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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BILLY RAY CASTLEBERRY, Defendant and Appellant.	E052360 (Super.Ct.No. RIF115124) OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia Garcia, and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Billy Ray Castleberry was convicted of second degree murder in the death of his 12-year-old son, Bradley. Defendant contended that he accidentally discharged a shotgun—a replica of a Civil War-era muzzle-loading shotgun—while the two were playing. He contends that the trial court erred in allowing the use of evidence of prior acts of misconduct committed against Bradley and his mother to impeach his credibility; that the court should have instructed the jury that an unintentional killing without malice in the course of an assaultive felony constitutes voluntary manslaughter; that the court should have instructed the jury on the lesser included offense of involuntary manslaughter based on the misdemeanor of brandishing a firearm; and that the above errors cumulatively, if not individually, caused a miscarriage of justice.

We will affirm the conviction.

PROCEDURAL HISTORY

The district attorney originally charged defendant with one count of willful, deliberate and premeditated murder in the death of Bradley Castleberry. (Pen. Code, § 187, subd. (a).) The information also alleged that defendant personally and intentionally discharged a firearm, proximately causing great bodily injury or death. (Pen. Code, § 12022.53, subd. (d).) (*People v. Castleberry* (Sept. 2, 2009, E044913) [nonpub. opn.] [at p. 2] (*Castleberry II*).)[1] (All further statutory citations refer to the Penal Code, unless another code is specified.)

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[1] This procedural information is not contained in the record on appeal. Consequently, we cite to our most recent prior opinion in this case, which is now before us for the third time.

The first trial ended in a mistrial when the jury was unable to reach a unanimous verdict. A second jury found defendant guilty of second degree murder and found the enhancement true. Defendant was sentenced to a term of 40 years to life. We reversed that conviction because the trial court failed to instruct on various theories of involuntary manslaughter which were supported by the evidence. (*People v. Castleberry* (Apr. 10, 2007, E039464) [nonpub. opn.] (*Castleberry I*).)

Following a third trial, defendant was again convicted of second degree murder with a finding that he personally and intentionally discharged the firearm. We reversed that conviction, finding that evidence of prior acts of misconduct was not admissible pursuant to Evidence Code section 1101, subdivision (b) or Evidence Code section 1109, subdivision (a), and that the error in admitting that evidence was prejudicial.[2] (*Castleberry II*, *supra*, E044913 [at pp. 2-3, 11-19].)

In his fourth trial, the subject of this appeal, defendant was again convicted of second degree murder with findings that he personally used a firearm and that he personally and intentionally discharged the firearm. The court again sentenced defendant to a term of 15 years to life for second degree murder, with a consecutive term of 25 years to life for the firearm enhancement.

Defendant filed a timely notice of appeal.

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[2] Evidence Code section 1101, subdivision (b) allows the use of evidence of specific instances of misconduct for certain evidentiary purposes; Evidence Code section 1109, subdivision (a) allows the use of evidence of prior acts of domestic violence as evidence of a propensity to commit such acts.

FACTS

On February 10, 2004, defendant shot and killed his 12-year-old son, Bradley, with a replica of a Civil War-era muzzle-loading black powder shotgun, a type of gun typically used by Civil War re-enactors. The weapon belonged to the late husband of defendant's girlfriend, Sharon Forbes.[3] She put it in the closet in defendant's bedroom when she moved in with him. A few weeks before the shooting, defendant took it to work, where his supervisor, Ferd Mawcinitt, who had 10 to 15 years' experience with black powder muzzle-loading shotguns, examined it. Before working on the gun, Mawcinitt determined that it was not loaded by putting a ramrod down each barrel and looking down inside each barrel with a flashlight, as well as tapping it on the ground to see if any powder came out. The gun was disassembled and rusty. The hammers were frozen because of the rust. Mawcinitt cleaned the mechanism, the springs and the hammers with oil. He reassembled the gun, which was now capable of being fired.

About a week later, Mawcinitt gave defendant some percussion caps, some wadding and a shotgun shell. The wadding was for a rifle and would not work in the shotgun. He told defendant that the shell would not work in his gun. He cut the shell open, just to show him what the BB's inside the shell look like. Mawcinitt put a percussion cap in the gun, pulled the trigger, and set off the percussion cap. He then gave

[3] Forbes died before the fourth trial. Her testimony from the prior trial was read to the jury.

the gun back to defendant. When he handed it back to defendant, the gun was not loaded. Mawcinitt told defendant where he could obtain some black powder.

According to defendant, on the day of the shooting, he got up to find Bradley playing with a piece of wood, pretending it was a gun. He went back to bed, but then felt bad that his son was playing alone. He got up and got the shotgun out of his bedroom closet. Mawcinitt had told him that if he placed percussion caps on the unloaded gun, it would make a small explosive noise, like a cap gun, and he thought it would be safe to use it to play with his son. He found Bradley standing in the hallway outside Bradley's bedroom. Bradley was holding the wooden "gun" in his hands. Believing that the shotgun was not loaded and intending to play with his son, defendant pointed it at Bradley and pulled the trigger for one barrel. Nothing happened. He pulled the second trigger and heard a loud explosion. The air filled with smoke. He then saw Bradley slumped against the bedroom door jamb with a big hole in his chest. Defendant ran to him, calling his name. He then called 911. He did not explicitly say so, but he gave the impression that Bradley had shot himself.

When Riverside County Sheriff's Deputy Jones arrived, defendant was outside the house. He was distraught and frantic, and said that his son had been shot. He took Jones inside the house, where Bradley was lying on his back in the hallway, with his feet inside his bedroom. He was not breathing and his pupils did not react to a flashlight. Defendant said that Bradley had been playing with a gun and some sticks. He heard a bang and then saw that Bradley had been shot.

Sergeant Knudson spoke to defendant about an hour later at the scene. Defendant told Knudson that Bradley had shot himself. Knudson drove defendant to the station. Defendant continued to maintain that Bradley had shot himself. He said that Bradley had been playing with a piece of wood and that he had given him "another item" to play with. He told Knudson four or five times that Bradley had shot himself. When Knudson told him that his story was not consistent with the crime scene, defendant changed his story. He said that when he had seen Bradley playing with the piece of wood, pretending it was a gun, he decided to give him a gun to play with. He described the gun, calling it a black-powder rifle, and described how to load it. He said he retrieved it from the bedroom closet and believed it was not loaded. He carried it toward his son, pointed downward at a 45-degree angle. He pulled the first trigger and nothing happened. He pulled the second trigger and saw a large cloud of smoke. He saw that his son was injured. He was shocked and surprised when the gun actually fired. That was the final version defendant told Knudson in the course of a four-and-a-half-hour interview.

The cause of death was a shotgun wound to the upper extremity and torso. Two pellets exited the body and were found underneath Bradley's body. Eight more were removed from his body. Shortly before his death, Bradley had received a contusion behind his right ear from blunt force trauma. The strike plate from the door of Bradley's room was about 10 feet away from the door. A wood chip from the door jamb was lying next to Bradley's foot. It appeared that the door had been kicked in. Blood spatter had travelled from Bradley's room toward defendant's bedroom. There were strike marks

from pellets hitting defendant's bedroom door. Defendant admitted that they were not there before the shooting. This suggested that the shooter was inside Bradley's bedroom and facing the bedroom door. Two pellets hit defendant's bedroom door and bounced back to the floor underneath Bradley.

The shotgun was lying on the floor in front of defendant's bedroom door. There was wadding on the dresser. Pieces of a different variety of wadding were found throughout the house. No black powder was found in the house. Outside the house, there was a pile of spent shotgun shells. The area appeared to have been used as a firing range.

A criminalist who examined the gun testified that one barrel was empty. The other barrel contained 10 steel shotgun pellets, some wadding and about 92 grains of black powder.

About a week before the shooting, defendant's friend Jacob Roesch examined the shotgun. By pulling the triggers and looking down the barrels with a flashlight, Roesch determined that it was not loaded. He reminded defendant never to point a gun at another person and always to treat a gun as if it were loaded.

Gary Orantes, defendant's cellmate while he was in custody awaiting his second trial, testified at defendant's second trial. He had died before the third trial, and his testimony from the second trial was read to the jury. Orantes testified that defendant originally told him that his son's death was an accident. After they had become friends, defendant told him that he had loaded the gun the day before he shot and killed his son. He said that a few days before the shooting, Bradley had seen him "in a homosexual

relationship" with another man. He told Bradley never to mention it. He loaded the gun as a scare tactic. He said he had always been a violent person and that his son "knows better when I ask him to do something, not to do it." However, the following day, his son repeated "about what he saw" and asked him why he would do such a thing. He grabbed the gun and went looking for his son. He kicked the door open, and his son appeared, holding a piece of wood for protection. Defendant shot his son in the chest, also hitting the piece of wood. Defendant said he was wondering if he should come clean about it, but he also said he had beaten the charges once in a mistrial and that he could do so again.

Orantes first provided information to the police about the case in August 2005. Approximately six months earlier, the Press-Enterprise newspaper had run a story detailing defendant's first trial. The article included defendant's account of the shooting as well as numerous other details about the case, including the nature of the weapon, the nature of Bradley's injuries, that percussion caps had been used, and that homicide investigators observed that the bedroom door was kicked in and that Bradley had splinters on his pants. Orantes acknowledged that at the time he went to the police with his information, the Press-Enterprise was delivered daily to the jail where he and defendant were being housed.

The parties stipulated that about six weeks after he testified, Orantes had resolved his pending criminal case via a negotiated disposition for a sentence of three years, to run concurrent with any other custody commitment.

Defendant admitted that he had lied repeatedly to the 911 operator, to Deputy Jones and to both detectives. He said that he was unable to accept what he had done. He maintained that the shooting was accidental and that he did not know the gun was loaded. A defense expert testified that it is very difficult to tell if a muzzle-loading firearm is loaded. He also testified that a muzzle-loading firearm can be fired many years after being loaded and then left unused.

LEGAL ANALYSIS

1.

IT WAS NOT AN ABUSE OF DISCRETION TO ALLOW THE PROSECUTOR TO IMPEACH DEFENDANT WITH PRIOR ACTS OF MISCONDUCT

Introduction

Over defendant's objection, the court permitted the prosecutor to impeach defendant with three prior acts of misconduct which did not result in any criminal conviction and with one prior misdemeanor conviction. Defendant objected below that all of this evidence should have been excluded pursuant to Evidence Code section 352.[4] He makes the same contention on appeal. As to the misdemeanor conviction, he also argues that its use for impeachment purposes was precluded because the conviction was dismissed pursuant to Penal Code section 1203.4.

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[4] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

The Trial Court Did Not Abuse Its Discretion.

Evidence of prior acts of misconduct involving moral turpitude is admissible to impeach a testifying defendant if the evidence is more probative than prejudicial within the meaning of Evidence Code section 352. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297 & fn. 7 (*Wheeler*).) If the prior misconduct involves moral turpitude, it is necessarily admissible for impeachment purposes, and the trial court has broad discretion to determine whether it should be admitted. (*People v. Castro* (1985) 38 Cal.3d 301, 306; *Wheeler*, at p. 296.) "To constitute an abuse of discretion, 'the resulting injury [must be] sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, . . . the court [must] exceed[] the bounds of reason, all of the circumstances being considered.' [Citation.] In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise. [Citation.]" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1092.)

Here, the prosecutor sought a ruling permitting him to impeach defendant with the following five incidents involving Bradley's mother, Tracy T.:

1. During an argument in 1991, defendant threatened to kill her and threatened her with a knife. He damaged numerous items of furniture.

2. During an argument in 1995, defendant threatened to kill her and pointed a shotgun at her.

3. During an incident in 1995, defendant hit her in the arm with a hatchet, causing serious injury.

4. During a separate incident in 1995, defendant punched her in the ribs.

5. In 1996, during an argument over Bradley, defendant pointed a handgun at Tracy in Bradley's presence and threatened to kill both Tracy and Bradley.

The prosecutor also sought to impeach defendant with an incident in 1996 in which defendant slapped Bradley and threw a paddleball racquet at him, hitting him in the head. Defendant pleaded guilty to misdemeanor infliction of corporal injury on a child, in violation of section 273d.

The trial court examined the prior incidents involving Tracy and determined that the first and fourth incidents were insufficiently probative to outweigh their prejudicial effect, but that the second, third and fifth incidents would be admissible to impeach defendant if he testified. The court initially deferred ruling on the incident involving infliction of corporal injury on Bradley. It ultimately ruled that the fact of the misdemeanor conviction would be admissible, but, at defendant's request, the court agreed that the underlying conduct would not be admissible. At trial, the prosecutor questioned defendant only about the incident in which defendant struck Tracy on the arm with a hatchet and about the prior misdemeanor conviction. The court instructed the jury that it could consider this evidence only as it reflected on defendant's credibility, both immediately prior to the prosecutor's cross-examination and again after the parties had rested.

Defendant contends only that the evidence should have been excluded pursuant to Evidence Code section 352. He contends that the probative value of the evidence was

slight because (1) the prior crimes had no tendency in reason to prove his intent or lack of accident or mistake; (2) the crimes had little relevance to an evaluation of his credibility; (3) a misdemeanor has less relevance with respect to credibility; and (4) the assault on Tracy with the hatchet was not based on a conviction "and thereby entailed problems of proof, decreasing its probative value."

That the evidence had no tendency in reason to prove his intent to kill Bradley or lack of accident or mistake is not relevant to the question whether it was an abuse of discretion to admit it for impeachment purposes. Defendant contends that because we held in *Castleberry II* that the same prior acts involving Tracy were inadmissible as evidence of his intent to kill Bradley or to negate his claims that the gun fired accidentally or that he acted in the mistaken belief that the gun was not loaded, we must find them inadmissible for impeachment as well. He is mistaken. In the prior trial, in which defendant did not testify, the trial court deemed the evidence of the prior acts of violence against Tracy relevant to prove defendant's intent or the absence of accident or mistake, pursuant to Evidence Code section 1101, subdivision (b). We analyzed the evidence solely for its relevance on those disputed issues and reversed defendant's conviction because we found the evidence not relevant and its erroneous admission prejudicial. (*Castleberry II*, *supra*, E044913 [at pp. 12-19].)[5] Here, in contrast, the

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[5] In *Castleberry II*, the prosecutor sought a ruling allowing him to introduce all six incidents pursuant to Evidence Code section 1101, subdivision (b) as relevant to defendant's intent and to show absence of mistake or accident, and under Evidence Code, section 1109, subdivision (a)(1) as evidence of propensity to commit domestic violence. The trial court ruled that all five incidents involving Tracy were admissible pursuant to

[footnote continued on next page]

evidence of the two prior acts was offered solely to impeach defendant's credibility when he testified. It is immaterial to our analysis that we found the same evidence inadmissible for another purpose.

Next, defendant contends that the prior crimes had little relevance to an evaluation of his credibility because the prior crimes involved violence rather than dishonesty. In *Wheeler*, the California Supreme Court held that although prior misconduct involving dishonesty may have more obvious relevance than a crime which does not include that element, it is nevertheless "'undeniable that a witness' moral depravity of any kind has "some tendency in reason" [citation] to shake one's confidence in his honesty. . . . [¶] There is . . . some basis . . . for inferring that a person who has committed a crime which involves moral turpitude [even if dishonesty is not a necessary element] . . . is more likely to be dishonest than a witness about whom no such thing is known. Certainly, the inference is not so irrational that it is beyond the power of the people to decree that in a

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[footnote continued from previous page]
Evidence Code sections 1101, subdivision (b) and 1109, subdivision (a)(1), but that the misdemeanor incident involving Bradley would be admissible only if defendant testified.

We held that none of the incidents involving Tracy were admissible pursuant to Evidence Code section 1101, subdivision (b) because they were not relevant to the issues, i.e., intent or lack of accident or mistake. We further held that on remand, those acts would also not be admissible pursuant to Evidence Code section 1109, subdivision (a)(1) because they occurred more than five years before the homicide. (The prosecutor in *Castleberry II* ultimately decided not to introduce the evidence for purposes of Evidence Code section 1109, subdivision (a)(1).) No contention concerning the admissibility of the misdemeanor involving Bradley was raised, and we did not decide whether that conviction or the conduct underlying it would be admissible upon retrial. (*Castleberry II*, *supra*, E044913 [at pp. 12-19].)

proper case the jury must be permitted to draw it . . . .' [Citation.]" (*Wheeler*, *supra*, 4 Cal.4th at p. 295.)

Assault with a deadly weapon is a crime involving moral turpitude. (*People v. Hinton* (2006) 37 Cal.4th 839, 888; *People v. Elwell* (1988) 206 Cal.App.3d 171, 175.) Similarly, the willful infliction of "'cruel or inhuman corporal punishment or injury'" on a child in violation of section 273d involves moral turpitude. (*People v. Brooks* (1992) 3 Cal.App.4th 669, 671-672.)[6] Accordingly, the trial court appropriately determined that both incidents were relevant to impeach defendant's credibility.

To support his contention that it was an abuse of discretion to permit the use of the hatchet incident, defendant contends that it should have been excluded because it was not based on a conviction and thus entailed problems of proof. While the court might have

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[6] Section 273d provides, in pertinent part, "(a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony and shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, four, or six years, or in a county jail for not more than one year, by a fine of up to six thousand dollars ($6,000), or by both that imprisonment and fine."

People v. Brooks held that a felony conviction of violating section 273d is a crime involving moral turpitude; it did not discuss whether a misdemeanor violation of that statute involves moral turpitude. *Brooks* was decided several months before *Wheeler*, *supra*, 4 Cal.4th 284, and at that time, it was accepted that only prior felony convictions involving moral turpitude could be used for impeachment. However, it was the element of willful infliction of punishment or injury on a child which the court deemed to reflect moral depravity. (*People v. Brooks*, *supra*, 3 Cal.App.4th at pp. 671-672.) Willfulness is an element of both felony and misdemeanor violations of section 273d; consequently, even a misdemeanor violation can be deemed to involve moral turpitude. In this case, defendant has not argued that his prior conviction did not involve moral turpitude.

chosen to exclude the incident for that reason, it was not an abuse of discretion to permit its use despite possible problems of proof.

Similarly, we cannot say as a matter of law that it was an abuse of discretion to admit both incidents because of the risk that the jury might use the evidence not only to determine defendant's veracity but also to conclude that he has a propensity for violence. (See, e.g., *People v. Lepolo* (1997) 55 Cal.App.4th 85, 91-92 [Fourth Dist., Div. Two] [prior incident in which defendant waved machete and threatened to "whack" police officer's head off properly admitted on question of defendant's veracity].) The court instructed the jury, both immediately after the evidence came in and again prior to deliberations, that this evidence could be considered only in assessing defendant's credibility. In the absence of any indication to the contrary, we presume that jurors follow the instructions they are given. (*People v. Boyde* (1988) 46 Cal.3d 212, 255.) Defendant has given us no reason to believe that the jury did not follow these instructions.[7]

The court's admission of the prior misdemeanor conviction for infliction of corporal punishment on Bradley was also not an abuse of discretion under the circumstances of this case. Although we agree that there is great potential for prejudice

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[7] *People v. Robinson* (2005) 37 Cal.4th 592, on which defendant relies, is inapposite. In that case, the court addressed the defendant's contention that the trial court abused its discretion by *excluding* evidence of prior misconduct to impeach a prosecution witness. (*Id*. at pp. 625-626.) That the Supreme Court found no abuse of discretion in excluding the evidence in that case has no bearing on whether the trial court in this case abused its discretion in admitting the evidence to impeach defendant's credibility.

in allowing impeachment of the defendant in a criminal trial with evidence of a prior act of violence against the same person the defendant is now alleged to have murdered, defendant has not provided any authority that such evidence must in all cases be excluded, and we cannot say as a matter of law that it is necessarily more prejudicial than probative. Moreover, the court did not allow impeachment with evidence of a prior act of violence against the same victim; the court precluded the use of any of the underlying facts and allowed only the use of the bare fact of the misdemeanor conviction. Furthermore, as we discuss below, it was not the court's ruling permitting the use of the prior misdemeanor conviction which allowed the jury to learn that Bradley was the victim of that offense.

Any Error or Misconduct Which Allowed the Jury to Learn That Bradley Was the Victim of the Prior Misdemeanor Was Not Prejudicial.

The evidence that Bradley was the victim of the misdemeanor conviction came about as follows. The fact of a misdemeanor conviction is hearsay and it is the underlying facts of the conviction which are typically admissible for impeachment.[8] (*People v. Chatman* (2006) 38 Cal.4th 344, 373; *Wheeler*, *supra*, 4 Cal.4th at pp. 297-

[8] The Attorney General contends that Evidence Code section 452.5, which was enacted in 1996, following the decision in *Wheeler*, creates a hearsay exception for all certified court records, including those reflecting misdemeanor convictions. The statute does not expressly so provide, and the Attorney General has not provided any authority or legislative history to establish that the Legislature intended to abrogate the holding of *Wheeler* that records reflecting misdemeanor convictions are hearsay and that there is no statute which creates an exception for such records. In any event, no such records were offered in this case.

300.) In this case, however, after determining that the incident was not subject to exclusion under Evidence Code section 352, the court acceded to defendant's request to limit the evidence to the fact that he had suffered a misdemeanor conviction for infliction of corporal injury on a child. Defense counsel urged the court to do so because the underlying conduct would be "incredibly prejudicial." The court allowed inquiry "into the misdemeanor conviction, the misdemeanor conviction only, the inquiry into the plea, the time of the plea and the nature of the offense." The court precluded questioning on the facts underlying the conviction unless defendant's testimony somehow opened the door to questioning on the facts underlying the conviction, and strongly cautioned the attorneys from straying from the bounds of its ruling. This was not an abuse of discretion.

On cross-examination, however, the prosecutor asked defendant, "In 1996 you pled guilty to corporal injury to a child, right?" Defendant replied, "Yes, sir." The prosecutor then asked, "And that was to Bradley?" Defendant replied, "Yes, sir." Defense counsel objected after the answer was in, on grounds of Evidence Code section 352. The court overruled the objection.

The name of the victim of a crime is not part of the fact of the conviction; it is an underlying fact, and the question was clearly in violation of the trial court's ruling. Accordingly, the jury learned the potentially prejudicial fact that Bradley was the victim of the prior misdemeanor not as a result of the trial court's decision to admit the prior misdemeanor but as a result of the improper question posed by the prosecutor.

Defendant did not initially raise any issue pertaining to the trial court's failure to sustain the objection to the prosecutor's question concerning Bradley's identity as the victim of defendant's misdemeanor conviction. We invited supplemental briefing to address any claim of error pertaining either to the court's failure to sustain the objection or any claim of prosecutorial misconduct.

In response, defendant filed a supplemental brief arguing that the Evidence Code section 352 objection should have been sustained and that under the circumstances, a contention of prosecutorial misconduct was adequately preserved for review, despite counsel's failure to object on that ground and to request a curative admonition to the jury. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [subject to some exceptions, timely and specific objection and request for curative admonition are required to preserve claim of prosecutorial misconduct for appellate review].) In her response, the Attorney General appears to concede that misconduct occurred, but contends that the objection was insufficient to preserve the issue of prosecutorial misconduct. She also concedes that the trial court abused its discretion in overruling the Evidence Code section 352 objection, when it had previously ruled that the very evidence elicited by the prosecutor's question must be excluded pursuant to Evidence Code section 352 as unduly prejudicial. She contends, however, that any error was not prejudicial.

Eliciting inadmissible testimony is prosecutorial misconduct. (*People v. Bonin* (1988) 46 Cal.3d 659, 689-690, overruled in part in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) This is true whether it was intentional or inadvertent. (*People v. Hill, supra*,

at pp. 822-823.) We need not decide whether that contention was preserved for review, however, because whether the admission of the evidence that Bradley was the victim of the prior misdemeanor conviction resulted from the trial court's error in overruling the objection or from prosecutorial misconduct, the prejudice analysis is the same: Prosecutorial misconduct which is not so egregious as to render the trial so fundamentally unfair as to amount to a denial of due process is reviewed under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Bonin, supra*, 46 Cal.3d at p. 690 ; *People v. Harris* (2005) 37 Cal.4th 310, 351.) The prosecutor's misconduct in this case was clearly not so egregious as to render the entire trial fundamentally unfair. (See *People v. Bonin, supra*, at p. 690.) Absent fundamental unfairness, the standard of prejudice for an abuse of discretion in admitting evidence is likewise *Watson*. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Accordingly, the issue is whether it is reasonably probable that the outcome would have been more favorable to defendant if the objection had been sustained. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

We conclude that it is not reasonably probable that the outcome would have been more favorable to defendant in the absence of his admission that he had been convicted of inflicting corporal injury on Bradley. The court admonished the jury before defendant's cross-examination that evidence that a witness committed a crime or other misconduct could be considered only in evaluating the witness's credibility. It repeated the admonition when it read the instructions to the jury. Limiting instructions are generally deemed to be effective in limiting or eliminating prejudice which might

otherwise result from potentially inflammatory testimony, and in the absence of any evidence to the contrary, jurors are presumed to understand and follow the court's instructions. (*People v. Boyde*, *supra*, 46 Cal.3d at p. 255.)[9] Moreover, the evidence that defendant was convicted of a misdemeanor involving corporal injury inflicted on Bradley is far less inflammatory than the evidence we found prejudicially inflammatory in *Castleberry II*, i.e., the incident in which defendant threatened to kill Tracy and Bradley. (*Castleberry II*, *supra*, E044913 [at pp. 17-19].) Finally, the prosecutor did not mention the misdemeanor conviction in his closing argument, presumably because defendant's own testimony, in which he admitted having lied repeatedly concerning the incident, provided him with a sufficient basis to challenge defendant's credibility.

Defendant Was Not Prejudiced by Any Alleged Ineffectiveness of Trial Counsel.

In his supplemental brief, defendant also contends that his trial attorney's failure to object to the admission of the evidence that Bradley was the victim of the misdemeanor conviction on grounds of prosecutorial misconduct and to request a curative admonition deprived him of his constitutional right to the effective assistance of counsel. Our conclusion that any error or misconduct by the prosecutor was not prejudicial, in that it is not reasonably probable that the outcome would have been more

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[9] Although neither party raises this contention, we note that the evidence of defendant's prior physical abuse of Bradley was not admissible as evidence of propensity to commit acts of domestic violence, pursuant to Evidence Code section 1109, because the misdemeanor conviction and conduct underlying it occurred more than five years before Bradley's death. (See *People v. Dallas* (2008) 165 Cal.App.4th 940, 952-953 [Fourth Dist., Div. Two]; see also *Castleberry I*, *supra*, E039464 [at p. 14, fn. 7].)

favorable to the defense if counsel had made the appropriate objection, disposes of that contention as well.[10] (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [ineffective assistance of counsel claim may be disposed of on basis of lack of prejudice without examining counsel's alleged deficiencies].)

A Misdemeanor Conviction Which Has Been Expunged Is Admissible to Impeach a Testifying Defendant in a Criminal Trial.

Defendant's 1996 misdemeanor conviction for violation of section 273d was dismissed pursuant to section 1203.4, subdivision (a) following his successful completion of probation.[11] Defendant argued that an expunged conviction cannot be used for impeachment in a subsequent trial.[12] The trial court admitted the misdemeanor

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[10] Defendant has also asserted his claim of ineffectiveness of trial counsel in a petition for writ of habeas corpus. We will address the petition by separate order.

[11] "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code." (§ 1203.4, subd. (a).)

[12] Section 1203.4 uses the term "dismissed." It is common, however, to use the term "expunged" interchangeably with "dismissed" in this context. (See, e.g., *People v. Field* (1995) 31 Cal.App.4th 1778, 1784-1790.)

conviction, as discussed above, but did not expressly address the contention that dismissal pursuant to section 1203.4 precluded its use. Defendant now raises the same contention on appeal.

A prior felony conviction which is dismissed pursuant to Penal Code section 1203.4 is not admissible for impeachment of a witness in a subsequent proceeding. The sole statutory exception to this rule applies to a criminal trial where the witness being impeached is the defendant. (Evid. Code, § 788, subd. (c).)[13] Defendant contends that because Evidence Code section 788, subdivision (c) does not apply to an expunged misdemeanor conviction, such a prior conviction is not admissible for impeachment of a defendant in a criminal trial.

Defendant relies primarily on *People v. Field*, *supra*, 31 Cal.App.4th 1778. The issue in *Field* is whether an expunged felony conviction may be used to impeach a witness in a criminal trial who is not the defendant. (*Id.* at pp. 1784-1790.) The court held that Evidence Code section 788, subdivision (c) reflects a legislative judgment that an expunged conviction is not relevant for impeachment: "The legislative purpose behind expungement is that 'no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his

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[13] "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless: [¶] . . . [¶] (c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense." (Evid. Code, § 788.)

credibility as a witness.' [Citations.]" (*People v. Field*, *supra*, at p. 1790.) The court held that Proposition 8's "Truth-in-Evidence" amendment to the state Constitution (Cal. Const., art. I, § 28, subd. (d)) (§ 28(d)) does not mandate that an expunged felony conviction be admissible for impeachment of a witness because that provision mandates only that all relevant evidence is admissible. Because an expunged felony conviction is deemed not to be relevant to the credibility of a witness, the court reasoned, the expunged felony is not made admissible by section 28(d). (*People v. Field*, *supra*, at p. 1790.)

In *People v. Field*, *supra*, 31 Cal.App.4th 1778, however, the court expressly noted that this rule does not apply to a testifying criminal defendant. (*Id.* at p. 1787 & fn. 4.) By legislative declaration, an expunged felony conviction *is* relevant to impeach a defendant in a criminal trial. (Evid. Code, § 788, subd. (c).) And, since the California Supreme Court held in *Wheeler* that misdemeanor convictions as well as felony convictions are relevant for impeachment purposes under section 28(d), it follows that just as an expunged felony remains relevant to impeach a defendant testifying in a criminal trial, an expunged misdemeanor is relevant as well, subject to the balancing test of Evidence Code section 352. (*Wheeler*, *supra*, 4 Cal.4th at pp. 292-297.)

2.

THE TRIAL COURT HAD NO DUTY TO INSTRUCT ON VOLUNTARY MANSLAUGHTER BASED ON THE THEORY THAT DEFENDANT COMMITTED AN UNINTENTIONAL KILLING WITHOUT MALICE DURING THE COURSE OF AN ASSAULT WITH A DEADLY WEAPON

Defendant contends that the trial court erred in failing to instruct, sua sponte, that the jury could convict him of voluntary manslaughter if it found that he killed his son unintentionally, without malice, during the commission of assault with a deadly weapon. He relies on *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), which, he contends, established this theory of voluntary manslaughter.

In *Garcia*, the court addressed the defendant's contention that his jury should have been instructed on *involuntary* manslaughter as a lesser included offense of murder. Garcia was charged with murder after an incident in which he struck someone in the face with the butt of a shotgun, causing the victim to fall and hit his head on the sidewalk, causing his death. Garcia testified that he did not intend to hit the victim or cause him to die. He was intoxicated, he said. The victim lunged toward him, and Garcia thought he was going to try to fight him. He "just reacted" and jabbed the gun toward the victim, intending to "back him up." Garcia was convicted of voluntary manslaughter. (*Garcia*, *supra*, 162 Cal.App.4th at pp. 22-24, 25.)

The court rejected Garcia's argument that the evidence supported a verdict of involuntary manslaughter. It held that an unintentional killing committed during the

commission of an inherently dangerous felony, such as assault with a deadly weapon, is not involuntary manslaughter. After thoroughly examining the law as it pertains to manslaughter, the court concluded that "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter." (*Garcia*, *supra*, 162 Cal.App.4th at pp. 26-31, italics added.) Accordingly, the court rejected Garcia's contention that he was entitled to an instruction on involuntary manslaughter. (*Ibid*.)

We do not read the *Garcia* court's conclusion that an unintentional killing during the commission of an inherently dangerous felony is "at least" voluntary manslaughter as the court's holding that such a killing would actually be voluntary manslaughter. On the contrary, because that is not the issue which was before the court, the statement is dictum.[14]

In any event, the evidence in this case did not support an instruction on the theory that defendant committed an unintentional killing without malice during the commission of an assault with a deadly weapon because, under the scenario defendant posits, he did not commit an assault.

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[14] The Attorney General discusses *People v. Bryant* (2011) 198 Cal.App.4th 134 in her respondent's brief. In that case, the court held that *Garcia* did articulate a new theory of voluntary manslaughter. Defendant relies on *Bryant* in his reply brief as additional authority supporting his contention. However, review has now been granted in *Bryant*, and the case is no longer citable as authority. (*People v. Bryant*, review granted Nov. 16, 2011, S196365.) Nevertheless, we agree with the Attorney General's analysis as to why the decision in *Bryant* is flawed.

A court has a duty to give an instruction on a lesser included offense only if there is substantial evidence which would support a guilty verdict on the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Substantial evidence in this context is evidence from which a reasonable juror could conclude that the lesser offense rather than the greater offense was committed. (*Id.* at p. 162.) Defendant contends that the evidence supports the conclusion that he believed the gun was not loaded and that he pointed it at Bradley with no intent to kill him. Rather, he intended to play with his son, expecting the gun merely to make a popping sound. He also contends that there is substantial evidence that he did not subjectively appreciate that he was placing Bradley's life in danger, and that he did not possess implied malice. He contends that this constitutes substantial evidence that he committed the crime of assault with a deadly weapon without malice, either express or implied.

The flaw in this argument is that if defendant pointed the gun at his son, believing it to be unloaded and with no expectation that Bradley would be injured as a result or the understanding that he could be injured as a result, he did not commit an assault. To be guilty of assault, a defendant must have the general intent to "'willfully commit an act the direct, natural and probable consequences of which[,] if successfully completed[,] would be the injury to another.' [Citation.]" (*People v. Miller* (2008) 164 Cal.App.4th 653, 662.) If defendant pointed the gun at Bradley with the honest and reasonable belief that the gun was unloaded, i.e., under a mistake of fact, then he did not commit an assault; rather, the shooting was an accident. (See *People v. Barnett* (1998) 17 Cal.4th 1044,

1149 & fn. 72.) Under that scenario, defendant was not guilty of murder or voluntary manslaughter, but the jury could convict him of involuntary manslaughter, if it found him negligent in his handling of the gun. Mistake of fact is a defense to criminal intent; it is not a defense to criminally negligent homicide. (*Castleberry I*, *supra*, E039464 [at pp. 10-13], citing and discussing *People v. Carmen* (1951) 36 Cal.2d 768, *People v. Goodman* (1970) 8 Cal.App.3d 705, and *People v. Velez* (1983) 144 Cal.App.3d 558.) Accordingly, under the factual scenario that defendant posits, the trial court had no duty to instruct the jury on voluntary manslaughter.

3.

DEFENDANT WAS NOT ENTITLED TO AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER BASED ON MISDEMEANOR BRANDISHING A FIREARM

Brandishing a firearm in violation of section 417, subdivision (a)(2) can support a verdict of involuntary manslaughter, if the evidence shows that the defendant acted with criminal negligence.[15] (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103-104, 107-112.) Defendant contends that he was entitled to an instruction on involuntary manslaughter on that theory. He contends that the instruction is supported by his testimony that, intending to play a game of soldiers, he jumped out to surprise his son, pointed the shotgun at Bradley's chest and pulled the trigger twice, expecting the gun to make a popping noise.

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[15] Section 417, subdivision (a)(2) provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable [as a misdemeanor]."

He contends that although he subjectively intended the act of pointing the gun at Bradley to be playful, the jury could reasonably have construed this to be displaying a firearm in a rude and threatening manner. He contends that pointing a real gun at a family member and pulling the trigger, even if it is intended to be a joke, "rises to the level of misdemeanor brandishing."

Defendant does not cite any authority that playfully pointing a gun at someone constitutes brandishing it within the meaning of section 417, nor does he provide any legislative history indicating that when the Legislature forbade pointing a firearm in a "rude, angry, or threatening manner" it really meant to forbid pointing a gun playfully. We decline to so construe the plain language of section 417.[16] In any event, the jury was instructed that defendant was guilty of involuntary manslaughter if it found that he acted lawfully but negligently and without the intent to kill and without the actual knowledge

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[16] The Attorney General argues that this contention is barred by the doctrine of law of the case because this same contention was raised and rejected in defendant's appeal from his second degree murder conviction in his second trial. This is incorrect. In *Castleberry I*, *supra*, E039464, we addressed defendant's contention that he was entitled to that instruction based on the testimony of his erstwhile cellmate, Orantes. We held that Orantes's testimony did not support a verdict of involuntary manslaughter because Orantes testified that defendant told him he was angry and that although he originally intended to scare Bradley, he decided to pull the trigger, even though he knew the gun was loaded. We held that this testimony did not show that defendant unintentionally shot Bradley with a gun he believed to be unloaded but rather tended to show that defendant intentionally shot his son. (*Id*. [at p. 10 & fn. 2].) Here, defendant bases his contention on his own testimony which, as we have discussed, directly contradicts that of Orantes. The doctrine of law of the case is binding on retrial as to the law as determined by a prior appellate decision in the same case, but it "controls the outcome only if the evidence on retrial . . . is substantially the same as that upon which the appellate ruling was based." (*People v. Mattson* (1990) 50 Cal.3d 826, 850.)

that his act endangered Bradley's life. However, the jury found that he personally and intentionally discharged the firearm. It was instructed that in order to make that finding, it must find that he intended to cause a projectile to be expelled through the barrel by the force of an explosion or other form of combustion. The jury's true finding on this allegation demonstrates that the jury found that defendant acted with the knowledge that the gun was loaded and intended not merely to pull the trigger, but to fire the weapon. (See *Castleberry I*, *supra*, E039464 [at p. 15].) Consequently, even if an instruction on involuntary manslaughter resulting from the negligent commission of misdemeanor brandishing had been warranted by the evidence, the omission would not have resulted in a miscarriage of justice. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 177-178 [*People v. Watson* (1956) 46 Cal.2d 818 standard of prejudice applies].)

4.

NO CUMULATIVE ERROR OCCURRED

Defendant contends that the errors complained of were cumulatively prejudicial, even if none was individually so. Having found no error, we of course need not address this contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P.J.

We concur:

KING
J.

MILLER
J.