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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RODNEY CYRIL CARR, Defendant and Appellant.	B232288 (Los Angeles County Super. Ct. No. NA075363)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed with directions.

Landra E. Rosenthal, 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, Senior Assistant Attorney General, Stephanie C. Brenan and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Rodney Cyril Carr appeals from the judgment entered following a jury trial in which he was convicted of first degree murder and mayhem, with a finding he personally used a deadly weapon. The jury also found that defendant was sane at the time he committed the offenses. Defendant contends insufficient evidence supports the jury's sanity verdict and the trial court erred by failing to instruct sua sponte on involuntary manslaughter and by admitting the testimony of a particular witness. He also notes an error on the abstract of judgment. We direct the trial court to correct two errors on the abstract of judgment, but otherwise affirm.

BACKGROUND

Defendant was charged with first degree murder and aggravated mayhem, with an allegation of personal use of a deadly weapon. Defendant was found to be incompetent to stand trial in January of 2009 and was placed in Patton State Hospital. In December of 2009, the state hospital certified defendant's competence to stand trial, and proceedings were resumed.

A. Guilt phase

In August of 2007, defendant was 23 years old and lived in Harbor City with his grandparents, Lonnie and Bobby Goodwin. (Undesignated date references are to 2007.) Because defendant's mother suffered from drug addiction, the Goodwins intermittently raised defendant. Lonnie testified that Bobby and defendant had a loving and affectionate relationship, although defendant displayed anger when Bobby chastised him. But the relationship had never been violent. Defendant dropped out of high school and joined the Navy, but was dishonorably discharged after a little more than two years. According to Marisela Nash, of the Naval Criminal Investigative Service, defendant was discharged in 2004 for a pattern of misconduct including unauthorized absences, wearing civilian clothes, missing curfew, and "having a false past." As part of his admission into the Navy, defendant underwent a medical examination addressing both his physical and mental health, including whether he suffered from any type of psychiatric condition. Defendant's records reflected a negative response with regard to psychiatric conditions.

Lonnie testified that defendant's discharge disappointed Bobby, who had served in the Army. Bobby was concerned that defendant was making the wrong choices in life. In 2007, defendant studied electronics at a technical school and worked nights.

On August 2, Los Angeles County Sheriff's deputies arrested defendant in Carson for being under the influence of a controlled substance. Defendant attracted their attention by staring into the windows of a closed business. As the deputies approached him, defendant ran, dropped to the ground, and repeatedly shouted, "Don't shoot me!" He was perspiring, fidgety, had dilated pupils and an elevated pulse, and appeared to be nervous and "paranoid." Defendant admitted he had used methamphetamine and marijuana about four hours earlier.

Lonnie went on a cruise from August 10 to August 13. When she returned home, Bobby told her that during her absence defendant had gone out with friends to celebrate his birthday, and when he came home, he "didn't know his head from his tail" and had slept for three days. Lonnie testified that defendant was behaving strangely when she returned on August 13, and she believed he was using drugs. Defendant had always been talkative, but when Lonnie asked him questions after her return home, defendant merely nodded, then he said he could not talk to her. The next morning, defendant stared at Lonnie and one of her travelling companions as they sat and talked in the Goodwin home. Lonnie asked defendant if he wanted something, and he replied, "I don't talk. I only do what I'm told. The voices tell me when to talk and when not to talk." Lonnie's sister hugged defendant and tried to talk to him, but he pushed her away, saying, "I can't talk." Lonnie also testified that defendant covered his ears "because he didn't want to hear anyone say anything or talk." Defendant also punched a door in the house.

At her sisters' urging, Lonnie phoned the police. Los Angeles Police Department (LAPD) Officer Jeanine Bedard responded to the Goodwin home. She testified that defendant was docile until she handcuffed him, then he became agitated and "stated a lot of different things about the Bible and about the beast, things that did not make sense."

Defendant did not appear to be under the influence of alcohol or drugs. Bedard arranged for a mental evaluation team to assess defendant and transported him to the police station.

The mental evaluation team, consisting of LAPD Officer Sean McPartland and psychiatric social worker Dawn Urasaki, interviewed defendant at the police station on August 14. Defendant did not consent to the evaluation. He stated he had no history of mental health problems and did not need mental health treatment. He explained he had told some houseguests to "shut up and be quiet" because he believed they were interfering in an argument he was having with his grandfather. He told the team he had "been having problems with his grandfather related to several issues, which he did not want to discuss any details and was having an argument with him." He said the argument was an ongoing one. Defendant admitted occasionally experimenting with drugs in the past, and ongoing use of marijuana and alcohol. He said he had last used marijuana a week earlier and alcohol three days earlier. Defendant told the team he wanted to resolve the disputes with his grandparents and move back in with them. He blamed the houseguests for the disturbance.

Urasaki testified that defendant's demeanor, speech, activity, and appearance were all normal during the evaluation. He was irritated about being handcuffed, but otherwise calm. He appeared hesitant to provide information, but his statements were responsive and logical. Defendant did not report any hallucinations, did not appear to be hallucinating, and made no references to the Devil or Antichrist. McPartland did not believe defendant was under the influence of drugs. Bobby told Urasaki that defendant had been "acting paranoid," "asking other weird questions," and said something about cameras in the house. Urasaki and McPartland concluded that defendant did not pose a danger to himself or others and should be released.

Defendant returned to the Goodwin home later on August 14. Lonnie would not let him in the house. Defendant requested a Bible and asked Lonnie whether he was the Antichrist. Lonnie put a Bible outside for defendant to take, and he left the area.

About 4:00 a.m. on August 15, the Goodwins and their next-door neighbor phoned the police to report defendant trespassing in the neighbors' yard. LAPD Officer Gil Carranza testified that he and his partner called for defendant to come out of the backyard, and he complied. Defendant was agitated and did not respond to the officers' questions, but he eventually told Carranza that he was just hanging out in his own backyard because his grandparents would not let him inside the house. Defendant did not appear to be under the influence of drugs or alcohol. The neighbors did not want defendant arrested, and Lonnie asked the officers to get defendant some help. With defendant's consent, the officers drove him to a bus depot and released him.

On the morning of August 16, defendant walked into the hair salon where Lonnie worked and asked to rest. He was dirty and scratched, and his hands were bleeding. Lonnie called Bobby and requested that he take defendant back to the house. When Bobby arrived, he awakened defendant, who was sleeping on a sofa. Defendant said nothing, and seemed tired and dazed. Lonnie saw Bobby hug defendant on the way to the car. Bobby phoned Lonnie at work between 4:00 and 6:00 p.m. that afternoon and asked when she was coming home. He said, "It's getting pretty rough," but did not elaborate. Lonnie said she would be home soon.

When Lonnie arrived at her home, something told her to enter through the garage, not the front door. She opened the garage door with a remote control and saw defendant standing over Bobby, who was lying on the floor of the garage, covered in blood. Lonnie did not see Bobby's face or head. She ran across the street to a neighbor's house, screaming. From across the street, Lonnie saw the garage door close again. The neighbors phoned the police, who arrived about 15 minutes later.

Responding LAPD officers opened the garage with Lonnie's remote and found Bobby's headless body lying on the garage floor. They retreated to the driveway and called for defendant to come out of the house. Defendant complied and was easily handcuffed. He had a bloody kitchen knife in his front trouser pocket. He was shirtless and covered with blood. He had one cut on his palm and minor scrapes on his hands. An

emergency medical technician testified that defendant's blood pressure, pulse, pupils, and behavior were within the normal range, and he did not appear to be under the influence of drugs. The officer who transported defendant to the police station testified that he was cooperative and his responses matched the officer's commands.

Police found a pool of blood and a gold necklace on the garage floor. Bobby's body lay at a different place in the garage, closer to the door leading into the house. Inside the house, there were blood smears on the walls, door, sink, and soap inside a bathroom near the door into the garage. In the den several golf trophies lay on the floor, broken and covered in blood, and a bloody knife lay on a barstool. There was blood on the walls, tables, and chairs. In the kitchen there was blood on drawers and the trash can, which contained two bloody knives. Nyquil and similar over-the-counter cold remedies sat on the kitchen counter. Next to the front door the officers found a set of car and house keys and Bobby's severed head wrapped up in a sheet. A total of seven bloody knives were found throughout the first floor of the house.

Detective Isidro Rodriguez testified that police searched the entire house, but found no drugs or drug paraphernalia.

Detectives conducted a video-recorded interview with defendant at the station and the recording was played at his trial. Defendant admitted killing Bobby and drew a detailed, two-page diagram of the house that included numbers and descriptions of what acts he had performed at particular places in the house. Defendant told detectives that he and Bobby were arguing. He initially said the argument was about toothpaste, but later said he was angry because Bobby had prevented him from killing himself with cold remedies. The argument led to a fistfight, then defendant grabbed one of Bobby's golf trophies and began hitting Bobby with it. Bobby tried to fight back, so defendant "bashed his face" with the trophy. He explained to the detectives, "I'm not going to stop hitting you with the trophy if you're still fighting." Bobby then ran to the kitchen, and defendant believed he was going for a knife. Defendant reached the kitchen first, and prevented Bobby from getting a knife. Defendant remarked to the detectives, "Lucky I got him

first." Defendant and Bobby wrestled over a knife, but defendant stabbed Bobby multiple times.

Defendant told detectives that Bobby escaped into the garage and locked the door behind him. Defendant went out the front door and entered the garage from the driveway. He continued to stab Bobby, even after he knew Bobby was dead. He realized what he had done and thought he should try to dispose of the body somehow. It occurred to him to cut it up. Defendant explained to the detectives that he lost his mind, was out of it, and was not thinking clearly. He decided to cut off Bobby's head; he wanted it as a souvenir. It was difficult work, and he had to keep returning to the kitchen to get new knives. He put his foot on Bobby's face and started "hacking." Once defendant got the head off, he decided to take the rest of the body inside to a bathtub to chop it up. Defendant wrapped Bobby's head in a blanket and put it in the downstairs closet, then began to drag Bobby's body toward the door leading into the house from the garage.

Defendant told detectives that after Lonnie arrived and opened the garage door, he closed the door and "went back to work." He explained, "Somewhat dark with a dead body here and I don't need the whole neighborhood." Defendant knew the police were going to come. He moved the head from the closet to the front door so he would not forget it when he left. He also took the car keys from Bobby's pocket because he considered hiding the body in Bobby's car.

Detective Rodriguez testified that defendant was "focused" as he made his confession and did not appear to be acting oddly. Defendant never told the police that he heard voices or thought someone was the Devil or Antichrist. Defendant admitted that in the past he may have "subconsciously" thought about killing Bobby because they were "always getting into it," and he was angry at Bobby, but he did not plan the killing. Defendant said he was remorseful, but believed Bobby was going for the knives, and it was "either me or him."

Bobby had 15 stab wounds, all but one of which were on his torso. One of those wounds perforated his heart and would have been rapidly fatal. Others punctured his

lungs and would have severely impaired his ability to breathe. One of Bobby's eyes was completely ruptured and the other was severely damages and protruding from its socket. These eye injuries were sustained while Bobby was alive and were consistent with blows from a trophy. He would not have been able to see. Bobby died before he was decapitated.

The Goodwins' neighbor, Marilyn McDonald, testified that during the week before Bobby's murder, she saw defendant walking in the neighborhood talking to himself and gesturing. He came to McDonald's door and asked for a cigarette. McDonald refused, and defendant slammed the door and walked away, waving his arms.

Defendant's former girlfriend, Melissa Sharp, testified for the defense that she had spoken to defendant on the phone during the summer of 2007, and he did not exhibit any erratic behavior. He seemed upbeat about his education and graduation. She visited defendant in jail in October of 2007 and his behavior had changed. He told Sharp he would be out of jail in a few weeks and would talk to her then. He hit his head with the visitation phone, said his head hurt, hung up, and walked away. Sharp also testified that she previously observed defendant to have a cordial, but not overly affectionate relationship with Bobby.

The jury convicted defendant of first degree murder and simple mayhem, as a lesser included offense of aggravated mayhem. It also found that defendant personally used a deadly weapon in the commission of both offenses. (Pen. Code, § 12022, subd. (b)(1); undesignated statutory references are to the Penal Code.)

B. Sanity phase and sentencing

Luis Sesco, who was 17 at the time of the crimes, had met defendant in the neighborhood sometime in 2007, and they socialized. Sesco noticed a change in defendant's behavior during the summer of 2007. Defendant grabbed a phone away from Sesco's friend, then got into a fight with that friend after a trip to the beach. On another occasion, defendant and Sesco were outside another friend's house and defendant was rapping. Defendant then saw his reflection in a window and began yelling at it. Sesco

also saw defendant holding his arms up in the air while he was "pacing" in the cul-de-sac where he lived. Sometimes defendant had a Bible in his hands when he did this. On defendant's birthday (August 1), he appeared to be under the influence of drugs. He was fidgety and "talking some nonsense" about "record deals." He told Sesco he wanted to "rob" a house.

About three weeks before Bobby's murder, neighbor Thomas Coleman saw defendant walking up and down the sidewalk shouting profanity, racial slurs, and something about gangs and drug dealers when no one else was around him. Then, a few days before the murder, defendant told Coleman that he had gotten into Pepperdine and was going to study engineering.

Defense psychiatrist Rebecca Crandall opined that defendant suffered from a psychotic disorder with mood components, and that he was legally insane when he committed the crimes because, although he understood the nature of his actions and probably knew that it was legally wrong to kill Bobby, he believed Bobby was Satan and "did not think that it was wrong to kill Satan." Crandall explained that one basis for her opinion was defendant's history of mental illness. Defendant's mother told Crandall that defendant was hospitalized and treated for bipolar disorder in 1999. Crandall also reviewed records from Valley Mental Health in Utah indicating that in 2002 defendant was diagnosed with generalized anxiety disorder and depression. After his roommate died of meningitis, defendant repeatedly expressed anxiety about catching the disease. Crandall's opinion was also based upon witnesses' observations of defendant's odd behavior in the period leading up to the murder, the circumstances of the crimes, defendant's post-incarceration statements to Crandall and other doctors that he believed Bobby was either possessed or Satan, a statement by neighbor Marilyn McDonald that she thought someone had told her that defendant had referred to Bobby as Satan, defendant's medical records from jail reflecting psychotic symptoms, and the report of Dr. Simpson, who examined defendant in jail and diagnosed him as suffering from "psychotic mental disorder, most likely schizophrenia." Crandall testified that defendant told Simpson that

he did not tell the police about hearing voices or his belief that Bobby was Satan because the voices told him not to "snitch."

Crandall admitted that psychosis can be caused by drug use and it is very difficult to distinguish between a naturally occurring mental illness and a drug-induced disorder without objective indications of drug use. All of defendant's odd behavior before the murder could have been caused by drug use. She further admitted that defendant may have killed Bobby simply from anger at being evicted from the Goodwin home.

Prosecution psychiatrist Ronald Markman agreed that defendant was in a psychotic state when he killed Bobby. He opined that this psychotic state could have resulted from a psychotic breakdown, being under the influence of drugs at the time of the murder, or prior drug use that caused a settled psychosis even after the drugs had left defendant's system. Markman believed defendant was most likely under the influence of drugs at the time of the murder, but if not, that prior drug use caused a settled psychosis. Accordingly, Markman opined defendant was not legally insane at the time of the offenses. Markman based his opinion on defendant's use of alcohol since the age of 10 and marijuana since the age of 11, defendant's report that he had used those drugs ever since, defendant's use of methamphetamine two weeks before the murder, defendant's report that he had not used drugs for four days before the murder (revealing that he had used them as late as August 12), and the paranoid and delusional nature of defendant's odd behavior in the weeks before the murder, which was fully consistent with use of stimulant-type drugs. Markman disagreed with defendant's jail diagnosis of schizophrenia.

The jury found defendant legally sane. The court sentenced defendant to prison for 26 years to life.

DISCUSSION

1. Sufficiency of evidence of sanity

Defendant contends that insufficient evidence supported the jury's sanity verdict.

In order to resolve this issue, we view the record in the light most favorable to the judgment to determine whether substantial evidence supports the jury's sanity

determination. (*People v. Chavez* (2008) 160 Cal.App.4th 882, 891; *People v. Skinner* (1986) 185 Cal.App.3d 1050, 1059.) Because defendant bore the burden of proving by a preponderance of the evidence that he was insane, before we can overturn the jury's finding to the contrary, "we must find as a matter of law that the [jury] could not reasonably reject the evidence of insanity." (*Skinner*, at p. 1059.)

Proving his insanity required defendant to show that at the time he committed the offense he was incapable of knowing or understanding the nature and quality of his act or distinguishing right from wrong. (§ 25, subd. (b); *People v. Skinner* (1985) 39 Cal.3d 765, 769.) Insanity cannot be based upon the "addiction to, or abuse of, intoxicating substances." (§ 25.5.) "This statute makes no exception for brain damage or mental disorders caused solely by one's voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off." (*People v. Robinson* (1999) 72 Cal.App.4th 421, 427.)

Substantial evidence supports the jury's sanity finding. The jury could have discounted defendant's post-incarceration statements about Bobby being Satan as a conscious effort to appear insane. The jury also had the benefit of viewing the recording of defendant's confession, during which he never mentioned hearing voices or a belief that Bobby was Satan. Ample evidence also supported a potential conclusion by the jury that Bobby's motive for the murder was anger, not a delusional belief. Defendant's confession revealed that the events leading to the murder began with an argument, and defendant told the detectives that he and Bobby were "always getting into it" and he may previously have "subconsciously" thought of killing Bobby. Defendant had also told Urasaki on August 14 that he had been having problems with his grandfather related to several issues and was having an ongoing argument with him. The jury could reasonably

infer that defendant's problems with Bobby were exacerbated by defendant's expulsion from the Goodwin home on August 14.

Accordingly, although the evidence would have supported an insanity verdict, it was not uncontradicted and entirely to the effect that defendant was insane, and we cannot overturn the jury's finding to the contrary.

2. Failure to instruct sua sponte on involuntary manslaughter

In the guilt phase, the trial court instructed the jury on first and second degree murder, voluntary manslaughter on the basis of both heat of passion and unreasonable self-defense, and self-defense.

Defendant contends that the trial court was required to instruct sua sponte on involuntary manslaughter. He argues such an instruction was required because the jury could have found he killed Bobby while committing a battery, assault with a deadly weapon, or other "inherently dangerous felony," or that he acted in self-defense or unreasonable self-defense.

A trial court must instruct sua sponte on a lesser included offense if there is substantial evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. (*People v. Blair* (2005) 36 Cal.4th 686, 745.) Substantial evidence in this context is "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Ibid.*)

Defendant's argument is completely contrary to the law and the record. Defendant confessed to repeatedly striking Bobby's face with golf trophies, then repeatedly stabbing him with kitchen knives. Defendant's confession supported instructions upon self-defense, which justifies a homicide and leads to an acquittal (§ 197), and unreasonable self-defense and heat of passion, which lead to a verdict of voluntary manslaughter (§ 192, subd. (a); *People v. Blakely* (2000) 23 Cal.4th 82, 88–89; *People v. Lasko* (2000) 23 Cal.4th 101, 109–110). "[A]n unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*People v.*

Garcia (2008) 162 Cal.App.4th 18, 31.) Nothing in the record supported a theory of involuntary manslaughter, which is an inherently unintentional killing. (§ 192, subd. (b); *People v. Hendricks* (1988) 44 Cal.3d 635, 643.) Non-vehicular involuntary manslaughter is a killing "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (§ 192, subd. (b)), or in the commission of a "noninherently dangerous felony . . . committed without due caution and circumspection" (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, disapproved on other grounds in *Blakeley*, at p. 89). "[W]ithout due caution and circumspection" is equivalent to criminal negligence. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007.) Striking Bobby with golf trophies and repeatedly stabbing him with knives were not unintentional acts, lawful acts, unlawful acts not amounting to a felony, or noninherently dangerous felonies. The trial court was not required to instruct upon involuntary manslaughter because neither the law nor the record supported such an instruction.

3. Admission of Nash's testimony

Defendant contends that the trial court erred by admitting the testimony of Marisela Nash, of the Naval Criminal Investigative Service, because it was irrelevant and more prejudicial than probative, in that it suggested defendant was a person of bad character who committed crimes and "could not conform his behavior to expectations of society."

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Evidence Code section 352 provides that the court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or mislead the jury. We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

After the court instructed the jury in the guilt phase, defense counsel noted for the record that in an unreported discussion in chambers, she had objected to Nash's testimony as irrelevant. The prosecutor then noted that in the same discussion, she had offered to have Nash testify only that defendant was discharged from the Navy for reasons other than a psychiatric condition, but defense counsel preferred additional testimony to prevent the jury from speculating. The court noted that defense counsel "elected, and I think wisely to, that we go—allow the People to go ahead and go into the specific conduct to demonstrate . . . it wasn't for any violent or other bad conduct that may be worse in the mind of the jurors than going AWOL or disobeying orders and so forth." Defense counsel agreed that these statements reflected the prior unreported discussion. It thus appears that defendant preserved a relevance objection to Nash's testimony but forfeited his Evidence Code section 352 objection by failing to raise it in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

Nash's testimony was arguably relevant to show that defendant's discharge from the Navy was not based on a psychiatric condition. It was also arguably relevant, in conjunction with Lonnie's testimony that Bobby was disappointed by defendant's discharge from the Navy and concerned that defendant was making the wrong choices in life, to demonstrate a source of tension between Bobby and defendant, which ultimately lent some support to an inference that the murder stemmed from a strained relationship between defendant and Bobby, not defendant's delusional thoughts.

Even if the court erred in admitting Nash's testimony, such error was not prejudicial. Nash's testimony was extremely brief and showed only that defendant committed minor rules violations and misrepresented some aspect of his history. In contrast with the nature of the offenses, defendant's post-offense conduct in cutting off Bobby's head, and defendant's detailed confession, there is no reasonable probability defendant would have obtained a more favorable result if the court had excluded Nash's testimony. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. Errors on abstract of judgment

Defendant contends, and the Attorney General aptly concedes, that the abstract of judgment erroneously reflects that defendant was convicted in count 3 of aggravated mayhem, in violation of section 205, whereas he was actually convicted of simple mayhem in count 2, in violation of section 203.

Our review further reveals that the abstract of judgment erroneously reflects that defendant's sentence for count 1 was enhanced by one year pursuant to section 664, subdivision (a), whereas the correct authority for the enhancement was section 12022, subdivision (b)(1).

We direct the trial court to correct both of these errors.

DISPOSITION

The judgment is affirmed. If it has not already done so, the trial court is directed to issue an amended abstract of judgment correcting the following errors: (1) count 3 should be numbered count 2 and was a conviction for mayhem (Penal Code section 203), not aggravated mayhem; and (2) the enhancement for count 1 was imposed pursuant to Penal Code section 12022, subdivision (b)(1), not Penal Code section 664, subdivision (a).

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.