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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE ELLIS,

Defendant and Appellant.

F066937

(Super. Ct. No. 11CM1270)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Larenda R. Delaini and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Robert Lee Ellis guilty of three counts of attempted murder (Pen. Code,¹ §§ 187, subd. (a), 664), three counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of discharging a firearm at an occupied motor vehicle (§ 246). The jury also found true special allegations that Ellis personally used a firearm (§ 12022.5), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), which proximately caused great bodily harm (§ 12022.53, subd. (d)), and personally inflicted great bodily injury upon two of the victims (§ 12022.7, subd. (a)). He was sentenced to 92 years to life, plus 35 years in state prison.

On appeal, Ellis contends (1) the trial court erred in denying his motion for a new trial based on juror misconduct, (2) the trial court erred by failing to instruct the jury on imperfect self-defense, (3) after the jury announced it could not reach a verdict on the attempted murder counts, the trial court gave an impermissibly coercive supplemental instruction, and (4) the cumulative effect of the errors warrants reversal.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the early evening of April 18, 2011, a shooting was reported in the Home Garden neighborhood of Hanford. Residents heard gunfire, and a vehicle parked in a driveway parallel to Home Avenue at Third Place sustained damage from apparent bullet strikes. The copper jacket of a bullet, shards of glass, a spent cartridge, and a piece of a bullet were found on the street.

The same date, Alonzo Curry was treated for a gunshot; an object that appeared to be a bullet was extracted from his leg. Bryan Walker was also treated for gunshot wounds, and metal objects were extracted from his back.

On April 22, 2011, New Mexico state police officers stopped a Greyhound bus traveling east on I-40 in New Mexico and detained Ellis, Mark Scott, and Donte

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

Patterson. Ellis admitted he was traveling under the alias Michael Chance.² The same day, the Kings County District Attorney filed a criminal complaint against Ellis, Scott, and Patterson, charging them with attempted murder, assault with a firearm, and discharging a firearm at an occupied motor vehicle based on the shooting in Home Garden.

Ellis's jury trial began on June 25, 2012.³ The only witness to testify that he saw the shooting was Sumnler Townsend. He was 40 years old at the time of trial. In the 1990's Townsend was convicted of transporting a controlled substance, sales of narcotics, and driving under the influence with injury. He has known Ellis since Ellis was a baby. He thought Ellis was about 25 years old.

Townsend testified that around 2:00 p.m. on April 18, 2011, he drove to a parking lot on Irwin Street where "everybody hung out." He noticed a group of about seven or eight children, ranging in age from 10 to 16 years old. The children were staring at Townsend and "looking real violent like something was wrong." Townsend asked the children what was wrong with them and "shooed all the kids off." He thought about the situation and went to apologize to the children for telling them to leave. Then Townsend approached Ellis and asked him why he told "the kids to jump on me." Ellis responded, "Man, what, what you want to do?" Townsend understood this to mean Ellis wanted to fight. Townsend was wearing flip-flops. He started asking people for shoes because he did not want to fight in flip-flops, but no one gave him shoes. Ellis walked to his car saying he would show Townsend something, which Townsend understood to mean Ellis

² The bus driver provided the manifest and collected tickets to the officers. After matching the tickets to the passengers other than the suspects, three unmatched tickets remained under the names Michael Chance, Kevin Johnson, and James Crawford. Patterson tried to convince the officers his name was Kevin Johnson, and officers assumed, by a process of elimination, that Scott was traveling under the name James Crawford. Scott was found with a .45-caliber revolver.

³ Codefendants Scott and Patterson were not tried at this time.

had a pistol. Townsend said, “Don’t play with me with no pistols.” Ellis put on white gloves. Townsend said: “Man, if you want to fight, you one that called me out to a fight. If you want to fight let’s fight, we don’t get pistols on each other.” Townsend, however, did not see a pistol. Ellis got in his car and drove away. Townsend stayed in the area for 10 or 15 minutes and then left.⁴

Townsend was not angry, but he thought, as the older person, he should talk to Ellis to defuse the situation. Townsend, his brother Curry, and Walker headed out to look for Ellis in Curry’s gray Chevy Malibu. Curry drove, Townsend sat in the front passenger seat, and Walker sat in the back behind the driver. They drove around Hanford looking for Ellis. As they drove around, they saw Ellis at Houston Avenue and 11th Avenue. Ellis was in a blue Mustang with Scott and Patterson. Scott was driving, Patterson was in the front passenger seat, and Ellis sat in the back. Townsend thought they could talk to Ellis as they crossed the intersection, but Walker said not to stop, “keep going, they might got something.” So they did not stop to try to talk to Ellis and instead drove to Walker’s grandmother’s house. They “stood out there by the older people” and tried to wave at Ellis to stop and talk to them. Townsend thought if Ellis and the others saw Townsend and his companions “by the older people,” they would realize “nothing [was] going on.” The blue Mustang drove by Walker’s grandmother’s house twice but did not stop.

Later the same day, around 5:00 or 6:00 p.m., Townsend saw Ellis in the blue Mustang again. Townsend was in the gray Malibu; Curry was driving, Townsend was in

⁴ Townsend also testified that, the next day, he saw a cell phone recording of part of this incident and he turned it over to the police. A CD of the recording was entered into evidence. According to a transcription of the video, Townsend asked for size 11 shoes, and Ellis said “Put em on[,] put em on” and “Yeah yeah yeah go get em.” Townsend said, “Don’t go play with me and no pistols” and “get out the car nigga.” An unidentified female is heard saying “that nigga[’]s a punk,” then laughter and the revving of a car engine are heard. An unidentified female said, “he so scared he about to back into something.”

the front passenger seat, and Walker was in the back. Townsend and his companions were traveling eastbound on Home Avenue and the Mustang turned onto Home traveling westbound. The cars passed each other, and then each car made a U-turn. The two cars stopped on the street next to each other, with the driver's side of the Malibu facing the driver's side of the Mustang. Walker talked to Ellis, who was sitting in the back seat of the Mustang, while Townsend talked with someone on his cell phone. The driver's window of the Mustang was rolled down. When Townsend heard Ellis say, "They talking about killing me," Townsend got off the phone and said to Ellis, "Ain't nobody talking about killing you" and "You the only one talking about fighting and killing." Townsend was trying to defuse the situation. He testified: "I was talking to him and I was telling him that you don't want to go there with your big homies. You don't get no guns and try to shoot us." At that time, Townsend and his companions did not know there were guns in the Mustang. There were no weapons in the Malibu. Ellis responded, "Nah, nah, nah." Townsend said, "you don't want to go there in Hanford," and then "[Ellis] said, 'Shut up, shut up, nigger,' and go to shooting." Ellis pointed a gun out of the Mustang and everyone in the Malibu ducked. Townsend heard shooting for about 15 seconds. He thought there were over 20 shots. He heard two sets of shots that sounded different from each other.

After the shooting stopped, Townsend looked up, and the blue Mustang was gone. Curry was bleeding from his left ankle, and Walker had been shot in the back. They drove to Townsend's house. Their first intention was not to go to the hospital, but they changed their minds when they saw the extent of the injuries. Townsend explained their first intention was not "really to tell anything" because of "growing up that way" and because Curry and Walker were on parole. The Malibu was parked in Townsend's garage. Townsend, his wife, and Curry drove to the hospital in Townsend's Chevy Impala. Walker went to the hospital separately with his wife. At the hospital, Townsend was approached by police officers, and he did not tell them what happened. Townsend

did not think he had done anything wrong that day, but he did not want to “snitch” and he did not want Curry or Walker to be found in violation of parole. About two days after the shooting, Townsend decided to tell the truth to the police.

Walker, who was 39 years old at trial, testified that he did not recall April 18, 2011. He only remembered waking up in the hospital and his back was injured, but he did not remember being shot. He did not remember anything about speaking to the police after he was shot. Walker testified that he knew Ellis his whole life. Curry testified he was shot in the ankle, but he did not remember how it happened or who shot him. He had heard of Ellis but did not know him.

Detective Rachel Moroles from the Kings County Sheriff’s Office conducted an interview with Walker two days after the shooting, and an audio recording of the interview was played for the jury. In the interview, Walker reported he was in a car with Curry and Townsend, and Townsend was trying to flag down a blue Mustang. Townsend was trying to talk to the people in the Mustang and “get the situation straight.” Walker saw the Mustang make a U-turn. He identified Ellis, Scott, and Patterson as the occupants of the Mustang. Ellis or Scott said, “you lookin’ for me.” Walker rolled down his window and said, “hey man these dudes ain’t comin’ down here to look for you” and “we[’re] folks ... [Ellis’s] grandmother is in the house with my grandmother right now.” Walker told them his word was good and they “need to talk this out.” Townsend told Ellis that Ellis was the one talking about getting a gun. Walker said no one in the Malibu had a gun. He said, “let’s talk this out,” and Townsend agreed. Then Ellis or someone else in the Mustang said, “shut up,” and “fuck you niggas” and the shooting began. Ellis, sitting in the backseat of the Mustang, shot at them with a chrome automatic pistol. Walker thought someone else must have been shooting too, because he heard two different types of gunshots. After the shooting, Townsend wanted to go to the hospital, but Walker was on parole and did not want to go. He called his wife and she came and

got him. Walker told Moroles he did not want to tell on Ellis, but he did not want to go to jail either.

The Kings County Sheriff's Office took possession of the gray Malibu on April 20, 2011, and processed it for evidence. A deputy sheriff testified there appeared to be about six bullet impact marks on the windshield, a bullet hole in the driver well, six holes in the driver's door, a bullet hole on the driver's side rear door, and another bullet hole in the quarter panel on the driver's side. Metal fragments were found in a door panel, a bullet was recovered from the driver's door area, and seven fragments were recovered from the rear area. The Malibu was swabbed for gunshot residue testing, and a criminalist found lead particles in the samples. This result is not inconsistent with a firearm having been shot in the vehicle, but it is also consistent with the vehicle being shot at, as lead particles disperse when a bullet hits the hard surfaces of a vehicle such as metal and glass.

A Visalia police officer discovered the blue Mustang in Visalia a day after the shooting. The car had been reported stolen, and it was found partially on the sidewalk with the driver's side window broken and a flat tire. There were no bullet holes on the car and no damage to the interior. A nine-millimeter shell casing was found underneath the driver's seat. Samples were taken for gunshot residue testing. A criminalist found many particles with lead, antimony and barium, which is characteristic of the discharge of a firearm.

Levoid Shoals testified that he was Ellis's cellmate in jail in December 2011. Shoals knows Townsend, Walker, and Curry. He testified that Ellis told him about the shooting. Ellis said there was a problem with a friend and the friend was looking for Ellis. Ellis said that Townsend was upset with Ellis because "nobody looked out for him when he was in jail." Right before the shooting, Walker was saying they should talk it out, but Ellis said, "fuck that," and began shooting. Ellis and his companions went to Las Vegas and they were going to Mexico. Shoals had been a snitch before.

On June 29, 2012, the jury began deliberations and reached a verdict, finding Ellis guilty of all charges and finding true all special allegations.

On February 14, 2013, Ellis filed a motion for a new trial based on juror misconduct. Ellis asserted that a juror improperly communicated with Ellis's cousin about the case during the trial. On March 11, 2013, the trial court denied the motion for a new trial and sentenced Ellis.

Ellis filed a notice of appeal on March 25, 2013.

DISCUSSION

I. Motion for new trial

Ellis contends the judgment must be reversed because the trial court erroneously denied his motion for a new trial based on jury misconduct in violation of his rights to due process and a jury trial. This contention lacks merit.

A. Background

In his motion for a new trial, Ellis asserted that Juror 90602 contacted Frederick "Cougar" Williams, whom the juror knew was Ellis's cousin, and discussed the proceedings of the trial. He argued that he was entitled to a presumption of prejudice based on the juror's misconduct, "unless, and until, the People carry their burden to rebut it."

After the People argued the motion was not supported by an affidavit from a percipient witness, Ellis filed the declaration of Williams on March 1, 2013.⁵ In his declaration, Williams stated that Ellis was his cousin and that he knew Juror 90602 because they grew up together and played sports together. Williams stated that, during the trial, he received a text message from the juror informing him that he was on the jury

⁵ Initially, Ellis's motion was supported only by a declaration from his attorney, who stated that "investigation" revealed that a juror had contacted Ellis's cousin during deliberations. An unsigned investigator's report was attached to the declaration documenting the investigator's telephone interview with Williams.

in Ellis's trial. Williams texted the juror back and later spoke with him on the telephone. Williams further stated: "[Juror] 90602 told me during these phone calls that things were looking good for Ellis as the evidence was weak. The following day I was called by 90602 and 90602 told me that another [*sic*] he and another juror were pressured by some older jurors to change their vote during deliberation. During deliberations, 90602 texted me and called me."

On March 11, 2013, the trial court heard arguments on the motion for a new trial. Observing that neither party had requested it, the court decided not to hold an evidentiary hearing on the motion. The court reasoned that Ellis's attorney had ample opportunity to talk to Williams about Juror 90602's communications with him, and "that's put forth in the declaration under penalty of perjury."

The court found Juror 90602 committed obvious misconduct by contacting Williams. It also found possible misconduct in the juror failing to inform the court he knew Ellis's family. Considering the entire record and the circumstances of the misconduct, however, the court determined there was no prejudice. The court explained:

"The declaration of Mr. Williams in this matter does not give the Court any cause to believe that there was tampering of the jury or that there was any, anything negative or wrong that was going on by the, by the juror.

"At this point in time, it appears that from what—it appears if I believe Mr. Williams'[s] statement, that the juror called him, told him kind of what was going on, like you're chatting, and then also telling him probably what he wanted to hear, that it looks good for [Ellis], and then when they go into deliberations like they're being told, instructed by the Court, you know, everybody's to consider their own opinion, discuss it with everybody else, come to a conclusion and render a fair and impartial verdict.

"It appears that after the trial ..., the juror indicated to Mr. Williams that, you know, something to the effect that, 'Hey, the other older jurors pressured me.'

"Well, that may be, and I expect, I don't know what goes on in a jury room, but I expect that there's a give and take whether there's older

more experienced jurors versus younger jurors, but I've also seen other cases where younger jurors outweigh the older jurors. So you can't always go by age as to what's going on in the jury room.

“And the fact that they came out and they rendered a verdict and then the Court polls each individual member to see whether or not this is their true and correct verdict, it appears that there's substantial time where, when the juror had the opportunity to say, ‘No, I was pressured by these older guys.’”

“And, quite frankly, sometimes this Court has seen that occur, and at that point in time then we have to take a different look at what's going on in the jury room. That didn't happen here. As such, ... the Court finds that the motion for a new trial does not have merit, and the Court will deny the motion.”

Accordingly, the trial court denied Ellis's motion for a new trial.

B. Analysis

“An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is “capable and willing to decide the case solely on the evidence before it” [citations].” (*In re Hamilton* (1999) 20 Cal.4th 273, 293–294.) “[W]here a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, ‘open to [corroboration by] sight, hearing, and the other senses’ [citation], which suggests a *likelihood* that one or more members of the jury were influenced by improper bias.” (*Id.* at p. 294, fn. omitted.) Juror misconduct includes “a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors” (*Ibid.*)

Juror misconduct raises a rebuttable presumption of prejudice. (*In re Hamilton, supra*, 20 Cal.4th at p. 295.) However, the “presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the

nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]” (*Id.* at p. 296.)

Whether juror misconduct is prejudicial is a mixed question of law and fact that we review independently. We accept the trial court’s factual findings if supported by substantial evidence. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.)

Here, the court implicitly accepted Williams’s declaration as true and found Juror 90602 engaged in misconduct by contacting Williams and by failing to disclose his relationship with a member of Ellis’s family. Williams’s declaration provides substantial evidence for these findings. We agree with the trial court, however, that given the nature of the misconduct, there is no substantial likelihood of prejudice. There is no evidence that Juror 90602 received outside information from Williams or from any other source. The juror reached out to contact Williams and told him that “things were looking good for Ellis.” While this is clear misconduct, it does not indicate bias against Ellis. To the contrary, it suggests that if the juror held a bias, it would be in favor of Ellis. (See *People v. Tafoya, supra*, 42 Cal.4th at p. 193 [no prejudice where juror discussed Catholic Church’s position on the death penalty with retired priest; among other things, priest’s opinion against the death penalty “weighed in favor of leniency toward defendant”].)

Contrary to Ellis’s argument, the misconduct in this case is not similar to the juror misconduct in *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*) and *People v. Pierce* (1979) 24 Cal.3d 199 (*Pierce*). In *Honeycutt*, the jury foreman called an attorney and asked him legal questions about involuntary manslaughter and diminished capacity, issues relevant to the case on which the jury foreman was deliberating. (*Honeycutt, supra*, at p. 154.) Observing that introducing outside views into the jury room creates a high potential for prejudice, the California Supreme Court concluded that the presumption of prejudice was not rebutted as the “defendant may have been deprived of

the benefit of the jury's full consideration of his diminished capacity defense.” (*Id.* at pp. 157–158.) In *Pierce*, the jury foreman talked to an investigating police officer who testified at trial. The jury foreman went to the officer's house and asked “several questions about the state of the evidence and the district attorney's method of presenting his case,” which the officer answered. (*Pierce, supra*, at p. 205.) Under those circumstances, the California Supreme Court concluded the presumption of prejudice was not rebutted but was *reinforced* by the evidence. (*Id.* at p. 209.) In contrast to the jurors in *Honeycutt* and *Pierce*, Juror 90602 did not seek outside information on the case.

The present case is also distinguishable from *Green v. White* (9th Cir. 2000) 232 F.3d 671, cited by Ellis. In that case, the jury foreman lied to the court about his criminal history, which included an assault conviction and a felony conviction that rendered him ineligible for jury service. (*Id.* at p. 672.) Further, at least two other jurors heard the jury foreman say he knew the defendant was guilty the moment he saw him, and one juror overheard him say he wished he could shoot the defendant. (*Id.* at pp. 673–674.) The Ninth Circuit Court of Appeals concluded there were serious questions about the juror's ability to impartially serve on a jury. In addition to lying to the court about his criminal history in order to serve on the jury, the juror's statements brought “his impartiality into serious question, and provide[d] strong circumstantial evidence of his motive for lying: his stated desire to get a gun and kill [the defendant] himself” (*Id.* at p. 677.) There is no evidence in this case that Juror 90602 rushed to judgment or was otherwise biased against Ellis.⁶

We also reject Ellis's argument that we should remand the case to the trial court to hold an evidentiary hearing on his motion for a new trial. Ellis cites *People v. Bryant*

⁶ We note that, on appeal, Ellis argues only that the misconduct by *Juror 90602* warrants a new trial. He does not argue that Williams's reference to Juror 90602 being “pressured by some older jurors” was evidence of misconduct by other jurors.

(2011) 191 Cal.App.4th 1457, in which the Court of Appeal concluded that jurors' statements submitted by the parties in support of, and in opposition to, a motion for a new trial were all inadmissible and could not be the basis for a finding of jury misconduct. (*Id.* at p. 1467.) At trial, however, the parties had waived any objection to the use of unsworn statements at the suggestion of the trial court. The Court of Appeal concluded that the appropriate remedy under those circumstances was "to return the matter to the trial court for a full and complete hearing with competent evidence." (*Id.* at p. 1471.) There is no similar evidentiary defect in this case. Williams was a percipient witness of the alleged misconduct by Juror 90602, and his declaration was signed under the penalty of perjury with the date and location of execution. Therefore, his declaration was competent evidence upon which the trial court properly based its ruling. (Cf. *id.* at p. 1470; Code Civ. Proc., § 2015.5.) We see no reason to remand this case for an evidentiary hearing.

II. Imperfect self-defense

Ellis contends that reversal of the attempted murder convictions is required because the trial court failed to instruct the jury on imperfect self-defense attempted voluntary manslaughter as a lesser included offense of attempted murder. We disagree.

A. Background

In addition to the testimony described above, Townsend testified that he and Ellis had an altercation about a year before the trial. The altercation occurred the previous summer and was over Ellis "putting [Townsend's] name in something that [he] didn't have anything to do with." Townsend testified that, since the altercation, he and Ellis saw each other off and on and "talked [and] smoked bud together."

During the jury instruction conference, the trial court stated that it had not heard any evidence warranting an instruction on attempted voluntary manslaughter and would not give such an instruction absent request or objection. Ellis's attorney responded that he had no request or objection.

Ellis did request the court give jury instruction CALCRIM No. 3470, “Right to Self-Defense or Defense of Another (Non-Homicide).” Outside the presence of the jury, Ellis’s attorney told the court the portions of CALCRIM No. 3470 he believed should be given. In response, the court stated, “The Court has been giving the [element of self-defense] on the other instructions concerning the crimes only because of the fact that *if the jury were to disregard almost all the testimony except the testimony of being chased, there could be an implication of self-defense*, and that is why I have been giving it as is.”⁷ (Italics added.) The court noted, however, that whether there was substantial evidence to support self-defense “is very close.”

The trial court then instructed the jury on self-defense as follows:

“Self-defense is a defense to the crimes charged. [Ellis] is not guilty of those crimes if he used force against the other person in lawful self-defense, or defense of another. [Ellis] acted in lawful self-defense or defense of another if:

“One, [Ellis] reasonably believed that he or someone else was in imminent danger of suffering bodily injury, or was in imminent danger of being touched unlawfully.

“Two, [Ellis] reasonably believed that the immediate use of force was necessary to defend against that danger.

“And three, [Ellis] used no more force than was reasonably necessary to defend against that danger. [¶] ... [¶]

“Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be.... [Ellis] is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation.... If [Ellis]’s beliefs were reasonable, the danger does not need to have actually existed. Someone who has been threatened or harmed

⁷ At this point, the court already had instructed the jury on assault with a firearm (counts 4, 5, and 6), assault as a lesser included offense of assault with a deadly weapon, and shooting at an occupied motor vehicle. For each offense, the court stated an element the People were required to prove was that Ellis did not act in self-defense or in defense of someone else.

by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.

“A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself, and if reasonably necessary to pursue an assailant until the danger of death or bodily injury has passed”

The trial court did not instruct the jury on attempted voluntary manslaughter.

B. Analysis

A trial court has a duty to instruct, “sua sponte, on all theories of a lesser included offense which find substantial support in the evidence.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support.” (*Ibid.*) We review de novo a trial court’s decision not to give an instruction on attempted voluntary manslaughter as a lesser included offense of attempted murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

Attempted murder is the attempt to commit an unlawful killing of a human being, with malice aforethought. (§§ 664, 187; *People v. Williams* (1988) 199 Cal.App.3d 469, 475.) “Attempted manslaughter is a direct but ineffectual act, committed without malice, but intended to kill a human being.” (*People v. Lewis* (1993) 21 Cal.App.4th 243, 251.) “Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense. ‘Only these circumstances negate malice when a defendant intends to kill.’ [Citation.]” (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) It follows that attempted voluntary manslaughter is a lesser included offense of attempted murder under the same circumstances, that is, when there is evidence the defendant attempted to kill upon heat of passion or in the unreasonable but good faith belief that deadly force was necessary to defend himself or others. The latter circumstance is called unreasonable or imperfect self-defense.

“Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury.” (*People v. Booker* (2011) 51 Cal.4th 141, 182.) Imperfect self-defense is similar to, but distinguishable from, true or perfect self-defense. (*People v. Barton* (1995) 12 Cal.4th 186, 199.) “The sole difference between true self-defense and ‘unreasonable self-defense’ is that the former applies only when the defendant acts in response to circumstances that cause the defendant to fear, and would lead *a reasonable person* to fear, the imminent infliction of death or great bodily injury (§§ 197, 198); unreasonable self-defense, on the other hand, does not require the defendant’s fear to be reasonable. [Citation.]” (*Id.* at pp. 199–200.)

Ellis contends that the same evidence that prompted the trial court to give CALCRIM No. 3470 on self-defense warranted an instruction on imperfect self-defense instruction. (See *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [“If there was substantial evidence of [the defendant’s] ‘honest belief’ [of imminent peril] for self-defense purposes, there was substantial evidence of his ‘honest belief’ for *imperfect* self-defense purposes.”].) Ellis acknowledges that this court rejected the contention that a trial court is required *sua sponte* to instruct on imperfect self-defense whenever it instructs on perfect self-defense in *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1276. Ellis urges this court to reconsider our decision in *Rodriguez*. We need not do so to decide this case because the evidence presented at trial did not support an instruction on perfect self-defense either.

Ellis relies on the court’s observation “if the jury were to disregard almost all the testimony except the testimony of being chased, there could be an implication of self-defense.” Actually, we cannot agree that substantial evidence was presented in this case to support perfect self-defense. The evidence showed that Townsend and Ellis had an altercation a year earlier. There was no evidence that violence was threatened at that time or that there had been any intervening confrontation between Townsend and Ellis until

April 18, 2011. The confrontation at the parking lot involved an invitation to fight, presumably a fist fight, and a cell phone recording confirmed Townsend’s testimony that he told Ellis not to “play with” a pistol. A woman or girl said that Ellis was “so scared.” Townsend and his companions then drove around Hanford looking for Ellis. Before the shooting occurred, the blue Mustang passed Townsend, who was riding in the Malibu, and then made a U-turn to confront him. The Malibu was found with multiple bullet holes, and both the driver and backseat passenger suffered gunshot wounds. There was no evidence that Townsend or anyone else in the Malibu had a gun and no evidence that the Mustang was fired at.⁸ Townsend, Walker, and Shoals all stated that Townsend and Walker were trying to resolve the conflict by talking, and Ellis’s reaction was to shoot.

For perfect self-defense, the defendant must have an objectively reasonable fear of imminent harm and use only the force necessary to repel that harm. (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629.) ““Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice.”” (*Ibid.*) Further, ““deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury”” (*Id.* at pp. 629–630.) Here, there is no substantial evidence that Ellis feared *imminent* harm from Townsend or that shooting at Townsend, Walker, and Curry was a reasonably necessary

⁸ In his reply brief, Ellis argues the jury reasonably could have inferred that Townsend or someone in the Malibu fired at Ellis first based on Townsend’s testimony that he heard two types of gunshots. We disagree. Townsend testified that he was talking to Ellis when Ellis began shooting and then everyone in the Malibu ducked. Townsend testified that Curry, who was in the driver’s seat, moved over and put the car in neutral as he ducked. Walker was hit in the back, suggesting he was turned away from the shooter and bent down. In his interview with Moroles, Walker stated that no one in the Malibu did any shooting. He saw Ellis shooting and everyone in the Malibu was “layin’ down.” Walker further stated that the first gunshots were not aimed at the backseat of the Malibu where he was because, as he lay down in the backseat, he could see the front windshield breaking. Then there were different sounding gunshots that did seem to be aimed toward the backseat. Townsend’s and Walker’s statements do not support an inference that someone in the Malibu shot at the Mustang first.

response. Although the trial court gave an instruction on self-defense, the instruction was not required by the evidence.

We separately conclude there was no substantial evidence to support an instruction on imperfect self-defense. We recognize that substantial evidence of a defendant's state of mind may be present without testimony from the defendant. (*People v. De Leon*, *supra*, 10 Cal.App.4th at p. 824.) But the evidence presented—earlier in the day, Townsend was willing to fight Ellis (apparently after Ellis invited him to fight) and Townsend and his companions drove around town looking for Ellis—is not substantial evidence from which a jury could infer that Ellis held an actual but unreasonable fear of imminent harm from Townsend. Moreover, even if we assume Ellis actually but unreasonably feared that Townsend was “chas[ing]” him in order to harm him, we cannot say that Ellis's response of confronting Townsend and shooting at a car containing Townsend and two other occupants merits an instruction on imperfect self-defense.

III. Supplemental instruction after jury informed court it was deadlocked

Ellis next argues that the judgment of guilt on counts 1, 2, and 3 must be reversed because the trial court gave a supplemental instruction that coerced verdicts from the jury.

A. Background

The jury began deliberations around 10:30 a.m. on June 29, 2012.⁹ That afternoon, the jury submitted a note to the court stating that it had reached a verdict on counts 4 through 7, but could not reach an agreement on counts 1, 2, and 3. The note further informed the court, “We do not believe we will reach a verdict on Counts 1, 2 or 3.” At 2:55 p.m., outside the presence of the jury, the trial court discussed the jury's note with the attorneys. The court observed that it had not been a long period of deliberation

⁹ The clerk's minute order indicates the jury commenced deliberations at 10:13 a.m. The trial court, however, stated the jury began deliberation at 10:34 a.m.

for a case “of this nature” and stated its intention to read the *Moore* instruction based on the instruction approved of in *People v. Moore* (2002) 96 Cal.App.4th 1105 (*Moore*). The court solicited Ellis’s attorney’s position on giving the *Moore* instruction, and he responded: “Your Honor, it is really up to you. I don’t have any objection to reading ... the *Moore* jury instruction, I think that helps sometimes.” (Italics added.)

The jurors then returned to the courtroom, and the court addressed them as follows:

“Good afternoon, ladies and gentlemen, I have received from you your note indicating to me that you cannot or feel you cannot reach an agreement on Count 1, 2 or 3 in this matter. You have reached a verdict you have indicated on the remaining counts. I do note that you have been out since 10:34 this morning with a break for lunch of course. However, in a case like this ... it is not an unduly lengthy case, but it is longer than some of the cases Kings County has done. It is my intention to at least send you back for a little bit more time to further contemplate the issues of [Counts] one, two and three in this matter with this instruction. After awhile once you have done what I have asked you to do, if you still are in the position that you feel you’re in, then let me know again and I will bring you back out and I’ll ask some other questions.

“Ladies and gentlemen, I have been advised that you may be having some difficulties in arriving at a verdict. I have further instructions, directions to give you as to any matters upon which you are unable to reach a verdict. It has been my experience on more than one occasion that a jury which initially reported it was unable to reach a verdict was ultimately able to arrive at verdicts on one or more of the counts before it. To assist you in your further deliberations, I am going to further instruct you as follows:

“Your goal as jurors should be to reach a fair and impartial verdict if you’re able to do so based solely on the evidence presented, and without regard for the consequences of your verdict, regardless of how long it takes to do so. It is your duty as jurors to carefully consider, weigh and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors. In the course of your further deliberations you should not hesitate to reexamine your views or request your fellow jurors to reexamine theirs. You should not hesitate to change the view you once held if you are convinced it is wrong, or to suggest other jurors change their views if you

are convinced they are wrong. Fair and [ef]fective jury deliberations require a frank and forthright exchange of views. As I previously instructed each of you, you must decide the case for yourself. You should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment.

“Both the People and [Ellis] are entitled to the individual judgment of each juror. As I previously instructed[,] you have the absolute discretion to conduct your deliberations in any way you deem appropriate. May I suggest that since you have not been able to arrive at a verdict using the methods you have chosen, that you consider to change the methods you have been following at least tempora[ri]ly, and try any new methods. For example, you may wish to consider having different jurors lead the discussions for a period of time. Or you may wish to experiment with reversed role playing, by having those on one side of an issue present and argue the other side[']s position and vice versa. This might enable you to better understand the other[']s positions. By suggesting you should consider the changes in your methods of deliberations, I want to stress I am not dictating nor instructing you as to how to conduct your deliberations. I merely find—you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views, and consider and understand the views of the other jurors.

“I will again ask that you retire to the jury room, continue your deliberations, please advise the Court when you have reached a verdict, or like I have previously advised you[, o]nce you have considered the matter, and if you’re still in your position, then let me know and I will call you back in. Okay, if you would please retire to the jury room, thank you. Thank you, we’re in recess.”

Court reconvened at 3:45 p.m. that day, and the court advised the parties that the jury reached a verdict.

B. Analysis

“[T]he question whether to declare a hung jury or order further deliberations rests, as both statute and case law provide, in the trial court’s sound discretion. (§ 1140 [citations].)” (*People v. Bell* (2007) 40 Cal.4th 582, 616.) Section 1140 provides: “Except as provided by law, the jury cannot be discharged after the cause is submitted to

them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.”

“Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived “as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.” [Citation.]’ [Citation.]” (*People v. Proctor* (1992) 4 Cal.4th 499, 539.)

A trial court is limited in the manner in which it directs a jury to continue deliberating. In *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*), the California Supreme Court disapproved of the “‘Allen charge’”¹⁰ or “‘dynamite charge,’” which the court described as an instruction given “as a means of ‘blasting’ a verdict out of a deadlocked jury.” (*Gainer, supra*, at pp. 842, 844, 852, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163.) Specifically, after examining the features of the *Allen* charge, the court held, “it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.” (*Gainer, supra*, at p. 852, fn. omitted.)

¹⁰ The name “*Allen* charge” comes from an instruction approved of in *Allen v. United States* (1896) 164 U.S. 492, but the *Gainer* court noted that “judicial improvisation ha[d] produced a variety of permutations and amplifications of the original wording.” (*Gainer, supra*, 19 Cal.3d at p. 845.)

In *Moore, supra*, 96 Cal.App.4th at pages 1118-1120, after the jury advised the trial court they had reached a verdict on one charge but could not reach a unanimous vote on the other, the court gave an instruction that was the basis for the instruction given in this case. Indeed, Ellis agrees that, for the purposes of this issue, the trial court's statement to the jury in the current case "essentially was the instruction approved of in *People v. Moore*." The *Moore* court rejected the defendant's challenges to the instruction, explaining:

"The trial court's additional instruction in this case did not constitute an improper *Allen* charge. The trial court did not direct the jurors that 'the case must at some time be decided.' To the contrary, the court instructed that the 'goal as jurors should be to reach a fair and impartial verdict *if you are able to do so* based solely on the evidence presented and without regard to the consequences of your verdict [or] regardless of how long it takes to do so.' (Italics added.) Nothing in the trial court's charge was designed to coerce the jury into returning a verdict. [Citation.] Instead, the charge simply reminded the jurors of their duty to attempt to reach an accommodation.

"Additionally, the court directed the jurors to consider carefully, weigh and evaluate all of the evidence presented at trial, to discuss their views, and to consider the views of their fellow jurors. Finally, the court instructed that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge '*if you can do so without violence to your individual judgment*.' (Italics added.)

"Contrary to [the] defendant's argument on appeal, the jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial. The trial court also made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach an agreement. In short, it is clear the trial court took great care in exercising its power 'without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency.... Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict' [Citation.]" (*Moore, supra*, 96 Ca.App.4th at p. 1121.)

Here, the jury had deliberated for less than four hours when it notified the court it could not reach a verdict on the attempted murder charges. Under these circumstances, it was well within the court's discretion to direct the jury to deliberate further. Ellis argues there is no indication that the trial court made a determination that there was a reasonable probability that the jury would reach verdicts with additional instruction, but "section 1140 vests the trial court with discretion to determine whether there is a reasonable probability of agreement among jurors who have reported an impasse." (*Moore, supra*, 96 Cal.App.4th at p. 1121.) As in *Moore*, "presumably because of the relatively brief duration of deliberations conducted by the jurors before they announced they could not reach a verdict . . . , the trial court concluded further deliberations might be beneficial without questioning the jury regarding the impasse. The fact the jury was able to reach a verdict relatively quickly after being further instructed reflects the court properly exercised its discretion." (*Id.* at p. 1122.)

We agree with the analysis of *Moore* and conclude the use of the instruction in this case was not coercive. Ellis's arguments challenging the *Moore* instruction are not persuasive. First, he argues the trial court should not have stated, "It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment," because a hung jury would be an equally appropriate outcome if it were the result of each juror following her or his conscience. However, given the qualifiers "if you're able to do so based solely on the evidence presented" and "if you can do so without violence to your individual judgment," the statement to jurors that their "goal" was to reach a verdict was not coercive or suggestive that a hung jury was not an option.¹¹

¹¹ In his reply brief, Ellis further argues the use of the word "violence" "told jurors to reach verdicts unless their qualms about doing so were very extreme, i.e., violently so." The "violence" referred to, however, was the possible harm reaching a verdict might have on the

Second, Ellis claims the phrase, “regardless of how long it takes,” raised the spectre of a protracted deliberation process and suggested that “holdout jurors, at some point, would cave in to the pressure of majority jurors if they believed it was the only way to be discharged from jury duty.” We disagree. The court prefaced the instruction by stating: “It is my intention to at least send you back *for a little bit more time* to further contemplate the issues of [counts] one, two and three in this matter with this instruction. After awhile once you have done what I have asked you to do, if you still are in the position that you feel you’re in, then let me know again and I will bring you back out and I’ll ask some other questions.” (Italics added.) We note again that the jury had been deliberating for less than four hours at the time the instruction was given. Read in context, we perceive no coercive threat to the jury that it would be held indefinitely if the jurors could not reach a verdict.

Third, Ellis asserts the *Moore* instruction fails to instruct the jurors not to surrender conscientiously held beliefs merely to secure a verdict. Ellis offers no authority for the proposition that the absence of a specific admonition not to surrender one’s conscientiously held beliefs renders a jury instruction coercive. The instruction given in this case reminded the jurors, “you must decide the case for yourself” and stated, “Both the People and the defendant are entitled to the individual judgment of each juror.” This instruction did not improperly suggest the jurors should surrender their conscientiously held beliefs merely to reach a verdict.

Fourth, Ellis points out the *Moore* instruction failed to advise the jury that the supplemental instruction on further deliberations deserved no more weight than the court’s earlier instructions. This does not render the instruction coercive. The

juror’s individual judgment. It did not suggest that the juror’s beliefs must be extreme or violently held.

supplemental instruction discussed deliberations only, not any aspect of the substantive law, and it did not suggest the jury could ignore the previously given instructions.

In sum, we find no error in the trial court giving the *Moore* instruction in this case.

IV. Cumulative error

Finally, Ellis urges that cumulative error compels reversal. Having found no error, we reject his contention.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Cornell, J.