Filed 11/30/18 P. v. Serrato CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OMAR SAMUEL SERRATO, Defendant and Appellant.	B269477 (Los Angeles County Super. Ct. No. KA103810)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Omar Samuel Serrato of sexual battery by restraint. He contends the trial court erred by (1) refusing to discharge a sitting juror; (2) admitting evidence of his prior "arrests"; and (3) failing to instruct the jury on the complete defense of unconsciousness. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In November 2013, the victim, 20-year-old Doe, was dating 20-year-old Christopher W. Miguel Serrato was one of Christopher's friends. Appellant is Miguel's father.[1] Serrato and Miguel lived in a small apartment located in the City of Pomona. Doe met Serrato for the first time when she and Christopher visited Miguel at the Pomona apartment on November 22, 2013. Doe had no relationship with Serrato.

a. *People's evidence*

On the evening of November 23, 2013, Christopher and Doe again visited Miguel at the Pomona apartment. Doe, Christopher, Miguel, and Serrato watched television, talked, and ate pizza in the living room. Serrato drank Jack Daniels whiskey throughout the evening. Doe did not flirt with Serrato, did not play "footsie" with him, and was not attracted to him. According to both Doe and Christopher, sometime during the evening, either Serrato or Miguel stated that the toilet in the apartment's hallway bathroom was not working, and they should use the master bathroom toilet located in Serrato's bedroom.

---

[1] Because appellant and Miguel share the same surname, for convenience, and with no disrespect, we hereinafter refer to Miguel by his first name and appellant by his surname.

Christopher used the master bathroom toilet during the evening. When he walked through the master bedroom, he noticed a shotgun.

Doe and Christopher decided to spend the night at the apartment. Doe had come to the apartment straight from her job at a fast-food restaurant, and was still wearing her uniform. Serrato or Miguel loaned Doe a T-shirt and shorts, so she did not have to sleep in her uniform. Miguel and Serrato went to sleep in their respective bedrooms. Doe and Christopher went to sleep on the living room floor.

At some point thereafter, Doe had to use the restroom. She woke Christopher and told him she was going to do so. Christopher fell back to sleep. Doe knocked on Serrato's bedroom door, and he opened it. He apologized for the messy state of his room. The television was on and the washer and dryer were running. Miguel also opened his door, thinking the knock was for him; when Doe told him she was going to use the master bathroom, he did not mention that the hallway bathroom was functioning. Miguel went back inside his room, and Doe went inside Serrato's room to the bathroom.

After Doe exited the bathroom, Serrato placed her against a wall in his bedroom, holding her arms. He touched her breasts, pulled down her shorts and underwear, and kissed her neck, chest, vagina, and anus. Doe cried, repeatedly said "no," and stated she had to leave. Shocked, she did not physically resist. When she cried out for Christopher, Serrato covered her mouth and told her to " 'Shut the fuck up.' " He then inserted his finger in Doe's vagina. Serrato eventually released Doe, and she left the room. Before she exited, Serrato asked if he could see her again and stated that he knew where she worked.

Doe returned to the living room and lay down next to Christopher, who immediately woke to find her "shaking and almost like hyperventilating." He asked what was wrong. Doe was reluctant to tell him, in part because she was afraid Christopher might confront Serrato. She kept shaking her head and crying, "could barely even speak," and "every single little thing . . . made her jump." Eventually she stated that Serrato had raped her.

Christopher said they needed to leave. He was worried that Serrato might realize what he had done, and was concerned about the shotgun in the bedroom. Doe did not want to report the attack to the police because she did not want to deal with testifying in court; she just wanted to go home to her mother. She appeared to be terrified. Christopher insisted on taking her to the police station.

At the police station, Doe, who appeared timid and scared, reluctantly described the assault to an officer. She voluntarily underwent a Sexual Assault Response Team (S.A.R.T.) examination at a hospital shortly thereafter.

A S.A.R.T. nurse described the protocols for S.A.R.T. examinations, and briefly described rape trauma syndrome and post traumatic stress disorder. Among other things, she explained the psychological factors that affect a victim's response to, and memory of, a sexual assault. Rape victims sometimes do not wish to talk about the attack, and sometimes forget aspects of the attack due to the neurological response to trauma. The majority of sexual assault victims do not fight back.

Testing revealed that Serrato's DNA was present on Doe's neck, external anal area, and breasts. There was a 1 in 36 chance that someone other than Serrato was the contributor of

the DNA found in the external anal sample. The likelihood that someone other than Serrato was the contributor of the DNA found on Doe's breasts and neck was in the quadrillions. No male DNA was found on her vaginal swab. No saliva was detected in the samples taken. Secondary DNA transfer from one person to another is possible even without direct contact between the two persons, for example when one wears another's clothing. DNA can stay on clothing indefinitely, even if washed. It was possible the DNA on Doe's neck and breasts was transferred from clothing.

Testing of Doe's blood and urine samples indicated the absence of alcohol and a variety of drugs. Testing of Serrato's urine sample likewise showed the absence of drugs.

After November 23, 2013, Christopher noticed that Doe's demeanor changed. They were no longer intimate, not even holding hands. Doe was easily startled and kept to herself. They stopped seeing each other in December 2014.

b. *Defense evidence*

(i) *Miguel's testimony*

Miguel testified in his father's defense, as follows. The hallway bathroom toilet was functioning that evening. While the group was watching television, Doe began to flirt with Miguel. He noticed Doe's legs moving in a "rhythmic sort of way" near his father's legs, and then saw his father move his feet onto a footrest in response. Miguel loaned Doe a pair of shorts; he did not remember who loaned her a shirt. During the evening, Christopher drank a lot of beer and fell asleep.

Approximately 15 minutes after Miguel and Serrato retired to their respective bedrooms, Miguel heard a knock. He opened his door and saw Doe knocking on his father's door. She said she

had to use the bathroom. He found this odd. Doe then entered Serrato's room. Miguel remained standing in his doorway, examining a broken paintball gun. Three minutes later, Doe exited Serrato's bedroom. She appeared calm and collected. Miguel asked whether everything was OK and she said yes. He never heard Doe cry out and never heard any noise from the master bedroom. The washer and dryer were not on. Within the next two hours, Miguel heard Doe and Christopher leave the apartment.

Police arrived at the apartment and arrested Serrato in the early morning hours. They did not conduct a search. According to Miguel, boxes blocked the wall in the master bedroom where Doe claimed she was pinned.

(ii) *Serrato's testimony*

Serrato testified in his own behalf. At the time of the incident, he was 50 years old. The hallway bathroom was functioning properly that evening, and everyone in the apartment, including Doe, used it.

Serrato, who was a heavy drinker, drank Jack Daniels throughout the evening. While watching TV, he and Doe played "footsie." They rubbed each other's calves with their feet. He became uncomfortable when her "body started to react to it." Upon retiring for the evening, Serrato, who had a "buzz" from the alcohol, got in bed and fell asleep.

There was a knock on his door, and he woke up to find Doe standing over him, with her hand on his chest and her face close to his. She said, " 'Why did you stop?' " He got out of bed. Doe put her arms around him and they "made out." Serrato was not "fully aware of what was going on" and was not fully awake. They held each other and "necked" a little bit. He kissed her

neck and chest, felt her breasts over her shirt, and cupped her buttock beneath her shorts. When Serrato "came fully to," and "c[a]me to his senses" he realized that it was not a good situation with Doe's boyfriend, who was a large man, in the other room. Serrato whispered, " 'hey, you gotta go.' " Reluctantly, Doe left the room. Serrato denied placing her against the wall, orally copulating her, pulling her pants down, restraining her, putting his hand over her mouth, or telling her to be quiet. She never cried out or told him to stop, nor did she give any indication she did not appreciate what was going on. She did not seem upset when she left the room. The entire incident lasted two minutes.

2. *Procedure*

A jury convicted Serrato of sexual battery by restraint (Pen. Code, § 243.4, subd. (a)),[2] and acquitted him of sexual penetration by a foreign object and forcible oral copulation. The trial court denied Serrato's motion to reduce the offense to a misdemeanor. It sentenced him to the midterm of three years in prison, suspended execution of sentence, and placed him on five years formal probation on the condition that he serve one year in jail. The court imposed a restitution fine, a suspended probation revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Serrato appeals.

DISCUSSION

1. *The trial court did not err by refusing to discharge Juror No. 5*

Serrato contends the trial court abused its discretion by failing to discharge a sitting juror, Juror No. 5, after she

---

[2] All further undesignated statutory references are to the Penal Code.

purportedly demonstrated impermissible bias. Because the juror demonstrated actual bias, he argues, her presence on the jury amounted to structural error, requiring reversal. We discern no abuse of discretion in the trial court's decision not to discharge the juror.

a. *Additional facts*

Doe was the first witness to testify at trial. Near the conclusion of her direct examination, and prior to cross-examination, Juror No. 5 asked to speak with the court out of the presence of the other jurors. She told the court, "I just don't think that I could be . . . a part of this case" and "I don't think [Serrato] will get a fair trial with me" because she thought Serrato was guilty. The trial court reminded Juror No. 5 that the jury had been apprised it would "hear a lot of things from the People initially" but needed to wait until all the evidence was elicited before making a decision. The court stated, "everybody is forming an opinion right now in spite of what I tell them," and "[w]e understand that, but all we need you to do is to wait until the end of the trial, wait until I instruct you and wait until everything is in" before deciding. Recognizing that "this is emotional testimony," the court reiterated that the juror must "wait until the end of the trial." It explained, "if you're going to sit up there, cross your arms, put your fingers in your ear[s] . . . figuratively, and say I'm not going to listen to anything else that's going on to see what's happening, then we have a problem." The court continued, "What I want you to do is think about what I just said. You need to listen to all the testimony . . . . [¶] Do you follow what I'm saying?" Juror No. 5 replied, "I just don't think I could just do this case. I think another case, yeah. I just don't think this one." The court asked whether the issue was that the

case involved sexual assault, and Juror No. 5 replied, "It bugs me, yeah." The court explained that oftentimes jurors must decide cases involving unpleasant, emotionally sensitive facts.

The conversation continued:

"The Court: [W]hat I want you to do is take a break. Take it easy. I will keep you through at least today. Go home and just rest, but what I need you to understand is this case isn't anywhere near being over. You need to listen to all the evidence. [¶] All right? Do you understand that? Can you do that? Can you try?

"Juror No. 5: I tried. I wanted to tell you the first half of this, and I sat here through the second to see if I could.

"The Court: I understand. I don't think you're alone, but I think what you have to understand, we're far from over. You haven't heard anything else from the defense side.

"Juror No. 5: The thing is I don't want to hear his side.

"[The Court]: I'm going to make everybody hear his side. . . . I need you to take a break. What's really important for you to understand, you can't talk to anybody about this. [¶] Do you follow me? . . . Go ahead. Go downstairs. Get something to drink. Stretch. Go outside. Take a deep breath of fresh air — well, as fresh as it gets in Southern California, but then come on back. Okay? Thank you."

After Juror No. 5 left the courtroom, the court addressed the attorneys, stating, "She's clearly distraught, but frankly, my impression is this witness [i.e., Doe] makes a very good witness, and I think several of the jurors were probably similarly affected. But we made it clear since the beginning they don't get to make their mind up until the end of the case. [¶] If she ends up putting her hands over her ears, even figuratively, I will deal

with the situation when it comes up, but to drop somebody out when you haven't even had a chance to cross the witness, I think, is a little bit premature." Defense counsel did not object.

After the parties rested, the court revisited the issue. It summarized: "[W]e left open until the end of the trial the issue of Juror No. 5 who initially approached the court, who was very upset. I had a conversation with her. She indicated she believed the victim's story. I asked her if she would listen to the entire case." Defense counsel had told the jury it would hear "bad things" about Serrato, but asked jurors to withhold judgment until the end of the trial. The court "asked [Juror No. 5] if she could do that and if she had any additional problems to let me know, and she said she would try. I paid attention to the jury as I do, but, in particular, to Juror No. 5. And it's been my observations, and I know you both have [observed] because you're both concerned with this. She's been attentive throughout the trial. [¶] She at no time — even with body language, she didn't fold her arms. She didn't sit up there and not pay attention. She watched and listened to every witness, and, additionally, she has not . . . been emotional through any other portions of the trial, and she has not sent any additional notes out. [¶] I think at this point in time, I want to consider that matter closed. She's been given the option that if she has any problems to let us know, and she hasn't done that yet."

Defense counsel did not object, but noted "for the record" that the court "left open for her that if she was concerned to let us know, and we have not received anything." Further, defense counsel concurred with the trial court's observations and had "seen her writing notes too with every witness, so clearly she's been paying attention." Defense counsel also agreed with the

court's observation that there was "no real way to bring her up and ask her how things are without getting into her mind." The court concluded, "I think that she's gotten over what she heard, and I believe she will be a fair juror." Defense counsel did not object or request that Juror No. 5 be excused.

b. *Applicable legal principles*

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors." (*People v. Nesler* (1997) 16 Cal.4th 561, 578 [lead opn. of George, C.J.]; U.S. Const., 6th & 14th Amends.; Cal. Const., art I, § 16; *People v. Hensley* (2014) 59 Cal.4th 788, 824.) Actual bias is a state of mind, in reference to the case or the parties, which would prevent a juror from acting with entire impartiality and without prejudice to any party's substantial rights. (*People v. Nesler*, at p. 581; *People v. Romero* (2017) 14 Cal.App.5th 774, 780.) A trial court may discharge a juror for good cause at any time if it finds the juror is unable to perform his or her duties. (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 69 (*Allen*); *People v. Lomax* (2010) 49 Cal.4th 530, 588; *People v. Romero*, at p. 781; § 1089.) When a court is apprised of information which, if proven true, would constitute good cause for a juror's removal, it must conduct whatever inquiry is reasonably necessary to determine whether the juror should be discharged. (*Allen*, at p. 69; *People v. Lomax*, at p. 588; *People v. Young* (2017) 17 Cal.App.5th 451, 463–464.) Whether and how to hold such a hearing is a matter within the court's discretion. (*Allen*, at p. 69.)

The decision whether to discharge or retain a sitting juror under section 1089 is reviewed for abuse of discretion. (*People v. Holloway* (2004) 33 Cal.4th 96, 124–125; *People v. Lomax*, *supra*, 49 Cal.4th at p. 589; *People v. Romero*, *supra*, 14 Cal.App.5th at

p. 781.) However, to support a decision to *discharge* a juror, a " 'somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal. [Citations.] . . . [T]he basis for a juror's disqualification must appear on the record as a 'demonstrable reality.' This standard involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence in the record supports the trial court's decision. [Citation.] It must appear '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.' [Citation.]" (*People v. Lomax*, at p. 589; *Allen*, *supra*, 53 Cal.4th at p. 71; *People v. Holloway*, at pp. 124–125; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Conversely, where substantial evidence supports a trial court's conclusion that a juror is able to serve impartially, and no inability to do so appears as a demonstrable reality in the record, the court's failure to discharge the juror is not an abuse of discretion. (*People v. Holloway*, at p. 126.)

Removal of a juror is "a serious matter," implicating the defendant's constitutional rights to a jury trial and due process. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1051, 1052.) Accordingly, a trial court should exercise its discretion to remove a juror for cause "with great care." (*Id.* at p. 1052; *Allen*, *supra*, 53 Cal.4th at p. 71 ["Great caution is required in deciding to excuse a sitting juror"].)

c. *Application here*

Serrato argues that Juror No. 5's statements disclosed an unwavering bias against him, requiring her discharge. He points to her statements that he would not get a fair trial with her, that

she believed he was guilty, and that she did not wish to hear his side of the story, as evidence supporting his contention.

(i) *Forfeiture*

Serrato has forfeited his challenge. *People v. Holloway*, *supra*, 33 Cal.4th 96, is instructive. There, during the guilt phase of a capital trial, a juror repeatedly asked to see photographs of the victims. Eventually the court, in the presence of counsel, discussed with the juror the reasons for his requests. Thereafter the juror discussed his photograph requests with other jurors. Again questioned by the court, the juror apologized and said he understood he should not discuss the matter with the other jurors. At no time did defense counsel ask that the juror be discharged. On appeal, defendant contended the trial court's failure to discharge the juror was prejudicial error. (*Id.* at pp. 123–124.) *People v. Holloway* concluded, "defendant forfeited this issue by failing to seek the juror's excusal or otherwise object to the court's course of action. [Citations.] '[H]ad [defendant] made the request at this time [after the juror was examined] when there was a suggestion of misconduct on the record, the court could have formally ruled on the matter . . . and cured the problem,' if any, by excusing the juror and substituting an alternate. [Citation.] Having expressed no desire to have the juror discharged at the time, and indeed no concern the juror had engaged in prejudicial misconduct, defendant 'is not privileged to make that argument now for the first time on appeal.' [Citation.]" (*Id.* at p. 124; see generally *People v. Young*, *supra*, 17 Cal.App.5th at p. 461.)

The same is true here. Serrato acquiesced in the trial court's treatment of the issue below. When the court revisited the question of Juror No. 5's comments after the parties rested,

counsel did not suggest further questioning was required to confirm that Juror No. 5 had, in fact, followed the trial court's admonishment to consider all the evidence, nor did he seek her removal. Instead, counsel agreed with the court that further questioning was improper, and did not object, suggest the juror's comments showed bias, or request her discharge.

(ii) *The record does not disclose bias to a "demonstrable reality"*

In any event, Serrato's claim fails on the merits. In order to remove Juror No. 5, the trial court had to determine — *to a demonstrable reality* — that the record indicated her bias. This standard, as discussed, is more stringent than the typical substantial evidence standard. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1052–1053; *People v. Fuiava* (2012) 53 Cal.4th 622, 711–712.) No such demonstrable showing of bias existed here.

What constitutes actual bias varies according to the circumstances of the case. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 580; *People v. Romero*, *supra*, 14 Cal.App.5th at p. 780, fn. 6.) In general, an impartial juror is one who is capable and willing to decide the case solely on the evidence presented at trial. (*People v. Nesler*, at p. 581.)

There is no assertion and no showing that Juror No. 5 was biased against Serrato based on something other than the evidence presented at trial. For example, there was no showing she had received information or evidence from an outside source; was predisposed to find Serrato guilty simply because he was the defendant in a sexual assault case; or was somehow biased *prior* to hearing Doe's direct examination. Instead, Juror No. 5's purported bias was limited to the question of whether, after hearing the victim's direct examination, she could remain open

minded and fairly consider the remaining evidence in the case, despite her impression that Doe was credible. (*Allen*, *supra*, 53 Cal.4th at p. 70 [for a juror to decide a case before it is submitted is misconduct].)

The fact Juror No. 5 expressed concerns to the trial court early during the case did not require, at that point, that she be discharged. As our Supreme Court has recognized, " 'it would be entirely unrealistic to expect jurors not to think about the case during the trial.' " (*Allen*, *supra*, 53 Cal.4th at p. 73.) "The reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature. We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. . . . What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (*Id.* at p. 75.) "A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations." (*Id.* at p. 73.) Even where a juror has extrajudicial knowledge of the case, a juror may serve if he or she " 'can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " (*People v. Nesler*, *supra*, 16 Cal.4th at pp. 580–581, italics omitted.) Thus, the question for the trial court was whether Juror No. 5 took to heart its admonition that she must consider all the evidence in the case before coming to a final conclusion.

Substantial evidence supported the court's conclusion that she did. Despite Juror No. 5's indication she believed Doe's

testimony, her subsequent conduct made clear that she had followed the trial court's directives and considered all the evidence. The court observed that since its discussion with her, Juror No. 5 had listened attentively to all the evidence. Her body language did not indicate a closed mind. Although she was initially upset, she had not been emotional through any other portion of the trial. She had made no further attempt to alert the court of any issue. And, defense counsel observed that Juror No. 5 had been taking notes "with every witness, so clearly she's been paying attention."

Based on Juror No. 5's conduct after her discussion with the court and the court's admonishment that she had to consider all the evidence, the trial court could reasonably conclude she had followed its advice and was seriously considering all the evidence despite her initial impression that Doe was credible. (See *Allen*, *supra*, 53 Cal.4th at p. 73 [fact juror did not refuse to listen to all the evidence indicated he had not prejudged the case].) The trial court was in the best position to observe the juror's demeanor. (See generally *People v. Holloway*, *supra*, 33 Cal.4th at p. 125.) Defense counsel accepted and reiterated the trial court's view, lending credence to the court's conclusions. (See *ibid.* [counsel's agreement with the trial court supported finding].) Moreover, there was no indication that Juror No. 5 failed to deliberate. (See *People v. Lomax*, *supra*, 49 Cal.4th at p. 589 ["Bias is often intertwined with a failure or refusal to deliberate"]; *Allen*, at p. 74 [participation in deliberations demonstrated juror had not prejudged the case].)

Significantly, the trial court's conclusion that Juror No. 5 followed its directive to listen to all the evidence was definitively confirmed by the fact Juror No. 5 voted to acquit Serrato on three

of the four counts alleged. Doe clearly testified that Serrato committed sexual penetration with a foreign object and oral copulation of both her vagina and anus. Had Juror No. 5 simply accepted Doe's account and closed her mind to the remaining evidence, including Serrato's and Miguel's testimony, Juror No. 5 could not have voted for acquittal on the three counts alleging sexual penetration and oral copulation.[3]

Serrato is correct that the trial court did not expressly invite Juror No. 5 to report to the court should she be unable to follow its directives. Arguably this was implied from the court's comments. The court stated it would keep her on the jury "through at least today" and that she should try to follow its instructions, intimating that if she was truly unable to consider the remaining evidence with an open mind, the issue could be revisited. Indeed, both defense counsel and the trial court believed this was the tenor of the court's remarks. Serrato also accurately points out that the trial court did not engage in further discussions with Juror No. 5 to obtain assurances that she would consider the remaining evidence and could be fair after

---

[3] Serrato argues that the presence of a biased juror constitutes structural error, not subject to harmless error analysis. Therefore, he argues, we may not consider the fact Juror No. 5 voted to acquit him on three of the four counts. But by so reasoning, we are not engaging in a harmless error analysis. To the contrary, the salient point is that the trial court's conclusion — that Juror No. 5 was unbiased, as indicated by her conduct in attentively and unemotionally considering the remaining evidence in the case —was definitively proven correct by virtue of her votes acquitting Serrato of three counts. We express no opinion regarding whether the presence of a biased juror constitutes structural error, or is subject to harmless error review, as the People contend.

all. But, as we have explained, the trial court's careful observations of Juror No. 5's demeanor and actions sufficed to demonstrate lack of bias, without the necessity of further discussions with her. In the absence of further communications from Juror No. 5 or evidence she was refusing to deliberate or consider the evidence, further inquiry was not required. (See generally *People v. Lomax*, *supra*, 49 Cal.4th at p. 592 [" 'the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists' "].)[4] And, contrary to Serrato's further argument, we do not believe the trial court's comments would have signaled to Juror No. 5 that she was required to sit on the jury no matter what.

In sum, the trial court did not abuse its discretion by failing to discharge the juror because bias did not appear as a demonstrable reality.

2. *Admission of evidence regarding Serrato's prior "trouble with the law"*

Serrato next contends that he was "impermissibly impeached with the fact of prior arrests, requiring reversal." We disagree.

---

[4] Serrato also argues that the court's initial comment, that "everyone" was forming an opinion despite admonitions not to do so, "legitimiz[ed] and reinforce[ed] the disclosed bias" and "exacerbated the error caused by allowing Juror [No.] 5 to remain on [Serrato's] case." However, the court's remark was inconsequential given Juror No. 5's attentive consideration of the remaining evidence and her verdict favoring Serrato on three of the four counts.

a. *Additional facts*

During Serrato's direct examination, defense counsel asked whether, as an adult, he had "ever been in any type of trouble with the law?" Serrato answered, "No." The prosecutor objected on relevance grounds. Before the court ruled, Serrato again answered, "No, I have not." The trial court then sustained the prosecutor's objection. The prosecutor did not request that the testimony be stricken.

Later defense counsel questioned Serrato about what transpired when he was arrested and taken to a hospital for an examination and DNA collection. Serrato explained that, when asked at the hospital whether he would submit to an examination, he asked to speak to a lawyer. His request was denied. When told he had to provide a DNA sample, Serrato stated he would provide one, but " 'under protest.' " Defense counsel queried, "This was all very foreign to you, correct?" Serrato answered, "Yeah, I've never been . . . in that situation." He did not know what his rights or "the procedures" were, and "without being able to contact anybody, [he] didn't know what to do." Thereafter, the prosecutor began cross-examination, and proceedings concluded for the day.

The following morning, the prosecutor stated she had learned Serrato had had two contacts with law enforcement as an adult. One incident did not result in a case filing; the other resulted in a case that was subsequently dismissed. The prosecutor sought to impeach Serrato with the fact of these contacts, which contradicted his testimony that he had never been in trouble with the law as an adult. She argued that

otherwise, the jury would be left with a false impression.[5] Defense counsel objected that any probative value the evidence had was outweighed by its prejudicial effect under Evidence Code section 352.

On the record, the court summarized the parties' discussion as follows: "Mr. Omar Serrato took the stand and testified he had never been in trouble as an adult with the law before. People did some homework last night, and it turns out that he had two incidents with law enforcement. [¶] One case was never filed, from what I can tell. The other case was filed but dismissed. However, based on the broad nature of the question and his answer, and his answer after there was an objection, the People are going to be able to ask the defendant, effectively, what you said was not true . . . ." The court directed that either the prosecutor or defense counsel should elicit from Serrato that he had not been convicted of an offense. It emphasized that the evidence would be admitted as relevant to Serrato's credibility, not as character evidence, and precluded the prosecutor from arguing that Serrato was a person of bad character. Defense counsel agreed that the court should not give a limiting instruction on the issue.

When cross-examination resumed, the following transpired:

"[Prosecutor]: You testified on direct yesterday that you had never been in any type of trouble with the law as an adult. [¶] Do you remember testifying about that yesterday?

---

[5] The parties' discussion with the trial court was held off the record. At Serrato's request, we ordered the court and the parties to prepare a settled statement regarding the content of the off-the-record discussion, and the record has been augmented with that settled statement.

"[Serrato]: Yes, I do.

"[Prosecutor]: And . . . your answer then was no, correct?

"[Serrato]: Correct.

"[Prosecutor]: But that wasn't . . . true; is that correct?

"[Serrato]: That is correct.

"[Prosecutor]: But you've never been convicted of any crime as an adult; is that correct?

"[Serrato]: Correct, and that's what I thought the meaning of the question was."

b. *Discussion*

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Jackson* (2016) 1 Cal.5th 269, 330.) Relevant evidence may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352; *People v. Jackson*, at p. 330; *People v. Lee* (2011) 51 Cal.4th 620, 643.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Jackson*, at p. 330; *People v. Williams* (2013) 58 Cal.4th 197, 270–271.) We apply the abuse of discretion standard to a trial court's rulings on admissibility. (*People v. Jackson*, at p. 330; *People v. Lee*, at p. 643.)

" 'By statute, evidence of prior specific acts of misconduct is ordinarily inadmissible either to prove conduct on a specific occasion or to attack a witness' credibility. [Citations.] More

specifically, it has long been held that evidence of an accused's prior arrests is inadmissible.' [Citation.]" (*People v. Woodruff* (2018) 5 Cal.5th 697, 759–760; *People v. Medina* (1995) 11 Cal.4th 694, 769; *People v. Williams* (2009) 170 Cal.App.4th 587, 609–610 ["Generally, evidence of mere arrests that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character"]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 [evidence of mere arrests is usually more prejudicial than probative].)

In *People v. Anderson* (1978) 20 Cal.3d 647, the prosecutor elicited evidence that two codefendants had been arrested together on prior occasions to show the affinity between them, which in turn was offered to demonstrate bias. (*Id.* at pp. 649–650.) *Anderson* reasoned that the prior arrests "might in a general sense be relevant" as demonstrating bias or interest, but because the prosecution had already established that the men were good friends, the evidence was cumulative for this purpose. (*Id.* at pp. 650–651.) *Anderson* observed that evidence of a previous arrest may seriously impair a witness's credibility before the jury, and, as with any evidence of prior misconduct, must be admitted only with " 'extreme caution.' " (*Id.* at p. 651.)

In *People v. Medina*, *supra*, 11 Cal.4th 694, the defendant's sister testified that his violent behavior began only after he was released from San Quentin. On cross-examination, the prosecutor elicited that the defendant had been arrested numerous times before being housed at San Quentin, to rebut the sister's testimony. *Medina* held admission of the prior arrests was improper, reasoning that "evidence of mere 'arrests' for violent conduct is not proper rebuttal evidence for this purpose." (*Id.* at p. 769.)

However, the foregoing authorities do not stand for the proposition that "an arrest is inadmissible for any type of impeachment." (*People v. Turner* (2017) 13 Cal.App.5th 397, 411.) Evidence of a prior arrest has been held admissible to establish a fact other than the defendant's propensity to commit crimes or impeach him with prior conduct involving moral turpitude. In *People v. Turner*, for example, the court rejected claims that the trial court erred by admitting evidence that the defendant had been found in possession of ammunition during a previous arrest. His prior possession of the same type of ammunition discovered during a subsequent incident "impeached his specific testimony suggesting that the police planted" the contraband. (*Id.* at pp. 400, 411–412.) Similarly, in *People v. Duncan* (1981) 115 Cal.App.3d 418, the defendant's use of an alias during a prior arrest was relevant, in light of his contradictory testimony, to show that he was attempting to avoid prosecution; further, the prosecutor elicited testimony about the prior arrest only after defendant testified he had not given a fictitious name to officers. (*Id.* at pp. 427–428; see also *People v. Panah* (2005) 35 Cal.4th 395, 479 [evidence witness was arrested on an unrelated matter was relevant to her credibility; it provided a reason for her hostility to the prosecution and undercut another portion of her direct testimony].)

Here, the prosecutor did not raise the issue of Serrato's prior contacts with law enforcement until *after* defense counsel elicited Serrato's inaccurate testimony that he had never been in trouble with the law. This evidence, along with Serrato's assertion that he was unfamiliar with his rights and the situation was "all very foreign" to him, tended to explain Serrato's choice to provide a DNA sample " 'under protest' " and to bolster his

character by suggesting he had never been in legal trouble. Serrato was not entitled to be clothed with a false aura of credibility. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1056 [" 'No witness including a defendant who elects to testify in his own behalf [is] entitled to a false aura of veracity' "]; see generally *People v. Disa* (2016) 1 Cal.App.5th 654, 672.)

Nor was the probative value of the evidence outweighed by its prejudicial effect.[6] (Evid. Code, § 352.) Evidence is prejudicial within the meaning of Evidence Code section 352 if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome, that is, if it " ' "uniquely tends to evoke an emotional bias against defendant as an individual and . . . has very little effect on the issues." ' " (*People v. Williams*, *supra*, 58 Cal.4th at p. 270; *People v. Case* (2018) 5 Cal.5th 1, 43.) The prior "trouble with the law" evidence was not of this ilk. It was not admitted to demonstrate Serrato's propensity to commit crimes, nor was it offered to impeach him by demonstrating he was involved in previous conduct involving moral turpitude. To the contrary, it was offered to demonstrate that he gave false testimony in the instant matter, a factor statutorily established as relevant to the jury's evaluation of witness credibility. (See

---

[6] Serrato also avers that because the question whether he had ever been in trouble with the law was ambiguous, his answer was not necessarily untruthful. The question was indeed ambiguous, but defense counsel — not the prosecutor — asked it, and defense counsel could have clarified the issue with ease, had the defense chosen to do so. Moreover, defense counsel did not object to admission of the challenged evidence on the ground Serrato's answer was in fact truthful or simply required clarification, and therefore he cannot raise this argument on appeal. (Evid. Code, § 353, subd. (a).)

Evid. Code, § 780, subd. (i).) The jury was told nothing about the nature of the prior "trouble," but was clearly informed that no conviction had resulted. Thus, any prejudicial effect was minimized.

Serrato complains that, since the court sustained the prosecutor's objection to defense counsel's initial "trouble with the law" question, his answer was not actually in evidence and had no probative value; further, the jury was instructed to disregard answers to which an objection was sustained. But, because Serrato actually answered the question and the answer was not stricken, it remained in evidence. (See *People v. Anderson* (1962) 199 Cal.App.2d 510, 515; *People v. Valencia* (1938) 30 Cal.App.2d 126, 128–129 [where witness answered question before objection was sustained and there was no motion to strike, the question and answer were left for the jury's consideration]; *People v. Olds* (1957) 154 Cal.App.2d 78, 83–84.) And, the instruction Serrato references did not tell jurors to disregard the evidence under these circumstances. The instruction stated, "If an objection was sustained to a question, do not *guess what the answer might have been*" and "Do not consider for any purpose . . . any evidence that was *stricken* by the court . . ." (CALJIC No. 1.02, italics added.) The evidence was not stricken, and given that Serrato answered the question, the jury did not have to guess at the answer.

Serrato also urges that the People should have moved to strike the evidence, rather than attempt to rebut it, and were not entitled to elicit inadmissible evidence in any event. In support, he cites, inter alia, *People v. Gambos* (1970) 5 Cal.App.3d 187. In *Gambos*, defense counsel elicited from a police officer that the defendant's nontestifying roommate told the officer that heroin

found in their kitchen was hers. The prosecutor did not object, but on the theory that defense counsel's question had " 'opened the door,' " elicited from the officer the roommate's hearsay statements that heroin found elsewhere in the apartment was *not* hers. (*Id.* at p. 191.) The appellate court found admission of the hearsay evidence reversible error, explaining: "By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' . . . argument is 'a popular fallacy.' " (*Id.* at p. 192.) But here, the prosecutor did not elicit inadmissible evidence as the *Gambos* prosecutor did. The challenged evidence was not inadmissible per se; its admissibility turned on its relevance and prejudicial effect.

In any event, assuming arguendo admission of the testimony was error, we discern no prejudice. The erroneous admission of evidence "does not require reversal except where the error or errors caused a miscarriage of justice." (*People v. Richardson* (2008) 43 Cal.4th 959, 1001; Evid. Code, § 353, subd. (b).) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson*, at p. 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

Contrary to Serrato's argument, the jury was never led to believe Serrato had suffered prior arrests. The only evidence before the jury was the vague showing that Serrato had experienced some unspecified "trouble with the law," which had *not* resulted in any conviction. Thus, the jury was unlikely to assume the existence of any prior arrests. Moreover, "[w]rongful evidence of police encounters is not as prejudicial as evidence of prior convictions. . . ." (*In re James B.* (2003) 109 Cal.App.4th 862, 874–875.) The challenged evidence was but a brief portion of the People's case. And, the evidence benefitted Serrato by clearly establishing he had no prior convictions.

Serrato argues the evidence was close, as indicated by the jury's acquittal of him on three of the four charged counts.[7] However, in our view, this circumstance indicates the opposite conclusion: that the jury acquitted on three of the charges demonstrates the evidence did not prejudice the jury against Serrato.

In sum, the jury was not likely to attach much significance to the entire issue, and Serrato has failed to show any likelihood of a more favorable result had the evidence been omitted.

---

[7] Serrato also argues that the fact the jury deliberated for three days demonstrates the close nature of the case. Not so. Deliberations commenced on Wednesday, March 11, 2015, at 4:02 p.m. On the morning of Friday, March 13, 2015, the court was alerted to and addressed an issue of jury misconduct, and ultimately dismissed one of the jurors. Deliberations started anew on March 13 at 11:09 a.m. At 1:30 p.m. that same day, the jury indicated it had reached a verdict.

3. *There was insufficient evidence to support an unconsciousness instruction*

Serrato contends that the trial court prejudicially erred by refusing his request to instruct the jury on the complete defense of unconsciousness. We disagree.

a. *Additional facts*

As defense counsel requested, the trial court instructed with CALJIC Nos. 4.20, 4.21.1, and 4.22, regarding voluntary intoxication. As relevant here, CALJIC No. 4.21.1 advised that as to counts 1 and 4 (sexual penetration by a foreign object and sexual battery by restraint), the jury must consider the effect of Serrato's voluntary intoxication, if any, when determining whether he formed the requisite specific intent.

Defense counsel also requested that the court instruct with CALJIC No. 4.30, regarding unconsciousness.[8] Counsel argued that Serrato had testified he was in a "dream-like state" and was "buzzed"; Doe awakened him; and when he "came to his senses"

---

[8] CALJIC No. 4.30 provides: "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime. [¶] This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium of fever, or because of an attack of [psychomotor] epilepsy, a blow on the head, the involuntary taking of drugs or the involuntary consumption of intoxicating liquor, or any similar cause. [¶] Unconsciousness does not require that a person be incapable of movement. [¶] Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission of the alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, [he] [she] must be found not guilty."

he told Doe to stop. The unconsciousness instruction, counsel argued, applied not only to persons who were "literally asleep," and but also "when someone is unconscious to the point that they don't realize what's going on," the state of affairs Serrato described. The prosecutor objected, arguing that the evidence showed Serrato was awake and was aware of what he was doing.

The trial court found insufficient evidence to support the instruction. Serrato's testimony demonstrated awareness. Viewing the evidence in the light most favorable to the defense, "[t]here was nothing unconscious about what was going on. It might have been a dream-like state. Could also be because it's a 51-year-old guy, and a 20-year old woman is in there coming on to him. I don't know what he meant by that, but it certainly doesn't rise to the level of unconsciousness."

b. *Discussion*

" 'Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge.' " (*People v. Parker* (2017) 2 Cal.5th 1184, 1223; *People v. Halvorsen* (2007) 42 Cal.4th 379, 417; § 26, para. Four [persons who "committed the act charged without being conscious thereof" are deemed incapable of committing a crime].) Voluntary intoxication, even if it induced unconsciousness, is not a complete defense, but may be relevant to the question of whether the defendant formed the requisite specific intent. (*People v. Boyer* (2006) 38 Cal.4th 412, 469; *People v. James* (2015) 238 Cal.App.4th 794, 805.)

"An unconscious act, as defined 'within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional.' " (*People v. Ferguson* (2011) 194 Cal.App.4th 1070,

1083.) "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' " (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 417; *People v. Rogers* (2006) 39 Cal.4th 826, 887; *People v. Gana* (2015) 236 Cal.App.4th 598, 609 ["unconsciousness 'contemplates . . . for example, somnambulists, or persons suffering with delirium from fever or drugs' "].) It is presumed that a person who appears to act in a state of consciousness is, in fact, conscious. (*People v. James*, *supra*, 238 Cal.App.4th at p. 804.) The defendant has the burden of demonstrating he was unconscious. (*Ibid.*; *People v. Froom* (1980) 108 Cal.App.3d 820, 830.)

A trial court must instruct on an affirmative defense, including unconsciousness, if the defendant relies on the defense and there is substantial evidence supporting it. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 887; *People v. Boyer*, *supra*, 38 Cal.4th at p. 469; *People v. James*, *supra*, 238 Cal.App.4th at p. 805.) However, a court is not obliged to instruct on theories that lack substantial evidentiary support. (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1049–1050.) Substantial evidence is that sufficient to deserve consideration by the jury, that is, evidence a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263; *People v. Ross*, at p. 1050.) The existence of any evidence, no matter how weak, will not justify an instruction. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) In deciding whether an instruction is required, a court does not weigh the credibility of the defense evidence, but only considers whether there was evidence that, if credited, was sufficient to support the defense.

(*People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. James*, at p. 804 [fact that evidence may not inspire belief does not authorize refusal of an instruction]; *People v. Cole* (2007) 156 Cal.App.4th 452, 484.) We independently review the question of whether the trial court erred by failing to instruct on a defense. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

Serrato recognizes that his voluntary intoxication could not support the requested instruction. However, he argues that "a person can be unconscious based on their state of sleep." In support of this contention, he points to section 261, subdivision (a)(4), which defines rape as, inter alia, sexual intercourse accomplished when the victim was "unconscious or asleep," or was not "aware, knowing, perceiving, or cognizant that the act occurred."

While we do not necessarily agree that section 261 has relevance to the defense of unconsciousness, we do not quarrel with the proposition that a defendant who acts when truly asleep, or who is otherwise unaware of his or her actions, may establish unconsciousness. It has long been understood, for example, that somnambulism is a form of unconsciousness. (See *People v. Ferguson*, *supra*, 194 Cal.App.4th at p. 1083; *People v. Gana*, *supra*, 236 Cal.App.4th at p. 609; CALJIC No. 4.30 ["This rule of law applies to persons who are not conscious of acting but who perform acts while asleep . . . ."].)

The problem for Serrato is that there was no substantial evidence demonstrating he acted while in such a state. He points to the following aspects of his testimony in support of his claim. (1) He was asleep when Doe approached him in the bedroom. (2) He was not fully awake and "wasn't fully aware of what was going on" during their encounter. (3) He ended the contact

between them when he "came fully to" and "c[a]me to [his] senses." Counsel below also argued that Serrato's testimony he was in a "dream-like state" suggested unconsciousness. Viewed in the totality of the circumstances, Serrato argues, his testimony demonstrated he was in a state of "diminished awareness" sufficient to require the instruction.

But "diminished awareness" and unconsciousness are not equivalents. Contrary to Serrato's argument, the totality of his testimony indubitably demonstrated he did *not* act while unconscious. His testimony was as follows. Usually, it took him a "little bit" to wake up, because he "just get[s] a little groggy." On the night of the incident he "was asleep. . . . [Doe] puts — or *I wake up*, and she's got her hand on my chest, and she says, 'why did you stop?' " (Italics added.) When the prosecutor, during cross-examination, asked whether Doe got in bed with him, he replied: "No. She did not get in bed with me." He "woke up. She was over me with her hand on my chest and her face close to mine." He got out of bed, although he "wasn't fully aware of what was going on," was still "groggy," and wasn't "quite awake." While they stood at the foot of the bed, Doe put her arms around him and they "made out." When he "came fully to," he realized that it was not a good situation, and he told her to leave. Serrato recalled that he did not kiss Doe's lips; did kiss her neck; had his hands around her waist when he kissed her; felt her breasts over her shirt; pulled her shirt — which had a "big neck" — down from the back when he kissed her neck; kissed the top of her chest; and reached under her shorts, which were quite short, and cupped her "butt cheek" with his hand. He did not remove her shirt; did not place her against the wall; did not restrain her in any way; did not put his hand over her mouth or tell her to shut up; did not

kiss her vagina; and did not pull her pants down. Doe did not cry out or tell him to stop. He did not hear the toilet flush. He did not think he was "dreaming this whole thing." The entire event lasted only two minutes. When the prosecutor asked whether Serrato had considered the fact that Doe's boyfriend was in the other room, he replied, "I wasn't in the mindset. I was asleep, and she woke me up, so until I got out of that – I don't want to – maybe dream-like state, whatever it is right when you wake up, it takes you a little bit to get your bearings." He admitted he was "awake enough to kiss" Doe in response to her purported overtures. When the prosecutor asked, "You weren't sleep walking during this, right?" Serrato answered, "No. . . . No, no, she woke me up," and "I was in between that wake period and sleep, you know."

Serrato's testimony is irreconcilable with a conclusion he was unconscious. He testified to the details of the encounter, including how he touched the victim, what the victim wore and purportedly said, where they stood, and how long the encounter lasted. He testified to precisely what he did and did not do, indicating awareness of his actions as they occurred. The only reasonable interpretation of his comments about being in a dream-like state, not fully aware of what was transpiring, and the like, was that he was groggy after being awakened. His statement that he came to his senses can only be understood as meaning he realized his conduct was unwise, not that he suddenly snapped out of a trance or unconscious state. In short, viewing the evidence in the light most favorable to Serrato, there was a dearth of evidence demonstrating unconsciousness. (See *People v. Parker*, *supra*, 2 Cal.5th at pp. 1225–1226; *People v. Rogers*, *supra*, 39 Cal.4th at pp. 887–888 [unconsciousness

instruction not warranted where defendant was aware of events as they occurred, but he reacted emotionally rather than logically].) Although Serrato argues that the trial court declined to give the requested instruction because it discredited his testimony, this was not the case. The trial court properly refused the requested instruction because the evidence was insufficient to support it.

Serrato's reliance on *People v. Wilson* (1967) 66 Cal.2d 749 and *People v. Bridgehouse* (1956) 47 Cal.2d 406 (disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89–91), is unavailing. As explained in *People v. Halvorsen*, *supra*, 42 Cal.4th 379, in *Wilson*, the defendant testified he did not recall shooting the victims, which was consistent with his statement to police at the time of his arrest. In *Bridgehouse*, the defendant testified his recollection of speaking with the victim just before the shooting was " 'very hazy' "; he had only a " 'very vague memory' " of the victim springing from the couch; the next thing he remembered was "pulling the trigger of his gun on empty cartridges"; and he characterized his action as " 'distorted by a haze of mental void.' " (*People v. Halvorsen*, at p. 418; *People v. Bridgehouse*, at p. 410.) Thus, in sharp contrast to the instant case, the defendants in *Bridgehouse* and *Wilson* "testified to a mental state consistent with unconsciousness and with prior statements to police." (*People v. Halvorsen*, *supra*, at p. 418; *People v. Carlson* (2011) 200 Cal.App.4th 695, 705.) As explained, Serrato's testimony evidenced awareness of events as they transpired. There was no instructional error.[9]

---

[9] Because the trial court did not commit instructional error, we do not reach Serrato's argument that the purported error was prejudicial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

GOODMAN, J.*

---

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.