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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAY ALLEN COLES,

Defendant and Appellant.

D057933

(Super. Ct. No. SCD220436)

APPEAL from a judgment of the Superior Court of San Diego County, Amalia L. Meza, Judge. Affirmed.

Ray Coles appeals from a judgment convicting him of battery with serious bodily injury and a finding that he personally inflicted great bodily injury. He argues the judgment must be reversed based on numerous claimed errors, including the following. First, his counsel provided ineffective representation by failing to present eyewitness and impeachment evidence. Second, the trial court committed instructional error by (1) refusing his request for instruction on the defense of accident, (2) improperly instructing on causation for the personal infliction of great bodily injury enhancement, and (3) giving

a flight instruction. Third, the trial court abused its discretion by permitting the prosecutor to cross-examine him at length about his procurement of cocaine, and his counsel provided ineffective representation by failing to request a mistrial or a limiting instruction based on this cross-examination. Defendant also asserts he did not receive a fair trial due to the cumulative effect of error, and the trial court abused its discretion in denying his new trial motion.

We reject defendant's claims of reversible error and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

The charged offenses arose from an incident on April 25, 2009, when defendant aggressively approached Ajmal Wardak (the victim) while the victim was standing on the stairs leading up to defendant's apartment, and the victim then fell over the stair railing and hit the pavement below. The incident was witnessed by defendant, the victim, and two of the victim's friends (Shantele Marcum and Daria Kasprzak). According to the prosecution's evidence, defendant punched or pushed the victim, whereas defendant claimed he made no physical contact with the victim.

On the night of the incident, Marcum, Kasprzak, the victim, and other friends had been out drinking. In the early morning hours the group continued their activities at the victim's home in Pacific Beach, including using cocaine. At some point they decided to go get more cocaine. Defendant lived a few blocks away from the victim and Marcum knew he was a drug dealer. Marcum testified that she had purchased cocaine from defendant about five times, and about one month earlier he had furnished cocaine (at her request) during a trip to Miami.

A short while before the incident, Marcum called defendant and told him they wanted to buy some cocaine, and defendant told her they could come over. At about 4:30 a.m., the victim drove Kasprzak and Marcum to defendant's home. Marcum got out of the car and stated she would be right back, while Kasprzak and the victim (who did not know defendant) stayed in the car. Marcum went upstairs to defendant's apartment, knocked on the door, and went inside the apartment.

After about five or 10 minutes, the victim was concerned because Marcum had not returned. The door to defendant's apartment was ajar, and the victim got out of the car and called out Marcum's name a couple of times. There was no response, so he reentered the car and, along with Kasprzak, dozed off. About 10 minutes later when Marcum still had not returned, the victim woke Kasprzak and told her he was going to go get Marcum. He went to the top of the stairs and called her name a couple of times.

Marcum testified that she heard the victim calling for her while she was inside the apartment. Defendant asked who was out there and opened the apartment door. The victim asked Marcum if she was ready and told her they should go. Defendant said to the victim, " 'Quiet down. I live here,' " and Marcum told the victim she would be out in a minute. Defendant or Marcum then closed the apartment door. A couple of minutes later, Marcum heard the victim call for her again. According to the victim, at this point he was standing on the stairs about two steps from the top with his back toward the apartment door, and he was leaning with his "butt" or "right hip" on the stair handrail. Defendant came out of the apartment saying " 'Are you trying to wake up my fucking neighbors?' " and then "charged" him and hit him. The victim explained he was

"completely shocked" at defendant's approach; when the door opened he turned around to look; before he could react he "got a fist right across" the left side of his face; and he "fell over the banister backwards." The victim testified he did not fall or roll down the steps but "just fell straight back" to the concrete about 12 to 15 feet below. The last thing he remembered before waking up in the hospital was "looking at the sky" and thinking he was going to die.

Marcum witnessed part of the incident from inside the apartment, and Kasprzak witnessed it from inside the car. According to Marcum, defendant was irate and he dashed out the door and yelled at the victim to be quiet. Defendant made a fist and "put his arm up in a threatening way." The victim had a "shocked look on his face" and started "backing down the stairs." Defendant was "in [the victim's] face," walking toward him. Marcum did not see what occurred next because the apartment door "slam[ed]" shut. She heard voices yelling; a "punching" or "thump" noise; the sound of a rail making a noise; and then an "impact" noise like something "fell or hit into something and fell." She opened the door, ran down the stairs, and saw the victim lying on the ground on his back. Marcum testified she did not actually see defendant punch the victim, but she assumed he had done this because defendant "put his arm up and got in [the victim's] face and was yelling at him," and after the apartment door slammed shut she heard an "impact noise."

Kasprzak was sitting in the back seat of the car with the windows rolled up, and she was looking out at the victim through the front windshield of the car. According to Kasprzak the victim was walking back down the stairs after looking for Marcum;

defendant then opened the apartment door; the victim turned around towards defendant; and defendant "[came] after" the victim. "[W]ithin an instant" of defendant coming out, defendant lunged forward and swung at the victim with his right arm; the victim "went flying over the railing" and hit his head on the pavement; and there was no time for the victim to respond. Kasprzak did not see the "direct contact" of defendant's hand connecting with the victim because the victim's back was blocking her view. However, she assumed that defendant either punched or pushed the victim and that the victim did not fall over on his own. She explained that she saw defendant raise his arms and swing at the victim; the victim did not fall down the stairs but "[i]nstantaneously" went flying over the railing; and the victim went over the railing with "a lot of force." She stated she did not know if defendant intended to cause the victim to go over the railing, but she believed he did intend to punch or push him.

The victim had fallen "straight on his head"; there was blood coming from his head; and his eyes were rolled back and wide open. Kasprzak ran over to the victim. Kasprzak was trying to get her cell phone to work and she told defendant they needed to call the police. Defendant grabbed both of Kasprzak's arms, shook her, and "with a lot of rage and panic" in his eyes told her she was not "going to call the fucking police." Kasprzak argued with defendant and said they had to. She then ran away from defendant around the corner of the building, trying to get her cell phone to work. Kasprzak testified she was afraid of defendant because he had committed a violent act of pushing the victim over and he had shaken her and told her not to call the police.

Marcum also came outside and tried to talk to the victim, but he was unresponsive. Marcum told defendant they needed to call 911, but defendant told her no. Defendant picked up the victim and put him in the front seat of the car so they could take him to the hospital. Kasprzak observed this and ran back to the car. When Marcum said she was going to drive the victim to the hospital, Kasprzak argued with her and defendant because she knew that Marcum was in no condition to drive and it "was just another accident waiting to happen." Kasprzak told them they needed to call the police, and defendant again grabbed her and shook her and said she was not going to do this. After defendant shook her, Kasprzak ran off again and was able to alert the police by flagging down a patrol car.

Meanwhile, Marcum was unable to manage the car's clutch, and so defendant ended up driving. As defendant was backing the car into the street, he was stopped by the police in response to a 911 call by a neighbor.<sup>1</sup> Medical emergency personnel arrived and transported the victim by ambulance to the hospital. Based on the information provided by Kasprzak, the police arrested defendant at the scene.

Officer Nicholas Minx spoke to defendant on the night of the incident. Defendant told Officer Minx that he had an argument with the victim and during the argument he "chest-bumped" the victim. Defendant explained to Minx that chest-bumping means you "get real close" to the person and "puff out" your chest. Minx testified that he did not

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<sup>1</sup> The officer flagged down by Kasprzak was directed to the vehicle just as it was stopped by another officer pursuant to the 911 call.

remember specifically speaking with defendant about whether he made contact with the victim, but when defendant stated that "he chest-bumped him or got close to chest-bumping him," Minx assumed there had been contact. When defendant was at the jail, Detective Gregory Olson told him what he was being charged with. Defendant responded spontaneously by saying, " I should not have touched that guy. I don't even know him.' " Defendant told Detective Olson that the victim was yelling "[Marcum, Marcum.] Where are you?", and defendant opened the door and grabbed the victim's shirt.

The victim was in the hospital for eight days. He suffered bleeding in his brain and a skull fracture, and he experienced vomiting, memory loss, loss of concentration, and severe headaches. At the time of trial he had chronic upper-back pain.

### *Defense*

Testifying on his own behalf, defendant stated that Marcum came to his home at about 5:00 a.m.; she was intoxicated; and she asked him to get her some ecstasy. He told her he could not do anything for her and she should not be coming over to his home at this time of night. When he heard the victim at the top of the steps yelling for Marcum, he was upset at the noise and went outside. Gesturing with his hands, defendant asked the victim what he was doing yelling outside his home and told him to " 'shut the F up'." The victim looked as if he was under the influence and appeared to be shocked that defendant had come outside. Defendant walked towards the victim, and the victim started walking backwards to avoid defendant. The victim then "clipped over the rail, fell over backwards, arms in the air, not even trying to brace himself." Defendant testified

that he never got closer than two to three feet from the victim; he never swung at, pushed, shoved or touched the victim; and he did not tell the police that he chest-bumped the victim or that he should not have touched the victim. Defendant acknowledged that he knew he should not have moved the victim because the victim had a head injury and that the proper thing to do would have been to call the police, but denied that he told Kasprzak not to call the police.

### *Jury Verdict and Sentence*

Defendant was charged with assault by means of force likely to produce great bodily injury (count 1) and battery with infliction of serious bodily injury (count 2), with allegations that he personally inflicted great bodily injury for both counts. For count 1, the jury acquitted him of the aggravated assault charge and found not true the personal infliction of great bodily injury allegation, and for this count convicted him of the lesser included offense of misdemeanor simple assault (Pen. Code,<sup>2</sup> §§ 240, 241, subd. (a)). For count 2, the jury found him guilty of the charged battery with serious bodily injury (§ 243, subd. (d)), and found the personal infliction of great bodily injury allegation to be true (§ 1192.7, subd. (c)(8)).

Defendant was also charged with dissuading a witness (count 3); the jury was deadlocked on this count and the trial court dismissed it.

Defendant admitted three prison priors, a serious felony prior conviction, and a strike prior conviction. The court struck the three prison priors and sentenced defendant

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<sup>2</sup> Subsequent unspecified statutory references are to the Penal Code.

to nine years in prison. The sentence consisted of a four-year term for the battery conviction (i.e., double the lower two-year term based on the prior strike), plus five years for the serious felony prior.

## DISCUSSION

### I. *Ineffective Assistance of Counsel Based on Failure To Present Evidence*

Defendant argues that his counsel was ineffective for failing to present two evidentiary items: (1) the testimony of an eyewitness (Melayni Patterson) who observed the incident from inside defendant's apartment and did not see him touch the victim, and (2) Marcum's pretrial statement (made to her friend Alexandra Escajeda) that the victim fell off the balcony. Represented by new counsel, defendant filed a new trial motion based on these claims. At the hearing on the motion defendant presented the testimony of Patterson, Escajeda, and his trial counsel (Jason Turner).

To show ineffective representation the defendant must establish that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's error the result would have been different. (*People v. Weaver* (2001) 26 Cal.4th 876, 925.) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Ibid.*) In reviewing a claim of ineffective representation, we are not bound by trial counsel's statement that he or she provided ineffective representation. Although we take counsel's hindsight viewpoint into consideration, we apply an objective standard to determine whether the defendant was afforded competent representation. (See *ibid.*; *People v. Beagle* (1972) 6 Cal.3d 441, 457 ["Self-proclaimed inadequacies on the part of

trial counsel in aid of a client . . . are not persuasive"]; *In re Burton* (2006) 40 Cal.4th 205, 223.) Further, if the record does not show prejudice from counsel's alleged deficiency, we may reject the claim without determining whether counsel's performance was deficient. (*People v. Sapp* (2003) 31 Cal.4th 240, 263.)

A. *Failure To Present Patterson's Eyewitness Testimony*

At the hearing on the new trial motion, Patterson testified that on the night of the charged incident she spent the night at defendant's apartment because of a domestic violence incident with her boyfriend.<sup>3</sup> She had not had anything to drink and had not taken any drugs. She was sleeping in the bedroom, and she woke up and heard defendant speaking with Marcum in the living room. She then heard the victim outside yelling for Marcum. Patterson got out of bed, grabbed a sheet to cover herself, and went into the living room. Defendant walked outside and told the victim in a loud whisper to "shut the fuck up." Marcum followed defendant outside. Patterson "peeked out of the blinds" that were by the door. It was dark outside, but there was a light on the outside balcony and she was in a position to clearly view the scene. She testified that the victim "was backpedaling down the stairs and he toppled over the banister." Defendant had his arms up and was saying "shut the fuck up." Patterson did not see any contact between defendant and the victim.

On cross-examination Patterson testified that defendant was walking towards the victim with his hands in the air, and from her vantage point in the apartment she was

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<sup>3</sup> Patterson testified she had known defendant for about three years; they had a brief romantic relationship; and they were good friends.

essentially behind defendant with defendant's "back to [her]." She stated the victim started "backing up," defendant went down a couple of steps towards the victim, and the victim fell.<sup>4</sup>

Defense trial counsel (Turner) testified that during his early interviews with defendant, defendant told him there was a woman with him at his apartment on the night of the incident. However, they did not pursue this witness because defendant had been "stepping out on his fiancée" with whom he had reconciled; he did not want his fiancée to find out about this; and it was very important that "this information not see the light of day." Turner did not know the woman's identity and did not interview her. Turner testified that after reviewing Patterson's proffered testimony, he felt he acted incorrectly; she would have been "key to the trial"; there was no tactical advantage to not calling her; in retrospect he should have "pushed [defendant] a little bit harder" to get the information about her; and he instead "simply respected [his] client's wishes and moved on." Turner opined that Patterson's testimony "would have made a world of difference" at trial because it would have supported that the victim was not pushed, punched, or otherwise forced over the balcony but rather simply fell.

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<sup>4</sup> Defendant requests that, in addition to considering Patterson's testimony at the hearing on the new trial motion, we also consider an interview of Patterson recorded on a DVD prepared by his new trial counsel. After Patterson had testified at the new trial motion hearing and had been excused, defendant requested that the trial court view the DVD. The People objected on hearsay grounds, and the trial court declined to view the DVD. Defendant has not presented any argument to show the trial court erred in declining to view the DVD, and we will not consider it for the first time on appeal.

In denying the new trial motion, the court stated there were policy concerns arising from permitting the defense to withhold a witness and then claim ineffective assistance when the trial strategy does not succeed. Also, the court observed that Patterson's testimony was not that powerful because she was not in the stair area and thus was not as close to the scene as the other witnesses. The court also concluded that defense counsel's decision not to call Patterson was based on a tactical decision to present defendant as a man who was devoted to his fiancée and child and to present the prosecution witnesses as immoral, untruthful characters under the influence of drugs and alcohol.

Defendant has not shown deficient performance on the part of his trial counsel based on counsel's failure to interview and call Patterson as a witness. Defendant himself made the decision (for personal reasons) not to have his counsel contact Patterson and present her testimony. Indeed, reflective of defendant's firm decision to keep Patterson out of the proceedings, on direct examination defendant affirmatively testified at trial that he had *no company* at his apartment on the night of the incident. Further, defendant elaborated to the jury that the last thing he did before he fell asleep that night was talk to his "girl" (who later became his fiancée) on the phone, and he then gestured towards his

fiancée, who was sitting in the courtroom.<sup>5</sup> At the new trial hearing, defendant's trial counsel acknowledged that defendant's fiancée and child were present in court during the trial, and that standard defense strategy included presenting the defendant as a person supported by his family.

Although counsel could have decided to override defendant's request and present Patterson's testimony (see *People v. Turner* (1992) 7 Cal.App.4th 1214, 1221), the courts have recognized that purported error arising from a defendant's *own volitional choice* to limit evidence cannot subsequently be used in hindsight fashion to support reversal before a reviewing court. (See *In re Shaputis* (2011) 53 Cal.4th 192, 211-212 [inmate's decision to limit his participation in current parole review proceedings did not show error arising from lack of current evidence of dangerousness]; *Strickland v. Washington* (1984) 466 U.S. 668, 691 [reasonableness of counsel's actions may be influenced by defendant's own statements]; *People v. Stewart* (1988) 202 Cal.App.3d 759, 765 [defense counsel's decision not to call defendant's son to testify may have reasonably been based on defendant's own wishes].) Here, the record shows that defendant did not want Patterson involved in the trial; trial counsel complied with his client's wishes; and at trial defendant consciously avoided mentioning Patterson's presence and instead told the jury that on the

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<sup>5</sup> This testimony on direct examination was as follows: "[Counsel:] So what, if anything, did you do that night? [¶] [Defendant:] I laid low, watched ESPN, and sat on my couch, went to bed around 11:00. [¶] [Counsel:] And did you have any company? [¶] [Defendant:] No, no company at all. [¶] . . . [¶] [Counsel:] Do you remember what the last thing you did before you went to sleep was? [¶] [Defendant:] Talked to my girl. [¶] [Counsel:] And you're gesturing out into the audience? [¶] [Defendant:] Sorry. [¶] [Counsel:] Is that because you're — when you say your girl, you're referring to your fiancé[e]? [¶] [Defendant:] Yes."

night of the incident he had no company and was focused solely on his fiancée. Given defendant's own affirmative conduct reflecting his desire not to have Patterson's presence revealed, he cannot now cite her absence as showing deficient performance by his trial counsel.

Alternatively, defendant has not shown prejudice from the failure to present Patterson's testimony. The key disputed issue at trial was whether defendant made physical contact with the victim, and Patterson's testimony at the new trial motion hearing shed no direct, definitive light on this issue. Patterson testified that defendant's arms were raised, and she acknowledged on cross-examination that *defendant's back* was facing her as she observed the incident. Although Patterson indicated she did not *see* any physical contact between defendant and the victim, because she was viewing defendant from behind, her proffered testimony does not establish that she was *actually able to observe* the totality of defendant's actions. Given the gap in her observations, Patterson's testimony would not have added any definitive evidence on the critical issue of whether defendant actually touched the victim. Defendant has not shown that there is a reasonable probability that the presentation of Patterson's testimony would have altered the jury's conclusions on what occurred just before the victim toppled over the railing.

Defendant has not established ineffective representation arising from the absence of Patterson's testimony.

#### B. *Failure To Present Marcum's Pretrial Statement*

Defendant also moved for a new trial based on his trial counsel's failure to impeach prosecution witness Marcum based on her statement to her friend Escajeda

shortly after the incident that the victim fell off the balcony. At the new trial motion hearing, Escajeda testified that she received a phone call from Marcum sometime after 5:00 a.m. on the date of the charged incident. Marcum told Escajeda that she was at the hospital and that the victim "fell off" the balcony. Trial counsel Turner testified that he knew about Marcum's statement to Escajeda, and he had no tactical reason for not presenting it but mistakenly overlooked it during trial.<sup>6</sup>

Assuming arguendo that reasonably competent counsel would have presented Marcum's statement to Escajeda, there was no prejudice from the omission of this evidence. Again, comparable to Patterson's testimony about her observations, Marcum's statement that the victim fell off the balcony shed no direct light on the key disputed issue of whether defendant touched the victim just before the victim fell. Standing on its own, a statement that the victim fell could be consistent with both the prosecution version and the defense version. Although the defense could have used Marcum's failure to tell Escajeda that she believed defendant was the cause of the victim's fall to support the defense claim that no touching occurred, this evidentiary item was not of such significance as to have reasonably affected the outcome. There is nothing to suggest that Marcum and Escajeda were engaged in a detailed conversation about what occurred during the incident; to the contrary, Escajeda testified that after Marcum told her about the victim falling, Marcum began talking about other matters, including about a dress that Marcum had ruined that night. The evidentiary weight of Marcum's short statement to

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<sup>6</sup> Escajeda testified at trial as a character witness on behalf of the defense.

Escajeda is further diminished by an officer's testimony that when interviewed at the scene Marcum specifically described defendant's involvement in the incident.<sup>7</sup>

Also, to determine the issue of whether defendant touched the victim, the jury was presented with detailed testimony from both Marcum and Kasprzak describing their precise observations (visual and/or auditory) of defendant's conduct and the manner in which the victim fell over the railing. There is no reasonable probability that Marcum's short statement to Escajeda that the victim fell would have been a pivotal consideration when the jury evaluated the credibility and import of the witness descriptions of the incident.

## II. *Instructional Errors*

### A. *Trial Court's Refusal To Instruct on Accident*

Defendant argues the trial court erred in refusing his request that the jury be instructed on the defense of accident. (See CALCRIM No. 3404.) As we shall explain, the charged offenses in this case (assault and battery with personal infliction of great bodily injury) do not require an intent to harm the victim. Further, to support an accident defense, there must be accidental conduct *by the defendant*, not merely accidental conduct *by the victim*. Thus, to the extent defendant's contentions rest on claims that there was evidence to support that he had no intent to hurt the victim and that *the victim* (as opposed to defendant) engaged in accidental conduct, they are unavailing.

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<sup>7</sup> The officer testified that when Marcum was initially contacted at the scene, she reported that defendant ran down the stairs, "bumped into" the victim, and knocked the victim down the stairs. When interviewed again at the scene, she told the officer that defendant "punch[ed]" the victim.

A trial court generally does not have a sua sponte duty to instruct on an accident defense; however, it must give a pinpoint instruction on the defense when it is requested and supported by the evidence. (*People v. Anderson* (2011) 51 Cal.4th 989, 996-998.) When determining whether a defense is supported by the evidence, the trial court does not make credibility resolutions; considers only whether there is evidence sufficient to deserve consideration by the jury; and resolves any doubts in favor of giving the instruction. (*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Strozier* (1993) 20 Cal.App.4th 55, 63.) A defendant has the right to jury instruction on inconsistent defenses, as long as each defense is supported by the evidence. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1018.) Thus, the trial court should give a requested instruction on a supported defense even if it is inconsistent with the theory of defense presented by defendant's own testimony. (*People v. Elize* (1999) 71 Cal.App.4th 605, 610, 615.)

The accident defense applies if the defendant acted " 'without the intent required for [the] crime, but acted instead accidentally.' " (*People v. Anderson, supra*, 51 Cal.4th at p. 996; § 26.) The crime of assault requires that the defendant commit an act that by its nature will probably result in the application of wrongful physical force on another, and the crime of battery requires that the defendant actually apply this force on another. (*People v. Williams* (2001) 26 Cal.4th 779, 782; *People v. Marshall* (1997) 15 Cal.4th 1, 38; *People v. Colantuono* (1994) 7 Cal.4th 206, 214 & fn. 4, 216.) Assault and battery are general intent crimes, requiring that the defendant commit the proscribed act willfully; i.e., on purpose. (*People v. Williams, supra*, at p. 782; *People v. Colantuono*,

*supra*, at pp. 213-214; *People v. Lara* (1996) 44 Cal.App.4th 102, 107; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1194.) Further, the defendant must have had knowledge of facts that would lead a reasonable person to realize the application of force was likely to result from the act. (*People v. Williams, supra*, at p. 788.) Thus, an accident defense can apply to charges of assault or battery when the defendant unwillingly or unknowingly (i.e., accidentally) directed force towards, or touched, the victim. (See, e.g., *People v. Lara, supra*, at p. 106 [accident defense applicable based on evidence showing victim grabbed defendant, and defendant then unintentionally hit victim while turning around to free himself]; *People v. Gonzales* (1999) 74 Cal.App.4th 382, 385, 390 [accident instruction supported by evidence showing defendant accidentally struck victim with door when he entered room as victim was leaving].)<sup>8</sup>

At trial, defendant argued an accident instruction was warranted based on the evidence showing he had no intention to cause harm and the incident occurred because the victim recoiled in response to his approach. The court concluded the accident defense did not apply because there was no evidence that defendant engaged in any involuntary conduct. Similar to his arguments to the trial court, on appeal defendant asserts an accident defense was supported by evidence showing that he went outside his apartment with no wrongful intent but merely to tell the victim to stop yelling, and the incident occurred because the inebriated victim accidentally fell over the railing when defendant approached him.

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<sup>8</sup> *Gonzales* was disapproved on other grounds in *People v. Anderson, supra*, 51 Cal.4th at page 998, footnote 3.

To the extent defendant is asserting an accident defense based on evidence showing he did not intend to cause harm to the victim, this showing would not refute the assault or battery charges in this case. Intent to harm is not an element of assault or battery; all that is required is knowledge of the relevant facts and intent to do the act that is likely to, or does, result in the application of the wrongful force. (See *People v. Williams, supra*, 26 Cal.4th at pp. 782, 786, 790 [assaultive act, by its nature, subsumes intent to injure]; *People v. Colantuono, supra*, 7 Cal.4th at pp. 214-215, 218; *People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) Likewise, intent to injure is not required for the personal infliction of great bodily injury enhancement. (*People v. Modiri* (2006) 39 Cal.4th 481, 501 & fn. 11; *People v. Poroj* (2010) 190 Cal.App.4th 165, 172-173.) Further, no touching is necessary for assault, and the slightest touching suffices to establish a battery. (*People v. Colantuono, supra*, 7 Cal.4th at pp. 214 & fn. 4, 216.) Thus, the fact that defendant may not have intended to hurt the victim does not preclude culpability for assault or battery and the great bodily injury enhancement.

Turning to the factual scenario proffered by defendant to support an accident defense (i.e., defendant approaching the victim and the intoxicated victim accidentally falling in response to defendant's approach), this scenario does not show that *defendant* engaged in any unwilling physical conduct. As stated, the required showing for application of the accident defense is accidental conduct *by the defendant*, whereas accidental conduct *by the victim* does not alone trigger the defense. Even under defendant's version of the incident, there are no facts showing his movement towards the victim was accidental or without knowledge of the relevant facts; rather, defendant went

out of his apartment and approached the victim of his own volition. The fact that the *victim* may have unintentionally fallen over the railing in response to defendant's approach does not transform defendant's intentional approach into accidental conduct by defendant supporting an accident defense.<sup>9</sup>

In his oral arguments before the trial court (and in his briefing on appeal), defendant made a brief reference to a second factual scenario to support an accident defense; i.e., that he inadvertently made physical contact with, or bumped into, the victim as he was rushing towards the victim. In this circumstance, defendant unwillingly made physical contact with the victim; hence it supports an accident defense. There is some evidence in the record that arguably supports this theory, including defendant's testimony that he was merely gesturing with his arms; Kasprzak's testimony that although she saw defendant "put up his arms and swing" she was unable to directly see whether he made contact with the victim; Officer Minx's testimony that Marcum initially reported that defendant ran down the stairs and "bumped into" the victim; and Officer Minx's testimony that defendant told him he "got close to chest-bumping" the victim. The jury could have rejected defendant's claim that he never touched the victim, but inferred from the various witnesses' testimony that the touching occurred accidentally while defendant was angrily gesturing with his hands.

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<sup>9</sup> We note that even though the accident defense did not legally apply to defendant's intentional approach, the jury was of course not required to find that defendant's mere approach made him culpable for the victim's ensuing fall. Indeed, in closing arguments to the jury the prosecutor argued defendant was guilty of assault and battery because he punched or pushed the victim, not merely because he aggressively approached the victim.

Assuming arguendo that a theory of accidental contact was sufficiently identified to the trial court and the evidence is sufficient to support it, we conclude the failure to give the instruction was harmless under any standard of review. (*People v. Wharton* (1991) 53 Cal.3d 522, 571 [state law standard of reasonable probability of different outcome applies to failure to give requested pinpoint instruction on defense]; *People v. Rogers* (2006) 39 Cal.4th 826, 868, fn. 16, 872 [federal constitutional standard of harmless beyond a reasonable doubt applies when error deprives defendant of right to present complete defense]; *People v. Salas, supra*, 37 Cal.4th at p. 984 [prejudice test for failure to instruct on defense not yet determined].) It is apparent from the record that the jury understood that defendant was liable for assault or battery only if the prosecution proved that he acted purposefully instead of accidentally. The jury was instructed that the offenses of assault and battery required the prosecution to prove that defendant did the act or touching "willfully" and that he was "aware of facts" reasonably showing the application of force was likely. The instructions provided to the jury explained that a defendant commits an act willfully when "he or she does it willingly or on purpose." (See CALCRIM Nos. 915, 925.) We assume the jurors understood and followed the court's instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 231.) Based on the instructions provided to the jury requiring that defendant act willingly and on purpose, we have no doubt the jury understood that it could not find defendant guilty unless it was convinced beyond a reasonable doubt that his conduct was purposeful, not accidental.

B. *Causation Instruction for Personal Infliction of Great Bodily Injury Enhancement*

Defendant argues the instructions provided to the jury incorrectly set forth a proximate cause standard for the great bodily injury enhancement. The Attorney General agrees that proximate causation is not the proper standard to establish the enhancement, but asserts there was no improper instruction on this issue and if defendant wanted an amplifying instruction on this point he was required to request it.

The trial court has a sua sponte duty to instruct the jury on the general principles of law that are necessary for the jury's understanding of the case. (*People v. Mayfield* (1997) 14 Cal.4th 668, 773.) Once the trial court correctly instructs the jury on the law, it has no further duty to give clarifying instructions, and defense counsel's failure to request clarification forfeits the issue on appeal. (*Id.* at pp. 778-779; *People v. Lee* (2011) 51 Cal.4th 620, 638.) In reviewing a claim that the court's instructions were incorrect, we inquire whether there is a reasonable likelihood the jury misunderstood and misapplied the instructions. (*People v. Mayfield, supra*, at p. 777.) We consider the instructions as a whole, and we assume the jurors are intelligent persons and capable of applying and correlating the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Prior to the instructions on the substantive offenses and enhancements, the jury was given a general instruction on causation which set forth a proximate causation standard; i.e., stating that an act causes an injury if the injury was a natural and probable

consequence of the act. (See CALCRIM No. 240.)<sup>10</sup> Thereafter, the jury was instructed on the substantive offenses, including count 2 battery with serious bodily injury. For count 2, the jury was instructed that defendant was charged with "battery causing serious bodily injury," and the People must prove that the victim "suffered serious bodily injury as a result of the force used." (See CALCRIM No. 925.) After being instructed on counts 1 and 2, the jury was given a standard instruction on the great bodily injury enhancement applicable to these counts, which stated in relevant part: "If you find the defendant guilty of the crimes charged in Counts 1 and 2, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant personally inflicted great bodily injury on [the victim] in the commission of that crime." (See CALCRIM No. 3160.)

The courts have concluded that a showing that the defendant proximately caused an injury does not suffice to show that the defendant personally inflicted the injury. (*People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321.) Under proximate causation principles, even if there are multiple contributing causes of an injury, the defendant is culpable if an intervening cause is a direct, natural and probable consequence of defendant's act, or if defendant's act was a substantial factor contributing to the injury

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<sup>10</sup> Based on CALCRIM No. 240 the jury was instructed: "An act causes injury if the injury is a direct, natural, and probable consequence of the act and the injury would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

along with other concurrent causes. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866-867, 871; *People v. Sanchez* (2001) 26 Cal.4th 834, 845.)

In contrast, when deciding the personal infliction of great bodily injury enhancement, the inquiry focuses on whether the defendant "directly, personally, himself inflict[ed] the injury." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349.) The California Supreme Court has explained that the meaning of personally inflict "does not differ from its nonlegal meaning. Commonly understood, the phrase 'personally inflicts' means that someone 'in person' [citation], that is, directly and not through an intermediary, 'cause[s] something (damaging or painful) to be endured' [citation]." (*People v. Cross* (2008) 45 Cal.4th 58, 68 [personal infliction supported in case where defendant had nonforcible but unlawful sexual intercourse with minor resulting in injury (i.e., pregnancy)]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1210-1211 [personal infliction supported in case showing defendant was "directly responsible" for injury because defendant held victim so she could be hit by codefendant, which caused victim to fall down hill and sustain injury]; compare with *People v. Rodriguez, supra*, 69 Cal.App.4th at pp. 346, 352 [personal infliction not supported in case where defendant's conduct consisted of trying to escape from officer, and officer was injured when he tackled defendant and hit his head on the ground or a lamppost]; see also *People v. Modiri, supra*, 39 Cal.4th at pp. 493-495; *People v. Warwick* (2010) 182 Cal.App.4th 788, 793-795.)

Here, the instructions for count 2 identified the substantive offense as "battery causing serious bodily injury," and the general causation standard defined the proximate

cause standard to apply to determine whether an "act *causes* injury." (Italics added.)

Thus, it is clear that these two instructions — defining the substantive battery offense and the proximate cause standard — were related to each other because they both referred to the issue of causation.

Defendant does not dispute that the proximate cause instruction properly applied to the battery offense; his sole contention is that somehow the jury might have applied the proximate cause instruction to the great bodily injury enhancement. However, there is nothing in the instruction on the great bodily injury enhancement that explicitly referenced the concept of causation. Rather, the instruction merely stated that the defendant must have "*personally inflicted*" the great bodily injury. (Italics added.) The ordinary meaning of the term "personal" is "done in person without the intervention of another." (Merriam-Webster's Collegiate Dict. (10th ed. 2002) p. 865, col. 1; see *People v. Warwick, supra*, 182 Cal.App.4th at p. 793.) Thus, based on the commonly-understood connotation of the word "personally," the jurors knew that they must conclude that defendant *himself* inflicted the great bodily injury and that they could not find the enhancement true if they concluded defendant did not personally participate in inflicting the injury.

Viewing the instructions as a whole, it is apparent that the proximate cause instruction was applicable to the substantive battery offense, whereas there was nothing tying the proximate cause instruction to the great bodily injury enhancement. Unlike the situation in the case cited by defendant (*People v. Rodriguez, supra*, 69 Cal.App.4th at pp. 346-347, 349, 351-352), here the trial court did *not* instruct the jury that a proximate

cause standard was applicable to the great bodily injury enhancement. Absent some connection between the two instructions, there is no reasonable likelihood the jury used a proximate cause standard when evaluating whether defendant personally inflicted the injury. Although an amplifying instruction concerning the causation standard applicable to the enhancement may have been appropriate upon request, the instructions provided by the court did not mislead the jury on this point. Accordingly, we reject defendant's claim of instructional error on this issue.

Defendant also argues the trial court erred by omitting standard language set forth in CALCRIM No. 3160 for the great bodily injury enhancement, which states the "defendant must have applied substantial force" to the victim. As pointed out by the Attorney General (and unrefuted by defendant), this contention is misplaced as it applies to cases involving group beatings where it is not possible to determine which injuries were inflicted by the various assailants.<sup>11</sup>

### *C. Flight Instruction*

Defendant argues the trial court erred in overruling his objection to a flight instruction because the evidence showed he was not trying to flee but was trying to take the victim to the hospital.

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<sup>11</sup> Concerning a group assault, CALCRIM No. 3160 states in relevant part: "If you conclude that more than one person assaulted [the victim] . . . and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury . . . if the People have proved that . . . [¶] . . . [¶] [t]he physical force that the defendant used . . . was sufficient in combination with the force used by the others to cause [the victim] to suffer great bodily injury. [¶] The defendant must have applied substantial force to [the victim]. . . . If that force could not have caused or contributed to the great bodily injury, then it was not substantial."

A flight instruction is proper if there is evidence from which the jury could reasonably infer that the defendant's departure from the crime scene was motivated by an awareness of guilt. (*People v. Lucas* (1995) 12 Cal.4th 415, 470-471.) Flight does not require the physical act of running nor the reaching of a far-away haven, but it does require a purpose to avoid being observed or arrested. (*People v. Crandell* (1988) 46 Cal.3d 833, 869, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) A flight instruction should not be given if there is no evidence "from which a jury could reasonably infer that [the defendant] left to avoid being observed or arrested." (*Crandell, supra*, at p. 869.)

However, the fact that there may be several explanations for the defendant's departure merely goes to the weight of the flight evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 772-774, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28.) The flight instruction may be given if there is sufficient evidence from which a jury *could* infer the defendant fled out of guilty knowledge. (*People v. Lucas, supra*, 12 Cal.4th at p. 471.) The instruction leaves it to the jury to decide whether flight occurred, what weight to give the evidence, and whether there was an alternative explanation for the defendant's departure. (*Ibid.*; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Over the defense's objection, the trial court decided to give the flight instruction based on the evidence supporting that defendant was driving away with the victim for the purpose of avoiding observation or arrest. The evidence supports this conclusion. The evidence showed that the witnesses at the scene (Marcum and Kasprzak) wanted to call the police after the victim's fall; defendant forcefully objected to this even though he

knew it was medically improper to move the victim; Kasprzak ran away from defendant and flagged down an officer to report the incident; and based on information provided by Kasprzak defendant was arrested at the scene. A jury could reasonably conclude that defendant knew that the nature and seriousness of the victim's injuries warranted the summoning of emergency personnel, but he refused to take this course of action because he was afraid he would be arrested and he was hoping to avoid a police investigation by transporting the victim to the hospital himself. Based on the evidentiary support for an inference that defendant was trying to avoid the police by transporting the victim without calling the authorities, the trial court did not err in giving the flight instruction.

### III. *Prosecutor's Cross-Examination of Defendant*

#### *About His Procurement of Cocaine*

Defendant contends the trial court abused its discretion and violated his due process rights by permitting the prosecutor, over defense objection, to cross-examine him at length about his procurement of drugs for Marcum to use while they were in Miami. He asserts the prosecutor's cross-examination was excessive and presented the jury with irrelevant and prejudicial information. He also argues his trial counsel was ineffective for failing to move for a mistrial based on this cross-examination, and for failing to request a limiting instruction stating the evidence should not be used to infer he has a criminal disposition. At the hearing on defendant's new trial motion, his trial counsel testified that he had no tactical reason for failing to move for a mistrial or request a limiting instruction and that he should have done so.

### *Background*

During the prosecution's case-in-chief, Marcum testified that defendant was a drug dealer; she had purchased cocaine from him on about five occasions; he provided cocaine to her in Miami; and on the night of the incident he told her that she could come over to get cocaine. In contrast, during the defense case defendant testified on direct examination that he never sold cocaine to Marcum. Defendant acknowledged that Marcum asked him to provide cocaine for the Miami trip and stated that he "made a couple of phone calls" to get the drug for her, but claimed that he did not sell it to her and this was the only occasion that he provided her with cocaine. He also denied speaking with Marcum on the phone in the early morning hours before the incident and denied knowing that she was coming over.<sup>12</sup>

After defendant testified on direct examination, on cross-examination the prosecutor asked whether he bought the cocaine for the Miami trip from someone. Defendant stated that he made a call to a friend and he did not need to buy it. When the prosecutor asked for the name of the friend, defendant disclosed that the friend was a male, but stated he did not want to provide the person's name. Over defense objection, the trial court ruled defendant was required to answer. Defendant provided the friend's first name (Joe), stated he did not know his last name, and explained that Joe was actually merely an acquaintance.

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<sup>12</sup> Defendant's phone records showed that he received a call from Marcum at 5:01 a.m. on the date of the incident. Defendant testified he would not have answered his phone at that hour.

The prosecutor continued to inquire about Joe's identity, and in response defendant provided some general information but indicated his reluctance to provide further identifying information. The prosecutor asked several additional questions about defendant's procurement and provision of cocaine for the Miami trip, concerning such matters as where he got the cocaine, his familiarity with cocaine, how he transported the cocaine to Miami, how the cocaine was packaged, and how he gave the cocaine to Marcum.<sup>13</sup>

During the course of the cross-examination, defense counsel objected on relevancy, cumulative, and prejudice grounds. The prosecutor argued that the prosecution believed defendant was "making this up" and the questions were designed to attack defendant's credibility. The trial court ruled the prosecutor could properly make

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<sup>13</sup> Concerning the identity issue, the prosecutor asked such questions as how many times defendant had "hung out" with Joe, what Joe looked like, and Joe's date of birth. Defendant stated that Joe lived in Pacific Beach; Joe was about six feet tall with a slender build; and he did not know Joe's ethnicity or date of birth. Defendant testified that he picked the drugs up from Joe at a mutual friend's house. When the prosecutor asked the name of this mutual friend, defendant answered Mark, but upon further questioning stated that he did not actually know the mutual friend's name.

In response to the prosecutor's continued questioning, defendant testified that he did not use cocaine but everyone in Pacific Beach knows where to acquire drugs; he carried the drugs in his luggage from San Diego to Miami by putting it in a pants pocket; the drugs were in a baggie; the baggie was about an inch by an inch and one-half in size and contained one gram of cocaine; the baggie was about halfway full; he was familiar with gram-sized baggies of cocaine because he lived in Pacific Beach; he had been around "everything" in Pacific Beach (including cocaine); he gave the cocaine to Marcum when they got to their rooms; and Marcum did not pay for the drugs.

Defendant also denied on cross-examination that he was engaging in drug-dealing at his apartment. On redirect examination, defendant testified he did not want to provide the names of the persons involved in his cocaine procurement because he did not want to be a "snitch."

"limited inquiry into this," noting that on cross-examination both parties have wide latitude to probe whether witnesses were providing a truthful account.

### *Analysis*

Contrary to defendant's assertion on appeal, the trial court did not improperly permit the prosecutor to cross-examine defendant about his cocaine procurement to show that defendant had a criminal propensity. Rather, the cross-examination was properly permitted for impeachment purposes. A "defendant who chooses to take the witness stand in a criminal action thereby subjects himself to impeachment in the same manner as any other witness . . . ." (*People v. Pike* (1962) 58 Cal.2d 70, 93.) "Evidence tending to contradict any part of a witness's testimony is relevant for purposes of impeachment." (*People v. Lang* (1989) 49 Cal.3d 991, 1017.) Thus, when a testifying defendant makes factual assertions concerning his or her conduct, the prosecutor may properly impeach this testimony by presenting evidence refuting the truth of these assertions. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 777-779.) A trial court has broad discretion concerning the scope of cross-examination, and we review the trial court's ruling for abuse of discretion. (*People v. Mayfield, supra*, 14 Cal.4th at pp. 755-756.)

Although defendant acknowledged that he provided cocaine to Marcum in Miami, he denied Marcum's claims that he was a drug dealer who sold her cocaine on other occasions, and he also denied that shortly before the incident he told her she could come over to get cocaine. To challenge defendant's veracity as a witness, the prosecutor was entitled to cross-examine him to test the truth of his testimony that conflicted with Marcum's testimony. To this end, the prosecutor could properly probe defendant about

the details of his procurement of cocaine for the Miami trip to see if the manner in which he responded would reflect that he was fabricating his claim of being a one-time cocaine procurer rather than an ongoing drug dealer, and fabricating his claim that on the night of the incident he never told Marcum she could come over to get cocaine. This was permissible cross-examination to generally impeach defendant's credibility as a witness.

Moreover, even assuming *arguendo* the trial court should have exercised its discretion under Evidence Code section 352 to curtail the length of the prosecutor's cross-examination about defendant's procurement of the cocaine, any error in this regard was not prejudicial. The jury was presented with other admissible evidence that defendant had provided cocaine to Marcum; thus, this is not a case where the prosecutor elicited testimony about a defendant's misconduct that the jury would not have otherwise heard. Further, much of the cross-examination about the cocaine procurement, including the questions about the identity of Joe, was relatively innocuous. We note that apart from the cross-examination concerning the Miami cocaine procurement, defendant does not otherwise challenge the admissibility of the evidence that he was a drug dealer. Considering the record as a whole, the cross-examination about defendant's procurement of cocaine for the Miami trip was a relatively minor item of evidence concerning

defendant's cocaine-related activity.<sup>14</sup> There is no reasonable probability that the prosecutor's cross-examination concerning defendant's cocaine procurement affected the outcome of the trial. (See *People v. Cooper* (1991) 53 Cal.3d 771, 823.)

For the same reasons, there was no reversible error arising from defense counsel's failure to move for a mistrial or to request a limiting instruction based on the cross-examination on the cocaine procurement issue. Additionally, the jury's acquittal on the count one aggravated assault charge (instead convicting defendant of misdemeanor simple assault) supports that it properly confined its evaluation to the relevant evidence with no bias based on the cocaine procurement cross-examination.

#### IV. *Cumulative Error*

Defendant asserts that the cumulative effect of error deprived him of a fair trial. The contention is unavailing. As set forth above, the evidentiary items omitted by defense counsel (i.e., the testimony of the woman at defendant's apartment and Marcum's pretrial statement to her friend) did not shed direct, definitive light on the key disputed contention of whether defendant touched the victim, and there is no reasonable probability that this evidence would have altered the jury's conclusions. Concerning the claims of instructional error, it is clear from the record that the jury understood

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<sup>14</sup> In closing arguments to the jury, both parties referenced the evidence of defendant's drug dealing to support their positions. Defense counsel argued that assuming *arguendo* defendant was a drug dealer as claimed by the prosecution, he would *not* have wanted to assault the victim because this conduct would draw attention to his activities at his apartment. In rebuttal, the prosecutor argued that defendant's drug dealing gave him a motive to assault the victim because the victim was drawing attention to his drug-dealing activities at his apartment.

culpability could not be based on accidental conduct by defendant; the jury was not told to apply a proximate causation standard to the great bodily injury enhancement; and the evidence warranted submitting the issue of flight to the jury. Finally, the prosecutor was entitled on cross-examination to challenge the veracity of defendant's testimony concerning his cocaine procurement, and to the extent the court should have curtailed the length of this cross-examination, it did not provide the jury with any new evidence of misconduct that the jury did not know about from other, admissible testimony.

#### V. *Denial of New Trial Motion*

Defendant argues the trial court abused its discretion in denying his new trial motion because the court's ruling was based on inaccurate facts and ignored some issues. As set forth above, defendant has not shown reversible error based on his claims presented in the new trial motion and reiterated on appeal. On appeal we review the legal correctness of the court's ruling, not the court's rationale. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.) Because there is no basis for reversal on appeal, there was no reversible error in the court's denial of the new trial motion based on the same claims of error.<sup>15</sup>

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<sup>15</sup> Defendant asserts the trial court erred in finding that his counsel made a tactical decision not to call Patterson given that his counsel never interviewed Patterson; in finding that other witnesses were closer to the incident than Patterson; in reasoning that Patterson was not the best witness; in failing to explain the relevance of cross-examination about defendant's cocaine procurement; and in failing to recognize that the accident instruction applied because of the evidence of defendant's innocent mens rea. These matters are all subsumed in our analysis of the issues raised on appeal.

Moreover, defendant has not shown that the purported errors made by the court created a reasonable probability of a different ruling on the new trial motion absent the errors. (See *People v. Braxton* (2004) 34 Cal.4th 798, 818.)<sup>16</sup> There is no showing of reversible error arising from the court's denial of the new trial motion.

#### DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.

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<sup>16</sup> Defendant additionally asserts the trial court erred by failing to rule on several contentions of error raised in his written new trial motion, including the issues of the causation instruction for the personal infliction of great bodily injury enhancement, the flight instruction, and the effect of cumulative error. These matters are also resolved in our analysis above. Moreover, except for the cumulative error issue, the record shows defendant did not raise these additional issues until a second new trial motion after the court had already ruled on the first new trial motion; the court found they were raised in an untimely fashion; and the court alternatively rejected the additional issues on their merits.