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COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CUAUHTEMOC RODRIGUEZ,

Defendant and Appellant.

C067425

(Super. Ct. No. 08F07273)

Defendant Cuauhtemoc Rodriguez appeals following a conviction for first degree murder (Pen. Code, § 187), subd. (a))¹ with personal discharge of a handgun (§ 12022.53, subd. (d)). Defendant contends the trial court erred when it: (1) refused to dismiss a juror who became ill when the jury was shown autopsy photographs during trial, (2) gave a modified jury instruction on justifiable homicide: self-defense or defense of others, and (3) denied presentence custody credits (§ 2933.2, former § 4019). We order correction of the abstract of judgment

¹ Undesignated statutory references are to the Penal Code.

to reflect the custody credits orally pronounced by the trial court and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant and his sons, Agustin and Octavio, with the murder of victim Kevin Marshall. The information further alleged that defendant personally discharged a firearm and thereby caused the victim's death.²

On the afternoon of August 21, 2008, the 17-year-old victim and his 13-year-old friend G.W. were standing outside the building where G.W. lived. From outside an apartment complex across the street, defendant's teenage son Octavio, aka Tommy, was looking at them with "a mug," an "ugly look." The victim asked Octavio what he was looking at, and a fistfight ensued. Defendant and another son, Agustin, emerged from the building and joined the fistfight. Agustin ended up on the ground with a dislocated finger and thumb, multiple abrasions, and a laceration to the head. The victim also fought with defendant, who lost his balance and fell down during the encounter. This ended the fight.

The victim ran toward his home and saw his friend and neighbor, 18-year-old Lutrell Thomas. The victim said he had been "jumped" by several men. The victim and Thomas called for

² Defendant's sons, Agustin Rodriguez and Octavio Rodriguez, were charged with the same crime. Agustin was convicted of voluntary manslaughter, but on September 2, 2011, we dismissed his appeal because he did not request appointment of counsel or file an opening brief. Octavio was not prosecuted in this trial. This appeal involves only Cuauhtemoc Rodriguez.

the victim's two brothers and two more friends to join them in returning to continue the fight. The victim and Thomas ran ahead, while the others walked behind them.

Meanwhile, in the victim's absence, defendant and his sons got into defendant's black Ford Mustang and moved it into the driveway of the apartment complex. According to G.W., they got out of the car when the victim and Thomas returned.

According to Thomas, he and the victim ran up to the car and they each assumed a boxing stance. Defendant pulled a gun from his waistband. The victim and Thomas turned and ran away. Defendant ran after them and fired several shots. No bullets hit Thomas. The victim was hit, but he made it back to the apartment complex, where he collapsed and died.

A neighbor testified he heard gunshots, looked out the window of his top floor apartment, saw a Black man running down the street, and several seconds later, saw the shooter following. The shooter fired three more shots and then ran back the way he had come. Another witness told a police officer that the man firing the gun did not run but just stood in the middle of the street as he fired the gun. Police discovered a bullet hole in a green van parked on the street and seven bullet casings in the street.

Thirteen-year-old Wendy N., a neighbor who lived in the same apartment building as defendant's family, was outside, passing out flyers for an organic vegetable stand. She knew Agustin from the apartment swimming pool, and her friend had dated Octavio. She knew the victim because she once lived in

the building where he lived. She saw the fistfight and saw the victim run away. Defendant and his sons moved the car. The victim and Thomas returned, and the two groups yelled and cursed at each other. The victim assumed a fighting stance with his hands up. According to Wendy and another young witness, it was Agustin who pulled out the gun and fired it.

After the shooting, the police tracked defendant and his sons to his sister's residence in Los Angeles. Agustin was arrested at a Los Angeles hospital. A search of the sister's home revealed a loaded .38-caliber handgun and ammunition, which the parties stipulated at trial was the gun that fired the bullet that killed the victim. When defendant was arrested, he told police, "You don't need my sons. They didn't do anything. I shot and killed that guy." He said nothing about shooting in self-defense.

A forensic pathologist testified that the victim sustained gunshot wounds from two bullets to the back. The pathologist opined that the shooter was behind the victim when the shots were fired. One bullet -- which was not lethal -- entered the back of the victim's right shoulder and exited the front of his body. The cause of death was a bullet that entered the back of the victim's right arm, exited and then entered the right side of the victim's back. A fragment of the lethal bullet was recovered from the victim's lung. The doctor placed a trajectory rod through the wounds in the back and arm, as depicted in a photograph admitted as People's Exhibit 35, which placed the victim's body in a position consistent with

running. The lethal bullet passed through the lung, heart and pulmonary trunk, and stopped in the left lung.

Defendant testified in his own defense. On the day of the shooting, he was inside his apartment when his daughter ran in and said some guys wanted to fight Octavio outside. Defendant and Agustin went outside, where the victim and his friend were standing. Octavio told defendant, "Those black kids want to fight with me." Defendant asked the victim, "What's up?" and "Do you have any problems with my sons?" The victim pointed to Octavio and said to him, "What's up, nigger?" Agustin then said, "[d]o you have a problem with my brother?" and the victim said, "[w]ith you too." The victim and Agustin began to fight. Agustin grabbed the victim around the neck, and the victim grabbed Agustin around the stomach. Both fell to the ground. Agustin could not get up. Defendant approached to help him up. The victim tried to hit defendant. Defendant stepped on his own untied shoelaces and fell down. The victim hit defendant. Defendant did not hit the victim. Defendant put his hands up and said, "Oh, you want to fight with me now? Are you sure you want to fight with me?" The victim backed up. Defendant said, "All right, boy, you win." "Go home." The victim asked, "Can I get my bike?"; it was leaning against the fence. Defendant said yes. The victim then left the area.

According to defendant, he got in his car to take Agustin to the hospital and sent Octavio upstairs to get Agustin's medical card. The victim and Thomas returned, running toward the car. Each was reaching behind his back. Defendant

testified that Agustin told him the victim and his friend were going to "shoot us up."³ Defendant was afraid. He lived in a dangerous neighborhood where shootings had occurred. Defendant retrieved his gun from under the driver's seat. He kept it there instead of the house because Agustin was on probation, which prohibited him from having a gun "near him." Defendant testified that, although the police had not found the gun when they searched defendant's car in an unrelated incident several months before the shooting, the gun was there, and the police overlooked it.

The victim and Thomas stopped approximately 30 feet away. Defendant put the gun in his waistband and got out of the car, intending to bring calm to the situation. According to defendant, Thomas said, "You want to fight with my brother?" and used the word "[m]otherfucker." Defendant said, "Hey, boys, no more trouble." Thomas replied, "You are fighting with my brother, motherfucker." Thomas, who had approached to a point about 13 feet from defendant, put his hand behind his back. Defendant believed Thomas was going for a gun and feared for his life and the lives of his sons, so defendant pulled out his gun, pulled the slide back and aimed it. Thomas saw the gun and ran

³ On both direct and cross-examination, defendant testified that Agustin told him the people running toward them were going to "shoot us up." In her opening brief, appellate counsel wrote that the men who were running toward the Mustang said they were going to "'shoot up' [defendant] and his sons." As will be seen, this is one of several misrepresentations of the record made by appellate counsel.

away. According to defendant, the victim, who was at that time about 22 feet away, put his hand behind his back. Defendant believed the victim was reaching for a gun. Defendant fired six or seven shots at the victim, who ran away after all of the shots had been fired. Defendant testified that the victim was facing him when all of the shots were fired. He denied shooting at the victim while the victim was running away. Defendant said he did not know the victim had been hit. Defendant said he got back in his car and drove off with Agustin. Defendant traded cars with his wife, and then drove Agustin and Octavio to Los Angeles. Defendant was afraid that if he went to a local hospital, he and Agustin would be arrested and Agustin would not get the medical care he needed. Defendant also feared deportation.

Defendant admitted he had no explanation for the bullet trajectory which indicated the victim had been shot in the back.

The jury found defendant guilty of first degree murder and found true the gun allegation.

On February 8, 2011, the trial court sentenced defendant to an indeterminate term of 25 years to life on the murder count, plus a consecutive term of 25 years to life for personal discharge of a firearm causing death.

DISCUSSION

I. Autopsy Photographs

Defendant contends the trial court committed reversible error by refusing to dismiss a juror who became ill after seeing

the autopsy photographs during trial and could not view this evidence. We disagree.

A. Background

Before trial, the prosecution moved in limine to use autopsy photographs to show the trajectory of the bullets that struck the victim. The trial court ruled some of the photographs could be admitted, but precluded others. Using the autopsy photographs, the forensic pathologist described how the two bullets hit the victim, and stated that one of them -- the lethal bullet -- entered the back of the victim's right forearm, exited that arm, and reentered when it perforated the right side of the victim's back. The pathologist opined that the victim was shot in the back, whereas defendant testified the victim was facing him and reaching for a gun when defendant shot at him.

One of the photographs allowed at trial showed a metal rod passing through the wounds in the victim's arm and into the wound in his back. When the prosecutor moved on to an X-ray exhibit, the trial court called a recess and asked Juror No. 6 to stay behind. The following ensued:

"THE COURT: How are you doing?

"SWORN JUROR NO. 6: I just get really queasy. I'm sorry.

"THE COURT: All right. I think we're probably about finished with the pictures, are we not, at least from the District Attorney?

"[PROSECUTOR]: We have no more pictures of the body.

"THE COURT: [Defense] Counsel, are you going to be putting the pictures back up?

"[AGUSTIN'S COUNSEL]: No.

"[DEFENDANT'S COUNSEL]: No. But, Your Honor, the photographs may be examined in the jury deliberations room.

"THE COURT: Well, that's true. What we need to make sure is that you can take a look at those photographs not just for the sake of looking at them and seeing the blood, but to determine -- One of the things that the lawyers are going to be arguing about is that trajectory. [¶] So will you be able to take a look at those photographs, discuss them with the other jurors and look at them with that in mind?

"SWORN JUROR NO. 6: I'll try.

"THE COURT: Okay. If you cannot, you make sure and let us know.

"SWORN JUROR NO. 6: Okay. Is that going to be a problem if I can't?

"THE COURT: If you can't, then we will have alternates. We can put alternates in.

"SWORN JUROR NO. 6: Okay.

"THE COURT: And you have been chosen as a juror.

"SWORN JUROR NO. 6: I know.

"THE COURT: We would just as soon you do it, but if there is something that makes you not able to fully consider and discuss the evidence, then don't you hesitate to tell us.

"SWORN JUROR NO. 6: Okay.

"THE COURT: And we will let you out, and you can stay and watch the rest of the trial if you would like, but we will put an alternate in to deliberate. Okay?

"SWORN JUROR NO. 6: I just don't want to get sick in front of everybody, you know.

"THE COURT: Pardon?

"SWORN JUROR NO. 6: I just don't want to get sick or pass out.

"THE COURT: All right. And, also, if you feel yourself getting sick or if you have any problem at all, if you got up and walked out, I would know why, and we can take a break. Okay?

"SWORN JUROR NO. 6: Okay.

"THE COURT: If you can, tell the bailiff first, but if you need to, just get up and walk out. Do you want a bucket?

"SWORN JUROR NO. 6: No, I'm okay.

"THE COURT: All right. We will start back up at 2:30.

"(Sworn Juror No. 6 leaves the courtroom.)

"THE COURT: Anything for the record, Counsel?

"[PROSECUTOR]: No.

"[AGUSTIN'S COUNSEL]: Your Honor, if I may. On behalf of Agustin Rodriguez, I'm going to ask the other parties to enter into a stipulation to relieve Juror No. 6. [¶] My observation of her was, I saw her on the -- when the very first picture was published. Because I remember voir dire and I checked her out real quick, and I honestly thought she was going to come close to regurgitation, like she was going to throw up. I think her

responses have dropped down to [sic] 'I can be fair and impartial' to 'I'll try.'

"[DEFENDANT'S COUNSEL]: Your Honor, just for the record, I would join in [Agustin's counsel's] position.

"THE COURT: [Prosecutor].

"[PROSECUTOR]: I'm not prepared to actually enter into the stipulation to remove her at this point. I think what Juror No. 6 is doing is, she's having a difficult time because they are not pretty pictures. She told us that. She still indicated that she is going to do her best to be fair, just like she promised us before. She understands that if she cannot look at these photographs and discuss these photographs, she is to alert the Court, and we can make the appropriate adjustments at that point. [¶] I'm not hearing -- I just don't hear enough for me to enter -- be willing to enter into a stipulation to relieve her at this point, Your Honor. Perhaps I can -- I'll focus on her a little bit more as the afternoon progresses, but --

"THE COURT: I haven't heard a motion for cause. Is there a motion or -- All I have heard is your invitation to the stipulation.

"[DEFENDANT'S COUNSEL]: Well, I would make the motion for cause, Your Honor.

"THE COURT: Is this matter submitted?

"[PROSECUTOR]: I'll submit.

"[AGUSTIN'S COUNSEL]: Your Honor, just one other real quick thing, if I could.

"THE COURT: Sure.

"[AGUSTIN'S COUNSEL]: I would rather -- and maybe this is not expediency, but I think it's reasonable. I think I would rather -- I will join the motion for cause now, and I would rather let her go now than let her get two days into deliberation, then come and tell you that she can't play any more or she can't be fair and impartial because of her sensitivities. If we put in an alternate, we start the deliberation all over again. [¶] So now I submit.

"THE COURT: I understand that it would be a matter for expedience; however, you guys picked these jurors, and I anticipate you did that purposefully, so unless there is actual cause, I would not remove her absent a stipulation. [¶] I'm satisfied that she will, as she did, notify the bailiff if she is not feeling well and notify the Court if she can't continue. So unless I see something to contradict that impression, I will leave her on and trust that she will let us know. And you guys keep an eye on her, as well."

Questioning concerning the autopsy resumed in front of the jury but was soon interrupted by the following:

"THE COURT: . . . [¶] Juror No. 6, it doesn't look to me like you are doing so good.

"SWORN JUROR NO. 6: Do I look bad?

"THE COURT: No. You just don't -- You look like you can't look at that.

"SWORN JUROR NO. 6: I'm sorry.

"THE COURT: Are you able to?

"SWORN JUROR NO. 6: Yes.

"THE COURT: Okay. I'm just checking."

At the end of the day, after the jurors left the courtroom, the following occurred:

"THE COURT: All right. We are out of the presence of the jury. Briefly for the record, when I broke in and inquired of Juror No. 6, it was because I noticed she was looking around and not looking up at the photograph on the screen. Later on when we were talking about -- when the other witnesses were on and not talking about any of the autopsy or anything like that, I noticed that she had the same kind of detached demeanor, that she was often looking down and periodically looks up at the witness or looks around. But, in general, she seems to have a fairly detached presentation. [¶] Anything else for the record?

"[PROSECUTOR]: No.

"[AGUSTIN'S COUNSEL]: I would agree with the Court in their [sic] observations. My concern was that she was refusing to look at the evidence, but then I watched her when Detective Jasperson took the stand, and she was staring at the same place in [sic] the floor, so --

"[DEFENDANT'S COUNSEL]: She wasn't looking at the photograph when I put it back up on the projector.

"[AGUSTIN'S COUNSEL]: It did not appear so to me.

"THE COURT: She is also apparently very concerned with -- I don't know -- split ends or something having to do with her hair. [¶] All right. Anything else for the record?

"[PROSECUTOR]: No, not on the record, Your Honor."

Defendants did not renew their earlier motion to excuse the juror for cause or contend that inattention was an additional reason to excuse the juror.

B. Analysis

Section 1089 provides, in pertinent part, "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (§ 1089, 5th par.)

A trial court has "broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve." (*People v. Millwee* (1998) 18 Cal.4th 96, 142, fn. 19.) We review the trial court's determination for abuse of discretion. (*People v. Boyette* (2002) 29 Cal.4th 381, 462 (*Boyette*); *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1117.)

When a juror's fitness is questioned, the trial court must make a reasonable inquiry to determine whether the juror should be discharged. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348-1349.) "[T]he mere suggestion of juror "inattention" does not require a formal hearing disrupting the trial of a

case. [Citation.]’” (*Bradford, supra*, at p. 1348; see *id.* at pp. 1348-1349 [trial court did not abuse its discretion in declining to conduct a hearing where juror fell asleep twice but did not appear to continually fall asleep or sleep for a long period of time].) Although juror inattentiveness may constitute misconduct, “\courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. . . . Perhaps recognizing the soporific effect of many trials when viewed from a layman’s perspective, [the] cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial.’” (*Id.* at p. 1349.)

The inability of the juror to perform his or her duties must be shown in the record to a “\demonstrable reality”” (*People v. Jablonski* (2006) 37 Cal.4th 774, 807), and we review the trial court’s exercise of discretion in this context under that standard (*People v. Fuiava* (2012) 53 Cal.4th 622, 711 (*Fuiava*)). We do not reweigh the evidence. (*Fuiava, supra*, at p. 714.) And we give deference to the trial court’s firsthand observations unavailable to us on appeal. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.) “Demonstrable reality” is a more stringent standard than “substantial evidence.” (*Id.* at p. 1052.) To meet the demonstrable reality standard, the trial court’s decision to remove a juror must be “manifestly supported” by the evidence on which the court actually relied. (*Id.* at p. 1053.) Under that standard, the trial court is not permitted to presume the worst of a juror. (*People v. Compton*

(1971) 6 Cal.3d 55, 59-60; *People v. Bowers* (2001)
87 Cal.App.4th 722, 729.)

Here, defendant argues the record makes clear that Juror No. 6 was not able to look at the autopsy pictures. Defendant's appellate counsel goes further and falsely claims in the opening brief that the juror "consciously refused to consider key evidence." Defendant also says the juror was detached during the remainder of the trial, which defendant suggests shows her inability to impartially confront the evidence, whether from her aversion to the autopsy photos or some "deeper mental deficiency."

However, there is no evidence whatsoever of mental deficiency. Nor does the record support the misrepresentation of defendant's appellate counsel that the juror consciously refused to consider the evidence. The juror did look at the photographs during trial, which is why she felt queasy. That the trial court observed her not looking at a photograph the *second* time it was displayed does not demonstrate an inability to confront the evidence. The court checked in with her, and she affirmatively stated she was able to look at the photograph. She also affirmatively stated she would inform the court if she could not look at and discuss the evidence during deliberations. The fact that she did not alert the court of any problem during deliberations indicates she was able to look at and discuss the evidence.

Defendant also argues on appeal that the juror was "detached" as the trial continued, and should have been excused

for this reason. Assuming, *arguendo*, that this contention was not forfeited when defendant's counsel did not assert it at trial (see *Boyette, supra*, 29 Cal.4th at p. 462), we address the merits.

Defendant cites cases holding that trial courts did not abuse their discretion in excusing jurors for a variety of personal issues. None of these cases make the trial court's decision in this case an abuse of discretion. In *People v. Marshall* (1996) 13 Cal.4th 799, a juror got a speeding ticket which could cost him his job. The juror considered it unjust that the district attorney's office would not drop the matter. (*Id.* at pp. 845-846.) Even though the juror said it would not affect his performance on the jury, the trial court concluded there was no way the juror could avoid it affecting his judgment at least unconsciously. (*Ibid.*)

In *People v. Fudge* (1994) 7 Cal.4th 1075, when the jury began deliberations, a juror asked to be discharged because she was starting a new job soon. (*Id.* at p. 1098.) She initially said her anxiety over the new job would not affect her deliberations, and the court left her on the jury. After the jury returned verdicts on some counts and returned to deliberate on the remaining counts, the same juror again asked to be discharged but again said her anxiety would not affect her deliberations. However, after phoning her present employer, the juror told the court that the manager said she needed to do paperwork so the employer could vacate her spot, and the juror affirmatively stated her anxiety over this matter

would affect her jury deliberations. (*Id.* at p. 1099.) The trial court excused her at that point. The Supreme Court affirmed, holding (1) the record supported the trial court's ruling that good cause to excuse the juror did not exist before she spoke with her employer, and (2) good cause to excuse her did exist after she spoke with her employer. (*Id.* at pp. 1099-1100.) *Fudge* supports affirmance in our case, where the juror earlier expressed anxiety but said it would not affect the performance of her duties as juror.

Defendant also cites *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, which held double jeopardy did not bar a retrial after the first trial ended in a mistrial when the court excused a juror who said he had prejudged the case and his mind kept wandering and he could not concentrate. (*Id.* at pp. 626-629.) The appellate court disregarded the juror's expression of prejudice, but concluded the juror's inability to concentrate was good cause to excuse the juror. (*Id.* at p. 629.) Here, in contrast, the juror said she was able to perform her duties as juror, and would let the court know if she could not.

Defendant also cites *People v. Green* (1971) 15 Cal.App.3d 524, which held a juror's moving out of state was good cause for the trial court to excuse her from the sanity and penalty phases of trial. (*Id.* at pp. 528-529.)

That the trial courts in the foregoing cases did not abuse their discretion in excusing jurors does not mean the trial court here abused its discretion in keeping Juror No. 6.

Defendant argues this case is analogous to *People v. Ramirez* (2006) 39 Cal.4th 398, 456-457, which held a trial court properly dismissed a juror after observing the juror sleeping multiple times during trial and learning that other jurors also observed the juror dozing during trial and deliberations. The Supreme Court held the trial court does not abuse its discretion when it discharges a juror who falls asleep during trial. (*Id.* at pp. 457-458.) Defendant argues the same inability to concentrate is present in this case. But it is not. Falling asleep is not the same as feeling queasy when viewing autopsy photographs or twirling one's hair. Moreover, *Ramirez* does not stand for the principle that a juror who appears inattentive must be dismissed. Rather, *Ramirez* held it was not an abuse of discretion for the trial court to dismiss the juror under the circumstances of that case. Here too, it was not an abuse of discretion for the trial court to keep Juror No. 6.

In *People v. Bennett* (2009) 45 Cal.4th 577, a juror expressed concern that the extension of the trial beyond the date it was originally predicted to conclude created a problem with her job as office manager of an elementary school. (*Id.* at pp. 618-621.) When the court asked if she would be distracted wondering what was going on at the school, she said, "Of course I'll be wondering what's happening at school," but she felt strongly that she could continue on the jury and maintain her focus on the case. (*Id.* at p. 620.) The Supreme Court concluded there was no abuse of discretion in declining to excuse the juror. The trial court was in the position to

observe the juror's demeanor in answering the court's questions and was persuaded the juror could perform her duties. (*Id.* at p. 621.)

Here, the record does not show as a demonstrable reality that Juror No. 6 could not carry out her responsibility to consider all of the evidence or that she was inattentive to the point that she missed trial evidence. Rather, it shows the trial court was hypervigilant after the juror's initial reaction to the autopsy photographs, such that the court noticed the juror played with her hair, looked around the room, and did not take a second look at an autopsy photograph redisplayed by defense counsel after having looked at the photograph when it was first displayed by the prosecution. None of this makes the trial court's decision an abuse of discretion. The trial court was in the position to observe the juror's demeanor in answering the court's questions and was persuaded the juror could perform her duties. (*People v. Schmeck* (2005) 37 Cal.4th 240, 298, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

Since we conclude the trial court did not abuse its discretion in keeping Juror No. 6 on the jury, we need not address defendant's argument that he was prejudiced by the trial court's error. We nonetheless address that argument as it relates to the autopsy photograph. Defendant assumes Juror No. 6 committed misconduct by not considering the autopsy photograph, thus raising the rebuttable presumption of prejudice discussed in *In re Hamilton* (1999) 20 Cal.4th 273, 295-296

(Hamilton). Assuming the presumption of prejudice arises in this context, that presumption is rebutted by the evidence and the arguments of counsel.

Defendant contends his testimony that the victim was facing him when he began firing made the autopsy photographs "a critical piece of evidence," and "[t]he difference between murder and voluntary manslaughter hung on this evidence." Yet, the autopsy photographs, combined with the pathologist's testimony, established that the victim's back was to defendant when the victim was struck by two of the bullets defendant fired. And defendant's attorney wisely conceded, based on the pathologist's testimony and photograph showing the bullet trajectories, that the victim was not facing defendant when defendant shot at him. Defense counsel argued defendant *believed* the victim was facing him, but was *wrong* in that belief.⁴

⁴ Defendant's counsel told the jury: "[Defendant] also tells us that [the victim] was facing him when he fired all seven of these shots. Now, we know that that can't be the case because we had the testimony from Dr. Fiore, . . . a forensic pathologist, who conducted the autopsy examination on the body of [the victim], and he told us that the wounds were back to front You will recall that she told us, that in her opinion -- there was a photograph . . . with a directional rod . . . where they positioned the arms so it would have been as though he were running. They put a rod through a wound to the arm into the wound of the upper back torso to show that that could have been a single shot that struck [the victim] as he was running. It went through his arm and then into his chest through his lungs, his heart and caused his rather immediate death. *So he could not have been facing [defendant] when all these shots were fired.* [¶] But, Ladies and Gentlemen, if

In our view, defendant essentially asserts on appeal that Juror No. 6 failed to consider evidence that was helpful to the prosecution, not evidence that was helpful to his case. Thus, assuming, *arguendo*, Juror No. 6 did not consider the evidence, defendant was not prejudiced, even applying the juror misconduct standard of "no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*Hamilton, supra*, 20 Cal.4th at p. 296; see *People v. Danks* (2004) 32 Cal.4th 269, 303, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654 ["'All pertinent portions of the entire record, including the trial record, must be considered. 'The presumption of prejudice may be rebutted, *inter alia*, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual'" bias."]) (Italics added by *Carpenter*.)

Here, assuming Juror No. 6 did not consider the autopsy photograph, no prejudice occurred because if she had considered it, the verdict would have been the same.

you look at this record again, if you go back and recall the evidence, there is some support here for [defendant's] *belief* that [the victim] was facing him when the shots were fired. *He was wrong in that belief. That's what the physical evidence tells us.* But I think the question here is: Could he have believed that, given the circumstances of the situation in which he was operating at the time these shots were fired? And again, this is happening quickly. It's under stress. And you have to assess it from that standpoint. . . ." (Italics added.)

II. Jury Instruction

Defendant next argues the trial court erred by modifying CALCRIM No. 505 -- the jury instruction on justifiable homicide: self-defense and defense of others -- by adding that fear of great bodily injury could include injury inflicted by hands or fists. Defendant argues the modification constituted judicial endorsement of the prosecution's theory of the case and lessened the burden of proof. We disagree.

A. Background

The trial court added the following italicized language to the penultimate paragraph in CALCRIM No. 505: "Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm, *and may be inflicted by hands or fists.*" (Italics added.)

The court also instructed the jury with CALJIC No. 5.31: "An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense or defense of another unless that person believes, and a reasonable person in the same or similar circumstances would believe, that the assault is likely to inflict great bodily injury upon him or upon another person."

B. Analysis

Defendant's appellate counsel again misrepresents the record by claiming the trial court added the "hands or fists" language "[o]ver appellant's objection." As the People point out, defendant's trial counsel actually requested that language.

Defendant's reply brief says trial counsel proposed multiple modifications to CALCRIM No. 505, some of which the trial court rejected, and defendant claims he did object to the trial court that he did not want the "hands and fists" language without his other modifications. Again, appellate counsel misrepresents the record.

After the court read the instructions to the jury, it asked counsel if there were any objections to the instructions. Defendant's trial counsel stated that he had several objections for the record. Regarding the modified CALCRIM No. 505, counsel stated, "I objected to the Court giving the version of CALCRIM 505 that is in the instruction package, and we requested in our trial brief a slightly different version of CALCRIM 505 [¶] The Court did give one portion of that instruction that we requested. That was the -- it's included in the Court's instructions, and that is that great bodily injury can be caused by hands and fists, but I wanted the Court to give the entire instruction . . . that we had crafted, because I felt that it was a better statement of the law and the burden on the People to prove beyond a reasonable doubt that this was not an act of self-defense. So having said that, that's the basis for my objection." The trial court said, "We did make a little bit of a modification of 505 to add in that the great bodily injury may be inflicted by hands or fists. It appeared to me that adding

in any more about the District Attorney's burden was redundant to the language that was already in the instruction."⁵

It is clear that defendant's proposed modification included the very language about which he now complains. Indeed, defendant devoted some two and a half pages in his trial brief to argument supporting the addition of the "hands or fists" language. Defendant's trial brief does not state he wanted all his proposed modifications to CALCRIM No. 505 or none at all, and defendant did not object in the trial court on the grounds that he advances now on appeal. And defendant does not contend on appeal that the trial court erred in rejecting other parts of defendant's proposal. Since defendant requested of the trial court the exact language he now challenges on appeal, the invited error doctrine bars his appellate challenge. (*People v. Huggins* (2006) 38 Cal.4th 175, 250 (*Huggins*).)

Even if we entertain the contention, it lacks merit. The modified instruction accurately states that great bodily injury can be inflicted by hands or fists. Indeed, the instruction actually benefited defendant by allowing the jury to find he acted in self-defense, even if the victim and Thomas did not have any weapons other than their fists.

⁵ The trial court rejected defendant's proposed language that stated: "Unless the prosecution proves beyond a reasonable doubt that [defendant's] beliefs were unreasonable, self-defense or defense of another applies regardless of whether or not the danger actually existed."

Defendant acknowledges the modification was a correct statement of law, i.e., that great bodily injury can include injury by hands or fists. He argues that, since the ability to cause great bodily injury with fists is implied in the commonly understood definition of great bodily injury, there was no need to state it expressly. Defendant claims the trial court, by "emphasizing" that great bodily injury can include injury by hands or fists, led the jury to believe that the court regarded the fist fight as the sole provocation and therefore minimized defendant's claim that the victim appeared to be reaching for a gun. He argues the two instructions together endorsed the prosecution's theory that defendant shot the victim in response to a fistfight, and that this fistfight did not justify defendant's use of deadly force. Defendant says the instructions also lessened the prosecution's burden of negating the defense theory that the victim was reaching for a gun when defendant shot him.

Defendant cites no authority whatsoever supporting reversal here, where the modification correctly stated the law. He cites case law that the correctness of an individual jury instruction is evaluated in the context of the entire charge to the jury, not in isolation. (*People v. Harrison* (2005) 35 Cal.4th 208, 252.) True, but that is not helpful to defendant. Where, as here, a defendant claims that instructions correct in law are ambiguous or misleading, the proper standard is to determine whether there is a reasonable likelihood that the jury misunderstood the instructions in the manner asserted by the

defendant. (*Boyde v. California* (1990) 494 U.S. 370, 380-381 [108 L.Ed.2d 316]; *Huggins, supra*, 38 Cal.4th at p. 193.) In making that determination, we look to the instructions as a whole. (*People v. Smithey* (1999) 20 Cal.4th 936, 963 [““““[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.”] We also look to the arguments of counsel. (See *People v. Garceau* (1993) 6 Cal.4th 140, 189.)

Here, there is no likelihood that the instructions led the jurors to convict defendant because they believed *the trial court* regarded the fistfight as the sole provocation and therefore minimized defendant's claim that the victim appeared to be reaching for a gun. Consistent with CALCRIM No. 101, which was given at the beginning of the trial, the court expressly told the jury, "Do not take anything I say or do during trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." At the end of the trial, consistent with CALCRIM No. 3550, the trial court repeated the admonition it gave at the beginning of the trial, instructing the jury, "It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." Earlier in the charge at the end of the trial, consistent with CALCRIM No. 200, the trial court told the jury, "Do not assume just because I give a particular instruction that I am suggesting anything

about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We presume the jurors followed the instructions.

(*Fuiava, supra*, 53 Cal.4th at p. 716.)

Moreover, none of the evidence supported defendant's theory other than his own self-serving testimony. All other evidence pointed the other way, e.g., no gun was found on the victim, and the victim was shot from behind as he was running away.

Lastly, nothing the prosecutor said during closing argument misled the jury. Contrary to defendant's argument on appeal, the prosecutor did acknowledge defendant's theory that the victim was reaching for a gun, and at no time did the prosecutor imply such evidence would not support a valid legal theory in this case. The prosecutor urged the jury to reject defendant's testimony. The prosecutor argued the testimony that defendant believed the victim and Thomas had guns was not reasonable, because if he really thought that, defendant would not have gotten out of his car to try to calm the situation down. She also argued it was unreasonable for the victim to reach for a gun he did not have. Additionally, the prosecutor emphasized that the victim was gunned down as he was fleeing, and contended it is not self-defense to shoot a person who is running away from you in the back even if you believe he had a gun. The prosecutor argued that, at most, such a scenario equates to a belief in future, not imminent harm.

We conclude defendant fails to show instructional error.

III. Custody Credits

Under a heading mislabeled "*CONDUCT CREDITS*" (italics added), defendant claims the trial court "improperly stripped" him of presentence custody credits. (§ 2900.5 [defendant is entitled to credit for days spent in custody during trial]; § 2933.2 [defendant convicted of murder is not entitled to custody credits under former § 4019; *People v. Johnson* (2010) 183 Cal.App.4th 253, 289 [defendant convicted of murder is entitled to presentence custody credits].)

Again, appellate counsel's argument is misleading.⁶ (See fn. 3, *ante*.) As noted by the People, the reporter's transcript shows the trial court did in fact give defendant his custody credits of 901 days, but the award somehow failed to make its way into the minute order or the abstract of judgment.

⁶ Because of appellate counsel's repeated misrepresentations in this appeal, we feel compelled to remind her of her ethical obligations. "It is the duty of an attorney . . . [¶] (d) To employ, for the purpose of maintaining the causes confided in him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).) "The representation to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court." (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.) "Even if [counsel's] misconduct were not wilful and dishonest, gross carelessness and negligence constitute a violation of an attorney's oath faithfully to discharge his duties" (*Ibid.*) "'It is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standards of ethics, civility, and professionalism in the practice of law.'" (*In re S.C.* (2006) 138 Cal.App.4th 396, 412.)

The oral pronouncement prevails over the abstract of judgment.
(*People v. Urke* (2011) 197 Cal.App.4th 766, 779.)

Defendant does not challenge the number of days awarded.

The abstract must be corrected to reflect 901 days of presentence custody credits. We see no need to order correction of the minute order, as requested by the People.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment to reflect 901 days of presentence custody credit and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

_____ MURRAY _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ NICHOLSON _____, J.