IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JASON CARL SCHULLER,

Defendant and Appellant.

S272237

Third Appellate District No. C087191
Nevada County Superior Court No. F16000111
The Honorable Candace S. Heidelberger, Judge

PETITION FOR REVIEW

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By appointment of the Court of Appeal under the Central California Appellate Program independent case system.

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TO THE CALIFORNIA SUPREME COURT, defendant and appellant **JASON CARL SCHULLER** hereby petitions this court for review of the ***published opinion*** of the California Court of Appeal, Third Appellate District, filed on November 10, 2021 (*People v. Schuller* (2021) 71 Cal.App.5th 548) and modified on December 7, 2021. Copies of the Court of Appeal's opinion and modification order are attached as Appendices A and B respectively.

ISSUES PRESENTED

1. Whether the erroneous failure to instruct on imperfect self-defense voluntary manslaughter as a lesser-included offense of malice murder violates the federal Constitution because it relieves the prosecutor of its burden to prove malice beyond a reasonable doubt and thus requires application of the test in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] to assess prejudice or whether it is a violation of state law only and

assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818.

2. Assuming federal constitutional error occurred, whether the Court of Appeal misapplied the *Chapman* test by finding the instructional omission harmless based on its own view that the evidence of guilt was overwhelming and whether the error in this case was in fact prejudicial because it cannot be said beyond a reasonable doubt that the error did not contribute to the verdict.

STATEMENT REGARDING NECESSITY FOR REVIEW

In the instant case, the Court of Appeal found that the trial court erred by denying Mr. Schuller's requested instruction on imperfect self-defense voluntary manslaughter as a lesser-included offense to the charged murder. However, it found the error harmless.

The *Schuller* court concluded that, under *People v. Gonzalez* (2018) 5 Cal.5th 186, 195-196 and *People v. Breverman* (1998) 19 Cal.4th 142, 149, the failure to instruct on any lesser included offense is an error of state law only and thus the *Watson* test applies to assess prejudice. It disagreed with two other published Court of Appeal cases—*People v. Dominguez* (2021) 66 Cal.App.5th 163, 183-184 and *People v. Thomas* (2013) 218 Cal.App.4th 630, 641-644—that found that, where the lesser-included offense is voluntary manslaughter, the instructional omission violates the federal Constitution because it is tantamount to failing to instruct thoroughly on malice and

therefore *Chapman* applies. The *Schuller* court reasoned that *Thomas* predated, and *Dominguez* failed to address, *Gonzalez*.

Mr. Schuller contends that the Court of Appeal misread *Gonzalez* and *Breverman*, which are distinguishable, and that its misunderstanding led it to create a conflict in the Court of Appeal regarding the appropriate standard for assessing prejudice when an instruction on voluntary manslaughter is erroneously omitted. The conflict is particularly problematic because, just 20 months ago, the same court that decided *Schuller* implicitly approved of but distinguished *Thomas* in *In re Hampton* (2020) 48 Cal.App.5th 463, creating a potential conflict on this issue within the same appellate district.

Additionally, in its opinion, the *Schuller* court held the instructional error was harmless under *Chapman* in any event. Viewing the evidence in the light most favorable to the prosecution and focusing on isolated pieces of evidence supporting the prosecution's theory, the Court of Appeal found the evidence overwhelming that Mr. Schuller was guilty of murder. Mr. Schuller contends the court misapplied *Chapman*, which itself precludes a reviewing court from finding harmlessness based simply on its own view of the evidence's overwhelming nature. (See *Chapman, supra,* 386 U.S. at p. 23.) Instead, it is settled that an error is prejudicial under *Chapman* unless it can be said beyond a reasonable doubt that the error did not contribute to the verdict. (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L.Ed.2d 432, 111 S.Ct. 1884].) Mr. Schuller contends that under that standard, the error in this case was prejudicial.

Review of this case is necessary to secure uniformity of decision and settle important questions within the meaning of California Rules of Court, rule 8.500(b).

STATEMENT OF THE CASE

The sole count of an information charged Mr. Schuller with malice murder (Pen. Code,[1] § 187, subd. (a) and alleged he personally discharged a firearm, which caused the victim's death (§ 12022.53, subds. (b), (c), (d)). (1CT 58-61.) Mr. Schuller pled not guilty by reason of insanity. (2RT 281-287.)

During the guilt phase of his trial, the jury found Mr. Schuller guilty of first-degree murder and found the firearm allegation true. (2RT 405, 535-536.) At the close of the sanity phase, the jury was deadlocked. The trial court dismissed the jury, and a new sanity phase ensued before a different jury. (2RT 428-429.) Following the second sanity phase trial, the jury found Mr. Schuller to have been legally sane at the time of the offense. (3CT 660-661, 664.)

Thereafter, the trial court sentenced Mr. Schuller to state prison for 50 years to life, consisting of 25 years to life for the offense plus 25 years to life for the firearm enhancement. (3CT 818-819.)

Mr. Schuller appealed. On appeal, he argued that the trial court prejudicially erred by denying his request for an instruction on imperfect self-defense voluntary manslaughter. In its

[1] Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

published opinion, the Court of Appeal agreed that the trial court erred because there was substantial evidence supporting the instruction. However, it rejected Mr. Schuller's argument that the error was of federal constitutional dimension, held it was a violation of state law only, and found the error harmless under *Watson*. (App. A.)

Mr. Schuller filed a petition for rehearing, relying on *inter alia Dominguez* and *Thomas* to contend that the court should have applied the *Chapman* test. The Court of Appeal issued an order modifying its opinion, in which refused to follow those cases but concluded that the error was harmless even under *Chapman*. (App. B.)

STATEMENT OF FACTS[2]

A. Prosecution

In 2016, W.T. lived on Banner View Drive in Grass Valley in the bottom of a two unit residence; his adult daughter, Heather, lived above him. (2RT 518, 521-522; 3RT 561-562.) During the evening of March 20, 2016, a neighbor, Jesse McKenna, noticed Mr. Schuller's white Chrysler sedan parked by W.T.'s unit. (2RT 525-526, 530.) Mr. Schuller had been a friend of W.T. and had lived with him the previous summer, but Mr. McKenna had not seen his car there for "at least a month." (2RT

[2] Because the instant appeal concerns only an instructional error that occurred during the guilt phase, Mr. Schuller limits his discussion of the facts to the evidence presented during that phase. He addresses the sanity phase in the arguments below only to the extent it is relevant to his instructional claim.

522-526; 3RT 553, 562-563.) At some point, W.T. mentioned to Mr. McKenna that he told Mr. Schuller he was not welcome there anymore but never told Mr. McKenna why.[3] (2RT 542, 553.)

At about 9:00 p.m. on March 20, Mr. McKenna and Heather heard gunshots coming from W.T.'s unit followed by a loud sound that physically shook the building. (2RT 526, 528; 3RT 567, 569-570.) Mr. McKenna recalled he heard upwards of 10 shots followed by a brief pause long enough to reload and then 3 additional shots. (2RT 528-529.) Heather called down to her father repeatedly, but he did not answer. (3RT 570.) Then Mr. Schuller's Chrysler sped away. (2RT 528, 530-531; 3RT 569, 571.)

Mr. McKenna went to W.T.'s unit. (2RT 536.) Upon his arrival, he observed a fire inside. He opened the exterior doors leading to the kitchen and dining area and found W.T. lying on the floor and engulfed in flames, and the room was filled with smoke. (2RT 537-538.) A 911 call was made, and Mr. McKenna used a fire extinguisher to put out the flames. (2RT 537-538; 3RT 572-573.) Mr. McKenna also found the stove's four gas burners lit and gas emanating from the open oven. He turned off the burners and gas and left the residence. (2RT 539; 3RT 574.)

Law enforcement and fire personnel arrived at the scene shortly thereafter. (2RT 479-483, 485, 500-505; 3RT 650.) W.T.'s charred and deceased body was on the floor between the kitchen

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[3] Around late December 2015, Mr. Schuller told Mr. McKenna that he was gay, (2RT 544-546.) Mr. McKenna believed W.T. was not gay but said nothing during his testimony suggesting W.T. did not want Mr. Schuller around due to his sexuality. (2RT 542, 545, 553.)

and dining room areas and surrounded by a large pool of blood. (2RT 488, 507; 3RT 658.) He had sustained nine gunshot wounds to the left side of his head, which caused his death. (4RT 845-847.) The burns to his body were post mortem. (4RT 834-835.) The fire damage was consistent with pouring gasoline on the body and igniting it, and a small red gasoline can was on the dining room table and an acetylene torch was in the living room. (2RT 492; 3RT 655, 658-659, 690.) The loud sound that rattled the structure could have been the result of the ignition of the gasoline's vapors. (3RT 660.) And the gas from the open oven and lit burners were capable of accelerating the fire and resulting in a serious explosion within the residence. (3RT 656-657.)

Also on the dining room table was a "large kitchen knife," a handgun case, and an empty handgun magazine. (3RT 583-584, 710, 736, 751-752.) Thirteen expended bullet cases from a semiautomatic handgun were on the floor around W.T.'s body. (2RT 488-490, 508; 3RT 684; 4RT 845-847.) Blood splatter was found on the floors and walls but not on the knife. (3RT 710; 5RT 1332.) W.T.'s cell phone was found at the scene too, and it had a bullet hole in it. (3RT 710, 736, 752.)

In a bathroom, officers discovered that the shower was running, and there were dark smudges around the bottom of the shower. (2RT 514.) A towel was found there too and collected. (4RT 889.)

Meanwhile, Nevada County Sheriff's Deputy Brian Condon located Mr. Schuller driving his Chrysler away from W.T.'s home. (3RT 621-623.) After a high-speed pursuit that covered 38 miles

and lasted an hour, law enforcement personnel were able to force the car to stop. (3RT 593-594, 624-634.) Mr. Schuller did not initially comply with efforts to get him to exit the vehicle but eventually did and was taken into custody. (3RT 597-598, 635.)

In the car, police found the semiautomatic handgun that discharged the expended cases found at the scene and the bullets that killed W.T.; the gun belonged to Mr. Schuller. (3RT 606-608, 720, 729-733.) A live round was in the chamber, and six bullets were in the magazine. The magazine was capable of holding 10 rounds, and the gun could hold an additional round in the chamber. (3RT 721, 750.)

Mr. Schuller's palm print was found on the gas can. One of his fingerprints was also found on a beer bottle located on the dining room table of W.T.'s unit. (3RT 784-786.) The bath towel in the unit had Mr. Schuller's blood on it. (3RT 805-806.) His DNA was also found on the handgun and acetylene torch. (3RT 807-812.) W.T.'s blood was found on Mr. Schuller's pants. (3RT 813-816.)

B. Defense

1. Background Information

In 2013, when he was 32 years old, Mr. Schuller moved from Nebraska to Grass Valley for a short-term job. (4RT 1036, 1039-1040, 1043.) Once there, he met and befriended W.T. (4RT 1040-1042.) W.T. was a marijuana farmer, and Mr. Schuller began selling marijuana for him. (4RT 1041, 1044.) Over the next couple of years, Mr. Schuller lived with or stayed at W.T.'s place

sporadically and, when not staying with W.T., would still hang out with him there. (4RT 1044-1045, 1046-1050.)

At some point in early 2016, Mr. Schuller was involved in a vehicle accident and suffered a head injury. (4RT 1061; 5RT 1354.) In the aftermath of the accident, he began seeing and speaking to dead people. (4RT 1062-1063.) He already had a long history of hallucinatory experiences and delusional thoughts that began as a child. (4RT 1063, 1065-1072.) After the accident, Mr. Schuller also began seeing what he referred to as "the light." He believed it was a gift from God that protected him and, when shared with others, could change people for the better. He told W.T. about it. (4RT 1084-1088.)

Stephen Smith worked at a bar that Mr. Schuller frequented. He noticed that Mr. Schuller's demeanor changed after the accident. Mr. Schuller had been quite jovial before the event but subsequent to it was not getting along with other patrons, to the point Mr. Smith would have to ask him to leave. Mr. Smith also observed him talking to people who were not there. (5RT 1350-1351.)

2. Trip to Nebraska

In March 2016, Mr. Schuller drove to Nebraska in response to voices in his head directing him to perform an operation there. (4RT 1077-1078.) The voices directed him in everything, including making music selections, setting the radio volume, whether to smoke, and when to stop and get out of the car. (4RT 1080, 1082.) He believed the voices were real, and they stressed him out and scared him. (4RT 1081-1083.)

While in Nebraska, Mr. Schuller visited with his sister, Jennifer Schuller, several times between March 6 and 13. (5RT 1292-1294.) Jennifer was concerned about her brother's behavior. He was not tracking conversations properly and seemed to be experiencing auditory and visual hallucinations. For example, in the middle of a conversation, he would pause and say, "They are telling me to shut the fuck up." When she would ask him who, he would respond the government or the "people following me." That happened several times during the week, and she had never seen that behavior in him before. (5RT 1295.)

Mr. Schuller claimed to see and talk to snipers. (5RT 1296.) He said that, when he had his vehicle accident, "they placed a chip" in his head to track him via satellite. (5RT 1296-1297.) He also believed "they" could track him by other items, such as his car, clothes, money, phone, debit card, and anything else he carried on his person. (5RT 1297.) At some point during the trip, Mr. Schuller discarded his identification cards, debit and credit cards, and cellular telephone. (4RT 1098-1099.) Mr. Schuller told his sister that the accident was a set up and that even the police in Omaha were trying to set him up. (5RT 1297.)

To Jennifer, 90 percent of her brother's behavior was irrational; only about 10 percent of it reflected clarity. (5RT 1298.) He seemed to be in fear for his life and was not sleeping much. (5RT 1296-1298.) He was also uncharacteristically aggressive. (5RT 1299.)

Jennifer last saw her brother on Sunday, March 13. (5RT 1293.) Over the next several days, she heard from friends that

Mr. Schuller was getting worse. She tried to contact him on March 19 and 20 but to no avail. Because he seemed like he was losing touch with reality, she filed a missing person's report with the local police. (5RT 1299-1300.)

During the trip, Mr. Schuller began seeing and hearing people that he believed were trying to kill him, but he also believed that the "light" protected him. (4RT 1089-1098, 1100-1101.) Among those targeting him were police officers, who he believed were working for Satan. (4RT 1102-1107.) Mr. Schuller also began to see dark shadows coming out of the ground to grab people. (4RT 1097, 1100.) These experiences prompted him to want to return to California. (4RT 1100.) As he proceeded west, he encountered numerous situations at gas stations in Nebraska, Wyoming, Utah, and Nevada in which people shot at him but he was protected. (5RT 1111-1126.) He did not sleep at all on the return trip and also did not use drugs, though he had a history of extensive drug use that he claimed reduced his hallucinations. (4RT 1067-1069; 5RT 1123.)

3. Winnemucca Interaction

On Saturday, March 19, 2016, Officers Daniel Klassen and Joel Martin of the Winnemucca Police Department in Winnemucca, Nevada were on patrol when dispatched to a gas station. They had received reports of a suspicious person and reckless driver. (5RT 1268-1270, 1279-1281.) The gas station was adjacent to and shared a parking lot with a hotel. Mr. Schuller's Chrysler fit the description of the one reported to police and was

parked in the lot. (5RT 1269.) The officers' body cameras recorded the events that followed. (5RT 1270-1272.)

Because nobody was in the car, the officers proceeded into the hotel lobby, where they found Mr. Schuller on the telephone. They asked to speak with him outside. (1SCT 1.) On the way outside, Officer Martin stepped on an aluminum strip at the bottom of the lobby doorway, producing a loud popping sound. (5RT 1273, 1281; 1SCT 1-2.) Mr. Schuller responded that that was the sound of a "gunshot right behind my head" and accused the officers of trying to "hurt" and "attack" him. (1SCT 3.) The officers denied that. (1SCT 4.) The officers said they had received a report that Mr. Schuller had been driving recklessly, and Mr. Schuller denied the accusation. They asked for his identification, but he could not produce any, although he gave them his name. (1SCT 3-4.) The officers indicated they thought he was refusing to produce identification because he was afraid of an outstanding warrant. Mr. Schuller denied that as well and said, "I'm worried about you guys weakening my army to kill me." (5RT 5.) He again claimed the sound in the doorway was a gunshot and demanded to see the body camera footage. (5RT 6.)

Mr. Schuller explained he did not have any identification because he went through a "cleanse moment," which prompted him to get rid of his cell phone, wallet, identification and other items. (1SCT 19; 5RT 1285.) He gave the officers his date of birth and driver's license number, and the officers were able to confirm his identity. (1SCT 7.)

During the interaction, Mr. Schuller kept moving around, which made the officers nervous. (1SCT 5, 15; 5RT 1274-1275.) He was also talking a little slow and could not recall his last stop. (1SCT 8-9.) The officers did not smell alcohol or marijuana on him and did not observe any signs warranting a field sobriety test. (5RT 1274-1275, 1281, 1284.)

Mr. Schuller told the officers it felt like they were attacking him and said something about the "police and agencies of the world are letting Satan" do something, but the thought was unintelligible. He asked the officers if they were Christian and believed in and had a relationship with Jesus. (1SCT 11; 5RT 1273-1275.) At some point later, Mr. Schuller mentioned the antichrist, who he said had been "painted" as a "fake miracle performer and a fake light." He also talked about the second coming. (1SCT 17; 5RT 1274.) In addition, Mr. Schuller claimed that three men "in there" had been trying to attack him in the throat with needles. (1SCT 12.)

The officers informed Mr. Schuller that his car matched the description of one involved in an incident and that they were going to search it. (1SCT 13-14.) Mr. Schuller suggested they might be planting something. (1SCT 14.) Officer Klassen said the search would be on video, but Mr. Schuller pointed out they would not give him the video of the gunshot so why should he believe they would give him the video of the search. (1SCT 14-15.) The search of the car produced nothing. The officers subsequently searched Mr. Schuller, which also produced nothing. (1SCT 19-20; 5RT 1283-1284.) The encounter lasted about 55 minutes.

(5RT 1283.) After the encounter, the officers let Mr. Schuller go. (5RT 1275.)

4. Incident

Mr. Schuller returned to California on Sunday, March 20, 2016. (5RT 1124, 1127.) He believed that, to end all the threats against him, he had to go to Monterey Bay, put one foot in the sea, and say a prayer. (5RT 1125.) However, upon his return, he went first to W.T.'s residence, arriving at about 5:30 p.m. (5RT 1124, 1127.) Mr. Schuller told W.T. about the trip. The two men also drank beers and ingested marijuana. (5RT 1129-1130.)

With W.T.'s permission, Mr. Schuller took a shower. (5RT 1129, 1131.) While showering, he heard five subtle gunshots, looked out of the shower, and saw a misty figure. He asked if W.T. had shot at him, and W.T. seemed confused. (5RT 1132.)

After the shower, W.T. asked Mr. Schuller to get rid of a gun that Mr. Schuller had been storing at the residence. Mr. Schuller agreed and put it on the kitchen table so he could take it with him when he left. (5RT 1133-1135.)

Before Mr. Schuller could leave, W.T. asked him to "share the light" with him, and Mr. Schuller did. (5RT 1135.) W.T. mentioned something about having a fondness for children, and Mr. Schuller thought sharing the light with him would cleanse him of his evilness. (5RT 1139.) However, this time, something unusual happened. (5RT 1135.)

Normally "the light" returns to Mr. Schuller after he shares it. On this occasion, W.T. kept it, smiled, looked outside, and said to someone, "See, I told you I could take it from him." (5RT 1135-

1136.) Then W.T. got a knife from the kitchen, pursued Mr. Schuller, and tried to stab him. (5RT 1136-1137.) Mr. Schuller attempted to flee through the exterior doors, but they would not open. (5RT 1137.) Mr. Schuller asked W.T. if he was Lucifer, and W.T. nodded yes. W.T. then went for the gun on the table while raising the knife, but Mr. Schuller grabbed the gun first and pulled the trigger, shooting W.T. in the head. (5RT 1138.) W.T. fell to the ground and dropped the knife but then began to get back up. In response, Mr. Schuller fired at him repeatedly. (5RT 1138-1139.)

W.T. had tried to stab Mr. Schuller one time in the past, but Mr. Schuller did not take it seriously at the time. On this occasion, though, he was afraid for his life. (5RT 1140-1141.) He also thought that, if W.T. was Lucifer, the end of the world might be coming. (5RT 1142-1143.) Then, W.T.'s teeth flew out at Mr. Schuller, causing him fear. Mr. Schuller shot W.T. again, emptying the gun. (5RT 1144.) He then reloaded the weapon with a fresh magazine. (5RT 1144-1145.) Meanwhile, W.T.'s telephone kept ringing and would not stop, so Mr. Schuller shot at it repeatedly. (5RT 1145.)

Mr. Schuller was about to leave when he saw Mr. Tackett's body convulsing and demons swirling around and leaving and going back into the body. He noticed a gas can nearby and decided to send the demons back to hell by lighting them on fire. He poured the gasoline on the body, lit a cigarette, and used the lit cigarette to ignite the fuel. (5RT 1145-1147.) The stove's burners were already on; W.T. used them to warm the house.

Before leaving, Mr. Schuller attempted to turn them off, including by turning the center dial, which was for baking. However, he was in a panic and may not have done it correctly. (5RT 1150.)

Mr. Schuller then decided to drive to Monterey. (5RT 1148.) He had hoped to get there by sunrise. (5RT 1148.) While en route, police tried to stop him. (5RT 1151-1152.) Eventually, the police were successful and took him into custody. (5RT 1153-1156.)

During the subsequent investigation, police spoke to Mr. McKenna. Mr. McKenna said that W.T. had told him he did not want Mr. Schuller around anymore because Mr. Schuller was "crazy." Mr. McKenna told the police that he thought Mr. Schuller was a nice guy but had a screw loose. (5RT 1334-1336.)

C. Prosecution's Rebuttal

Dr. Kevin Dugan, a forensic psychologist, was appointed by the court to evaluate Mr. Schuller. (6RT 1387-1402.) Dr. Dugan believed there was data suggesting Mr. Schuller was "exaggerating or feigning psychiatric distress." (6RT 1407-1415.) However, witness reports from Nebraska and the Winnemucca incident, all of which predated the killing, were cause for "some concern" and showed Mr. Schuller was "not functioning very well," was "impaired," and was demonstrating "bizarre" and "disturbed behavior." (6RT 1410-1418.) On the other hand, the doctor believed the destruction of the body and effort to evade capture showed he "knew what he did was wrong." (6RT 1418.) Dr. Dugan did not believe Mr. Schuller suffered from "a

qualifying mental health disorder" and believed that his extensive drug use could cause hallucinations. (6RT 1419-1420.) The doctor also noted Mr. Schuller had a history of "aggressive violent substance abusing and criminal conduct" and the killing was consistent with that history. (6RT 1421.)

Dr. Deborah Schmidt, also a forensic psychologist appointed to evaluate Mr. Schuller, believed he was malingering or exaggerating his mental health condition and symptoms. (6RT 1449-1452, 1462.) She also believed his effort to destroy the body and evade police showed he knew what he did was wrong or illegal. (6RT 1462-1463.) His extensive history of substance abuse could have caused him to hallucinate. (6RT 1455-1456, 1460.) However, Dr. Schmidt also concluded that, despite Mr. Schuller's claims of hallucinations, he described the shooting as a response to the victim attacking him with a knife, suggesting he acted to protect himself rather than because of any hallucinations. (6RT 1459-1460.)

ARGUMENTS

I.

THE COURT OF APPEAL ERRED BY CONCLUDING THE FAILURE TO INSTRUCT ON IMPERFECT SELF-DEFENSE WAS AN ERROR OF STATE LAW ONLY THAT REQUIRED PREJUDICE TO BE ASSESSED UNDER *WATSON*

During the guilt phase of Mr. Schuller's trial, the trial court refused to give the jury an instruction on voluntary manslaughter based on imperfect self-defense as a lesser-included offense of murder. (6RT 1510.) The court reasoned that Mr. Schuller was not entitled to the instruction because his asserted belief in the need to defend himself from W.T. was purely delusional. (6RT 1505-1507; see *People v. Elmore* (2014) 59 Cal.4th 121, 130 [imperfect self-defense not available to a defendant "when belief in the need to defend oneself is entirely delusional" because the lesser offense must be premised upon "a mistake of *fact*"].) Mr. Schuller challenged that conclusion on appeal.

Citing Mr. Schuller's claim that W.T. attacked him with a knife while reaching for the gun, the Court of Appeal held the trial court erred because Mr. Schuller's "account pertaining to the actual shooting was not *entirely* delusional and thus provided substantial evidence of an actual but unreasonable belief in the need for self-defense." (App. A [Opn., at pp. 12, 15], emphasis in original; see *Elmore, supra,* 59 Cal.4th at p. 146 ["defendants who mistakenly believed that actual circumstances required their

defensive act may argue they are guilty only of voluntary manslaughter, even if their reaction was distorted by mental illness"]; *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409 [a defendant's uncorroborated statement that he needed to defend himself from what he thought was a weapon, even if his perception was affected by a mental disability, provides the "'objective correlate'" necessary to support a claim of imperfect self-defense].) However, the Court of Appeal found the error harmless. (App. B [Opn., at pp. 18-20, as modified by Order Modifying Opinion and Denying Petition for Rehearing].) Citing *Gonzalez, supra,* 5 Cal.5th at pages 195-196 and *Breverman, supra,* 19 Cal.4th at page 149, the court held that the failure to instruct on any lesser included homicide offense is an error of state law only and that prejudice is therefore to be analyzed under the test announced in *Watson, supra,* 45 Cal.2d at page 836. (App. B.) Mr. Schuller respectfully submits that the court was incorrect.

A. Thomas and Dominguez: Chapman Applies

The 2013 analysis by Division Three of the First Appellate District in *Thomas, supra,* 218 Cal.App.4th 630 persuasively shows that, where the lesser included offense is voluntary manslaughter, the erroneous failure to instruct on it is a violation of the federal Constitution and thus requires that prejudice be assessed under the *Chapman* test. At issue in *Thomas* was the failure to give a requested instruction on provocation sufficient to reduce murder to heat of passion voluntary manslaughter. (*Id.* at

pp. 641-642.) The court likened the instructional omission to a "mistaken instruction on malice as an element of murder." (*Id.* at p. 641.) The court noted that, when heat of passion is put in issue, "the federal due process clause requires the prosecution to prove its absence beyond a reasonable doubt." (*Id.* at p. 643, citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 44 L.Ed.2d 508].) It observed that this court has held the absence of "sufficient provocation" for heat of passion becomes an element of malice that the prosecution must prove. (*Ibid.*, citing *People v. Rios* (2000) 23 Cal.4th 450, 461-462.) It then relied on the settled principle that "'[j]ury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution.'" (*Id.* at p. 644, quoting *People v. Flood* (1998) 18 Cal.4th 470, 491.) Accordingly, it held that it must "apply the test articulated in *Chapman*" to determine whether the instructional omission was prejudicial. (*Id.* at pp. 633, 641, 644.)

Just five months ago, in *Dominguez, supra,* 66 Cal.App.5th 163, Division One of the Fourth Appellate District followed the *Thomas* court's lead. As in *Thomas*, the court in *Dominguez* held there was substantial evidence of provocation to support an instruction on heat of passion voluntary manslaughter. (*Id.* at pp. 175-183.) Regarding the standard for assessing prejudice, it found *Thomas*'s reasoning "straightforward" and "persuasive" and held too that *Chapman* governed. (*Id.* at pp. 183-184.)

Like a claim of heat of passion, a properly raised claim of imperfect self-defense imposes upon the prosecutor the burden of proving beyond a reasonable doubt the absence of an actual belief in the need to defend oneself to establish malice. (*Rios, supra,* 23 Cal.4th at p. 462.) That requirement is contained in the standard instruction on that theory of voluntary manslaughter. (See CALCRIM 571 ["The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder"].) The failure to give that instruction where the defendant is entitled to it is tantamount to failing to instruct accurately or thoroughly on malice, an essential element of malice murder. As *Thomas* noted, such an error violates a defendant's federal constitutional right to due process and thus must be assessed for prejudice under *Chapman*. (See *People v. Larsen* (2012) 205 Cal.App.4th 810, 829 ["An instructional error that relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense, or that improperly describes or omits an element of an offense, violates the defendant's rights under both the United States and California Constitutions, and is subject to *Chapman* review"].)

Significantly, in declining to follow *Thomas* and *Dominguez*, the Court of Appeal in this case did not find fault with their reasoning. (App. B.) In fact, about 20 months ago, in *Hampton, supra,* 48 Cal.App.5th at pages 481-482, the *Schuller* court had the opportunity to do so and did not then either,

instead distinguishing that case from *Thomas* and even going so far as to hold that in its view *Thomas* "'did not create a new rule of law.'" In this case though, rather than counter the reasoning in *Thomas* and *Dominguez*, the *Schuller* court merely implied that they were inconsistent with this court's jurisprudence, which it was bound to follow. (App. B.) Mr. Schuller disagrees. To date, this court has not answered the question raised by this case—i.e., whether the erroneous omission of an instruction on a lesser-included offense that modifies the definition of malice is a violation of state or federal law in a malice murder prosecution.

B. Breverman and Gonzalez: Distinguishable Authorities

Neither of the two Supreme Court cases on which the *Schuller* court relied are controlling. The first of those cases to be decided was *Breverman, supra,* 19 Cal.4th 142. In *Breverman*, this court held it was error for the trial court not to instruct *sua sponte* on voluntary manslaughter based on heat of passion. (*Breverman, supra,* 19 Cal.4th at pp. 148-149.) It then held that the *Watson* test should be applied to assess whether the error was harmless and remanded the case to the Court of Appeal "for an evaluation of prejudice" under that standard. (*Id.* at p. 149.)

At first blush, that holding would appear to settle the issue. After all, both heat of passion and imperfect self-defense "reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice" and thus "the complete definition of malice" that the prosecution must prove includes "the absence of both heat of passion and unreasonable

self-defense." (*Breverman, supra,* 19 Cal.4th at p. 154; see also *id.*, at p. 189 (dis. opn. of Kennard, J.).)

However, in a footnote, the *Breverman* majority expressly declined to decide whether the erroneous omission of a voluntary manslaughter instruction was of federal constitutional dimension on the ground it resulted in an incomplete definition of malice and thus relieved the prosecution of its burden to prove that mental state. (*Breverman, supra,* 19 Cal.4th at p. 170, fn. 19 [observing the issue had not been presented to it for consideration].) Following that decision, this court repeatedly observed it yet to answer that precise question. (*People v. Moye* (2009) 47 Cal.4th 537, 558, fn. 5 [declining to decide the issue because the defendant did not raise it]; *People v. Lasko* (2000) 23 Cal.4th 101, 113 [explaining that *Breverman* "declined to consider whether [the] error violated the federal Constitution by giving the jury an incomplete definition of malice"].)

Then, in 2018, this court issued its decision in *Gonzalez*. *Gonzalez* stated the general rule that the "failure to instruct on lesser included offenses supported by substantial evidence [is] state law error," the statement on which the *Schuller* court relied most heavily. (*Gonzalez, supra,* 5 Cal.5th at p. 196; App. B.) However, that does not end the inquiry. *Gonzalez* does not address the precise question raised by this case.

In *Gonzalez*, the defendants were found guilty of first degree felony murder, the only murder theory presented to the jury, and the jury also found true the special circumstance allegation that the murder was committed during a robbery.

(*Gonzalez, supra,* 5 Cal.5th at p. 191.) The defendants argued they were entitled to instructions on malice murder and *its* lesser-included offenses as well as the defenses of self-defense and accident. (*Id.* at p. 195.) The court assumed without deciding that there was substantial evidence supporting the requested instructions. (*Id.* at pp. 197-198.) The question before the court was thus whether the special circumstance finding rendered harmless any error in failing to instruct on those crimes. (*Id.* at p. 195.)

Gonzalez observed that "[w]hether an error proves harmless or not depends on the kind of error at issue" and relied on *Breverman* when repeating the general principle that the failure to instruct on a lesser-included offense is "state law error." (*Gonzalez, supra,* 5 Cal.5th at pp. 195-196.) But as noted, *Breverman* left open the question whether the omission of a lesser-included offense instruction that adds elements to the definition of malice in a malice murder case violates the federal Constitution, a question that it held had to be expressly raised to warrant consideration. There was nothing in *Gonzalez* that indicated the defendants expressly presented that question or that this court intended to settle that question. And that makes sense because *Gonzalez* was not a malice murder prosecution but a felony murder one.

In rejecting the application of the *Chapman* test, *Gonzalez* noted that the issue before it—namely the failure to instruct on malice murder, "an *alternative* theory" that would have "allowed [the jury] to convict defendants of the *same crime*"—was

"categorically different" from "the failure to instruct on the *elements* of an offense." (*Gonzalez, supra,* 5 Cal.5th at pp. 198-199, emphasis in original.) That logic is unmistakable and serves to distinguish *Gonzalez* from this case. Malice murder, the omitted theory, does not modify the definition of an element of felony murder, the theory on which the jury based its guilty verdict, such that the instructional omission relieved the prosecutor of its burden of proving all the elements of the crime. But in a case in which the defendant is convicted of malice murder, omitting a required voluntary manslaughter instruction does just that, as discussed above. In such a context, omitting the lesser-included offense instruction is *categorically the same* as failing to instruct on an element of the offense.

Perhaps most significantly, this court observed in *Gonzalez* that it had yet to decide whether the failure to instruct on a requested affirmative defense, such as self-defense, was federal constitutional error and observed it "need not decide that issue here." (*Gonzalez, supra,* 5 Cal.5th at p. 199.) The court reasoned that if the failure to instruct on malice murder was harmless, then the failure to instruct on defenses was as well. (*Ibid.*) And it ultimately found the omitted malice murder instruction to be harmless error. (*Id.* at p. 200.) Under that same logic, the failure to instruct on any other offenses necessarily included in malice murder, such as voluntary manslaughter, was necessarily harmless too. Thus, again, the court was not called upon to answer the question whether the failure to instruct on voluntary

manslaughter in a malice murder case was federal constitutional error.

The court's discussion of self-defense is particularly relevant here because the issue presented in this case is much more akin to the failure to instruct on self-defense than the failure to instruct on an alternative theory of murder. Like imperfect self-defense, the prosecution typically has the burden to prove a defendant did not act in self-defense beyond a reasonable doubt when that defense is properly raised. (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 571; *People v. Adrian* (1982) 135 Cal.App.3d 335, 340-342.) It would be illogical to find that *Gonzalez* settled the question whether an omitted *imperfect self-defense* instruction was federal constitutional error when it expressly declined to decide whether the failure to instruct on *perfect self-defense* was.

The procedural history in *Thomas* further supports the idea that the general principle announced in *Breverman* and repeated in *Gonzalez* does not govern the issue in this case. That history was summarized by the Court of Appeal in *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 11451146 as follows:

> When the defendant in *Thomas* first appealed, the Court of Appeal affirmed his conviction of second degree murder by relying on *Breverman* and concluding in a nonpublished opinion that the trial court's failure to give a requested heat-of-passion instruction was harmless under *Watson, supra*, 46 Cal.2d 818. (*Thomas, supra*, 218 Cal.App.4th at p. 633; *People v. Thomas* (May 16, 2012, A129933) [nonpub. opn.].) Our Supreme Court granted the defendant's petition for review and remanded the case back to the Court of Appeal "with directions to

> address defendant's contention that the trial court's refusal to instruct on heat of passion voluntary manslaughter constituted federal constitutional error." (Supreme Ct. mins., *People v. Thomas*, Aug. 29, 2012, S203557, p. 1518.) Acting on this remand, the Court of Appeal then reversed the defendant's conviction of second degree murder by concluding that the failure to give a heat-of-passion instruction was a federal constitutional error subject to review under *Chapman*. (*Thomas, supra*, 218 Cal.App.4th at pp. 633, 642–644.) The Attorney General's petition for review of the revised *Thomas* decision was denied. (Supreme Ct. mins., *People v. Thomas*, Oct. 30, 2013, S213262, p. 1794.)

Thus, the holding in *Thomas* certainly seems compatible with this court's opinions in *Breverman* and now *Gonzalez*.

C. Conclusion

No doubt this court used generalized language in *Breverman* and *Gonzalez* that, viewed in isolation, would appear to apply to the error in this case. However, a more thorough review of those cases reveals that the question presented in this case has not yet been decided by this court. Given the confusion generated by the type of generalized language used by the court in *Breverman* and *Gonzalez* and the resulting split of authority it has now triggered in the Court of Appeal, and in light of the statewide importance of resolving this issue, review should be granted.

II.

THE COURT MISAPPLIED THE TEST IN *CHAPMAN* IN CONCLUDING THAT THE ERROR WAS HARMLESS

Next, the Court of Appeal found that, even under *Chapman*, the error in this case was harmless because it believed the evidence that Mr. Schuller was guilty of murder was "overwhelming." (App. B.) As support, it cited the following evidence and inferences that it drew from that evidence: (1) Mr. Schuller failed to assert self-defense shortly after he was apprehended; (2) two psychologists believed that he "appeared to be malingering;" (3) a detective believed that he seemed lucid in jail calls; (4) he attempted to destroy the body and fled the scene without summoning help, which the Court of Appeal believed was inconsistent with his self-defense claim; (5) he provided internally inconsistent testimony regarding the gun and W.T.'s attempt to take it; (6) the knife was found on the table rather than the floor and did not have blood splatter on it; and (7) he shot W.T. in the head nine times, which the court believed was "indicative of a personal motive, rather than panicked self-defense." (App. B.) Mr. Schuller submits that the Court of Appeal misapplied the *Chapman* test. It improperly focused on isolated pieces of evidence favorable to the prosecution, drew its own inferences from that evidence to find Mr. Schuller's self-defense claim incredible, and ignored other evidence that supported the defense. Proper application of the *Chapman* test demonstrates that the instructional omission was not harmless.

A. Chapman Test

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra*, 386 U.S. at p. 24; accord, *People v. Aledamat* (2019) 8 Cal.5th 1, 9.) *Chapman* expressed concern that, in finding constitutional errors harmless, California courts were placing too much emphasis on what they considered overwhelming evidence in support of the verdict. (*Id.* at p. 23.) To correct the problem, the court focused the test on whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24; accord, *Yates, supra,* 500 U.S. at p. 403.)

> To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

(*Yates*, at p. 403.)

That is not to say that overwhelming evidence of guilt is irrelevant. For example, where an instruction omits an element of the offense—a situation analogous to the error in this case (see Argument I, *ante*)—*objectively* overwhelming evidence of the omitted element is a valid consideration. As the United States Supreme Court has explained, when "the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder v. United States* (1999) 527 U.S. 1, 17 [119 S.Ct. 1827, 144 L.Ed.2d

35], emphasis added.) In that case, the error could not have possibly "'contribute[d] to the verdict obtained.'" (*Ibid*.) On the other hand, "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," the reviewing court "should not find the error harmless." (*Id.* at p. 19.)

B. Discussion

Two version of events were presented to the jury in this case. Under the prosecution's version, Mr. Schuller killed W.T. willfully, deliberately and with premeditation (see 2CT 483), and his claim that he killed W.T. in self-defense while in the throes of a delusional state was feigned. This was the version the Court of Appeal found overwhelmingly believable. But the omitted element—the absence of imperfect self-defense—*was* contested. It was the basis for the other version of events presented to the jury—that, while in a delusional state, Mr. Schuller believed W.T. was attacking him with a knife and attempted to take the gun, prompting Mr. Schuller to shoot him repeatedly in self-defense. Despite there being some evidence, as cited by the Court of Appeal, that arguably supported the prosecution's version, there was also ample evidence supporting Mr. Schuller's version that the Court of Appeal ignored entirely.

Perhaps the most significant evidence supporting Mr. Schuller's defense was the overwhelming independent evidence that he was suffering from delusions that made him aggressive and afraid for his life prior to and leading up to the killing of

W.T. Mr. Schuller claimed that, while his delusions started in childhood, they became more significant after his 2016 motor vehicle accident. (4RT 1061.) Bartender Stephen Smith corroborated that claim, testifying about the accident and about seeing Mr. Schuller with "his head taped up" afterwards. (5RT 1354.) According to Mr. Smith, after the accident and shortly before the shooting, he noticed Mr. Schuller's demeanor change such that he was more aggressive with others and would talk to people who were not there. (5RT 1350-1351, 1353.)

Mr. Schuller's sister testified that he visited her several times between March 6 and 13 and was noticeably irrational and aggressive, was experiencing hallucinations, and was acting afraid for his life. (5RT 1292-1299.) She was so concerned that he was losing his grip on reality that, when she could not contact him on March 19 and 20, she filed a missing person's report with local police in Nebraska. (5RT 1299-1300.)

The March 19 encounter with the two Winnemucca police officers was perhaps the most significant evidence. It occurred just one day before the shooting. It was also highly credible evidence of his mental state at that time because the event was captured on video by both officers' body cameras, the recordings were played for the jury, and the officers who experienced the event testified about it. (5RT 1270-1273, 1281.) The evidence of the incident showed that, at the time, Mr. Schuller believed the police were in league with Satan, interpreted a popping sound from a doorway as an attempt by police to shoot him, and asserted that three men in the hotel tried to attack him with

needles. (1SCT 1-6, 11-12; 5RT 1273, 1281.) This was strong evidence that Mr. Schuller's mental state could lead him to misinterpret actual innocuous events—e.g., the loud popping sound of the metal doorway threshold—as life threatening.

The Court of Appeal ignored all of this independent and credible evidence of his mental condition. But in light of that evidence, a conclusion that Mr. Schuller was faking his condition would require believing that he had been doing so for months leading up to the shooting and so convincingly that he fooled Mr. Smith, his sister, and two police officers.

A significant flaw in that logic is that it is unclear why he would do so. His motive for committing a willful, deliberate and premeditated shooting was unclear. At trial, there were some vague and speculative suggestions that it may have had something to do with Mr. Schuller's sexuality. For example, Mr. McKenna testified that several months before the shooting, Mr. Schuller admitted being gay, that W.T. was not gay, and that shortly before the shooting, W.T. had told Mr. McKenna that Mr. Schuller was no longer welcome at his house. (2RT 542, 544-546, 553.) However, Mr. McKenna's police interview revealed that W.T. told him Mr. Schuller was unwelcome there not because of his sexuality but because he was "crazy" and had a "screw loose." (5RT 1334-1336.) That is consistent with Mr. Schuller's testimony that, at about the time of the accident, he told W.T. about the "light" (4RT 1084) and supports the view that he was actually delusional. Moreover, Mr. McKenna described Mr. Schuller and W.T. as friends and told police that, despite W.T.'s

view about Mr. Schuller's mental state, W.T. still thought Mr. Schuller was nice and courteous. (2RT 523; 5RT 1336.)

That Mr. Schuller shot W.T. nine times may have been consistent with a personal motive, as the Court of Appeal believed. But as just noted, no evidence of such a motive was presented. Moreover, that act was consistent with Mr. Schuller's claim that he fired repeatedly when W.T. began to get up after being shot in the head and that he shot at W.T. some more when frightened by the man's teeth flying out of his mouth. (5RT 1138-1139, 1144.)

Next, the psychologist testimony that the Court of Appeal believed undermined Mr. Schuller's version of events was not as "overwhelming" as the court suggested. It is true that Dr. Schmidt believed Mr. Schuller was malingering or exaggerating his mental health condition and symptoms. (6RT 1449-1452, 1462.) However, she also concluded that his description of the event suggested he in fact acted to protect himself and was not motivated by hallucinations. (6RT 1459-1460.) That is consistent with imperfect self-defense.

The other psychologist, Dr. Dugan, declined to conclude definitively that Mr. Schuller was feigning his condition. He said that there was data supporting that conclusion but also that the witness reports from Nebraska and the Winnemucca incident, which predated the killing, were cause for "some concern" and showed Mr. Schuller was "impaired" and demonstrating "disturbed behavior." (6RT 1410-1418.)

The physical evidence, to an extent, also corroborated Mr. Schuller's version of events. As noted, Mr. Schuller claimed W.T. attacked him with a kitchen knife and went for the gun on the dining room table, prompting Mr. Schuller to shoot him. (5RT 1136-1138.) Consistent with that story, police found a large kitchen knife and a handgun case on the table. (3RT 583-584, 710, 736.)

The Court of Appeal found the physical evidence was not corroborative of and actually undermined Mr. Schuller's claim because the knife was not on the floor and covered in blood. (App. B.) However, that fact is still consistent with imperfect self-defense. Had the knife been on the floor and splattered with blood, it would have been evidence that in fact W.T. did threaten Mr. Schuller with the knife just before being shot, that Mr. Schuller's stated fear was thus reasonable, and that the shooting was justified as the product of perfect self-defense. But perfect self-defense is not the issue here. The issue is whether Mr. Schuller believed, although *unreasonably*, that his life was in danger based on any objective correlate. The knife and gun case on the dining room table constitute objective correlates of that fear.

Finally, in concluding the error was harmless under *Chapman*, the Court of Appeal found it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (App. B, quoting *People v. Geier* (2007) 41 Cal.4th 555, 608, internal quotation marks omitted.) In other words, it believed that there was no

"reasonable possibility" that a jury would believe Mr. Schuller's version of events if instructed on imperfect self-defense. (App. B, quoting *People v. Reese* (2017) 2 Cal.5th 660, 671, internal quotation marks omitted.)

But it appears at least some of the jurors actually believed Mr. Schuller. At his first sanity phase trial, the jury that decided his guilt was tasked with deciding whether he was legally insane at the time of the crime and was told it could consider "the evidence introduced during the guilt phase" along with any "evidence introduced during the sanity phase." (2CT 495, 498.) The parties relied mostly on the guilt phase evidence. Mr. Schuller supplemented his case with the testimony of Dr. Jason Roof, an expert in forensic psychiatry, who merely concluded what the defense evidence at the guilt phase showed—that Mr. Schuller was suffering from delusional beliefs and was not malingering and that he believed W.T. was going to kill him and shot W.T. to protect himself. (6RT 1615-1616, 1630-1636, 1643-1644.) The jury deadlocked. (2CT 428-429.) Six of the 12 jurors believed the prosecution failed to prove Mr. Schuller's delusional thoughts and fears were feigned and failed to disprove he was acting out of fear for his life. (2CT 429; 7RT 1774A-1775.) The Court of Appeal ignored that fact too, but it showed that not only was it reasonably possible jurors could believe Mr. Schuller but that some of the jurors in his case did. And if only one juror might have been sway to vote to acquit if instructed on imperfect self-defense, the error was necessarily prejudicial. (See *People v. Walker* (2015) 237 Cal.App.4th 111, 118 [prejudice established

where at least one juror would cast a different vote]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [hung jury is more favorable result than guilty verdict].)

That the Court of Appeal may have been able to identify some evidence that it believed overwhelmingly proved Mr. Schuller guilty of murder does not mean the error was harmless under *Chapman*. In fact, the reviewing court's own interpretation of the evidence is not the test. The test is whether one can say beyond a reasonable doubt that the instructional omission did not contribute to the verdict. There was ample evidence that it could have. That is enough to establish prejudice.

CONCLUSION

For the reasons stated above, Mr. Schuller asks this court to grant his request for review.

Dated: December 16, 2021.

Respectfully submitted,

/s/ David L. Polsky

David L. Polsky
Attorney for Mr. Schuller

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.504 of the California Rules of Court that appellant's petition for review in the above-referenced case consists of 8,926 words, excluding tables, as indicated by the software program used to prepare the document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 16, 2021, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

APPENDIX A:

PUBLISHED OPINION OF THE COURT OF APPEAL

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. JASON CARL SCHULLER, Defendant and Appellant.	C087191 (Super. Ct. No. F16000111)

APPEAL from a judgment of the Superior Court of Nevada County, Candace S. Heidelberger, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein, Supervising Deputy Attorney General and Peter H. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Defendant, Jason Carl Schuller, shot his long-time friend, W.T., nine times in the head and set the body on fire. Defendant testified, claiming self-defense, but his trial testimony about what happened leading up to and during the shooting suggested he was delusional and hallucinating. Following a plea of not guilty by reason of insanity, a jury found defendant guilty of first degree murder in the guilt phase. He was ultimately found legally sane and sentenced to an aggregate term of 50 years to life.

On appeal, defendant contends the trial court erred in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense. He maintains substantial evidence demonstrates he had an actual, albeit unreasonable, belief in the need for self-defense that was not entirely delusional. We agree but find the error harmless.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Prosecution's Case

The night of the murder, W.T.'s daughter, who lived in a separate upstairs unit with her kids, heard banging sounds like metal hitting metal coming from W.T.'s residence. She tried calling W.T. and then heard a very loud noise that shook the house.[1] She then saw defendant's car speed off. Her father did not answer her phone calls.

A neighbor testified he heard gunshots coming from W.T.'s residence — a first set of multiple gunshots, "six, ten" and a couple minutes later, a second set of three. He then heard and saw defendant's car speeding off. Seeing smoke coming from the house, the neighbor went inside and found W.T.'s body. After extinguishing the fire, he called 911.

Police dispatched to a report of a drunk driver, ultimately saw and pursued defendant's car for an hour, over a span of 38 miles, running red lights and reaching

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[1] A fire chief testified that this noise was consistent with ignitable liquid being lit and vapor flashing.

speeds of 100 miles per hour. After strip spikes were deployed to puncture the car's tires, defendant kept driving for a mile, but he eventually stopped. After an approximately one- hour-long standoff, defendant surrendered after a SWAT team and an armored vehicle were deployed. He was arrested. The semi-automatic handgun used in the shooting was found in the car.

W.T. sustained nine gunshot wounds to the left side of his face and head and post-mortem burns.[2] Some of the nine head wounds were "quite closely grouped." Thirteen shell casings were found on the floor in the vicinity of the body.[3] A gun case, empty magazine, gas can, and large kitchen knife were found on the kitchen table. There was blood spatter on the walls and floor, but not on the knife. A cell phone belonging to W.T. was found under the table. There was a bullet hole in the phone. The neighbor testified that when he went inside, he could smell gas, the oven door was open, and "the gas was on full," and the burners were on as well.

The neighbor also testified that around January or February, W.T. said he did not want defendant to come around, but did not say why. At some point after that, defendant told the neighbor he was gay and coming out of the closet and he thought his father would be mad at him.[4] The neighbor did not believe W.T. was gay.

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[2] The pathologist testified that five of the head wounds were to the left side of W.T.'s face. The bullet trajectories were from left to right, front to back, some slightly downward and some slightly upward. There was a tenth wound to the head that was probably the result of a ricochet, with a right to left, front to back and downward trajectory. There was also a gunshot wound to the back of his left hand that appeared to have been caused by a bullet that went through W.T.'s head.

[3] The gun found in defendant's car had the capacity of holding 10 rounds plus one in the chamber. When it was found, it was loaded, with one round in the chamber and six in the magazine.

[4] In the prosecution rebuttal case, the neighbor's wife testified that her husband told her defendant said he was gay and coming out at some point before W.T.'s murder.

The Defense's Case

The defense introduced evidence through defendant's own testimony, the testimony of his sister and two police officers who briefly detained him that he was experiencing delusions and hallucinations while in Nebraska and travelling back to California in the weeks before the murder. These included that he was being shot at and attacked with Ninja stars, but was protected by "the light." During his testimony, defendant explained that "the light" was a gift from God that protected him from harm and, when shared with others, would make them better. He also testified that demons were trying to steal the light and misuse it.

Defendant testified that when he returned to California, he went straight to W.T.'s house. Defendant testified that after arriving there, they each drank two or three beers[5] and a couple of shots and took a couple of hits of concentrated THC, while defendant told W.T. about his trip. At one point, defendant shared the light with him. Defendant testified that W.T. looked surprised and said to people outside the window, "Yes, it is him."

Defendant testified that he then took a shower and, while showering, heard five "subtle" gunshots and saw a misty figure. He subsequently asked W.T. if he had shot at him, but W.T. seemed confused and ignored the question.

Later, W.T. brought out a gun and put it in a case by the kitchen table. It was defendant's gun that he had been storing at W.T.'s house. W.T. asked defendant to take it with him when he left, and defendant planned to do so.

W.T. then asked defendant to share the light again. Defendant testified that W.T. expressed a fondness for children and defendant thought the light would "cleanse" that evil out. Normally when defendant would share the light it would return to him. On this

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[5] Law enforcement found empty beer bottles on the kitchen table.

occasion, however, "he was able to hold it. I wasn't able to get it back." W.T. then looked outside, and smiling, said, " 'See, I told you I could take it from him.' "

Defendant testified W.T. then got a knife from a kitchen drawer. Defendant tried to leave through some French doors, but they wouldn't open. He then ran to the kitchen table to put something between him and W.T. Defendant testified that W.T. then approached and "went to stab at me," but "when he was in the air he couldn't get any closer" apparently because there was a large white angel there protecting defendant. Defendant grabbed the gun from the table, pointed it at W.T., and said, " 'Tell me right now. Are you Lucifer?' " W.T. nodded yes. Defendant said he put the gun down and said sarcastically something like, " 'Yeah, right dude. . . ha, ha, You're not Lucifer.' "

Defendant testified, "[a]s soon as I set the gun down he went for the gun and raised the knife and tried like that[**6**] and I remember just picking it back up and taking a step or two back and pulled the trigger." Defendant testified he fired just one shot, striking W.T. in the head. W.T. fell to the floor and the knife fell out of his hand. Defendant testified he was in fear for his life when W.T. came at him with the knife.

Defendant testified, "I remembered walking, saw him at the side of the table." He asked W.T. why he did that. W.T. pushed himself up and said something to defendant like "You f'd up" or "You f'er." Describing W.T.'s movement defendant said, "It was all like one motion like push yourself up, getting to your knees, grabbing something at the same time." (RT 1141) Defendant testified, "I don't remember if he grabbed the knife and somehow it got back on the table but he was like pushing himself up." At that point, defendant jumped back and shot W.T. five more times in the head.

Defendant testified he sat on a chair, confused about what had just happened. He then tried to use W.T.'s house phone to call 911, but it was not working. Next, he tried to

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6 The motion W.T. purportedly made was not described for the record.

use W.T.'s cell phone, but was having trouble unlocking it. At the same time, the cell phone was ringing, "It just didn't stop."

Defendant testified he heard a gasp and W.T.'s dentures then flew out of his mouth. That scared defendant and he "jumped back in the chair and pulled the trigger three more times," but he did not see the bullets hit W.T.'s head. Defendant noticed the slide on the gun was back. He testified, "I remember dropping the magazine out, putting another one in and letting the slide slide forward one more in the chamber."

Defendant testified he continued to try to use W.T.'s cell phone, but it would not stop ringing, so he shot it. He recalled shooting at it three times and hitting it on the third shot.

As he was about to leave, defendant testified he saw W.T.'s body convulsing with demons swirling around it. He started to run out the door and noticed a gas can by a weedeater. He decided to "kill the demon or Lucifer [and] send it to hell" by setting the body on fire. He doused the body with gasoline, lit a cigarette, took a few "drags" from the cigarette and then set the body on fire.[7]

Defendant then drove away, planning to go Monterey, which is where he had planned to go after leaving W.T.'s house. He eventually noticed a helicopter and police cars chasing him. He testified that when he was surrounded by police, he shared "the light" with himself, and voluntarily surrendered since he believed the police could not get any closer.

On cross-examination, defendant testified that when he first pointed the gun at W.T. and asked if he was Lucifer, W.T. was holding the knife to his side. Defendant testified that he put the gun on the table and he began to walk toward the front door in the

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[7] Defendant denied lighting the stove burners or oven. He said W.T. had them on to keep the house warm. After setting the fire, defendant said he tried to turn the burners off, but was frantic and panicked and could not figure out how to do that.

living room. He said he "just wanted to leave." Defendant testified that it was at that point that W.T. raised the knife again and then reached for the gun on the table. Although he was leaving, defendant testified, he "kind of came back at the same time like I knew I couldn't get out of there without getting stabbed." He said he was able to get the gun because he was closer. At that moment, W.T. lunged toward defendant with the knife and defendant shot him.

Also on cross, when the prosecutor asked if the killing had something "to do with some type of gay issue," defendant responded, "Absolutely not." He denied it had anything to do with W.T. rebuffing his advances. He also denied being gay, and having told a neighbor he was gay. When asked if he had initially told police he shot W.T. "out of some kind of delusional, crazy self-defense," defendant acknowledged he had not. He also acknowledged he told the police the shooting had something to do with W.T. being gay and coming on to him — though he testified that was a lie. During further cross-examination on the next day's court session, defendant testified that overnight he thought about what his thinking might have been about what he had told the police and claimed he lied about that because he thought "the gay thing" would have been "more justifiable for what happened. . . . I thought it would be justifiable. That is why I told them the gay thing."

The Prosecution's Rebuttal

Defendant's jail calls were monitored, and a detective testified that in his initial conversations, defendant appeared lucid and normal. But once it became clear defendant was going to pursue a mental health defense, defendant's conversation changed. From then on, defendant's conversation exhibited "conspiracy theory type language" involving the government and law enforcement framing him and "angels and demons [were] effecting things in his every day life."

A forensic psychologist opined that defendant was "exaggerating or feigning psychiatric distress." This opinion was based on a variety of reports he read

associated with the case, interviews he did with defendant as well as psychological testing he administered. The psychologist did not believe defendant was mentally ill, but his extensive drug use could have caused hallucinations. He believed defendant setting fire to the body and evading police demonstrated knowledge of wrongdoing and an understanding of consequences.

Another forensic psychologist testified that, while defendant claimed to be hallucinating, he described the shooting as a response to W.T. attacking him with a knife while trying to grab the gun, suggesting he acted in self-defense. He told her he took the gun with him when he left the house in case he needed it to have a shootout with the police or kill himself. In her experience, the hallucination of seeing demons is unusual for people with mental health issues and it caused her to be suspicious. She also noted that in one of defendant's jail phone conversations shortly after defendant was booked in the jail, he talked about his case, but made no mention of psychiatric symptoms, hallucinations, seeing demons or any of the problems defendant described to her during interviews. She concluded defendant was malingering and his efforts to destroy the body and flee from police demonstrated he knew what he did was wrong.

Defense Request for an Imperfect Self-Defense Instruction

During the guilt phase, the defense requested an instruction on voluntary manslaughter based on imperfect self-defense. The trial court denied the request. While noting that actions based solely on delusion cannot form the basis for imperfect self-defense, the court examined the evidence to determine whether defendant's delusions could be separated from his testimony of being attacked by W.T. It concluded that in defendant's case all the "statements and the conduct which defendant attributes to [W.T.] are all . . . part of and arise out of defendant's delusions and hallucinations." It noted, "[T]here was no light being shared . . . There wasn't a light that [W.T.] held onto and wouldn't give back. [W.T.] is not Lucifer."

The court added: "In addition, the physical evidence, specifically, where the knife was located, the fact that there were no blood spatters on the knife, that's not supportive of the defendant's statements that [W.T.] actually had a knife. Even though credibility is for the jury to determine, based upon the evidence, the fact that he was in a delusion, and that the physical evidence doesn't match the self-defense allegation or contention, to me it seems like it was pretty delusional. [¶] So, to me — and even if [W.T.] had picked up a knife as testified to by the defendant, it doesn't seem to me that this is a situation where the defendant misperceived an objective actual circumstance that required a defensive action. It seems more like it's a situation where his reaction was produced by the mental disturbance alone, which is the very thing that the cases talk about as being the sanity phase, not for the guilt phase." The court reasoned that it was not making a credibility determination in lieu of the jury, but noted "there has to be some evidence to support the self-defense" and there was none in the court's view. The court further explained: "I don't think that the evidence supports that [W.T.] was holding the knife. That, I think is the key. If the evidence had been different, if the knife had been on the ground, perhaps, that might have made a difference."

Based on that reasoning, the trial court concluded there was no basis to support an imperfect self-defense instruction.

Verdict, Sanity Phase, and Sentencing

The jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a))[8] and found he personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)).

After the sanity phase, the jury was unable to reach a decision and was discharged. A second jury later found defendant legally sane at the time of the shooting.

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[8] Undesignated statutory references are to the Penal Code.

The trial court thereafter imposed an aggregate term of 50 years to life, consisting of 25 years to life for the murder and 25 years to life for the firearm enhancement.

DISCUSSION

Defendant contends the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on a theory of imperfect self-defense. He argues that despite making many delusional claims at trial, he testified to a relatively straightforward claim of self-defense: W.T. attacked with a knife and he shot in self-defense.

We agree defendant was entitled to the instruction, but find the error harmless.

I. Delusions, Hallucinations, and Imperfect Self-Defense

When there is substantial evidence that the defendant killed in imperfect self-defense, the trial court must instruct on this theory of voluntary manslaughter. (*People v. Elmore* (2014) 59 Cal.4th 121, 134 (*Elmore*); *People v. Breverman* (1998) 19 Cal.4th 142, 162.) In this context, substantial evidence is " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed." (*Breverman*, at p. 162.) " '[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself.' " (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137 (*Millbrook*).) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses." (*Breverman,* at p. 162.) That is a task for the jury. (*Ibid.*) We review the trial court's refusal to instruct on a lesser included offense de novo and, in so doing, consider the evidence in the light most favorable to the defendant. (*People v. Campbell* (2020) 51 Cal.App.5th 463, 501 (*Campbell*); *People v. Brothers* (2015) 236 Cal.App.4th 24, 30 (*Brothers*); *Millbrook,* at p. 1137.)

Voluntary manslaughter based on imperfect or unreasonable self-defense is available to a defendant who had an actual, but unreasonable, belief in the need for self-defense. (*Elmore*, *supra* 59 Cal.4th at pp. 121, 129.) It mitigates murder to manslaughter because malice " 'cannot coexist' " with an actual, although mistaken, belief in the need to defend oneself from the victim's imminent attack. (*Id*. at pp. 129-130.)

As our high court in *Elmore* explained, "unreasonable self-defense involves a misperception of *objective circumstances*, not a reaction produced by mental disturbance *alone*." (*Elmore*, *supra*, 59 Cal.4th at pp. 134-135.) " '[U]nreasonable self-defense 'is based on a defendant's assertion that he lacked malice . . . because he acted under an unreasonable *mistake of fact*—that is, the need to defend himself against imminent peril of death or great bodily harm.' " (*Id*. at p. 136.) And "because unreasonable self-defense is 'a species of mistake of fact [Citation] . . . it cannot be founded on delusion.' " (*Ibid*.)

Thus, "unreasonable self-defense, as a form of mistake of fact, has no application when the defendant's actions are *entirely* delusional. *A defendant who makes a factual mistake misperceives the objective circumstances. A delusional defendant holds a belief that is divorced from the circumstances*." (*Elmore*, *supra*, 59 Cal.4th at pp. 136-137, italics added.)[9] But the *Elmore* court was careful to note: "[a] defendant who misjudges the external circumstances may show that mental disturbance contributed to the mistaken

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[9] The *Elmore* court explained how the law regards a purely (or entirely) delusional belief in self-defense: "[A] belief in the need for self-defense that is purely delusional is a paradigmatic example of legal insanity." (*Elmore*, *supra*, 59 Cal.4th at p. 135.) It "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." (*Id*. at p.140.) Thus, where the defense is that defendant acted *purely* on a delusional belief in the need for self-defense, such a claim is reserved for the sanity phase, where it may result in complete exoneration from criminal liability. (*Id*. at pp. 145, 147.) However, such a claim "may not be employed to *reduce* a defendant's degree of guilt." (*Id*. at p. 145.)

perception of a threat," and thus "defendants who mistakenly believed that actual circumstances required their defensive act may argue they are guilty only of voluntary manslaughter, *even if their reaction was distorted by mental illness*." (*Id.* at p. 146, italics added.)

So, in deciding whether substantial evidence supports an instruction on unreasonable self-defense, where must a court draw the line? The *Elmore* court explained: "The line between mere misperception and delusion is drawn at the absence of an *objective correlate*." (*Elmore*, *supra*, 59 Cal.4th at p. 137, italics added.) For example, "[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." (*Ibid*.) Given the *Elmore* court's distinction between "misperceive[ing] objective circumstances," and holding a belief that is "divorced from the circumstances," and its snake example, we understand the reference to "an objective correlate" to relate to the presence or absence of objective circumstances supporting a claim of imperfect self-defense.

So, who may testify about the objective circumstances and what type of proof is required? As the court noted in *People v. Ocegueda* (2016) 247 Cal.App.4th 1393 (*Ocegueda*), in a slightly different context, no corroborating evidence is required beyond a defendant's statement or testimony. (*Id*. at pp.1409-1410 .) It is for the jury to decide whether a defendant is credible. (*Id.* at p. 1409.) Thus, a single witness, including the defendant, can provide evidence establishing the objective circumstances necessary to support the instruction. (*Id*. at pp. 1401, 1409.) We apply these principles here.

II. Analysis

We conclude the refusal to instruct on imperfect self-defense here was error. While defendant's testimony included evidence of delusion, his account pertaining to the actual shooting was not *entirely* delusional and thus provided substantial evidence of an actual but unreasonable belief in the need for self-defense.

This case stands in contrast to *Elmore,* which exemplified conduct "produced by mental disturbance *alone*" and a belief that was "divorced from the circumstances." (*Elmore*, *supra*, 59 Cal.4th at pp. 134, 137.) There, the defendant — who by all accounts was mentally ill — attacked a middle-aged woman, a stranger who was merely out to go shopping. (*Id*. at p. 130.) While she was sitting at a bus stop, defendant approached her and stabbed her to death with a sharpened paint brush handle. (*Ibid*.) A witness did not see the victim do anything to defendant before he attacked her. (*Ibid*.) At trial, defendant testified, that " 'somebody was saying something violent to me.' " (*Id*. at p. 131.) Asked who, defendant said, " 'some person out there,' " but could not say whether the person was a man or woman. (*Ibid*.) When asked why he stabbed the victim, he testified, " 'Person said something and did something to me, I didn't just go do it to be doing it.' " (*Ibid*.) Like the court's snake example, nobody was threatening defendant — the threatening person was the product of defendant's delusional state. Admitting there was no factual basis for defendant to believe he had to defend himself, defense counsel nevertheless asked for an instruction on unreasonable self-defense, "based *solely* on [the] defendant's delusional mental state." (*Id*. at pp. 131-132, italics added.) Our high court rejected that theory, holding that the doctrine of unreasonable self-defense is not available when the belief in the need to defend oneself is *entirely* delusional. (*Id*. at p. 130.) "A purely delusional belief in the need to act in self-defense may be raised as a defense, but that defense is insanity." (*Ibid*., see fn. 9, *ante*.)

Here, the parties and the trial court struggled with the lack of published authority covering a situation such as presented here. No published case has addressed a court's refusal to give an imperfect self-defense instruction where a defendant's story is that a real person attacked him, but there are delusional components to the defendant's description of what happened.

Ocegueda, *supra*, 247 Cal.App.4th 1393, however, provides some guidance. Applying *Elmore*, the *Ocegueda* court held that the trial court erred by precluding the

jury from considering evidence of defendant's mental disabilities in deciding whether he harbored the state of mind required for imperfect self-defense. (*Id*. at p. 1396.) In *Ocegueda*, the defendant told police the victim had been " 'mad dogging' " him and making derogatory comments. (*Id*. at p. 1401.) At one point, the victim appeared to reach under his coat and pull out "something metal." Thinking the victim was pulling out a gun, defendant shot the victim " 'for [his] own protection.' " (*Id*. at pp. 1397, 1401.) The defendant had been diagnosed with a developmental disability, and an expert testified that people with "processing disorders [like defendant] might have problems with interpreting what they see or hear, or it might take them longer to arrive at a conclusion about what they see or hear." (*Id*. at p. 1402.) The trial court instructed on imperfect self-defense, but did not instruct the jury that it could consider evidence of the defendant's mental disabilities in deciding whether he had the state of mind required for imperfect self-defense. (*Id*. at pp. 1404-1405)

Relying on *Elmore*, the Attorney General in *Ocegueda* argued that even if the defendant had a genuine belief in the need to defend himself, the belief must have been purely delusional because no other witness saw the victim move as defendant described and no weapon was found. (*Ocegueda*, *supra*, 247 Cal.App.4th at p. 1409.) To this, the *Ocegueda* court wrote: "We do not read *Elmore* as precluding imperfect self-defense in any case where mental disabilities affect the defendant's beliefs or perceptions. The key distinction identified in *Elmore* is the 'absence of an objective correlate.' " (*Ibid*.) The court continued: "Based on defendant's statements, the jury reasonably could have inferred that [the victim] actually made some threatening motion or pulled out a metallic object, such as a cell phone, from his waistband. Whether defendant's statements were sufficiently credible or his beliefs purely delusional were questions of fact for the jury to decide. *Elmore does not establish a heightened evidentiary standard requiring corroborating evidence independent of defendant's statements to show his beliefs were not purely delusional*." (*Id*. at pp. 1409-1410, italics added.)

Here, like Ocegueda's uncorroborated claim that he thought the victim was pulling out a gun, defendant testified that W.T. came at him with a knife, while reaching for the gun on the table, prompting him to shoot in self-defense. While there were delusional components to defendant's story (the "light" being taken from him, and whether W.T. was Satan), his claim was not entirely delusional like in *Elmore* or the *Elmore* court's snake example. Defendant testified that the person he shot was W.T. and that he did so because W.T. came at him with a knife. *Elmore* contemplates that imperfect self-defense is available here: "defendants who mistakenly believed that actual circumstances required their defensive act may argue they are guilty only of voluntary manslaughter, *even if their reaction was distorted by mental illness*." (*Elmore, supra*, 59 Cal.4th at p. 146, italics added.)

Indeed, we think it important that although defendant questioned whether W.T. was Lucifer just before the shooting, he dismissed the idea. He did not testify that Lucifer was trying to kill him or that when he pulled the trigger, he thought he was shooting Lucifer. Defendant testified it was W.T. he shot, not because he had taken "the light," but rather because W.T. came at him with a knife. Considering this evidence in the light most favorable to the defendant, we must conclude that despite whatever delusion his testimony suggests he was acting under, he was not entirely delusional.[10]

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[10] This distinguishes *People v. McGehee* (2016) 246 Cal.App.4th 1190, a case the trial court relied upon. In *McGehee*, another panel of this court addressed the question of whether a defendant who had been delusional was entitled to an instruction on involuntary manslaughter. There, a mentally ill defendant stabbed his mother to death and sought an involuntary manslaughter instruction based on the theory that he thought she was a demon and not a human being. (*Id*. at pp. 1194, 1208.) Acknowledging that "instructions on involuntary manslaughter are required where there is substantial evidence that may come in the form of evidence of the defendant's mental illness, raising a question as to whether or not that defendant actually formed the intent to kill," the court concluded that there was no serious dispute that defendant intended to kill when he inflicted 10 stab wounds in an attack the medical examiner described as "overkill." (*Id*. at p. 1208.) The court then observed that the defendant was not claiming he lacked an

And further, a jury could have inferred from defendant's testimony he had an actual belief in the need to defend himself, but that belief was unreasonable given he had a gun and W.T. — on the other side of the table — had only a knife. Or the jury could have reasonably determined that after firing the initial shot, defendant did not need to shoot W.T. multiple times in the head and thus he reacted unreasonably by doing so when W.T. tried to get up from the floor after having dropped the knife, especially in light of defendant's inability to say whether W.T. had the knife in his hand at that time.

Thus, defendant's own testimony, even though uncorroborated and not otherwise credible, supported an instruction on actual but unreasonable belief in the need for self-defense. As the *Ocegueda* court noted, "a single witness, even if not inherently credible, may provide sufficient evidence to establish a fact" supporting the instruction and "*Elmore* does not establish a heightened evidentiary standard requiring corroborating evidence independent of [the] defendant's statements to show his beliefs were not purely

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intent to kill and went on to write: "Instead, defendant argues: 'If [he] believed, due to a hallucination or delusion, that he was being tormented and attacked by a demon, as he 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.' This argument is foreclosed by the reasoning of *Elmore*, *supra*, 59 Cal.4th 121." (*Ibid*.) Under *Elmore*, the *McGehee* court concluded such a claim could only be addressed in a sanity phase after a plea of not guilty by reason of insanity. (*Id*. at pp. 1209-1211.) Acknowledging that *Elmore* presented a different question which concerned voluntary manslaughter instructions grounded on a claim of imperfect self-defense, the *McGehee* court stated in dicta: "Defendant does not argue he was entitled to voluntary manslaughter instructions because substantial evidence supported the view he hallucinated an attack by a demon, and therefore actually, although unreasonably, believed in the need to use deadly force in self-defense. Such an argument would be foreclosed by the holding in *Elmore*." (*Id*. at p. 1210.) We need not consider whether *Elmore* actually would foreclose imperfect self-defense in any particular case where a defendant believes he is being attacked by a demon. Each case would require consideration of its own circumstances. As for the instant case, looking at the evidence in a light most favorable to defendant, we conclude the evidence established that when defendant shot W.T., he believed it was W.T. who was attacking him and he intended to kill W.T. based on his belief self-defensive actions were necessary to avoid being stabbed.

delusional." (*Ocegueda*, *supra*, 247 Cal.App.4th at pp. 1409-1410.)

And even if such corroboration was required, it is present here. Beyond the circumstance that defendant knew it was W.T. he was shooting, there was the objective circumstance corroboration that a large knife was found on the kitchen table. Additionally, a gun case was on the table, which corroborated defendant's testimony that that was where the gun had been located just before he grabbed it.

Of course, the jury was free to reject defendant's self-defense testimony as unsupported or unreliable. (*Ocegueda, supra,* 247 Cal.App.4th at p. 1409.) That the knife was found on the table, not the floor, and had no blood spatter on it were facts the jury could consider along with defendant's story. But the trial court erred in relying on those circumstances to conclude defendant was purely delusional.[11] "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence" (*People v. Salas* (2006) 37 Cal.4th 967, 982), and a court is not permitted to concern itself with inconsistencies in the evidence (*Millbrook, supra,* 222 Cal.App.4th at p. 1137), rather the court must "consider the evidence in the light most favorable to the defendant." (*Campbell*, *supra*, 51 Cal.App.5th at p. 501; *Brothers, supra,* 236 Cal.App.4th at p. 30; *Millbrook,* at p. 1137.)

Therefore, we conclude the trial court erred in refusing to instruct on voluntary manslaughter based on imperfect self-defense.

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[11] We understand the trial court to have reasoned this inconsistency between defendant's testimony and the physical evidence established that defendant was entirely delusional. But defendant testified about other facts that demonstrated he was in touch with reality. For example, after shooting W.T., he noted that the slide on his semi-automatic handgun was back, indicating that the gun was empty, so he dropped the empty magazine and reloaded with a magazine that had additional ammunition in it. Also, defendant realized the phone was ringing, because it was, in fact, ringing — Defendant's daughter was calling. Moreover, in his testimony, defendant allowed for the possibility that the knife was in W.T.'s hand when he pushed himself up and it wound up on the table, although he was unable to say for sure where the knife was at that time.

III. Harmless Error

Defendant argues the error was prejudicial because there was a reasonable chance the jury would have convicted him of voluntary manslaughter had it been instructed on imperfect self-defense. We disagree.

Failure to instruct on a lesser included offense is analyzed under the harmless error test in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195-196 (*Gonzalez*); *Breverman, supra,* 19 Cal.4th at p. 149.)[12] " '[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is l*ikely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Beltran,* at p. 956.)

Here, a more favorable result was not reasonably probable given the overwhelming evidence that defendant was not acting in any form of self-defense. Defendant's account of the killing radically changed leading up to trial. Shortly after he

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[12] Defendant maintains the standard from *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705], should apply because the error violated his constitutional rights. He argues that California has only held that failure to instruct on lesser included offenses is to be reviewed under *Watson* in non-capital cases, and he is not entitled to fewer rights because he is not facing capital punishment. We disagree. (*Gonzalez*, *supra*, 5 Cal.5th 186, 195,198 ["The failure to instruct on lesser included offenses supported by substantial evidence was state law error"; "Although we have long recognized the duty to instruct on lesser included offenses under *California* law, neither we nor the United States Supreme Court recognizes a similar duty to instruct on lesser included offenses under *federal constitutional* law—at least in noncapital cases"].)

was apprehended, he implied to law enforcement that W.T. was gay and coming on to him — defendant said nothing of killing in self-defense. But during trial, defendant told the jury he lied to the police because he thought "the gay thing" would have been "more justifiable for what happened," an excuse a reasonable jury would likely find unconvincing and evincing a willingness to create a story to justify his actions.

Two forensic psychologists testified that defendant appeared to be malingering. One testified that psychological testing designed to determine whether a person is malingering or exaggerating psychiatric symptoms supported this conclusion. The other testified that hallucination of demons is unusual for people with mental health issues. She also noted that in a recorded jail conversation shortly after defendant's arrest, defendant talked about his case without mentioning hallucinations or demons or any of the problems he described during interviews with her. Similarly, a detective testified that defendant seemed lucid in his earlier recorded jail phone conversations, only to later exhibit delusions about government conspiracies, angels, and demons after it "became clear" he would pursue a mental health defense. The testimony of the psychologists undercut the credibility of the claim he acted in self-defense, as well as the credibility of his claim he was suffering from delusions or hallucinating.

Defendant's attempt to destroy the body (and perhaps the house) and his flight also undercut his claim of self-defense. Indeed, there was an inherent contradiction in defendant's testimony that he tried to call the police after the shooting, only to be stymied by the ringing phone — yet, when police found him, rather than seek their help, he led them on a 38-mile pursuit, surrendering only after his car was rendered inoperable and an hour-long standoff had ensued.

Indeed, a reasonable jury likely concluded defendant had the opportunity to get help while he was at or near the house — if he really wanted it. Defendant testified he wanted to call 911 but had trouble unlocking W.T.'s phone to do so. But when someone called (the daughter said she called numerous times after hearing noises), instead of

answering the phone and asking the caller to get help, defendant shot the phone to make it stop ringing. Shortly thereafter, he fled without summoning help from anyone nearby, leaving the house to burn down.

Other aspects of defendant's testimony undercut his credibility. Defendant testified he set the gun on the table, even though W.T. still had a knife in his hand. A reasonable jury would likely have found defendant's purported unilateral disarmament by setting the gun down to lack credibility. He testified on direct examination that "as soon as" he set the gun down on the table, W.T. went for it and raised the knife. Yet, on cross-examination the following day, he testified that after he put the gun on the table, he started to walk away toward the front door because "he just wanted to leave." Aside from disproving his earlier testimony indicating W.T. immediately reached for the gun after he set it down, a jury could have reasonably found the claim that he started to leave without the gun to lack credibility because the purported plan had been for him to take the gun with him whenever he left; putting the gun on the table and then leaving did not square with that plan. This testimony further undercut his claim that shot W.T. in a self-defense scenario.

Finally, although there was substantial evidence for purposes of supporting an imperfect self-defense instruction, the physical evidence did not entirely align with his story. Again, the knife was found on the table — not the floor. And unlike the surrounding area, the knife had no blood on it. Further, that W.T. was shot nine times on the left side of his face and head, with some wounds "quite closely grouped," suggested a personal motive, rather than panicked self-defense.

Again, our focus in a *Watson* review is "not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error." (*Beltran*, *supra*, 56 Cal.4th at p. 956.) Given the evidence, we conclude there was no reasonable chance of a more favorable outcome had the jury received the requested instruction.

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

RAYE, P. J.

RENNER, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: The People v. Schuller
C087191
Nevada County
No. F16000111

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✓ Honorable Candace S. Heidelberger
Judge of the Nevada County Superior Court - Main
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APPENDIX B:

ORDER MODIFYING OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE, Plaintiff and Respondent, v. JASON CARL SCHULLER, Defendant and Appellant.	C087191 (Super. Ct. No. F16000111) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

APPEAL from a judgment of the Superior Court of Nevada County, Candace S. Heidelberger, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein, Supervising Deputy Attorney General and Peter H. Smith, Deputy Attorney General, for Plaintiff and Respondent.

THE COURT:

It is ordered that the published opinion filed on November 10, 2021 be modified as follows:

1. On page 18, delete the language in section III of the Discussion, and replace with the following:

> Defendant argues the error was prejudicial because there was a reasonable chance the jury would have convicted him of voluntary manslaughter had it been instructed on imperfect self-defense. We disagree.
>
> Our high court has held that prejudice stemming from the failure to instruct on a lesser included homicide offense is analyzed under the harmless error test in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 195-196 (*Gonzalez*) [holding that the failure to provide instructions on lesser included offenses of second degree malice murder, voluntary manslaughter, and involuntary manslaughter was harmless error, applying *Watson*]; *Breverman, supra,* 19 Cal.4th at p. 149.) " '[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*Beltran,* at p. 956.)
>
> Defendant, however, asserts in a petition for rehearing that the harmless beyond a reasonable doubt standard from *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*) applies where a trial court refuses a defendant's request for an imperfect self-defense instruction.[13] Under the *Chapman* standard,

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[13] In his original briefing, defendant pointed out that our high court has held the failure to instruct on lesser included offenses is to be reviewed under *Watson* in non-capital cases, and argued he should not receive "fewer rights" just because he is not facing capital punishment. We must disagree with this contention. Our high court in *Gonzalez* noted: "Although we have long recognized the duty to instruct on lesser included offenses under California law, neither we nor the United States Supreme Court recognizes a similar duty to instruct on lesser included offenses under *federal constitutional law*—at least in

" 'an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' " (*People v. Geier* (2007) 41 Cal.4th 555, 608; accord, *People v. Aledamat* (2019) 8 Cal.5th 1, 3.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*Geier*, at p. 608.) Put differently, "we examine the entire record and must reverse if there is a ' " 'reasonable possibility' " ' that the error contributed to the verdict." (*People v. Reese* (2017) 2 Cal.5th 660, 671.)

Defendant cites the Fourth District's recent decision, *People v. Dominguez* (2021) 66 Cal.App.5th 163 (*Dominguez*), holding *Chapman* applies to the failure to instruct on heat of passion voluntary manslaughter. The court reasoned that "because malice is an element of murder and heat-of-passion negates malice, when heat of passion is put in issue the federal due process clause requires the prosecution to prove the absence of provocation beyond a reasonable doubt." (*Id*. at pp. 183-184.)

Dominguez, relied on *People v. Thomas* (2013) 218 Cal.App.4th 630, 641-642, which arrived at the same conclusion. But *Thomas* predated the California Supreme Court's decision in *Gonzalez*, *supra*, 5 Cal.5th 186. And *Dominguez* did not mention *Gonzalez* or our high court's clear pronouncement made in the context of trial court error in failing to instruct on second degree murder, voluntary manslaughter, and involuntary manslaughter: "The failure to instruct on lesser included offenses supported by substantial evidence [is] state law error." (*Id*. at p. 196.) The *Gonzalez* court went on to reject the defendant's contention that the trial court committed structural error when it omitted instructions "on murder with malice aforethought, its lesser included offenses, and its defenses," stating: "The trial court's failure to instruct on lesser included offenses and defenses of murder with malice aforethought is subject to harmless error review." (*Id*. at p. 199.) The *Gonzalez* court did note that the omission of an element of the offense from instructions is federal Constitution error because a jury must find the defendant guilty of every element of the crime of conviction beyond a reasonable doubt. (*Id.* at pp. 198-199.) But the court did not equate the failure to instruct on imperfect self-defense or sudden quarrel/heat of passion — defenses to murder with malice aforethought — to the failure to instruct on the element of malice. Instead, it rejected the defendant's structural error contention, which was based on a similar

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noncapital cases." (*Gonzalez*, *supra*, 5 Cal.5th at p. 198.) We are bound by our high court's pronouncement. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 52 Cal.2d 450, 455.)

argument and held that the failure to instruct on lesser included offenses, including voluntary manslaughter, was state law error to which the *Watson* standard applies. (*Id*. at pp. 196, 199.)

In any event, what standard applies does not matter here. On the record before us, the error was harmless under either standard given the overwhelming evidence that defendant was not acting in any form of self-defense. Defendant's account of the killing radically changed leading up to trial. Shortly after he was apprehended, he implied to law enforcement that W.T. was gay and coming on to him — defendant said nothing of killing in self-defense. But during trial, defendant told the jury he lied to the police because he thought "the gay thing" would have been "more justifiable for what happened."

Two forensic psychologists testified that defendant appeared to be malingering. One testified that psychological testing designed to determine whether a person is malingering or exaggerating psychiatric symptoms supported this conclusion. The other testified that hallucination of demons is unusual for people with mental health issues. She also noted that in a recorded jail conversation shortly after defendant's arrest, defendant talked about his case without mentioning hallucinations or demons or any of the problems he described during interviews with her. Similarly, a detective testified that defendant seemed lucid in his earlier recorded jail phone conversations, only to later exhibit delusions about government conspiracies, angels, and demons after it "became clear" he would pursue a mental health defense. The testimony of the psychologists and the detective undercut the credibility of the claim he acted in self-defense, as well as the credibility of his claim he was suffering from delusions or hallucinating.

Defendant's attempt to destroy the body (and perhaps the house) and his flight also undercut his claim of self-defense. Indeed, there was an inherent contradiction in defendant's testimony that he tried to call the police after the shooting, only to be stymied by the ringing phone — yet, when police found him, rather than seek their help, he led them on a 38-mile pursuit, surrendering only after his car was rendered inoperable and an hour-long standoff had ensued.

Indeed, defendant testified he wanted to call 911 but had trouble unlocking W.T.'s phone to do so. But when someone called (the daughter said she called numerous times after hearing noises), instead of answering the phone and asking the caller to get help, defendant shot the phone to make it stop ringing. Shortly thereafter, he fled without summoning help from anyone nearby, leaving the house to burn down.

Other aspects of defendant's testimony undercut his credibility. Defendant testified he set the gun on the table, even though W.T. still had a knife in his hand.

Under the circumstances as he described them, defendant's claim of unilateral disarmament by setting the gun down lacked credibility. He testified on direct examination that "as soon as" he set the gun down on the table, W.T. went for it and raised the knife. Yet, on cross-examination the following day, he testified that after he put the gun on the table, he started to walk away toward the front door because "he just wanted to leave." Aside from disproving his earlier testimony indicating W.T. immediately reached for the gun after he set it down, the claim that he started to leave without the gun was inconsistent with the purported plan for defendant to take the gun when he left. This testimony further undercut his claim that he shot W.T. in a self-defense scenario.

Finally, although there was substantial evidence for purposes of supporting an imperfect self-defense instruction, the physical evidence did not entirely align with his story. Again, the knife was found on the table — not the floor. And unlike the surrounding area, the knife had no blood on it. Further, that W.T. was shot nine times on the left side of his face and head, with some wounds "quite closely grouped," is indicative of a personal motive, rather than panicked self-defense.

Given the overwhelming evidence, we conclude there was no reasonable possibility the error contributed to the verdict, and therefore the failure to instruct was harmless under either standard of prejudice.

This modification order does not change the judgment.

FOR THE COURT:

RAYE, P. J.

MURRAY, J.

RENNER, J.

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PROOF OF SERVICE

I declare that:

I am employed in Windham County, Connecticut; I am over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 118, Ashford, CT 06278. On December 16, 2021, I served a copy of the attached **PETITION FOR REVIEW** in said cause on all parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Ashford, Connecticut, addressed as follows:

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Hon. Candace Heidelberger, Judge
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In addition, I electronically served the attached brief to the following parties via the TrueFiling electronic service system:

Office of the Attorney General

Central California Appellate Program

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 16, 2021, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. SCHULLER**
Case Number: **S272237**
Lower Court Case Number: **C087191**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/16/2021
Date

/s/David Polsky
Signature

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Law Office of David L. Polsky

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