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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND SORIANO VARGAS, Defendant and Appellant.	B292479 (Los Angeles County Super. Ct. No. NA097061)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura L. Laesecke, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Roberta L. Davis and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Raymond Soriano Vargas appeals the judgment entered following a jury trial in which he was convicted of first degree murder.[1] (Pen. Code,[2] § 187, subd. (a).) The jury found true the allegations that appellant personally and intentionally discharged a firearm causing death. (§ 12022.53, subds. (b)–(d).) The trial court sentenced appellant to 25 years to life for the murder, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), for a total state prison term of 50 years to life.

Appellant contends: (1) insufficient evidence supported the jury's finding of premeditation and deliberation for first degree murder; (2) appellant received constitutionally ineffective assistance of counsel due to trial counsel's failure to request CALJIC No. 8.73; (3) the prosecutor committed prejudicial misconduct by misstating the law of premeditation and deliberation in closing argument, in violation of appellant's federal constitutional right to due process, and trial counsel was ineffective in failing to object to the prosecutor's argument; (4) appellant was deprived of his federal constitutional right to an impartial jury due to a non-juror's interference with the jury; (5) the foregoing errors were cumulative and prejudicial; and (6) the trial court erred in failing to consider whether to impose a lesser firearm enhancement. We disagree and affirm the judgment of conviction.

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[1] The jury acquitted appellant on count 2, dissuading a witness. (Pen. Code, § 136.1, subd. (b)(1).)

[2] Undesignated statutory references are to the Penal Code.

In addition, appellant requests, and respondent does not oppose appellate review for abuse of discretion of the hearing on appellant's *Brady*/*Pitchess*[3] motion. Having conducted our review of the *in camera* proceedings, we find no abuse of discretion.

FACTUAL BACKGROUND

Omar Colarte and appellant were friends in 2013. On September 19, 2013, around 7:00 p.m., Colarte was riding a bicycle to a marijuana dispensary located across the street from a liquor store on Avalon Boulevard in Wilmington. Appellant, who was also on a bicycle, stopped Colarte and gave him $20 or $30 to buy some marijuana. Appellant and Colarte parked their bikes in front of the liquor store, which had numerous surveillance cameras.[4] Colarte walked to the marijuana dispensary while appellant went inside the liquor store and purchased a bottle of beer, which he placed into a black plastic bag.

When Colarte returned to the liquor store to retrieve his bicycle and give appellant the marijuana, another person on a bicycle, David Gonzales, approached appellant. Appellant and Gonzales began to argue. Appellant set the bag containing the beer on the pavement, pulled a gun from his waistband, and loaded the chamber. As he moved closer to Gonzales, appellant said, "What's up? I'll shoot you, dog." Gonzales replied, "You want to shoot me, dog?" Appellant then raised the gun, pointed it at Gonzales, and from about two and a half feet away, fired once.

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[3] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*); *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

[4] Surveillance video from the liquor store, which showed the entire incident, was played for the jury.

Appellant lowered the gun as Gonzales leaned over. Appellant then raised the gun and fired at Gonzales a second time. Gonzales fell to the ground. Appellant moved his bicycle back, picked up his beer from the sidewalk, and rode away.

Colarte kept his distance during the confrontation between appellant and Gonzales, and left the scene when he heard the first gunshot. After the shooting, appellant caught up with Colarte and said, "You know, you didn't see shit or anything," and, "I know where you kick it at." Colarte understood appellant's statement to mean that "snitches get stitches," and he agreed that he did not see anything.

Gonzales suffered two fatal gunshot wounds. One bullet entered just below Gonzales's right earlobe, fracturing the right jawbone and passing across the tongue and through the roof of the mouth before lodging inside the left cheekbone. Another bullet entered Gonzales's right chest near the armpit, passed through the right lung and lodged in Gonzales's back. Gonzales's toxicology screen was positive for methamphetamine.

Police arrived to find Gonzales lying in the gutter on top of a bicycle. He appeared to be dead. Two spent casings that had been fired from the same gun along with a live round were recovered at the scene. No firearm was located, but a fixed blade sheathed knife was found on the ground next to a backpack Gonzales had been wearing.

As he was being booked for the murder of Gonzales, appellant said, "It's over. Say goodbye. My life is over. I fucked up my whole life."

Appellant testified on his own behalf. He was not a gang member, but his brother Paul was a member of the West Side Wilmas gang. Appellant testified that on August 28, 2013, Paul gave appellant a gun to carry "at all times" because "there was a

tension in the city." Appellant had never had a gun before and did not know how to work it. Nevertheless, he put the gun in his waistband whenever he left the house, even though he did not know if it had a magazine or was loaded.

On September 19, 2013, after appellant had left the liquor store and was waiting for Colarte, Gonzales rode up on a bicycle, stopped at the curb, and in a threatening manner asked appellant where he was from. Appellant did not respond, and Gonzales said, " 'You got a beef or what, bitch?' " Appellant was scared: He did not know this "sketchy person," who seemed like a gang member and looked like he was on drugs.

Seeing the chrome and black handle of a gun on the left side of Gonzales's waistband, appellant moved closer to Gonzales to protect himself. With his left hand close to his hip, Gonzales said twice, " 'I'm going to smoke you.' " Appellant thought Gonzales was going to kill him, and he was scared, nervous and panicked. Appellant put the bag containing his beer on the ground. In hopes of scaring Gonzales away, appellant took out his gun and "rack[ed] the round," although he did not intend to shoot Gonzales. Appellant testified that he had never touched the gun other than to put it in his waistband. Although he knew enough to load the chamber, appellant averred that he "didn't know what [he] was doing with the gun."

As appellant walked toward Gonzales with the gun in his hand, Gonzales moved his left hand "from more of his lap to his waist." Appellant believed Gonzales was reaching for his gun and was going to shoot him. Appellant raised his own gun, pointed it at Gonzales, and fired two rounds. Although he claimed he had not known the gun was loaded, appellant admitted he "kind of knew" it was loaded when he pointed it at Gonzales. Appellant testified that when he fired his gun he did not want to kill

Gonzales, but wanted Gonzales to back up and just "leave [him] alone." Gonzales never removed a gun from his waistband.

After the shooting appellant picked up his beer and rode away on his bicycle. When he caught up with Colarte at the park, Colarte gave him his marijuana, and they stayed at the park smoking the marijuana together. Appellant denied threatening Colarte. Appellant put the gun in his brother's room.

A recording of appellant's interview with police was played for the jury. Appellant explained that he had lied to the police about the shooting because he felt they would not believe him if he told the truth about why he shot Gonzales.

DISCUSSION

I. Substantial Evidence Supports the Jury's Finding of Premeditation and Deliberation

Appellant contends the evidence did not support the finding of premeditation and deliberation necessary for a first degree murder conviction. Viewing the evidence in the light most favorable to the judgment, as we must, we find substantial evidence supported the jury's finding.

A. *Legal principles*

The principles governing appellate review of a substantial evidence challenge to a conviction are well settled. To assess the sufficiency of the evidence, we review the whole record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence to determine whether there is substantial evidence to support the verdict—" 'that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; *People v. Mendez* (2019) 7 Cal.5th 680, 702.)

The standard of review is the same even where the case against the defendant was based primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) On appeal, "our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44; *People v. Manibusan* (2013) 58 Cal.4th 40, 92.) Rather, "[i]t is the duty of the jury to acquit the defendant if it finds the circumstantial evidence is susceptible to two interpretations, one of which suggests guilt and the other innocence." (*Zaragoza*, at p. 44.) And "[w]here the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 358.) Indeed, we will not reverse a judgment of conviction for insufficient evidence " 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*Id*. at p. 357.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A murder "that is 'willful, deliberate, and premeditated' [citation] is murder of the first degree." (*People v. Romero* (2008) 44 Cal.4th 386, 402; § 189, subd. (a).) Our Supreme Court has explained that " '[i]n the context of first degree murder, " 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action' " ' [citation]. 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection." ' "

(*People v. Smith* (2018) 4 Cal.5th 1134, 1164; *People v. Potts* (2019) 6 Cal.5th 1012, 1027 (*Potts*).)

In *People v. Anderson* (1968) 70 Cal.2d 15, the high court observed that " '[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories': (1) facts about planning activity 'prior to the actual killing which show[s] that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing'; (2) 'facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim'; and (3) 'facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design." ' (*Id.* at pp. 26–27, italics omitted.) 'Since *Anderson*, we have emphasized that its guidelines are descriptive and neither normative nor exhaustive, and that reviewing courts need not accord them any particular weight.' (*People v. Halvorsen* (2007) 42 Cal.4th 379, 420.)" (*People v. Rivera* (2019) 7 Cal.5th 306, 324.)

B. *Analysis*

Evidence in each of the *Anderson* categories supported the jury's finding of premeditation and deliberation in this case.

The video of the shooting together with Colarte's statements to police established that appellant engaged in planning " 'directed toward, and explicable as intended to result in, the killing:' " Appellant armed himself with a loaded gun, which he placed in his waistband for immediate access; as Gonzales crossed the street on his bike, appellant set the bag containing his beer on the sidewalk, pulled the gun from his waistband, and immediately moved the slide to "rack [a] round"

in the chamber; holding the gun at his side, appellant moved toward Gonzales and said, " 'I'll shoot you, dog,' " to which Gonzales responded, " 'You want to shoot me, dog?' "

That appellant's planning occurred over a matter of seconds or even during an altercation with Gonzales did not preclude the jury's finding of deliberation. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 13 ["planning activity can happen during an altercation itself and '*over a short period of time*' "]; *People v. Disa* (2016) 1 Cal.App.5th 654, 666.) " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " (*Potts*, *supra*, 6 Cal.5th at p. 1027; *People v. Smith*, *supra*, 4 Cal.5th at p. 1164.)

As for the second *Anderson* factor, Colarte's statement to police that appellant and Gonzales seemed to know each other and were arguing before the shooting also provided some evidence of enmity between them from which the jury could infer a motive to kill.

The manner of killing further supported the finding of premeditation and deliberation. Appellant moved forward and fatally shot Gonzales twice at close range: once in the head and once in the chest. Had appellant's intent been merely to scare Gonzales and get him to back off, he could easily have fired into the air or aimed at non-vital parts of Gonzales's body. (See *People v. Gomez* (2018) 6 Cal.5th 243, 283 [victims "were shot from close range in the head or neck," supporting an inference of premeditation and deliberation]; *People v. Halvorsen* (2007) 42 Cal.4th 379, 422 (*Halvorsen*) [victims "were shot in the head or neck from within a few feet, a method of killing sufficiently ' "particular and exacting" ' to permit an inference that defendant was 'acting according to a preconceived design' "].) Appellant also

had an opportunity to reflect between the two shots, suggesting the intentional and deliberate manner of killing that the jury found. After firing the first round, appellant brought the gun down to his side as Gonzales leaned over. Appellant then raised the gun and fired a second time. (See *People v. Williams* (2018) 23 Cal.App.5th 396, 410 [implied interval of time to reflect between two stabs to the neck evidenced the deliberate manner of killing].)

The jury could also take into account appellant's calm conduct after the shooting and find it "inconsistent with a state of mind that would have produced a rash, impulsive killing." (*People v. Perez* (1992) 2 Cal.4th 1117, 1128.) While Gonzales lay dying on the ground, appellant calmly picked up the beer he had set down and rode away on his bicycle. Appellant caught up to Colarte, threatened him, and took the marijuana Colarte had purchased for him. Appellant then stayed at the park and smoked marijuana with Colarte. (See *People v. Disa*, *supra*, 1 Cal.App.5th at p. 667 [jury could find defendant's calm behavior after the killing, including smoking cigarettes, "inconsistent with a state of mind that would have produced a rash, impulsive killing"].)

In seeking to counter the evidence supporting the jury's finding of premeditation and deliberation appellant simply offers "competing inferences he wishes the jury had drawn." (*People v. Casares* (2016) 62 Cal.4th 808, 827.) However, where, as here, "the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Abillar* (2010) 51 Cal.4th 47, 60.) Appellant's sufficiency of the evidence claim fails.

II. Trial Counsel Was Not Ineffective for Failure to Request CALJIC No. 8.73

Appellant contends defense counsel was ineffective for failing to request CALJIC No. 8.73, a pinpoint instruction on provocation which bears on deliberation and premeditation. (See *People v. Rogers* (2006) 39 Cal.4th 826, 880 ["CALJIC No. 8.73 is a pinpoint instruction that need not be given on the court's own motion"]; *People v. Ward* (2005) 36 Cal.4th 186, 214 [a pinpoint instruction need be given only if requested and supported by substantial evidence].) We disagree.

A. *Legal principles*

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both " 'that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms," and " 'that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " (*People v. Bell* (2019) 7 Cal.5th 70, 125 (*Bell*); *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

" 'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." ' " (*Bell*, *supra*, 7 Cal.5th at p. 125; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) Our Supreme Court has noted that "[i]t is particularly difficult to prevail on an *appellate* claim of ineffective assistance" because "[o]n direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide

one, or (3) there simply could be no satisfactory explanation" for counsel's act or omission. (*Mai*, at p. 1009; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) Thus, where the record is silent as to the basis for counsel's action or omission, "a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Mickel*, at p. 198; *People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 267–268.)

CALJIC No. 8.73 provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

B. *Analysis*

Appellant's claim of ineffective assistance "fails in the context of this direct appeal because the record does not reveal whether counsel had a plausible tactical reason for not requesting the instruction." (*People v. Carter* (2003) 30 Cal.4th 1166, 1223.) Moreover, appellant fails to demonstrate that there could be no satisfactory explanation for trial counsel not to request CALJIC No. 8.73. Indeed, the Attorney General suggests several plausible tactical reasons for counsel not to request such an instruction. As respondent points out, the jury was instructed on first and second degree murder, perfect self-defense, and voluntary manslaughter based on imperfect self-defense. In closing argument, defense counsel did not argue that if appellant was found guilty of murder it should be in the second rather than first degree. Instead, counsel argued for an acquittal based on perfect self-defense.

This posture in closing argument would have been consistent with a tactical decision not to request an additional instruction on second degree murder that was inconsistent with appellant's defense, particularly in light of the scant evidence of provocation. Further, counsel might have chosen not to request CALJIC No. 8.73 so as to avoid suggesting that what evidence there was of provocation was insufficient to reduce the homicide from murder to manslaughter.

III. The Prosecutor Did Not Misstate the Law of Premeditation and Deliberation in Closing Argument

Appellant contends the prosecutor committed prejudicial misconduct[5] during closing argument by misstating the law of premeditation and deliberation, thereby violating appellant's federal constitutional right to due process.[6]

A. *Background*

In closing argument, the prosecutor illustrated the elements of premeditation and deliberation by analogizing them

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[5] As our Supreme Court has observed, " '[t]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667 (*Centeno*).)

[6] Appellant further asserts that counsel was ineffective for failing to object to the prosecutor's argument. Because we conclude the prosecutor's explanation of the concepts of premeditation and deliberation did not constitute prejudicial error, we do not address appellant's ineffective assistance claim.

to a driver's decision-making process in choosing whether to drive through a yellow light just before it turns red. The district attorney explained, "[Y]ou're weighing the options. You're trying to make a decision as to what you're going to do. Whatever choice you make, whether it's slam on the brakes, whether it's push on the gas, that act, that decision-making process, whatever it is you ultimately choose to do was done willfully, deliberately, and with premeditation, and it can happen that quickly. [¶] There is no test of time. There is nothing in the instructions that says the People must prove the defendant deliberated and meditated upon this for 5 seconds, 10 seconds, 15 seconds, whatever it is. Because every situation is different. Every set of circumstances is different, and so the law leaves it to you to decide what that is."

B. *Legal principles*

"Under California law, to establish reversible prosecutorial misconduct a defendant must show that the prosecutor used ' "deceptive or reprehensible methods" ' and that it is reasonably probable that, without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] A prosecutor's misconduct violates the federal Constitution if the behavior is ' " ' " ' " 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " ' " ' " (*People v. Caro* (2019) 7 Cal.5th 463, 510.) A prosecutor has wide latitude during closing argument to make assertions of common knowledge or use illustrations based on common experience. (*People v. Ward*, *supra*, 36 Cal.4th at p. 215; *People v. Loker* (2008) 44 Cal.4th 691, 742.) But in relating the jury's task to a more common experience, the prosecutor "must not imply that the task is less rigorous than the law requires." (*Centeno*, *supra*, 60 Cal.4th at p. 671.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*Centeno*, *supra*, 60 Cal.4th at p. 667; *Bell*, *supra*, 7 Cal.5th at p. 111.)

C. *Analysis*

Viewed in the context of the prosecutor's whole argument, the yellow light analogy was not improper. Consistent with the law, the prosecutor used the traffic light illustration to explain the term "deliberation" as a weighing of options that can happen very quickly. (CALJIC No. 8.20 [" 'deliberate' . . . means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action"]; *People v. Pearson* (2013) 56 Cal.4th 393, 440.) The prosecutor also correctly argued "[t]here is no test of time" for premeditation and deliberation. As the jury was instructed, "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated

killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill." (*Potts*, *supra*, 6 Cal.5th at p. 1027.)

In *People v. Avila* (2009) 46 Cal.4th 680, 715 (*Avila*), our Supreme Court rejected the defendant's assertion that the prosecutor had equated " 'the "cold, calculated" judgment of murder' " with "deciding whether to stop at a yellow light or proceed through the intersection." Rather, the court upheld the prosecutor's argument that "assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.' " (*Ibid*.)

Pointing to the prosecutor's statement in *Avila* that " 'the decision to kill is similar, but . . . not . . . in any way . . . the same' " as deciding to drive through a traffic light (*Avila*, *supra*, 46 Cal.4th at p. 715), appellant asserts that the prosecutor here "expressly argued the two decision-making processes *were* the equivalent." Not so. In the context of the argument it is apparent that the prosecutor did not equate the gravity of a decision to kill with a traffic decision, but used the illustration to show that, like a decision to drive through a yellow light, a premeditated and deliberate decision to kill could be made quickly. Given the prosecutor's emphasis on the lack of any requirement that "the People must prove the defendant deliberated and meditated upon this for 5 seconds, 10 seconds, 15 seconds, whatever it is," no reasonable juror would have understood the illustration as appellant characterizes it. (*Bell*, *supra*, 7 Cal.5th at p. 111.)

IV. The Trial Court Properly Denied Appellant's Motion for a Mistrial Based on a Non-juror's Improper Communication with the Jury

Appellant contends he was deprived of his right to an impartial jury as a result of his aunt's communication with two of the jurors, and the trial court prejudicially erred in denying appellant's motion for a mistrial. We disagree.

A. *Background*

Jurors No. 2 and 9 went to the women's rest room after the start of deliberations, and Juror No. 9 overheard one of appellant's family members say, " 'The victim is a bad person.' " Juror No. 9 told Juror No. 2 what she had heard, and the two jurors reported it to the court. Juror No. 2 indicated that some of the other jurors may have also heard about the comment. The court admonished both jurors not to consider the comment for any purpose, and both stated they would abide the court's instruction. The court and counsel then conferred, and agreed that the whole jury should be admonished to disregard any "extraneous comments" and each juror should be asked individually to agree to follow the court's direction.

The court ordered all members of appellant's family out of the courtroom and addressed the jury as a whole: "So, ladies and gentlemen, it's come to my attention that there may have been some information or comments made to one or more of the jurors relevant to this case that are outside of my imaginary box. [¶] Remember, we spent all of this time saying you can only make a decision based upon what comes in through this witness stand, no other source. We closed the imaginary box. We're sending it back with you. Nothing else. [¶] I don't want to go into the statements, but several—a couple of jurors reported them. They

did absolutely the right thing. I know they're going to follow my directions."

After determining that about six other jurors were aware of some statements related to the case that had been made to one or more jurors, the court asked each juror individually to affirm that he or she could follow the court's admonition not to consider any such statement for any purpose at all, to completely ignore the statement, and not to use the statement to make any decision in the case. Every juror agreed to follow the admonition.

Appellant's family returned to the courtroom, and outside the jury's presence it was revealed that appellant's aunt had made the comment to the two jurors. The court found it clear that the aunt was intentionally trying to influence the jury, and added, "Do you realize that doesn't look good for your nephew?"

Addressing the lawyers, the court declared, "I think that we have addressed any potential harm. I think the jurors are going to follow the admonition. I don't sense that anybody is going to willfully disregard it, so I think we're okay. [¶] We certainly don't have grounds for a mistrial at this point." Defense counsel then moved for a mistrial and submitted the matter without argument. The court denied the motion, stating: "I think that this jury will follow my directions. If anything, the comment was intended to benefit [the defense]. It would be more prejudicial to the People. [¶] But my sense from observing both Juror No. 2 and Juror No. 9 is that they knew it was something that shouldn't have been said and that they—particularly Juror No. 2 knew it was something that can't be used to reach a decision. [¶] Something that sort of mitigates it—although we didn't get into the criminal history or too much of the gang affiliation of the victim—[the prosecutor], in her opening had said the victim is not a nice guy. It's not as if everybody thought he was some sort of

local businessman or something that would be a respectful individual, perhaps, and this was somehow coming as a shock. [¶] So for that reason, I don't know that there is sufficient prejudice to justify a mistrial."

After the jury returned its verdicts, the court asked the panel, "And everybody is in agreement that [the aunt's comment] was not used to affect [the] verdicts; am I correct? It was in no way used; am I correct?" The jury responded collectively, "Correct."

B. *Legal principles*

Under both the federal and state Constitutions, a criminal defendant is guaranteed the right to trial by an impartial and unbiased jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Brooks* (2017) 3 Cal.5th 1, 98 (*Brooks*); *In re Hitchings* (1993) 6 Cal.4th 97, 110.) "A deprivation of that right occurs even if only one juror is biased." (*People v. Merriman* (2014) 60 Cal.4th 1, 95 (*Merriman*); *People v. Nesler* (1997) 16 Cal.4th 561, 578.) A juror's involuntary exposure to information other than what is presented at trial generally raises a rebuttable presumption of juror bias and prejudice to the defendant. (*Brooks*, at p. 98; *In re Hamilton* (1999) 20 Cal.4th 273, 295–296 (*Hamilton*).)

However, " 'the presumption of prejudice is rebutted, and the verdict will not be disturbed, if a reviewing court concludes after considering the entire record, including the nature of the misconduct and its surrounding circumstances, that there is no substantial likelihood that the juror in question was actually biased against the defendant. [Citations.] Our inquiry in this regard is a "mixed question of law and fact" subject to independent appellate review. [Citation.] But " '[w]e accept the trial court's credibility determinations and findings on questions

of historical fact if supported by substantial evidence.' " ' " (*Brooks*, *supra*, 3 Cal.5th at pp. 98–99, quoting *Merriman*, *supra*, 60 Cal.4th at pp. 95–96.) The substantial likelihood test is both an objective and pragmatic standard that takes account of the " 'day-to-day realities of courtroom life' " and society's strong "interest in the stability of criminal verdicts." (*Hamilton*, *supra*, 20 Cal.4th at p. 296.) In determining whether the presumption of juror bias has been rebutted, the trial court may properly rely on jurors' affirmations regarding their ability to maintain their impartiality. (*People v. Harris* (2008) 43 Cal.4th 1269, 1304.) Further, an admonition by the trial court may dispel the presumption of prejudice arising from a juror's receipt of outside information (*People v. Tafoya* (2007) 42 Cal.4th 147, 192–193), and jurors are generally presumed to follow the court's instructions to disregard improperly received information (*People v. Zapien* (1993) 4 Cal.4th 929, 996 (*Zapien*)).

A motion for mistrial based on juror bias " 'should be granted only when " 'a party's chances of receiving a fair trial have been irreparably damaged.' " ' " (*Bell*, *supra*, 7 Cal.5th at p. 121, quoting *People v. Ayala* (2000) 23 Cal.4th 225, 282.) On appeal, we review a trial court's ruling on a mistrial motion for an abuse of discretion. (*Bell*, at p. 121.) And " '[a] trial court should declare a mistrial only " 'if the court is apprised of prejudice that it judges incurable by admonition or instruction.' " [Citation.] "In making this assessment of incurable prejudice, a trial court has considerable discretion." ' " (*Ibid.*; *People v. Lewis* (2008) 43 Cal.4th 415, 501.)

C. *Analysis*

Applying the foregoing principles to the case before us, we conclude that although the extrajudicial communication with the jurors created a presumption of prejudice, the presumption was

rebutted, and the trial court did not err in refusing to declare a mistrial based on juror misconduct. Appellant is not entitled to reversal of the judgment.

Our review of the entire record reveals no substantial likelihood the non-juror's comment caused any juror to be biased against appellant. In promptly admonishing the jury it could not consider the extraneous comment for any purpose, the trial court used a clear illustration to impress upon the jury that the non-juror's statement about the victim was not in evidence and could not factor in the jury's decision. Both Jurors No. 2 and 9 stated unequivocally they would abide the court's admonition, as did all the other jurors.[7] Based on its own observations of the jurors, the trial court stated it believed the jury would follow the court's directions. There appears no basis to reject the court's credibility finding, which is supported by substantial evidence. (*Merriman*, *supra*, 60 Cal.4th at pp. 95–96.) Nor does appellant offer any rebuttal to the general presumption that the jury followed the court's instruction. (*Zapien*, *supra*, 4 Cal.4th at p. 996.)

Further mitigating any prejudice to appellant, the court found it would come as no shock to this jury that the victim was "not a nice guy" because the prosecutor had made the point in her opening statement. And as the court noted, it was the prosecution that was more likely to suffer prejudice from the comment, for "[i]f anything, the comment was intended to benefit [the defense]."

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[7] After trial, the jury itself confirmed that it had followed the court's admonition, and the comment played no part in its deliberations or verdict.

V. There Was No Cumulative Error

Appellant contends his conviction should be reversed because of the cumulative effect of the errors identified in his opening brief. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488, fn. 15.) But appellant " 'has merely shown that his " 'trial was not perfect—few are' " ' " (*People v. Farley* (2009) 46 Cal.4th 1053, 1124), and we have found no errors that individually or collectively deprived appellant of a fair trial (*Halvorsen*, *supra*, 42 Cal.4th at p. 422).

VI. Remand for Resentencing Is Unwarranted

Appellant contends his case must be remanded to allow the trial court to exercise its discretion as to whether to impose a lesser firearm enhancement—10 or 20 years under section 12022.53, subdivisions (b) or (c), instead of 25 years to life under section 12022.53, subdivision (d). We disagree.

The prosecution in this case charged appellant with three firearm enhancements: he personally used a firearm (§ 12022.53, subd. (b)), he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and he personally and intentionally discharged a firearm causing death (§12022.53, subd. (d)). The jury found all three firearm enhancement allegations true. At sentencing, the court stated, "The court is aware that I have discretion with respect to the firearm enhancement. I'm choosing to impose it consecutively, 12022.53(d). The other two, (b) and (c), are stayed pursuant to 654."

Relying on *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), appellant asserts that, because at the time of sentencing in this case, "no published decision had held that a court could strike the greater firearm enhancement and impose the lesser one, this matter should be remanded for the court to exercise its discretion." (See *id*. at p. 224 ["At the time of

resentencing, no published case had held an uncharged lesser firearm enhancement could be imposed in lieu of an enhancement under section 12022.53, subdivision (d) in connection with striking the greater enhancement"].)

Appellant, however, misstates the *Morrison* holding, and thereby overlooks a critical distinction between *Morrison* and the instant case. *Morrison* began its analysis by observing that "[c]ase law has recognized that the court may impose a 'lesser included' enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence." (*Morrison*, *supra*, 34 Cal.App.5th at p. 222.) The court then reasoned that because a court could impose an *uncharged* section 12022.53, subdivision (b) or (c) enhancement in place of an enhancement under section 12022.53, subdivision (d) that was unsupported by substantial evidence, defective, or legally inapplicable in some other respect, "[w]e see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385." (*Id*. at pp. 222–223.) *Morrison* concluded that remand was necessary because the record did not reveal whether the trial court had understood its discretion to impose a lesser uncharged enhancement under section 12022.53, subdivision (b) or (c) if it were to strike the subdivision (d) enhancement. (*Id*. at p. 224.)

By contrast, in this case the lesser enhancements under section 12022.53, subdivisions (b) and (c) were charged and were also found true by the jury. Moreover, the trial court expressly chose to impose the greater enhancement while staying the lesser ones. Because "we presume the trial court knew and applied the governing law" in the absence of any evidence to the contrary

(*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1390), we must conclude that the trial court was aware that striking the enhancement under section 12022.53, subdivision (d) "would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice." (*Morrison*, *supra*, 34 Cal.App.5th at p. 222.) Accordingly, a remand for resentencing on the firearm enhancement is unwarranted in this case.

VII. *Pitchess* Review

Appellant filed a *Brady*/*Pitchess* motion seeking *Brady* material pertaining to officer misconduct involving coerced confessions or false attributions of confessions by the officers involved in appellant's arrest and interrogation. The trial court granted the motion and conducted an *in camera* hearing, at the conclusion of which the court ordered certain materials turned over to the defense, subject to a protective order. Appellant has requested that this court independently review the sealed record of the hearing to assess whether the trial court properly ordered all discoverable material turned over to the defense.

We have reviewed the sealed transcript of the proceedings and conclude that the trial court did not abuse its discretion in ordering discovery of certain materials. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Landry* (2016) 2 Cal.5th 52, 73–74.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.