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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. QUI THANH NGUYEN, Defendant and Appellant.	B209509 (Los Angeles County Super. Ct. No. VA077468)

APPEAL from a judgment of the Superior Court for Los Angeles County, Phillip H. Hickock, Judge. Affirmed.

Cannon & Harris and Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Qui Thanh Nguyen was sentenced to 75 years to life plus 20 years in state prison, plus two consecutive life terms, after a jury found him guilty of first degree murder (Pen. Code,[1] § 187, subd. (a)) and two counts of attempted premeditated murder (§§ 664/187, subd. (a)), found that he intentionally discharged a firearm at all three victims, causing death to one and great bodily injury to another (§ 12022.53, subd. (c), (d)), and found that he was sane at the time of the offenses. Defendant appeals, arguing that the trial court (1) erred by failing to instruct on voluntary manslaughter under a heat of passion theory; (2) abused its discretion by denying defendant's request for a continuance, made shortly before trial was to begin; and (3) violated defendant's right to due process by denying defendant's request to appoint an additional psychiatrist to examine defendant's sanity at the time of the offenses. We affirm the judgment.

BACKGROUND

Defendant and Tyna Troung dated for five years, and lived together for three and a half to four of those years. They had a child together in January 2002, while they were living in New Jersey. They met when Troung was working at a nail salon that defendant owned. In October 2002, they moved to California to be closer to defendant's family. Once in California, defendant bought another salon, which he subsequently sold to buy yet another salon called New York Nails, which he sold sometime in May or June 2003. Troung worked at New York Nails.

There were incidents, both in New Jersey and in California, in which defendant hit or threw things at Troung. The violence escalated after they moved to California, and Troung feared for her safety. Troung eventually broke off the relationship after she learned that defendant had cheated on her. She and her child

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[1] Further undesignated statutory references are to the Penal Code.

moved in with her friend, Ngoc Luong, who also worked at New York Nails. Luong's boyfriend, Tung Pham, helped Troung move.

Sometime after Troung and her child moved in with Luong, defendant picked the child up from the babysitter without Troung's permission. Troung called defendant, and he agreed to bring the child to Troung. Troung did not want defendant to know where she was living, so she arranged to meet defendant at a location a few blocks away. When defendant arrived, Troung opened the rear door of his car to get the child. As she was doing so, defendant stepped on the gas pedal, as if he wanted to run her over. She tried to run away, but defendant drove after her. Troung eventually escaped by stepping inside a neighbor's house.

After that incident, Troung applied for and obtained a restraining order against defendant. Defendant was served with the restraining order the morning of June 12, 2003, and immediately began calling Troung. He called her repeatedly that day, and every day after that, telling her that the restraining order made him mad and upset, and that he did not know what he would do if she did not lift it. At one point, Troung found a letter and bouquet of flowers defendant had left for her; in the letter, defendant apologized and said he wanted to come back to her. Troung told defendant not to call her anymore, and called the police.

On June 19, 2003, while a police officer was at Troung's home, taking her report of defendant's violations of the restraining order, defendant called. Troung handed her cell phone to the officer, who told defendant that he was violating the restraining order by making calls to Troung. Defendant told the officer that he wanted to maintain his relationship with Troung and he was upset that she was denying him access to his child. The officer went to defendant's house and arrested him for violating the restraining order. The next day, defendant called Troung from jail, asking her to bail him out. He called again later that night, after he got out of jail, taunting her and telling her there was nothing she could do about

it. After Troung reported these calls, the police went to arrest defendant again, but could not locate him.

On July 1, 2003, Troung, her friend Luong, and Luong's boyfriend Pham were leaving for work when Troung saw defendant as they were driving out of the mobile home park where she was staying; defendant was driving in. Troung and her friends arrived at New York Nails, which was a 25 to 30 minute drive from their home, at around 10:00 that morning. At around 10:30, Troung saw defendant walk into the salon. Believing he was angry with her, Troung tried to calm him down by saying, "Hi, dear, you look so handsome today." Defendant pulled out a gun from under his shirt and said, "Tyna, you done today." He fired the gun at her, but missed, and Troung ran to the bathroom and locked the door. She heard another gunshot as she was running to the bathroom. Defendant pounded on and kicked the bathroom door, then walked over to Luong, pointed the gun at her, and fired it from about a foot away. The bullet hit her left hand, then entered behind her left ear, travelling toward her jawbone and across her face. She fell to the ground. Both she and Troung heard Pham ask defendant what he was doing. Luong passed out, but Troung, still in the bathroom, heard Pham say that he did not want to die, followed by two more gunshots. When Luong regained consciousness, she saw Pham on the ground bleeding. She crawled to the front door, and called 911.

Two construction workers who were installing cabinetry in a store next door to the nail salon heard the shooting and saw an Asian man leave the salon and run toward the corner. The man then slowed to a walk and got into a car parked up the street. The man was smiling as he passed them.

When the police arrived, they found Luong by the front door and Pham on the floor inside, with a revolver near him. The revolver had six used casings in it. Troung was found, unharmed, locked in the bathroom. Luong was taken to the

hospital, where she stayed for a week; she lost about 80 percent of her hearing in her left ear. Pham, who was shot twice -- once in the right arm and side, and once in the head -- died of the gunshot to his head. The police recovered three bullets at the scene and two bullets from the coroner's office; a sixth bullet was removed from Luong about four or five months later. The bullets recovered from the scene and the coroner's office were determined to have been fired from the revolver recovered from the scene.

Officers were sent to find defendant, but they were not able to locate him. Fifteen days later, on July 16, 2003, defendant's car was found parked in an industrial parking lot in Anaheim. It appeared that the car had been there for some time. Officers from the Los Angeles County Sheriff's Department conducted surveillance of several locations in Orange County to try to locate defendant. They were able to track defendant's mail to a location, and they followed a person who had picked up defendant's mail to a location in Midway City, where they arrested defendant on September 11, 2003.

A preliminary hearing was held a year later, on September 23, 2004. Defendant was held to answer and charged by information with first degree murder of Pham (§ 187, subd. (a)), attempted willful, deliberate, premeditated murder of Luong (§ 664/187, subd. (a)), and attempted willful, deliberate, premeditated murder of Troung (§ 664/187, subd. (a)). As to all three counts, the information also alleged that defendant personally used and intentionally discharged a firearm and, as to the first two counts, caused great bodily injury or death. (§ 12022.53, subd. (b), (c), (d).)

Three months after defendant was arraigned, his attorney declared a doubt regarding defendant's mental competence. The trial court adjourned the criminal proceedings under section 1368 and ordered a psychiatric evaluation to determine defendant's competence to stand trial. The appointed psychiatrist, Dr. Mark Jaffe,

examined defendant and issued a report in which he concluded that defendant was not competent. Based on Dr. Jaffe's report, on July 1, 2005, the trial court found defendant not competent to stand trial and remanded him to Patton State Hospital for treatment.

A year later, on June 30, 2006, the trial court received a certificate of mental competency from Patton State Hospital. The court attempted to contact defendant's attorney (who was privately retained), but was unable to reach him after several attempts. The court then appointed counsel for defendant, and found defendant competent to stand trial. Two months later, defendant's retained attorney was substituted back into the case to represent defendant. Six months later, on March 23, 2007, with the case ready for trial the next day, defendant's attorney informed the court that he was unable to proceed due to a family emergency. Defendant then told the court that he did not want that attorney to represent him. The court relieved the attorney and appointed a bar panel attorney to represent defendant.

Three and a half months later, on July 9, 2007, defendant, represented by his new appointed attorney, changed his plea from not guilty to not guilty by reason of insanity. His attorney then stated, "I think pursuant to law in these proceedings, we need -- both the People and I will gain a report from a doctor indicating their opinion with regards to my client's mental state and sanity at the time of the crime. [¶] I had previously, prior to my appointment in this case, two or three doctors that have been appointed by the court for the defense, including [Dr. Kaushal] Sharma. It is my intention to use [Dr.] Sharma for this report. The D.A. will have to get

some other doctor to get involved and view the file and render an opinion."[2] Counsel indicated that, before counsel was involved in the case, Dr. Sharma may have been appointed to determine defendant's sanity, but it appeared that the doctor had not made that determination.[3]

Dr. Sharma interviewed defendant in January 2008 and issued his report in March 2008. Based upon his interview of defendant and his review of the police report and facts of the case, Dr. Sharma concluded that defendant was sane at the time of the offenses. Dr. Sharma did not have Dr. Jaffe's report on defendant's competency or defendant's records from Patton State Hospital at the time he issued his report.

On April 29, 2008, defendant's attorney filed a motion to continue the trial, which was to begin in a few days. The attorney, Jonathan E. Roberts, stated that he had "recently become aware of potentially crucial evidence" about defendant's mental history that had been contained in Dr. Jaffe's June 2005 competency report, which Roberts had overlooked. Roberts noted that Dr. Jaffe's report included information that Dr. Jaffe had received from defendant's brother, Loi Nguyen, and that Roberts needed additional time to try to locate Loi and complete a further

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[2] Counsel's understanding of the law was incorrect. The statute governing the appointment of psychological experts following pleas of insanity does not direct that each side be provided an appointment of an expert. Instead, the statute provides that "[w]hen a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists . . . to examine the defendant and investigate his mental status." (§ 1027, subd. (a).) Any of the appointed psychiatrists may be called to testify by any party or the court. (§ 1027, subd. (e).)

[3] In fact, when defendant's previous attorney had declared a doubt regarding defendant's competency in February 2005, one of his stated reasons for that doubt was that defendant "has been unable to complete tests of the court appointed expert, Dr. Sharma."

investigation into defendant's medical history and mental state.[4] Roberts also indicated that he was concurrently asking the court to authorize additional funds for Dr. Jaffe to assist Roberts in expediting contact with Loi and to conduct an additional psychiatric evaluation.

At the May 1, 2008 hearing on defendant's motion to continue, Roberts informed the court that since filing the motion, he had been in contact with defendant's sister, who was coming to meet with Roberts and be interviewed by the prosecutor later that day. He said that this was his first contact with any of defendant's family members; he had been advised when he took over defendant's case that there were no family members who were available or willing to be involved in the case. Although Roberts admitted that he did not know what the sister would say, he hoped she would verify the statements Loi made to Dr. Jaffe. He also admitted that when he contacted Dr. Sharma and asked him to assume the facts revealed by Loi to Dr. Jaffe and reconsider his sanity opinion, Dr. Sharma stated that he still would conclude that defendant was sane at the time he committed the murder and attempted murder.

The trial court denied defendant's motion to continue, finding there was no good cause for a continuance because (1) it appeared that the information to be provided by defendant's sister would in all likelihood not affect Dr. Sharma's opinion; (2) no psychiatric expert has concluded that defendant was insane at the time of the offense; and (3) the case was very old. Addressing defendant's request for additional funds for Dr. Jaffe to have him "weigh in on the [sanity] issue," the court denied the request without prejudice, observing there was an agreed upon

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[4] According to Dr. Jaffe's report, Loi said that defendant developed psychiatric problems when he was about 18 years old and had been in psychiatric hospitals in Vietnam and the United States, and he gave some examples of defendant's apparent problems.

mental health practitioner who had already rendered an opinion on that issue. But the court noted that if Roberts believed that Dr. Jaffe might be able to shed light on any issues at trial, he could renew his request based upon the evidence that was submitted at trial.

The case went to trial before a jury. Defendant did not significantly challenge the prosecution's case during the guilt phase. There were no defense witnesses called, and minimal cross examination of the prosecution's witnesses. The jury found defendant guilty on all counts and found all special allegations to be true.

The case then proceeded to the sanity phase. Defendant called four psychiatrists to testify, and testified on his own behalf.

The psychiatrist who treated defendant at Twin Towers jail after he returned from Patton State Hospital testified that defendant was taking an antipsychotic medication, which is used to treat psychotic conditions such as schizophrenia, and an antidepressant. He also testified that defendant had denied all symptoms of mental illness to him, including auditory or visual hallucinations (although defendant did tell another clinician that he had auditory hallucinations when he did not sleep properly), and that defendant said he did not understand why he was in a mental health facility.

One of defendant's treating psychiatrists from Patton State Hospital testified about defendant's diagnosis and treatment at the hospital. She testified that defendant was diagnosed with schizophrenia and poly-substance dependence.[5] She noted that defendant reported that he had been having auditory hallucinations since he was 15 years old and that he had cut off his finger when he was younger

[5] Defendant was evaluated several times during the year he was at the hospital, and his diagnosis sometimes changed, but the diagnosis of schizophrenia and poly-substance dependence was fairly consistent.

because the voices told him to. Defendant also had multiple scars on his forearm and was observed burning himself with cigarette butts while he was in the hospital. She testified that, based upon psychological evaluation and testing, she was convinced that defendant's self-mutilation was the result of defendant responding to internal stimuli (i.e., voices telling him to do it).

Dr. Jaffe testified that he met with defendant twice, in May and June of 2005, and reviewed defendant's psychiatric records from 2004, while defendant was in jail. According to the jail records, defendant was diagnosed in June 2004 as having major depression with psychotic features – he was having thoughts of wanting to kill himself and was hearing voices. In September 2004, the records indicated that defendant seemed to be responding to internal stimuli. He testified that defendant told him that he started hearing voices when he was 15 years old, and that defendant's brother Loi told him that defendant has had symptoms of mental illness since defendant was 18. Loi also told him that at times defendant does not recognize family members and does not speak in a logical fashion, and that the family sometimes would tie defendant to a chair to control him.

Dr. Sharma testified that he was appointed by the court to evaluate defendant's sanity at the time of the crime. He interviewed defendant once in January 2008, but did not talk to any of defendant's family. He also did not initially consider Dr. Jaffe's June 2005 competency report or defendant's records from Patton State Hospital. Instead, he reviewed the police report and the facts of the case. Based on that information, he concluded that defendant's actions at the time of the offense were not due to mental illness, but were due to defendant's anger and jealousy. His conclusion did not change after he considered Dr. Jaffe's report and the Patton records. He testified that he believes that defendant knew the nature and quality of his acts and was conscious of his actions. He noted that defendant's actions were extremely deliberate – defendant drove to a different city,

parked his car up the street from the salon, shot at the person he was mad at (Troung) and killed the person who he believed had taken his girlfriend away (Pham), and initially ran away, but then slowed to a walk. He also noted that defendant's attempt to hide after the crime suggests his knowledge that he had done something wrong. He stated that, in his opinion, the facts support only one conclusion, that defendant was legally sane at the time of the crime.

Testifying on his own behalf, defendant stated that he has been hearing voices since he was 15 or 16 years old, and that sometimes the voices made him laugh, sometimes they made him angry, and sometimes they told him to do something totally wrong. He said that he cut off his pinky and cut his arm because voices told him to. He also testified that he hit Troung and tried to run her over with his car because voices told him to, and that he was hospitalized once after a voice told him to crash his car into his father's house to kill himself. He said that on the day of the shooting, voices told him to go to the salon and kill Troung so his daughter could come back to him. He got a gun from his roommate that morning and drove to the salon; after he shot at Troung and she ran away, the voices told him to kill the girl and then kill the man, so he did.

After the defense rested, the prosecution offered two stipulations regarding defendant's responses to questions from staff at the jail after he was arrested: (1) on the day after he was arrested in September 2003, defendant answered "No" to questions about his medical and mental health, including whether he had a history of mental illness or current mental health problems; and (2) defendant told staff in November 2003 that he did not have a history of mental illness, hallucinations, or delusions. The prosecution also re-called Troung, who testified that defendant never did anything to make her question whether defendant had any mental health problems, and that defendant never told her that he heard voices or tried to kill himself. Finally, the prosecution called the deputy sheriff who interviewed

defendant the day after he was arrested. The deputy testified that defendant said he felt bad about shooting Luong, but he was mad at Troung and was not sorry about shooting Pham. The prosecution rested and the jury was excused for the day.

The following morning, outside the presence of the jury, the court and counsel discussed some problems the defense was having getting information from a hospital about an incident in May 2003 in which police were called about a disturbance at a residence and took defendant to the hospital for observation. The court agreed to continue the trial to give the defense time to get the information. Due to the unavailability of the court, counsel, and the jurors, trial was continued for almost a month. When trial resumed, the parties presented a stipulation about the May 2003 incident. The incident began when defendant had a cake delivered to his parents' house, but his mother would not accept it. Defendant came to the house and started yelling, and threatened to kill himself. Defendant's sister, who said that defendant had acted similarly several times in the previous few months, called the police. The police took defendant to Emergency Treatment Services, which is a temporary holding facility that holds individuals for up to 48 hours. When defendant was brought to the facility, he denied any previous psychological problems or history and denied that he ever had auditory or visual hallucinations or suicidal or homicidal ideations. He was discharged to himself and his girlfriend, and denied that he presented any danger to himself or to others.

The case went to the jury, which found that defendant was sane at the time of the murder and attempted murder. Defendant was sentenced to 75 years to life plus 20 years in state prison, plus two consecutive life terms, computed as follows: on count 1 (first degree murder), 25 years to life for the murder, plus 25 years to life under section 12022.53, subdivision (d); on count 2 (attempted murder of Luong), life with a seven year minimum for the attempted murder, plus 25 years to life under section 12022.53, subdivision (d), consecutive to count 1; on count 3

(attempted murder of Troung), life with a seven year minimum for the attempted murder, plus 20 years under section 12022.53, subdivision (c), consecutive to counts 2 and 3. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Failure to Instruct on Heat of Passion*

Defendant contends that the trial court erred by not instructing the jury on voluntary manslaughter and attempted voluntary manslaughter under a heat of passion theory, and therefore denied defendant his constitutional right to have the jury determine every material issue presented by the evidence. We disagree, because the evidence presented at trial does not support such instructions.

Defendant is correct that the trial court has a *sua sponte* duty to """"instruct on the general principles of law relevant to the issues raised by the evidence,"""" including lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) But that duty to instruct on lesser included offenses -- such as voluntary manslaughter under a heat of passion theory -- applies only "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*Ibid.*) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.)

In this case, defendant argues there was sufficient evidence from which a jury could have concluded that defendant killed Pham and attempted to kill Luong

and Troung "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)), which would have reduced the offenses to voluntary manslaughter and attempted voluntary manslaughter. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 ["Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' [citation], the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter -- a lesser included offense of murder"].) We find no such evidence.

The Supreme Court has explained that a "heat of passion" sufficient to reduce a murder to manslaughter "exists only where 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'"' [Citation.] To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation. [Citations.]" (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1306; see also *People v. Lee* (1999) 20 Cal.4th 47, 59 ["The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim . . . or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"].) The Supreme Court has noted, however, that "'if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter. . . .' [Citation.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

Here, the only arguably "provocative" conduct was Troung's ending her relationship with defendant and obtaining a restraining order against him, which

prevented defendant from seeing his child. But that conduct had taken place several weeks before the shooting, more than sufficient time for passion to subside and reason to return. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) Moreover, Troung obtained the restraining order only *after defendant had tried to kill her* by running her over with his car. And Luong's and Pham's only connection to the purported "provocation" was that Luong allowed Troung to stay with her and her mother after Troung moved out from defendant's home, and Pham was Luong's boyfriend and helped Troung move. No reasonable jury could conclude that the conduct of any of the victims was "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.) Thus, the trial court had no duty to instruct on voluntary manslaughter. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

B. *Denial of Motion to Continue Trial*

Defendant contends the trial court abused its discretion by denying defendant's pretrial motion to continue the trial, which prevented defendant from adequately preparing his defense. We find no abuse and no prejudice to defendant.

A continuance in a criminal case may be granted only for good cause. (§ 1050, subd. (e); see also *People v. Doolin* (2009) 45 Cal.4th 390, 450.) "[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. . . . The court considers '"not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion."' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for

trial with due diligence [citation], the trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.] [¶] A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal. [Citation.]" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450.)

In this case, defense counsel sought a continuance on the eve of trial based upon a three-year-old report that had been in his possession since he was appointed to represent defendant more than a year before the motion. Clearly, he failed to show due diligence.

Counsel also failed to show the benefit he anticipated or the likelihood that that benefit would result if the continuance were granted. In his written motion, counsel offered two reasons for the continuance. First, he indicated that Dr. Sharma, who had not considered Dr. Jaffe's report when he concluded that defendant was sane at the time of the shooting, told him that the information in the report might impact his conclusion; counsel sought additional time to allow Dr. Sharma to reconsider his sanity conclusion in light of the report. Second, counsel indicated that he needed time to contact defendant's brother, who was interviewed for the report and who may have information related to defendant's history of mental illness. At the hearing on the motion, counsel stated that, since he filed the motion, Dr. Sharma had considered the information in the report and nevertheless concluded that defendant was sane. Counsel also stated that he had spoken to defendant's brother, who put him in touch with defendant's sister, who was going to meet with counsel and the prosecutor later that day. Counsel indicated that he did not know what the sister would say, but that she might give information that would help defendant's insanity defense. Given the failure by the moving party to

show the likelihood of any benefit resulting from a continuance, we cannot conclude the trial court abused its discretion by denying defendant's motion for a continuance.

In any event, there was no prejudice from the denial of the continuance. It appears that (probably as the result of the post-motion interview of defendant's sister) defense counsel learned of an incident that occurred several weeks before the shooting in which defendant was hospitalized after he threatened to kill himself. When counsel was unable to obtain the hospital records related to that incident before the end of the sanity phase of the trial, the trial court continued the trial for a month, during which the records were obtained. The parties then entered into a stipulation, which was presented to the jury, about the contents of those records. There is no indication in the record on appeal that there was any other evidence that defendant was unable to present. Thus, defendant suffered no prejudice from the denial of the pretrial continuance.

C. *Denial of Motion to Re-Appoint Dr. Jaffe*

Defendant argues that he was denied the right to effective assistance of counsel and to present a defense when the trial court denied his request to re-appoint Dr. Jaffe and authorize additional funds for Dr. Jaffe to evaluate defendant's sanity at the time of the crime. His argument is without merit.

To the extent defendant asserts that the denial of his request constituted a violation of his federal constitutional rights, his assertion is forfeited because he failed to argue the constitutional issue in the trial court. (*People v. Panah* (2005) 35 Cal.4th 395, 436.) In any event, his assertion lacks merit. While defendant is correct that, under *Ake v. Oklahoma* (1985) 470 U.S. 68, a state must assure a criminal defendant access to a competent psychiatrist to assist in the defense when the defendant's sanity at the time of the offense is at issue (*id.* at p. 83), there is no

question that the state did so in this case by appointing Dr. Sharma. Defendant had no *constitutional* right to the appointment of an additional psychiatrist when defendant's first choice came to a conclusion defendant did not like.

To the extent defendant's argument is premised upon the trial court's failure to appoint two psychiatrists in accordance with section 1027, that argument also is forfeited. Section 1027 provides in relevant part that "[w]hen a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists . . . to examine the defendant and investigate his mental status." (§ 1027, subd. (a).) But "[t]he examination of an accused by [psychiatrists] which are appointed by the court is . . . not a jurisdictional proceeding and may be waived" by the failure of the defendant to request such an appointment. (*People v. Wiley* (1931) 111 Cal.App. 622, 626; see also *People v. Pearson* (1940) 41 Cal.App.2d 614, 621-622, disapproved on another ground by *In re Wright* (1967) 65 Cal.2d 650, 654-655 & fn. 3.) Here, at the time defendant changed his plea from not guilty to not guilty by reason of insanity, his counsel asked the court to appoint Dr. Sharma and said that the prosecution could select a different psychiatrist to be appointed. Apparently, the prosecution chose not to select another psychiatrist. Then on the eve of trial, when defense counsel asked the court to authorize additional funds so Dr. Jaffe could "weigh in on the [sanity] issue," the court noted the parties' prior agreement to go forward with only one psychiatrist, Dr. Sharma. Defense counsel did not contest the court's characterization, nor did he raise section 1027. And although the court invited counsel to renew his request during trial if he "believe[d] that Dr. Jaffe may be able to shed some light on any of the issues that may be presented in the case, the guilt phase, or ultimately on the insanity phase," counsel never renewed his request. Accordingly, we find that defendant has forfeited the issue on appeal.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.