p. 691.)

James’s argument with respect to his inability to use Rodriguez’s testimony is confusing. As we discuss *post*, trial counsel sought to have the testimony introduced, but the trial court properly exercised its discretion to prohibit its admission. James cannot have been prejudiced by counsel’s failure to fully develop information that was properly excluded *after* being fully developed at trial. Moreover, Rodriguez’s testimony that he did not remember seeing James at the scene was helpful to James’s case. Rodriguez was one of the first people to respond to the scene and attempted to help Garcia while he was still alive. His testimony bolstered James’s argument that he was not involved in the murder.⁷

⁷ To the extent that James argues trial counsel should have called more than one witness to testify, we reject the contention. The decision to call witnesses is a matter of trial strategy and tactics. (*People v. Robles* (1970) 2 Cal.3d 205, 214–215.) Generally, counsel’s decision to call particular witnesses 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,

Evidence of Third Party Culpability

“[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.]’ [Citation.]” (*People v. McWhorter* (2009) 47 Cal.4th 318, 367–368 (*McWhorter*).) “[T]he third-party evidence need not show “substantial proof of a probability” that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant’s guilt.’ [Citation.]” (*Id.* at p. 368.) However, “[t]he evidence must meet minimum standards of relevance: ““evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt: there must be direct or circumstantial evidence linking the third person to the

disapproved on another point in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) Regardless, James provides no justification for calling additional witnesses and has therefore failed to establish prejudice.

actual perpetration of the crime.” [Citation.]’ [Citation.]”
(*Ibid.*)

Prior to trial, the prosecution objected to the testimony of a gang expert, who would purportedly opine that after Garcia’s death, graffiti in the area where the murder occurred indicated that a local gang was “broadcasting” the murder. Trial counsel argued for the expert testimony’s admission in connection with a third-party culpability defense and also requested that the court instruct on third party culpability. He stated that in conjunction with Rodriguez’s testimony that he saw two strange men fleeing the area after the murder, the gang expert’s testimony would demonstrate that two other people may have been responsible for the death. The prosecutor countered that the connection between the gang evidence and Rodriguez’s testimony was tenuous at best. The court agreed and excluded the gang evidence under *McWhorter, supra*, 47 Cal.4th 318, and Evidence Code section 352.

The next day the court emphasized that it was not preventing Rodriguez from testifying to anything that he saw on the night of the murder. However, when the issue was raised again, the court reversed its order, barring trial counsel from questioning Rodriguez about the two men, because Rodriguez had not seen the murder and his suspicions regarding them were speculative. Following direct examination of Rodriguez, the court allowed the parties to question him outside the presence of the jury. Rodriguez’s testimony confirmed that he had not witnessed

the stabbing. Some people arrived after he had started trying to assist Garcia, including two men who he did not recognize. He could not identify them individually or identify their race because one wore a hoodie and the other wore a hat. Another person at the scene told Rodriguez that the men said something to the effect of “[Let’s] get out of here.” The court reiterated its ruling that the testimony would be excluded on the basis that any link between these men and the murder was speculative.

James challenged the court’s exclusion of the expert’s testimony and Rodriguez’s testimony at the motion for new trial. The court rejected his arguments for the same reasons.

On appeal, James again contends that the trial court erred in refusing to admit expert testimony that the murder may have been gang-related and Rodriguez’s testimony that he saw two individuals running away from the murder scene. We conclude that the trial court did not abuse its discretion.

With respect to Rodriguez’s testimony, the only thing linking the two men to the murder was their presence in a group of people who gathered at the scene after Garcia was found. Rodriguez did not see the men holding weapons or observe anything connecting them to a gang. Rodriguez’s suspicions were based on the fact that he did not recognize the men and that a neighbor told him they said, “[Let’s] get out of here.” Any testimony would be purely speculative, and is therefore subject to exclusion under Evidence Code section 352. (*People v. Peoples* (2016) 62 Cal.4th 718, 743

[““exclusion of evidence that produces only speculative inferences [under Evidence Code section 352] is not an abuse of discretion””].)

Similarly, there was no evidence that the murder may have been gang-related such that it would be appropriate for a gang expert to testify regarding a third-party culpability defense. Trial counsel proposed that the expert would testify regarding graffiti near the murder site that said “We miss you” and “Love” in memorial to Garcia, which allegedly had “some overages to the Mexican Mafia and criminal behavior, 211, three dots.” There was no evidence that the “overages” were in any way connected to Garcia, or that gang members had been involved in the murder. The connection was speculative at best. The trial court did not abuse its discretion by excluding it.

Restraints

“[A] criminal defendant may be subjected to physical restraints in the jury’s presence upon “a showing of a manifest need for such restraints.” [Citations.] This requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court. [Citations.]” (*People v. Williams* (2015) 61 Cal.4th 1244, 1259.) “The trial court’s determination is reviewed for abuse of discretion.” (*Ibid.*)

At the new trial hearing, James argued that trial counsel rendered ineffective assistance by failing to object to use of restraints, and that he was prejudiced because some of the jurors saw the bailiff unhooking the belt at the back of his chair as they were exiting the courtroom. Counsel first informed the court that jurors may have seen James's restraints in the motion for new trial. The motion included James's mother's affidavit in which she stated: "On the second day of trial, the bailiff began removing my son from the courtroom before all the jurors had left, and the stealth belt restraining device that my son was wearing became visible to some of the jurors." The trial court ruled that there was manifest need for the stealth belt,⁸ and that there was no evidence that any of the jurors actually saw James's restraints. Counsel did not request an evidentiary hearing and none was held.

On appeal, James contends that his constitutional rights were violated when jurors viewed the stealth belt, and that the trial court abused its discretion by failing to conduct an evidentiary hearing to determine whether any jurors saw James's stealth belt.

With respect to the due process claim, we note that although James entitles his opening brief argument "James's due process rights were violated when the jury saw the bailiff unhook James's stealth belt at the conclusion of the

⁸ The trial court explained that a stealth belt "is not visible to the jurors." "[It] is a belt that goes on the defendant . . . with a loop that goes into the back of the chair."

second day of trial,” he does not mention the issue within the section, let alone support it with argument or authority. In the reply brief, James asserts that the argument was not waived, but fails to offer support for the substance of the claim. Because James offers no analysis or legal authority in support of his due process claim, it is waived. (E.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37 [“As this contention is perfunctorily asserted without any analysis or argument in support, we reject it as not properly raised”]; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 [“We need not consider an argument for which no authority is furnished”]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 [“When an appellant . . . asserts [a point] but fails to support it with reasoned argument and citations to authority, we treat the point as waived”].)

The argument that the trial court abused its discretion by failing to hold an evidentiary hearing also fails for lack of support. James cites to no authority requiring a court to hold an evidentiary hearing on restraint visibility sua sponte—particularly on the basis of speculation—and we know of none. James also forfeited the issue by failing to request an evidentiary hearing in the motion for new trial. The trial court did not abuse its discretion.

DISPOSITION

We affirm the judgment and the trial court's order denying the motion for new trial.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIM, J.