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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR ANTHONY ORTEGA,

Defendant and Appellant.

C065027

(Super. Ct. No. 08F07509)

A jury convicted defendant Victor Anthony Ortega of first degree murder (Pen. Code, §§ 187, subd. (a), 189;¹ count one) of Marcus Mayes and found true allegations that defendant personally and intentionally discharged a firearm causing death or injury (§ 12022.53, subd. (d)) and personally used a firearm (§ 12022.5, subd. (a)(1)). The jury acquitted defendant of the attempted murder (§§ 187, subd. (a), 664; count two) of Dariece Sims. Defendant was sentenced to state prison for two

¹ Undesignated statutory references are to the Penal Code.

consecutive terms of 25 years to life for the offense and the firearm enhancements.

On appeal, defendant contends (1) his conviction is not supported by sufficient evidence of intent to kill and premeditation, (2) the trial court erred prejudicially by failing to instruct the jury sua sponte on the lesser included offense of unlawful act involuntary manslaughter, and (3) the court erred by refusing to allow defendant to discharge his retained counsel and to consider a new trial motion based on ineffective assistance.

We conclude that there is substantial evidence supporting the conviction, any error in not giving unlawful act involuntary manslaughter instructions was harmless, and the trial court did not abuse its discretion when it impliedly determined that defendant's request to discharge retained trial counsel was untimely. We affirm the judgment.

FACTUAL BACKGROUND

On May 28, 2008, around dusk, the victim, Marcus Mayes, and his friend Dariece Sims walked down a street. Defendant drove past them, going in the opposite direction. As the car passed, the passenger, who was reclined in his seat, leaned up and quickly glanced at Mayes and Sims while trying to hide his face. This piqued Sims's curiosity and spooked him. Sims asked Mayes if he had seen the car. Mayes looked back at Sims but did not otherwise respond as they continued walking.

After the car went down the street, it evidently made a U-turn and headed back in the direction in which Mayes and Sims

were walking. The car slowly passed them and drove out of sight behind a fence and a bend in the road. As the car passed, defendant and the passenger were "mad-dogging" Mayes and Sims. Sims described the term "mad-dogging" as "[l]ooking hard, like staring at somebody for a long time." Sims got suspicious and asked Mayes, "Did you see them?" Mayes replied, "Yeah, I saw them. Just keep walking." Sims did not recognize defendant or the passenger.

Mayes and Sims kept walking. When they rounded the bend in the road, they saw that the car had parked facing toward them, as if it had made another U-turn in the interim.

Defendant and the passenger left the car and walked toward Mayes and Sims, who continued walking toward them as the distance quickly closed. When defendant and the passenger were about six feet from Mayes and Sims, everyone stopped walking. The passenger asked defendant, "[d]on't you know him?" and defendant replied, "[y]eah, that's the bitch-ass nigger from the Light Rail."² Sims believed there was going to be a fight.

Defendant drew a revolver from his jacket pocket as he finished his remark. Mayes, who was two or three steps in front of Sims, swung at defendant but missed, which threw him off balance. Mayes grabbed the front of defendant's jacket with both hands and pushed him into a gate and fence. Defendant and Mayes were upright at that point. Defendant had both hands up

² Sims told a detective that they had not gone to the light rail station and had remained in the neighborhood all day.

by his head with the gun in his left hand "pointing up in the air."

Sims rushed at defendant and tried to grab the gun. He fought for the gun for three to five seconds. As soon as Sims felt the gun, it fired, burning his hand. Sims heard the loud shot go past him; he felt heat on his hand and his shoulder. The heat caused him to let go of the gun. It was later discovered that Sims's coat had two bullet holes, one in the top right shoulder, which appeared to be an entry hole, and the second in the back of the right shoulder, which appeared to be an exit hole.

At the time the first shot was fired, defendant, Mayes and Sims were all standing upright. After the first shot was fired, Sims looked at the gun, turned around and dropped to the ground for protection. Sims could not see anything. At that point, he did not know what Mayes, defendant and the other person who had confronted them were doing. Prior to that point, the other person had not been doing anything aside from standing.

After falling to the ground, Sims grabbed for Mayes's shirt and tried to pull him down. Sims heard three more shots as he tried to pull Mayes to the ground, but he did not see what position Mayes was in at that time.

After the shooting stopped, Sims looked up and saw defendant and the passenger run off. The duo ran to the car, got inside, backed up and drove away.

Mayes hit the ground right next to Sims but hopped right back up. Sims tried to grab Mayes. Mayes took about five steps

and fell. Sims talked to Mayes, but Mayes did not respond. Sims, who was hysterical and yelling, stayed with Mayes until the police arrived.

Five citizen witnesses testified at trial. Joanne Parker, who lived in the area, heard two gunshots back to back. She looked out the window of her home and saw two males run and get into a car that sped off, made a U-turn, and drove away.

Karen Johnston, who also lived in the area, heard what she thought was a car backfiring. She went out to her backyard and determined that she had heard gunfire -- five shots in quick succession. Johnston looked over her fence, heard one man screaming and saw a second man running to a car as she heard someone yell "[g]o, go, go." The second man entered the car on the driver's side. Then the car, with the two occupants, backed up and drove away.

Sandra Swift, who also lived in the area, was watching a movie on her television when she heard a pop that she thought was a gunshot. A "few seconds" later, she heard three more shots. From her window, she saw two men hurriedly run down the street and jump into a car. The car made a U-turn and sped off.

Harold Fulkerson was standing in a parking lot approximately 200 yards away from the shooting scene. He heard "five or six gunshots" in rapid succession "about as fast as [someone could] pull the trigger." He estimated that all of the shots were fired within a span of approximately three seconds. Because of his distance from the scene, he

could not see the shooting or see or hear anything that had occurred prior to or after the shooting.

Diane Barber was driving her car and stopped at a stop sign at a nearby intersection. From a distance of 30 to 40 feet, she saw four males walking in two pairs and heading toward each other. It looked as if one or two words were exchanged, but she could not hear what was said. "[T]he victim" threw a punch, but she did not know whether he made contact. A scuffle ensued. The person accompanying the victim was trying to help him fight the others. To Barber, it seemed as if all four males began fighting. Ten seconds or less after she first observed the males, Barber heard at least two to three gunshots in very quick sequence. Barber thought all four men were upright when the shots were fired. She "gassed [it]" -- pressed her gas pedal -- and drove away. At that time, it appeared to her that all four men were "going to the ground." She had no idea who had fired the gun.

Dr. Mark Super, chief forensic pathologist for the Sacramento County Coroner's Office, performed the autopsy on Mayes and testified as an expert regarding autopsy results and findings. Mayes sustained gunshot wounds to the right arm, right shoulder and right hip. He also had abrasions on both knees, on his left palm, and above his temple, which had occurred at or about the time he received the other injuries and which could have occurred around the time of his death or hours before. Mayes also had abrasions around the knuckles of his right hand. Dr. Super opined that the abrasions to Mayes's

knees were "fairly characteristic of somebody just falling down on their knees," and the abrasions to his knuckles were consistent with Mayes putting out his hand during the fall. Dr. Super opined that the abrasion to Mayes's head was the result of his head impacting a broad surface such as the ground or a wall or something like that. The abrasions were also consistent with Mayes having been involved in a physical altercation, but Dr. Super opined that bruising to the hand is more common than abrasions to the hand in that scenario, and Mayes did not sustain any bruising.

The bullet that struck Mayes's right arm entered his forearm on the pinky finger side below the elbow, traveled in a straight line anatomically upward into his upper arm, and exited near his right armpit. Dr. Super opined that, given the bullet's path, Mayes's arm had to have been away from his body and his elbow had to have been bent somewhat backward, as if throwing a ball. Otherwise, the bullet would have entered his chest.

The gunshot wound to Mayes's right hip entered from the outside of his hip and exited on the inside of his right hip, traveling on a downward and slightly back-to-front path.

The gunshot wound to Mayes's right shoulder was fatal. It entered at the top of Mayes's shoulder close to the base of his neck and traveled anatomically straight down in a direction toward his feet. The bullet path was from right to left, not significantly frontward or backward. The bullet traveled behind his collarbone, struck his right lung, traveled through his

heart, passed between two ribs, and came to rest in the front left portion of his chest. The bullet path indicated that the muzzle of the gun was anatomically above Mayes when the shoulder wound was inflicted.

Dr. Super opined that the gunshot wound to Mayes's shoulder was consistent either with Mayes having been bent forward and the shooter firing horizontally into Mayes's shoulder or the shooter being above Mayes. However, he acknowledged that he could not determine the sequence in which the gunshot wounds were inflicted, Mayes's exact position during any of the shots, or the time lapse involved in the shots. He agreed there was "[e]ssentially" "an endless combination" of possible positions of Mayes's body and the gun, and offered as an example that Mayes could have been hanging upside down while the shooter fired upward.

Dr. Super was asked about the proximity of the muzzle to Mayes in connection with only one of the three gunshot wounds -- the wound to Mayes's hip. Dr. Super said there was nothing around that entrance wound to indicate whether it was or was not a close-range wound. He characterized the wound as being of "indeterminate[]range."³

³ A jacket with DNA on the collar that could have come from defendant or from one out of 110 Hispanics selected at random, also had a sleeve stained with blood that matched Mayes's DNA. Defendant contends this evidence showed that defendant and Mayes were in close proximity during the shooting. However, there was no testimony about the nature of these bloodstains, i.e., whether they appeared to be spatter or transfer smears.

Because the fatal bullet traveled through his heart, Mayes would have collapsed 30 seconds following the infliction of the wound to his shoulder. He would have died within several minutes of collapsing from lack of pressure. It would have been possible for him to get off the ground and run a couple of feet before collapsing.

During closing argument, the prosecutor argued inferences that could be drawn from the evidence to establish the sequence of gunfire. She told the jury, "So we have this first gunshot. Maybe an accident? Maybe? Couple of people struggling for the gun. I don't know. But let's talk about the next gunshots because those are certainly no accident."

The prosecutor then went on to argue her theory of the sequence in which the three gunshot wounds were inflicted. She argued that the first wound Mayes sustained was the one to the hip, and it was inflicted while he was standing. The second was the wound to the forearm. It was inflicted while Mayes was in a position lower than defendant and his arm was up in a defensive position. The final wound was the fatal gunshot to the shoulder that entered the top of Mayes's shoulder, traveled downward and penetrated his chest cavity. The prosecutor argued that Mayes was going down to the ground or was down on the ground when the fatal bullet was fired. Further, Mayes could not have had his own hands on the gun in a struggle for control of it when the fatal wound was inflicted.

Defense counsel argued the shooting was not intentional, deliberate or premeditated. He argued imperfect self defense

and that defendant pulled the gun only to scare Mayes. He suggested that pulling the gun's trigger was a "joint effort between the two guys grabbing the gun." He emphasized that Dr. Super could not determine the exact sequence in which the gunshot wounds had been inflicted.

DISCUSSION

I. There Was Sufficient Evidence of Intent to Kill, Deliberation and Premeditation

Defendant contends his conviction must be reversed because there was insufficient evidence of the mens rea elements for first degree murder. Primarily, he argues that the evidence was insufficient to support a finding that he harbored the specific intent to kill when the fatal shot was fired. He also argues that the evidence was insufficient to support the jury's verdict of premeditated murder.

Defendant focuses on what he characterizes a concession by the prosecutor that the first shot was "maybe an accident," and challenges her arguments that the second shot wounded Mayes's leg, the third shot wounded his arm, and the fourth and fatal shot was deliberately inflicted. Noting Dr. Super's inability to determine the order in which the shots were fired, defendant argues reversal is required because the prosecutor's theory as to the order of the shots was "not supported by its own expert or either of the two eyewitnesses." We are not persuaded.

A. Standard of Review

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable

trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]” (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480 (*Boyer*)).

“The same standard [of review] applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 (*Kraft*); see also *People v. Johnson* (1980) 26 Cal.3d 557, 578.) As this court has noted, before we can set aside a verdict for insufficiency of the evidence, “it must clearly appear that on no hypothesis whatever is there

sufficient substantial evidence to support the verdict of the [finder of fact].’ [Citation.]” *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

B. Sufficiency of the Evidence

The first degree murder theory advanced by the prosecution here was that the murder was willful, deliberate and premeditated. Defendant contends that the evidence was insufficient to establish an intent to kill and premeditation.⁴ In considering these contentions, we look to how our Supreme Court has analyzed claims of insufficient evidence in the context of willful, deliberate and premeditated murder.

Defendant acted “willfully” if he intended to kill. (§ 7; *People v. Moon* (2005) 37 Cal.4th 1, 29.) “In the context of first degree murder, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.” [Citation.]’ [Citation.] ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” [Citations.]’ [Citation.] ‘In [*People v.*

⁴ Although not expressly stated, we assume defendant also contends that the evidence was insufficient to establish deliberation.

Anderson (1968) 70 Cal.2d 15], [our Supreme Court] “identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing.” [Citation.] However, these factors are not exclusive, nor are they invariably determinative. [Citation.] “‘*Anderson* was simply intended to guide an appellate court’s assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]’” [Citation.]’ [Citation.]” (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

Here, the evidence supports each of the factors identified in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*); the evidence of premeditation and deliberation in turn supports the challenged finding of intent to kill.

1. Planning activity

Two types of planning activity were shown by the evidence. First, defendant deliberately sought out Mayes. After driving by Mayes in the opposite direction, defendant made a U-turn and, while “mad-dogging” him, slowly drove past Mayes again. Defendant then drove around the bend, turned the car around, drove toward Mayes a third time, and parked. Defendant and his passenger got out of the car and quickly approached Mayes.

Second, as he approached Mayes, defendant carried a loaded firearm in his pocket, a place where it was easily accessible. He pulled the firearm out of his pocket when he confronted Mayes. This evidence supports an inference that defendant planned to use the gun. (*People v. Steele* (2002) 27 Cal.4th

1230, 1250 [evidence defendant carried the fatal knife into the victim's home makes it "'reasonable to infer that he considered the possibility of homicide from the outset'"].)

The planning evidence supports an inference that not only did defendant harbor an intent to kill, but also that his intent to kill arose before, rather than during, the shooting. Thus, the inference of intent to kill does not turn upon which of the multiple shots was fatal.

2. Motive

The evidence of motive was compelling. As they drove by, defendant and his passenger "mad-dogged" Mayes and Sims. When defendant and the passenger confronted Mayes face to face, the passenger asked, "[d]on't you know him?" and defendant answered, "[y]eah, that's that bitch-ass nigger from the Light Rail." Defendant's mad-dogging and subsequent remark about seeing Mayes at the light rail revealed animosity toward Mayes and suggested there had been a conflict between defendant and Mayes or someone who looked like Mayes. Defendant's conduct and words showed a motive to kill Mayes.

3. Manner of killing

The number of shots fired and the location of the fatal wound evinces a specific intent to kill Mayes. The defense focuses on the prosecutor's statement that the first shot was fired accidentally and contends that the sequence of gunfire argued by the prosecution was not proved beyond a reasonable doubt. The defense further asserts that the first shot fired could have been the shot that caused Mayes's death.

These arguments miss the point. As we have noted, the test we must apply is the substantial evidence test. In doing so, we review the evidence in the light most favorable to the judgment. We must presume every fact the jury could reasonably have inferred from the evidence, including the circumstantial evidence. (*Boyer, supra*, 38 Cal.4th at pp. 479-480.) Thus, if the circumstances reasonably justify the jury's findings, we must hold that the evidence is sufficient, even if the circumstances might also reasonably be reconciled with a contrary finding. (*Kraft, supra*, 23 Cal.4th at pp. 1053-1054.)

Applying this test, we note at the outset that the jury was not required to accept the idea that the first shot may have been fired accidentally. Indeed, the prosecutor never conceded it was fired accidentally. The prosecutor posed the question "Maybe an accident? Maybe?" She then indicated she did not know whether the first shot was fired accidentally or not and focused the jury on the subsequent gunfire, which she argued was "certainly no accident."

The jury justifiably could have rejected the idea that the first shot was fired accidentally. Since defendant drew the weapon, the jury was free to infer defendant had his finger on the trigger. Sims did not testify that he touched the trigger, and there is no evidence he did. Consequently, the jury justifiably could have inferred that defendant fired the first shot intentionally and that he did so to make Sims remove his hand from the weapon. The jury reasonably could have inferred

that the subsequent shots were intentionally fired at Mayes, the person defendant and his companion confronted.

Defendant asserts that the forensic evidence did not establish the position of the gun relative to Mayes or Mayes's position at the time any of the shots were fired. From this, he argues that the fatal gunshot could have been inflicted during the struggle.

Dr. Super testified that he could tell the relationship of the muzzle of the gun and one part of Mayes's body, but that he could not opine with certainty Mayes's specific position when the fatal wound was inflicted. However, Dr. Super did testify that the best use of autopsy findings is to determine possible scenarios. He also indicated that the fatal bullet, which entered Mayes from the top of his right shoulder and traveled anatomically downward, could have been inflicted by a shooter firing horizontally at a bent-over Mayes or from above Mayes. Inferences that either occurred are reasonable. Mayes could have bent over after sustaining the other gunshot wounds, or after Sims pulled him to the ground, or as a result of a combination of both. Alternatively, given the abrasions to Mayes's knees, it would also have been reasonable for the jury to infer that Mayes went to his knees after the nonfatal wounds were inflicted and was then shot by defendant from above while Mayes was bent slightly forward.

Moreover, even if the first shot was fired accidentally when Sims grabbed for the gun, the jury could find that neither Mayes nor Sims continued to struggle while the succeeding shots

were fired. Rather, the jury could accept Sims's testimony that he dropped to the ground following the first shot and tried to pull Mayes to the ground with him, and infer that Mayes's ability to struggle for the gun was diminished after he sustained any of the gunshot wounds. Regardless of whether Mayes was on the ground or going to the ground, the evidence suggested that his ability to struggle for the gun -- and thereby to cause it to fire accidentally -- had been compromised significantly by the time the last shot was fired. Indeed, as the prosecutor explained, Mayes could not have been reaching for the gun at the time the gunshot wound that entered his shoulder was inflicted. And the jury could infer from the fact defendant kept firing the gun that he intended to kill Mayes.

Defendant places great weight on the testimony of Barber and Sims in his contention that defendant and Mayes were standing at the time the fatal gunshot wound was inflicted. Barber testified that she thought all four men were "upright" when the shooting stopped and that all went to the ground thereafter. And, as defendant also points out, Sims testified that when the first shot was fired -- the shot defendant contends was accidental -- defendant held the gun at the level of Sims's head. Thus, defendant argues, the evidence was equally consistent with a scenario in which the shots were fired

as the three men struggled for the gun while standing against the fence.⁵

First we note that Sims did not testify that Mayes was standing when all of the shots were fired. Sims testified that when he went to the ground, Mayes was still standing. Sims tried to pull Mayes to the ground, but did not see what position Mayes was in when the other shots were fired.

Second, the contention that Mayes was standing upright when the fatal wound was inflicted ignores the forensic evidence. As we have noted, the fatal bullet traveled anatomically straight down, from right to left, but not significantly frontward or backward. Internally, the bullet traveled behind Mayes's collarbone, struck his right lung, passed through his heart and between two ribs, and came to rest in the front left portion of his chest. If both men were still struggling over the gun from upright positions, the gun would have been above Mayes's shoulder and pointed downward when it fired. It was reasonable for the jury to reject such a scenario as unreasonable and it would have been reasonable for the jury to conclude that Barber was mistaken when she testified that defendant and Mayes were standing while all of the shots were fired.

4. Flight

As our high court has noted, "*Anderson* did not purport to establish an exhaustive list that would exclude all other types

⁵ The record is silent as to how tall defendant, Mayes, and Sims were at the time of the shooting.

of evidence that could support a finding of premeditation and deliberation.'" (People v. Solomon (2010) 49 Cal.4th 792, 812.) Here, there is additional evidence showing defendant's mental state. His flight from the scene by running away, getting in the car he had parked in advance and driving off supports an inference that he acted with the intent to confront Mayes, shoot him, and flee from the area.

5. Conclusion -- Sufficiency of the evidence

Based on the foregoing, we are satisfied there was sufficient evidence from which a reasonable trier of fact could conclude that defendant acted with the requisite intent to kill, deliberation, and premeditation.

II. Any Instructional Error Was Harmless

Defendant contends there was evidence supporting a finding that the shooting was "without the intent to kill but during the commission of an unlawful act," and the trial court erred prejudicially by failing to instruct the jury sua sponte on the lesser included offense of unlawful act involuntary manslaughter.

Assuming arguendo that the court erred by not giving unlawful act involuntary manslaughter instructions, any such error was harmless. It is well settled that "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.'" (People v. Beames (2007) 40 Cal.4th 907, 928 [failure to give involuntary manslaughter

instructions was harmless because jury necessarily determined killing was intentional when it found the torture special circumstance allegation true]; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 21-22 [failure to give involuntary manslaughter instruction was harmless because jury necessarily found that the killing was intentional when it found the killing to be willful, deliberate and premeditated by its first degree murder verdict]; *People v. Polley* (1983) 147 Cal.App.3d 1088, 1091 [failure to give involuntary manslaughter instruction based upon evidence the defendant killed his wife accidentally while trying to commit suicide himself was harmless because the jury's verdict of first degree murder necessarily resolved the issue of express malice, i.e. intent to kill]; see also *People v. Lewis* (2001) 25 Cal.4th 610, 647; *People v. Prettyman* (1996) 14 Cal.4th 248, 276.) This rule originated in *People v. Sedeno* (1974) 10 Cal.3d 703, 721 (*Sedeno*), disapproved on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10 (*Breverman*).

In *Sedeno*, our high court abrogated the prejudicial per se rule and held that the failure to give an involuntary manslaughter instruction based on diminished capacity in that case was harmless. In doing so, the court observed, "the jury necessarily rejected defendant's evidence that his diminished capacity negated intent to kill when it found the shooting to be first degree rather than second degree murder. Thus, the failure to give an instruction on involuntary manslaughter could not have been prejudicial to defendant since the offense could

have been no less than voluntary manslaughter[, for which the jury was properly instructed]. [The] failure to give [an involuntary manslaughter] instruction did not remove a material issue from the consideration of the jury." (*Sedeno, supra*, 10 Cal.3d at p. 721.)

In the face of the well-settled harmless error rule from *Sedeno*, defendant focuses on a statement this court made in *People v. Racy* (2007) 148 Cal.App.4th 1327 (*Racy*). In *Racy*, this court said, "it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence."

The defendant in *Racy* was convicted of "residential robbery and elder abuse 'under circumstances or conditions likely to produce great bodily harm or death,'" a felony. (*Racy, supra*, 148 Cal.App.4th at pp. 1329-1330.) The trial court did not instruct the jury on misdemeanor elder abuse, which does not require that the abuse take place under circumstances or conditions likely to produce great bodily injury. (*Id.* at pp. 1334-1335.) This court held that there was substantial evidence to support the verdict of felony elder abuse, but that the trial court erred in not instructing on misdemeanor elder abuse. The error was prejudicial because, based on the record, there was a reasonable chance the jury would have convicted defendant of misdemeanor elder abuse had the trial court instructed on that lesser offense. (*Id.* at pp. 1335, 1336.) This court reasoned that "the jury was left to draw inferences

about whether the circumstances or conditions under which defendant inflicted physical pain or mental suffering were likely to produce great bodily harm or death. . . . [T]he evidence could support such an inference. However, in assessing prejudice, it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence."⁶ (*Id.* at p. 1335.)

We do not read *Racy* as holding that it never matters that a defendant is convicted of a greater offense. Such a reading

⁶ This court based that statement on a footnote in *Breverman*, *supra*, 19 Cal.4th at page 178, footnote 25 -- a statement written in response to the dissent. The majority wrote: "[W]e disagree with Justice Mosk's assertion that if the defendant was convicted of the charged offense on substantial evidence, any error in failing to instruct on a lesser included offense must be *harmless per se*. Justice Mosk's premise is that such error affects only the lesser offense of which the defendant was not convicted. But the very purpose of the rule is to allow the jurors to convict of *either* the greater or the lesser offense where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' [citation], it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice. Depending on the circumstances of an individual case, such an examination may reveal a reasonable probability that the error affected the outcome in this way." (Italics in original.)

Of course, by this statement, our high court did not preclude the possibility of determining there is no reasonable probability that the outcome was affected when that finding is based on the conclusion that the jury necessarily decided the factual questions posed by the omitted instruction adversely to the defendant under other properly given instructions.

would effectively abrogate the *Sedeno* harmless error analysis in many situations. Indeed, this court in *Racy* did not even consider the *Sedeno* line of cases. Thus, the court in *Racy* did not intend to depart from the *Sedeno* reasoning on this point, and we do not do so here.

Here, it is not reasonably probable defendant would have obtained a more favorable outcome because the jury necessarily decided the factual question at issue under properly given instructions. The jury necessarily rejected defendant's argument that the gun discharged accidentally during a struggle when it found true the allegation that defendant *personally and intentionally* discharged a firearm. (§ 12022.53, subd. (d), italics added.) The finding that defendant personally and intentionally discharged the firearm is inconsistent with an accidental discharge occurring during a struggle for the gun. If the jury had a reasonable doubt about whether it was defendant and not Sims or Mayes who caused the gun to discharge during the brief struggle for it, or if the jury had a reasonable doubt about whether the gun was accidentally discharged, the jury would not have found the firearm enhancements true. Its further determination that the shooting was willful, deliberate and premeditated is also inconsistent with the notion that the shooting was an unintentional accident. The omission of instructions on unlawful act involuntary manslaughter was harmless.

III. The Court did not Err by Refusing to Allow Defendant to Discharge Retained Counsel

Defendant contends the trial court violated his Sixth Amendment right to counsel when it refused to allow him to discharge his retained lawyer and refused to consider a new trial motion based on ineffective assistance of counsel. We disagree.

A. Background

On April 8, 2010, in defendant's presence, the trial court set a briefing schedule that gave his defense counsel until April 19, 2010 to file any postconviction motions, gave the prosecution until April 27, 2010 to file any response, and set judgment and sentencing for May 6, 2010.

On May 6, 2010, just prior to judgment and sentencing, this exchange occurred:

"THE COURT: All right. Before we proceed, as I understand it you wish to have a hearing per *Marsden*?^[7]

"THE DEFENDANT: Yes, your Honor.

"THE COURT: All right. What I'm going to do is I'm going to ask that the district attorney leave the courtroom.

"[DEFENSE COUNSEL]: Your Honor, I don't know if *Marsden* is appropriate. I'm retained in the case.

"THE COURT: Oh, you are retained. I didn't know that. *Marsden* is not appropriate. He's retained counsel. *Marsden* deals with counsel other than retained counsel.

⁷ *People v. Marsden* (1970) 2 Cal.3d 118.

"[DEFENSE COUNSEL]: Your Honor, what I can tell the Court based upon a very recent conversation I had with [defendant] is that he chooses to seek someone to file for him a motion for new trial based on inadequacy of counsel. [¶] I told him I wasn't his candidate for that particular job.

"THE COURT: Well, the bottom line, there's no one here and I'm not going to stop these proceedings. [¶] And in terms of my evaluation of your performance, you were not below the standard of care. You were well within the standard of care [sic]. [¶] You must remember that in these charges count [two], I believe the attempt, and all lessers therein, [defendant] was acquitted. [¶] To tell you the truth, I thought you did a good job for him and we're going to proceed. Let's go."

Thereafter, during the sentencing hearing, the prosecution presented a video photo album that had been prepared by Mayes's family. Mayes's brother and mother addressed the court. The trial court then sentenced defendant.

B. Analysis

Where, as here, defendant's counsel is retained rather than appointed, a *Marsden* hearing is "[an] inappropriate vehicle in which to consider [defendant's] complaints against his retained counsel.'" (*People v. Hernandez* (2006) 139 Cal.App.4th 101, 108, quoting *People v. Lara* (2001) 86 Cal.App.4th 139, 155.)

A criminal defendant can discharge his retained counsel, with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) "A nonindigent defendant's right to discharge his

retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]. As the court stated in *Sampley v. Attorney General of North Carolina* (4th Cir. 1986) 786 F.2d 610, 613, the 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the [S]ixth [A]mendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."' The trial court, however, must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*Ortiz, supra*, at pp. 983-984.)

As noted, on April 8, 2010, in defendant's presence, the trial court set a briefing schedule that gave defense counsel until April 19, 2010 to file any postconviction motions and set judgment and sentencing for May 6, 2010. The April 19, 2010 deadline came and went, but no motion for a new trial was filed. On May 6, 2010, which was 17 days after the deadline had passed, and immediately prior to judgment and sentencing, defendant's retained counsel informed the court that, based on a "very recent conversation" he had had with defendant, "[defendant]

chooses to seek someone to file for him a motion for new trial based on inadequacy of counsel." The court responded in part, "[w]ell, the bottom line, there's no one here and I'm not going to stop these proceedings." The court impliedly found that defendant's motion was untimely such that it would disrupt the orderly process of justice. (*Ortiz, supra*, 51 Cal.3d at pp. 983-984.)

The Attorney General notes that the implied finding of untimeliness was supported by the fact that the court, its personnel, and the prosecutor were in place and ready to go forward; the prosecution had set up the video photo album, which impliedly required some preparation; and Mayes's brother and mother were present and prepared to address the court on the issue of sentencing.

Citing *Ortiz, supra*, 51 Cal.3d at page 984, defendant replies that an assessment of timeliness "requires a reasonable exercise of discretion," but fails to demonstrate that the trial court's implied assessment and exercise of its discretion were unreasonable. Instead, defendant faults the court for failing to ask him how long it would take for him to find replacement counsel and have counsel investigate any bases for a new trial motion. However, because no new counsel appeared at the hearing, and there was no evidence of any efforts made by defendant to obtain counsel, and retained counsel never asserted that the 28 days allotted for postconviction matters had proved to be inadequate to obtain new counsel, the trial court justifiably could conclude that defendant had not sought new

counsel in a timely manner and that his "request for delay" was not "justifiable." (*Ibid.*) There was no abuse of discretion and no Sixth Amendment violation.

DISPOSITION

The judgment is affirmed.

_____ MURRAY _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ BUTZ _____, J.