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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

STANLEY S. PARK,

Defendant and Appellant.

B251289

(Los Angeles County
Super. Ct. No. NA080541)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Affirmed as modified.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

A December 17, 2008 felony complaint, followed by an information, charged Stanley S. Park with the murder of Michael Martoni under Penal Code section 187, subdivision (a),¹ and specially alleged the personal and intentional discharge of a firearm causing death pursuant to section 12022.53, subdivision (d). The charge was based on Park's shooting Martoni twice, first in the abdomen and then in the head, and killing him during an altercation between the two outside a bar in Long Beach. After a first jury was unable to reach a verdict, a second jury convicted Park of the lesser included offense of voluntary manslaughter and found true a special allegation under section 12022.5, subdivision (a), that Park personally had used a firearm during commission of the offense. The trial court sentenced Park to 21 years in state prison, consisting of the upper term of 11 years for the voluntary manslaughter conviction, plus the upper term of 10 years for the section 12022.5, subdivision (a), enhancement.

On appeal, Park contends that the judgment should be reversed based on prejudicial evidentiary error, as well as the trial court's lack of disclosure and investigation into potential juror misconduct. He also contends that imposition of the upper term on the voluntary manslaughter offense and enhancement was improper and that he is entitled to additional presentence custody credit. Aside from the claim for additional presentence custody credit, we reject Park's contentions. Accordingly, we modify the judgment to reflect the correct amount of presentence custody credit and affirm the judgment as modified.

DISCUSSION

1. *No Grounds Exist to Reverse the Judgment Based on Park's Claims of Prejudicial Evidentiary Error*

Park contends that the trial court made numerous evidentiary errors: (1) excluding evidence that purported to show Martoni had a propensity for aggression and violence; (2) excluding statements made by Park's and Martoni's mutual friend to Park that Martoni was aggressive and violent; (3) excluding statements Martoni made to the mutual

¹ Statutory references are to the Penal Code unless otherwise indicated.

friend that Martoni suspected Park had been involved with Martoni's girlfriend; and (4) admitting evidence that Park possessed in his apartment two firearms, ammunition and other gun-related items that were not linked to the firearm Park used to shoot Martoni. According to Park, these errors, whether considered separately or together, prejudiced his case by causing the jury to reject the theory that he shot Martoni in self-defense.

Even if we agreed with Park that the trial court committed evidentiary error, reversal of the judgment is not warranted. "It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citations.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) Here, it is not reasonably probable that Park would have obtained a more favorable verdict absent any error, whether viewed cumulatively or singularly.²

The evidence against Park was strong. It was undisputed that Park removed a concealed, unregistered .40-caliber firearm loaded with hollow point bullets from his waistband and fired two fatal shots at Martoni, the first to the abdomen and the second to the head. Although Martoni initiated the physical altercation between the men by punching Park in the face, Park then pulled out his gun. According to Park, Martoni said,

² Contrary to Park's argument, mere evidentiary error, like other trial error, generally is not subject to the more stringent standard of prejudice (i.e., harmless beyond a reasonable doubt) for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18. Although the federal standard presumably would apply if a trial court were to completely exclude all evidence in support of a defendant's defense (see *People v. Fudge* (1994) 7 Cal.4th 1075, 1103), that standard does not apply in this case because the court admitted evidence to support Park's self-defense claim (*ibid.* ["If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense'"]); see also *People v. Boyette* (2002) 29 Cal.4th 381, 427-429).

“You’re going to pull a fucking gun . . . do you have the balls to pull the trigger” Park replied that he did. Park pulled the trigger and shot Martoni in the abdomen. Park testified he did so because he believed Martoni would carry out his threat to stomp Park’s head into the curb. Two witnesses saw Martoni fall to the ground after being shot in the abdomen. Park said Martoni appeared to swing at him again, although Park was more than an arm’s distance away from Martoni. Park pulled the trigger a second time and shot Martoni in the head. The jury convicted Park of voluntary manslaughter, finding either that he acted with passion and provocation or in imperfect self-defense. But the evidence was not close that Park acted in self-defense, at least when he fired the second shot, hitting Martoni in the head.

In addition to the strength of the evidence against Park, examination of the evidence about which he complains demonstrates that the trial court’s rulings did not prejudice him as to his claim of self-defense. No dispute existed that Martoni was aggressive and violent in instigating the physical altercation with Park, and the People conceded as much. Moreover, Park did testify that their mutual friend had told him that Martoni “was a crazy guy” who “would beat people up for nothing.” And, although Park complains that the trial court did not admit evidence that Martoni had “prison” tattoos, he did testify that he feared Martoni who was bigger than he is, describing Martoni as six feet tall with a large, muscular build, and that Martoni had skull tattoos on his legs of which the jury saw pictures. Park contends evidence that he was told Martoni suspected he had been involved with Martoni’s girlfriend would have explained Martoni’s desire to physically assault him. But, as noted, it was undisputed that Martoni began the physical altercation with Park, which was relevant to Park’s claim of self-defense, and thus the proffered evidence about the girlfriend would not have significantly bolstered the grounds for self-defense. As to the additional firearms evidence, no prejudice resulted, given the gun used to shoot Martoni and the circumstances under which Park fired the two fatal shots. The jury knew that Park carried to the bar an unregistered, concealed .40-caliber handgun loaded with hollow point bullets, which the evidence showed are designed to expand once inside a body and thereby enlarge the bullet’s wound path. The

jury also knew that Park had been trained to use that gun, which was of greater caliber than the other two found at his residence, by an investigator friend of his with extensive firearms expertise, who considered Park to be “a very good shot.”³

2. *No Grounds Exist To Reverse the Judgment Based on Potential Jury Misconduct*

Park contends that reversal of the judgment is required because the trial court mishandled potential juror misconduct by failing to disclose it and then later in connection with new trial proceedings declined to conduct a hearing regarding it. Reversal is not required.

Park filed a motion asking the trial court to recuse itself from ruling on post-conviction matters, including his new trial motion, based on the court’s conduct in

³ Park also complains about the trial court’s exclusion of a statement in a police report of a bar employee who saw Martoni’s body after Park had shot him. He asserts that the statement, which related to the positioning of Martoni’s body, supported his theory that Martoni was upright when shot the second time. Park contends the statement was admissible under the excited utterance exception to the hearsay rule and then through the police report as a business record. As the court found, however, the statement was not an excited utterance. For a statement to be admitted as an excited utterance, ““(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.” [Citations.]” (*People v. Poggi* (1988) 45 Cal.3d 306, 318; see Evid. Code, § 1240.) Park relies on the police officer’s report that the employee “appeared to be in a state of shock” when the officer first saw him and “was pacing back and forth on the sidewalk.” But the report also indicates that the officer attempted to focus the employee on what he had observed and that the employee then related to the officer a substantial description of the events surrounding the shooting. The report does not suggest that the employee spontaneously and without reflection uttered a statement about Martoni’s position on the ground after seeing his body. (*People v. Hines* (1997) 15 Cal.4th 997, 1034-1035, fn. 4 [trial testimony that witness “sounded ‘kind of nervous, scared like’ was insufficient to show that her statement was ‘the instinctive and uninhibited expression of the speaker’s actual impressions and belief’” and she appeared to be responding to a question, thus not speaking spontaneously].) Moreover, by convicting Park of voluntary manslaughter, the jury rejected the People’s argument that Park had committed murder by shooting Martoni in the head while he was lying on the ground. Thus, exclusion of the statement regarding the positioning of Martoni’s body was not prejudicial.

connection with a claim of potential juror misconduct.⁴ According to Park, he learned after the verdict that during presentation of the evidence a juror had stated a belief that he was guilty. Park said that another juror had reported the comment about the belief in guilt to the bailiff who was sitting in the courtroom that day, and the bailiff replied that the court wanted specific details regarding the comment. Although the reporting juror agreed that she would provide further information to the court, she did not. Nor did the court contact that juror. Park claims that the court's failure to inform him during the trial about the juror's report and any interaction between the court and the bailiff constituted judicial misconduct. We disagree. "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial." (*People v. Ray* (1996) 13 Cal.4th 313, 343.) Here, the court indicated that its "consistent practice [is] that requests and comments from the jurors off the record must be submitted to [it] in writing to ensure that there is a record." No such communication was submitted to the court.

Nor does the trial court's failure to conduct an evidentiary hearing in connection with the new trial motion regarding the juror's statement warrant reversal. "The trial court has the discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [Citation.] Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' [Citation.] 'The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence

⁴ Park filed four statements of disqualification, which all were stricken by the trial court. After the court struck the first statement of disqualification, Park filed a petition for a writ of mandate in this Court. We summarily denied the petition (Case No. B248635).

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.' [Citations.]" (*People v. Avila* (2006) 38 Cal.4th 491, 604.) The appellate court reviews for an abuse of discretion the court's denial of a defendant's postverdict request for an evidentiary hearing on allegations of juror misconduct. (*Ibid.*) No abuse of discretion occurred here.

Initially, Park's showing of juror misconduct was based in part on hearsay evidence in an affidavit from a defense investigator who had spoken to the bailiff about her communication with the juror and purportedly with the court as well. "Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct.' [Citation.]" (*People v. Avila, supra*, 38 Cal.4th at p. 605.) Nor was there a strong possibility that prejudicial misconduct occurred or a material conflict in the evidence on potential juror misconduct. (*Id.* at p. 604.) Park's evidence on juror misconduct did not indicate that the juror had expressed a belief in his guilt based on any matter extrinsic to the trial. "[I]t is not prejudging for a juror to form an opinion about the proper verdict before deliberations begin, provided that the juror's opinion is based on the evidence presented at trial and not on extrinsic matters. [Citations.]" (*In re Bolden* (2009) 46 Cal.4th 216, 226.) The juror's remark about guilt occurred during the presentation of evidence. At that time, the jurors knew only that Park was charged with the murder of Martoni. They were not informed of the possibility of convicting on the lesser offense of voluntary manslaughter, which they ultimately did, until they heard closing arguments and instructions from the court. Park submitted no evidence indicating that this juror declined to properly deliberate once the jury had the charged offense and the lesser included offenses before it. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1195-1196.)

3. *The Trial Court Did Not Err By Imposing Upper Terms for the Voluntary Manslaughter Offense and the Firearm Enhancement*

As noted, the trial court imposed the upper term of 11 years for the voluntary manslaughter offense and the upper term of 10 years for the firearm enhancement under section 12022.5, subdivision (a). Park contends that the trial court abused its discretion in imposing upper terms. We disagree.

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term under section 1170, subdivision (b), rests within the sound discretion of the trial court. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The court’s sentencing decision is reviewed for abuse of discretion. (*Ibid.*) “[S]entencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ [Citation.]” (*Ibid.*) An abuse of sentencing discretion occurs when the court “relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]” (*Ibid.*) “Neither section 1170 nor the California Rules of Court attempt to provide an inclusive list of aggravating circumstances. Thus, a . . . court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made. [Citation.]” (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196; see Cal. Rules of Court, rules 4.408(a), 4.420(b).)

The trial court supported its decision to impose the upper term for the voluntary manslaughter offense by stating, “The court in looking at the evidence presented in this case and to the argument of counsel, the moving documents, the California Rules of Court, that is, the aggravating circumstances versus the mitigating circumstances, in this case, it would appear that the victim in this case, Mr. Martoni, was intoxicated. . . . I believe that the blood alcohol level was .18 in this case. [Defense counsel] has indicated and argued extensively that the victim was drunk. He was drunk. . . . And the victim before the first shot was vulnerable pursuant to [California Rules of Court, rule] 4.421,

subsection 3. The victim after the first shot was even more vulnerable. From the testimony presented, [Park's] behavior, contrary to some of the testimony that he may have been previously injured—that alleged limitation or incapacity was not displayed on the video showing Mr. Park . . . hitting that punching bag [inside the bar], he was doing a tremendous job in accomplishing that exercise. So the jurors didn't accept the defense theory of self-defense. . . . Further, . . . pursuant to [California Rules of Court, rule] 4.421, subsection 8, the [manner] in which the crime was carried out indicates planning, sophistication and professionalism. Further, he fired twice. He hit twice. As somebody may have said, [Park] had extensive training and knowledge in firing weapons. He knew how to use it. Didn't miss much of a target. Respectfully speaking, neither did he in this instance. One may say, one may not say that [Park's] actions subsequent to the shooting may come within [California Rules of Court, rule] 4.421, subsection 6. [Park] ostensibly attempted to and did get rid of the evidence in this case by either putting [the firearm] in the bushes or throwing it in the river, dismantling part of the weapon, getting rid of some, putting some in the bushes. [Park] has a minimal criminal record, and the court would classify it as nonexistent, driving with a suspended license or driving without a license . . . and even a DUI perhaps in the past . . . so that will be a mitigating circumstance. [Park] has provided a lot of friends and family members and character witnesses to attest to his ability or reputation in the community for peacefulness. However, many of those law abiding citizens [who] testified when confronted with the issues of alcohol, weapons, firearms and controlled substances uses—none of them w[as] aware of those circumstances. Therefore, . . . the court in weighing the aggravating circumstances versus the mitigating circumstances, the court clearly finds that the aggravating circumstances substantially outweigh[] the mitigating circumstances.”

Only one aggravating circumstance is necessary to support imposition of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 813 [“existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term”].) “An aggravating circumstance is a fact that makes the offense ‘distinctively worse than

the ordinary' [citation]" (*Id.* at p. 817.) The trial court found Martoni a particularly vulnerable victim under California Rules of Court, rule 4.421(a)(3). Under that rule, a particularly vulnerable victim is one who is vulnerable "in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.) Martoni, whether or not he was particularly vulnerable before Park fired the first shot, he was a particularly vulnerable victim when Park shot him in the head after Park already had fired a bullet into his abdomen. Moreover, Park's conduct after the offense in dismantling the weapon and throwing its parts into the river and surrounding area prevented the weapon from being found and is a circumstance reasonably related to the sentencing decision. (See *People v. Bloom* (1983) 142 Cal.App.3d 310, 321-322 [upper-term sentence on vehicular manslaughter conviction imposed in part because after the crime "[t]he defendant had a 'complete lack of remorse,' evidenced by the fact that 'this defendant, knowing that he had taken the life of another person by virtue of his drinking alcohol, still continued to drink alcohol'" and defendant's actions after the crime were "'reasonably related'" to the sentencing decision]; *People v. Gonzales* (1989) 208 Cal.App.3d 1170, 1172-1173 [trial court properly used defendant's conviction for firing three shots from a revolver at a gas station attendant, occurring three years after the voluntary manslaughter offense for which he was being sentenced, to impose upper term because such subsequent conduct was "'reasonably related'" to the sentencing decision].)

Park contends the trial court failed to consider mitigating circumstances, maintaining that Martoni aggressively provoked the incident, the crime was committed because of great provocation and Park was suffering from a physical condition that reduced his culpability for the crime. (See Cal. Rules of Court, rule 4.423(a)(2), (a)(3) & (b)(2).) The court, however, noted it had weighed aggravating versus mitigating circumstances, specifically referring to what it characterized as a "minimal" or "nonexistent" criminal record as a mitigating circumstance. The court also was well aware that Martoni was the initial aggressor in the incident, as the People conceded that

point at trial, and was sentencing on a voluntary manslaughter count because the jury had concluded that Park acted either under passion and provocation or in imperfect self-defense. Moreover, although Park claimed in his testimony at trial that he had a physical impairment to his leg, the evidence did not unequivocally support that injury or suggest that any injury should reduce his culpability for the crime. As a result, the mitigating circumstances proposed by Park do not render the imposition of the upper term improper.

In imposing the upper term for the firearm enhancement, the trial court stated, “In this case, 1, [Park] is carrying an unlicensed weapon. 2, He’s carrying a concealed weapon. 3, He’s carrying a loaded concealed weapon. 4, It is a 40-caliber, but the ammunition used is hollow point. Very dangerous ammunition. Number 5, [Park] brings a very powerful firearm to either an unfriendly encounter or an attempt by [Martoni] to engage in a fight. At least one punch is thrown. There is no physical evidence that [Park] suffered any injury, scratch, brown mark, a bruise. I am mindful of the testimony presented that the autopsy may have shown that [Martoni] may have had a bruise on his hand. . . . [Park], while carrying a concealed, loaded firearm with hollow point, commences to drink in public. . . . So he’s with a firearm, loaded, concealed; ingesting alcohol; a controlled substance, cocaine. Therefore, again, respectfully speaking, when looking at the totality of the circumstances of the evidence and when looking at the law, . . . considering the powers of the court and its discretionary powers, the court firmly, respectfully, humbly believes that as to the use allegation, that the aggravating circumstances substantially, substantially, outweigh any mitigating circumstance.”

Carrying an unlicensed, concealed and loaded firearm in public while under the influence of alcohol and cocaine and using hollow-point bullets, which, as noted enlarge the bullet’s wound path, are facts reasonably related to the decision to impose an upper-term sentence. These facts thus demonstrate that the trial court acted within its discretion in selecting the upper term for the firearm enhancement. Park again contends the court failed to consider mitigating circumstances, this time referring to his education, work history and involvement in the community and his church. The court, however, was well aware of Park’s background and acknowledged his friends and family members who had

attested to his reputation in the community for peacefulness, either in testifying at trial or by submitting letters in connection with sentencing. The court did not fail to consider Park's evidence to support a lesser sentence but, as indicated, found "the aggravating circumstances substantially, substantially, outweigh any mitigating circumstances."

4. *Park Is Entitled to Additional Presentence Custody Credit*

At sentencing, the trial court awarded Park presentence custody credit of 608 actual days plus 90 conduct days for a total of 698 days. Park and the People agree that the correct calculation of presentence custody credit awarded should have been 859 days, consisting of 747 actual days and 112 conduct days. We agree with the calculation advanced by Park and the People. We thus modify the judgment to reflect 859 days of presentence custody credit, 747 actual days and 112 conduct days, and order the abstract of judgment corrected. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 ["failure to award an adequate amount of credits is a jurisdictional error[,] which may be raised at any time"].)

DISPOSITION

The judgment is modified to reflect 859 days of presentence custody credit, 747 actual days and 112 conduct days. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.