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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROLANDO CASTELLANOS,

Defendant and Appellant.

A141623

(Alameda County
Super. Ct. No. 172277)

Rolando Castellanos appeals from a judgment sentencing him to prison for 40 years to life after a jury convicted him of second degree murder with firearm allegations. The killing was committed while appellant and his brother were attempting to recover a truck that had just been stolen by the victim. Appellant contends the judgment must be reversed because (1) the jury was not properly instructed on the defense of justifiable homicide while making a citizen's arrest, (2) the court should have instructed the jury on the heat-of-passion variant of voluntary manslaughter, (3) the trial court violated appellant's right to compulsory process in declining to order the sheriff to serve a warrant of attachment on a defense witness, (4) an 11-day break during jury deliberations violated his right to due process, and (5) the court abused its discretion in failing to conduct an evidentiary hearing regarding a juror's possible concealment of bias during voir dire. We affirm.

BACKGROUND

On August 16, 2013, the district attorney filed an information charging appellant with the murder of Hector Ramirez along with an allegation he had personally and

intentionally discharged a firearm causing great bodily injury and death. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).)¹ Lesser allegations of firearm use and the infliction of great bodily injury were also included. (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c) & (g), 12022.7.) The case proceeded to a jury trial, at which the following evidence was adduced:

A. Prosecution Evidence

In February 2012, appellant lived with his wife and daughter on one side of a duplex on A Street in Oakland. Also living in the unit were appellant's brother Mario Villasenor, Mario's family, and appellant's nephew Luis Villasenor. Alejandro Diaz lived next door and was friends with appellant, Mario and Luis.² Appellant, who by all accounts worked very hard in his gardening business, had purchased a residence in Concord and a share in some unimproved land in Tehama County.

Just after midnight, on February 19, 2012, Alejandro was sitting in his mother's car outside the duplex when he noticed Mario's black Nissan pickup truck was moving. Appellant and Mario came out of their unit and shouted that someone was stealing the truck. The brothers got into Alejandro's car and they all pursued the stolen truck with Alejandro driving. Appellant was armed with a .22-caliber rifle and Mario was armed with a shotgun. Alejandro brought the truck to a stop on C Street near 98th Avenue by passing it on the left side and pulling in front of it. Appellant and Mario got out of the car and Alejandro drove away. Although Alejandro had a cell phone with him, he did not call the police.

At about 12:14 a.m., Oakland police officers responded to the scene of a shooting near C Street and 98th Avenue and found Hector Ramirez lying in the street with his head near the curb. Ramirez had four entrance gunshot wounds in his body and was pronounced dead at the scene. None of the wounds had any gunshot residue on them,

¹ Further statutory references are to the Penal Code unless otherwise indicated.

² Because several of the individuals referred to in this opinion share a common surname, we use their first names.

meaning they had not been fired from a close enough range to leave traces of burning powder on the body. Police found one expended shotgun casing and four expended .22-caliber casings on the scene, located between 20 and 50 feet from Ramirez's body. No weapons were found on Ramirez.

Jesus Sesma lived on 87th Avenue with his wife Guadalupe, his daughter Fransisca, his son-in-law Marco Valenzuela-Quintero, and his grandchildren. On the night of the shooting, Jesus heard Mario calling to him from outside, asking in a scared tone of voice to be let inside the house. Jesus looked out and saw Mario and appellant, who were standing next to a Nissan truck. Mario was wearing pants and a shirt, but appellant was in shorts with no shirt or shoes. Jesus allowed Mario to pull his truck into the driveway of the house and park behind a gate. Guadalupe heard Mario say they had just killed someone.

Against Guadalupe's wishes, Jesus allowed appellant and Mario to come inside the house, where they spoke to Jesus and Marco for about 25 minutes. Most of the talking was done by Mario; appellant did not correct him or indicate he disagreed with what his brother said. Neither Mario nor appellant mentioned anything about gang members or looked outside the window during the conversation. They did not appear to have any injuries. Guadalupe and Fransisca listened to what was said from other rooms in the house.

Mario told Jesus he and appellant had shot a "kid" who had stolen his pickup truck and several other things. A neighbor had given them a ride to look for the stolen truck and had stopped it by blocking its path, after which Mario and appellant had pulled the thief out of the truck (the neighbor was not involved). Mario said he had "finished off the kid" with a shotgun after appellant had shot him first with a .22. Mario was laughing and said they had "killed an asshole." Jesus asked appellant whether this was true and appellant said yes. Appellant said he thought they had been followed.

During the conversation, appellant acknowledged shooting the person who stole the truck and indicated he was going to his property in Tehama County. He used Marco's cell phone to make a call and was picked up by his wife and his nephew Luis.

After appellant left the Sesma house, Mario described the shooting to Fransisca and his wife, who had arrived to pick him up. He said they thought the man was carrying some type of metal object or a “piece,” and they didn’t know whether it was a firearm or a knife. According to Mario, they were “gonna fuck him up before he fucked them up.” Mario explained that the man started to run after being pulled from the truck and he (Mario) pushed him. The man then tried to pull something out and because they did not know what it was they shot him.³ Mario admitted he had given the man who stole the truck the “mercy shot.”

The morning after the shooting, Guadalupe called an Oakland Police Department officer she knew and told him about the visit from Mario and appellant the night before. The same day, appellant’s nephew Luis came to the Sesma home and retrieved two guns: a shotgun from the driver’s side of Mario’s truck and another “rusty” gun from the back of Jesus’s work truck. Jesus found a .22-caliber piece of ammunition in the bed of his truck a few days later. About a week after Luis took the guns, appellant’s cousin Damaris moved Mario’s truck off the Sesma property and was later seen by police in San Leandro with another woman removing a rack from the truck. Appellant did not return to the duplex where his family lived on A Street, and for three months after the shooting, Luis did not know where he was. Luis moved with appellant’s wife and daughter to the house in Concord, and when he saw appellant again three months later, appellant’s facial hair had changed.

An autopsy on Ramirez’s body was performed by Thomas Rogers, M.D., a forensic pathologist who determined the cause of death to be multiple shotgun and gunshot wounds. A total of four wounds were found on Ramirez’s body: a small-caliber gunshot wound to the middle of his back near his spine, another small-caliber gunshot wound near the right side of his back, a shotgun wound to the right side of his chest, and a shotgun wound to his left foot. The shotgun wound to the foot was minor, but the bullet

³ Neither Mario nor appellant specifically said they had shot the man in self-defense.

wound in Ramirez's middle back and the shotgun wound to the chest could have been lethal in and of themselves, the chest wound being the most severe. Ramirez might have been able to walk after receiving the foot wound, but the chest wound damaged his soft tissue, muscles, sternum, chest cavity, heart, lungs, esophagus, trachea and vertebral column, and he would have collapsed to the ground if he had been standing when he received it. He might have been able to walk after receiving the wounds to his back. In addition to the gunshot wounds, Ramirez had scrapes and a bruise on his right arm that were caused within three days of the time of death, and blunt injuries on his knees. He had methamphetamine in his system, and although this could have made him more aggressive, Dr. Rogers could not say what effect the drug actually had on his behavior.

B. Defense Evidence

Several of appellant's former gardening clients testified as character witnesses on his behalf. They described appellant as "extremely trustworthy," "very honest" and possessing a "high level of integrity."

Appellant testified that his neighborhood in Oakland was a high crime area. He had known several people who had been the victims of shootings and he himself had been robbed at gunpoint in 2010. He purchased property in Tehama County and a house in Concord with the intention of moving from the neighborhood and had bought a .22 rifle for protection.

On the evening of February 18, 2012, appellant and his wife went to bed early and were awakened by appellant's sister-in-law banging on the bedroom door and yelling that they were being robbed. Thinking that robbers were in the house, appellant jumped out of bed, grabbed his rifle, and put in a clip of ammunition. When he ran out of the bedroom, his sister-in-law told him, "No, no . . . [i]t's your brother. He's outside." Wearing only his boxer shorts, appellant ran outside and saw Mario and their neighbor Alejandro getting into a car. Mario told appellant his truck had been stolen and appellant got into the back seat of the car.

They caught up to the truck, which was traveling at about 15 miles per hour. Appellant was very nervous and thought the driver, who turned out to be Ramirez, was looking for someone or waiting for somebody. Alejandro pulled alongside the truck on its left and Mario told Ramirez through the window to give the truck back. Ramirez laughed at them and made signs with his hands “like gang bangers do.” Appellant thought Ramirez might be on drugs based on his behavior.

Alejandro pulled his car in front of the truck, blocking its path and forcing it to stop. Mario got out of the car first and by the time appellant got out, he saw Mario holding a shotgun horizontally in front of Ramirez to prevent him from escaping. Ramirez, who was larger than Mario, struggled with him over the gun, causing it to move up and down and point in many different directions. Mario told Ramirez to get down on the ground, and Ramirez told him he (Ramirez) “was not alone, that his friends were about to arrive, and that it was going to be bad for us.” Appellant couldn’t believe what was happening.

The shotgun went off as Mario and Ramirez struggled and Mario fell to the ground. Appellant thought Mario had been shot and ran to his side and asked if he was all right. Mario said he was okay and got up, holding the shotgun. Ramirez started walking backward at an angle and appellant pointed his rifle at him and told him twice, “Stop, I’m gonna call the police.” Ramirez said something rude in response and “moved his hand to his waistline.” The man who had robbed appellant in 2010 had made a similar gesture when pulling out a gun, and appellant thought Ramirez was going to take out a gun and shoot him. Appellant raised his rifle and fired, backing away from Ramirez as he did so because he “wanted to get out of there.” He did not remember how many shots he fired, but it was more than twice. Ramirez walked toward the other side of the street without giving any indication he had been shot.

Appellant saw headlights coming in his direction and believed it was a car containing Ramirez’s gang-member friends. Appellant got behind the wheel of Mario’s truck and told Mario to get in. Another shot went off and Mario jumped in the back of the truck. As appellant drove away, he saw the car that had been approaching was

following him. He drove evasively and got away from the car, then went to the Sesma home at Mario's direction.

While at the Sesma home, appellant was in shock and didn't speak. When his wife and daughter picked him up, he took them to the property in Tehama County because he feared reprisal by gang members associated with Ramirez. He also told his nephew Luis not to go back to the duplex in Oakland. Soon after the shooting, appellant's wife and daughter moved to their house in Concord and appellant went to Mexico by himself. He returned to the United States a couple of months later and was arrested.

After his arrest, appellant was questioned at a police station and denied being present at the scene of the shooting or knowing anything about what had happened that night. He lied because he had never had any problems with the law before and had never been interrogated by the police.

C. Jury Instructions, Verdict and Post-Verdict Proceedings

The trial court instructed the jury on theories of first degree premeditated murder, second degree murder, voluntary manslaughter based on imperfect self-defense, self-defense as a justification for homicide, and aiding and abetting. (See generally *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [discussing difference between perfect and imperfect self-defense in a murder case].) It also gave a special instruction advising the jury that while a citizen may arm himself to effect a citizen's arrest of a person who has committed a felony, deadly force may not be used to prevent escape unless the person has committed a violent felony, and it was no defense that Ramirez was shot during an arrest for vehicle theft.

The jury returned a verdict convicting appellant of second degree murder and finding true the firearm and great bodily injury allegations. After denying appellant's motion for new trial, the court imposed a prison sentence of 40 years to life: 15 years to life on the second degree murder count and a consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d).

DISCUSSION

I.

Instruction on Deadly Force During Citizen's Arrest

Appellant argues the trial court should have instructed the jury that the shooting was justified if he fatally shot Ramirez while effecting a lawful citizen's arrest for a violent felony. (See CALCRIM No. 508.)⁴ He contends the trial court violated his rights under the Sixth and Fourteenth Amendments of the federal Constitution by refusing to instruct the jury on a justification defense based on this theory. We disagree.

⁴ CALCRIM No. 508 provides: "The defendant is not guilty of [murder or manslaughter] if [he] [killed] someone while trying to arrest him or her for a violent felony. Such [a] killing is justified, and therefore not unlawful, if:

1. The defendant committed the [] killing while lawfully trying to arrest or detain [the decedent] for committing [name of the crime decedent was suspected of committing], and that crime threatened the defendant or others with death or great bodily injury;

2. [Decedent] actually committed [name of the crime decedent was suspected of committing], and that crime threatened the defendant or others with death or great bodily injury;

3. The defendant had reason to believe that [decedent] had committed [name of the crime decedent was suspected of committing], and that crime threatened the defendant or others with death or great bodily injury;

[4. The defendant had reason to believe [decedent] posed a threat of death or great bodily injury, either to the defendant or to others]; [¶] AND

5. The [] killing was necessary to prevent [decedent's] escape.

A person has *reason to believe* that someone [poses a threat of death or great bodily injury or] committed [name of the crime the decedent was suspected of committing], and that crime threatened the defendant or others with death or great bodily injury when facts known to the person would persuade someone of reasonable caution to have [that] belief.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the [] killing was not justified. If the People have not met this burden, you must find the defendant not guilty of [murder or manslaughter].

A. Instructions Given and Refused

Appellant proposed two special jury instructions regarding the legality of carrying a firearm during a citizen's arrest and the use of force to arrest a felon. First: "A private person is permitted to arrest a suspected felon when a felony has in fact been committed or is being committed and the person has reasonable cause for believing the person arrested is the person who committed it. The right to arrest includes the right to exercise reasonable force as necessary to accomplish it." Second: "A private person is permitted by law to have a loaded firearm present during the lawful apprehension of a suspected felon."

The trial court rejected the instructions proposed by the defense and indicated it would instead instruct the jury as follows: "A private citizen may arm himself and lawfully arrest another person who has committed a felony, and may use reasonable force to prevent the arrestee's escape while doing so. However, deadly force may be used to prevent escape only if the person being arrested has committed a *violent* felony. Theft of a motor vehicle is a felony, but it is not a violent felony. Therefore, it is not a defense in this case that Hector Ramirez was killed while trying to arrest him for theft of a motor vehicle."

Defense counsel objected to the court's special instruction on the use of force during a citizen's arrest on the ground it did not advise the jury that deadly force was appropriate if Ramirez posed a threat of serious physical harm to appellant or others. The court disagreed: "[W]hat I'm really telling them here is, this is a defense that under some circumstances may be available, but it's not in this case. The purpose of this paragraph, by the way, is really to assure the jury or reassure the jury, in a sense, that if you believe the defendant's testimony as to what it was that he was doing or intending to do when he got in the car with Mario and Alejandro, he was doing something lawful. It's lawful for a person to arrest for a felony, auto theft being a felony, and it's lawful to be armed to do that. So, it's basically my way of telling the jury, don't hold that against the defendant because that's as far as it goes, it's not unlawful. [¶] . . . [¶] But then I go into telling

them that self-defense is a defense, and that they must find the defendant not guilty if they found that it was done in self-defense.” The court instructed the jury as indicated.

B. General Legal Principles

“A private person may arrest another: [¶] 1. For a public offense committed or attempted in his presence. [¶] 2. When the person arrested has committed a felony, although not in his presence. [¶] 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.” (§ 837; *People v. Fosselman* (1983) 33 Cal.3d 572, 579 (*Fosselman*)). A private person may use reasonable force to effectuate a citizen’s arrest. (*Fosselman*, at p. 579; § 835.)

“Reasonable force” does not include deadly force except in limited circumstances. Section 197, subdivision 4 provides that homicide is justifiable “[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed.” California case law has construed this statute to allow the use of deadly force against a fleeing suspect only when “the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.” (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333; see *People v. Zinda* (2015) 233 Cal.App.4th 871, 879; *People v. Quesada* (1980) 113 Cal.App.3d 533, 535, 537; *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 329 (*Piorkowski*)).

The court must instruct the jury sua sponte on general principles of law raised by the evidence, including defenses on which the defendant is relying or defenses supported by substantial evidence that are not inconsistent with the defendant’s theory of the case. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) “A trial court has no duty to instruct the jury on a defense—even at the defendant’s request—unless the defense is supported by substantial evidence.” (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Substantial evidence is not synonymous with any evidence, no matter how weak. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227-1228.) It is, rather, evidence

sufficient to deserve consideration by the jury, or evidence a reasonable jury could find persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

C. Analysis

The special instruction given by the trial court was a correct statement of law. Motor vehicle theft (whether a violation of section 487, subdivision (d)(1) or Vehicle Code section 10851, subdivision (a)) is not a crime that inherently poses a threat of death or great bodily injury, and would not itself justify the use of deadly force during a citizen's arrest. (See *Piorkowski, supra*, 41 Cal.App.3d at p. 329 [deadly force not justified to apprehend fleeing suspects who had stolen wallet from purse in dry cleaning establishment].) Appellant's proposed instruction on reasonable force during a citizen's arrest was incomplete and misleading under the facts of this case, because it would not have advised the jury that deadly force was reasonable only if the underlying felony for which the arrest was made was violent in nature.

Appellant does not suggest he was entitled to use deadly force to make an arrest for vehicle theft, but argues the court's instruction was not appropriate because the evidence supported a finding Ramirez additionally committed violent felonies that *did* threaten death or great bodily injury—assault with a deadly weapon or firearm, robbery and carjacking. In support of this assertion, appellant relies on his own testimony regarding the pursuit of the truck, Ramirez's struggle with Mario over the shotgun, and the shooting itself. He reasons that in attempting to wrest the gun away from Mario, Ramirez committed an assault with a deadly weapon and used force to effectuate the taking of the truck, transforming the theft into a carjacking and/or robbery. Moreover, in light of his testimony that Ramirez had thrown gang signs and had told Mario his friends were coming, appellant argues he had reason to believe Ramirez posed a threat of death or great bodily injury to himself or others. We are not persuaded.

First, substantial evidence did not support the conclusion Ramirez committed any of the three violent felonies posited by appellant. An assault requires the present ability to commit a violent injury on another person (*People v. Licas* (2007) 41 Cal.4th 362,

364), and there was no evidence Ramirez ever gained control over the shotgun during his struggle with Mario. (Contrast *People v. Hanson* (1934) 220 Cal. 589, 590 [defendant who struggled with police officer over police officer's gun, causing it to discharge and hit police officer in the hand, supported conviction for assault with a deadly weapon]; *People v. McCoy* (1960) 181 Cal.App.2d 284, 286-287 [conviction for assault with intent to commit murder upheld where defendant grabbed officer's gun and gained control over it but third party intervened].) And, while the use of force may transform a theft into robbery or carjacking where the force is used to escape with the property (*People v. Webster* (1991) 54 Cal.3d 411, 441; *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131), the evidence does not support an inference that Ramirez was attempting to escape with the stolen truck when the struggle ensued.

Second, even if we assume appellant's description of events would support the inference Ramirez committed a violent felony during his struggle with Mario (as opposed to simply trying to escape on foot), appellant did not testify that he was attempting to arrest Ramirez for a violent felony when he shot him. Rather, appellant testified that after the struggle had ended he told Ramirez to stop "[b]ecause I wanted him to stop, I wanted to call the police. He had stolen the truck." It was only after Ramirez made a gesture toward his waistline that appellant fired his rifle, claiming he did so because he believed Ramirez was going to pull out a gun and shoot him.

Third, any argument that appellant was entitled to use deadly force because Ramirez posed a risk of death or serious bodily harm to others⁵ was encompassed in the

⁵ In *Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11 (*Garner*), the United States Supreme Court held that in the context of a federal civil rights action, the Fourth Amendment precludes a peace officer from using deadly force against a fleeing felon unless such force is necessary to prevent the escape *and* the suspect poses a significant threat of death or serious physical injury to the officer or others. The Bench Notes to CALCRIM No. 508 indicate that under *Garner*, it is "unclear whether the defendant [making a citizen's arrest] must always have probable cause to believe that the victim poses a threat of future harm or if it is sufficient if the defendant knows that the victim committed a forcible and atrocious crime." (Judicial Council of Cal., Crim. Jury Instns. (2006) Bench Notes to CALCRIM No. 508; see *People v. Martin* (1985) 168 Cal.App.3d

jury instructions on self-defense and imperfect self-defense. Appellant suggests these instructions did not adequately cover the theory of deadly force used to effectuate a felony arrest because both self-defense and imperfect self-defense require a perception of “imminent” danger, whereas there is no comparable requirement for the force used during a citizen’s arrest. Assuming appellant is correct about the law on this point, the only evidence that appellant shot Ramirez because he posed a risk of death or great bodily harm arises from appellant’s own testimony that he thought Ramirez was in the process of pulling out a gun to shoot him. Under the facts of this case, the instructions on self-defense adequately covered any theory that appellant acted because he believed Ramirez posed a risk of death or serious bodily injury. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 278-280 (*Dieguez*) [no instructional error when legal principle at issue covered in other instructions].)⁶

1111, 1124 [fatal shooting of burglar by off-duty peace officer was justified; court noted that while *Garner* “necessarily limits the scope of justification for homicide under section 197, subdivision 4,” it could not be given retroactive application].)

⁶ The court gave CALCRIM No. 505, the standard instruction on self-defense, which provided in part: “The defendant is not guilty of murder if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in *future* harm is not sufficient, no matter how great or how likely the harm is believed to be.”

The court also instructed the jury with CALCRIM No. 571, regarding imperfect self-defense: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. [¶] If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant’s belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense if: [¶] 1. He actually believed that he was in imminent danger of being killed or suffering great bodily injury; AND [¶] 2. He actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT [¶] 3. At least one of those beliefs was unreasonable.”

Finally, any error in failing to instruct on the use of deadly force during a citizen's arrest was harmless. The California Supreme Court has not yet determined which standard of prejudice applies to the erroneous failure to instruct on an affirmative defense. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) But whether we apply the "miscarriage of justice" standard for state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), or the more stringent harmless-beyond-a-reasonable doubt standard for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), a failure to instruct will be deemed harmless when the question posed by the omitted instruction was resolved under other instructions. (See *People v. Watt* (2014) 229 Cal.App.4th 1215, 1220; *Dieguez, supra*, 89 Cal.App.4th at pp. 278-280.) In rendering a verdict of second degree murder despite the instructions on self-defense and imperfect self-defense, the jury necessarily rejected the theory that appellant reasonably believed Ramirez posed a risk of death or great bodily harm.

II.

Failure to Instruct on Provocation Variant of Voluntary Manslaughter

Appellant argues the trial court had a sua sponte duty to instruct the jury on voluntary manslaughter based on a theory of provocation and heat of passion, in addition to the instruction it gave on voluntary manslaughter based on imperfect self-defense. We disagree because any error was invited.

During a reported discussion on jury instructions, the court memorialized its off-the-record conversations with counsel and stated it would instruct on voluntary manslaughter, "but only on the theory of imperfect self-defense, not on a theory of a heat of passion." The court indicated that both parties agreed with its decision and defense counsel responded, "Well, after sober reflection, heat of passion may well be present with regard to the shotgun firing, the brother being thrown on the ground, and—I don't want that. No, that doesn't make sense to me. I wouldn't want the jury to go in that direction. I would agree with the Court."

“ ‘The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance and mistake.’ ” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) Appellant’s trial counsel objected to giving an instruction on the provocation variant of voluntary manslaughter and articulated a tactical reason for doing so.

Appellant argues the invited error doctrine does not apply because defense counsel requested jury instructions on voluntary manslaughter based on imperfect self-defense, demonstrating he was not trying to force the jury into an “all-or-nothing” choice between murder and acquittal. We disagree with the assumption that an all-or-nothing strategy is the only legitimate reason a defense attorney might have for opting to forgo an instruction on a lesser included offense. In this case, the evidence supporting voluntary manslaughter under an imperfect self-defense theory was appellant’s testimony that he actually (though mistakenly) thought Ramirez was pulling out a gun. Voluntary manslaughter under a heat-of-passion theory would have required a showing that appellant’s reason “ ‘was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’ ” (*People v. Barton* (1995) 12 Cal.4th 186, 201.) Although appellant testified he was scared and in shock during the encounter with Ramirez, there was scant if any evidence his reason was so obscured when he fired his rifle. Defense counsel might well have concluded it was better to present the jury with a clean argument regarding imperfect self-defense, rather than injecting a weak provocation theory into the mix. (See *People v. Moye* (2009) 47 Cal.4th 537, 554-555 (*Moye*) [substantial evidence did not support provocation instruction in case where “the thrust of defendant’s testimony below was self-defense”].)

Defense counsel’s comments also indicate he was concerned a provocation instruction would cause the jurors, who were instructed on aiding and abetting, to focus on *Mario*’s state of mind when he delivered what was probably the final shot to Ramirez.

If the jurors focused on Mario's culpability, they might be more prone to find appellant aided and abetted a greater crime than voluntary manslaughter, particularly in light of some of Mario's comments to Jesus Sesma. And, even if the evidence supported a determination that *Mario* acted in a heat of passion and that appellant was aiding and abetting Mario when he shot Ramirez, appellant's culpability could be greater than Mario's if he was not acting in a heat of passion himself. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1122-1123 (*McCoy*) [aider and abettor who assists in unlawful killing may be found guilty of greater homicide offense than direct perpetrator].)

Defense counsel made a reasonable tactical decision to limit the jury's focus to appellant's own state of mind and a self-defense theory. This is not a case, like *People v. Bradford* (1997) 14 Cal.4th 1005, 1057, in which counsel mistakenly believed the instructions did not warrant an instruction on a lesser included offense. The invited error doctrine applies.

Even if we were to assume an instruction on provocation should have been given, and that the trial court's failure to do so was not invited error, we would not reverse. The erroneous failure to instruct on a lesser included offense requires reversal only if the error resulted in a "miscarriage of justice" (Cal. Const., art. VI, § 13), in other words, when, under *Watson, supra*, 46 Cal.3d at p. 836, it appears reasonably probable the defendant would have obtained a more favorable result if the error had not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*).) Under *Watson*, we "focus[] not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, at p. 177.)

The evidence that appellant himself acted in a heat of passion was relatively weak, given his testimony that he only shot Ramirez because he thought Ramirez was drawing a weapon. "Once the jury rejected defendant's claims of reasonable and imperfect self-

defense, there was little if any independent evidence remaining to support [a] further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense.” (*Moye, supra*, 47 Cal.4th at p. 557.) Evidence that Mario acted in a heat of passion would not have itself entitled appellant to a verdict of voluntary manslaughter rather than murder if the jury found appellant aided and abetted an unlawful killing by Mario, but did not himself act in a heat of passion. (*McCoy, supra*, 25 Cal.4th at pp. 1122-1123.) It is not reasonably probable appellant would have obtained a more favorable verdict if the jury had been instructed on voluntary manslaughter under a heat-of-passion theory.

III.

Compulsory Process

Appellant argues the trial court deprived him of his right to compulsory process because it denied defense counsel’s request to continue the trial and issue an order directing the sheriff’s office to show cause as to why it had not served a bench warrant issued against a prospective defense witness who did not appear in response to a subpoena. We disagree.

The issue raised by appellant arises in the following context: On February 1, 2013, a woman named Victoria Perez was interviewed by a defense investigator. She told him that on the night of the shooting, she had been visiting a friend who lived on C Street, “drinking alcohol and rolling blunts” two or three houses down from where the shooting occurred. Perez heard a scuffle followed by several gunshots. She looked through an open door and saw a white pickup truck, which had been stopped with the engine running in the middle of the street, drive away. Two people were inside the passenger cabin. Perez described the truck as a late 1980s Toyota, with wooden panels that might have been used to haul metal or cardboard. The only other moving vehicle

was a newer sedan heading toward the airport that did not seem to be involved. Perez thought there had been a drive-by shooting because she had not heard any doors opening.

Voir dire commenced on October 28, 2013, and the presentation of witnesses began on October 30. The defense case began on November 6, and defense counsel served Perez with a subpoena to appear on November 7. Perez failed to appear, and at defense counsel's request, the trial court issued a bench warrant to secure her attendance, setting bail at \$10,000. The prosecution completed its rebuttal evidence on November 12, and on November 13, defense counsel requested a continuance so he could secure Perez's attendance, indicating her testimony was important because it would corroborate appellant's testimony that Mario and Ramirez struggled over the shotgun before Ramirez was shot. Counsel filed a written motion for a continuance on November 14, asking for two or three days, and recounting the efforts of his defense investigator to locate Perez. Asked how long it would take to secure her appearance, counsel stated he "ha[d] no idea."

The court denied counsel's request for a continuance, noting it had been a week since the bench warrant issued and indicating it did not find Perez's anticipated testimony to be particularly significant. On December 3, 2013, during jury deliberations, defense counsel moved to reopen the evidence because he had information about where Perez was attending school and hoped to get the sheriff to arrest her there. Counsel asked the court to instruct the sheriff to go to the school and "bring her in," and the court responded: "I issue a warrant. I don't direct the sheriff to go out somewhere to find somebody." On December 4, defense counsel advised the court he had contacted the sheriff's department, which acknowledged receiving the bench warrant but had not made efforts to locate or serve Perez. Counsel asked the court to stay the proceedings and order the sheriff to show cause as to why Perez had not been arrested. The court replied that it did not have the authority to do so and denied counsel's requests to reopen the defense case or issue an order to show cause.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for

obtaining witnesses in his favor.” The California Constitution similarly provides: “The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant’s behalf.” (Cal. Const., art. I, § 15.) The right to compulsory process includes “the right to the government’s assistance in compelling the attendance of favorable witnesses at trial.” (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.) “A defendant’s constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf.” (*In re Martin* (1987) 44 Cal.3d 1, 30.) “A defendant claiming a violation of this right must establish both that he was deprived of the opportunity to present material and favorable evidence and that the deprivation was arbitrary or disproportionate to any legitimate purpose. [Citation.] At bottom, ‘[i]n order to declare a denial of [due process based on the denial of compulsory process] we must find that the absence of . . . fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. [Citation.]’ ” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 367-368.)

“Generally it is not the duty of the district attorney or public officials to locate or to assist a defendant in locating a witness whose address is unknown to him. [Citations.] Where compulsory process has been issued, served and has proved ineffective, and the court has issued a bench warrant for the witness, neither the court [citation], nor the prosecutor [citation] can be chargeable with error because the defendant failed to secure the witness.” (*People v. Avila* (1967) 253 Cal.App.2d 308, 330, disapproved on another ground in *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851, fn. 4, 852, fn. 5; *People v. Brinson* (1961) 191 Cal.App.2d 253, 257-259 (*Brinson*).) In the case before us, the trial court issued a subpoena, and, when that did not prove effective, it issued a bench warrant. Appellant “makes no showing that anything that the court did or refused to do is the cause of the absence of the witness at the trial” (*Brinson*, at p. 258), or that the sheriff’s alleged inaction can be imputed to the court. He cites no case supporting his claim the trial court was required to order the sheriff to show cause as to why the warrant had not been served. Appellant’s right of compulsory process was not violated.

Additionally, any error relating to the failure to procure Perez as a defense witness was harmless beyond a reasonable doubt. (See *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1759 [applying *Chapman* standard to compulsory process violation].) According to the statement she gave to the investigator, Perez did not see the shooting itself, but heard a struggle followed by several shots (which she believed to have been fired by the same gun, an opinion not supported by the forensic evidence). Perez did not see the shooting or the events that preceded it. While her testimony about a struggle would have been consistent with appellant's version of events, it was also consistent with the prosecution theory that Mario and/or appellant pulled Ramirez from the stolen truck before shooting him. Perez also advised the investigator that she saw a *white* pickup truck drive away after the shooting. Although the defense suggested in the motion for new trial that a jury hearing the evidence might have believed this truck contained Ramirez's gang member friends and thus corroborated appellant's testimony, it seems equally if not more likely that the jury would have believed the truck was Mario's, and that Perez was mistaken about its color. She said the only other car she saw did not appear to be involved in the shooting, something that would have tended to contradict appellant's testimony about being followed.

IV.

Break in Jury Deliberations

Appellant argues his right to due process was violated because the trial court ordered an "11-day recess" during jury deliberations. We do not agree.

Due to a preplanned vacation, the court advised the jury at the commencement of trial that court would not be in session during the week of the Thanksgiving holiday. On November 20, 2013, the Wednesday of the week before Thanksgiving, the court excused a deliberating juror for medical reasons and substituted an alternate, observing, "It's all been understood and agreed we're not going to be in session next week." On November 21, the court advised the jurors it wished to discuss scheduling and gave them three options: (1) returning on Friday, November 22, to deliberate, with the caveat that

the court would not be available to answer any questions they might have;
(2) deliberating during Thanksgiving week under another judge's supervision; and
(3) suspending deliberations until December 2, the Monday following Thanksgiving.
The judge available to cover during Thanksgiving week was not available that
Wednesday or Friday (the latter of which was a court holiday and apparently a normal
day off for the jury).

Later that same day, the jurors indicated they were deadlocked. The court
instructed them to continue their deliberations. The foreperson also advised the court
they had agreed to the third option for scheduling—taking the week of Thanksgiving
off—and asked to reconvene on Tuesday, December 3. The court agreed and counsel did
not object. The jury reconvened on December 3 and reached a verdict on December 4.

Appellant argues the trial court abused its discretion and deprived him of due
process by allowing the jurors to separate for 11 calendar days (five court days, when
weekends and holidays are subtracted) without a showing of good cause. Appellant has
forfeited this claim because his trial counsel did not object below.

The situation before us is similar to that in *People v. Johnson* (1993) 19
Cal.App.4th 778 (*Johnson*). There, the trial court noted that the trial would be lengthy
and opined that it would be wrong to keep the jurors in session through the Christmas
holidays since many would have travel and family plans and obligations. The court
discussed scheduling with the parties and, as here, all parties agreed to a recess.
Thereafter, during the jury deliberations, the court adjourned the proceedings for the
holidays for 17 calendar days, including nine court days, without objection from either
party. (*Id.* at pp. 791-792.) On appeal, the defendant claimed the adjournment and
resulting jury separation was prejudicial error. The appellate court disagreed, concluding
the defendant had forfeited his claim. (*Id.* at pp. 793-794; see *People v. Gray* (2005)
37 Cal.4th 168, 226-229 [failure to object waived appellate challenge to 338-day hiatus
between guilt and penalty phase in a capital case; court cited *Johnson* with approval];
People v. Ochoa (2001) 26 Cal.4th 398, 440, abrogated on another ground as stated in
People v. Preito (2003) 30 Cal.4th 226, 263, fn. 14 [citing *Johnson* with approval and

concluding continuance of trial for nine calendar days and five court days at the start of trial was forfeited by defense counsel's failure to object[.]

Appellant claims his right to due process was violated because the adjournment resulted in a separation of the jury during deliberations, after the jury announced it was deadlocked. He relies on *People v. Santamaria* (1991) 229 Cal.App.3d 269, 277 (*Santamaria*), in which the court held an adjournment of 10 days during deliberations was an abuse of discretion where it could have been avoided by transferring the case to another judge. We are not persuaded.

As observed by the *Johnson* court: "The jury often breaks its deliberations, with the consent of counsel for the parties, for lunch or dinner, or to return home to sleep. Deliberations often do not continue on Sundays and holidays. The *Santamaria* court never intended to call such practices into question. Nor does the *Santamaria* court opine, even in dicta, that an appellant who has affirmatively agreed to even a long break in deliberations may bide his time and later complain about the matter on appeal, as appellants seek to do here. Certainly, neither the *Santamaria* court nor any other California court has so held, and no court has ever cited *Santamaria* for this proposition in a published opinion, before today. We will not so hold, either." (*Johnson, supra*, 19 Cal.4th at pp. 793-794.) The court in *Johnson* additionally noted: "Tactically, there would be no reason why a defendant would necessarily want to force the jury to continue to deliberate without ceasing, against a Christmas holiday deadline; this could lead to a very quick and unfavorable verdict, if the jurors had travel plans or other obligations for the holidays." (*Id.* at p. 792.) These considerations also apply to the Thanksgiving holiday that was looming in this case. (See *People v. Bolden* (2002) 29 Cal.4th 515, 561-562 [no due process violation where jury deliberations adjourned for 13 calendar days and four court days during Christmas holidays].)

Appellant argues the reasoning of *Johnson* should not apply when, as here, there has been a declaration of juror deadlock before the adjournment. We do not agree. Defense counsel was well aware of the deadlock when he acquiesced in the scheduling. Knowing that at least some of the jurors were leaning toward finding appellant guilty of

something, counsel might have believed that it would benefit his client to have the jury separate at that juncture. We will not presume the jury's impartiality was compromised when the trial court admonished the jurors before the adjournment that it was "very important" they not "do research of any kind" or "talk about the case with anybody." In the absence of a contrary showing, we presume the jurors followed the court's admonition. (*People v. Stanley* (1995) 10 Cal.4th 764, 836-837 [reversal not required when penalty phase of capital trial interrupted by more than three months due to trial on issue of defendant's competency].) To the extent *Santamaria* would require a different result, we respectfully disagree with its reasoning and instead follow *Johnson*.

We also reject appellant's claim that the adjournment required his express, personal concurrence because the right to a continuous trial is a fundamental right that must be waived personally. (See *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781 [continuance of trial beyond 60-day statutory limit may be granted on motion of defense counsel].) "It is well established the power to control judicial proceedings is vested exclusively in counsel. [Citation.] Defense counsel is generally authorized to make tactical decisions concerning the introduction of evidence and to control court proceedings, without the necessity of first obtaining a personal waiver from the client. [Citations.] Counsel does have the authority to make decisions involving the client's constitutional rights. [Citations]." (*People v. Moore* (1983) 140 Cal.App.3d 508, 513 [decision to request a mistrial or proceed to a conclusion of the case with the same jury, though fundamental, is one that can be made by counsel alone].)

V.

Juror Misconduct

Appellant argues the trial court erred in denying his motion for new trial based on juror misconduct. He claims the court abused its discretion in failing to hold an evidentiary hearing because posttrial statements made by one of the jurors to a defense investigator suggested she was untruthful when she stated in a written questionnaire submitted during voir dire that she was not biased against Hispanics. We disagree.

In support of his claim of juror misconduct, appellant submitted a declaration from his defense investigator regarding a posttrial interview of Juror No. 4. According to the declaration, Juror No. 4 was asked by the investigator whether she would have had a different view of the case if an independent witness had testified to the facts recounted by Victoria Perez. Juror No. 4 initially said yes, but when presented with a declaration along those lines refused to sign it and stated: “I am just through with this. I don’t want to sign anything. I don’t want to be involved anymore. I served my jury duty. Beside[s], he is just a Mexican and he and his brother got what they deserved. He is just an illegal who was trying to get something.” When answering a pretrial written questionnaire, Juror No. 4 had left blank a response to a question asking her to identify any racial or ethnic group about which she had negative feelings, and had answered no to a question asking whether the fact appellant was of Mexican heritage would make her feel more or less inclined to convict him of a crime.

At the hearing on the motion for new trial, defense counsel argued Juror No. 4’s posttrial statements to the investigator suggested she had been untruthful when she answered her questionnaire and effectively denied any bias against Hispanics. The prosecutor urged the court to reject this claim, noting, “[Ninety] percent of the people in this courtroom, throughout the course of this trial, were actually Mexican, including the victim in this case, the prosecutor, most of the civilian witnesses, so I don’t really see how that would have impacted any outcome.”

The court denied defense counsel’s request for an evidentiary hearing on the issue of juror misconduct and denied the motion for new trial. “First of all, . . . the heritage of [appellant] and his brother, . . . I’m not considering that as reflective of her thought process during the decision making process in any way. I think the law prohibits that. [¶] So, the only way in which I could determine that it might be—it’s potential juror misconduct is if it tends to be indicative of her having lied in the juror questionnaire. And I do not consider it to be such. Number one, she’s obviously—what she said is something she said in apparent frustration with the investigator’s efforts to get her to sign a declaration and her desire not to do that, not to have anything to do with this and be

done with the whole thing. And, frankly, it appears she was not in a very good mood at the time she said that. Comments made at that point well after the trial, under circumstances where she apparently just basically feels bothered by this whole thing, this inquiry, I don't consider to be in any way evidence of what her attitude was at the time she completed a questionnaire or really necessarily that that's what her attitude was at the time she was reaching a verdict in this case.”

The court continued: “What it really tells me is, she was really bugged with this investigator, and if she did really have this attitude at that moment in time, it doesn't mean she had that attitude when she was completing that questionnaire, and I don't think it would be appropriate for me to conduct—start a whole inquiry and issue an order for her to appear in court and answer questions about that based on these comments, and so I'm denying that request for a hearing, based on this showing. [¶] And you gotta realize that I am not considering this as evidence of what thought—of what her thought process may have been or her attitudes may have been at the time she was reaching a verdict, because it's absolutely inadmissible for that purpose.⁷ I can only consider it as—on the question of whether this is somehow evidence of her being dishonest at the time she completed the questionnaire, and to me it doesn't have any bearing on that. It doesn't tend to reveal anything on that one way or another.”

“ ‘A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct. [Citations].’ ” (*In re Boyette* (2013) 56 Cal.4th 866, 889 (*Boyette*), citing *In re Hitchings* (1993) 6 Cal.4th 97, 111.) “Although prejudice is presumed once misconduct has been

⁷ The court was referring to Evidence Code section 1150, subdivision (a), which provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.*” (Italics added.)

established, the initial burden is on defendant to prove the misconduct.” (*In re Carpenter* (1995) 9 Cal.4th 634, 657.) “In determining whether misconduct occurred, ‘[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]’ ” (*People v. Majors* (1998) 18 Cal.4th 385, 417.) This is true even when the evidence presented at a new trial hearing takes the form of affidavits or declarations, rather than live testimony. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1465 [trial judge, who had observed juror’s demeanor during course of trial, was in better position to assess credibility of her declaration than appellate court].)

“[W]hen a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to hold an evidentiary hearing to determine the truth of the allegations. We stress, however, that the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact.” (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415 (*Hedgecock*); see *People v. Avila* (2006) 38 Cal.4th 491, 604.) A hearing “should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties’ evidence presents a material conflict that can only be resolved at such a hearing.” (*Hedgecock*, at p. 419.) “Normally, hearsay is not sufficient to trigger the court’s duty to make further inquiries into a claim of juror misconduct.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256.)

The trial court did not abuse its discretion in denying defense counsel’s request for an evidentiary hearing to determine whether Juror No. 4 had committed misconduct. Although the only evidence of the purported misconduct was the hearsay declaration of the defense investigator, the court assumed the statements by Juror No. 4 had been made. There was, therefore, no material conflict of fact requiring a hearing. (*Hedgecock, supra*, 51 Cal.3d at p. 419.)

Nor did the court err in concluding appellant had failed to establish a strong possibility that prejudicial misconduct occurred. The court reasonably concluded that in context, Juror No. 4's statements were borne of frustration with the posttrial investigation and did not tend to show her state of mind when she answered the written questionnaire during voir dire. Moreover, the statements cited as proof of misconduct were made after the verdicts were entered, long after Juror No. 4 filled out the written questionnaire. And, as the trial court noted, the statements were inadmissible to show her mental process during deliberations themselves. (Evid. Code, § 1150, subd. (a).) In any event, no evidence was presented to suggest Juror No. 4 shared the expressed sentiments with other jurors or with anyone other than the defense investigator at a moment of frustration.

Appellant cites federal cases holding that statements by jurors evincing their own racial prejudice are not inadmissible to prove jury bias under the rule that the mental processes of jurors may not be admitted to impeach a verdict. (*Williams v. Price* (3d Cir. 2003) 343 F.3d 223, 227-233; *United States v. Henley* (9th Cir. 2001) 238 F.3d 1111, 1121.) Here, the trial court did not decline to consider evidence of Juror No. 4's statement to the investigator on the ground it was inadmissible; rather, the court made the factual finding that given the context of the statement (a posttrial interview in which the juror was irritated with the defense investigator and did not wish to submit a declaration), the defense had not carried its burden of demonstrating Juror No. 4 was untruthful during voir dire.

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A141623)