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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>KAMREN ROY ANDERSON<br><br>Defendant and Appellant. | B233199<br><br>(Los Angeles County Super. Ct. No. MA050198) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed as modified.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Karmen Anderson appeals the judgment entered following his conviction by jury of attempted murder committed in a willful, deliberate and premeditated fashion and assault with a semiautomatic firearm. (Pen. Code, §§ 187, subd. (a), 664, subds. (a) & (f), 245, subd. (b).) The jury found Anderson personally used a firearm in the commission of both offenses. (Pen. Code, §§ 12022.53 subd. (b), 12022.5, subd. (a).)

Anderson contends the evidence was insufficient to support the finding the attempted murder was deliberate and premeditated, and the trial court erred in failing to instruct sua sponte on the lesser included offense of attempted voluntary manslaughter based on sudden quarrel or heat of passion, defense counsel rendered ineffective assistance in failing to request an instruction advising the jury provocation insufficient to reduce attempted murder to attempted voluntary manslaughter may be considered in determining whether the accused acted with deliberation and premeditation, and the trial court erroneously excused a deliberating juror.

As set forth below, we conclude the evidence supports the jury's finding Anderson acted with deliberation and premeditation, the trial court had no sua sponte obligation to instruct on sudden quarrel/heat of passion as there was insufficient evidence a reasonable person in Anderson's position would have been provoked. Further, on the facts presented, even if defense counsel had requested instruction on provocation as it relates to deliberation and premeditation, there is no reasonable probability of a different result. We also reject Anderson's claim of error in the trial court's excusal of a deliberating juror but agree with the People's assertion the abstract of judgment must be amended to reflect the sentence imposed by the trial court. We therefore affirm the judgment as modified to reflect a 10-year firearm enhancement imposed by the trial court.

## FACTS AND PROCEDURAL BACKGROUND

1. *Evidence adduced at trial.*

a. *Wao's testimony.*

On July 25, 2010, at approximately 1:00 a.m., Elias Wao, Aresto Neme and another individual were working at a liquor store on East Avenue K in Lancaster, California. Wao testified there were more than six customers in the store. A Black male, determined by other evidence to have been Deaven Irvin, entered the store and demanded a 50 cent refund on a $1 cigar he purchased the night before. Donavan Williams, a frequent customer of the store, told Irvin to be quiet and stated, "It's my store."

Anderson and another individual then entered the store shirtless. Anderson began talking to Williams. Wao suspected there was about to be a fight. Wao told Anderson, the other shirtless individual and Irvin to leave the store. During the ensuing argument, an unidentified individual grabbed three or four small bottles of liquor and ran from the store. Wao went to the door of the store with a cell phone, demanded the return of the liquor and threatened to call the police. Anderson and his companions tried to push Wao out of the store. Wao and Neme then pushed Anderson and Irvin out of the store. Irvin fell in front of the store, then stood and struck Neme in the face. Wao went to the counter and obtained a wooden pole and a machete. Wao saw Neme was bleeding and attempted to take Neme's place at the door to prevent Anderson and his companions from reentering the store. Wao put the pole in front of Neme with his left hand. Anderson grabbed the pole and Wao struck Anderson on the forearm with the flat side of the machete, causing Anderson to release the pole without injury to Anderson. Anderson then walked to the parking lot and went behind a car. From the doorway of the store, Wao saw Anderson point a gun at him. Anderson appeared to pull the trigger and Wao heard a click.

Wao went behind the counter and pressed an alarm button. From behind the counter, Wao could see Anderson through the window of the store. Anderson had moved from the left side of the store to the right side and again was pointing the gun at Wao. Wao heard a click but the gun did not fire. Anderson then made a sliding motion with his left hand on top of the gun and Wao saw a bullet come out of the gun. Anderson then pointed the gun at Wao a third time and tried to shoot but nothing happened. Anderson cursed the gun, entered his car and drove away.

The police did not respond to the alarm. Wao did not immediately report the incident because he was not sure it had been a real gun. However, after Wao closed the store, he found a bullet in the parking lot where Anderson had been standing. Wao reported the incident to the police when he returned to the store at 7:30 a.m. the next morning.

On cross-examination, Wao admitted he did not see the person who took the alcohol interact with the two shirtless individuals before the theft.

b. *Testimony of Williams, Irvin and Sergeant Welle*.

Donavan Williams testified he and Irvin were selecting purchases of alcohol when Wao said, "they're stealing something." Wao ordered everyone out of the store, grabbed a phone and said he was calling the police. Williams immediately left the store but Irvin took his time, was pushed in the back and fell. After Irvin punched a store clerk in the face, Wao obtained a pole and ordered everyone to leave the store. Wao swung the pole at Anderson who grabbed it. Wao struck Anderson's arm with a machete. Williams thought he was going to see Anderson's arm fall off but Anderson released the pole and exited the store unharmed. Anderson looked at his arms as he walked toward the middle of the parking lot. Anderson went between parked cars, made motions with his hands, then produced a pistol and pointed it at the front of the store where the clerks were standing. Williams saw Anderson move the slide more than twice and saw

Anderson squeeze the trigger three or four times while he pointed the weapon at the store.

Deaven Irvin testified he was at the liquor store with his brother Russell Irvin, Anderson and Donavan Williams. Irvin already was in the store when Anderson arrived. Two people entered the store after Anderson and one of them stole some liquor. The clerk became angry and told everyone to leave. The clerk pushed Irvin out the door, causing him to fall. Irvin punched a clerk in the face. Anderson tried to stop the fight and take the pole from the clerk but the clerk hit Anderson with a machete with what appeared to Irvin to be a forceful blow. Anderson walked into the parking lot, went around a car and removed a firearm from his pocket. The store clerks remained at the door. Irvin saw a shell fall from the gun and heard one or two clicking sounds when Anderson was approximately 30 feet from the store.

While Irvin was a suspect in this case, he advised a detective the gun Anderson used during the incident could be found in a box on the porch of his home.

On August 26, 2010, Deputy Sheriff Daniel Welle recovered an inoperable .25 caliber semiautomatic handgun and a magazine from a chest on the porch of Irvin's home. The gun consisted of a frame and a slide; it had no grips, no trigger mechanism and no springs. Also, Welle could feel sand in the mechanism, indicating the weapon had been buried. The .25 caliber round Wao found in the parking lot had never been struck by a firing pin.

c. *Defense evidence*.

The defense rested without presenting evidence.

2. *Instruction on self-defense requested by defense counsel and refused*.

Defense counsel requested instruction on self-defense based on Wao's act of striking Anderson with the machete. Counsel noted Wao continued to possess the machete and he remained in close proximity to Anderson.

The prosecutor asserted Anderson was not in danger when he pointed the gun at Wao as Wao never left the door of the store or attempted to chase Anderson. Also, Anderson was a considerable distance from Wao. Defense counsel responded Wao and Anderson were in sufficient proximity to warrant the conclusion an element of danger remained and one interpretation of the evidence was to conclude Anderson acted in self-defense.

The trial court refused the requested instruction, finding no substantial evidence of self defense. The trial court noted Anderson armed himself when he was a safe distance from Wao and "then came back and walked closer to the victim."

3. *Jury argument and verdicts.*

Defense counsel argued Wao struck Anderson with the machete and scared him. Anderson, in turn, went to his car and obtained the inoperable gun frame to scare Wao. Thus, Anderson lacked the intent to commit attempted murder and was guilty only of simple assault, a lesser offense included within assault with a firearm.

The jury convicted Anderson of attempted murder and found he acted with deliberation and premeditation. The jury also convicted Anderson of assault with a semiautomatic firearm and found Anderson personally used a firearm in the commission of attempted murder and assault with a semiautomatic firearm.[1]

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[1] We note in passing that firearm enhancements under Penal Code section 12022.53, subdivision (b) and section 12022.5, subdivision (a) do not require proof of an operable firearm. Section 12022.53, subdivision (b) states: "The firearm need not be operable or loaded for this enhancement to apply." Similarly, section 12022.5, subdivision (a) applies even though the firearm is unloaded or inoperable. (*People v. Sheldon* (1989) 48 Cal.3d 935, 962; *In re Arturo H.* (1996) 42 Cal.App.4th 1694, 1697-1698.) "Personal use of a firearm may be found where the defendant intentionally displayed a firearm in a menacing manner in order to facilitate the commission of an underlying crime. [Citations.]" (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.) The jury was instructed on these principles.

## CONTENTIONS

Anderson contends the evidence was insufficient to support the jury's finding the attempted murder was deliberate and premeditated, the trial court erred in failing to instruct on the lesser included offense of sudden quarrel/heat of passion attempted voluntary manslaughter, defense counsel rendered ineffective assistance in failing to request an instruction advising the jury that provocation insufficient to reduce attempted murder to attempted voluntary manslaughter may be considered in deciding whether the accused deliberated and premeditated, the cumulative effect of these errors require reversal, and the trial court erroneously excused a deliberating juror.

The People contend the abstract of judgment must be modified to reflect a 10-year firearm enhancement imposed by the trial court.

## DISCUSSION

1. *The evidence supports the jury's finding the attempted murder of Wao was willful, deliberate and premeditated.*

Anderson contends there was insufficient evidence of the factors which typically are present in cases of premeditation and deliberation, namely, planning, motive and manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) He notes there was no evidence he planned to kill, the most important of the factors. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018-1019.) Anderson argues Wao over-reacted by ordering everyone from the store and assaulting Anderson with a pole and a machete before Anderson walked toward the middle of the

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Also, the jury was instructed that, in order to convict Anderson of assault with a semiautomatic firearm, it had to find, inter alia, he had the present ability to apply force with a semiautomatic firearm to a person. Here, because the jury convicted Anderson of assault with a semiautomatic firearm, it necessarily determined the firearm was operable. The jury's finding in this regard is supported by Anderson's conduct with the gun. By threatening a victim with a gun, a defendant impliedly asserts the gun is loaded and capable of inflicting injury. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 12-13; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541-542.)

parking lot. Anderson asserts he could not have reflected meaningfully on his actions and concludes the decision to attempt to shoot at Wao was a spontaneous and unconsidered reaction to Wao's conduct rather than a deliberate plan carried out according to a preconceived design.

We are not persuaded.

Cases decided after *Anderson* repeatedly have stated the *Anderson* factors are not a definitive statement of the prerequisites for proving premeditation and deliberation. The three categories do not " 'establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) Further, these factors need not be accorded any particular weight and evidence of all three elements is not necessary. (*People v. Booker* (2011) 51 Cal.4th 141, 153; *People v. Halvorsen* (2007) 42 Cal.4th 379, 420; *People v. Sanchez* (1995) 12 Cal.4th 1, 32-33.) "*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" (*People v. Pride* (1992) 3 Cal.4th 195, 247.) Thus, "we continue to apply the principle that '[t]he 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. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' " (*People v. Bolin* (1998) 18 Cal.4th 297, 332.)

In this case, after Wao prevented Anderson from reentering the store, Anderson had time to reflect and deliberate as he walked into the parking lot before deciding to obtain the handgun. (See *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["That defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter.' "].) Anderson aimed the gun at Wao, who remained in the doorway of the store, and tried to fire the weapon.

When Wao moved from the door to the area behind the counter, Anderson again had time to deliberate and premeditate as he repositioned himself in the parking lot in order to have a clear view of Wao in that location. Once repositioned, Anderson pointed the gun at Wao and pulled the trigger. When the gun failed to fire, Anderson manipulated the slide of the weapon, ejected a bullet from it and once more tried to shoot Wao. This evidence supports a reasonable inference Anderson planned and deliberated, albeit briefly, before trying to shoot Wao. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 577.)

With respect to the manner of the shooting, Anderson repeatedly tried to shoot Wao from different locations in the parking lot, indicating his resolve to visit harm on Wao. There was also evidence of motive as Anderson apparently sought to revenge his perceived mistreatment by Wao.

In sum, viewing the evidence in the light most favorable to the judgment (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054), there is ample evidence from which the jury reasonably could conclude Anderson acted with deliberation and premeditation rather than on an unconsidered and rash impulse.

2. *No sua sponte obligation to instruct on sudden quarrel/heat of passion attempted voluntary manslaughter*.

Anderson contends the trial court erred in failing to instruct the jury sua sponte that provocation can reduce attempted murder to attempted voluntary manslaughter. Anderson asserts Wao's acts of shoving Anderson's group out the door, knocking Irvin to the ground and hitting Anderson with a machete constituted substantial evidence of provocation which mitigated his offense to attempted voluntary manslaughter. Anderson's claim fails.

An accused who intentionally attempts to kill in a sudden quarrel or heat of passion is guilty only of attempted voluntary manslaughter. (See *People v. Lasko* (2000) 23 Cal.4th 101, 108; Pen. Code, § 192, subd. (a).) "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as

the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . . . " ' [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any ' " ' [v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citations] other than revenge . . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.)

Sudden quarrel/heat of passion voluntary manslaughter is a lesser offense included within murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) The trial court must instruct the jury sua sponte "on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman*, *supra*, at p. 162.) Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude the defendant committed the lesser offense but not the greater. (*Id*. at p. 162.) "[T]he existence of ' *any* evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*Ibid.*)

Here, there was insufficient evidence an ordinary person of average disposition in Anderson's position would have been provoked to heat of passion by Wao's conduct. Putting aside Wao's right to exclude Anderson from the store, the confrontation ended when Anderson left the area of the door of the store, walked to the parking lot and Wao did not follow. Although Wao forcibly excluded Anderson from the store, Wao did not use lethal force and struck Anderson with the flat side of the machete, causing no injury. Because Wao did not follow Anderson into the parking lot and no one threatened or taunted Anderson as he walked away, Anderson no longer was in any danger. He could have left the scene or called the police. Instead, he chose to arm himself and attempt to shoot Wao. (See *People v. Middleton* (1997) 52 Cal.App.4th 19, 34,

overruled on another point in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)

Moreover, in order to satisfy the subjective aspect of heat of passion, "the victim must taunt the defendant or otherwise initiate the provocation. [Citations.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306; accord *People v. Verdugo* (2010) 50 Cal.4th 263, 293; *People v. Avila* (2009) 46 Cal.4th 680, 705; cf. *People v. Manriquez*, *supra*, 37 Cal.4th at pp. 585-586 [provocation lacking where defendant calmly shot bar patron who insulted and goaded him into firing]; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1732-1733.) Here, Anderson walked away from the confrontation at the door of the liquor store without being chased or taunted. Thus, the evidence does not suggest Anderson acted under the sway of a violent, intense, high-wrought or enthusiastic emotion, other than the prohibited one of revenge. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) Consequently, the trial court had no sua sponte obligation to instruct on attempted voluntary manslaughter.

3. *No ineffective assistance of counsel shown in the failure to request an instruction relating provocation to deliberation and premeditation.*

Anderson contends defense counsel rendered ineffective assistance in failing to request an instruction advising the jury that provocation insufficient to reduce attempted murder to attempted voluntary manslaughter can nonetheless be considered in determining whether Anderson acted with deliberation and premeditation. (See CALCRIM No. 522).[2]

Anderson relies on *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296, which quoted *People v. Wickersham* (1982) 32 Cal.3d 307, disapproved on

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[2] CALCRIM No. 522 provides, in part: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed [attempted] murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

another ground in *People v. Barton, supra,* 12 Cal.4th at pp. 200-201, as follows: "The fact . . . a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance. [Citation.]" (*People v. Fitzpatrick, supra,* at p. 1296.)

We conclude Anderson is unable to demonstrate ineffective assistance of counsel. When provocation is invoked not to reduce the class of the offense from murder to sudden quarrel/heat of passion voluntary manslaughter but as it "relates the evidence of provocation to the specific legal issue of premeditation and deliberation, it is a 'pinpoint instruction' as that term was defined in *People v. Saille* [(1991)] 54 Cal.3d [1103] at pages 1119-1120, and need not be given on the court's own motion." (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879.) Thus, Anderson properly raises this contention under the rubric of ineffective assistance of counsel. However, the claim fails on the merits.

In order to demonstrate ineffective assistance of counsel, the defendant must show counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 218.) To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra,* at p. 694; *People v. Ledesma, supra,* at pp. 217-218.)

In determining whether defense counsel's performance was deficient, we accord great deference to counsel's tactical decisions and reverse only if the record affirmatively discloses no rational tactical purpose for counsel's act or omission. (*People v. Stanley* (2006) 39 Cal.4th 913, 954; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437; *People v. Osband* (1996) 13 Cal.4th 622, 700-701.) If the record fails to show why counsel acted or failed to act, the claim of

ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Here, defense counsel defended on the ground Anderson intended only to scare Wao. It would have been inconsistent for counsel to argue Anderson intended to frighten Wao, while also claiming Anderson was so enraged he could not deliberate or premeditate. As Anderson's theory of defense on appeal would have required trial counsel to advocate inconsistent mental states, defense counsel cannot be said to have lacked a rational tactical purpose for failing to request the provocation instruction. Because the record discloses a tactical reason for not requesting the instruction, which must be accorded deference on appeal, any deficiency on defense counsel's part does not require reversal. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 954; *People v. Lucas*, *supra*, 12 Cal.4th at pp. 436-437; *People v. Osband*, *supra*, 13 Cal.4th at pp. 700-701.)

Further, even if an effective advocate would have requested the instruction, counsel's omission was harmless. The jury was instructed, pursuant to CALCRIM No. 601, the prosecution had to prove beyond a reasonable doubt that Anderson acted willfully and with deliberation and premeditation.[3]

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[3] As given in this case, CALCRIM No. 601 stated: "If you find the defendant guilty of attempted murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant acted *willfully* if he intended to kill when he acted. The defendant *deliberated* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant *premeditated* if he decided to kill before acting. [¶] The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and

According to the definition of those terms, the jury found Anderson "intended to kill when he acted" and he "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." Given these findings, there is no reasonable probability a provocation instruction would have affected the verdict. Thus, any deficiency on defense counsel's part must be seen as harmless. (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at p. 694.)

The jury rejected the intent to scare argument, which was plausible on the facts presented and required consideration of Anderson's provocation as the explanation for Anderson's intent to scare. An instruction specifically directing the jury it could consider provocation in determining whether Anderson deliberated and premeditated would not have altered the result.

In sum, defense counsel's failure to request an instruction advising the jury it could consider provocation in determining whether Anderson deliberated and premeditated was a reasonable tactical choice on the facts presented and, even if counsel rendered ineffective assistance in failing to request the instruction, the omission was harmless in that it did not result in prejudice to Anderson.

4. *No cumulative error.*

Anderson contends that, even if the foregoing errors are insufficient to require reversal, the combined effect of the errors deprived him of a fair trial. However, there can be no cumulative error if each assignment of error fails. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382.) Moreover, in examining a claim of cumulative error, the critical question is whether the defendant received a fair trial. (*People v. Cain* (1995) 10 Cal.4th 1, 82.) Here, having found no resultant prejudice related to any of Anderson's claimed errors, we further conclude the cumulative effect of these errors does not support the conclusion

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premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved."

Anderson was denied a fair trial. (*People v. Booker*, *supra*, 51 Cal.4th at p. 186.) Consequently, the claim of cumulative error fails.

5. *The trial court committed no reversible error in excusing Juror No. 4.*

a. *Additional background.*

The jury commenced deliberations at 11:20 a.m. on March 2, 2011. The next day, at 10:53 a.m., the trial court received a note from Juror Nos. 3 and 5 which stated: "Several of us feel that one of the jurors is not abiding by the juror rules handed down by the judge and does not want to use the facts of the case to make a decision either way. They seem to be very distracted by their cell phone. [Illegible] that have nothing to do with the case and evidence given to us. (Does not want to look at the testimony, only her notes.) One of the jurors came to us and said this person was on another jury with one of the attorneys and seems to have a biased opinion of him. Please advise. (We do not want a mistrial.)"

After discussing the matter with counsel, the trial court conducted a hearing at which it questioned Juror Nos. 5, 3, 7, 8, and 4, in that order.

Juror No. 5 stated Juror No. 4 was "not looking at the same evidence" as the other jurors. Also, Juror No. 7 had advised Juror Nos. 5 and 3 that Juror No. 4 had stated she recognized one of the trial attorneys and would indicate which of the two attorneys she recognized after the trial was over. Further, Juror No. 4 had sat as a juror before and appeared to have a "slightly negative" opinion about the attorney in question. In addition, Juror No. 7 stated that, during the first day of deliberations, Juror No. 4 repeatedly tapped Juror No. 7 with her foot under the table and it was making Juror No. 7 very uncomfortable. Juror No. 5 also indicated Juror No. 4 checked her cell phone every 10 to 15 minutes and stated she was looking for a text from her child.

Juror No. 3 indicated Juror No. 4 was concerned primarily with her phone and her notes. When the other jurors suggested they ask for a reading of testimony, Juror No. 4 said she did not need the testimony as she had her notes. However, her notes were confusing and did not match the testimony. During the

trial, Juror No. 4 had her cell phone on her lap "most of the time" and appeared to be sending emails or text messages. During deliberations, Juror No. 4 had her cell phone on the table and she picked it up and looked at it at least six or seven times during the first day of deliberations. On the morning of the second day of deliberations, Juror No. 7 told Juror Nos. 3 and 5 that Juror No. 4 stated she had been a juror on a previous case tried by one of the attorneys in this trial.

Juror No. 7 indicated that, on the first day of deliberations, in the hallway outside the court room, Juror No. 4 stated she recognized one of the attorneys in this case but he had not recognized her. When Juror No. 7 asked which of the attorneys, Juror No. 4 responded she would tell her later. Based on Juror No. 4's demeanor, Juror No. 7 concluded Juror No. 4 had a negative impression of the attorney. Juror No. 7 stated Juror No. 4 talked over other jurors during deliberations when they offered opinions. Also, when Juror No. 7 expressed an opinion, Juror No. 4, who was seated next to Juror No. 7, kicked Juror No. 7 under the table. At first, Juror No. 7 thought it was an accident, moved her legs and said, "Excuse me," but it happened three other times. Also, Juror No. 4 checked her phone for messages and typed on her phone during deliberations, even though the bailiff had instructed the jurors to turn their phones off. Juror No. 4 did this two or three times an hour the first day of deliberations and had done it three or four times the second day.

Juror No. 8 had seen Juror No. 4 check her cell phone during deliberations and she announced to the jury she was doing so, despite the bailiff's instruction not to use cell phones.

Based on these interviews, the trial court found Juror No. 4 was not refusing to deliberate. However, the trial court wished to interview Juror No. 4 regarding her failure to disclose her recognition of trial counsel, her cell phone use during trial and/or deliberations, and whether she deliberately had kicked Juror No. 7.

When examined, Juror No. 4 indicated she had been a seated juror on a trial five or six years earlier and thought defense counsel looked familiar. She possibly recognized defense counsel and had seen him in the courthouse and in a restaurant. Juror No. 4 recognized counsel the first or second time she sat in the jury box. When asked whether she remembered being introduced to the attorneys at the start of jury selection, Juror No. 4 said she must have "missed that." Juror No. 4 heard the bailiff tell the jurors not to use their cell phones while deliberating. Juror No. 4 admitted her cell phone had been "sitting there" during deliberations in case she received an emergency call from her children. Juror No. 4 initially did not recall using her phone during deliberations but then denied using it during trial or deliberations. She also denied kicking another juror in the foot or shin but conceded she might have "tripped on somebody accidentally."

The trial court indicated its tentative decision was to excuse Juror No. 4 for misconduct based on its findings she intentionally concealed material information and gave false answers during voir dire regarding her knowledge of one of the attorneys. The trial court also found Juror No. 4's denial of cell phone use was contradicted by several other jurors, one of whom stated Juror No. 4 had been typing on her phone. Additionally, Juror No. 4's denial that she had kicked another juror was not credible.

Defense counsel pointed out that, five or six years earlier, his hair had been gray and it now was darker. Thus, Juror No. 4 might have made an honest mistake in not immediately recognizing counsel.

After hearing argument, the trial court found Juror No. 4 intentionally had concealed a material fact during voir dire, thereby impairing the ability of the defense to exercise peremptory challenges, as well as the prosecution's right to a fair trial. The trial court did not believe Juror No. 4's assertion she did not hear the trial court ask if the prospective jurors recognized any of the parties based on Juror No. 4's statement to another juror that she would indicate which attorney

she had recognized after the trial concluded. The trial court did not believe Juror No. 4's denial of cell phone usage in light of the testimony of Juror No. 3, who was seated next to Juror No. 4. Also, Juror No. 4's denial was contradicted by the statements of Juror Nos. 7 and 8, whom the court found independent and credible. Finally, as to the kicking, the trial court found Juror No. 4's "explanation was not credible."

The trial court further concluded an admonition would be an inadequate remedy in light of Juror No. 4's "complete denial of all the allegations . . . ." The trial court excused Juror No. 4, seated an alternate juror, admonished the jury not to consider the substitution for any purpose and instructed the jury to set aside the prior deliberations and to begin anew. Approximately half an hour later, the jury reached verdicts.

b. *Relevant principles*.

"The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. ([Pen. Code,] § 1089.)"[4] (*People v. Lomax* (2010) 49 Cal.4th 530, 588.) "[A]n appellate court's review of the decision to remove a seated juror is not conducted under the typical abuse of discretion standard, but rather under the 'demonstrable reality' test." (*People v. Fuiava* (2012) 53 Cal.4th 622, 711.) The demonstrable reality test " 'requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. . . . [T]he reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the

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[4] Penal Code section 1089 provides, in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' " (*Id*. at p. 712, citing *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053.) In doing so, we do not reweigh the evidence. (*People v. Barnwell, supra,* at p. 1053.)

c. *The record supports the trial court's finding Juror No. 4 was unable to perform her duties as a juror to a demonstrable reality*.

Anderson first contends the record does not support the trial court's finding Juror No. 4 intentionally concealed the fact she recognized defense counsel. He relies on Juror No. 4's statement that, when she initially sat in the jury box, she was not 100 percent certain she recognized counsel but believed she may have seen counsel in a restaurant and may have seen him in court about five or six years ago. Also, defense counsel had changed his appearance over the last five years. Anderson asserts Juror No. 4 cannot be held to have concealed something of which she was not certain. (*People v. Wilson* (2008) 44 Cal.4th 758, 824.)

Anderson's reliance on *People v. Wilson, supra,* 44 Cal.4th at p. 839, is misplaced. In *Wilson*, the trial court found the challenged juror was unaware of his own prejudicial assumptions. *Wilson* concluded the juror could not have intentionally concealed these views. The trial court in this case did not find Juror No. 4 was unaware she had recognized defense counsel or that Juror No. 4 innocently concealed her recognition of defense counsel. On the contrary, the trial court found Juror No. 4 intentionally concealed her recognition of defense counsel. Moreover, the trial court's rejection of Juror No. 4's denial that she recognized defense counsel at the outset of the trial is supported by the record.

At the hearing, Juror No. 4 initially was evasive when questioned by the trial court but eventually admitted she first recognized counsel while Juror No. 4 was seated in the jury box during voir dire. With respect to the trial court's rejection of Juror No. 4's claim she must have missed the trial court's admonition

to the prospective jurors to disclose whether they recognized any of the attorneys, we defer "to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1053.) Also, Juror No. 4's reluctance to indicate to Juror Nos. 7 and 3 which attorney she recognized demonstrates consciousness of her wrongdoing. Thus, the evidence supports the trial court's finding Juror No. 4 intentionally concealed material information.

Anderson next addresses Juror No. 7's claim Juror No. 4 repeatedly kicked her under the table during deliberations. Anderson contends this accusation is questionable because Juror No. 7 did not report this conduct until Juror Nos. 3 and 5 reacted unfavorably toward Juror No. 4. However, the trial court was aware of the timing of the accusation and nonetheless found it credible. Absent something more substantial than the timing issue raised by Anderson, we defer to the trial court's factual finding Juror No. 4 repeatedly kicked a fellow juror when that juror expressed opinions with which Juror No. 4 did not agree. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1053.) Attempting to dissuade a juror through physical intimidation clearly constitutes misconduct. (See *People v. Wilson*, *supra*, 44 Cal.4th at p. 839.)

Anderson also claims the finding Juror No. 4 used her cell phone during trial and deliberations is suspect because Juror No. 8 did not see Juror No. 4 use her cell phone to the extent observed by the other jurors. However, the trial court's finding was supported by the testimony of the jurors seated closest to Juror No. 4 who reported she not only consulted her phone from time to time, but also typed on it during the trial. Indeed, Juror No. 4 admitted she made improper use of her phone during deliberations in violation of the trial court's order.

Lastly, Anderson contends that, even assuming each incident of misconduct were proved, Juror No. 4 committed only trivial violations that did not require her removal. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.) He asserts Juror No. 4's failure to disclose her recognition of defense counsel did not

prejudice the People's right to a fair trial because the record indicates Juror No. 4 had a negative impression of defense counsel. He claims the remaining aspects of her misconduct were not serious and there was little probability actual prejudice ensued. (*People v. Loot* (1998) 63 Cal.App.4th 694, 698.)

The trial court was entitled to consider the entirety of Juror No. 4's misconduct. Thus, we decline to parse Juror No. 4's misconduct into its components. Taken as a whole, the misconduct found by the trial court was not trivial. Juror No. 4 committed misconduct and undermined the jury selection process by concealing relevant facts and giving false answers during voir dire. (*In re Hitchings* (1993) 6 Cal.4th 97, 110-111.) Although Juror No. 4 assertedly had a negative opinion only with respect to defense counsel and not the prosecutor, her intentional failure to disclose her recognition of defense counsel amounted to misconduct. Also, she repeatedly ignored admonitions from the trial court and the bailiff in charge of the jury not to use her cell phone. She repeatedly kicked a fellow juror during deliberations, suggesting an intent to dissuade through physical intimidation. Moreover, with respect to each type of misconduct, Juror No. 4 steadfastly asserted she had done nothing wrong. She claimed she had not been certain of her identification of defense counsel, she denied cell phone use and she denied kicking Juror No. 7.

Based on these facts, the trial court properly could conclude an admonition would be inadequate to insure Juror No. 4 would commit no further misconduct. Juror No. 4 had committed three acts of intentional misconduct and lied when questioned about her conduct. The trial court indicated on the record it doubted an admonition would be an effective remedy in light of Juror No. 4's denials of misconduct. The trial court reasonably could conclude the juror could not be trusted to follow instructions to refrain from further misconduct. As noted in *People v. Daniels* (1991) 52 Cal.3d 815, "a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to follow instructions in the

future." (*Id.* at p. 865; see *People v. Ledesma* (2006) 39 Cal.4th 641, 738 ["a trial judge may conclude, based on a juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror."].)

Finally, Anderson contends reversal is required because the record suggests Juror No. 4 was the lone holdout juror as Anderson was convicted approximately half an hour after she was replaced. A similar claim was rejected in *People v. Fuiava, supra*, 53 Cal.4th 622, which stated: "Because the trial court's finding of good cause to dismiss Juror T. is supported to a demonstrable reality, there was no violation of defendant's statutory or constitutional rights. [Citation.] Moreover, there is no merit to defendant's claim that the court's entirely proper discharging of Juror T., . . . coerced the jury's verdict. We presume the reconstituted juries followed the trial court's instructions to begin the deliberations anew [citation], and defendant's speculation to the contrary does not persuade us to conclude otherwise." (*Id.* at p. 716.)

In sum, because the evidence showed to a demonstrable reality that Juror No. 4 was unable to perform the duties of a juror, we affirm the trial court's decision to remove the juror. (*People v. Wilson, supra*, 44 Cal.4th at p. 839; *People v. Barnwell, supra*, 41 Cal.4th at p. 1052.)

6. *The abstract of judgment must be modified to conform to the oral pronouncement of judgment.*

The People contend the abstract of judgment fails to reflect a 10-year firearm enhancement (Pen. Code, §12022.53, subd. (b)) imposed by the trial court with respect to count 2, attempted murder. It appears the point is well taken. We shall order the abstract of judgment modified to reflect the sentence imposed by the trial court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

## DISPOSITION

The judgment is modified to reflect a 10-year firearm enhancement within the meaning of Penal Code section 12022.53, subdivision (b) with respect to count 2, attempted murder. In all other respects, the judgment is affirmed. The clerk of the superior court shall prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting this modification.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.