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CERTIFIED FOR PARTIAL PUBLICATION *

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN RAY COLEY, Defendant and Appellant.	C021002 (Super. Ct. No. 945811)

APPEAL from a judgment of the Superior Court of Shasta County. Gregory M. Caskey, Judge. Affirmed as modified.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Robert R. Anderson, Senior Assistant Attorney General, Michael J. Weinberger and Roger E. Venturi, Deputy Attorneys General, for Plaintiff and Respondent.

The defendant assaulted a bartende r and the mother of his son. A jury convicted him of assault with a deadly weapon and

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts II through VIII of the discussion.

other crimes, and the trial court found he suffered two prior felony convictions pertinent to the “Three Strikes” law. Sentenced to state prison for 25 years to life, he appeals. In the published portion of this opinion, we reject his contention the verdicts of the jury and the trial court must be reversed because the trial court lost the exhibits from trial. We hold a defendant must move to have lost exhibits reconstructed before he can contend on appeal that they were insufficient to sustain the verdicts. Accordingly, we affirm the convictions but, for reasons explained in the unpublished portion of this opinion, vacate the sentence and remand for the trial court to exercise its discretion in determining whether to strike the priors.

FACTS AND PROCEDURE

On the evening of June 20, 1994, the defendant went to T.C.’s Sports Bar in Redding. Later, Marlena Brady entered the bar. She was the mother of the defendant’s 12-year-old son, but the defendant and Brady had not lived together for 12 years and were not friendly. The defendant eventually approached Brady, confronted her about wanting to see their son, and threw a glass of beer in her face. She tried to stand up, but the defendant pushed her to the floor. The bartender, Leslie Stickney, got between the defendant and Brady and, while the defendant yelled at them, told Brady to go into the kitchen area.

The defendant lunged at Brady, but Stickney and a bar patron prevented him from getting to her. They tried to push him out of the bar, but the defendant drew and opened a large Buck-type knife with a locking blade. Stickney tried to get the defendant

to put the knife away. Instead, he threatened Brady, who was about 20 feet away, and then made slashing and jabbing motions toward Stickney. She jumped out of the way to avoid injury. Other bar patrons approached the defendant from behind and wrestled the knife away from him. He began swinging a cane he had been carrying and threw it at Stickney. Finally, a group pushed him, still yelling and fighting, out of the bar.

The defendant was charged with assault with a deadly weapon on Stickney (count 1, Pen. Code, § 245, subd. (a)(1)), two counts of exhibiting a deadly weapon (counts 2 and 3, Pen. Code, § 417, subd. (a)(1)), battery (count 4, Pen. Code, § 242), disturbing the peace (count 5, Pen. Code, § 415, subd. (1)), and public intoxication (count 6, Pen. Code, § 647, subd. (f)). The information also alleged the defendant had suffered a conviction for burglary in 1986 and convictions for robbery and kidnapping (later proved to be attempted kidnapping) in 1982. (See Pen. Code, §§ 667, subds. (d) & (e).) The court dismissed count 6, and a jury convicted the defendant of the remaining counts. The defendant waived jury trial on the prior convictions, and, after a hearing, the court found the allegations to be true.

The trial court sentenced the defendant to a term in state prison of 25 years to life. It also sentenced the defendant concurrently to 180 days for each misdemeanor and one year each for the prior prison terms. (Pen. Code, § 667.5, subd. (b).) He appeals.

Additional facts and procedural history are contained in the discussion.

DISCUSSION

I

Failure to Move for Reconstruction of Lost Exhibits

In his first two contentions on appeal, the defendant claims the evidence does not support (1) his convictions for assault with a deadly weapon and brandishing a deadly weapon and (2) the true findings on the prior felony convictions. He does not assert the evidence seen and heard by the jury and the court was insufficient; instead, he bases his claims entirely on the trial court's post-trial loss of exhibits. Because the knife he used in the crimes and the documents showing his prior convictions cannot be examined on appeal, he argues, the evidence is insufficient to sustain those convictions and findings. We conclude the defendant has not properly raised these issues.

At trial, the prosecution produced the knife the defendant used in the crimes and documentation supporting the allegations of prior convictions. The exhibits were marked and admitted. When the trial was completed, a court services assistant placed the exhibits in the court's exhibit room. Later, in response to a motion to augment, the court services assistant went to retrieve the exhibits from the exhibit room. She could not find them. After a search of the exhibit room, the file room, and other locations by several people, the court services assistant certified to this court that the exhibits could not be found.

Seizing upon this administrative dereliction, the defendant argues we must reverse his convictions and findings of prior

convictions because the actual exhibits are not available to us for review. Perhaps recognizing there is no rule of appellate procedure which mandates reversal per se for lost trial exhibits, he frames his argument in terms of insufficiency of evidence. He cites no authority allowing such an attack. Indeed, reversal for insufficiency of evidence when exhibits are not available for appellate review is not now and never has been the law. The situation gives rise to, at most, a due process of law violation, not an insufficiency of evidence claim. (See *People* v. *Osband* (1996) 13 Cal.4th 622, 663.) The distinction is significant because reversal for insufficiency of the evidence bars retrial, while reversal for a due process violation may not. (*People* v. *Bryant* (1992) 10 Cal.App.4th 1584, 1597.)

Reconstructi on of exhibits is essentially the same as preparing a settled statement for unreported portions of trial proceedings; it provides "evidence," for want of a better term, of the trial proceedings. Even what appears to be a verbatim transcript is an imperfect representation of the trial proceedings. Such "verbatim" transcripts are commonly challenged and "corrected" after trial. (See *People* v. *Chessman* (1950) 35 Cal.2d 455, 461.) Moreover, they fail to reflect demeanor and other factors observed by the trier of fact, whether judge or jury. Our system of appellate review is grounded in common sense and the real world. Trial court proceedings are imperfect, as are appellate proceedings. This is not to say close is good enough. We merely observe we always deal with all the errors and imperfections, conscientiously and cautiously, to determine

whether a miscarriage of justice has occurred. (Cal. Const., art. VI, § 13.) If it has, we reverse. If it has not, we affirm.

Criminal defendants are entitled to due process, not perfect process. (See *In re Carpenter* (1995) 9 Cal.4th 634, 649, stating defendants are not entitled to perfect proceedings; see also Fleming, The Price of Perfect Justice—The Adverse Consequences of Current Legal Doctrine on the American Courtroom (1974).) Thus, an imperfect representation of the exhibits is not grounds for reversal unless it is reasonably probable the outcome is affected by the deficiencies in the record. (*People* v. *Osband, supra*, 13 Cal.4th at p. 664.) Even if a judgment is reversed because lost exhibits prevent meaningful appellate review, the reversal is not due to the prosecution's failure to prove its case; therefore, retrial is permitted. (See *People* v. *Shirley* (1982) 31 Cal.3d 18, 71.)

While the defendant is entitled to a record adequate to afford a meaningful appeal, he bears the burden to show the deficiencies in the record are prejudicial. (*People* v. *Howard* (1992) 1 Cal.4th 1132, 1165.) That burden is not carried by simply citing an administrative dereliction. Lost exhibits may be reconstructed in many instances. (See *People* v. *Osband, supra,* 13 Cal.4th at pp. 661-663.) If they can be reconstructed, the appellate court can review them as if they had not been lost, with no resulting prejudice to the defendant. As models or replicas are admissible in the absence of an actual piece of evidence to assist the jury, reconstructed exhibits similarly

assist the appellate court. (See *People* v. *Kynette* (1940) 15 Cal.2d 731, 755.) Consequently, it would be a violation of the constitutional requirement that we not reverse a conviction absent prejudice if we were to reverse a conviction because the exhibits were lost when no attempt has been made to reconstruct them. (Cal. Const., art. VI, § 13.) The test is whether the exhibits can be reconstructed sufficiently to determine there was no prejudicial error at trial.

In *Osband*, the trial court clerk's office destroyed many of the trial exhibits after the capital trial concluded. The Supreme Court ordered the trial court to hold hearings to (1) determine which exhibits were lost, (2) attempt to reconstruct them, and (3) prepare and certify a settled statement concerning the exhibits that could not be reconstructed. (13 Cal.4th at p. 661.) The trial court reconstructed 62 exhibits, all photographs, by developing new prints from the original negatives. The court was unable to identify the exact negative for twelve other exhibits but narrowed its search to between two and five negatives. The court was unable to reconstruct six exhibits; however, it described those exhibits in a settled statement. (*Id*. at p. 662.)

The *Osband* court undertook a two-pronged analysis of the trial court's response to its order and of the defendant's appeal. First, the court concluded substantial evidence supported the trial court's reconstruction and settled statement, with the exception of one reconstructed exhibit. And second, the court determined the reconstructed record, including the settled

statement, was adequate to allow meaningful review. (*People* v. *Osband, supra,* 13 Cal.4th at p. 662.)

Regarding the second prong of the inquiry, the *Osband* court stated: "The exhibits 'admitted into evidence or refused' are part of the record on appeal. (Cal. Rules of Court, rule 4.5.) Defendant is entitled to a record 'adequate to permit meaningful appellate review.' (*People* v. *Howard* (1992) 1 Cal.4th 1132, 1165 [5 Cal.Rptr.2d 268, 824 P.2d 1315] [impliedly considering state and federal law]; see also *id*. at p. 1166 [explicitly addressing Eighth and Fourteenth Amendment requirements].) But the burden is his to show that the deficiencies in the record are prejudicial to him. (*Id*. at p. 1165.) The parties were able either to reconstruct or to issue a settled statement regarding virtually the entire record. The reconstruction restored most of the record; the settled statement provided a satisfactory substitute for other portions (*People* v. *Holloway* (1990) 50 Cal.3d 1098, 1116 [269 Cal.Rptr. 530, 790 P.2d 1327]). Although the record as reconstructed remains deficient, defendant has not met his burden of showing that the deficiencies -- the loss of certain exhibits and the court's inability to assign an exact replacement photograph to each of 12 original photographic exhibits -- have left him unable to proceed with his appeal on a record adequate to permit meaningful appellate review." (*People* v. *Osband, supra,* at p. 663.)

Osband plows no new ground. (*People* v. *Chessman, supra,* 35 Cal.2d 455.) In *Chessman*, the court reporter died before he completed the transcription of the testimony at the defendant's

trial from shorthand notes taken at trial. Another reporter attempted to complete the transcription from the notes, aided by the trial judge's notes. After hearing objections and making some amendments, the trial court approved the transcript. (*Id*. at pp. 458-459.) On appeal, the defendant asserted the record was not made according to the Rules of Court. The Supreme Court, however, rejected the assertion, concluding the determinative issue is "whether there is or can be made available a record on which this court can perform its function of reviewing the cause and determining whether there was error in the court below and, if so, whether such error requires reversal. If a record can be 'prepared in such a manner as to enable the court to pass upon the questions sought to be raised' (3 Am.Jur. 212), then there is no rational likelihood or legally cognizable possibility of injustice to the appealing defendant even though a verbatim record certified by the official court reporter cannot be supplied." (*Id*. at p. 460.)

The *Chessman* court concluded: "On this appeal, as in every appeal, it is to be presumed that defendant has been accorded a fair trial and that the judgment of conviction is valid. We perceive no legal impropriety and no unfairness in placing on an appellant in the situation of Chessman the burden of showing either prejudicial error in the record or that the record is so inadequate that he is unable to show such error. Inconsequential inaccuracies or omissions in a record cannot prejudice a party; if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is

consequential. The situation is similar to that in *People* v. *Botkin* (1908), 9 Cal.App. 244 249 [98 P. 861], where the court said, ‘we know of no rule that permits us to presume that defendant did not have a fair trial because a portion of the record upon . . . appeal has been destroyed without fault of either party.’” (*People* v. *Chessman, supra,* 35 Cal.2d at p. 462, ellipses in original.)

In this case, we were informed of the lost exhibits during the pendency of this appeal; however, we had no reason to order the trial court to reconstruct them. Indeed, it would be wasteful to order reconstruction as a matter of course any time an exhibit is lost. Many exhibits are immaterial to the issues to be reviewed and, as stated in *Chessman*, it is presumed the conviction is valid. (35 Cal.2d at p. 462.) An appellant has the burden to perfect the appeal and to show error and resulting prejudice. To carry this burden, the defendant must move for reconstruction of lost exhibits because, without at least an attempt at reconstruction and a settled statement concerning any exhibit that cannot be reconstructed, the defendant cannot show the loss of the exhibits resulted in prejudice to his right to a record adequate to afford meaningful appellate review. (See *People* v. *Osband, supra,* 13 Cal.4th at p. 663.)

This case is a good ex ample of when the defendant might not choose to move for reconstruction of an exhibit. While he disingenuously argues to the contrary in his opening brief, he fails to acknowledge the knife he used in the attack is described in testimony as a large Buck-type knife with a locking blade.

Under the circumstances, there is no chance that, once the exhibit is reconstructed--that is, the court either concludes on a detailed description or reasonable replica of the knife introduced into evidence at trial--this court will find it is not a deadly weapon. (See *People* v. *Simington* (1993) 19 Cal.App.4th 1374, 1381 (defining "deadly weapon" as "any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury").)

Since an appellant bears the burden of perfecting the appeal and showing error and resulting prejudice, it follows that the appellant must move for an order from the appellate court to the trial court to reconstruct the lost exhibit as a prerequisite to asserting the evidence, including the exhibit, is insufficient to sustain the conviction. This does not imply that the loss of the exhibit is the fault of the defendant, here; instead, it comports with the general appellate process in which one who asserts prejudicial error in a lower court judgment bears the burden of showing the appellate court both error and prejudice.

The defendant argues we should follow a juvenile case from another district of the Court of Appeal in which the court reversed a finding the minor possessed a switch-blade knife. (*In re Roderick S.* (1981) 125 Cal.App.3d 48, 53.) In *Roderick S.*, the testimonial evidence was insufficient to establish the knife was a switch-blade, and the knife, introduced as an exhibit at trial, was destroyed before the appellate court could examine it. The court stated: "The effect of this unauthorized destruction

of the knife is to preclude this court from making an examination on its own of the critical bit of evidence in this case. While there is substantial oral evidence the blade was over two inches in length, nevertheless, the testimony as to the manner in which the blade may be opened does not conform to the statutory language describing the specified ways in which a proscribed switch-blade knife will open. Absent a testimonial description which would constitute evidence, substantial in nature before the juvenile court, and now absent the device itself, this court is unable to ascertain whether the judge's view of the knife was in fact substantial evidence supporting the trial court's finding. The unauthorized destruction of the knife denies Roderick the opportunity for a fair appellate review of the evidence and is a denial of due process." (*Ibid*.)

We are not persuaded by *Roderick S.* because the court did not consider the possibility of reconstructing the exhibit or obtaining a settled statement. Instead, it impliedly presumed it could not be reconstructed. In light of high court authority reviewing a judgment by considering reconstructed exhibits, the defendant may not challenge the sufficiency of the evidence solely on the basis that the exhibits considered by the jury are now lost. Since the defendant made no effort to obtain reconstruction of lost exhibits, his contentions concerning the sufficiency of the evidence are not properly raised.

II

Sufficiency of the Evidence

at the Competency Trial

The defendant claims the evidence at the competency trial was insufficient to support the jury's finding that he was competent to stand trial. The claim is without merit.

It is "presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (Pen. Code, § 1369, subd. (f).) "The trial court and jury's task in 'competency to stand trial' proceedings . . . is to weigh the evidence and determine whether a given individual is 'competent' . . . for the law's purposes, not merely to decide whether or not he is 'mentally ill' in some sense. Our task, on appeal, is to determine whether the evidence 'view[ed] in the light most favorable to the verdict,' supports their finding. (*People* v. *Samuel* (1981) 29 Cal.3d 489, 505 [174 Cal.Rptr. 684, 629 P.2d 485].)" (*People* v. *Kurbegovic* (1982) 138 Cal.App.3d 731, 749, fns. omitted.)

The defendant devotes two paragraphs to his courtroom behavior during the competency trial. This behavior was not evidence for the jury to consider in making its determination of whether he was competent; accordingly, we disregard it. Also, the defendant cites reports of two psychologists in the clerk's transcript. Those reports were not admitted into evidence or given to the jury; therefore, we also disregard them in determining whether the evidence was sufficient. (See *Whispering*

Pines Mobile Home Park, Ltd. v. *City of Scotts Valley* (1986) 180 Cal.App.3d 152, 157.)

During the competency trial, two psychologists, Kent R. Caruso and Ray H. Carlson, appointed to examine the defendant testified, as did the prosecutor. Dr. Caruso conducted a two-hour, twenty-minute interview with the defendant. At the beginning of the interview, Dr. Caruso detected no mental problems. However, as the interview proceeded, after approximately an hour, the defendant began to exhibit psychotic processes, such as an inability to appreciate the gravity of a term of incarceration, paranoia, and delusions. Finally, the defendant proclaimed he was Jesus Christ. Dr. Caruso initially thought the defendant was a malingerer. Although some reservations remained, he concluded the defendant probably was not malingering.

Dr. Caruso gave his opinion that the defendant was incompetent to stand trial because of the risk he would deteriorate into delusional thinking and be unable to assist his attorney. In particular, Dr. Caruso gave his opinion that the defendant might decide to plead guilty while subject to delusional thinking and that his delusions might interfere with the courtroom process. He concluded an effort to plead guilty might come as a result of either a rational decision or a delusion concerning the irrelevance of the judgment and sentence. He expressed some tentativeness to his opinions, however, recommending the defendant be sent to Atascadero State Hospital for long-term analysis.

Dr. Carlson met with the defendant for approximately three hours, administering various psychological tests and interviewing him. After two to two and one-half hours of the session, the defendant began to show symptoms of psychosis, declaring he was Jesus Christ and acting paranoid. Dr. Carlson gave the opinion that the defendant was not malingering.

As a result of the tests and interview, Dr. Carlson concluded the defendant understood the nature of the charges and proceedings. He also concluded, "provisionally," that the defendant could assist his attorney in a rational fashion. He stated: "I thought that he had enough possession of his mental faculties -- he has a certain psychiatric illness which is relatively circumscribed and need not totally incapacitate a person. I felt that he was able to share with you, his attorney, the relevant facts of the case, his own perceptions of what occurred, his -- his whereabouts at the time of the offense and -- and exactly what transpired, to the best of his ability. I thought to that extent, that he could assist counsel rationally." Dr. Carlson continued: "I think what's problematic about the second prong is, Mr. Coley's statements to me that he was not concerned about being found guilty. And here is where his delusional system comes in. That he felt that he would not be punished were he found guilty because he had a particular mission here. And his being held here was more than simply reflecting the offenses and the charges against him in this particular case. But that he would not be, if found guilty, sentenced to prison or to jail because -- he would rather be remanded into the custody

of these people who were observing him and want to get this information from him about his second coming and the message that he has to deliver."

When asked to offer his opinion on whether the defendant was competent to stand trial, Dr. Carlson responded: "I think he is provisionally competent; that is, he's competent unless. [*Sic*.] In my view, he is competent unless he wants to enter a guilty plea. Because I think at that point his delusional disorder begins to influence his decision making."

Deputy District Attorney Cara Beatty testified concerning her observations of the defendant during the proceedings before the competency issue arose. She testified that, through the preliminary hearing and other pretrial proceedings, the defendant appeared to react normally and participated with his attorney in the proceedings. He also appeared to act normally through jury selection for the trial and the early questioning of witnesses in the prosecution's case.

Later, but still during the prosecution's case while the jury was not present, the defendant began pounding the table and telling his attorney and the court he wanted to plead guilty. The defendant said: "I'm not crazy. I'm not crazy just because I want to plead guilty or something like that. Just because I want to plead guilty doesn't make me crazy, I'm not crazy. He can't tell me that I am." The defendant's attorney then told the court he believed the defendant was incompetent to stand trial and mentioned the jury would "go away" if competency proceedings were initiated. The defendant stated: "Well, your Honor, I wish to

tell you something. I have to tell you something right now." The court inquired, and the defendant said: "Your Honor, I'm Jesus Christ, the son of God. I'm here for the second coming."

The core of the defendant's argument on appeal is that, since the psychologists concluded he was not competent to enter a guilty plea, he also was not competent to stand trial, as a matter of law. He bases this argument on *Godinez* v. *Moran* (1993) 509 U.S. __ [125 L.Ed.2d 321]. In proceedings leading up to the United States Supreme Court's decision in *Godinez*, the Ninth Circuit of the Court of Appeals reversed the defendant's murder conviction after his guilty plea because it found the trial court should have held a hearing on the defendant's competency to plead guilty, even though he had already been found competent to stand trial. (*Id*. at pp. __ [125 L.Ed.2d at pp. 329-330].) The federal high court reversed. It held the standard for competency to plead guilty is the same as the standard for competency to stand trial, that is, "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" (Id. at pp. __ [125 L.Ed.2d at p. 330].)

The trial court, here, instructed the jury concerning the appropriate standard for finding competency to stand trial: "[A]lthough on some subject [the defendant's] mind may be deranged or unsound, a person charged with a criminal offense is deemed to be competent to be tried for the crime charged against him if, one, he is capable of understanding the nature and

purpose of the proceedings against him; two, he comprehends his own status and condition in reference to such proceedings, and three, he is capable to assist his attorney in conducting a defense in a rational manner." (See CALJIC No. 4.10.)

In support of his insufficiency claim, the defendant attempts to have us consider evidence not presented to the jury. He states: "It is noteworthy that despite the jury's determination that [defendant] was competent to participate in the criminal proceedings, the CDC has placed appellant at the Department of Mental Health's Atascadero State Hospital for treatment because of his delusions, his nearly successful attempts at suicide, and severe mental illness. At Atascadero, appellant was diagnosed as having organic brain disorders as a result of repeated head trauma which he sustained prior to the present case. The probation report reveals that at the time the present charges arose, appellant was receiving Social Security Insurance (SSI) benefits as a result of a mental disability related to brain damage sustained when appellant was hit by a car." Except for the probation report, none of this information comes from the record, and the jury in the competency trial did not consider the probation report. It was improper, indeed, misconduct, for counsel to include this information in his argument. (See *People* v. *Pinholster* (1992) 1 Cal.4th 865, 948.)

The defendant claims that, since the psychologists opined he was not competent to plead guilty, he was not competent to stand trial. He argues, in essence, that, because the standard for finding a defendant competent to stand trial is the same as the

standard for finding the defendant competent to plead guilty, it is not possible he could be competent to stand trial but not competent to plead guilty. This argument is illogical and factually unsupported. It is illogical because, even though the standard is the same for both, the defendant's mental condition may not be the same when he stands trial and when he pleads guilty. It is factually unsupported because the defendant apparently became delusional when he said he wanted to plead guilty. What the psychologists were saying is that the defendant's stated desire to plead guilty was a result of delusional thinking that he was Jesus Christ and, therefore, it did not matter what happened in the trial court proceedings.

This is not a matter of applying different standards to two different situations. It is a matter of applying the correct standard to each different situation. If the defendant were to lapse into delusional thinking again, counsel or the court could raise the issue of whether the trial could continue. Nonetheless, the evidence at the competency trial did not mandate a finding of incompetence to stand trial. The evidence supports the conclusion that, as long as the defendant did not lapse into delusional thinking, he was competent to stand trial.

The defendant concedes h e was capable of understanding the nature and purpose of the proceedings and was capable of assisting his attorney in a rational manner, as long as he was not delusional. However, he contends there was no evidence he comprehended his own status and condition in reference to the proceedings. (See *People* v. *Conrad* (1982) 132 Cal.App.3d 361,

369-370.) He asserts: "Neither psychologist directly addressed [this requirement], whether [the defendant] was capable of understanding his own status and condition in relation to the proceeding. Given that [the defendant] claimed to be the second coming of Jesus Christ who was unaffected by the court proceedings and potential punishment, failure to have expert testimony directly on that issue was unfortunate." When a defendant bears the burden of proving incompetence in the trial court and, on appeal after a finding of competence, must overcome the presumptions in favor of the judgment, a lament that there was no evidence on an issue will not lead to success on appeal.

The defendant's contention he was incompetent to stand trial is without merit. The evidence was sufficient to support the jury's finding that the defendant was competent *to stand trial*.

III

Instructions in Competency Trial

The defendant asserts the trial court erred because it did not instruct the jury, pursuant to *Godinez, supra*, 509 U.S. __ [125 L.Ed.2d 321], that the standard for finding a defendant competent to plead guilty is the same as the standard for finding a defendant competent to stand trial. This assertion is without merit because the evidence did not warrant such an instruction and the defense did not rely on the theory the defendant was incompetent to plead guilty. (See *People* v. *Stewart* (1976) 16 Cal.3d 133, 141.) Indeed, the evidence was that the defendant would be incompetent to plead guilty *if he was delusional* and he

may have been delusional when he stated he wanted to plead guilty (just before his attorney raised the competency question).

During closing argument of the competen cy trial, defense counsel argued: "We submit to you that [the defendant], at the present time, is incompetent to stand trial, that he should go to Atascadero like Dr. Caruso indicated, receive treatment, obtain medications and then come back, after he has been stabilized, to do his trial in this matter." There was no factual reason to give an instruction telling the jury the standard of competency for standing trial is the same as the standard of competency for pleading guilty. Furthermore, the defense did not rely on a theory that required the jury to differentiate between the two situations. Accordingly, there was no duty to instruct the jury as the defendant now contends.

We also reject the defendant's suggestion that defense counsel was ineffective for failing to request an instruction pursuant to *Godinez, supra*, 509 U.S. __ [125 L.Ed.2d 321]. As stated above, no such instruction was warranted either by the evidence or the defense theory.

IV

Definition of

Reasonable Doubt

The defendant asserts the trial court erred in the definition it gave the jury concerning reasonable doubt. (CALJIC No. 2.90.) The contention is without merit.

The trial court instructed the jury using the 1994 revision of CALJIC No. 2.90: "Reasonable doubt is defined as follows: It

is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. [¶] It is not a m ere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt."

The term "to a moral certainty" has been taken out of the previous version of CALJIC No. 2.90. Before the revision, it stated, in part: "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge." (Former CALJIC No. 2.90, italics added.)

The defendant contends that by leaving out the "to a moral certainty" language, the trial court did not require the jury to have any particular *degree* of conviction concerning the defendant's guilt. This contention has no merit for two reasons: (1) the California Supreme Court has approved the instruction as given and (2) the instruction properly informed the jury concerning the meaning of "reasonable doubt."

The United States Supreme Court upheld the use of fo rmer CALJIC No. 2.90, but criticized the use of the "to a moral certainty" language: "We do not think it reasonably likely that the jury understood the words moral certainty either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. At the same time, however, we do not condone the use of

the phrase." (*Victor* v. *Nebraska* (1994) 511 U.S. ___, ___ [127 L.Ed.2d 583, 597].)

"[S]o long as the Court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, . . . the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' [Citation.]" (*Victor* v. *Nebraska, supra,* 511 U.S. at p. __ [127 L.Ed.2d at p. 590].) Only one instruction has been held by the United States Supreme Court to violate this standard. That instruction informed the jury, in part, that reasonable doubt "' *must be such doubt as would give rise to a grave uncertainty* . . . .'" (*Cage* v. *Louisiana* (1990) 498 U.S. 39, 40 [112 L.Ed.2d 339, 342], italics in original; see also *Victor, supra,* at p. __ [127 L.Ed.2d at p. 590].)

Responding to *Victor* v. *Nebraska*, the California Supreme Court also upheld the constitutionality of former CALJIC No. 2.90. (*People* v. *Freeman* (1994) 8 Cal.4th 450, 501.) However, the court opined the words "moral certainty" should be taken out: "Although modifying the standard instruction [defining reasonable doubt] is perilous, and generally should not be done, today it might be more perilous for trial courts not to modify it in a narrow and specific manner in light of the high court's statement that the instruction's 'common meaning . . . may continue to [change] to the point that it' becomes unconstitutional. (*Victor* v. *Nebraska*, *supra*, 511 U.S. at p. __ [127 L.Ed.2d at p. 597, 114

S.Ct. at p. 1248].) A slight modification in view of that decision might be deemed safe, indeed safer than not making it. The high court made clear that the terms ‘moral evidence’ and ‘moral certainty’ add nothing to the jury's understanding of reasonable doubt. It thus seems that trial courts might, in the future, safely delete the following phrases in the standard instruction: ‘and depending on moral evidence,’ and ‘to a moral certainty.’” (*People* v. *Freeman, supra,* at p. 504, italics and fn. omitted.) Thus, the defendant’s contention is without merit because we are bound by precedent of the California Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455; see also *People* v. *Light* (1996) 44 Cal.App.4th 879.)

The defendant’s contention is without merit also because the California Supreme Court was correct--taking “to a moral certainty” out of the instruction is constitutionally permissible. “An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof.” (*Victor* v. *Nebraska, supra,* 511 U.S. at p. __ [127 L.Ed.2d at p. 596].) This has been the position of the United States Supreme Court for at least 110 years. (*Hopt* v. *Utah* (1887) 120 U.S. 430, 439 [30 L.Ed. 708, 711-712].) In *Hopt*, the trial court gave a definition of reasonable doubt similar to the one given in this case: “[R]easonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you

can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have *an abiding conviction of the defendant's guilt*, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." (*Id*. at p. 439 [30 L.Ed. at p. 711], italics added.) Although this instruction does not refer to moral or evidentiary certainty, the court approved it: "The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." (*Ibid*.) The court continued: "[T]he words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt' . . . ." (*Id*. at p. 440 [30 L.Ed.2d at p. 711].)

Accordingly, the trial court's reasonable doubt instruction was not erroneous. (See *People* v. *Light, supra,* 44 Cal.App.4th at p. 889; *People* v. *Torres* (1996) 43 Cal.App.4th 1073.)

V

Three-month Recess of Guilt Phase

Trial for Competency Trial

The trial of the defendant's guilt commenced with jury selection on December 6, 1994. On December 8, after the two victims had testified for the prosecution, defense counsel expressed his doubts concerning the defendant's competence to stand trial. The court suspended the criminal proceedings, appointed two psychologists to examine the defendant, and

instructed the members of the jury they would be released temporarily but were not to form an opinion or discuss the case. After two continuances caused by the failure of the psychologists to file their reports, the competency trial commenced on January 31, 1995. Meanwhile, the defendant moved to discharge the guilt phase jury and declare a mistrial. The court deferred ruling on the issue until after the competency trial. On February 2, the jury found the defendant competent, and, on February 10, the court heard and denied the defendant's motion for verdict notwithstanding the judgment. On February 16, the court denied the motion to discharge the jury, but later took under consideration a motion to reconsider pending a hearing to question the jurors concerning hardship.

On February 24, 1995, the court met with the jury. One of the jurors had been excused due to an injury, but the alternate took his place. The court asked the jurors if any of them had a problem with keeping an open mind until the rest of the evidence was presented. The jurors indicated they could continue with open minds. The court again denied the motion to discharge the jury and declare a mistrial.

On March 14, 1995, the jury trial recommenced. Ninety-six days elapsed from the time it was suspended on December 8, 1994.

By statute, a jury already impaneled when the court suspends proceedings for a competency trial must not be discharged except for undue hardship: "If a jury has been impaneled and sworn to try the defendant, the jury shall be discharged only if it appears to the court that undue hardship to the jurors would

result if the jury is retained on call." (Pen. Code, § 1368, subd. (c).)

The defendant claims his right to due process was violated by the trial court's refusal to discharge the jury because of the delay caused by the competency trial, but he cites no case in which the refusal to discharge a jury retained on call during a competency trial was held to be a violation of due process. Instead, he cites cases, a Court of Appeal decision and a Superior Court Appellate Division decision, in which a recess was taken in the trial proceedings for an improper purpose. (*People* v. *Santamaria* (1991) 229 Cal.App.3d 269; *People* v. *Engleman* (1981) 116 Cal.App.3d Supp. 14.)

In a murder and robbery trial in *Santamaria*, the trial court adjourned jury deliberations for 11 days because the judge was "away." The jury returned and, on the same day, convicted the defendant of the crimes. (229 Cal.App.3d at p. 275.) On appeal, the court determined the trial court erred because the adjournment was not for good cause. (Id. at p. 277.) The court held the error was prejudicial and reversed because the adjournment in deliberations disrupted the jury's orderly examination of the evidence and exposed the jury to possible outside influences. The focus of the inquiry concerning prejudice was on the fact that a lengthy adjournment was taken *during the deliberations*: "It cannot be overemphasized that this prolonged and unwarranted interruption came at the most critical period in the trial." (Id. at pp. 278-279, 281.)

Santamaria is distinguishable for two reasons: (1) the continuance of the trial in this case was indisputably for good cause while the adjournment in *Santamaria* was not and (2) the adjournment in *Santamaria* took place during deliberations, "the most critical period in the trial," while the continuance here came long before submission of the case to the jury and was accompanied by admonitions to keep an open mind.

In *Engleman*, the appellate department held a drunk driving conviction had to be reversed because of improperly admitted evidence. (116 Cal.App.3d Supp at p. 20.) Having already concluded the conviction had to be reversed, the court went on to determine that an improper three-week continuance in the trial, after the prosecution's case, required reversal. It stated: "We hold that this was inherently prejudicial to defendant's receiving a fair trial, even though it is hard to demonstrate what effect this delay had on the jurors' thought processes." (Id. at p. 21.) The *Engleman* opinion is both distinguishable and discountable--distinguishable because the continuance was not for good cause as was the continuance in this case and discountable because the court presumed prejudice contrary to the constitutional requirement not to reverse unless there is actual prejudice. (Cal. Const., art. VI, § 13.)

The defendant argues: "Given the actual juror exposure to extrajudicial evidence and the virtual certainty [of] lapsed recall of the early testimony, the separation of the jury for ninety-seven [*sic*] days violates due process." Contrary to the defendant's argument, there was no attempt to prove juror

exposure to extrajudicial evidence relevant to these proceedings. Furthermore, any lapse in memory was adequately remedied by rereading of the testimony to the jurors. While a long delay is certainly not ideal, it was justified here and resulted in no actual prejudice. Accordingly, we reject the defendant's arguments.

VI

Discretion to Reduce Assault

to a Misdemeanor

In a frivolous argument, the defendant asserts the trial court abused its discretion in denying his motion to reduce the assault with a deadly weapon to a misdemeanor. While he asserts the trial court had the discretion (see *People* v. *Superior Court (Alvarez)* (Jan. 16, 1997, C053029) ___ Cal.3d ___) and the Attorney General concedes there is such authority, the defendant gives only the following reasoning for asserting the refusal to reduce the assault with a deadly weapon to a misdemeanor was an abuse of that discretion: "Given that no one was injured in the barroom struggle, the court abused its judicial discretion in failing to reduce the conviction to a misdemeanor to avoid such disproportionate punishment for a relatively uneventful, domestic-like, barroom dispute where no one was injured or even touched in the assault."

We take issue with this argument for several reasons. First, that no one was injured came about only because the victims were successful in avoiding the defendant's assault. He tried to injure them. Second, there is no requirement that the

trial court exercise its discretion in a manner to minimize the defendant's punishment for his crimes. And third, characterizing the assault as "domestic-like" does not make the assault any less egregious. To the contrary, domestic assaults strike at the very heart of a victim's well-being.

At oral argument, the defendant's appellate counsel intimated the trial court may not have known it had discretion to reduce the assault to a misdemeanor and, therefore, we must remand for a new determination on this issue. We do not, however, consider arguments made for the first time at oral argument. (See *People* v. *Harris* (1992) 10 Cal.App.4th 672, 686.) In any event, there is no indication in the record the trial court doubted it had discretion to reduce the assault to a misdemeanor.

VII

Discretion to Strike Prior Convictions

The defendant contends this case must be remanded for the trial court to consider exercising its discretion to strike the prior felony convictions that qualified him for sentencing treatment under the three strikes law. We agree.

Our state Supreme Court's recent decision in *People* v. *Superior Court* (*Romero*) 13 Cal.4th 497 is dispositive of the issue. There, the court decided the three strikes law did not eliminate the trial court's power to act on its own motion pursuant to section 1385. (*Id*. at p. 504.) The court reasoned that, if the statute was construed to eliminate the trial court's discretion, the trial court would not have the power to dismiss

unless the prosecutor consented. "So interpreted, the statute would appear to violate the doctrine of separation of powers." (*Id*. at p. 513.) The court held that in cases charged under the three strikes law, a trial court may exercise the power to dismiss granted in section 1385, either on the court's own motion or on that of the prosecuting attorney, subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion. (*Id*. at p. 532.)

The *Romero* court also supplied guidelines that may be used by a reviewing court in deciding whether a particular case should be remanded for resentencing. The court stated, in essence, a remand for reconsideration of the sentence is appropriate unless the record shows "the sentencing court was aware that it possessed the discretion to strike prior felony conviction allegations without the concurrence of the prosecuting attorney and did not strike the allegations, or if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id*. at p. 530, fn. 13, citation omitted.)

Here, none of the exceptions to the standard for remand identified by the *Romero* court are present. The court did not state it knew it had discretion to strike the priors and did not say it would not strike them even if it had discretion. All that is discernible from the present record is that the court denied the motion to strike the prior felony convictions. Consequently, remand is required. Accordingly, we will remand to the trial court for reconsideration of the sentence.

VIII

Other Sentencing Issues

Given our determination that the case must be remanded for resentencing, we need not reach the issue of whether the sentence, as imposed, constituted cruel and unusual punishment.

The defendant asserts and the Attorney General concedes the sentence of 180 days on count five, misdemeanor disturbing the peace (Pen. Code, § 415, subd. (1)), exceeded the maximum term, which is 90 days. On remand, the trial court must impose a sentence within the statutory limits.

Also on remand, the trial court must consider whether it must sentence the defendant consecutively on the prior felony convictions and prior prison terms. "[A] defendant's sentence under the three strikes law should include a doubled term or life term, as appropriate under section 667, subdivision (e), plus an enhancement under section 667, subdivision (a) for each prior serious felony conviction." (*People* v. *Cartwright* (1995) 39 Cal.App.4th 1123, 1138-1139; *People* v. *Purata* (1996) 42 Cal.App.4th 489, 497-499.) In resentencing the defendant, the court must impose the sentence required by law. (See *People* v. *Karaman* (1992) 4 Cal.4th 335, 348-349.)

Finally, the trial court sentenced the defendant to two concurrent terms of one year for the prior prison terms under Penal Code section 667.5, subdivision (b). Those terms, however, must be imposed consecutively. (See *Romero, supra,* 13 Cal.4th at pp. 506-507.)

DISPOSITION

The convictions are affirmed. The sentence is vacated and the matter remanded to the trial court for the purpose of allowing the court to exercise its discretion whether to strike the defendant's prior serious felony convictions. If the trial court strikes one or more of the priors, it shall resentence defendant. If the trial court declines to strike the priors, it shall reinstate the sentence previously imposed, modifying the minimum term and the sentence on count 5 to conform to law as discussed in this opinion.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

MORRISON, J.