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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. SEGIERAY EMANUEL COOPER, Defendant and Appellant.	E052519 (Super.Ct.No. FBA700295) OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Segieray Cooper, of second degree murder (Pen. Code, § 187, subd. (a))[1] and assault on a child by means of force likely to produce great bodily injury, which resulted in death (§ 273ab). He was sentenced to prison for 25 years to life and appeals, claiming a juror was improperly excused during deliberations and the murder charge should have been dismissed for vindictive prosecution, or his trial attorney was incompetent for failing to file a motion to dismiss for this reason. We reject his contentions and affirm, while directing the trial court to file an indeterminate abstract of judgment showing the correct sentence imposed.

Defendant, who had sole physical custody of his seven month old son at the time, killed the child on July 21, 2007.

1. *Excusal of a Juror*

On the first day of jury deliberations, the jury was together for a little over one hour. The following day, the jury deliberated for about an hour and a half before submitting three requests for read-backs. The trial court instructed the jurors to continue deliberating, which they did for about another hour and a half. The foreman then sent the court the following note, "I have a concern about Juror #4. She seems unwilling or unable to accept stipulated evidence as being factual. She has stated all the doctors are "making up stories" to explain the baby's injuries. She has also speculated the baby was ok when he arrived at Weed Community Hospital and may have been injured by

[1] All further statutory references are to the Penal Code unless otherwise indicated.

personnel at Weed Hospital or Loma Linda." The trial court permitted the jury to deliberate another half hour before beginning an inquiry into the note.

The trial court examined all 12 jurors, and both counsel participated to some extent in the examination of some of the jurors. After the foreman, Juror No. 4 and four other jurors were questioned, Juror No. 4 interrupted proceedings and asked to be excused "[t]o keep everyone happy." The trial court told her to think about it overnight. The following day, the rest of the jurors were examined. At the conclusion, the trial court excused Juror No. 4, saying that 10 of the 12 jurors did not believe Juror No. 4 was deliberating or engaging in meaningful discussion about the facts of the case and applying the law as the instructions provided. The court concluded that the one juror, other than Juror No. 4, who did not believe that Juror No. 4 was refusing to deliberate or engage in meaningful discussion about the facts and apply the law, had taken the position that he had not yet given up on persuading Juror No. 4 to do both of those things. The court further noted that Juror No. 4 had asked to be excused. The court opined that Juror No. 4 presented herself as being somewhat emotional and the concern was that she did not engage meaningfully in the deliberative process in that she apparently did not listen to other jurors when they identified evidence and pointed out evidence to her. Rather, she applied her personal experiences or a medical condition she had to figure out what happened, and this was improper because her experiences and medical condition were not in evidence. The court noted that only one other juror besides Juror No. 4 disagreed with this assessment. The court added, "So what we have here is . . . Juror No. 4 requesting to be excused because it would just be, . . . ["]easier for everybody else,["] which tells me

she's not deliberating with the other jurors because it would be easier for her not to be here. So she's not invested in the deliberation process by her own comment. [¶] . . . [S]he herself said, I make up my mind. That's it. And so that tells me she's not examining the facts. According to the foreperson, she in her mind decided that the medical evidence – the doctors who testified [-] are in some kind of conspiracy in which they discussed their testimony with each other and have agreed on conclusions which she has completely rejected. So she's not accepting the testimony that was offered by both sides. She was imagining facts that were not presented in that she has a medical condition of choking. She decided that this baby choked and died from choking which was not presented by either side. . . . [¶] There [were] discussions during the trial about fluid in the child's lungs and other potential medical causes, but the child, based on all of the medical testimony, did not die from choking. [¶] After talking to other jurors, . . . a majority of jurors, 8 of 12, have agreed and stated quite clearly, Juror No. 4 refuses to deliberate, refused to follow the law and refuses to apply the evidence to the law as the court has instructed. [¶] Several jurors indicated that Juror No. 4 also had an emotional reaction to the evidence, again applying her own personal physical condition to the evidence. She's also somehow decided that there was somebody else present with the child without [evidence] and [w]hen confronted [by] other jurors[,] [s]he is unable to logically tell the other jurors who that some other person was that was present, and she refuses to discuss the issue. She also referred to the evidence as, according to the other jurors, a . . . ["]story.["] She's not referring to the evidence presented as evidence, but rather stories that are told to her that she refuses to believe and it is just a ["]story,["] . . . .

Even [the] juror in seat No. 5[, who said juror No. 4 was not refusing to deliberate] stated that she's not looking at the evidence objectively. She's displayed bias of her own personal beliefs and is emotional and confusing herself about the evidence. [¶] Juror No. 7 . . . said she's not looking at the evidence. She refuses to deliberate. Juror No. 9 said she's unable to comprehend the facts. She's refusing to deliberate and follow the law and applying her own personal experience to the case instead of evidence that's presented. [¶] Juror No. 11 mentioned she's nervous. She has an anxiety issue. She's not sleeping well, that she's refusing to follow the law and discuss basic facts."

Defendant here claims that the basis for Juror No. 4's dismissal does not appear in the record as a demonstrable reality,[2] therefore, reversal is required (*People v. Lomax* (2011) 49 Cal.4th 530, 589, 590). Defendant seeks to prove this by extensively discussing *People v. Cleveland* (2001) 25 Cal.4th 466, in which the California Supreme Court reversed the trial court's excusal of a juror. However, we note that in defendant's description of the facts in *Cleveland*, the trial court there excused a juror for failure to deliberate because "when the other jurors asked him specific questions about the elements of the crime or the facts of the case, he would not respond to their specific question, so there was no meaningful discussion about the particular facts of the case or elements of the offense." The acts of Juror No. 4 in this case, however, went well beyond not answering specific questions about the elements of the crime or the facts of the case.

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[2] The reviewing court does not reweigh the evidence but looks to see "whether 'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 712.)

Returning to *Cleveland*, the Supreme Court concluded that although 10 of the 12 jurors, in each other's presence, raised their hands when asked if one of the jurors there was not deliberating, "individual questioning of the jurors revealed that *it was the conclusion* arrived at by [the challenged j]uror *that was at issue*. The jurors complained that [the challenged j]uror discussed matters that *they* considered 'irrelevant' and adopted an 'unreasonable *interpretation*' based upon 'his own personal opinion,' while 'the rest of us have a *different interpretation*.' [¶] . . . It is possible that [the challenged j]uror employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. [The challenged j]uror participated in deliberations, *attempting to explain*, however inarticulately, *the basis for his conclusion* that the evidence was insufficient to prove [the charged crime], and he listened, even if less sympathetically, to the contrary views of his fellow jurors." (*Id.* at p. 486, italics added.)

Here, in contrast, as the trial court explained, and the record demonstrates, Juror No. 4 rejected all the evidence presented, then refused to explain the basis for her rejection of it other than her own personal medical condition or her unsupported theory that all the doctors got together and conspired about their testimony, she made up a scenario that was unsupported by any of the evidence presented, i.e., that someone else was with the victim during the period the injuries were inflicted, and she refused to discuss with other jurors her reasons for arriving at this conclusion. Additionally, she was allowing her own personal biases and emotions to sway her, rather than the evidence presented. It was not that Juror No. 4 disbelieved certain evidence or certain witnesses—according to a number of other jurors, she disbelieved *everything* that had been presented,

including evidence presented by the defense or stipulated to by both sides, and when asked why, either refused to explain her reasons or relied on her own personal medical experience.[3] She was also dismissive of a fellow juror by waiving her hand in the latter's face when the latter was trying to explain to her why a certain factual determination the jury was trying to make was important. This suggests that she lacked respect for other jurors and their points of view. She was not required to agree with them, but part of the deliberative process mandates that she have sufficient respect for their opinions that she will listen to and consider them, even if she ultimately rejects them. While defendant here offers up his *interpretation* of what the other 11 jurors said when questioned, failing to cite to specific portions of the record, he does not assert for the most part that the trial court's conclusions were not supported by the record, nor can he.

As to specifics, defendant asserts that there was no evidence that Juror No. 4 had expressed a fixed conclusion at the very beginning of deliberations and refused to consider other points of view. However, Juror No. 6 reported that Juror No. 4 refused to listen when other jurors talked to her about the evidence and that afternoon, she took the

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[3] Thus, the assertion in defendant's reply brief that Juror No. 4 expressing the opinion all the doctors were making up stories to explain the victim's injuries and the victim may have been alright when he arrived at either of the hospitals that treated him, but one of them may have caused his injuries, does not constitute deliberation, especially when her explanation for holding both views is based on matters that were not supported by any of the evidence at trial. The same is true of Juror No. 2's allegation that when she asked Juror No. 4 for the basis for her refusal to agree that defendant was home alone with the victim during the time the latter was injured, Juror No. 4 answered, "I don't know." It is also true of Juror No. 4's statement that she believed the victim choked when he coughed, based solely on her personal medical experience.

position that the victim had died from choking and she would not change her mind[4] and she refused to listen to what any of the other jurors said about this. Juror No. 8 reported that Juror No. 4 appeared to have her mind set already and was refusing to look at the evidence. Juror No. 11 reported that Juror No. 4 wanted to take a vote and leave, she did not want to hear anything and she thought she knew everything.

The pre-eminent complaint of 10 of the 12 jurors was that Juror No. 4 was rejecting *all* of the evidence presented at trial for either no reason or due to emotions or based on her own personal medical experience. Deliberation requires a juror to consider the evidence presented and apply the law to it. Rejecting all of the evidence, out of hand, for no reason or for reasons that are not supported by the evidence presented, is a failure to deliberate (see *People v. Williams* (2001) 25 Cal.4th 441, 448). The fact that eight jurors said that Juror No. 4 was failing to deliberate without being told by the court what constitutes the failure to deliberate is of no moment because the record makes clear that the allegations all 10 jurors made constitute a failure to deliberate.

In his reply brief, defendant relies heavily on *People v. Allen and Johnson* (2011) 53 Cal.4th 60 (*Allen and Johnson*), which was decided after defendant filed his opening brief. Therein, on the fifth day of deliberations, the foreman and another juror told the trial court that they believed the juror in question had made up his mind before deliberations began. (*Id*. at pp. 66, 74.) The foreman's reason for this conclusion was a

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[4] Specifically, she said, " . . . I'm not going to listen to any of [the medical evidence]. I know [the victim] choked when he coughed. And that's my story and I'm sticking to it."

statement the juror in question allegedly made the second day of deliberations that when the prosecutor rested, she didn't have a case. (*Id*. at p. 66.) However, the foreman admitted that when the juror in question was asked if he had made up his mind, he denied it and he had voted undecided during a preliminary vote taken that morning. (*Ibid*.) The other reporting juror alleged that the juror in question had, on several occasions, said that he was waiting for the prosecutor to bring her case forward and it never happened. (*Ibid*.) The juror in question admitted that he had said, more than once, that when the prosecutor rested, she had not convinced him. (*Id*. at p. 68.) One juror claimed that the juror in question had said that he had made up his mind before deliberations began and another juror suspected that the juror in question felt that way, but acknowledged that the juror in question had said otherwise. (*Id*. at p. 67.) Yet another juror acknowledged that the juror in question had said that he had already made up his mind, then recanted the statement. (*Ibid.*) The remaining seven jurors did not state that the juror in question had said anything about having already made up his mind and they did not express their belief that he had. (*Id*. at pp. 67-68.) The other reporting juror acknowledged that the juror in question had denied having already made up his mind, but she believed he was not being completely honest. (*Id*. at p. 66.) She also believed that the juror in question had misconstrued evidence to support his position that the prosecutor had not brought her case forward. The example of this she gave was a statement allegedly made by the juror in question that the eyewitness to the shootings who testified that an Hispanic friend of his sometimes punched his timecard for him must have been lying because "Hispanics . . . never cheat on timecards." (*Id*. at p. 66.) The juror in question admitted

making the statement. (*Id*. at p. 68.) The trial court excused the juror in question on the bases that he had already made his mind up before deliberations began and he based his opinion on the credibility of the eyewitness not on evidence presented at trial but on his experience with Hispanics as a group. (*Ibid*.) As the Supreme Court noted, "*There was no refusal to deliberate here*." (*Id*. at p. 70, italics added.)

The Supreme Court concluded that the record did not manifestly support the basis that the juror in question had made up his mind before deliberations began, thusly, " . . . [D]uring deliberations [the j]uror . . . did say words to the effect that, 'When the prosecution rested, she didn't have a case,' [but] the precise meaning of his statement is not entirely clear. The [trial] court interpreted it to mean that [the j]uror [in question] . . . had . . . prejudged the case by deciding to vote not guilty before hearing defense and rebuttal evidence, closing argument, jury instructions, and the views of his fellow jurors. [¶] . . . [¶] . . . [*The*] *comment*, however phrased, *was subject to some interpretation*. His remark was not an 'unadorned statement' that he had conclusively prejudged the case. It did not establish that he had ignored further evidence, argument, instructions, or the views of other jurors. . . . A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations. [¶] . . . The record does *not demonstrate that* [*the j*]*uror* [in question] . . . *refused to listen to all of the evidence, began deliberations with a closed mind, or declined to deliberate*. . . . [¶] . . . [¶] [The j]uror was participating in jury discussions. He voted 'undecided' on the fifth day of deliberations, just before the court

interviewed the jurors. No juror testified [that the j]uror [in question] . . . expressed doubt as to the prosecution's case during the presentation of evidence, and there was no indication that he stopped paying attention after the prosecutor rested. . . . [¶] . . . [¶] [His] 'undecided' vote and participation in deliberations were consistent with his representation[s] . . . that he had not made up his mind before deliberations began. The [trial] court here, however, implicitly rejected his denials of prejudging the case. Yet, the court made no findings that his 'undecided' vote and participation were somehow a sham or lacking in good faith. Moreover, the court did not ask [him] what he meant by his statement. . . . [¶] The court's approach to resolving the issue was also deficient. Based on [the j]uror . . . 's statement about the prosecutor's case, the court concluded that he 'had his mind made up.' In doing so, the court relied on 'the opinions of a large number of jurors including the fore[man]' . . . . [T]he court's finding that [the j]uror [in question] . . . 'made it relatively clear to a majority of the jurors . . . that he . . . had his mind made up at the time . . . before the matter had been submitted to the jury' is inconsistent with this record. [¶] The reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature. . . . What we can, and do, require is that each juror *maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination*. [¶] . . . [A] trial court should be wary of relying on the *opinions of jurors*, rather than on its own consideration of objective facts. . . . [A] court should focus on its own consideration of a juror's *conduc*t. The court cannot substitute the opinions of jurors for its own findings of fact. [¶] . . . [T]he court here appropriately relied on the

jurors' recitation of what [the j]uror [in question] . . . had said. . . . [A] reviewing court defers to the factual determinations the trial court makes when assessing the credibility of the jurors, who may offer conflicting accounts. [Citation.] That [the j]uror [in question] . . . made the comment was not disputed . . . . The jurors' opinions, however, about [the j]uror's comment should not have played a role in the court's ruling. . . . [¶] . . . That [the j]uror [in question] . . . was unimpressed by the strength of the evidence and unpersuaded by his colleagues' assertions during deliberations does not amount to prejudgment." (*Allen and Johnson*, *supra*, 53 Cal. 4th at pp. 72-76, italics added and original.)

As to the trial court's conclusion in *Allen and Johnson* that the juror in question was relying on facts not in evidence to determine the credibility of the eyewitness, the Supreme Court said, " . . . [A] distinction must be drawn between the introduction of new facts and a juror's reliance on his or her life experience when *evaluating* evidence. [¶] . . . 'Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss *an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct*. [Citations.]' [¶] *A juror may not express opinions based on asserted personal expertise that is different from or contrary to . . . the evidence*, but . . . we must allow those jurors to use their expertise in *evaluating and interpreting* that evidence. . . . [The juror] relied on his life experience in evaluating [the eyewitness's] credibility. [¶] The record here does not demonstrate that

[the j]uror . . . ignored or substituted his own beliefs for the court's legal instructions. . . . [T]he court informed the jury: 'A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others.' . . . [The eyewitness] claimed to be a . . . witness to the shootings, while other evidence indicated that he was not there. This conflict went to the heart of [his] credibility. [The j]uror . . . 's comments show that he did not believe [the eyewitness's] testimony that someone punched in for him on the day of the shootings, and thus rejected his testimony. [¶] . . . His . . . opinion about the reliability of Hispanics in the workplace did not involve specialized information from an outside source." (*Allen and Johnson*, *supra*, 53 Cal.4th at pp. 76-78, italics added.)

There is nothing in *Allen and Johnson* that alters our conclusions in this case. As we have stated, the Supreme Court initially observed in *Allen and Johnson* that it did not involve a failure to deliberate, which is the issue in this case. The Supreme Court's condemnation in *Allen and Johnson* of the trial court relying on jurors' *opinions* of the meaning of the challenged juror's statement, rather than the *conduct* of that juror and the courts own findings of fact has no application here. In *Allen and Johnson*, the challenged juror had made a statement whose meaning, the Supreme Court found, was not clear and which had to be interpreted. The High Court held that the trial court should not have relied on the other jurors' interpretation of the statement, especially where the record did not support that interpretation. Here, there were no ambiguous statements whose meaning had to be discerned by the trial court. Juror No. 4 denied doing those things the other jurors accused her of doing. They were not interpreting her remarks but reporting her conduct. The trial court gave several reasons for its conclusion that Juror No. 4 was

not deliberating and none of them were based on interpretations rendered by the other jurors.[5] We also disagree with defendant that Juror No. 4 was doing what the juror in *Allen and Johnson* was doing, i.e., permissibly relying on his own life experience in evaluating the credibility of one witness. *Rather, she was rejecting wholesale all* of the evidence presented at trial, including that for which there was no dispute, based on her own medical condition. Moreover, although *Allen and Johnson* was not a failure to deliberate case the portions of it we have italicized above demonstrate that what occurred in this case provided a sound basis for the excusal of Juror No. 4.

2. *Amendment of the Information*

The trial culminating in defendant's conviction was the second one in this case. The first had resulted in a hung jury. During the first trial, defendant was charged only with assaulting the victim by means of force likely to produce great bodily injury which resulted in the victim's death. During the pretrial period for the second trial, the People amended the Information to add a count of murder. After defendant pled not guilty to both counts, he brought a motion to dismiss the murder charge pursuant to section 995. The sole basis for this motion was that the evidence presented at the preliminary hearing,

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[5] To reiterate, those were: 1) Juror No. 4 asked to be excused because it would be easier for everyone; 2) Other jurors reported that Juror No. 4 said she makes up her mind and that's it, a comment she somewhat confirmed during her examination by the court; 3) Juror No. 4 rejected all the medical testimony because she decided, without any supporting evidence, that the doctors who testified had conspired with each other to manufacture their testimony ; 4) Juror No. 4 rejected all the evidence based on her personal medical condition and, 5) Juror No. 4 was not able to willing to explain the basis for her conclusion that someone else must have been with the victim during the time he was injured.

which had taken place when he had been charged only with aggravated assault resulting in death, was insufficient to support the murder charge. Concluding that evidence presented at the preliminary hearing was supportive of a finding of implied malice, the trial court denied the motion to dismiss. Defendant here concedes that his trial attorney did not file a motion to dismiss on the basis of vindictive prosecution.

When a trial ends in a hung jury, a mistrial is declared, and the charging document is amended before retrial to add a more serious charge, a presumption of vindictiveness in adding the more serious charge arises. (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 363-365.)

In *People v. Edwards* (1991) 54 Cal.3d 787, 826 (*Edwards*), the defendant contended that the prosecutor amended the complaint to charge a special circumstance which had not originally been charged, in part, to retaliate against him for asserting his right to counsel, for temporarily refusing to waive extradition and for refusing to talk to the police, all before trial began. The Supreme Court held, " . . . [T]he issue is not properly before us because defendant neither moved to dismiss the amended complaint nor otherwise objected on this basis. . . . '[*B*]*ecause a claim of discriminatory prosecution generally rests upon evidence completely extraneous to the specific facts of the charged offense*, we believe the issue should not be resolved upon evidence submitted at trial, but instead should be raised . . . through a pretrial motion to dismiss.' [Citation.] *This rationale applies to claims of vindictive prosecution*. [Citation.]" (*Id*. at p. 827, italics added.)

Defendant seeks to distinguish *Edwards* on the basis that it involved a pre-trial situation where jeopardy had not yet attached and, in this case, it had. However, *Edwards*, itself, made clear that whether jeopardy had attached is relevant only to the question whether the *presumption of vindictiveness* should arise because in contrast to "'the pretrial stage [where] "the prosecutor's assessment of the proper extent of prosecution may not have fully crystallized[,] . . . once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which [defendant] should be prosecuted." [Citations.]'" (*Edwards*, *supra*, 54 Cal.3d. at pp. 827-828.) Additionally, the presence of the presumption of vindictiveness at the pretrial stage would interfere with prosecutorial discretion and the give and take necessary for effective plea bargaining (*In re Bower* (1985) 38 Cal.3d 865, 875, 876 (*Bower*)).

That there is sound reason for the application of the forfeiture rule of *Edwards* to this case is proven by the language in *Edwards* italicized above, which addresses the means available to the prosecution, when a motion to dismiss is brought on the basis of vindictiveness, to rebut the presumption of vindictiveness. That is, the prosecution may seek to rebut the presumption of vindictiveness by demonstrating that "the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and . . . that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." However, by failing to bring a

motion to dismiss below for vindictive prosecution, defendant deprived the People of the opportunity to make this demonstration.

Defendant's assertion that the fact that the trial court concluded, during the motion to dismiss that *was* brought, that there was sufficient evidence presented at the preliminary hearing of the aggravated assault charge to prove implied malice for the murder charge, did not establish that "there was no objective change in the circumstances or the state of the evidence that were not known to the prosecution when they brought the . . . [aggravated] assault . . . charge."

Defendant's alternative end-round the forfeiture rule, i.e., that we can determine for ourselves that there was no basis for rebutting the presumption of vindictiveness by comparing the evidence presented at the first and second trials is equally problematic. In support of his position, defendant cites *Bower*, *supra*, 38 Cal.3d 865 and *People v. Valli* (2010) 187 Cal.App.4th 786 (*Valli*). However, in *Bower*, there was a writ proceeding below during which the prosecutor explained why he had charged defendant with first degree murder after the first trial, during which he had stipulated that defendant was guilty of no more than second degree murder. (*Id*. at pp. 870-871.) The appellate court in *Bower* thus had the opportunity to compare the prosecutor's stated reasons against the record before it to determine their legitimacy. (*Id*. at pp. 871, 877, 879.) Here, there is nothing in the record before this court about the prosecutor's reasons for charging defendant with murder after the mistrial. Thus, there is nothing for us to review.

In *Valli*, the defendant was acquitted of murder, attempted murder and being an ex-felon in possession of a gun, then was charged with two counts of felony evading

based on evidence presented at the first trial, which had been introduced there to show defendant's consciousness of guilt. (*Valli*, *supra*, 187 Cal.App.4th at p. 790.) Defendant's guilt at the felony evading trial was proven in part by his testimony at the first trial in which he admitted committing felony evasion. (*Ibid*.) The defendant had brought a pretrial motion to dismiss the evading counts on the basis of section 654 and a posttrial motion to dismiss on the basis of vindictive prosecution. (*Valli*, at p. 790.) As to the latter, he alleged that he had been charged with felony evasion because he testified at his first trial in his own behalf. (*Id*. at p. 802.) The *Valli* court first noted that defendant had been *acquitted* in the first trial, therefore, there was no basis for a presumption of vindictiveness. (*Id*. at pp. 804-805.) The court cited in support a federal case holding, "'Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace. [Citation.] We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality.' [Citation.]" (*Id*. at p. 804.) The *Valli* court overlooked the fact that defendant had failed to bring a pretrial motion to dismiss for vindictiveness "[b]ecause defendant's posttrial motion was based on a new case [(i.e., the felony evasion case)], and because defendant contends if his motion was untimely he was denied effective assistance of counsel . . . ." (*Id.* at p. 802.) In rejecting defendant's claim that he had been vindictively prosecuted, the appellate court held, as a matter of law, and as already stated, that the presumption of vindictiveness had not arisen. The court added that the timing of the felony evasion

charges did not suggest vindictiveness and defendant had presented no evidence demonstrating same. (*Id*. at p. 805.) *Valli* cannot be read as support for the proposition that we may determine the merits of defendant's claim of vindictiveness when, as here, the presumption does apply, but the People have not been given an opportunity to rebut that proposition.

For the same reason, we must reject defendant's fall-back assertion that his trial attorney was incompetent for failing to bring a motion to dismiss on the basis of vindictiveness. This is because the record before us supplies no basis whatsoever for a conclusion that such a motion would have been successful. (See *Strickland v. Washington* (1984) 466 U.S. 668, 691-693.)

DISPOSITION

The trial court is directed to file an indeterminate abstract of judgment, reporting, inter alia, the sentence imposed for aggravated assault of 25 years to life, rather than a determinate abstract reporting a term of 25 years, as currently exists. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.