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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL ALEXANDER WEBSTER III,

Defendant and Appellant.

D059430

(Super. Ct. No. SCD224513)

In re SAMUEL ALEXANDER WEBSTER
III on Habeas Corpus.

D060193

CONSOLIDATED APPEAL and petition for writ of habeas corpus following a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Petition denied; judgment affirmed.

INTRODUCTION

A jury found Samuel Alexander Webster III guilty of the second degree murder of Devin Johnson (count 1: Pen. Code, § 187, subd. (a); undesignated statutory references will be to the Penal Code unless otherwise specified) and found true an enhancement

allegation that Webster intentionally and personally discharged a firearm (a handgun) proximately causing death within the meaning of section 12022.53, subdivision (d) (hereafter section 12022.53(d)). In a bifurcated proceeding, the court found true enhancement allegations that (1) Webster was released from custody on bail within the meaning of section 12022.1, subdivision (b) when he committed the murder; and (2) he had served a prior prison term within the meaning of section 667.5, subdivision (b).

The court sentenced Webster to an indeterminate term of 15 years to life for his second degree murder conviction, plus a consecutive indeterminate term of 25 years to life for the firearm enhancement, plus consecutive determinate terms of two years for the on-bail enhancement and one year for the prison prior enhancement.

Contentions

Webster appeals, contending (1) the judgment must be reversed because the court violated his Sixth and Fourteenth Amendment rights to due process and a unanimous jury verdict by dismissing juror No. 10, who Webster claims was a holdout juror, and replacing him with an alternate; (2) substantial evidence supported a finding that witness Rachael Battle was an accomplice, and, thus, the court prejudicially erred and violated Webster's federal constitutional rights to due process, to present a defense, and to have a fair trial, by failing to instruct the jury on the legal principles governing how jurors should assess accomplice testimony, including the principle that accomplice testimony requires corroboration; and (3) the court committed prejudicial error and violated Webster's federal constitutional rights, by failing to sua sponte instruct the jury on voluntary and involuntary manslaughter.

The grounds for relief stated in Webster's habeas corpus petition,¹ which he has brought in *propria persona*, are somewhat unclear. He asserts that (1) he is entitled to relief from the 25-year-to-life section 12022.53(d) firearm enhancement (a) because "[t]he elements" of that enhancement were "not alleged in proper form," and (b) "due to its [*sic*] illegal application of unreasonable implication of state law"; and (2) the two-year section 12022.1, subdivision (b) on-bail enhancement "was impermissible," and "the prior felony conviction was not of serious or 'felonies' consistent [*sic*] with violence pursuant to [section] 1192.7."

For reasons we shall explain, we deny Webster's habeas corpus petition and affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

On December 10, 2009, at around noon, Janet McNeely and her boyfriend Devin Johnson went to Maddox Liquor Store, which was located at the corner of Fairmount Avenue and Thorn Street in the City Heights area of San Diego. McNeely went into the store to get change for the bus. When she came out, she and Johnson walked across the

¹ Although Webster's petition is titled "Petition for Writ of Corum [*sic*] Nobis," we deem it to be a petition for writ of habeas corpus, not a petition for writ of error *coram nobis*. "[T]he writ of error *coram nobis* applies where a fact unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment." (*People v. Kim* (2009) 45 Cal.4th 1078, 1093, second italics omitted.) Here, Webster does not allege the existence of any such fact. By order dated August 3, 2011, this court ordered that Webster's petition would be considered concurrently with his appeal. For purposes of disposition, these cases are consolidated by separate order dated November 30, 2012.

street to the bus stop. McNeely testified that a Black man, wearing dark clothing and a baseball cap, came out of the store and stared at them. Johnson stared back at him. The man angrily yelled, "What?" Johnson took his gloves from his back pocket, shook them over his shoulder toward the man, and said, "Do I know you?" to McNeely, as though asking himself that question. McNeely asked Johnson whether he knew the man, and Johnson replied he did not. Johnson put the gloves back in his rear pocket when McNeely asked him to do so. McNeely testified that the man got into a "grayish" car with tinted windows that drove away eastbound on Thorn Street.

Shortly thereafter, Brady Manning and his wife Marlene Barrales were in their car on Thorn Street, waiting to turn onto Fairmount Avenue, when the gray car, which Manning thought was a silver 1999 Honda Accord, pulled up near them. A Black female was driving the car, and the passenger was a Black male. Manning indicated he saw the passenger reach his arm outside the silver Honda, point a black semiautomatic handgun at Johnson, and fire two shots. Barrales heard the shots. Johnson fell to the ground. The Honda went past Manning and Barrales as it drove away.

Van Trieu, a Honda mechanic, testified he was about 200 feet away from the shooting when it happened. He heard two pops, turned around, and saw a silver Honda Accord sedan driving away and the victim lying on the ground. Trieu heard someone say, "I smoked you."

Dr. Craig Nelson, a deputy medical examiner for the County of San Diego performed an autopsy on Johnson and signed Johnson's death certificate. Johnson had been shot once and died as a result. The manner of death was homicide.

Detective John Howard of the San Diego Police Department responded to the scene at around 2:45 p.m., a couple of hours after the shooting. He found two nine-millimeter shell casings. The gun was never recovered. Detective Howard received information that led him to believe that Webster might be a suspect. Through a computer search, he learned that Rachael Battle was Webster's girlfriend and that she owned a silver Honda similar to the one used in the shooting. Detective Howard contacted Battle at around 9:30 that night. With Battle's consent, Detective Howard interviewed her at police headquarters and Battle detailed Webster's involvement in the murder. Battle told Detective Howard that she picked Webster up near her home earlier that day and later drove him to Maddox Liquor Store, where Webster bought a pint of Hennessy. She indicated that they then drove around the block, ended up at a stoplight on eastbound Thorn Street, she heard a gunshot, Johnson fell to the ground, and Webster put a gun on the floorboard of her car.

Homicide Detective Jana Beard testified that she interviewed Battle at police headquarters a couple of days later. Battle said she was driving her car when the shooting occurred. She said that although she did not see a gun, she believed Webster had a gun in his waistband because of the way he "postured" and "adjusted" himself when he got in her car. She said she believed it was a semiautomatic gun with a black handle that he had carried on prior occasions. Battle also said that Webster was wearing a black T-shirt, a pair of blue jeans, and a black and red ball cap. She related that before he shot Johnson, Webster said, "I'm going to scare him." Battle also told Detective Beard that immediately after the shooting, Webster said, "Did you see my aim? Did you see my

aim?" Battle said that she saw the victim (Johnson) go down, she saw Webster put a gun on the floorboard, she "freaked out," and she "floor[ed] it" as she drove away.

Video surveillance cameras in and around Maddox Liquor recorded both Johnson and Webster inside the store, Battle's car pulling into the parking lot, and the shooting.

Detective Beard interviewed Webster following his arrest. Webster waived his *Miranda*² rights and agreed to make a statement. He told Detective Beard that he and Battle went to Maddox Liquor after arguing all morning, and pulled into the parking lot. Webster said he went inside, bought some Hennessey, returned to the car, and they left. Battle drove the wrong way and went back to the store. Webster said he heard the sound of gunfire and thought someone was shooting at their car. He told Detective Beard, "I didn't kill nobody."

Detective Beard advised Webster that the shooting incident was captured on video. Webster replied, "If it is then you have no reason talking to me." Detective Beard told Webster he was going to be booked on a murder charge, and Webster responded that he did not kill anybody and he did not own a gun.

Battle testified under a grant of immunity. She stated that on December 10, 2009, she picked Webster up in her silver 2001 Honda Accord. Webster was wearing a dark shirt, jeans, and a hat. He told Battle he wanted to go to a liquor store. When Webster got into the car, Battle thought he might have a gun because of the way he maneuvered himself. Battle testified that Webster often carried a black semiautomatic handgun. At

² *Miranda v. Arizona* (1966) 384 U.S. 436.

Webster's request, they drove to Maddox Liquor. Battle parked in the parking lot, and Webster got out of the car and entered the store. Battle testified that when Webster came back out, he nodded his head toward someone. He was agitated when he got back in the car. Webster explained that he tried to say "hi" to a guy, but the guy did not respond. Webster may have said he "had a problem" with that person. Webster directed her to drive and circle around a school back toward Fairmount Avenue. When they got to the red light at Fairmount Avenue, Webster, who was still agitated, said, "I'm just going to scare him." Webster fired two shots at Johnson, who was standing on the corner on Battle's right-hand side. Battle saw Johnson lying on the ground. She also saw Webster put the gun on the floorboard. Webster told her to drive. Battle testified she was frightened and "slammed on the gas," causing the front wheels to come off the ground. Webster asked her, "Did you see my aim?" Later that day, Webster told Battle that she should talk to the police but not say anything about their involvement in the shooting.

B. The Defense Case

Kristen Beyers, who works in the forensic biology unit of the San Diego Police Department crime laboratory, testified that she analyzed DNA swabs taken from the passenger's and driver's sides of Battle's Honda Accord. Webster and Battle were excluded as possible contributors to the passenger's side samples. Regarding the driver's side sample, Battle was excluded and the results were inconclusive as to Webster.

The parties stipulated that the Honda Accord was processed for gunshot residue, and no particles of gunshot residue were found.

DISCUSSION

I. APPEAL

A. *Excusal of Juror No. 10 During Deliberations*

In his appeal, Webster first contends the judgment must be reversed because the court violated his Sixth and Fourteenth Amendment rights to due process and a unanimous jury verdict by dismissing juror No. 10, who Webster claims was a holdout juror, and replacing him with an alternate. We conclude Webster has forfeited this claim and, even if he had preserved this claim for appeal, the court did not err.

1. *Background*

During deliberations, juror No. 10 sent the court a note that stated: "Can I speak w[ith] you?" The court clerk informed the court she had asked juror No. 10 why he wanted to speak with the court, and the juror told her he was feeling pressured by the other jurors.

The court summoned juror No. 10 into the courtroom and asked him what he wanted to talk to the court about. Juror No. 10 replied, "I feel different about it than the rest of the people. I don't want to be pressured into making the same decision that other people make, so I'd rather just walk away from it, if I could." When the court asked what he meant, juror No. 10 indicated he no longer wanted to serve on the jury.

The court asked the juror whether he had a full opportunity to share his views with the other jurors. Juror No. 10 replied that he had, but said, "[I]t's like I'm talking to myself." He complained that they were "making up stuff." The court asked juror No. 10 whether he would be willing to remain on the jury and keep an open mind if the court

directed the whole jury to continue to deliberate and work together. Juror No. 10 responded, "I can try," adding that the jury had taken a vote, one other person felt the way he did, and he could not "make a decision on someone else's life . . . just because you feel this way." He told the court he thought jury service "would be easier, but it's not."

The court directed juror No. 10 to wait outside and then asked counsel what they wanted to do. The prosecutor indicated that, from the juror's comments, it appeared he might not be willing to sit in judgment of another person or follow the law, and it was difficult to know without "getting into what the jury is deliberating on, which we obviously can't do." The prosecutor suggested that the court replace juror No. 10 with an alternate juror because he did not want to be on the jury. Defense counsel disagreed, arguing that wanting to serve as a juror was not a requirement. Counsel suggested that the court instruct the jurors to work together and listen to one another.

Following a break, the court told both counsel that juror No. 10's stated desire to walk away from jury service was based on his statement that he was feeling pressured into making the same decision that other jurors were making, and it appeared he was advising the court that the jury might be hung, not requesting to walk away from jury service due to inability to fulfill his duties as a juror. The court stated it was appropriate to reinstruct the jury on its duty to deliberate. After suggesting a specific modified instruction, the court asked for input.

The prosecutor suggested that the court instruct the jury to evaluate only the evidence presented to them in court. Defense counsel agreed. The court indicated it

would include this in the supplemental instruction. The court brought the jury back in and gave the following instructions:

"[A]s I explained to you before, it is your duty to deliberate. It is your duty to talk with one another in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself but only after you have discussed the evidence with all the other jurors. [¶] Do not hesitate to change your mind if you become convinced that you are wrong, but do not change your mind just because other jurors disagree with you. [¶] Now, deliberation, what does that mean? Deliberation means careful consideration of all the evidence and discussion about it. It involves expressing your opinions as well as the reasons for them and listening carefully to the views of all of the other jurors. I would encourage each of you to be as specific as possible when explaining why you hold a certain view about the evidence and to give as much time as necessary for everyone to understand and thoroughly evaluate each person's point of view. [¶] No one should feel rushed or pressured in any way during these discussions, but each of you should be open to the views of others before making up your mind. [¶] Remember that your role is to be impartial judges of the facts and not to act as an advocate for one side or the other. Remember also your decision should be based only on the evidence presented in this court."

A couple of hours later, juror No. 10 sent the court another note which stated, "If I feel like I can't come to the same conclusion as everyone else what is the next step?" The court brought the jury into the courtroom, told the jurors that the note suggested the jury was deadlocked, and asked the foreperson, "Is it your opinion the jury is hopelessly deadlocked at this point?" The foreperson replied, "I don't know. I can't say for sure. The person that couldn't come to a decision was saying that he didn't find it in his opinion."

The court told the jury that a verdict required a unanimous decision, and the question was whether there was no possibility that, with further deliberations or

instructions, "all 12 jurors will agree." The jury foreperson responded he did not think everyone would agree. The court asked whether there was anything it could do to help, and the foreperson stated he had suggested that the jurors take another day and "let the person in question sleep on it before he makes his final decision." The court asked for the numerical breakdown. The foreperson responded that the last vote was 11 to 1.

When the court asked how many votes had been taken, the foreperson replied there had been three votes. The first was 11 to 1, the second was 10 to 2, and the last was 11 to 1.

The court again asked whether additional time would help. The foreperson answered, "It could." The court then asked each of the jurors whether the jury was hopelessly deadlocked. Jurors Nos. 1, 2, 4, and 5 felt the jury was deadlocked. The remaining jurors thought they should resume deliberations the following day. Following a discussion with counsel off the record, the court told the jury to return in the morning, at which time the court would give additional instructions.

The next morning, during a recorded chambers conference, the court informed counsel that juror No. 10 had telephoned the clerk and left a message that he was ill, had been in urgent care the previous night, was on medication, and was not coming to the court that morning. The court called juror No. 10 from chambers, put him on the speaker phone, and directed the court reporter to transcribe the conversation. The court asked juror No. 10 for an update on his condition, stating that, although he did not have to give details, the court wanted to find out whether the illness was "relatively short-lived" and he could return the next day, or whether he felt he could not return in a reasonable period of time. Juror No. 10 replied that he did not know how long he would be ill, stating, "I

think it's my nerves. I don't know. My stomach, my head [are] all messed up right now." The court asked him how long he was in urgent care the previous night, and he replied he was there until 9:00 p.m., but it took until 11:00 p.m. to get his medications.

The court told the juror it needed to know how he was feeling, because it had to decide whether it would be appropriate to replace him with an alternate juror. Juror No. 10 replied, "I think it would be better to have an alternate take my place. I would hate to hold you guys up." The court responded that it could wait a reasonable period of time and indicated it would be fine to wait a day, but he might need to be replaced with an alternate if "this may be something that will continue for quite a while." Juror No. 10 told the court, "I think it's going to be more than a day" and explained that the doctor in urgent care had told him to follow up with his primary care doctor, but he had not been able to reach his doctor. He added, "I don't see that being anytime soon" and said he had not slept and was tired. The court told him it would call him back and ended the call.

The court then asked counsel for comments. The prosecutor submitted. Defense counsel expressed the belief that juror No. 10 had gone to urgent care and may have been prescribed medication, but indicated the juror was looking for a way to be removed from the jury. The court stated that juror No. 10's responses appeared to be credible and that the juror could not give a commitment to return within a reasonable period of time. The court then found there was no reasonable option other than replacing juror No. 10 with an alternate. The court stated, "Otherwise, I think we're left in a position of simply waiting an indefinite period of time, which is obviously not fair to all of the . . . other jurors."

The court concluded, "So unless there's any other comment by either counsel, that what I intend to do."

When neither the prosecutor nor defense counsel objected, the court replaced juror No. 10 with an alternate.

2. *Legal principles governing the discharge of a sitting juror (§ 1089)*

Section 1089 sets forth the procedure for removing a sitting juror and provides in pertinent part: "If at any time . . . a juror . . . upon . . . 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" (See *People v. Boyette* (2002) 29 Cal.4th 381, 462.)

"Removal of a juror under section 1089 is committed to the discretion of the trial court." (*People v. Thompson* (2010) 49 Cal.4th 79, 137.) "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1029.) A juror's inability to perform as a juror must appear in the record as a ""demonstrable reality."" (*People v. Williams* (2001) 25 Cal.4th 441, 448.)

"The court's decision whether to discharge a juror under section 1089 is reviewed for abuse of discretion." (*People v. Lucas* (1995) 12 Cal.4th 415, 489.) A reviewing court requires that substantial evidence support any factual finding upon which the decision was based. (*People v. Boyette, supra*, 29 Cal.4th at p. 462.) The reviewing court also requires that "the grounds for . . . removal of the juror appear in the record as a

demonstrable reality." (*People v. Thompson, supra*, 49 Cal.4th at p. 137; *People v. Boyette*, p. 462.)

3. *Analysis*

Although defense counsel initially expressed the view that juror No. 10 was looking for a way to be removed from the jury, counsel did not object when the court replaced that juror with an alternate, and, thus, failed to preserve the issue for appeal. (*People v. Boyette, supra*, 29 Cal.4th at p. 462 ["Defendant did not object and thus failed to preserve the issue for appeal."]; *People v. Cunningham, supra*, 25 Cal.4th at p. 1029 ["It is apparent that defense counsel not only did not object to the substitution of the juror or move for a mistrial, but sought to have her excused. Therefore, the present claim of error is waived."]; *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16 ["As a general rule, a defendant may properly raise in this court a point involving a trial court's allegedly improper discharge of a juror only if he made the same point below."], abrogated on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Were it necessary for this court to reach the merits of Webster's claim, we would conclude the court did not abuse its discretion or violate Webster's constitutional rights as there is substantial evidence supporting the court's finding that juror No. 10 was ill and unable to perform the duties of a juror. (See § 1089.)

B. *Claim of Instructional Error Regarding Accomplice Testimony*

Webster next contends substantial evidence supported a finding that prosecution witness Rachael Battle was an accomplice and thus the court prejudicially erred and violated his federal constitutional rights to due process, to present a defense, and to have

a fair trial, by failing to instruct the jury on the legal principles governing how jurors should assess accomplice testimony, including the principle that accomplice testimony requires corroboration. This claim is unavailing.

1. *Applicable legal principles*

A conviction cannot be based on an accomplice's testimony unless "other evidence tending to connect the defendant with the commission of the offense corroborates that testimony." (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986; § 1111.)

"Under section 1111, an accomplice is 'one who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'" (*People v. Lewis* (2001) 26 Cal.4th 334, 368-369, quoting § 1111, italics added.) "To be chargeable with an 'identical offense' [for purposes of determining whether a witness is an accomplice within the meaning of section 1111], a witness must be considered a principal under section 31."³ (*People v. Lewis*, at pp. 368-369, fn. omitted.) The term "accomplice" does not include an accessory. (*People v. Boyer* (2006) 38 Cal.4th 412, 467; see § 32 [defining accessory as "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or

³ Section 31 defines principals as "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission"

punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof").)

"An accomplice must have "guilty knowledge and intent with regard to the commission of the crime."" (*People v. Lewis, supra*, 26 Cal.4th at p. 369.)

"If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony." (*People v. Lewis, supra*, 26 Cal.4th at p. 369; see also *People v. Boyer, supra*, 38 Cal.4th at p. 466 ["The court need give such instructions [on accomplice testimony] only where there is substantial evidence that the witness was an accomplice."].)

2. *Analysis*

We conclude the court did not have a duty to sua sponte instruct the jury on the legal principles governing how jurors should assess accomplice testimony, and thus the court did not commit instructional error or violate Webster's federal constitutional rights because there is no substantial evidence from which the jury could find that Battle was an accomplice to the murder with which Webster was charged in this case.

Our analysis is guided by the California Supreme Court's decision in *People v. Sully* (1991) 53 Cal.3d 1195. In *Sully*, the murder victim offered to sell cocaine to the defendant, who decided with his companion to arrange a meeting with the victim at a warehouse with the intention of stealing the cocaine. (*Id.* at p. 1214.) At defendant's request, a witness who later testified at trial for the prosecution—and who the defendant on appeal claimed was an accomplice—drove the victim to the warehouse after the

defendant told her he was going to buy cocaine from the victim. The witness then walked to a nearby bar and waited for a couple of hours. (*Id.* at pp. 1214, 1227.) When the witness returned to the warehouse to pick up her car, she observed defendant's companion stabbing the victim. (*Id.* at p. 1214.) The witness expressed concern that the killing would be traced to her and then left. (*Id.* at p. 1227.) On appeal, the defendant claimed the trial court prejudicially erred by failing sua sponte to instruct the jury to decide whether the witness was an accomplice and, if she was, to view her testimony with distrust and to require corroboration by independent evidence. (*Ibid.*) The *Sully* court rejected this claim, concluding the evidence did not support an inference of accomplice liability on the part of the witness. (*Id.* at p. 1228.) Holding that sua sponte accomplice instructions were not required, the high court explained that the facts that the witness was at the murder scene or drove the victim there "d[id] not make her an accomplice." (*Ibid.*) The court added that the defendant's theory, that the witness knew the victim was to be robbed and that the killing was foreseeable, was "at best highly speculative." (*Ibid.*)

Similarly here, the evidence does not support an inference of accomplice liability on the part of Battle. Battle testified that on December 10, 2009, Webster asked her for a ride and she picked him up in her silver 2001 Honda Accord. Webster told Battle he wanted to go to a liquor store. When Webster got into her car, Battle thought he might have a gun because of the way he maneuvered himself. Battle indicated that Webster often carried a black semiautomatic handgun. At Webster's request, they drove to Maddox Liquor. Battle parked in the parking lot and waited while Webster went into the

store. Battle testified that when Webster came back out, he nodded his head toward someone and was agitated when he got back in the car. Webster complained that he tried to say hi to a guy, but the guy did not respond. Battle indicated that Webster told her he had a problem with that person. Webster then directed Battle to circle around a school back toward Fairmount Avenue. Webster, who was still agitated when they got to the red light at Fairmount Avenue, told Battle, "I'm just going to scare him." Webster then fired two shots at Johnson, who fell to the ground. Battle saw Johnson lying on the ground. Battle testified that she saw Webster put the gun on the floorboard, and that Webster told her to drive. Battle stated she was frightened and the front wheels to come off the ground when she "slammed on the gas." Soon thereafter, Webster asked Battle, "Did you see my aim?" As discussed, *ante*, in the factual background section of this opinion, Battle gave similar versions of the events to Detectives Howard and Beard.

The foregoing evidence supports an inference that Battle, by driving Webster away from the scene of the shooting after he fired his gun at Johnson, was at most an accessory after the fact, not an accomplice. The evidence that Battle was Webster's girlfriend, that she knew Webster had previously carried a gun, and that she suspected he was carrying the gun when she picked him up on the day of the shooting, is insufficient to support an inference that she knew of, and shared, Webster's intent to shoot Johnson. We

conclude Webster's claim that Battle was his accomplice "is at best highly speculative."⁴ (*People v. Sully, supra*, 53 Cal.3d at p. 1228.)

C. Claim of Instructional Error (Voluntary and Involuntary Manslaughter)

Last, Webster contends the court committed prejudicial error, and violated his federal constitutional rights, by failing sua sponte to instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter. This contention is unavailing as Webster has failed to meet his burden of showing that any claimed instructional error was prejudicial.

1. Background

The information charged Webster with one count of murder (§ 187, subd. (a)), and alleged, as a special circumstance, that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death (§ 190.2, subd. (a)(21)). The information also alleged that Webster intentionally and personally discharged a firearm and proximately caused death within the meaning of section 12022.53(d)).

During the jury instruction conference, the court said, "I don't see there's been any evidence presented to support any theory of voluntary or involuntary [manslaughter], unless you want to point me to something." Defense counsel replied, "Not at this time."

⁴ In light of our conclusion, we need not reach the Attorney General's arguments that "ample independent corroborating evidence connect[s Webster] to the charged crime" and that "it is not reasonably probable that [Webster] would have received a more favorable outcome had accomplice instructions been given." Were it necessary to reach these issues, we would agree with the Attorney General's arguments.

Seeking clarification, the court asked Webster's counsel, "So you are not requesting an LIO [(lesser included offense)] of either [voluntary or involuntary] manslaughter; correct?" Defense counsel responded, "Correct."

With respect to the murder charge, the court instructed the jury under a modified version of CALCRIM No. 521 that, if the jury decided Webster had committed murder, it was required to decide whether the murder was of the first or second degree; and that it could convict him of first degree murder under any one of three theories: (1) the murder was willful, deliberate, and premeditated; (2) the murder was committed by lying in wait; or (3) the murder was committed by shooting a firearm from a motor vehicle.

The court also instructed the jury on second degree murder, but did not instruct on the lesser included offenses of voluntary manslaughter or involuntary manslaughter.

The jury found Webster not guilty of first degree murder, but convicted him of second degree murder. The jury found true the allegation that Webster intentionally and personally discharged a firearm, causing death to a person within the meaning of section 12022.53(d)).

2. *Analysis*

As noted, Webster claims the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses of voluntary manslaughter (§ 192, subd. (a)) and involuntary manslaughter (§ 192, subd. (b)). Relying on *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), Webster specifically contends the court committed reversible error in failing to instruct the jury sua sponte on voluntary manslaughter premised on the theory that he committed an unintentional killing without malice during the course of an

inherently dangerous assaultive felony.⁵ The Attorney General disputes that *Garcia* articulated a new theory of voluntary manslaughter. With respect to involuntary manslaughter, Webster contends the court committed reversible error in failing to instruct the jury, sua sponte, on involuntary manslaughter premised on the theory that he committed an unintentional killing without malice during the course of the misdemeanor offense of brandishing a firearm.

In support of these contentions, Webster states "[t]here was evidence from which the jury could have reasonably concluded that [he] fired the gun without malice . . . by accident or only with the intent to frighten [the victim, Johnson]." Specifically, he asserts "the only evidence bearing directly on [his] intent was his statement to Battle immediately before the shooting that he intended merely to 'scare' Johnson," and "that statement was substantial evidence that he did not intend to inflict bodily injury." Thus, Webster contends, "[if] the jury concluded that [he] merely intended to commit the misdemeanor of brandishing the firearm, then it would have been warranted in returning a verdict of involuntary manslaughter. If, on the other hand, the jury concluded that [he] intended to commit a felony by firing the gun, it would have been warranted in returning a verdict of voluntary manslaughter."

⁵ The Supreme Court has granted review on this issue in *People v. Bryant* (2011) 198 Cal.App.4th 134, review granted November 16, 2011, S196365. In *Bryant*, this court followed the *Garcia* court's conclusion that voluntary manslaughter may consist of an unlawful killing during the commission of an inherently dangerous felony, even if unintentional.

We conclude Webster's contentions are unavailing. "The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Blair* (2005) 36 Cal.4th 686, 744 (*Blair*)). "That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser." (*Id.* at p. 745.) "To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Ibid.*; see also *People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*)). "In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.'" (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

Here, we shall assume, without deciding, that it was error for the court to fail sua sponte to instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter. The People urge us to conclude that any such error was harmless under the *Watson* test for prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 836), which the California Supreme Court in *Breverman*, *supra*, 19 Cal.4th at pages 177–178 made applicable to instructional errors of this sort in noncapital cases. (See *Moye*, *supra*, 47 Cal.4th at p. 555.)

Under the *Watson* test, an error in failing sua sponte to instruct on a lesser included offense requires reversal of the conviction for the greater offense "if, 'after an examination of the entire cause, including the evidence' [citation], it appears 'reasonably

probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman, supra*, 19 Cal.4th at p. 178.) Probability under *Watson* "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918 (*Ghilotti*)). *Breverman* explained that appellate review under *Watson* "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, at p. 177.)

Here, Webster has failed to meet his burden of showing a reasonable probability under *Watson* that he would have obtained a more favorable outcome had the court sua sponte instructed the jury on voluntary manslaughter and involuntary manslaughter. Stating that the "only evidence bearing directly on [his] intent" was his statement to Battle immediately before he fired the handgun that he was only going to scare Johnson, Webster asserts in conclusory fashion that "[t]here was certainly more than 'an abstract possibility' that the jury would have returned convictions on only one of the lesser offenses had it been given the option to do so." However, Webster disregards substantial evidence in the trial record when he claims the only evidence bearing directly on his intent was the evidence of his statement to Battle that he was only going to scare Johnson. Homicide Detective Jana Beard testified that when she interviewed Battle at

police headquarters after the shooting, Battle stated that Webster asked her (Battle) immediately after the shooting, "Did you see my aim? Did you see my aim?". Battle testified at trial that after Webster fired shots at the person (Johnson) standing on the corner of Fairmount and 45th Street, Webster, asked her, "Did you see my aim?". According to Battle, Webster was agitated before the shooting when he got back in the car after buying liquor at Maddox Liquor. Webster had explained to her that he tried to say "hi" to a guy, but the guy did not respond. Battle testified that Webster may have said he had a problem with that person. She also testified that Webster directed her to drive and circle around a school back toward Fairmount Avenue right before the shooting. Another prosecution witness, Van Trieu, testified he was about 200 feet away from the shooting when it happened. He heard two pops, turned around, and saw a silver Honda Accord sedan driving away and the victim lying on the ground. Trieu heard someone say, "I smoked you." In light of the foregoing substantial evidence that Webster has chosen to disregard, we conclude the court's assumed error in failing to instruct on the lesser included offenses of voluntary manslaughter and in voluntary manslaughter was harmless.

II. *HABEAS CORPUS PETITION*

In his habeas corpus petition, Webster seeks relief on two grounds (discussed, *post*). We conclude he has failed to meet his heavy initial burden of presenting a *prima facie* case for relief.

A. *A Summary of Habeas Corpus Procedure*

"When presented with a petition for a writ of habeas corpus, a court must first

determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief—and also whether the stated claims are for any reason procedurally barred." (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

"Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474, quoting (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.)

To satisfy this initial burden of pleading adequate grounds for relief, the habeas corpus petition must plead the facts with particularity and should "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*Ibid.*, quoting *People v. Karis* (1988) 46 Cal.3d 612, 656.) These rules apply even when a habeas corpus petition is prepared by a defendant in propria persona. (*People v. Karis*, at p. 656.)

"If . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause]." (*People v. Duvall, supra*, 9

Cal.4th at p. 475.) However, a habeas petition may be resolved by a summary denial of the petition when the court determines the petitioner has not presented a prima facie case for relief. (*Ibid.*; *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 407-408.)

B. Webster's Habeas Corpus Petition

In his form petition, which he prepared and filed in propria persona, Webster seeks relief on two grounds.

1. *Ground No. 1:*

Regarding the first alleged ground for relief, Webster states:⁶ "The elements in Penal Code § 12022.53(d); is not alleged in proper form, as it violates due process by the VI; VIII; and XIV; Amend. U.S. Const. while Petitioner's priors are not enumerated nor serious or violent in nature."

In support of this ground for relief, Webster pleads the following "[s]upporting facts":

"While Petitioner was priorly convicted of Health and Safety Code HS11351.5 this is the only prior conviction, that the Court did not plead and prove was consistant with the prior serious or violent offense elements in Penal Codes § 1170.1; § 667.5; or § 1192.7; and specifically the elements of *P.C. § 12022.53(d)*. However for the trial court to impose such an enhancement without all elements to meet the requirements of § 12022.53(d); exposing Petitioner to two life sentences. Specifically, as he is innocent of the crime of murder at any degree, further has violated his VI, VIII, & XIV Amend. U.S. Const. While the jury should have decided any and all special circumstances, however the Court on January 28, 2011, found *P.C. § 12022.1(b)* and *PC 667.5(b)*; to be true. This was done without prior being plead or proved. Unless the trial is bifurcated, the

⁶ Spelling and grammatical errors in the following quoted excerpts are in the original petition.

findings on these issues must be made at the time the jury declares the verdict in court. The jury's failure to make a find- (court trial; judge's failure to rule on prior conviction operated as acquittal.).

"Specific forms of verdict are called for when allegations in the charging document call for enhanced punishment if certain facts are found true, armed with or use of a deadly weapon or firearm (Pen. C §§ 12022(a), 12022.3, 12022.5, 12022.53).

"When a defendant has a right to a trial on a prior conviction, including a Pen. C § 667.5 prison prior (*People v. Thomas (2001) 91 CA4th 212, 222 110 CR2d 571*), this right is generally limited to the factual validity (truth) of the prior. Pen. C § 1025(b), (c); *People v. Kelii (1999) 21 C4th 452, 87 CR2d 674*.

"The prosecution's burden of proof on the fact of conviction of a charged prior is beyond a reasonable doubt. *People v. Jones (1995) 37 CA4th 1312, 44 CR2d 552* (waiver forms insufficient). The prosecutor must prove each 'element' of a prior. *People v. Winslow (1995) 40 CA4th 680, 46 CR2d 901*. Here these elements were not met. The Court simply enhanced Petitioner 25 years to life without pleading and proving, that Petitioner suffered a serious or violent prior felony conviction.

"Therefore, Petitioner demand relief from enhancement of Penal Code § 12022.53(d); due to it's illegal application of unreasonable implication of state law."

2. *Ground No. 2:*

Regarding the second alleged ground for relief, Webster states:⁷ "Penal Code § 12022.1; on-bail enhancement, imposed upon Petitioner was impermissible, and the prior felony conviction, was not of serious or 'felonies' consistant with violence pursuant to Pen. C § 1192.7."

⁷ See footnote 6, *ante*.

In support of this ground for relief, Webster pleads the following "[s]upporting facts":

"On January 18, 2011, the Court found true the allegations that Defendant violated Penal Code Section 12022.1(b), committing a felony while out on bail from case #SCD221662, and Penal Code Section 667.5(b), a prison prior from case SCD 188891. Further, the defendant is also awaiting sentencing on case #SCD221662.

"The above colloquy was taken from page 1-2 of the People's March 24, 2011, statement in aggravation pursuant to Penal Code Section 1170(b) and Judicial Council Rule 4.437 #SCD224513 DA AC0371) attached as exhibits (A).

"However, the Court did not specify the alleged reason for its upper term enhancements, and Petitioner's prior felony conviction do not qualify for an additional term of 2 years consecutive sentencing, due to the nature of the prior conviction, that is not included in P.C. § 667.5(c)-(d) or P.C. § 1192.7. No specific (conduct) enhancements on subordinate terms for nonviolent felonies (repealed effective January 1, 2001). For offenses committed before 2001, specific (conduct) enhancements do not apply to subordinate terms for nonviolent offenses. Former *Pen. C* § 1170.1(a). also *Pen. C* § 1025"

In support of his petition, Webster has attached copies of the following documents as exhibit "A": The People's statement in aggravation pursuant to Penal Code section 1170[, subdivision] (b) and Judicial Council Rule 4.437, filed on March 24, 2011, in case No. SCD224513; pages 1, 2, and 20 of the probation officer's report in case No. SCD224513; and the court's minutes of the March 25, 2011 probation and sentencing hearing in case No. SCD224513.

B. *Analysis*

As already noted, "all presumptions favor the truth, accuracy, and fairness of the conviction and sentence." (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) Having read

and considered Webster's habeas corpus petition, including the exhibits attached thereto, we conclude he has failed to meet his initial burden to plead sufficient grounds for relief. Webster's petition is denied.

DISPOSITION

The petition is denied and the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.