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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. LEMONT E. TOWNSEND et al., Defendants and Appellants.	B270929 (Los Angeles County Super. Ct. No. MA065756)

APPEAL from judgments of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified with directions.

Tara Mulay, under appointment by the Court of Appeal, for Defendant and Appellant Lamont E. Townsend.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant Calvin Holt.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Two separate juries convicted defendants Lemont Everett Townsend and Calvin Dewayne Holt of first degree robbery. (Pen. Code, §§ 211, 212.5, subd. (a).)[1] The jury that tried Townsend also found him guilty of assault with a firearm (§ 245, subd. (a)(2)) and attempted second degree robbery (§§ 211, 212.5, subd. (c), 664). It was further alleged each defendant had prior strike convictions and had served prior separate prison terms. (§§ 667, subd. (d), 667.5, subd. (b), 1170.12, subd. (b).) Those allegations were admitted (Townsend) or found true (Holt). The trial court sentenced Townsend to 22 years 4 months in state prison and Holt to 35 years to life in state prison. We affirm the judgment as to Townsend. We modify and affirm the judgment as to Holt.

II. THE EVIDENCE

A. Defendants' First Degree Robbery of Calvin Ousley

On April 6, 2015, defendants went to Calvin Ousley's Lancaster residence in search of Holt's girlfriend, Kimberly Reed.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

Reed, an active addict, had consumed alcohol, marijuana and cocaine that evening. She was asleep on a couch. When Ousley opened the security door to let Reed leave, defendants rushed in, pushing him back. Holt hit Ousley in the face. Reed ran outside. Townsend pointed a gun at Ousley. Holt disconnected Ousley's 60-inch flat-screen television and took it with him. Townsend wiped the doorknob with his hoodie as he left. The television was recovered from Townsend's home. No gun was ever recovered.

Ousley called 911 as soon as defendants were gone. He told the emergency operator, "[T]wo guys . . . came in my house at gunpoint and . . . robbed me, and . . . kept my TV set out of here." He described the men as "African-American" and "Black." He knew one of the men was named Calvin. Calvin had a bald head. He did not know the man with the gun.

Ousley had met Holt about three weeks earlier. During the investigation, Ousley identified Holt in a photographic lineup. During the preliminary hearing, Ousley again identified Holt and also identified Townsend. Ousley testified Townsend had the gun.

As he was being arrested, Holt urged Reed to claim Ousley had raped her while she was passed out from drugs and alcohol. Detective James Speed with the Los Angeles County Sheriff's Department overheard Holt tell Reed "something to the effect of tell them about the rape." Later, during a recorded telephone conversation with Reed, Holt again urged her to claim Ousley had raped her or she thought he had done so. He wanted to establish he had reacted to information to that effect and committed only a "crime of passion."

Reed gave contradictory statements to Detective Speed. She did not waver in identifying Holt as having been involved.

But as to the second perpetrator, she at first identified him as "Mont"; she said she had seen him pull out a gun. Later, she said she did not see a gun. She went back and forth on whether she recognized Townsend. At trial, however, Reed testified she did not know the man who accompanied Holt. He was a Black man wearing a black hoodie. But later that evening Holt had told her it was Townsend. Reed knew who Townsend was. Holt said Townsend held a gun to Ousley while Holt disconnected Ousley's television. Reed saw a large flat-screen television in Holt's living room that had not been there previously. Later, Holt told Reed he sold the television to Townsend. Following Holt's arrest, Reed identified Townsend in a photographic lineup.

During a recorded interview, Holt told law enforcement officers he had gone to Ousley's home to find Reed. He asked Townsend to come with him and to bring a gun for protection. Once at Ousley's residence, Townsend took the gun out and told Ousley, "Sit your ass down." Holt denied there had ever been any discussion of a rape accusation. Detective Speed testified, however, that Holt told him he went to Ousley's house to get Reed because she had been raped. Holt told the detective Reed had called Holt and said she had been raped.

Townsend's older brother Ernest testified for the defense. He said Townsend purchased a "pretty big" television from Holt and paid between $50 and $100 for it. Townsend's mother, Kisha Crisp, testified she had never seen Townsend and Holt together.

B. Townsend's Attempted Second Degree Robbery of Brittney Gardley

On April 16, 2015, Townsend was with a friend, Anthony William Tucker. Tucker attempted to take Brittney Gardley's backpack by force. The two men knew Gardley had just withdrawn $219 in cash at a liquor store. They were present when she did so. Tucker punched Gardley in the face with his fist five or six times. Tucker got control of the backpack. But then Townsend, who was standing on the sidewalk, told Tucker someone had called the police. Tucker dropped Gardley's backpack and ran. Townsend walked off in the opposite direction. Gardley told a 911 operator a Black man with tattoos on his face had assaulted her and tried to take her backpack. The description matched Tucker. Gardley later identified Tucker in a photographic lineup but was unable to identify his accomplice.

Events inside and immediately outside the liquor store were captured on surveillance videotape. Townsend and Tucker were detained in a traffic stop on May 7, 2015. Los Angeles County Deputy Sheriff Daniel Ament recognized both men from the surveillance videotape. Townsend was wearing a black jacket that was consistent with what he wore on April 6 as reflected in the surveillance videotape. Clothing recovered from the vehicle and Townsend's and Tucker's homes also matched what they had been wearing as seen in the videotape. A photograph on a cell phone recovered from Townsend's residence showed him wearing the same black jacket. The photograph was taken on April 16, the date Gardley was assaulted. Tucker admitted to Deputy Ament that he was one of the two men in the liquor store.

III. DISCUSSION

A. Townsend's Appeal

1. Admitting Ousley's Preliminary Hearing Testimony

The prosecution established that Ousley was unavailable to testify at trial, so the court permitted the prosecution to introduce his preliminary hearing testimony. Townsend argues that in finding that the prosecution had exercised due diligence in attempting to find Ousley, the court erroneously relied on incompetent hearsay evidence—what a non-testifying investigator told a testifying investigator. This, Townsend argues, meant that the court violated Townsend's Sixth Amendment confrontation rights in admitting Ousely's prior testimony. We conclude that the evidence was admissible for the nonhearsay purpose of establishing the prosecution's diligence, so no error occurred.

a. <u>The applicable law: unavailable witness</u>

When a witness is unavailable to testify at trial, his or her prior testimony may be used in certain circumstances without violating a defendant's confrontation rights under the Federal Constitution. As our Supreme Court has explained: "A defendant has a constitutional right to confront witnesses, but this right is not absolute. If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.

[Citations.] The constitutional right to confront witnesses mandates that, before a witness can be found unavailable, the prosecution must 'have made a good-faith effort to obtain his presence at trial.' [Citations.] The California Evidence Code contains a similar requirement. As relevant, it provides that to establish unavailability, the proponent of the evidence, here the prosecution, must establish that the witness is absent from the hearing and either that 'the court is unable to compel his or her attendance by its process' (Evid. Code, § 240, subd. (a)(4)) or that the proponent 'has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process' (Evid. Code, § 240, subd. (a)(5)). The constitutional and statutory requirements are 'in harmony.' [Citation.] The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) "'The law requires only reasonable efforts, not prescient perfection.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706; accord, *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1293.) Factors to be considered in assessing due diligence include "the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored. [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 341; accord, *People v. Cromer* (2001) 24 Cal.4th 889, 904.) We independently review the trial court's determination that the prosecution's efforts to locate an absent witness were reasonable. (*People v. Valencia* (2008) 43 Cal.4th 268, 292; *People v. Cromer, supra*, 24 Cal.4th at p. 901.)

b. The due diligence hearing

The trial court held a February 11, 2016 hearing outside the jury's presence to determine whether the prosecution had made reasonable efforts to find Ousley. Los Angeles County district attorney investigator Krist Mason had been put in charge of finding Ousley. She testified about her efforts as well as those of Los Angeles County district attorney investigator Joe Henry, acting under her direction.

Mason had received a subpoena on January 28, 2016, for Ousley to appear in court on February 8. Mason searched multiple databases—including LexisNexis, DMV, Cal-Photo, Trans Union and others—to locate Ousley. She also searched social media and inquired of utility companies. She went to the address listed in the police report. The house was completely empty. No one was living there. She canvassed the neighborhood. A neighbor said Ousley had moved away seven months earlier. The neighbor did not know where Ousley had gone. She had no forwarding information for him.

Mason determined Ousley had a Lancaster, California, post office box. She contacted the postmaster, who said Ousley had not checked his mail for two months. Only junk mail was coming to the box. The only address the postmaster had for Ousley was the residence Mason had visited.

Mason next reviewed Ousley's credit reports. She then telephoned a relative, Douglas Bell, who was listed as a reference. Bell's was the only working telephone number among the 10-15 relatives listed. Some were deceased. Bell lived in Los Angeles, near Hollywood, and Bell told Mason that Ousley was living with him. Mason asked Bell to have Ousley call her.

Having not heard anything, Mason telephoned Bell again two days later. His demeanor had changed. He said he did not know where Ousley was; Ousley sometimes received mail at the address but he did not live there.

Mason requested assistance from Joe Henry, a district attorney's investigator in Los Angeles. During the due diligence hearing, Mason recounted Henry's attempts to locate Ousley. Henry went to Bell's residence on February 2, 2016. He heard music and the lights were on. A note on the door said, "[w]ent to Food 4 Less." Henry knocked but there was no answer. He remained at the location for two hours, from 5 to 7 p.m. He did not see anyone go in or out. Before leaving he knocked again, loudly, but again there was no answer. He left his business card.

Ousley called Henry the next day. He said he had an appointment at the VA, he was having surgery on February 4 and he would not be released from the hospital until February 6. When Henry asked if he could come to the hospital to speak with him, Ousley hung up. VA hospital staff subsequently advised Henry that Ousley was not scheduled for surgery nor did he have any upcoming appointment.

Henry returned to Bell's residence and knocked again. There was no answer. Henry telephoned Ousley at the number from which Ousley had called him. Ousley answered. He told Henry he did not want to have anything to do with testifying in court because he had gotten his television back. Once again, Ousley hung up on Henry. Henry called again five or six times but got no answer. He texted Ousley but got no response. Multiple subsequent attempts to contact Ousley at that telephone number were unsuccessful.

Two days later, Mason and a partner staked out Bell's address. They waited six hours but never saw Ousley or any of his vehicles. Neighbors recognized Ousley's photograph, but they did not know whether he was living with Bell.

Henry also investigated several addresses in Santa Monica associated with Ousley. Some of the locations were empty. At others, the current tenant said Ousley did not live there. Henry went to the Santa Monica Police Department and searched its database. He did not find any information about Ousley.

Each time Henry spoke with an individual, he left his business card with a request that the person contact him if Ousley was seen. Someone gave Henry a purported telephone number for Ousley, but it was not a working number. A pastor in Santa Monica told Henry that Ousley was a transient and frequented a park near the VA hospital. Henry went to the park and showed Ousley's photograph to people there but no one recognized Ousley. Investigators Mason and Henry also contacted homeless shelters in Lancaster and Los Angeles to no avail.

On February 9, 2016, two days prior to the due diligence hearing, Mason requested a forwarding address from the Lancaster postmaster. She explained the urgency and gave the court date. She was told it would be one to three weeks before she got a response. Mason also telephoned Ousley several times but could not reach him.

c. The hearsay was admissible

During the due diligence hearing, defense counsel raised a hearsay objection to investigator Mason recounting what

investigator Henry told her. On appeal, defendant again argues the trial court relied on incompetent hearsay evidence, that is, what Henry told Mason as testified to by Mason. Defendant further asserts absent competent evidence of Mason's efforts, the prosecution failed to establish it exercised due diligence. Defendant's argument focuses on the absence of competent evidence an investigator tried to serve Ousley by knocking on Bell's door. We conclude the challenged evidence was admissible for the nonhearsay purpose of establishing the prosecution's due diligence, apart from the truth of any statement by Henry.

Townsend cites case law to the general effect that due diligence must be shown by competent evidence.[2] Only one case Townsend cites *Smith, supra*, 30 Cal.4th 581 discusses a hearsay

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[2] *People v. Valencia, supra*, 43 Cal.4th at p. 292 ["'The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable,'" citing *Smith*]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1296, abrogated on another point in *People v. Merritt* (2017) 2 Cal.5th 819, 821-822 [same]; *People v. Enriquez* (1977) 19 Cal.3d 221, 235, disapproved on another point in *People v. Cromer, supra*, 24 Cal.4th at pp. 898, 901, fn. 3 [same]; *People v. Plyler* (1899) 126 Cal. 379, 382 [fact of unavailable witness's death must be shown by competent evidence]; *People v. Foy* (2016) 245 Cal.App.4th 328, 339 ["'The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable,'" citing *Smith*]; *People v. Williams* (1979) 93 Cal.App.3d 40, 51, disapproved on another point in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499 ["The proof of witness-unavailability must be made by competent evidence [citations], which means that the exclusionary rules such as the hearsay, best evidence and opinion rules apply to the evidence offered at a hearing to determine this issue"].)

objection. In *Smith,* the prosecution sought to introduce the preliminary hearing testimony of a foreign exchange student from Tokyo who was unavailable to testify at trial. The district attorney advised the court he had received a telephone call from the witness's host parent in San Diego saying the witness had left the country. The trial court accepted that representation without requiring the district attorney to testify. Additionally, a district attorney's investigator testified he had called the witness's telephone number in Japan and asked to speak to the witness. A male voice responded, "Yes, this is me." (*Id.* at p. 608.) Defense counsel objected to that testimony as hearsay. The trial court admitted the evidence for a nonhearsay purpose—to show what the prosecution had done to locate the witness. In other words, the pertinent question was not whether the witness had in fact left the country or whether the person who answered the phone in Japan was in fact the missing witness. The issue was whether the prosecution had made reasonable efforts to locate the witness. The challenged evidence was admissible to show the investigator, acting on information the witness had left the country, called a telephone number in Japan and spoke to a person who claimed to be the witness. (*Id.* at pp. 608-609.)

On appeal, our Supreme Court upheld the trial court's ruling. The court explained that the prosecution had to prove only that it had exercised reasonable diligence. "That requirement focuses on what the proponent of the evidence, here the prosecution, did, that is, whether it made reasonable efforts to obtain the witness. The statements by the host parent and the male voice at the end of the line at the Japanese telephone number were admissible on this question, not to prove the truth of the matter asserted, but to show what efforts the prosecution

made to ascertain [the witness's] whereabouts. . . . [¶] . . . This information may have been legally incompetent, due to the hearsay rule, to show that [the witness] was actually in Japan. But it sufficed to show that the prosecution made reasonable efforts to locate him and that further efforts to procure his attendance would be futile. . . . In the functioning world outside the courtroom, people often rely on hearsay and, under the circumstances of this case, the prosecution reasonably did so. The prosecution met its burden of showing due diligence, and the court properly found [the witness] was unavailable . . . ." (*Smith, supra*, 30 Cal.4th at pp. 610-611; see *People v. Herrera* (2010) 49 Cal.4th 613, 627-628; 1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 46, pp. 840-841.)

Smith controls this case. Investigator Mason recounted steps investigator Henry took to locate Ousley. The question before the trial court was whether the prosecution took reasonable steps to obtain Ousley's presence at trial. The evidence that Mason learned that Henry took specific steps to find Ousley, and Mason took additional steps in reliance on Henry's activities, was offered to establish the reasonableness of the prosecution's efforts to secure Ousley's presence at trial. Under *Smith*, the evidence of Henry's efforts, testified to by Mason, was admissible for a nonhearsay purpose of showing Mason's diligence, and thus the prosecution's diligence, in attempting to locate Ousley. Put another way, even if it somehow could be shown that Henry told Mason entirely false statements about the actions he took, it nevertheless helped establish Mason's reasonable diligence to explain that she relied on another district attorney investigator to accomplish some tasks, and that she was actually told of his actions in executing those

responsibilities. Much as the Supreme Court observed in *Smith*, this was a typical way for a lead investigator to act in the "functioning world outside the courtroom" (*Smith*, *supra*, 30 Cal.4th at p. 611), and it was appropriate to explain the hearsay on which she in fact reasonably relied.

d. Due diligence

We further conclude even absent Mason's learning about Henry's efforts, the prosecution established it acted with reasonable diligence. There was evidence that Mason: searched multiple databases; searched social media; inquired with utility companies; went to the address for Ousley listed in the police report and found the premises vacated; contacted the Lancaster postmaster in an unfruitful search for a forwarding address; searched Ousley's credit reports for relatives' names; contacted a relative, Bell, who at first said Ousley was living with him but, two days later, denied Ousley resided there and claimed not to know where he was; staked out Bell's address but never saw Ousley come or go; and contacted homeless shelters in Lancaster and Los Angeles. We conclude these efforts were sufficient under the circumstances. The prosecution was not required to keep periodic tabs on Ousley. (*People v. Hovey* (1988) 44 Cal.3d 543, 564; *People v. Wilson, supra*, 36 Cal.4th at p. 342.) Nor could the prosecution prevent Ousley from leaving the area. (*People v. Hovey, supra*, 44 Cal.3d at p. 564; *People v. Diaz, supra*, 95 Cal.App.4th at p. 706.) And all leads to Ousley's possible location were explored. "That additional efforts might have been made or other lines of inquiry pursued" does not preclude a reasonable diligence finding. (*People v. Cummings, supra*, 4 Cal.4th at p.

1298 (*Cummings*); accord, *People v. Wilson, supra*, 36 Cal.4th at p. 342.)

2. Exclusion of Deputy John Chipinka's Testimony

Townsend argues the trial court erroneously excluded evidence impeaching Ousley's preliminary hearing testimony and in doing so violated his federal constitutional rights. Defense counsel made an offer of proof: "What [Deputy Chipinka] would testify to based on his report is that Mr. Ousley, that night [after the crime occurred], when he spoke to Deputy Chipinka said that the man with the gun was 45 years old. It was Calvin Holt who had the gun. And the other guy was 45 years old. It was the other person who was the one who took the TV. It was Calvin Holt who had the gun on him. And everything was completely switched 180 degrees. It was Calvin Holt who wiped the doorknob." Townsend was just shy of 26 on the date of the offense.

The Attorney General concedes the evidence was admissible as a prior inconsistent statement under Evidence Code section 1202. That statute states in pertinent part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing."

Our review is for an abuse of discretion. (*People v. Hartsch* (2010) 49 Cal.4th 472, 497.) We conclude that even if the trial court abused its discretion in excluding the inconsistent statements, the error was harmless under any standard. (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1006, disapproved on another point in *People v Black* (2014) 58 Cal.4th 912, 919; see *People v. Osorio* (2008) 165 Cal.App.4th 603, 618, fn. 4.) In the immediate aftermath of the crime, Ousley told the 911 operator he recognized Holt but he did not know the man with the gun. Ousley subsequently identified both Holt and Townsend as the perpetrators; he said Townsend had the gun. During the preliminary hearing, Ousley testified he "instantly" recognized Holt when he came to the door. Moreover, Ousley consistently testified it was the other guy, not Holt, who had the gun. Ousley testified, "Calvin didn't have the gun; the other gentleman had the gun." Reed corroborated Ousley's testimony. Reed told detective Speed, albeit inconsistently, that she saw Townsend with a gun. And Reed testified that immediately after the incident, Holt told her that Townsend had the gun. Further, during recorded telephone conversations, Reed and Holt also discussed Holt's claim that Townsend had the gun. Given the weight of the evidence, there is no likelihood the jury would have concluded it was Holt who had the gun even with the proffered evidence from deputy Chipinka.

Townsend contends the trial court's ruling violated his confrontation rights and his right to present a defense under the federal constitution. These constitutional claims were not raised in the trial court. But to the extent Townsend's constitutional arguments "'do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert

that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution . . . [Townsend's] new constitutional arguments are not forfeited on appeal.' [Citations.]" (*People v. Garcia* (2011) 52 Cal.4th 706, 755, fn. 27.) As a general rule, however, "violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91; accord, *People v. DeHoyos* (2013) 57 Cal.4th 79, 120.) Townsend's constitutional claims fail under this rule. (*Ibid.*) And in any event, because any error was harmless, Townsend's constitutional claims also fail. (*People v. Jennings* (2010) 50 Cal.4th 616, 652; *People v. Jenkins* (2000) 22 Cal.4th 900, 1015-1016.)

3. Redaction of Telephone Conversation

At trial, Townsend objected to the prosecution's introduction of excerpts of the telephone conversation between Holt and Reed. Townsend asked the court to redact references to him (by name, "Lemont," or by nickname, "Mont" or "Monty"). During the conversation, Reed said she was "scared of Lemont." Reed asked Holt, "Why did you tell them [Lemont] had the gun?" Holt explained he told the police he asked his "friend" to "catch [his] back" when he went to rescue Reed from Ousley; further, the friend "always . . . travel like that," impliedly, with a weapon. Reed commented, "Whether he had it, or you had it, . . . y'all charged with the same shit." Holt subsequently asked Reed what he had told her during an earlier recorded telephone conversation. Reed said, "You told me . . . that you . . . told them that Lemont had the gun . . . ." Holt responded he was pretty

sure he did not say "Lemont"; he might have said "[m]y friend," or "Monty," but not "Lemont."

a. *Crawford v. Washington*

In the trial court, Townsend argued unsuccessfully that the references to him were testimonial under *Crawford v. Washington* (2004) 541 U.S. 36, 68, because Holt and Reed knew the telephone conversation was being recorded and potentially would be used in a prosecution against Townsend or Holt. Townsend renews this contention on appeal. Our review is de novo. (See *People v. Hopson* (2017) 3 Cal.5th 424, 432 & fn. 3; *People v. Rangel* (2016) 62 Cal.4th 1192, 1217.) We conclude the statements were not introduced erroneously under *Crawford*.

First, Reed's statements could not have been introduced in violation of *Crawford* because she testified at trial. The Sixth Amendment confrontation right is violated upon introduction of an out-of-court testimonial statement when the declarant is unavailable to testify at trial and the defendant had no prior opportunity to cross-examine that declarant. (*Crawford v. Washington, supra*, 541 U.S. at p. 68; *People v. Wilson, supra*, 36 Cal.4th at p. 340.) Because Reed testified at trial and Townsend had an opportunity to and did cross-examine her, introducing Reed's out-of-court statements did not implicate Townsend's Sixth Amendment confrontation right.

Second, Holt's statements were not testimonial. A statement is testimonial when, viewed objectively, its primary purpose is to establish past events potentially relevant to a later criminal prosecution. (*Michigan v. Bryant* (2011) 562 U.S. 344, 358; *Davis v. Washington* (2006) 547 U.S. 813, 822.) Statements

made during a law enforcement interrogation of Holt would, for example, be a clear example of testimonial statements. Here, in contrast, the statements were made in a context objectively indicating that Holt was striving to avoid making testimonial statements. He used another inmate's identification number to place the call for the specific purpose of preventing a recording of his statements from being used against him. He was speaking with his girlfriend to instruct her what to tell the police. A person in his position would not expect, nor want, his instructions to be introduced as evidence. The circumstances thus do not suggest that Holt had an expectation that his statements would later be used as evidence for a criminal prosecution. His statements were not testimonial. (*People v. Rangel, supra*, 62 Cal.4th at pp. 1201-1202, 1214-1215, 1217; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173-174.)[3]

b. Declarations against penal interest

The prosecution argued and the trial court found that Holt's statements were declarations against interest within the meaning of Evidence Code section 1230. Evidence Code section 1230 provides that a statement is not inadmissible hearsay if it "when made, . . . so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be

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[3] Townsend does not raise a claim that the admission of the statements violated due process, as opposed to the confrontation clause.

true."[4] The prosecution was required to show the declarant was unavailable, the statement was against the declarant's interests when made, and the statement was sufficiently reliable to warrant admission despite being hearsay. (*People v. Grimes* (2016) 1 Cal.5th 698, 711.) The exception's rationale is that: "'a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.]" (*Ibid.*) In determining whether a statement falls within Evidence Code section 1230, the trial court may consider not just the words spoken but the surrounding circumstances. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) Our review is for an abuse of discretion. (*People v. Grimes, supra*, 1 Cal.5th at pp. 711-712.)

We find no abuse of discretion. Holt was unavailable because he did not testify at trial and could not be compelled to do so. Holt's statements that he had told police Townsend had a gun were against his penal interests insofar as they implicated him as a co-perpetrator and subjected him to criminal liability. A

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[4] In full, the statute states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

reasonable person in Holt's position would not have made statements implicating himself in a robbery that Reed partially witnessed unless he believed them to be true. The statements were sufficiently trustworthy because they were made to a girlfriend during a phone call Holt made using another inmate's identification. A conversation between friends in a noncoercive setting is trustworthy. (*People v. Cervantes, supra*, 118 Cal.App.4th at p. 175; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.) Further, although Holt identified Townsend as the gunman, he did not place the major responsibility on Townsend; Holt admitted his presence with a co-perpetrator who was armed. (*People v. Brown* (2003) 31 Cal.4th 518, 536-537; *People v. Samuels* (2005) 36 Cal.4th 96, 120-121; compare *People v. Duarte* (2000) 24 Cal.4th 603, 611-613.)

c. Multiple levels of hearsay

Townsend argues the references to him should have been excluded as double or triple hearsay. We need not address Townsend's hearsay argument beyond the trial court's findings. Townsend did not object in the trial court on the ground that the testimony involved multiple levels of hearsay grounds. Therefore, the argument has been forfeited. (*People v. Clark* (2016) 63 Cal.4th 522, 561-562.) Townsend asserts alternatively that his counsel was ineffective for failing to raise a multiple hearsay objection. As discussed in the subsection immediately below, because we find no prejudice to Townsend, his ineffective assistance argument fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

d. Harmless error

We alternatively conclude even if the challenged statements should have been redacted, including Reed's statement she feared Townsend, any error was harmless under any standard. The jury was consistently and repeatedly informed through Ousley's 911 call, Ousley's preliminary hearing testimony, Reed's statements to detective Speed, and Holt's recorded law enforcement interview that Townsend was the one with the gun. The jury had to decide, even absent the challenged evidence, whether Ousley, Reed and Holt were dishonest or mistaken in that respect. There is no likelihood the jury's conclusion would have been materially influenced by the brief recorded references to Holt telling the police that Townsend had the gun. And because there was no prejudice to Townsend, his ineffective assistance of counsel claim fails. (*Strickland v. Washington, supra*, 466 U.S. at p. 697; *People v. Carrasco, supra*, 59 Cal.4th at p. 982.)

4. Cumulative Error

Townsend argues the errors at trial had a cumulative prejudicial effect. Having found no prejudice to Townsend, we find no cumulative prejudice.

B. Holt's Appeal

1. Competence to Stand Trial

Holt argues the trial court violated his due process rights when it failed to suspend proceedings and order a psychiatric examination into his competence to stand trial. Through a series of several court appearances where Holt behaved in a variety of different ways, the Court concluded that Holt was seeking to delay the proceedings and voluntarily absenting himself. It is not clear at precisely what time Holt believes that the trial court was presented with substantial evidence of Holt's incompetency as he relies on the entire course of proceedings to establish it, yet we conclude that the entire proceeding demonstrates that there was no substantial evidence of Holt's incompetency to stand trial.

a. <u>The preliminary hearing and pretrial proceedings</u>

i. April 21 and 23, 2015

A preliminary hearing was set for April 21, 2015. While in the lockup, Holt complained of chest pain. Paramedics transported him to the hospital. Judge Shannon Knight trailed the hearing to April 23, 2015.

On April 23, 2015, defense counsel advised Judge Kathleen Blanchard that, according to Holt: "[S]ince before this incident . . . he has been on Remeron and Risperdal (phonetic) since 1997 or 1998. These were prescribed for him by a psychiatrist for mental health reasons. [¶] He indicates to me that he has high anxiety; that he is hearing voices; that this has

been going . . . [since] two days ago. [¶] . . . and he has chest pains and has had them for two days. [¶] Now, I am aware of [the] fact that he was taken to the hospital two days ago and at that time, that they gave him [an] okay to proceed. But I am telling the court that he does not feel physically able to sit here. [¶] It has been my observation that he has deteriorated. I can only talk to the mental state, not the physical, since I have no background in that. [¶] But he sounds as though he has deteriorated mentally since I have talked to him two days ago. And I believe he is unable to assist in his own defense at this time." Counsel noted Holt had offered to waive the preliminary hearing. Judge Blanchard ruled she did not have sufficient information to declare a doubt as to Holt's competency. The judge noted Holt had conferred with his attorney and relayed his concerns, which led her to believe he was able to assist in his defense. She suspected Holt was seeking to delay the proceeding as he had done on April 21.

Holt interjected: "[Holt]: Judge, my chest is hurting me. [¶] The Court: The same as it was two days ago, sir? [¶] [Holt]: Yes. [¶] The Court: They cleared you two days ago. [¶] [Holt]: Until today. I'm hurting." Judge Blanchard offered to sign a medical order later that day. Defense counsel responded: "I don't doubt his competency in terms of knowing who the actors are, where he is, what the charges are, et cetera. But I believe in his current state, he is unable to assist in his own defense." Holt said: "I need help. I need an ambulance." Judge Blanchard asked whether defendant wanted to waive his right to be present. Defendant answered: "I need an ambulance. That's what I'm trying to say. I want to be treated." Judge Blanchard ruled the hearing would proceed.

As the prosecution called its first witness, defendant repeatedly interrupted: "I need a doctor. My chest is hurting real bad right now. I need a doctor. Can I please get a doctor right now?"; "I don't believe this. My chest it hurting." "Ma'am I'm aching. It's hard to keep my voice down. It's hurting. I'm trying to tell you over and over. You're not in my body, you don't know I'm hurting." Judge Blanchard warned Holt if he continued to interrupt he would be removed from the courtroom. Defendant responded, "I'm hurting." The judge ordered him removed: "The court is going to find that by his conduct, [Holt] has voluntarily absented himself from these proceedings. [¶] I just want to make a brief record on that. It is clear from what happened two days ago, that he made the same sort of claims, it upended the proceedings, it inconvenienced the witnesses. We had to put it over. [¶] It's clear to me that he is attempting to do the same thing again today. They can certainly have him checked; I will sign any medical order. But I am confident that this is a behavioral issue on the part of [Holt] and that there's no way for us to conduct this hearing with a defendant who is clearly not going to stop loudly complaining." Defendant's counsel objected to Holt's removal: "I think that without Mr. Holt here, even in his whatever his condition may be, I will not be as effective in representing him as I would with him present." Judge Blanchard replied: "[I]t is very clear to me that that is simply untrue. He was not planning on assisting you in any way. He was planning on yelling in your ear the entire time, such that it would have interfered with your ability to listen to the witnesses, just as it would interfere with mine. [¶] I repeatedly admonished him and he only got louder and more aggressive with the court as I did so." On a later date, the deputy district attorney represented to

the court that Holt did not have any medical problem at that time and did not receive any treatment.

Ousley testified at the preliminary hearing. That testimony has been set forth above. Detective Speed also testified. His testimony was consistent with his subsequent trial testimony.

ii. June 18, 2015

The case was called for a pretrial hearing on June 18. Defendant refused to appear in court. Judge Blanchard issued an extraction order.

iii. September 29, 2015

On September 29, Judge Blanchard granted Holt's motion under Evidence Code sections 730 and 1017 to appoint a psychiatrist to examine him. Defense counsel explained he sought an opinion whether Holt had the capacity to form the requisite specific intent at the time of the alleged crimes. Defense counsel told Judge Blanchard he was relying in part on Holt's statements to him regarding Holt's status as a psychiatric patient in the jail facility. Judge Blanchard directed the psychiatrist to render findings relative to defendant's mental state or condition at the time of the alleged offenses. The record does not reflect whether the psychiatrist in fact rendered an opinion as to Holt's mental state at the time of the crime. Holt's trial attorney never referenced the evaluation in connection with Holt's competence or otherwise, including after Holt swallowed the razor.

b. The trial

i. February 8, 2016

Jury selection was scheduled to begin on February 8. Holt sought to represent himself. Upon inquiry, Holt told the judge he would not be prepared to go to trial pro. per. at that time because he needed time to prepare and to file motions and writs. Holt estimated he would need two to four weeks to prepare. The trial court denied Holt's motion as untimely. During a subsequent discussion, Judge Blanchard found defendant's trial counsel's representation had been excellent; defendant's attorney had been present and was familiar with the facts; he had engaged in multiple conversations with Holt. The judge further observed: defense counsel could consider defendant's request to file writs and motions; the case had been pending for some time; allowing Holt to represent himself would cause significant disruption and delay, particularly given this was a two-defendant case with dual juries requiring overtime for deputies; further, the attorneys had other trials stacking up in other courtrooms; and there were four prosecution witnesses present and prepared to testified.

Judge Blanchard advised Holt, "[Y]ou have an opportunity to be present at every single step of the proceedings, but you can also voluntarily absent yourself." Holt answered, "I've done that before."

ii. February 16, 2016

Holt was present during jury selection, on February 10, 2016. On February 16, 2016, the case was ready for trial. The

parties and their counsel were present and the jurors were waiting outside the courtroom. Judge Blanchard observed: "I understand Mr. Holt has advised the deputy and lawyer that he is having chest pains and has claimed to have swallowed a razor blade. . . . [¶] I do recall, in the past, numerous times when Mr. Holt has basically been holding up appearances in this court by his own conduct." Holt told the judge he had smuggled into the lockup a razor in his shoe and had swallowed it. Defense counsel advised that "out of an abundance of caution," Holt should be examined. The court concluded Holt was not willing to participate and had by his conduct voluntarily absented himself. The court was wary of encouraging further such behavior. The trial court admonished the jury not to consider Holt's absence for any purpose.[5]

Reed, Ousley and Deputy Ament testified. Artisha Hickman testified she had rented a room to Townsend. He did not bring a television with him. She remembered when the sheriff's searched Townsend's room. But she did not remember whether the sheriffs took a television from Townsend's room.

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[5] The court advised: "A criminal defendant has the constitutional right to be present at every stage of the proceedings against him, including the right to attend his jury trial. A criminal defendant also has the right to waive his appearance at any stage of the proceedings, including the jury trial. [¶] Today, for our blue jurors, you may have noticed that defendant Holt is not present. The fact that he is not present here in court is not to be considered by you for any purpose. A defendant's presence or his absence during court proceedings is not evidence that the defendant is more likely to be guilty than not guilty. You're not to discuss the defendant's absence, nor allow it to enter into your deliberations in any way."

iii. February 17, 2016

The following day, February 17, 2016, the court learned Holt had in fact swallowed a razor. As of 10:30 a.m., Holt was in the jail ward of a medical center under observation. Detective Speed testified that morning.

At 1:45 p.m., Judge Blanchard updated the parties about Holt's condition. Holt had been admitted to the hospital but had refused a "very simple" medical procedure to remove the razor blade. Holt told his doctor he wanted the razor blade to remain in his system for as long as possible. Holt could not be discharged. The trial court construed Holt's refusal to undergo the medical procedure as further evidence he was voluntarily absenting himself. At 1:25 p.m., Judge Blanchard was advised Holt was signing the necessary paperwork so that the medical procedure could proceed. Defense counsel had spoken to his client by telephone. He advised the court: "[H]e sounded very groggy to me. So I asked him if he was under any anesthetic. He told me he was not. I believe he said he was under Haldol. I'm not a pharmacist. I have no degree in pharmacology. [¶] My understanding, it is some sort of pain medicine. . . . [¶] I proceeded to ask him—and I told him he has to make these decisions. . . . [T]he gist of it had to do with his attendance here and making the decision as to whether to testify or not. [¶] . . . [W]hen I asked him if . . . his mind was clear enough to absorb what I was telling him, it became clear to me that he wasn't."

The trial court ruled: "We are almost done with the detective. We [will] finish up with him. . . . [W]e'll introduce whatever evidence there is as to the blue jury [(Holt)]. The

People rest as to the blue jury and handle any motions and I'll have [the jury] come back tomorrow morning at 10:30. . . . [¶] . . . [I] need to know for Mr. Holt whether or not he intends to testify, so I'm going to take a short break in the trial for us to figure that portion out."

iv. February 18, 2016

At the outset of the February 18 trial date, defense counsel stated he had spoken with his client at the hospital jail ward by way of a video conference. They discussed Holt's right to testify. Holt said three separate times he would not testify. Defense counsel stated he would not be calling any witnesses. The court noted: "[M]y position is unchanged that [Holt's] absence here at trial is induced by his own conduct, and therefore, he's voluntarily absented in my view for the jury trial on the priors the same way as he was on the substantive offense." The court proceeded to instruct the jury.

c. Substantial evidence supported the court's decision

Holt argues the trial court's failure to order a competency hearing violated his due process rights given that defense counsel expressed a doubt as to Holt's competence, Holt had been prescribed anti-psychotics for years and was hearing voices, and Holt swallowed a razor.

It is a violation of federal due process fair trial rights, and California constitutional and statutory law, to criminally try an incompetent person. (*Cooper v. Oklahoma* (1996) 517 U.S. 348,

354; *People v. Mickel* (2016) 2 Cal.5th 181, 194-195; § 1367, subd. (a).) Competency to stand trial has long been tested by the following factors: "It has long been accepted that a person whose mental condition is such that *he lacks the* [*present*] *capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 171, italics added; accord, *People v. Mickel, supra*, 2 Cal.5th at p. 195.) Under federal decisional authority, the test of incompetence is "whether a criminal defendant '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."' [Citation.]" (*Drope v. Missouri, supra*, 420 U.S. at p. 172.) Under California statutory law, section 1367, subdivision (a), "A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Our review is for substantial evidence. "The decision whether to order a competency hearing rests within the trial court's discretion, and may be disturbed upon appeal 'only where a doubt as to [mental competence] may be said to appear as a matter of law or where there is an abuse of discretion.' [Citation.] When the [trial] court is presented with 'substantial evidence of present mental incompetence,' however, the defendant is 'entitled to a section 1368 hearing as a matter of right.' [Citation.] On review, our inquiry is focused not on the subjective opinion of the trial judge, but rather on whether there was substantial evidence

raising a reasonable doubt concerning the defendant's competence to stand trial. [Citation.] Evidence may be substantial even where it is contested or presented by the defense. [Citation.] A trial court reversibly errs if it fails to hold a competency hearing when one is required under the substantial evidence test. [Citation.]" (*People v. Mickel, supra*, 2 Cal.5th at p. 195.)

There was no substantial evidence Holt was not competent to stand trial. Holt demonstrated a capacity to understand, factually and strategically, the nature and object of the proceedings. He was able to, and did, repeatedly consult with counsel with a reasonable degree of rational understanding. He exhibited an ability to assist in preparing his defense by seeking self-representation and proposing that writs and motions needed to be filed. And he made a decision not to testify.

This case differs significantly from *Drope v. Missouri, supra*, 420 U.S. 162, on which Holt relies. In *Drope*, the defendant unsuccessfully made an unopposed pretrial motion for a psychiatric examination, attaching an examining psychiatrist's pretrial report that offered diagnoses and recommended further examination; the wife/victim had told the defendant's attorney she believed her husband needed psychiatric care; the wife testified to the defendant's questionable behavior—the defendant and four acquaintances had forcibly raped her and subjected her to bizarre abuse, he would roll down the stairs when he did not get his way, and he had choked and tried to kill her the Sunday evening prior to trial; and, during trial, the defendant shot himself in an apparent suicide attempt. (*Id.* at pp. 165-166.) On the other hand, the wife testified she was not convinced that the

defendant was sick after talking to his psychiatrist. (*Id.* at p. 166.)

The United States Supreme Court held the state courts had given too little weight to the evidence of incompetence in failing to order an examination of the defendant's competency to stand trial. The court held, "[W]hen considered together with the information available prior to trial and the testimony of [the defendant's] wife at trial, the information concerning [the defendant's] suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question." (*Id.* at p. 180.)

In contrast with *Drope*, the initial pretrial evidence in this case was that Holt told his counsel he had high anxiety; he had been taking Remeron and Risperdal since 1997 or 1998 for mental health reasons; and he had been hearing voices and experiencing chest pains for two days; further, two days earlier, after complaining of chest pain, Holt had been medically examined and cleared; and defense counsel observed that Holt's mental state had "deteriorated." Thereafter, there was no claim Holt continued to hear voices. The evidence Holt suffered from any mental health problem rested on his self-report and defense counsel's observation of mental deterioration. Although defense counsel represented Holt was medicated for mental health reasons, no evidence was introduced that, as Holt asserts on appeal, he had been "prescribed . . . drugs that treated major depression, schizophrenia, and bipolar disorder."

The requirement of *substantial* evidence triggering a trial court's duty to conduct a competency hearing is a meaningful one. Our Supreme Court has stated that "'to be entitled to a competency hearing, "a defendant must exhibit more than bizarre

. . . behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel. [Citations.]" [Citation.]' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 464-465.) Accordingly, "defense counsel's expressed belief that [the] defendant might be mentally incompetent does not automatically trigger" a requirement that the trial court order a competency hearing. (*Id.* at p. 465.) Instead, "defense counsel must present expert opinion from a qualified and informed mental health expert, stating under oath and with particularity that the defendant is incompetent, or counsel must make some other substantial showing of incompetence that supplements and supports counsel's own opinion. Only then does the trial court have a nondiscretionary obligation to suspend proceedings and hold a competency trial. [Citation.] Otherwise, we give great deference to the trial court's decision not to hold a competency trial." (*Ibid.*)

Each case is different, and there may be various ways that a showing of substantial evidence can be made. (*Drope v. Missouri*, *supra*, 420 U.S. at p. 180 ["There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated."]) Nevertheless, the trial judge is "'in the best position to observe the defendant during trial.' [Citation.]" (*People v. Sattiewhite*, *supra*, 59 Cal.4th at p. 465; see *People v. Howard* (2010) 51 Cal.4th 15, 45 [trial court properly relied on its own observations of defendant's coherency and credibility]; *People v. Rogers* (2006) 39 Cal.4th 826, 847 ["[a] trial court's decision whether or not to hold a competence hearing is entitled to

deference, because the court has the opportunity to observe the defendant during trial"]; *Drope v. Missouri*, *supra*, 420 U.S. at p. 181 [relevant whether trial judge was "able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him"]).

Here, Holt engaged in varied conduct that included statements of chest pain (April 21 and 23, 2015), continual interruptions (April 23), refusal to appear (June 18), a request as jury selection began for a delay so he could represent himself (February 8, 2016), chest pains and swallowing a razor blade during trial (February 16), and the initial refusal of a simple procedure to have it removed (February 17.) This course of conduct, along with its observations of defendant in court, supported the trial court's view that Holt was malingering. As Holt himself said when the court denied his request to represent himself and informed Holt that he had a right to be present but his actions could voluntarily absent himself, "I've done that before." Based on Holt's conduct and a consideration of the trial court's vantage point, we conclude that there was no substantial evidence that Holt was incompetent to stand trial. The trial court did not commit reversible error in declining to require a competency hearing.

3. Holt's absence from trial

A defendant's right to be present at trial is protected by the federal and state Constitutions. (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *People v. Espinoza* (2016) 1 Cal.5th 61, 72; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) Holt

argues proceeding with the trial in his absence violated his federal constitutional rights.

A defendant's constitutional right to be present at trial is not absolute; it may be expressly or impliedly waived. (*People v. Espinoza, supra*, 1 Cal.5th at p. 72.) Our courts have held a defendant who voluntarily absents himself from trial cannot assert a violation of his constitutional rights. In *People v. Cox* (1978) 81 Cal.App.3d Supp. 1, 3, the defendant was absent from one day of a two-day misdemeanor trial after he ingested LSD and a prescription drug and was hospitalized. The trial court granted a new trial. The Appellate Department of the Superior Court reversed on abuse of discretion grounds. The court found a self-induced absence is voluntary and not a due process violation. (*Id.* at pp. 4-5.) Similarly, in *People v. Guillory* (1960) 178 Cal.App.2d 854, the defendant appeared for his one-day felony trial without batteries for his hearing aid. The Court of Appeal held any difficulty was "self-induced" and "gave no ground for complaint." (*Id.* at pp. 859, 862.) And in *People v. Rogers* (1957) 150 Cal.App.2d 403, a felony prosecution, the defendant over-injected himself with insulin and then refused to eat lunch, which would have remedied the situation. The Court of Appeal held the defendant by his own actions waived his right to be "mentally present." (*Id.* at p. 415; compare, e.g., *People v. Avila* (2004) 117 Cal.App.4th 771, 781 & fn. 5.)

We apply the following standard of review: "The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. [Citation.]" (*People v. Espinoza, supra*, 1 Cal.5th at p. 74.) Here, after employing other delaying tactics, and just as trial was to commence, Holt

intentionally swallowed a razor blade. The trial court could reasonably conclude Holt voluntarily absented himself by his action and that he did so in a deliberate attempt to delay the trial. Holt acknowledged in open court that he had voluntarily absented himself previously.

Further, nothing in the record indicates and no argument is made on appeal that Holt's absence adversely affected the defense or prejudiced Holt or denied him a fair trial. Therefore, we reject his constitutional error claim. (*People v. Freeman* (1994) 8 Cal.4th 450, 479-480; *People v. Medina* (1990) 51 Cal.3d 870, 902-903.)

4. Prior prison term

Holt argues and the Attorney General concedes Holt's one-year enhancement for a prior separate prison term (§ 667.5, subd. (b)) based on case No. MA057779 must be reversed because the conviction was reduced to a misdemeanor before Holt was sentenced. We agree. (*People v. Call* (2017) 9 Cal.App.5th 856, 858, 859-865; *People v. Evans* (2016) 6 Cal.App.5th 894, 902; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.) The judgment must be modified to strike the one-year sentence under section 667.5, subdivision (b) predicated on case No. MA057779. (*People v. Abdallah, supra*, 246 Cal.App.4th at p. 749.)

IV. DISPOSITION

The judgment as to defendant Lemont Everett Townsend is affirmed. The judgment as to defendant Calvin Dewayne Holt is modified to strike the one-year sentence under Penal Code

section 667.5, subdivision (b) predicated on case No. MA057779. The judgment as to Holt is affirmed in all other respects. On remand, the superior court is to prepare an amended abstract of judgment for Holt and deliver a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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