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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BURK ASHFORD,

Defendant and Appellant.

In re BURK ASHFORD on Habeas Corpus

D060425

(Super. Ct. No. SCN269521)

D061772, D061853
(Super. Ct. No. SCN269521)

APPEAL from a judgment of the Superior Court of San Diego County and petitions for writ of habeas corpus, Runston G. Maino, Judge. Judgment affirmed; petitions denied.

A jury convicted Burk Ashford of assault with a firearm (Pen. Code,¹ § 245, subd. (a)(2)) and discharging a firearm in a grossly negligent manner (§ 246.3, subd. (a)).

¹ All statutory references are to the Penal Code unless otherwise specified.

Additionally, the jury found Ashford had personally used a firearm within the meaning of former section 12022.5, subdivision (a), and had personally inflicted great bodily injury within the meaning of former section 12022.7, subdivision (a). The court sentenced Ashford to prison for eight years.

Ashford appeals, contending the court erred in (1) denying his request for a mistake of fact instruction and (2) denying his request for an instruction on the presumption that a resident is in reasonable fear of harm, if he reasonably believes an intruder has unlawfully and forcibly entered his home. We affirm the judgment.

Ashford has also filed two petitions for writ of habeas corpus, D061772 and D061853, which by separate order we have consolidated with his appeal for purposes of disposition. Ashford's petitions allege (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, (3) cruel and unusual punishment, (4) sentencing error, (5) judicial misconduct and (6) inhumane conditions of confinement. We deny both petitions.

FACTS

At all material times, Ashford lived in a rented home in Escondido which belonged to James Auten. In July 2007, Ashford began to fall behind on the rent so Auten allowed him to perform work on the property in lieu of paying rent. However, when Ashford failed to perform the agreed upon work, Auten initiated eviction proceedings. After Knox Attorney Services (Knox) unsuccessfully tried to personally serve Ashford with notice of the unlawful detainer action filed against him, Knox

engaged Gregory Cole, an independent contractor and the victim in this case, as a process server.

Around 7:00 p.m. on November 10, 2009, Cole arrived at Ashford's residence to personally serve him with notice of the unlawful detainer action. Given the potential for danger in Cole's line of work, his friend Louis Webb occasionally went with Cole to effect service. Webb was waiting in the car when Cole approached Ashford's residence. Cole knocked on the security screen door for two or three minutes, but when there was no response, Cole went to the backyard fence and looked over it. Cole did not see anyone, so he went back to the front porch and tried ringing the door bell. After knocking for a little longer, Cole left.

Cole returned to Ashford's residence a little after 9:00 p.m. and approached the front door. He knocked on the security door for a few minutes.² While he was knocking, Cole heard a gunshot from behind the backyard fence. After the first gunshot, Cole ran toward his car. As he approached his car, a second gunshot was fired and a bullet pierced the back of Cole's right thigh. Cole fell but quickly got up and made his way to the car and climbed into the passenger seat. Cole told Webb, "I was shot. Get me to the hospital." Cole dialed 911 and briefly spoke to an operator before handing the phone to Webb who stopped the car and waited for paramedics to meet them. Cole was transported to the hospital and examined. Though his femoral artery had not been severed, a portion of it was damaged and surgery was necessary to repair the artery.

² There is conflicting testimony as to whether Cole attempted to open the security door.

A few minutes after Cole called 911, Ashford also dialed 911 and reported two African-American men were "trying to break into [his] house." He stated "they were pounding on [his] door, . . . pounding on [his] window, ringing the doorbell and trying to open the security screen door." Ashford told the operator he loaded his gun and fired it twice. He insisted that he did not intend to hit anyone but was not sure if he had. Ashford further explained he was going through an unlawful detainer action and it was the second time that night people had come to his home to give him documents. He told the operator he believed the people he shot at were people trying to serve him with documents.

Officer Jared Lunt responded to Ashford's residence. Ashford told Lunt that around 7:30 p.m. he heard pounding on his doors and windows. He said that he had already been served with papers "a lot" and thought that someone was trying to serve him again so he ignored the knocking. Ashford told Lunt the knocking stopped but he heard knocking again shortly after 9:00 p.m. Ashford acknowledged he had been drinking and he was "tired of people pounding on his doors and windows." Ashford told Lunt he responded to the knocking by grabbing and loading his single-action .22 caliber revolver. In the version of events he provided to Lunt, he went out the back door, looked over the fence, aimed his gun at the street, yelled at the men to get off his property³ and fired two shots. Ashford never told Lunt that he was afraid at any time, that he thought he would be harmed or that he thought his house was being burglarized.

³ Cole testified that he never heard Ashford say "get off my property" before he fired the first shot.

Ashford did not testify on his own behalf.

As we indicated at the outset, the jury convicted Ashford of assault with a firearm and discharging a firearm in a grossly negligent manner and found true allegations Ashford inflicted great bodily injury and personally used a firearm. The trial court sentenced Ashford to eight years in prison. On count one, assault with a firearm, the court imposed the lower term of two years. The trial court imposed the consecutive three-year enhancement term required by former section 12022.7 on the finding Ashford personally inflicted great bodily injury; on the finding Ashford personally used a firearm within the meaning of section 12022.5 subdivision (a), the judge imposed the lower term of three years, to be served consecutively. The court imposed the midterm of two years on count two, discharging a firearm in a grossly negligent manner, and imposed the three-year enhancement term required by section 12022.7; however both the sentence on the negligent discharge count and the section 12022.7 enhancement were stayed.

In denying Ashford's request for felony probation, the trial court stated it believed probation was inappropriate because Ashford shot Cole while Cole was vulnerable and running away from Ashford's residence. In imposing sentence however, the trial court did take into consideration Ashford's age, lack of criminal history and deteriorating health and for those reasons imposed the lower term on the assault conviction and the firearm use enhancement. Defense counsel filed a timely notice of appeal on Ashford's behalf.

In October 2011, appellate counsel sent Ashford a letter informing Ashford he had been appointed to represent Ashford on appeal. Counsel asked Ashford to tell him everything he believed was wrong with his trial or sentence, as well as what

Ashford would like to gain from the appeal. In response to Ashford's request for a trial transcript, counsel informed Ashford that counsel needed the transcripts to prepare the briefs in the case and if Ashford wanted to pay for copies, counsel would make them and send them to Ashford. In the alternative, counsel offered to send Ashford the transcripts once the appeal was complete.

In March 2012, Ashford sent the trial court and his trial counsel a petition for rehearing. Both the trial court and trial counsel advised Ashford the trial court no longer had jurisdiction over the case because more than 120 days had passed since the date Ashford was sentenced. Indeed, by the time Ashford filed his petition, appellate counsel had already filed an opening brief on Ashford's behalf.

DISCUSSION

I

*The Court Properly Declined Ashford's Request
for CALCRIM No. 3406, Mistake of Fact*

Ashford contends the court erred when it declined to instruct the jury with CALCRIM No. 3406, Mistake of Fact.⁴ Ashford contends his statements to the 911 operator and Officer Lunt provided substantial evidence he was under the mistaken belief Cole and Webb were breaking into his home when they were in fact process servers. We apply the de novo standard of review to Ashford's claim. (See *People v. Posey* (2004) 32 Cal.4th 193, 218 [claims pertaining to failure to give jury instructions are reviewed de novo].) Nonetheless as we explain, we agree with the trial court that a mistake of fact instruction was not required on this record.

Even in the absence of a request, a trial court has the obligation to instruct "on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) However, the court need not give the instruction if the evidence is minimal

⁴ CALCRIM No. 3406 states: "The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____<insert crime[s]>.

"If you find that the defendant believed that _____<insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for/_____<insert crime[s]>.

"If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____<insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)." (Revised Dec. 2008.)

and insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145.) Substantial evidence means evidence of a defense, which if believed by the jury would be sufficient to raise a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.) In addition, a trial court need not give a pinpoint instruction if it "merely duplicates the standard instructions." (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559.)

Here, Ashford contends that although the evidence was conflicting, it was sufficient to show he reasonably could have believed he was defending his home against an intruder. To support his contention, Ashford points to the conversation he had with the 911 operator in which he said that two men were trying to break into his home. However, in describing how these two men were "breaking into" his home, Ashford said "they were pounding on [his] door, pounding on [his] window, ringing the doorbell and trying to open the security door." Ashford further explained to the 911 operator that he was involved in an unlawful detainer action and people had been to his residence numerous times to try and serve him with documents. In fact, he told the operator that it was the second time that night someone knocked on the door and rang the doorbell. When the operator asked Ashford if he thought the men at his door were trying to serve him, he answered affirmatively.

Additionally, when Ashford spoke with Officer Lunt, he acknowledged that Cole and Webb had been to his residence an hour and a half before the incident. He told the officer he believed the men were trying to serve him again and he ignored the

knocking. However, when they returned that same night, Ashford had been drinking and became angry because he was "tired of people pounding on his doors and his windows." In response to the knocking, he grabbed his gun and fired it to get the men off his property. When he fired the second shot, which resulted in Cole's injury, Cole was already running away from his house. Ashford never told Officer Lunt that he was afraid of Cole or Webb, nor that he thought the men intended to burglarize his residence. Instead, he merely said he was tired of people knocking on his door and he fired the gun at them to get them off his property.

Contrary to Ashford's argument on appeal, his statements to the 911 operator and Officer Lunt would not support a finding Ashford actually believed Cole and Webb were trying to break into his residence. The jury could not reasonably conclude that Ashford believed the knocks on the door and doorbell ringing were an attempt to break into his home, especially in light of the fact Ashford conceded he knew the men outside were attempting to give him an eviction notice and had been trying to do so earlier in the evening.

Of some significance as well is the fact the trial court gave CALCRIM No. 3476—Right to Defend Real or Personal Property—and CALCRIM No. 3470—Right to Self-Defense or Defense of Another. Both instructions advised the jury that in deciding whether the defendant acted reasonably, it should "consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have

believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." (CALCRIM Nos. 3476, 3470.) These statements fully conveyed to the jury the principle that a reasonable mistaken belief on Ashford's part relieved him of culpability.

Given the absence of any evidence Ashford was mistaken about what the men outside his home wanted and the defense of property and self-defense instructions which were given, the trial court acted properly in refusing the request for an additional mistake of fact instruction.

II

The Court Properly Declined Ashford's Request for CALCRIM No. 3477, The Presumption Created by Penal Code Section 198.5.

Ashford contends the trial court also erred when it declined to instruct the jury with CALCRIM No. 3477,⁵ which articulates the presumption created by section 198.5 that occupants of a residence have a reasonable fear of death or great bodily injury when

⁵ CALCRIM No. 3477 states: "The law presumes that the defendant reasonably feared imminent death or great bodily injury to (himself/herself) [, or to a member of (his/her) family or household,] if: [¶] 1. An intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home; [¶] 2. The defendant knew [or reasonably believed] that an intruder unlawfully and forcibly (entered/ [or] was entering) the defendant's home; [¶] 3. The intruder was not a member of the defendant's household or family; [¶] AND [¶] 4. The defendant used force intended to or likely to cause death or great bodily injury to the intruder inside the home. [¶] . . . [¶] The People have the burden of overcoming this presumption. This means that the People must prove that the defendant did not have a reasonable fear of imminent death or injury to (himself/herself) [, or to a member of his or her family or household,] when (he/she) used force against the intruder. If the People have not met this burden, you must find the defendant reasonably feared death or injury to (himself/herself) [, or to a member of his or her family or household]."

confronting an unlawful and forcible intruder. Again, Ashford contends his statements to the 911 operator and Officer Lunt provided substantial evidence he reasonably believed Cole was trying to forcibly enter his home. Again, we apply the de novo standard of review to Ashford's claim and reject it. (*People v. Posey, supra*, 32 Cal.4th at p. 218.)

Section 198.5, entitled the "Home Protection Bill of Rights" creates a "rebuttable presumption that a residential occupant has a reasonable fear of death or great bodily injury when he or she uses deadly force against an *unlawful and forcible intruder into the residence.*" (*People v. Brown* (1992) 6 Cal.App.4th 1489, 1494-1495, italics added.)

Four elements must be present in order for section 198.5 to apply: "[1] There must be an unlawful and forcible entry into a residence; [2] the entry must be by someone who is not a member of the family or the household; [3] the residential occupant must have used 'deadly' force (as defined in § 198.5) against the victim within the residence; and finally, [4] the residential occupant must have knowledge of the unlawful and forcible entry." (*Ibid.*, italics added.)

The plain language of section 198.5 shows that the statute was intended to protect occupants inside a residence when they are confronted with unlawful intruders *inside* their homes. (*People v. Owen* (1991) 226 Cal.App.3d 996, 1005; *People v. Brown, supra*, 6 Cal.App.4th at p. 1495.) The presumption in section 198.5 does not apply when the alleged intruder is on the porch because the porch is not a "portal" in which an occupant has a reasonable expectation of protection from unauthorized intrusion. (*People v. Brown, supra*, at pp. 1497-1498) "Social convention dictates that anyone wishing to summon the occupant's presence or gain entry into the home must first enter the porch."

(*Ibid.*) Therefore, an entry onto the porch is not an entry into the residence as required by the statute. (*Id.* at p. 1491.)

Here, the record satisfies only one of the four required elements. Admittedly, Cole is not a member of Ashford's family nor the household. He was only at the residence to serve Ashford with paperwork. Thus, the second element was established.

However, there is no evidence with respect to the remaining elements. Neither Cole nor Webb unlawfully and forcibly entered Ashford's home. Ashford points to testimony which suggests that Cole may have tried to open the security door, arguing this behavior may scare a residential occupant. Although whether Cole did try to open the screen door is a disputed fact, the undisputed facts indicate that Cole had been knocking on the screen door for a few minutes and there was a closed wooden door behind the screen door. Testimony from Knox's employee showed that a process server would normally open a screen door to knock on the wooden door behind it because knocking on a screen door is ineffective in announcing one's presence. No one came to open the door and Cole never gained access to the residence. Thus under either version of events there was no unlawful and forcible entry into Ashford's home.

Ashford fired the gun while standing behind a fence outside his house. There is no evidence Ashford was inside his residence when the shots were fired. Thus, there is not evidence of the third element.

Finally, although Ashford first told the 911 operator that he shot at two men trying to break into his home, he also stated he believed the men he shot at were there to serve him with documents. According to Officer Lunt's testimony, Ashford believed that Cole

and Webb were the same men who were at his residence earlier in the evening. Ashford told Officer Lunt that he was "tired of people pounding on his doors and windows," and he shot at the men because he wanted to get them off his property. Accordingly, there is no reason to believe Ashford had knowledge of any kind of unlawful and forcible entry, as required by the fourth element of section 198.5.

In sum then, because the record only establishes one of the four elements required by section 198.5, the trial court properly declined Ashford's request to instruct the jury with CALCRIM No. 3477.

III

Petitions for Writ of Habeas Corpus

A. Ineffective Assistance of Counsel

By way of one of his petitions for a writ of habeas corpus, D061772, Ashford contends his trial counsel was ineffective and that in failing to raise trial counsel's ineffectiveness his counsel on appeal was also ineffective. We reject these related claims.

A defendant "claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.]

"To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citations.]

"Our Supreme Court recently reiterated the obligations of appellate courts in reviewing claims of ineffective assistance of counsel: ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of professional assistance." ' [Citation.] '[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" [Citation.]

" 'Competent counsel is not required to make all conceivable motions or to leave an exhaustive paper trail for the sake of the record. Rather, competent counsel should realistically examine the case, the evidence, and the issues, and pursue those avenues of

defense that, to their best and reasonable professional judgment, seem appropriate under the circumstances. [Citation.]' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146–1148.)

Appellate counsel has the duty to prepare a legal brief containing citations to the appellate record and appropriate authority, set forth all arguable issues, and not to argue the case against his client. (*People v. Barton* (1978) 21 Cal.3d 513, 519.)

Ashford bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. (See *People v. Harris* (1993) 19 Cal.App.4th 709, 714.)

With respect to his trial counsel, Ashford complains solely about tactical decisions trial counsel made with respect to a host of decisions, including witnesses to call, Ashford's theory Auten was not the lawful owner of the home in which Ashford was living, counsel's failure to put Ashford on the stand, counsel's failure to investigate the two process servers and counsel's pursuit of a ricochet theory. None of these criticisms and the remainder of Ashford's complaints about trial counsel will support a claim of ineffective assistance of counsel; they all fall within the realm of reasonable tactical decisions to which we defer to counsel's judgment. (*People v. Montoya, supra*, 149 Cal.App.4th at 1146–1148.) Thus, appellate counsel cannot be faulted for failing to raise an ineffective assistance of counsel claim.

With respect to appellate counsel, we note counsel has filed a timely brief setting forth two arguable issues with proper citations to both the record and

appropriate authority. Counsel sent Ashford a letter in October 2011, informing Ashford that counsel had been appointed to represent him on appeal. In the letter counsel asked Ashford to tell him everything he believed was wrong with his trial or sentence, as well as what Ashford would like to gain from the appeal. Counsel described in detail the kind of information he needed. Additionally, counsel informed Ashford there was no provision in the appointed appellate attorneys programs for making copies of the record for Ashford; however, counsel advised Ashford that if Ashford wanted to pay for a copy of the record, counsel would make one and send it to Ashford. If not, counsel would send the transcripts to him once the appeal was complete.

In March 2012, Ashford sent the trial court a petition for rehearing. In April 2011, the trial court advised Ashford it had no power to grant a rehearing because over 120 days had passed since the date Ashford was sentenced. Additionally, Ashford sent a copy of the petition to his trial counsel, who also advised Ashford that because more than 120 days had passed since he was sentenced, his case was no longer within the jurisdiction of the trial court. At that point in time, appellate counsel had already filed Ashford's opening brief for his appeal.

In sum, the record shows that Ashford was adequately represented both at trial and on appeal.

B. Cruel and Unusual Punishment

Ashford contends his eight-year prison sentence is cruel and unusual punishment because he is 68 years old, in poor health and there is a very good chance he may die in prison. Again, we find no merit in his claim.

Punishment is cruel and unusual if it is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In making this inquiry, courts consider the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, the consequences of the act, the defendant's age and history of criminality and the defendant's mental capabilities. (*People v. Cox* (2003) 30 Cal.4th 916, 970, disapproved on other grounds *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Here, a jury convicted Ashford of assault with a firearm and discharging a firearm in a grossly negligent manner because he shot at an unarmed man running away from his residence. Additionally, the jury found Ashford had personally used a firearm and inflicted great bodily injury. Cole was shot in the thigh and had to undergo surgery to repair his damaged femoral artery. On the night of the incident, Cole was at Ashford's residence to serve him with notice of an unlawful detainer action filed against him. Ashford became angry and fired two shots in Cole's direction to get him off of his property. Such a reaction shows Ashford is not capable of controlling his anger and is also a danger to society when he does become angry. The trial court noted that it could have been anyone at Ashford's front door for any reason and banging on the door loudly does not deserve a shooting.

Although Ashford's age and lack of criminal history are factors weighing in favor of a shorter prison sentence or even probation, they are not dispositive. Ashford became angry, took his gun, loaded it and made the conscious decision to shoot at Cole. Cole had to undergo surgery and a painful recovery. Cole also suffered a significant financial loss because he was unable to work and run his business during his rehabilitation. Although the consequences of Ashford's actions were significant, as the court noted, Ashford did not show remorse and actually felt justified in his actions. Given these circumstances, eight years was a reasonable sentence for the offenses Ashford committed.

C. Abuse of Discretion in Sentencing

Ashford contends the trial judge abused his discretion when he denied Ashford's request for felony probation. Probation is generally reserved for convicted criminals whose conditional release into society poses no risk to public safety and promotes rehabilitation. A sentencing court has broad discretion to determine whether a defendant is suitable for probation. (*People v. Welch* (1993) 5 Cal.4th 228, 233.) The trial court's sentence will be upheld, unless there is a showing that the denial of probation was arbitrary or capricious, or otherwise exceeded the bounds of reason. (*People v. Buttram* (2003) 30 Cal.4th 773, 788-789.) Ashford has the heavy burden of showing that the trial judge abused his discretion in denying his request for probation. (*People v. Kingston* (1974) 44 Cal.App.3d 629, 637.)

Here, the trial court denied Ashford's request for felony probation because Ashford shot Cole as he was running away from Ashford's residence, which resulted

in great physical and emotional injury as well as a significant financial loss for Cole. However, the trial court did take into consideration Ashford's age, lack of criminal history and deteriorating health and imposed the lower term of two years on Ashford's assault conviction and the lower term of three years on the firearm enhancement. The trial court did not abuse its discretion in denying probation.

D. *Judicial Misconduct*

Ashford contends the trial judge engaged in judicial misconduct when he denied Ashford's request for felony probation and sentenced him to eight years. Particularly, Ashford claims that because the trial judge was aware of the possibility that Ashford may die in prison because of his age and deteriorating health, sentencing him to any prison term was judicial misconduct. We must determine whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial. (*People v. Snow* (2003) 30 Cal.4th 43, 78.) The misconduct of a trial judge that would warrant a reversal of the judgment must be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial. (*People v. Browning* (1933) 132 Cal.App. 136, 153; accord, *People v. Kendrick* (1961) 56 Cal.2d 71, 92.) We find no such misconduct by the trial judge here because, as discussed above, the eight-year sentence was neither cruel and unusual punishment nor an abuse of discretion.

E. *Conditions in Prison*

Ashford contends that the conditions of his incarceration are inhumane and he should be granted felony probation instead. Particularly, Ashford claims that he is not getting the medical care he needs. The Constitution does not require comfortable prisons; however, it does not permit inhumane ones. The treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. (*Farmer v. Brennan* (1994) 511 U.S. 825, 832-833.)

Prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care and must "take reasonable measures to guarantee the safety of the inmates." (*Ibid.*)

Ashford claims he needs surgery to remove a bone spur in his shoulder, as well as a deep cleaning of his teeth because of a gum infection. Additionally, he has been X-rayed and diagnosed with advanced arthritis, which is not being treated effectively. However, Ashford states that he has seen a doctor who has prescribed him pain medication for the bone spur and arthritis as well as antibiotics for the gum infection. He states that his deteriorating health is the result of inhumane prison conditions; however, for each malady he concedes he has received medical attention. Although, Ashford may not be getting the kind of health care he believes he deserves, his own statements show that he is getting adequate healthcare in prison.

DISPOSITION

The judgment is affirmed. The petitions for writ of habeas corpus are denied.⁶

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.

⁶ In support of his appeal, Ashford has filed a request for judicial notice of correspondence he received from the warden of the prison where he is incarcerated with respect to performance of a section 1170, subdivision (d) evaluation. We deny the request for judicial notice. The correspondence is not relevant to any issue on appeal nor raised in Ashford's habeas petitions. Our denial of the request for judicial notice is without prejudice to whatever other rights Ashford may have with respect to the evaluation.