People v. Nipiossian

2007 | Cited 0 times | California Court of Appeal | December 13, 2007

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Defendant and appellant, Hartune Nipiossian, appeals from the judgment entered following his conviction, by jury trial, for first degree murder with firearm use findings (Pen. Code, §§ 187, 12022.5, 12022.53).[1] Sentenced to state prison for 50 years to life, Nipiossian claims there was trial error.

The judgment is affirmed.

BACKGROUND

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

1. Prosecution Evidence

This case involves the shooting death of Armen Blkhoyan. Defendant Nipiossian was married to Armen's sister, Lala, and they had two daughters, ages five and three. At the time Armen was killed, Nipiossian and Lala had been separated for more than a year. Lala was living with the two girls in an apartment and Nipiossian was living with his parents.

Armen had been supporting Lala financially and emotionally during the separation, which angered Nipiossian because he thought Armen and Armen's father disliked him and that was why they were helping Lala. Nipiossian believed he and Lala would have reconciled but for her family's interference. On March 25, 2001, at a birthday party for one of Nipiossian's daughters, he argued with his father-in-law and Armen about this. His father-in-law told him to get a job and take care of his children.

On April 11, 2001, Lala was at home with her parents, her daughters and Armen. Nipiossian arrived and tried to confront Armen about Lala. Armen and his parents left. Moments later, Armen called and asked Lala to tell Nipiossian to move his car. Nipiossian came outside and angrily confronted Armen again, but then he left.

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On April 12, 2001, Nipiossian celebrated his 41st birthday at his parents' home. Lala and the children were there. Lala testified Nipiossian seemed anxious and nervous, and that he was pacing back and forth. Lala and the children left about 9:00 p.m. Shortly thereafter, Nipiossian drove off in his mother's car, saying he was going for cigarettes. Instead, he drove to Armen's apartment complex and waited in the parking lot. Armen's wife, Teresa, arrived home about 9:30 p.m. Armen arrived home moments before her; Teresa saw Armen park his S.U.V. and go up to their apartment. Teresa parked her car and then noticed Nipiossian, who told her he had come to see Armen.

Teresa invited Nipiossian upstairs, but he refused, saying: "It's more convenient and it's better for me to talk to him outside." Teresa went up to the apartment and told Armen that Nipiossian wanted to talk to him. Reluctantly, because he was very tired, Armen put his jacket back on and went downstairs. The next thing Teresa heard was the sound of Armen's S.U.V. driving off. Armen had never before left without telling Teresa where he was going.

Shortly after 10:00 p.m. that same night, Evan Kim was riding in his friend Daniel's car when he saw Nipiossian and Armen fighting at the intersection of Belmont and Broadway. Armen went down to his knees and Nipiossian either kicked or kneed him. Kim saw a flash, and the two men in the car jumped as if surprised. Armen then staggered into the path of Daniel's car. Daniel swerved to avoid him and pulled over. Daniel and Kim tried to call 911, but they couldn't get through. Daniel made a U-turn and stopped at the intersection again. A black Lexus had also stopped and Kim saw Armen get into the back seat.

Anton Oganesyan, who had been driving the black Lexus, testified Armen stepped in front of his car. Oganesyan could see he was bleeding. Armen got into the back seat. Nipiossian tried to get in too, but Armen started cursing and shut the door. Armen said, "Help me. I'm dying." Oganesyan flagged down a passing patrol car. The officer had Oganesyan ask Armen, who was speaking Armenian, who shot him. Armen replied, "My sister's husband."[2] Armen died shortly thereafter at the hospital.

Police officers found Nipiossian standing at the intersection of Belmont and Broadway, smoking a cigarette and looking around. He was bleeding from the left wrist. Nipiossian told the officers he and Armen had been parked on Belmont when they were confronted by a Hispanic man who approached the passenger side of Armen's S.U.V., brandished a gun and demanded their money. Nipiossian said he raised both hands, with his palms facing forward, but the Hispanic man started shooting anyway. The officers who spoke to Nipiossian testified he appeared to be oriented to time, person and place, seemed to understand their questions, and gave coherent responses.

Armen's S.U.V. was found on Belmont, straddling the sidewalk. There was blood on both front seats. Three expended .25 caliber bullet casings were found on the floorboard. A trail of blood led from the driver's side of the S.U.V. toward a planter box, where the bushes had been parted and the leaves were covered in blood. An empty .25 caliber semi-automatic Raven handgun was found hidden inside the planter box. Another trail of blood led from the planter box, down the sidewalk, to the corner of

Belmont and Broadway where the police had found Nipiossian standing.

Nipiossian was taken by ambulance to Glendale Adventist Hospital for treatment of his wrist injury. While at the hospital, Nipiossian asked police officers a number of times to use the phone. When these requests were refused, Nipiossian "started breathing heavy" and announced "I'm psycho. You know, I'm psycho." Nipiossian became extremely agitated, shaking and pulling on his hair. Hospital security arrived, gave Nipiossian an injection and put him into restraints. He was later taken to the jail ward at U.S.C. Medical Center.

The morning after the shooting, police searched the bedroom Nipiossian occupied in his parents' home. They found gun cleaner and a gun cleaning kit on his night stand. Nipiossian's parents told police that on the previous evening Nipiossian had been angry at Armen.

Nipiossian's mother's car was found close to Armen's apartment complex.

There were five unfired rounds of .25 caliber ammunition inside the driver's side door compartment. Ballistics testing showed that the three .25 caliber bullets recovered from Armen's body, and the three .25 caliber expended cartridge casings found inside Armen's S.U.V., had been fired from the gun found in the planter box.

The autopsy showed Armen had been shot in the chest, the stomach, and the neck. The bullet causing the neck wound had been fired from at least two feet away; the gunshot wounds to the chest and stomach had been inflicted from point-blank range. There were abrasions on Armen's left knee and on his hands that were consistent with him having fallen in the street. Nipiossian's wrist injury had apparently been caused when a bullet entered the back of his hand, traveling from right to left.

Police conducted a crime scene reenactment with the assistance of the coroner and a forensic firearms examiner. Armen's chest and stomach injuries were consistent with Nipiossian having shot him while Nipiossian was sitting in the passenger seat of the S.U.V. Armen's neck injury was consistent with Nipiossian having fired at him from above while Armen was on his knees in the street. Nipiossian could not have sustained the wound to his wrist if his palms had been facing outward when he was shot. It appeared Nipiossian had accidentally shot himself inside the S.U.V. as he stretched out his left hand toward Armen.

DNA testing showed Armen's blood was on the sidewalk and on the driver's seat of the S.U.V. Nipiossian's blood was on the passenger seat. The trail of blood leading to the planter box, as well as blood on the gun concealed there, came from Nipiossian.

2. Defense Evidence

Dr. Lukas Alexanrian,[3] a psychiatrist, testified Nipiossian had been suffering from severe chronic

schizophrenia, paranoid type, since January 1999. His condition was marked by persecutory delusions, including the belief people were trying to kill him. It is not uncommon for such people to carry weapons for protection. Nipiossian's symptoms included auditory hallucinations, paranoia, extreme agitation, anxiety, insomnia and pacing. The symptoms became overt in December or January 1999, and culminated in a psychotic break on April 11, 1999, which had apparently been triggered by Nipiossian's belief he would be killed on April 12, his birthday.

Nipiossian was hospitalized for a week in April 1999. After being discharged, his treatment continued for two years on an out-patient basis with a psychiatrist, Dr. Ara Kadoyan. Kadoyan prescribed various psychotropic medications, including Risperdal, Prozac and Congentin. Although Nipiossian's condition was chronic, it could be controlled with medication. If he failed to take his medication, his psychosis would return. Alexanrian's review of Kadoyan's records indicated Nipiossian often did not take his medication. Alexanrian testified that during this period Nipiossian "was continuously paranoid. The very clear assumption should be made that he still believes that he is going to be killed . . . [¶] There is some significance about his birth date that was coming up . . . . [O]ne of the beliefs that he had is that he is going to be killed on his birthday." Nipiossian was seen by Dr. Kadoyan on April 9, 2001, three days before Armen was killed. Kadoyan's records for that appointment indicated Nipiossian was exhibiting persecutory symptoms and appeared not to have been taking his medication.

Alexanrian testified the hospital records from Nipiossian's treatment at Glendale Adventist on April 12 and 13, 2001, in the immediate aftermath of the shooting, show he was out of control and had to be restrained by the use of drugs and physical restraints.

Asked for his opinion about Nipiossian's psychiatric condition on the day of the shooting, Alexanrian opined Nipiossian was "quite delusional . . . , quite agitated, quite distraught at that date, and that he . . . continued being psychotic." On cross-examination, Alexanrian acknowledged a psychotic person could commit murder for reasons unassociated with his or her psychosis.

3. Rebuttal Evidence

Dr. Kaushal Sharma, a forensic psychiatrist, concurred with Alexanrian's diagnosis of schizophrenia, paranoid type. Sharma explained that the four common symptoms of schizophrenia were delusions, hallucinations, disorganized thought processes, and misperceptions. There was a difference between schizophrenia and psychosis: "Psychotic disorder is . . . when the person's symptoms are active, and the person is having gross distortions of reality. For example, in a schizophrenic, a patient at a given time may not have symptoms because the nature of the illness is such that sometimes they do well . . . without medication. Sometimes they do well because of medication. [¶] So if a person is actively having symptoms, actively hallucinating, actively delusional, actively having [misperception], that would be considered [a] psychotic condition; while in the phase of the medication or whatever, he would still be schizophrenic, but not psychotic."

Nipiossian claimed to have impaired memory, which Sharma found significant because memory impairment "is not consistent with schizophrenia. Something else is going on, or the person may simply be dishonest." Sharma testified he had not seen any evidence in the records he reviewed that Nipiossian had not been taking his medication at the time of the shooting. Nipiossian's pacing and restlessness on the night of the shooting were common side-effects of the kind of medication he had been prescribed and, therefore, consistent with Nipiossian taking his medication. These symptoms, along with a partially empty bottle of medication recovered from Nipiossian's bedroom, showed he was taking his Risperdal, even if not consistently. If Nipiossian had been taking most of the prescribed Risperdal he "should be getting benefits, including the improvement in symptoms and including the increased side effects." Sharma opined there was nothing to indicate Nipiossian had been psychotic in the days right before the killing. Sharma testified Dr. Kadoyan's entry for April 9, 2001, contained no indication Nipiossian was experiencing a psychotic or otherwise heightened condition at that time.[4] Sharma testified such factors as pre-offense preparation, targeting a person who is an object of hatred, and post-offense efforts at concealment would indicate the offense had not been caused by the perpetrator's mental illness. A schizophrenic can commit a crime for reasons independent of the schizophrenia, such as anger, resentment or jealousy.

Asked to gauge Nipiossian's condition between April 1999 and April 2001, Sharma opined it was only "mildly serious." Sharma based this judgment on the fact that during this time Nipiossian had been receiving on-going psychiatric treatment and, even if he had not always taken all of his medication, he had been hospitalized only once. Nipiossian had been able to live with his parents and be somewhat socially active. Sharma testified the records of Nipiossian's hospitalization right after the shooting did not indicate any psychosis, that "none of those four main symptoms I described [were indicated] except that he was belligerent and uncooperative." Regarding Nipiossian's statement at the hospital that he was "psycho," Sharma commented: "It's hard to get my real patients to make statements that they are crazy or psycho . . . ." Sharma noted the April 23, 2001, psychiatric evaluation at U.S.C. Medical Center concluded Nipiossian was not psychotic. As for Nipiossian's police statement, Sharma had listened to the tape recording of the interview and he opined Nipiossian had displayed no psychotic symptoms.

CONTENTIONS

1. The trial court erred by failing to hold a second competency hearing.

2. The trial court improperly restricted Nipiossian's presentation of evidence.

3. Nipiossian was denied effective assistance of counsel.

4. There was prosecutorial misconduct.

5. There was cumulative error.

DISCUSSION

1. Trial court did not err by failing to hold a second competency hearing.

The trial court held a competency hearing and determined Nipiossian was competent to stand trial. Nipiossian now contends the trial court erred by failing to hold a second competency hearing. This claim is meritless.

a. Legal Principles

"Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution [citation] and article I, section 15 of the California Constitution. Those protections are implemented by statute in California." (People v. Hayes (1999) 21 Cal.4th 1211, 1281). "Under California law, a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).)

A defendant is presumed to be mentally competent to stand trial. (§ 1369, subd. (f).) [¶] . . . [S]ection 1368 provides that if the trial court has any doubt as to the defendant's competence to stand trial, it must state that doubt in the record and inquire of counsel whether, in his or her opinion, the defendant is mentally competent. (§ 1368, subd. (a).) The trial court is authorized to conduct a competency hearing on its own motion and at the request of counsel. (§ 1368, subd. (b).) [¶] . . . '[O]nce the accused has come forward with substantial evidence of incompetence to stand trial, due process requires that a full competence hearing be held as a matter of right. [Citation.] In that event, the trial judge has no discretion to exercise. [Citation.] As we also have noted, substantial evidence of incompetence is sufficient to require a full competence hearing even if the evidence is in conflict. [Citation.] We have concluded that where the substantial evidence test is satisfied and a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed. [Citation.]' " (People v. Young (2005) 34 Cal.4th 1149, 1216-1217, fn. omitted.) "In this context, substantial evidence means evidence that raises a reasonable doubt about the defendant's ability to stand trial. [Citation.] The substantiality of the evidence is determined when the competence issue arises at any point in the proceedings. [Citation.] The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard. [Citations.] [¶] Substantial evidence of incompetence may arise from separate sources, including the defendant's own behavior. For example, if a psychiatrist or psychologist 'who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.' . . . [A] defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (People v. Ramos (2004) 34 Cal.4th 494,

507-508.)

" ' "When a competency hearing has already been held and defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." ' " (People v. Lawley (2002) 27 Cal.4th 102, 136, italics added.) "We apply a deferential standard of review to a trial court's ruling concerning whether another competency hearing must be held. [Citation.] We review such a determination for substantial evidence in support of it." (People v. Huggins (2006) 38 Cal.4th 175, 220.)

b. Procedural Background

On February 20, 2003, during jury selection, defense counsel declared a doubt as to Nipiossian's competence: "I can say unequivocally, in the 20 years of practice in criminal law, I've never had a situation where a defendant is less able to aid me in his defense." The trial court discharged the prospective jurors and ordered a competency hearing pursuant to section 1368. The hearing was held on June 9 and 10, 2003.

The defense presented the testimony of Dr. Kadoyan, the psychiatrist who had been treating Nipiossian since his 1999 hospitalization. Kadoyan testified Nipiossian had been admitted to Glendale Adventist Hospital on his birthday, April 12, 1999, and remained there for a week. He had been brought to the emergency room by his parents and admitted on an involuntary basis. Nipiossian was having auditory hallucinations, he believed someone was trying to kill him, and he was suicidal. He was diagnosed with paranoid schizophrenia, and given medication for psychosis and depression.

After Nipiossian was discharged, Kadoyan treated him on an outpatient basis until April 9, 2001, three days before Armen was killed. During these two years, Nipiossian had been uncooperative and unwilling to talk, and this was true whether or not he had been taking his medication. Kadoyan opined that, as opposed to being incapable of cooperation, Nipiossian had simply refused to cooperate with his treatment. Kadoyan testified he knew nothing about Nipiossian's competence at the present time, because he never saw him again after their appointment on April 9, 2001.

Defense counsel Paul Geragos testified Nipiossian was so uncooperative it became difficult to formulate a defense. Nipiossian refused to talk about Armen or the events surrounding his death. Defense counsel Mark Geragos testified Nipiossian had been uncooperative on more than 10 occasions when Geragos tried to discuss the case with him.

Dr. C. J. Bench, a forensic psychiatrist, testified for the prosecution. After interviewing Nipiossian in March 2003, Bench found no evidence of any psychosis. Although Nipiossian was able to provide information about various aspects of his social and personal history, he refused to talk about the past two years, including anything having to do with his psychiatric problems or with Armen's killing.

Bench concluded there was no cognitive or psychiatric reason for Nipiossian's refusal to cooperate, and he opined Nipiossian's refusal was volitional. Bench concluded Nipiossian was competent to stand trial within the meaning of section 1368.

Dr. Ronald Markham, a forensic psychiatrist, first examined Nipiossian in November 2002. He reported: "Current mental status examination revealed him to be oriented, alert, semi-cooperative and of normal intelligence with a good fund of knowledge and fundamental skills. Responses were limited and meager, but relevant and coherent. . . . There was no clinical evidence of an acute psychotic process or thought disorder, likely due to his medication." Markham concluded Nipiossian "is competent to stand trial within the meaning of Section 1368 P.C. He is oriented, aware of the charges, demonstrated an adequate understanding of the nature and purpose of the proceedings and has the capacity to cooperate with counsel in a rational manner. Any contrary clinical picture would be created intentionally and volitionally." Markham conducted another examination in February 2003, and reached similar findings. He opined Nipiossian's "[m]emory impairment was contrived in my opinion," and that "[h]e continues in his attempt to manipulate the clinical picture."

Dr. Kaushal Sharma, a forensic psychiatrist, examined Nipiossian in November 2002, to determine his sanity at the time of the crime, not to determine his competency to stand trial. Sharma noted: "During my interview the defendant was highly uncooperative and provided minimal information. He answered many of my questions by stating 'I don't remember' or 'I don't know.' An individual suffering from [a] psychotic mental condition does not have impairment of memory."

Dr. Kory Knapke, a forensic psychiatrist, interviewed Nipiossian in August 2001.

Based on that interview and a review of Nipiossian's medical records, Knapke concluded: "[I]t is clear that the defendant has a significant psychiatric history including documented psychotic symptoms dating back to 1999. His family reported in the 1999 hospital record that the defendant began having problems as far back as 6-7 years prior to 1999 after he began having problems with his wife and family. His psychotic symptoms did not appear until a few months prior to his hospitalization in 1999. Based on this history, it appears that the defendant has a valid psychiatric illness. [¶] However, the defendant understood the charges and proceedings against him during this clinical examination. He was also calm and able to rationally cooperate with me during this interview. Because of this, it is my opinion that he would also be able to rationally cooperate with counsel in his defense. Therefore, the defendant is competent to stand trial."

After considering the medical evidence, the trial court concluded Nipiossian "is able to understand the nature of the proceedings" and "has the capacity to assist counsel in the conduct of a defense in a rational manner, and I, therefore, find the defendant presently mentally competent within the meaning of Penal Code section 1368."

Trial proceedings resumed and a new jury was chosen. Before testimony got underway, defense

counsel Paul Geragos told the trial court: "I'm not raising a [section] 1368 again, but I just want the record to reflect that our client's condition ha[s] n[o]t changed . . . ." Geragos added, "And it's not because he is obstinate or unwilling to cooperate. It's just that his mind can't focus on issues that we want to talk about." Ten days later, defense counsel Lara Yeretsian told the trial court: "I just want to make it clear, that we do have a problem in our case, and that is we don't have our client's version of the facts. [¶] Our client, up until this day, from day one until now, has never told us what happened. We've never gotten his side, his version of what happened that night or prior to that night." Two weeks later, when the trial court asked if Nipiossian was going to testify, defense counsel Paul Geragos said, "[M]y point is that I haven't had that rapport with the client to know what he's going to say, so therefore, I can't represent him when he's on the witness stand. When I say 'I can't represent him,' it's difficult for me to advise him when I don't know what he's going to say."

c. Analysis

Nipiossian contends the trial court should have held a second competency hearing because defense counsel told the court Nipiossian was not cooperating with them. While acknowledging that a mere refusal to cooperate does not demonstrate incompetence, Nipiossian argues: "Counsel made plain that appellant's difficulty . . . was the result of his incapacity rather than a willful refusal to cooperate. Indeed, counsel's comments made clear that appellant was more than simply unwilling to cooperate, but rather was in some psychological sense . . . unable to do so." But defense counsel were not qualified to render medical opinions as to the cause of Nipiossian's failure to cooperate. (See People v. Frye (1998) 18 Cal.4th 894, 953 ["a trial court is not required to order a competency hearing based on counsel's perception that his client may be incompetent"].) And the expert medical evidence uniformly showed Nipiossian had the ability to cooperate, but was simply refusing to do so. The mere fact Nipiossian would not cooperate with defense counsel does not by itself demonstrate he was incompetent. (Cf. People v. Blair (2005) 36 Cal.4th 686, 718 [defendant's choice not to present defense at penalty phase did not compel doubt as to his competence].)

The Attorney General argues that, although defense counsel "advised the trial court several times that appellant was not cooperative, none of counsel's statements alluded to a change of circumstances or suggested that new evidence of incompetence existed. At the first competency hearing in June 2003, appellant's lack of cooperation was defense counsel's sole basis for asserting that appellant was not competent to stand trial. However, Dr. Bench testified that any lack of cooperation was not caused by mental illness, but rather a volitional choice by appellant. Raising this same complaint about appellant's lack of cooperation during the 2004 trial, absent substantial evidence of a change in circumstances or new evidence, did not trigger the trial court's duty to sua sponte order another competency hearing. Appellant's alleged lack of cooperation constituted nothing more than a continuation of the same behavior that the trial court addressed at the first competency hearing." We agree. "When a competency hearing has already been held and the defendant has been found competent to stand trial . . . , a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change of

circumstances or with new evidence' casting a serious doubt on the validity of that finding." (See People v. Jones (1991) 53 Cal.3d 1115, 1153.)

Although Nipiossian argues there were other indications he was now incompetent, he only references the pre-June 2003 psychiatric evidence. But it had already been determined at the first competency hearing that this evidence was insufficient to establish Nipiossian's incompetence. The question here is: What changed since the first competency hearing? Nipiossian does not tell us.

Nipiossian argues, "The expert testimony about the effect of anti-psychotic drugs on appellant's demeanor did nothing to cure the strong possibility that his decision to testify or not to testify, his interaction with counsel, and his comprehension at trial were compromised by the administration of anti-psychotic drugs." But Nipiossian has to do more than merely suggest a possible reason why he might have been incompetent. He points to no evidence showing that the side effects of his medication caused a material change in his mental state after the first competency hearing.

In his reply brief, Nipiossian for the first time questions the validity of the first competency hearing, implicitly claiming the trial court erred when it found him competent to stand trial in June 2003: "As to the contention a second competency hearing was not required because appellant failed to demonstrate a change of circumstances, critically, the cases on which respondent relies assumes [sic] that the initial determination of competency was correct, a contention which is not supported by this record. [¶] At the 1368 hearing . . . , defense counsel . . . made a strong showing of incompetence." Nipiossian cannot raise this issue for the first time in his reply brief. "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief. [Citation.]" (People v. King (1991) 1 Cal.App.4th 288, 297, fn. 12; see People v. Newton (2007) 155 Cal.App.4th 1000, 1005 ["we do not consider an argument first raised in a reply brief, absent a showing why the argument could not have been made earlier"]; Moore v. Shaw (2004) 116 Cal.App.4th 182, 200, fn. 10 ["Ordinarily, an appellant's failure to raise an issue in its opening brief waives the issue on appeal. [Citation.] Therefore, this contention merits no discussion."].)

In sum, the medical evidence, which included findings by several of the examining psychiatrists that Nipiossian was both malingering and engaging in purposeful manipulation of the legal process, more than amply supported the conclusion Nipiossian was willfully refusing to cooperate with defense counsel in an attempt to derail his trial. This did not constitute incompetency, and the trial court did not abuse its discretion by failing, sua sponte, to order a second competency hearing. (See People v. Lawley, supra, 27 Cal.4th at p. 136 [trial court need not conduct second competency hearing unless presented with a substantial change of circumstances or new evidence casting serious doubt on the validity of a prior competency finding].)

2. Trial court did not improperly restrict the presentation of defense evidence. Nipiossian contends he is entitled to a new trial because his rights to confront witnesses and present a defense were violated when the trial court improperly restricted his presentation of evidence. These claims are

meritless.

a. Lala's Knowledge of Nipiossian's Mental State

Nipiossian contends, without merit, that the trial court erred by sustaining prosecution objections when defense counsel asked Nipiossian's wife, Lala, if she had been aware of his psychiatric problems:

"Q During, again, that one-year period of time that we've been talking about [i.e., the year preceding Armen's death], did you know if Mr. Nipiossian suffered from any type of mental illness?

"[The prosecutor]: Objection; calls for a conclusion, medical or otherwise. "The Court: Sustained. "[By defense counsel]: [¶] Q Do you know that during that period of time if Mr. Nipiossian, again that one year, was seeing a psychiatrist?

"[The prosecutor]: Objection; lack of foundation as to this witness. "The Court: Sustained. [¶] Lack of personal knowledge. "[By defense counsel]: [¶] Q Do you have any knowledge about, again during that period of one year, if Mr. Nipiossian was seeing a psychiatrist or not?

"[The prosecutor]: Objection again. It goes beyond the scope of this witness's knowledge.

"The Court: Sustained."

Nipiossian argues the prosecutor's objections should have been overruled because "[a]n important factor in this case was appellant's state of mind, particularly whether he suffered from schizophrenia which affected his mental state on the day in question." Without a doubt, whether Nipiossian was suffering from a mental illness was the crucial issue at trial, but this witness was not qualified to render a medical opinion on that subject.

The Attorney General argues that even asking whether Lala knew if Nipiossian was seeing a psychiatrist went beyond her personal knowledge because they were no longer living together. However, although separated, Nipiossian and Lala apparently saw each other with some frequency, so this is something Lala might have known. In any event, the sustaining of this objection could not have caused any prejudice because ample evidence was presented showing Nipiossian had been seeing a psychiatrist during that period.

b. Teresa's Knowledge of Nipiossian's Mental State

Nipiossian contends, without merit, that the trial court erred by sustaining objections to testimony from Armen's wife, Teresa, about her knowledge of Nipiossian's psychiatric condition:

"Q As soon as [the police informed you that Armen had been shot], your reaction was that Mr. Nipiossian did it because he had a mental illness; is that correct?

"[The prosecutor]: Objection. Calls for hearsay. "The Court: Sustained. "[By defense counsel]: [¶] Q Do you have any knowledge . . . whether Mr. Nipiossian had suffered from any type of mental illness . . . from April 12th of 2000 to April 12 of 2001?

"[The prosecutor]: Objection. Calls for speculation on the part of this witness. Also --

"The Court: Sustained. . . . . .

"[By defense counsel]: Did your husband . . . ever tell you that he believed that Mr. Nipiossian had a mental illness?

"[The prosecutor]: Objection. Calls for hearsay. "The Court: Sustained"

Nipiossian argues the questions were admissible for the nonhearsay purpose of showing Teresa's state of mind, i.e., that she believed Nipiossian was schizophrenic and must have acted irrationally in shooting Armen. But Teresa's state of mind was not relevant to any disputed issue. Nipiossian argues, "Alternatively, the statements were admissible under the spontaneous statement exception to the hearsay rule, coming as they did in response to [Teresa's] learning that her husband had just been murdered." But Nipiossian did not cite this hearsay exception in the trial court and so cannot raise it here. (See People v. Morrison (2004) 34 Cal.4th 698, 724 [in response to prosecutor's hearsay objections, defendant did not cite any hearsay exception and therefore failed to preserve issue for appeal]; see also People v. Dorsey (1974) 43 Cal.App.3d 953, 959 [failure to state specific ground for evidentiary objection waives appellate review under Evidence Code section 353[5]].) In any event, the evidence would have had no relevance because Teresa was not qualified to render a medical opinion regarding Nipiossian's mental state.

Finally, Nipiossian argues Teresa's answers would have been "relevant and admissible as prior inconsistent statements." Not only did Nipiossian fail to raise this hearsay exception in the trial court, but he has not provided any record cite establishing the alleged inconsistency. The failure to properly develop an argument is fatal on appeal. (See Jones v. Superior Court (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].) In any event, prior inconsistent statement evidence would be admitted for its truth and, again, Teresa was not qualified to give a medical opinion about Nipiossian's mental state. If the point was just to have Teresa testify she knew Nipiossian had been having psychiatric problems, it was so inconsequential there could have been no prejudice flowing from the trial court's ruling.

c. Meri Nipiossian's Observation of her Son's Behavior Just Prior to Armen's Death

Nipiossian contends, without merit, that the trial court erred by sustaining the prosecutor's objections to questions asking Nipiossian's mother, Meri, to describe his behavior during the two weeks before Armen was killed:

"Q Can you tell us your observations of Mr. Nipiossian, your son's, behavior and demeanor, during the two weeks prior to April 12th of 2001?

"A He was uneasy. He was in that condition recently before that time. And he was walking all the time inside the house. He was not sleeping at night. And he was seeing something in front of his eyes.

"[The prosecutor]: . . . Your Honor, I'm going to move to strike that last response and ask the jury to disregard it.

"The Court: 'Seeing something in front of his eyes' is stricken. Jury ordered to disregard."

Meri then testified Nipiossian "was feeling some kind of needle sensation." When the prosecutor again objected, the trial court ruled: "What Mr. Nipiossian was feeling is hearsay or beyond the personal knowledge of the witness and the jury is ordered to disregard."

Nipiossian argues these questions were relevant to his psychiatric defense and admissible as lay opinion under Evidence Code section 800, which provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

"[L]aypersons may testify to their observations of a witness's behavior outside the therapeutic setting that is relevant to the overall question of the witness's mental state. [Citation.]" (People v. Gurule (2002) 28 Cal.4th 557, 621 [when prosecutor asked if lay witness "had observed 'any delusional or hallucinatory speech or conduct on the part of Mr. Garrison,' " witness properly "testified that Garrison did not appear distracted or hesitant during the interview, was responsive to questions, and 'his attention was always toward the speaker' "].) Here, the trial court properly allowed Meri to testify about Nipiossian's observable behavior, for instance that he was not sleeping and was walking around the house all the time. But the trial court also properly prevented Meri from testifying about Nipiossian's subjective perceptions, about which she could have had no first-hand knowledge.

d. State-of-Mind Evidence

Nipiossian contends the trial court erred by excluding relevant evidence showing his state of mind and Armen's state of mind. These claims are meritless.

(1) Legal principles

"Evidence Code section 1250, subdivision (a) provides that evidence of a statement of a declarant's then-existing state of mind or emotion is not inadmissible under the hearsay rule when '(1) [t]he evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) [t]he evidence is offered to prove or explain acts or conduct of the declarant.' [¶] Where that evidence involves the victim's fear of the defendant, we have initially looked to whether the victim's state of mind was really in dispute and whether it was relevant to an issue in the case. [Citations.]" (People v. Thompson (1988) 45 Cal.3d 86, 103.) Hence, the evidence is inadmissible, for instance, where the victim's state of mind is irrelevant because the "only issue was whether defendant or someone else had killed [the victim]." (People v. Hernandez (2003) 30 Cal.4th 835, 873.)

"The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. [Citation.] This standard is particularly appropriate when, as here, the trial court's determination of admissibility involved questions of relevance, the state-of-mind exception to the hearsay rule, and undue prejudice. [Citation.] Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (People v. Guerra (2006) 37 Cal.4th 1067, 1113.)

(2) Evidence that Armen Feared Nipiossian

Nipiossian complains he was prevented from asking Teresa whether Armen ever told her he believed Nipiossian "had a mental illness." Defense counsel argued to the trial court that this evidence was relevant because, if Armen believed Nipiossian was schizophrenic, then Armen might have had a gun in his possession the night of the shooting in light of the fact Nipiossian "had been hounding him, had been trying to talk to him constantly." The trial court disagreed, saying "any speculation as to what [Armen] might have done if he had a particular state of mind, is just that, it's mere speculation. It doesn't make his state of mind any more relevant."

Nipiossian argues this evidence was admissible under the general rule that "evidence showing that the victim feared the defendant may be admissible if the acts or conduct of the victim prior to the crime are at issue." (People v. Cox (2003) 30 Cal.4th 916, 957.) He asserts, "Under the circumstances of this case, where there were indications of a struggle . . . , probative value attaches to Armen's expressed fear of appellant because it enables the factfinder to infer that Armen might have been armed on the night in question. . . . [E]vidence of Armen's state of mind was relevant to prove appellant's claim that he acted in self-defense, [and was] relevant to whether appellant premeditated or deliberated his acts."

The case law demonstrates, however, that the victim's fear of the defendant is not admissible every time the defense claims a killing was accidental or in self-defense.

Rather, it depends on the trial evidence up to that point and on the purpose for which the evidence will be elicited. A few examples will illustrate this rule.

In People v. Sakarias (2000) 22 Cal.4th 596, 628-629, the murder victim's fear was relevant to show she would not have voluntarily given defendant her property and, therefore, that the defendant had likely obtained the victim's jewelry by force while committing robbery murder. In People v. Cox, supra, 30 Cal.4th at p. 959, a witness's fear of the defendant was relevant to rebut the defendant's claim this witness had fabricated the defendant's confession, because it "tended logically to provide a legitimate reason for her withholding this confession [from police]." In People v. Lew (1968) 68 Cal.2d 774, 780, because the defendant testified the victim's shooting had been accidental, "some probative value attaches to [the victim's] expressed fear of defendant because it enables the factfinder to infer that [she] might have been reluctant to handle a gun in defendant's presence." In People v. Atchley (1959) 53 Cal.2d 160, 172, the victim's fear was relevant to rebut the defendant's claim the victim had been the aggressor in a struggle for the gun, during which the victim was shot accidentally, because her fear made it unlikely she would have grabbed the gun out of the defendant's waistband. In People v. Cox, supra, at pp. 937-939, a victim's fear of the defendant was relevant to show he must have forced her into his car, where the evidence, including the defendant's confession, already showed he had murdered the victim after driving her to a remote location in his car.

In all these cases, evidence of the victim's fear was directly relevant to prove how the victim would have acted with regard to some material, disputed question; e.g., as the aggressor in a struggle (Atchley), as likely to have made a gift to the defendant (Sakarias), or as likely to have gotten into the defendant's car (Cox). This is what makes the state-of-mind evidence relevant.

The only evidence that Armen's death might have resulted from a struggle over the gun, and therefore the only evidence justifying a finding of self-defense, imperfect self-defense, or second degree murder for lack of premeditation and deliberation, came from the testimony of the bystander Kim. But although Kim witnessed some kind of struggle between Nipiossian and Armen, he was describing an interaction that occurred after Nipiossian had already shot and seriously wounded Armen. That is, all of the evidence showed Nipiossian had already shot Armen in the chest and the stomach before Armen got out of the S.U.V. and was subsequently shot in the neck while kneeling in the street. There was no evidence there had been a struggle between Nipiossian and Armen inside the S.U.V. On top of this, all the other available evidence pointed to Nipiossian as the one who brought the gun that night: the gun cleaning kit on the night stand in Nipiossian's bedroom; the extra rounds of .25 caliber ammunition in his mother's car; the way Nipiossian initiated the encounter by going over unannounced to Armen's apartment and insisting that Armen come out with him. It is this state of the factual record that distinguishes this case from those in which the victim's fear of the defendant was admitted as state-of-mind evidence.

(3) Evidence that Nipiossian Feared Armen

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Nipiossian contends the trial court improperly refused to let him elicit testimony from his uncle Walter to show that Nipiossian was afraid of Armen because of Armen's criminal background, specifically his connections to the Russian Mafia. This claim is meritless.

Nipiossian asserts the evidence "was directly relevant to the defense theory that appellant shot Armen out of an actual if not delusional need to act in self-defense." It appears from the record, however, that before the trial court could make a final ruling on the admissibility of this evidence, defense counsel decided not to pursue it. Defense counsel Yeretsian initially said only that Walter would testify Nipiossian was afraid of Armen. When the trial court asked for more detail about this proposed testimony, defense counsel said so far she had only spoken briefly to Walter. So the trial court invited counsel to make a subsequent, more detailed proffer. Later, defense counsel reported: "The only information I have . . . is that . . . Walter Nipiossian will testify that our client told him that [Armen] would brag about his past criminal history or connections to organized crime in Russia, and that's really pretty much it. I haven't really found out anything else that I thought was very relevant, that's the only reason I would call him." (Italics added.) When the trial court said it needed more details in order to make a ruling, defense counsel said, "Fair enough. I will do that. I will do that before calling him." But it appears defense counsel dropped the matter at that point and never sought a final ruling.

Defense counsel's failure to secure a ruling from the trial court means the issue has not been preserved for appeal. (See People v. McPeters (1992) 2 Cal.4th 1148, 1179 ["Initially, the court did not sustain any objection or specifically preclude any line of inquiry. Its mere inquiry was not a definite ruling against defendant's proposed examination; the absence of an adverse ruling precludes any appellate challenge."].)

Given the state of the record, we can only presume that, upon further inquiry, defense counsel determined Walter's testimony was not going to be exculpatory.

(4) Evidence that Nipiossian thought Armen tried to kill him in 1999. Nipiossian contends the trial court erred by not allowing him to elicit testimony from his parents that, when he was hospitalized in 1999, he believed Armen and Lala were trying to poison him. This claim is meritless.

Defense counsel argued this evidence was relevant to the defense theory of imperfect self-defense because, if the jury believed Nipiossian had again been psychotic at the time of the shooting in 2001, a fair inference would be that Nipiossian again feared Armen was trying to kill him. The trial court refused to admit this evidence on the ground the testimony of the defense expert did not warrant such an inference. As the trial court earlier explained: "There is nothing I have heard from Dr. Alexanrian or the offer of proof that would suggest that just because Mr. Nipiossian expressed that his wife and brother-in-law were trying to poison him in 1999, that he would have the same paranoid delusion [in 2001] as opposed to any other delusion . . . , in other words, there's been no offer of proof in that respect. I have not heard that from the doctor. It appears to me that the statements of what

the defendant said in 1999 is not relevant state-of-mind testimony, but, in fact, hearsay." "You're making it sound [¶] . . . [¶] as though believing that a particular person is trying to poison him is a diagnosis of a particular type of paranoia.

And I've heard nothing to that extent. And to suggest that what he believed in 1999 would be . . . relevant in 2001 . . . , I am not going to allow it."

The trial court's reasoning accurately reflected the defense expert's testimony, which indicated Nipiossian's paranoia consisted of his fear that people in general were after him, not that any specific person was trying to kill him. When asked for his detailed impression of the particular paranoid delusions Nipiossian had been suffering when he was hospitalized in April 1999, Dr. Alexanrian testified: "Overall, again, thing was that people are after him, that he's marked, that he's being sought for or looked for to be harmed, to be hurt by certain number of people. [¶] There is none [sic] in the -- that I could observe that would say any certain one person that the defendant mentioned that is out there to kill him. But . . . he felt that people are after him in general. And this is the very nature of the illness. [¶] That overall thing of being persecuted and possibly killed stays the same. It remains throughout the years, as I noticed by evaluation. [¶] The nature of that, who is after him or how many people or what people, could change.

But the theme, the paranoia that someone is going to get him, was there, stayed there, and continued."

The trial court properly ruled that the assumption underlying defense counsel's question, that Nipiossian's paranoia had been particularly fixated on Armen, was not warranted by the medical evidence.

e. Basis for Expert's Opinion

Nipiossian contends the trial court erred when it prevented his defense expert, Dr. Alexanrian, from testifying about the content of Nipiossian's medical records and about statements Nipiossian had made to treating physicians. This claim is meritless.

It is well established that reliable hearsay evidence is admissible under Evidence Code sections 801 and 802 for the non-hearsay purpose of revealing the basis for an expert witness's opinion. (People v. Gardeley (1996) 14 Cal.4th 605, 618.) Under this rule, a medical expert may rely on a hospital record or another doctor's opinion, but "it generally is not appropriate for the testifying expert to recount the details of the other physician's report or expression of opinion." (People v. Catlin (2001) 26 Cal.4th 81, 137.) "We have explained that '[a]n expert may generally base his opinion on any "matter" known to him, including hearsay not otherwise admissible, which may "reasonably . . . be relied upon" for that purpose. [Citations.] On direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them. However, prejudice may arise if, " 'under the

guise of reasons,' " the expert's detailed explanation " '[brings] before the jury incompetent hearsay evidence.' " ' [Citations.] In this context, the court may ' "exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." ' [Citation.]" (Ibid, italics added.)

The trial court gave Alexanrian quite a bit of leeway to discuss what records he had relied on in reaching his medical opinions and, in doing so, to recount significant details from those records. For instance, Alexanrian testified Dr. Kadoyan's notes "consistently referr[ed] to the term 'delusion,' 'guarded behavior,' 'suspiciousness,' or 'persecutory delusions' or 'positive persecutory delusions' " from which Alexanrian "conclude[d] that [the] patient continued having the illness or symptoms of illness." Alexanrian related the contents of Kadoyan's records regarding Nipiossian's appointment three days before the shooting: "So the treating psychiatrist is observing while he is evaluating the patient. That patient is quite suspicious looking. And he puts the word 'paranoid looking,' meaning very, very guarded." "There is a note clearly indicating . . . that [the] patient was . . . yet, again, uncompliant with medication." Another note indicated Nipiossian was "[i]rritated, anxious, guarded, restless. These are observations. These are not what [the] patient says. This is the doctor observing the symptoms of the patient."

Dr. Alexanrian ended up giving extensive testimony in support of the defense theory that, because of Nipiossian's medical condition, he did not have the required mental state to be convicted under the prosecution's theory of the case. Alexanrian testified Nipiossian had: suffered from paranoid schizophrenia since January 1999; experienced a psychotic breakdown on April 11, 1999, triggered by the belief he would be killed on his birthday, April 12; experienced delusions that people were trying to kill him; and, exhibited such symptoms as agitation, restlessness, insomnia and hallucinations. Alexanrian testified about Nipiossian's week-long hospitalization in 1999, and how he was subsequently treated on an out-patient basis by a psychiatrist who prescribed anti-psychotic medication.

Nipiossian asserts the trial court improperly prevented defense counsel from asking Alexanrian a hypothetical question based on the facts of the case. He argues, "The proposed hypothetical was formulated to address whether appellant did in fact form an intent to kill at the time of the killing. Alexanrian's opinion on this point would have been within the proper scope of expert testimony." Not so. "Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29[6] permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state." (People v. Coddington (2000) 23 Cal.4th 529, 582, fns. omitted, disapproved on other grounds by Price v. Superior Court (2001) 25 Cal.4th 1046, 1069, fn. 13.) As the trial court said, "Having [Alexanrian] testify that taking the gun that night is consistent with his paranoia is really just a back door way of

saying that the defendant had a particular state of mind that night," which amounts to asking Alexanrian "to testify to a state of mind that night that negates an element and is specifically violative of Penal Code section 29."

We conclude the trial court did not place improper restrictions on Nipiossian's presentation of expert medical testimony.

3. Nipiossian was not Denied Effective Assistance of Counsel

Nipiossian contends he was denied effective assistance of counsel because his attorneys' performance was deficient on a number of different grounds. These claims are meritless.

a. Legal Principles

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

"[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citation.]" (People v. Castillo (1997) 16 Cal.4th 1009, 1015.) An appellate court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (Strickland v. Washington (1984) 466 U.S. 668, 697.)

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

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

b. Failing to Request Second Competency Hearing

Nipiossian contends he was denied effective assistance because defense counsel failed to request a second competency hearing. This claim is meritless.

Nipiossian merely repeats the same arguments he made in connection with his earlier claim, discussed above, that the trial court should have ordered a second competency hearing sua sponte. These arguments were insufficient to demonstrate the trial court erred by not ordering a second competency hearing, and they are equally insufficient to demonstrate his attorneys were ineffective for not asking the trial court to hold a second competency hearing.

In the absence of evidence Nipiossian's condition underwent a change since the first competency hearing, a request for a second competency hearing would have been properly denied by the trial court. "[C]ounsel is not required to make futile motions or to indulge in idle acts to appear competent." (People v. Torrez (1995) 31 Cal.App.4th 1084, 1091.)

c. Preparing Dr. Alexanrian's Testimony

Nipiossian contends defense counsel were ineffective for not adequately preparing Dr. Alexanrian to testify. This claim is meritless.

Nipiossian complains defense counsel did not contact Alexanrian until the middle of trial, failed to provide the materials he needed to accurately evaluate Nipiossian's mental state, and did not adequately prepare Alexanrian for testifying. Nipiossian also complains Alexanrian did not interview him until two days before testifying, and then only interviewed him for 35 minutes.

The Attorney General argues, "[T]he primary reason defense counsel had difficulty deciding whether to assert a mental illness defense was due to appellant's volitional refusal to cooperate with his attorneys. . . . Any difficulty in this regard was due to appellant's behavior, not a lack of diligence on defense counsel's part. Appellant's own conduct determined when Dr. Alexanrian was hired." This appears to be what happened.

Nipiossian complains that although an insanity defense was abandoned early on, defense counsel should have realized a psychiatric defense would be involved once doubts were declared as to

Nipiossian's competence to stand trial. Nipiossian complains that on "February 14, 2004, counsel indicated there was a possibility of a psychiatric defense, though the prosecution represented that none of the appointed experts had been consulted. [¶] On March 16, the first day of trial . . . , defense counsel asked for a 'little bit of time to actually consult with a medical doctor.' In response, the prosecutor told the court Mr. Mark Geragos had faxed medical records to a defense medical consultant over a year earlier. [¶] On March 17, defense counsel told the court she was still 'making that decision' as to whether to call a psychiatric expert. [¶] On March 23, 2004, a week into jury selection defense counsel represented it was 'most likely' Dr. Alexanrian would be called to testify as to mental illness issues, but he had not reviewed the medical records no[r] had counsel conferred with him regarding his opinion. . . . [¶] On March 29 and again on March 30 counsel told the court she still had not decided if she would be calling Dr. Alexanrian to address mental illness issues nor had she conferred with the doctor and did not know what his opinion was."

What this chronology omits, however, is the following: on March 16, 2004, defense counsel told the trial court Nipiossian was refusing to cooperate in his defense; on March 26, defense counsel told the trial court Nipiossian would not even give them his version of events; and, on April 9, when the trial court asked if Nipiossian was going to testify, defense attorney Paul Geragos said, "[I]t's difficult for me to advise him when I don't know what he's going to say."

Moreover, Nipiossian has not shown how any of counsel's alleged deficiencies affected the outcome of his trial. Nipiossian does not specify what additional records should have been given to Alexanrian or how those records would have strengthened Alexanrian's testimony. He does not show that defense counsel was responsible for Alexanrian interviewing him for only 35 minutes, or what difference it would have made if Alexanrian had taken more time. Nipiossian complains Alexanrian had been inadequately prepared for an evidentiary hearing regarding the voluntariness of Nipiossian's police statement, but when the trial court ruled against Nipiossian it also praised both sides for their fine work on this issue.[7] In any event, to prevail on an ineffective assistance of counsel claim on this issue, Nipiossian would have to show prejudice, which he has not done.

d. Failure to Adequately Prepare for Trial

Nipiossian contends defense counsel's trial preparation was inadequate because counsel failed to contest the prosecution's pretrial motions, examine crucial physical evidence, and exploit exculpatory aspects of the medical records. These claims are meritless.

The prosecution filed pretrial motions seeking to prevent Nipiossian's hearsay statements from being put into evidence by way of the defense expert's testimony, to require that the defense psychiatric evidence comply with sections 28 and 29, and to hold an evidentiary hearing before the psychiatric evidence was presented to the jury. Nipiossian complains defense counsel failed to prepare written opposition to these pretrial motions. He has not, however, shown these motions were lacking merit in any way. (See Jones v. Superior Court, supra, 26 Cal.App.4th at p. 99 ["Issues do not

have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

Nipiossian complains defense counsel neglected to examine the bottles of prescription medication found in his bedroom. He argues that because some of those bottles still contained pills, they would have demonstrated he had not been taking his anti-psychotic medication. However, it appears from the record that, when those bottles were subsequently examined, they actually demonstrated Nipiossian had been taking most of his prescribed medication in the period immediately preceding the shooting.[8]

Nipiossian complains defense counsel failed to develop evidence indicating he may have been "cheeking" his medication when he was hospitalized in 1999. There was testimony at the competency hearing that "cheeking" occurs when patients hide medication in their mouths and "spit it out after the nurse is gone." Nipiossian argues this evidence could have "dispel[led] the presumption of compliance from a partially filled bottle. This would have done much to controvert the state's claim that appellant was complaint with the medication and committed the crime for reasons other than psychosis." But defense counsel could have reasonably concluded such evidence would not have been particularly salient because, once Nipiossian left the hospital, he was no longer being supervised by hospital personnel.[9]

In his reply brief, Nipiossian complains, for the first time, that defense counsel "failed to prepare appellant's parents . . . to testify about his mental state." "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief. [Citation.]" (People v. King, supra, 1 Cal.App.4th at p. 297, fn. 12.)

e. Failure to Keep Track of Trial Court's Rulings and Call Witnesses Critical to the Defense

Nipiossian contends his attorneys were ineffective for failing to call certain witnesses and not promptly notifying the trial court when a mistaken ruling was discovered. These claims are meritless.

The trial court originally limited the scope of the mental state testimony to the year preceding the shooting, as well as to evidence about Nipiossian's April 1999 hospitalization. This ruling occurred at a time when Nipiossian was being represented by a member of the defense firm who did not ultimately represent him at trial. Subsequently, the trial court mistakenly precluded defense counsel from asking witnesses about the 1999 hospitalization. A week later, defense counsel brought this error to the trial court's attention and moved for a mistrial, arguing several witnesses had been on the stand who could have testified about the events surrounding Nipiossian's 1999 hospitalization. The trial court denied the motion, saying those witnesses were still available and were probably more appropriate as part of the defense case anyway. Nipiossian contends this one-week delay in rectifying the error constituted ineffective assistance of counsel. However, he does not argue, let alone demonstrate, there was any resulting prejudice, so the claim fails.

Nipiossian contends defense counsel were ineffective for not calling his father, his uncle, his wife and his mother-in-law to testify as to his mental state. But, again, Nipiossian does not even suggest how he was prejudiced by this.

Nipiossian complains that, after the defense had rested, his attorneys asked for permission to call Nipiossian's parents in order "to establish self-defense." Nipiossian contends that, "[i]n light of this admission that the defense case was incomplete, counsels' failure to call the parents, or to put on any additional evidence regarding this issue during the defense case in chief is inexplicable." This claim is meritless. Defense counsel had already put Nipiossian's mother on the stand to testify about Nipiossian's behavior at the time of his 1999 hospitalization. Counsel's subsequent request to reopen the defense case related to a single aspect of the 1999 incident: Nipiossian's paranoid delusion that Armen and Lala were trying to kill him. As discussed above, the trial court properly concluded the assumption underlying this defense theory, i.e., that the jury could infer Nipiossian had the same deluded belief two years later, was not supported by the psychiatric testimony. Again, there was no resulting prejudice and no ineffective assistance of counsel.

Nipiossian contends defense counsel were ineffective for not eliciting evidence showing Armen had a criminal background and connections to the Russian Mafia. Again, Nipiossian has failed to show that exculpatory evidence was thereby lost.

f. Failure to Object to Amendment of Information

Nipiossian contends he was denied effective assistance because defense counsel failed to object when the information was amended. This claim is meritless.

Nipiossian asserts that "when [defense] counsel indicated her intention to introduce evidence to establish a case for voluntary manslaughter based on provocation or heat of passion, the prosecutor represented that if such evidence were allowed it [sic] would amend the information to include a Penal Code section 12022.5 [firearm use] allegation. . . . Though the stated contingency was never met, the information was amended without objection. This resulted in a forfeiture of the right to challenge that amendment."

But the portion of the record cited by Nipiossian does not support his assertion there was any such contingency or quid pro quo regarding the firearm enhancement.

The original information had alleged the more serious section 12022.53 aggravated firearm enhancement, without also alleging the less serious section 12022.5 enhancement. When the trial court asked the prosecutor what she was going to do about the missing section 12022.5 allegation, the prosecutor suggested the information could be amended at the conclusion of the case. As Nipiossian's trial attorney acknowledged when the information was subsequently amended, nothing improper had occurred. (See People v. Winters (1990) 221 Cal.App.3d 997, 1005 ["Section 1009

authorizes amendment of an information at any stage of the proceedings provided the amendment does not change the offense charged in the original information to one not shown by the evidence taken at the preliminary examination."].)

g. Failure to Request Pinpoint Instruction

Nipiossian contends defense counsel were ineffective because a pinpoint jury instruction they asked for regarding the mental state evidence was defective. This claim is meritless.

Nipiossian asserts, "The pattern instruction regarding mental disorder was incomplete. It failed to relate the evidence of mental disease to the specific legal issue of premeditation and deliberation. Instead the instruction merely permitted the jury to consider evidence of mental disease, defect, or disorder in determining whether defendant 'actually formed the mental state which is an element of the crime charged.' [Citation.] This failed to inform the jury that evidence of mental disease, defect, or disorder could raise a reasonable doubt regarding whether he harbored each of these particular mental states."

The problem with Nipiossian's claim is that this is not the pinpoint instruction the jury was given. The language he quotes apparently comes from the CALJIC pattern instruction, whereas the instruction actually given to the jury was the following: "You have received evidence regarding a mental disease of the defendant at the time of the commission of the crime charged, namely, first degree murder, or the lesser charges of second degree murder or voluntary manslaughter. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent to kill, premeditated, deliberated or harbored express malice aforethought." This language plainly related the mental state evidence to the issues of premeditation and deliberation. And when combined with the standard reasonable doubt instruction, this language adequately advised the jury to consider whether the mental state evidence raised a reasonable doubt regarding the evidence of premeditation and deliberation.

4. There was no Prosecutorial Misconduct

Nipiossian contends he was denied a fair trial because the prosecutor referred to Armen as "the victim," to his killing as "a murder," and to the gun found in the planter box as the "murder weapon." Nipiossian argues such characterizations "are argumentative and subvert the defendant's presumption of innocence." We do not agree the prosecutor's minimal use of such language rendered Nipiossian's trial unfair.

The characterizations to which Nipiossian objects were predominantly used by the prosecutor during her opening statement to the jury. In response, defense counsel told the jury: "[T]he opening statements are just the version . . . of the facts of that particular attorney. It's that person's opinions; it's not evidence. You're not supposed to consider that in your deliberations. [¶] And it is for you, the

jury, to decide -- I know you've heard [the prosecutor] . . . use the words 'murder,' 'aggressor,' 'attack,' 'hiding,' all sorts of stuff. That's not for her to decide. That's for you to decide. And I just want to make sure that all of you keep that in mind."

There is something problematic about such characterizations. In People v. Williams (1860) 17 Cal. 142, 147, our Supreme Court said: "The word victim, in the connection in which it appears [i.e., a jury instruction], is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused.

It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. . . . And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression." However, Williams made clear that it was concerned about the trial court's use of such language.[10]

In People v. Wolfe (1954) 42 Cal.2d 663, defendants claimed there had been prosecutorial misconduct because the prosecutor referred to a defendant's knife as having been "left in the victim's back." (Id. at p. 666.) While acknowledging the concerns expressed in Williams, the Wofle court explained how the prosecutor's use of this language was different: "In the present case, the expression did not come from the judge, but from the prosecuting attorney without objection by defense counsel or motion to strike being made, and the jury was instructed that it was the sole judge of the value and effect of the evidence; that it could not convict a defendant upon mere suspicion; that the prosecution was 'bound to establish the guilt of a defendant beyond a reasonable doubt, and unless the prosecution does so, then it is your duty to find the defendant not guilty.' " (People v. Wolfe, supra, at p. 666.) In People v. Sanchez (1989) 208 Cal.App.3d 721, 740, the court refused to grant relief on an ineffective assistance of counsel claim arising out of a similar situation, reasoning: "The scattered references to 'victim' made by the , though possibly objectionable, did not deserve defense counsel's interruption of the trial."

Here, unlike in Wolfe and Sanchez,the defense objected to the characterizations, but we do not believe their use could have prejudiced Nipiossian. Defense counsel specifically told the jury such characterizations merely reflected one attorney's view of the evidence that was going to be presented. And, once the opening statement was out of the way, it appears from the record that the prosecutor generally used neutral language. Thus, during her examination of Teresa, the prosecutor referred to Armen as "your husband." During her examination of Lala, the prosecutor referred to Armen as "your brother." And, during closing argument, the prosecutor usually referred to Armen by his name.

In these circumstances, we do not agree Nipiossian was denied a fair trial. 5. There was no cumulative error.

Nipiossian contends the cumulative prejudicial effect of the various trial errors he has raised on

appeal requires the reversal of his conviction. However, we have found at most only a few insignificant errors that were clearly harmless. Nipiossian's trial was not fundamentally unfair. (See People v. Jenkins (2000) 22 Cal.4th 900, 1056 ["Defendant contends the cumulative prejudicial effect of the various errors he has raised on appeal requires reversal of the guilt and penalty judgments. We have rejected his assignments of error, with limited exceptions in which we found the error to be nonprejudicial. Considered together, any errors were nonprejudicial. Contrary to defendant's contention, his trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred."].)

DISPOSITION

The judgment is affirmed.

We concur: KITCHING, J., ALDRICH, J.

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

2. Pursuant to a stipulation, this evidence was admitted as a dying declaration.

3. Throughout their briefing, both parties have misspelled the doctor's name as "Alexanian."

4. Sharma testified: "The only thing which suggests an active symptom in this note alone was that the doctor . . . thought that the defendant had a paranoid look, whatever that means. But there was no description of delusions or hallucinations or disorganization of thought process or misperception. While the same doctor, in previous notes, had described [such] symptoms, but yet does not describe [them] at this time . . . ."

5. Evidence Code section 353 states: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

6. Section 28 states, in relevant part: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." Section 29 states: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the

crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

7. Although ruling against Nipiossian, the trial court said: "I appreciate, however, the great deal of information and effort that was provided for the court [so that a decision] could be made, and I compliment both counsel on the way in which it was handled . . . ."

8. Dr. Sharma testified he examined all of the pill bottles and he counted the pills remaining from Nipiossian's March 2001 prescription for the anti-psychotic drug Risperdal. Sharma testified this March prescription was for 90 pills to be taken over a period of 45 days. Sharma testified there were only 22 Risperdal pills remaining, from which he concluded Nipiossian had been taking most of this medication during the month preceding the shooting.

9. Dr. Sharma seemed to anticipate Nipiossian's point when he testified that the number of pills missing from the bottle containing Nipiossian's Risperdal prescription for March "shows [that] most of the time, the pills were being consumed . . . , assuming that the pills were not being . . . thrown down the toilet."

10. "The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding Judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A Judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges." (People v. Williams, supra, 17 Cal. at p. 147.)