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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS GUTIERREZ, Defendant and Appellant.	B226367 (Los Angeles County Super. Ct. No. KA085357)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tia G. Fisher, Judge. Affirmed.

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Valerie G. Wass, 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, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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Jose Luis Gutierrez appeals from the judgment entered after a jury convicted him of second degree murder and found true the special allegation under Penal Code section 12022.53, subdivision (d), that, while committing the crime, he personally and intentionally discharged a firearm causing death.[1] Gutierrez contends that the trial court erred by rejecting his request to instruct the jury on voluntary manslaughter; failing to sua sponte tell the jury that the absence of malice is an element of murder; and denying his motions for a mistrial and a new trial based on juror misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An information, dated February 26, 2009, charged Gutierrez, who then was 16 years old, with the murder of Miguel Martin (§ 187, subd. (a)) and specially alleged that Gutierrez personally and intentionally had discharged a firearm while committing the offense (§ 12022.53, subd. (d)).[2]

2. *The Evidence Presented at Trial*

a. *The People's Evidence*

Albert Sandoval, known as "Amaze," testified that Gutierrez, whom he called "Looney," grew up around the corner from him and that he had known Gutierrez for about four years. On December 5, 2008, about 3:00 p.m., Gutierrez showed up at Sandoval's home. Sandoval drove them in his parents' Nissan Altima to buy food. When they returned to Sandoval's home, Gutierrez left on foot, and Sandoval drove his sisters to church. Sandoval again returned home, gave some of the food to his mother and then drove down the street to a friend's house. On the way he saw and spoke to Gutierrez and a few other friends, including Tremayne Williams, who were standing on the corner. Sandoval stopped at his friend's house, where he visited with his friend's

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[1] Statutory references are to the Penal Code unless otherwise specified.

[2] The information also specially alleged personal and intentional use and discharge of a firearm under section 12022.53, subdivisions (b) and (c). It specially alleged a criminal street gang enhancement under section 186.22, subdivision (b)(4), which the People dismissed before trial.

father for about 10 minutes. Upon leaving, Sandoval saw two of the friends he had seen earlier at the same corner, but Gutierrez and Williams were no longer there. Sandoval drove to buy beer and chips for a party at his house the next day and proceeded onto Mission Boulevard when he realized that he had forgotten his driver's license, which he would need to buy beer.

While on Mission Boulevard, Sandoval saw Gutierrez walking in the parking lot of a liquor store and Williams about seven feet away on a bicycle and waved to them. He made a u-turn on Mission Boulevard to head back home for his driver's license when he saw a flash and heard about three shots fired from the parking lot of the market near the liquor store. Sandoval saw Gutierrez in the market parking lot and Williams about 50 feet away on the sidewalk. Gutierrez was running and had a gun in his hand. Sandoval came to a stop in the middle of the street because Gutierrez ran in front of his car. Gutierrez opened the front passenger door of the car, got in and said, "'Take me to Tijuana.'" Sandoval denied waiting in his car across the street before the shooting and said that he did not know that Gutierrez was going to shoot anyone. Sandoval initially asked Gutierrez what had happened and then thought, "No, I don't want to be a part of this. No. No. And [he] proceeded to drive." Sandoval drove to his home, asked Gutierrez to leave and went inside.

Williams testified at trial that he knew Gutierrez as "Looney" and that they had been friends for about three years. Williams knew Sandoval for about three years as well and referred to him as "Amaze." Sandoval drove a Nissan. On December 5, 2008, Williams rode his bicycle to a market on Mission Boulevard to buy beer. After making a purchase, he hopped on his bicycle, heard shots and hit the ground. He waited about a minute and rode off on his bicycle, noticing a man, later determined to be Martin, lying on the ground. About two hours later, police took Williams to the station for questioning. Williams slept there for a couple of hours because he had been drinking all day and probably had smoked marijuana and possibly methamphetamine as well. When he woke up, he said he was feeling okay and spoke to the police. Williams denied telling police that "Looney" was the shooter or that he knew who was the shooter. Williams did not

want to be involved in the case because "people would show up at your house. Like I already have people showing up at my house . . . [and] telling me that I better not go to court or something or they were gonna go and get me." Several men came to his house with a gun and told him not to go to court.

According to a police detective, when Williams spoke to the police on the night of the shooting, he did not appear to be under the influence of alcohol or drugs. At first, Williams denied being near the scene of the shooting but later said he had heard gunshots. In speaking to the police detective, Williams pointed to a picture of Gutierrez and identified him as the shooter. Williams said that he did not hear any words exchanged between Gutierrez and Martin but saw Gutierrez shoot Martin as he exited the market. Sandoval was parked nearby in a Nissan Altima. After Gutierrez fired shots, Williams saw him run across the street and get into the car.

On December 5, 2008, before dark, Tommy Martinez was working at a fast-food restaurant on Mission Boulevard when he heard something that he thought was a gunshot. He looked out the window and, although he could not hear any voices, noticed two people who appeared to be arguing. After about 12 seconds, one person ran and the other gave chase, firing one shot at first and then several more shots. Martinez saw the shooter run across the street and jump into the front passenger seat of a Nissan Altima parked on the street, a car that, before the shooting, had been parked in the lot of his restaurant for 10 or 15 minutes, not in a space but in the fire zone at an angle toward Mission Boulevard. The driver of the car took off. Later that evening, police showed Martinez a photographic lineup. He selected one photograph, which was a picture of Gutierrez, and said that he thought the man looked similar to the shooter but was not positive about the identification.

Renato Luna, who was standing outside a building on Mission Boulevard about 5:00 p.m. on December 5, 2008, saw a man driving a car, which he thought was a Honda sedan but could have been a Nissan Altima, stop his vehicle for 10 to 20 seconds and then make a u-turn from Luna's side of the street. While the car was stopped on the other side of the street, after about 20 seconds, Luna heard four or five gunshots and moments later

saw another man, running in the street. The man jumped into the waiting vehicle on the front passenger side, and the driver of the vehicle "[k]ind of hesitated" and then "took off." Luna also saw a man on a bicycle in the area where the shots were fired.

Martin, who had been at the market and purchased a piece of pie, died of multiple gunshot wounds. A toxicology analysis determined Martin's blood alcohol level was .17 and detected the presence of marijuana and methamphetamine. Gutierrez's thumbprint was found on Sandoval's car. A bullet analysis determined the gun used to kill Martin was a .38 special or .357 magnum; three shell casings from a .357 magnum and one from a .38 special were found in a bedroom of the residence where Gutierrez's cousin lived.

After being arrested in connection with the shooting, Sandoval was charged with the murder of Martin along with Gutierrez. While they were both in custody, Gutierrez told Sandoval that he had shot Martin because Martin was part of a group that had earlier fired at him and Sandoval's brother.[3] Gutierrez suggested to Sandoval that he change the statement that he had given to the police implicating Gutierrez in the crime. He also told Sandoval that he would plead guilty to the murder charge for a 20-year prison sentence and report that Sandoval was not involved in the case. Sandoval decided to resolve the matter against him on his own and pleaded guilty to being an accessory after the fact to Martin's murder, for which he would receive a three-year prison sentence, in exchange for his truthful testimony in the case.

b. *The defense's evidence*

Gutierrez's aunt testified that, when she returned home from picking up her son and grandchildren from school at 3:25 p.m. on December 5, 2008, Gutierrez was at her home. Gutierrez went into her son's bedroom and played video games. He stayed in the home until 6:00 p.m. when she and Gutierrez went to get pizza. Gutierrez's cousin testified that Gutierrez was at his home when he returned from school with his mother on

[3] The shooting to which Gutierrez referred took place about six months before Martin was killed. Neither Gutierrez nor Sandoval's brother was struck or injured during that shooting. Sandoval's brother was in custody at the time of Martin's death on charges unrelated to the shooting or to this case.

the afternoon of December 5, 2008. He and Gutierrez went into his bedroom and played video games. Later, they played with the other kids in the home. Gutierrez did not leave the home before 6:00 p.m. when he went to get pizza. Gutierrez left the home again that evening to go to church or an appointment with his mother, but returned and spent the night at his cousin's home. The cousin's brother, who had been in custody for about four months, used to keep bullets in the cousin's bedroom because it had a door.

c. *The People's rebuttal evidence*

Gutierrez's mother testified that she went to Gutierrez's aunt's home on December 5, 2008. Although she told police that Gutierrez had stayed home while his aunt went to get pizza, at trial she testified that Gutierrez had gone with his aunt. After eating pizza, she took Gutierrez to church and to get him a haircut. Later, she dropped him back at his aunt's home, where he spent the night. Gutierrez's mother did not know about the shooting when she went to see her son, but noticed that police had blocked off some of the streets in the area.

A police detective testified that, when he interviewed Gutierrez after arresting him, Gutierrez reported that his mother had told him about the shooting on December 5, 2008 and asked him if he was okay. Gutierrez said he saw his mother about 1:00 p.m. that day. When the detective questioned Gutierrez about the discrepancy between his statement that his mother told him about the shooting around 1:00 p.m. and the actual time of the shooting several hours later in the day, Gutierrez said that his mother had come to see him about 1:00 p.m. but must not have told him about the shooting until the evening. He went to church that evening with his mother, returned home with his mother and spent the night at her house. He did not mention anything about getting a haircut or spending the night at his cousin's house.

3. *The Jury's Verdict and Sentencing*

The People proceeded against Gutierrez on a theory of first degree murder. The trial court instructed the jury on both first and second degree murder. During deliberations the jury informed the court that it had reached an impasse between first and second degree murder. The court dismissed the charge of first degree murder at the request of the People and informed the jury that "[t]he issue of guilt as to first degree murder is no longer before you. The verdict forms regarding first degree murder will be removed from the jury room." The jury then returned a verdict of guilty of second degree murder and found that, in committing the crime, Gutierrez personally and intentionally had discharged a firearm causing death within the meaning of section 12022.53, subdivision (d). The court sentenced Gutierrez to a state prison term of 40 years to life, consisting of 15 years to life for the second degree murder of Martin, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d).[4]

DISCUSSION

1. *The Trial Court Did Not Err by Rejecting Gutierrez's Request to Instruct the Jury on Voluntary Manslaughter*

Gutierrez's counsel requested that the trial court instruct the jury on voluntary manslaughter based on the theory that Gutierrez had acted in a heat of passion. The court denied the request on the ground that the evidence was insufficient to warrant the instruction. Gutierrez contends that the court erred. We disagree.

The trial court must instruct the jury, whether sua sponte or on the defendant's request, on a lesser included offense "'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'[T]he existence of "*any* evidence, no matter how weak"

[4] The jury also found true the special allegations of firearm use and discharge under section 12022.53, subdivisions (b) and (c). Based on imposition of the 25-year-to-life sentence for the firearm enhancement under section 12022.53, subdivision (d), the trial court stayed execution of sentence pursuant to section 654 for the firearm enhancements under section 12022.53, subdivisions (b) and (c).

will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]'" that the lesser offense, but not the greater, was committed. [Citations.]' [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 553.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) "'[W]hen the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)),'" the defendant is deemed to have acted without malice, even if he or she intended to kill. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.) Thus, a killing "'upon a sudden quarrel or heat of passion'" can negate the malice element of murder and reduce the offense of murder to voluntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 58-59; see also *Breverman*, at pp. 153-154.)

"A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.]" (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) "'"To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" [Citation.]' [Citation.] '[T]he factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim (citation), or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]' [Citation.]" (*Id*. at pp. 549-550.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of

average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.] '"However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . ." [Citation.]' [Citation.]" (*Id*. at p. 550.) "Heat of passion [also] may not be based upon revenge. [Citation.]" (*People v. Burnett* (1993) 12 Cal.App.4th 469, 478; see also *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 ["desire for revenge does not qualify as a passion that will reduce a killing to manslaughter"].) Moreover, "[a]dequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee*, *supra*, 20 Cal.4th at p. 60; *Fenenbock*, at p. 1704.) Otherwise, the evidence does not warrant instruction on voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10 ["murder defendant is not *entitled* to instructions on the lesser included offense of voluntary manslaughter if evidence of provocation . . . , which would support a finding 'that the offense was less than that charged,' is lacking"].)

Gutierrez contends instruction on voluntary manslaughter was warranted because "[a] rational jury could have found that intense and high-wrought emotions were aroused during the argument that ensued between [him] and [Martin] just prior to the shooting. Further, such a jury could find that [he] was sufficiently provoked when he encountered and confronted [Martin] outside the liquor store in regard to the prior shooting incident, which resulted in an argument that ultimately ended with the shooting."

The evidence, however, does not support Gutierrez's theory that "intense and high-wrought emotions were aroused" during an argument between Martin and him before the shooting. Martinez testified that, after hearing a gunshot, he looked across the street from the restaurant where he was working and saw two men who, based on their body language, appeared for about 12 seconds to be arguing. Martinez then saw one man take off running and the other chase him, firing additional shots. No evidence indicates that Martin was armed. Any body language observed by Martinez thus occurred after Gutierrez already had fired a shot and, as a result, could not constitute either objective or subjective provocation. In addition, even assuming an argument between Gutierrez and

Martin, no evidence suggests that Martin was the aggressor, thereby provoking Gutierrez to shoot him.

Evidence that Gutierrez shot Martin in retribution for the shooting incident six months prior involving Gutierrez and Sandoval's brother also is not a sufficient basis to require instruction on voluntary manslaughter. Revenge does not constitute the provocation necessary to negate the intent to kill. (*People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1704; *People v. Burnett*, *supra*, 12 Cal.App.4th at p. 478.)

2. *The Trial Court Was Not Required to Instruct the Jury That Absence of Heat of Passion Is an Element of Murder*

In a related argument, Gutierrez contends the trial court erred by failing, sua sponte, to instruct the jury that the absence of heat of passion is an element the People must establish beyond a reasonable doubt to prove a defendant is guilty of murder. Gutierrez, however, recognizes that the law does not support his contention. As the Supreme Court has noted, "in a murder case, unless the People's own evidence suggests that the killing may have been provoked . . . , it is the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.]" (*People v. Rios*, *supra*, 23 Cal.4th at pp. 461-462; see also § 189.5, subd. (a) ["Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable"].) The evidence proffered by the People, as discussed, was not sufficient to warrant instruction on voluntary manslaughter. Gutierrez thus was obligated to present a showing of heat of passion to justify instruction on such a theory. Under these circumstances, the trial court properly instructed the jury under CALCRIM No. 520 on the definition of malice and the People's burden in seeking a murder conviction to prove beyond a reasonable doubt that Gutierrez had acted with malice in killing Martin and was not required to give further instruction.

3. *No Basis Exists to Reverse the Judgment on the Ground of Juror Misconduct*

During Williams's testimony, a judicial assistant informed the trial court that Juror No. 2 had approached him and asked "if anything was being done to protect . . . Williams, because . . . he received a death threat and we know that's real. We all know that's real." The court asked Juror No. 2 to explain her comments, and the juror said, "I hope I expressed it in a way as a general citizen concern. What happens to these young men of this type? . . . I mean his life is in jeopardy. I know that's the way life is out there. I'm just wondering are there witness programs? It was just a general question of is there a witness program out there for people like this? It has nothing to do with the trial whatsoever. That's all. I just want to be educated." Juror No. 2 then produced a note she had written to the court, which stated, "I have grave concerns re: Mr. Williams['s] safety. [¶] Is there a 'witness program' available to him or ? [¶] Can you please have someone explain to me the process for his safety—(Privately) as not to interrupt the trial—Signed, Juror # 2 (a concerned citizen). [¶] NOTE: this will NOT change my unbias[ed] opinion of the case in any way[.]" The court asked Juror No. 2 whether a concern for witness safety had been discussed with or among other jurors, and she responded, "I don't have a really good memory, but I believe it was just in passing in [the] hallway out there. I couldn't even tell you which one it was. . . . I think just as I was walking by I heard somebody say a reference to the concern of the safety. I mean how can we not be concerned . . . ? We're human." Juror No. 2 said that no other juror had seen her write the note, but she had asked one other juror, probably in thinking out loud, "just in general . . . what happens to these guys? . . . [I]s there a protection program I'm wondering?" The other juror responded that she did not know.

The trial court then questioned the other jurors. Juror No. 1 stated that she had heard a passing comment from one of the jurors expressing sympathy based on Williams's testimony that he was scared, but she "wasn't really paying attention." Juror No. 3 heard Juror No. 2 make a general comment about concern for witness safety, but did not hear any juror respond to her. Juror No. 3 said that she did not think that hearing the comment would have any impact on her ability to be a fair juror. Juror No. 6

also heard Juror No. 2 express concern for Williams's safety, but ignored the comment and changed the subject. Juror No. 6 said nothing about the comment would influence her opinion or decision making in the case. Juror No. 9 heard Juror No. 2 state that she hoped Williams would be protected and expressed general agreement in response. Nothing further was said, and no other jurors responded to Juror No. 2. Juror No. 2's statement would "not at all" interfere with Juror No. 9's ability to be a fair and impartial juror, and Juror No. 9 promised to set aside issues of sympathy, pity, prejudice and public opinion in being a fact-finder in the case. Alternate Juror No. 1 made a statement to two jurors that Williams had looked "sort of scared" but said the jurors just nodded in response and she could be a fair and impartial juror, follow the law and base her determination on the evidence. Alternate Juror No. 2 heard another juror express concern for Williams's safety with two other jurors present. Alternate Juror No. 2 said she "also felt bad for him[,]"and the conversation went no further. Alternate Juror No. 2 said "[a]bsolutely, yes" that she could be a fair and impartial juror in the case. Juror Nos. 4, 5, 7, 8, 10, 11 and 12 and Alternate Juror No. 3 did not hear any juror comment about concern for witness safety.

Gutierrez's counsel initially requested that the trial court excuse Juror No. 2 and then moved for a mistrial, arguing that the jurors' "feelings for the witness [Williams] have crept into the . . . fact-finding job that they have. They're sympathetic. They're empathizing and they're accepting factually as true that he, in fact, has been threatened and threatened with deadly force and they believe that as a unit or group."

The trial court granted the defense request to excuse Juror No. 2, finding that she had committed misconduct by violating the admonition not to talk about the subject matter of the case. The court denied the motion for a mistrial, stating, "I accept the credibility of all of the other responses from the jurors that it's not going to have any impact on them. They were very forthright, very credible, were forthcoming, extremely quickly. You know, the record will speak for itself but many of them are doing their very best to ignore it and having that thought I need to ignore this, they were well aware of that and assured the court that what they heard coming from her would not impact their

ability to be fair and impartial. So I'm confident that I have appropriately investigated the issue. I've made my factual findings. I accept . . . all of these other jurors in terms of their promise to the court that they will continue to be fair and impartial despite their overhearing the concerns of Juror No. 2. And it did not so taint the panel. . . . It is . . . actually a very limited area and it is also clear that there were a number of jurors who didn't hear it. There were maybe one or two incidents going to lunch or sitting there where she expressed her concern that she's expressed in this letter." Although some discussion occurred as to whether the court should excuse Alternate Juror No. 1 as well based on misconduct, the parties ultimately stipulated to excuse her because she had a medical appointment that conflicted with the trial proceedings that afternoon. Alternate Juror No. 3 was selected at random to replace Juror No. 2.

After the jury reached a verdict, Gutierrez moved for a new trial in part on the ground of jury misconduct based on the concern for witness safety expressed during Williams's testimony. The court denied the new trial motion, stating, "I was satisfied that all of the jurors who were questioned were credible and when they assured the court that to the extent some of them heard it that they were also credible when they advised me that they would not in any way be impacted by what they heard. They behaved appropriately, responded to the court's inquiry appropriately and honestly."

Gutierrez contends that the jury committed prejudicial misconduct by expressing concern for Williams's safety and that the trial court should have granted a mistrial during trial or a new trial after the jury reached its verdict. We disagree.

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and [the appellate court] use[s] the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) With respect to a motion for a new trial, a court may grant a defendant a new trial upon his application when, among other instances, the jury has "been guilty of any misconduct by which a fair and due consideration of the case has been prevented[.]" (§ 1181, par. (3).) The court first determines whether the evidence presented is admissible under Evidence Code

section 1150, subdivision (a)[5], and then, based on any admissible evidence, considers whether misconduct occurred. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) "The trial court has the discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 604.) Even if misconduct has occurred, it is not necessarily cause for reversal. Misconduct raises a rebuttable presumption of prejudice; nevertheless, a reviewing court will set aside a verdict only upon a substantial likelihood of juror bias. (*People v. Bennett* (2009) 45 Cal.4th 577, 626.) Such bias is present when "the misconduct is inherently and substantially likely to have influenced the jury. Alternatively, even if the misconduct is not inherently prejudicial, [the reviewing court] will nonetheless find such bias if, after a review of the totality of the circumstances, a substantial likelihood of bias arose. [Citation.] While the existence of prejudice is a mixed question of law and fact subject to . . . independent determination, [the reviewing court] accept[s] a trial court's credibility determinations and factual findings when they are supported by substantial evidence. [Citation.]" (*Id*. at pp. 626-627.) "Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 296.)

No basis exists to set aside the verdict here. The trial court interviewed each juror separately, which led to the dismissal of Juror No. 2 and the parties' stipulating to excuse

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[5] Evidence Code section 1150, subdivision (a), provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Alternate Juror No. 1. Juror Nos. 4, 5, 7, 8, 10, 11 and 12 and Alternate Juror No. 3, who replaced Juror No. 2 on the panel, did not hear any juror comment about concern for witness safety. Although Juror Nos. 1, 3, 6 and 9 heard a comment, Juror Nos. 3, 6 and 9 each expressly told the court that the comment would not affect their ability to be fair and impartial about the case. Although the court did not make that express inquiry of Juror No. 1, that juror said the comment was in passing and she "wasn't really paying attention." The court, both in commenting on the mistrial request and the new trial motion, found that the jurors' testimony was credible and that the expressed concern regarding witness safety did not taint the jury panel. Under these circumstances, Gutierrez's ability to receive a fair trial was not irreparably damaged, and no substantial likelihood exists that one or more jurors were actually biased against Gutierrez to prejudice his case.[6]

[6] Gutierrez contends that Juror Nos. 3, 6 and 9, who merely heard a comment about witness safety, committed misconduct themselves by not immediately reporting the comment to the bailiff. According to Gutierrez, these jurors were required to report the comment to the bailiff based on the instruction they had received at the outset of trial that, "[i]f you receive any information about this case from any source outside of the trial, even unintentionally, do not share that information with any other juror. If you do receive such information or if anyone tries to influence you or any juror, you must immediately tell the bailiff." Even if Juror No. 2's comment, in connection with the fact that Juror Nos. 3, 6 and 9 did not themselves say anything to the bailiff, could be construed as a violation of this instruction, Gutierrez did not lose his right to a fair trial, nor did he suffer prejudice as a result. The trial court became aware of Juror No. 2's concerns after she had expressed them to the judicial assistant, stopped the testimony and questioned Juror No. 2 and the remaining jurors right away. Juror Nos. 3, 6 and 9 all informed the court that they could be fair and impartial in deciding the case. The court dismissed Juror No. 2, replacing her with Alternate Juror No. 3, who did not hear a comment regarding witness safety, and the parties stipulated to excuse Alternate Juror No. 1 before any testimony resumed.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.