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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL ALBERTO ESTRADA, Defendant and Appellant.	B240623 (Los Angeles County Super. Ct. No. YA080588)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed.

Stratton S. Barbee, 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, Linda C. Johnson and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Manuel Alberto Estrada (defendant) was convicted of second degree burglary of a vehicle in violation of Penal Code section 459,[1] attempted unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a) and section 664, and driving with a revoked or suspended driver's license in violation of Vehicle Code section 14601.1, subdivision (a). He appeals, contending that he received ineffective assistance of counsel, there was insufficient evidence that he intended to steal the vehicle, and he is entitled to a new trial because a juror slept through a portion of the trial. We find no error, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Prosecution Case

Mike Cokley is a manager of a Chili's Restaurant in Manhattan Beach. On October 9, 2010, he drove to work and parked his 1995 Ford Mustang GT in the restaurant parking lot. He locked the car and set the car alarm. At about 3:40 p.m., his car alarm beeped and indicated that the driver's side door of his car had been opened. Cokley ran out of the restaurant and towards his car. He saw that the driver's side door was open about six inches and a man, whom he later identified as defendant, was sitting in the driver's seat. Defendant had his hand on the top of Cokley's steering wheel and "was kind of looking underneath the steering wheel." Defendant was wearing a white t-shirt, dark jeans, a Dodgers hat, and black gloves.

Cokley noticed that a blue Cadillac Escalade was parked next to his car. A man sitting in the passenger seat of the Escalade yelled in the direction of Cokley's car something like, "Get out, get out. Someone is coming." Cokley made eye contact with defendant and asked what he was doing in his car. Defendant did not answer. Instead, he

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

jumped out of Cokley's car, opened the driver's side door of the Escalade, and jumped in. He then drove quickly away.

Cokley copied down the Escalade's license plate number and called 911. Officer Taylor Klosowski responded within approximately five minutes and took a report. Cokley described defendant's appearance and reported that the keyhole on the driver's side door had been "punched with, I would guess, a flat head screwdriver" and the door had been dented. The glove box had been opened, but nothing had been taken. As far as Cokley could tell, nothing else had been moved in his car. Officer Klosowski observed that the keyhole on the driver's side door of the vehicle had been damaged in a manner consistent with an object having been forced inside it. He believed that the object was a shaved key[2] or "some sort of punching device," possibly a screwdriver. He later learned that the registered owner of the Escalade with the license plate reported by Cokley was a Victor Estrada, with a registered address in Lennox.

Sometime after the incident, Cokley met with Detective Enriquez of the Manhattan Beach Police Department. Detective Enriquez showed him six photographs and asked whether any of the men depicted in the photographs was the man who broke into his car. Cokley identified defendant.

On cross-examination, Cokley admitted that he had told the 911 operator that defendant and his accomplice had tried to steal his car stereo, not his car. He said, however, that "[a]t that point I was just making a bunch of guesses going off what information I did have."

Brian Edwards, a field representative for the Department of Motor Vehicles (DMV), testified that defendant's driver's license had been suspended as of May 9, 2009, and remained suspended on October 9, 2010. On rebuttal, he testified that DMV records reflected that the Escalade Cokley saw at the scene had been purchased by a Victor Estrada for $1,000 on March 1, 2010. DMV records further showed that Victor Estrada

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[2] Klosowski described a shaved key as "a key that's going to mimic and manipulate what the correct key would do to be able to get the locking mechanism to unlock."

transferred the Escalade to a Joel Diaz on October 20, 2010. Joel Diaz registered the vehicle in his name on March 18, 2011. Edwards said that when a vehicle is sold or transferred, California law requires that a notice of transfer and release of liability be filed with the DMV within five days. The new owner can then register the vehicle in his or her name at a later time.

II. The Defense Case

Defendant's father, Victor Manuel Estrada (Victor), testified that he formerly owned a blue Cadillac Escalade, which he sometimes permitted his son to drive. Victor sold the Escalade in September 2010. He and the buyer filled out transfer paperwork, but Victor did not send the paperwork to the DMV because his son had possession of the title documents. About a month after the sale, Victor gave the cash he received from the buyer to defendant "[b]ecause he was the owner of the car." Defendant had lived with his father at some times, but was not living with him in September or October 2010. Victor did not keep keys to the vehicle after he sold it, and to his knowledge defendant also did not have keys to the vehicle after the sale.

Jorge Gallardo testified that he bought a blue Cadillac Escalade from Victor on September 25, 2010. He did not inspect the car before he bought it. Victor gave him a single set of keys that he said was the only set of keys to the car. Gallardo and Victor filled out a release form "because they didn't have a pink slip on hand so they gave me like a paper that said that I was the owner of that vehicle." Victor gave Gallardo the pink slip at the end of October 2010, but Gallardo never registered title with the DMV because he sold the car again within a month. Gallardo said that he withdrew several thousand dollars from the bank to buy the car, but at time of trial he was not able to locate either the transfer paperwork or his bank statement. To Gallardo's knowledge, Estrada had not been in the car since the sale.

Sara Rodriguez testified that defendant was her boyfriend of five years and the father of two of her three children. He supported her and the children financially by selling cars. In 2010, Rodriguez generally saw defendant every other day, but there was a

period of time between August and October 2010 when she did not see defendant in the United States. She saw defendant in Tijuana in September 2010, and again during the first week of October 2010. She was in Tijuana with him on his birthday on October 12, 2010. Her passport was not stamped in October, however. Defendant returned from Tijuana in late October, in anticipation of Rodriguez giving birth to their second child on December 2, 2010.

III. Trial, Conviction, and Sentence

Defendant was charged by amended information as follows: (1) count 1, second degree burglary of a vehicle in violation of section 459; (2) count 2, attempted unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a) and section 664; and (3) count 3, driving with a revoked or suspended driver's license in violation of Vehicle Code section 14601.1, subdivision (a). The amended information further alleged as to counts 1 and 2 that defendant suffered two prior convictions for which he served a prison term.

A jury convicted defendant of all three counts on February 10, 2012. The court sentenced defendant as follows: as to count 1, the high term of three years, plus an additional year for each of two priors, for a total sentence of five years; as to count 2, a term of eight months, stayed pursuant to section 654; and as to count 3, a sentence of 180 days in county jail, to be served concurrently with counts 1 and 2.

Defendant timely appealed from the judgment.

DISCUSSION

Defendant contends: (1) he received ineffective assistance of counsel; (2) there was insufficient evidence to establish that he intended to drive or take the vehicle; and (3) he was denied a fair trial because a juror slept through a portion of the testimony. We consider these issues below.

I. Defendant Received Effective Assistance of Counsel

Defendant contends that he received ineffective assistance of counsel because counsel stipulated that the perpetrator intended to steal the car (rather than its contents), and counsel failed to produce evidence of defendant's alleged deportation in 2010. For the following reasons, we do not agree.

A. Standard of Review

"'"A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 575, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 215, italics in original.) It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] We have summarized defendant's burden as follows: "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . ."'"

"'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) If the record on appeal '"'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked

for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,"' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

B. Stipulation to Perpetrator's Intent to Steal Victim's Car

1. Factual Background

Prior to trial, the prosecution moved to admit evidence of defendant's prior uncharged crimes. Specifically, the prosecution sought to admit evidence that (1) on May 24, 2005, defendant was detained by police after entering a 1987 Chevy Caprice from the driver's side door and then attempting to flee when the Caprice's alarm sounded; when police apprehended defendant, they recovered bolt cutters, a channel lock, and screwdrivers; and (2) on August 2, 2007, defendant stole a black Chevy Caprice from a parking lot and was apprehended by officers shortly thereafter; he had managed to break into the Caprice through the driver's side door, which had been locked, and was found with a pair of pliers in the passenger compartment of the stolen vehicle. The prosecution argued that defendant's actions in the prior cases demonstrated a pattern "extremely probative of the defendant's criminal intent to commit a theft and or felony upon entry into the locked vehicle. [¶] . . . The defendant's prior acts both display the defendant's similar intent to commit a theft upon entering the vehicle in this case and his intent to take the car itself." The prosecution also argued that the prior acts were relevant to show a common plan or scheme and defendant's identity.

The trial court initially denied the motion, stating that the evidence "would be relevant really only to identity and for identity, it has to have the stronger similarities so that you can almost say that it's a signature." The court reconsidered the issue sua sponte, however, after defense counsel elicited testimony that Cokley told the 911 operator that someone had tried to steal his car radio, not his car. After excusing the jurors from the courtroom, the court said as follows: "I discussed with counsel

something off the record and that is that from the way the evidence has come out something that I did not know but after hearing the 9-1-1 where the witness testified or stated to the operator that he thought they were trying to steal his stereo and then counsel on cross . . . reinforced it by saying on the 9-1-1 you were trying to — to say that he was taking your stereo, I mean basically. So in my mind, whether he's intending to steal the stereo or just the intent for the burglary is very different from the intent than the People have to prove for intending to steal the actual car. So that is an issue now which I did not think [of]. I thought identification was the only real issue in this case when we discussed the People's motion to get in the prior car theft conviction or joy riding conviction. So we need to relitigate that issue at this time. And I did tell [defense] counsel that if he's willing to stipulate . . . that the only issue in this case is who the person was, then identity really is the only issue. But if the intent is there and needs to be argued, then I believe that it's a much lower threshold for the priors as stated in the People's motion. Intent, I believe, was the lowest, . . . common plan and scheme is the next one[,] and then identity is the most stringent which is why I denied the People's motion."

Defense counsel argued that the court should not reconsider its ruling because defendant should not be "penalized" for counsel's cross-examination of the victim. The court agreed that defense counsel had the right to examine the victim about his 911 call, but concluded that the examination impacted the earlier ruling "because when I made that ruling . . . it was very clear on the record that I said . . . the main thing that the jury is going to have to decide is who did this. That is why I made the ruling that I did. If I thought in anyway that the witness was going to say he thought his stereo was going to be stolen or that you were going to ask him isn't it true that you thought he was there to steal your stereo, [which] basically is what you asked him, then the intent to steal the car is truly an issue." The court then noted that if defense counsel agreed to stipulate to intent, "then we don't need to get into the priors."

After further discussion, the court asked defense counsel if he was willing to stipulate that the intent element had been proven, noting that "you can discuss that with your client." Defense counsel agreed to stipulate, but said as he did so that "I believe this

is unfair and somewhat prejudicial to the defendant because this was a matter that was already settled in so far as the court's assertion that the subject matter has now been changed or otherwise broached when it wasn't previously." The court thereafter instructed the jury as follows: "It is stipulated by and between the parties that when a person entered Mr. Cokley's vehicle that person had the intent at the time of entry to commit unlawful taking or driving of that vehicle. . . . It is further stipulated by and between the parties that the person intended to deprive Mr. Cokley, the owner, of possession or ownership of the vehicle for any period of time." Both attorneys stated on the record that they so stipulated.

2. Analysis

Defendant contends counsel should not have stipulated that the person who broke into Cokley's car intended to steal the car because there was evidence to the contrary.[3] Further, he says, the stipulation was "unnecessary" because the trial court had the discretion to exclude evidence of prior bad acts: "Defense counsel was understandably concerned that if the court allowed appellant's prior record to be admitted into evidence the jury might assume that appellant was, indeed, the person who broke into Mr. Cokley's vehicle. While the court did show her intent to revisit the issue of whether appellant's prior record should be entered into evidence, she clearly expressed her willingness to listen to arguments from both sides. Instead of making formal arguments against permitting appellant's prior record into evidence defense counsel entered a

[3] Defendant identified the following evidence: there was damage to the driver's side keyhole, but not to the ignition; the driver's side door was left open, suggesting that the perpetrator intended to quickly exit the vehicle, not to drive it away; the perpetrator's accomplice sat in the passenger seat of the getaway car, suggesting the perpetrator intended to reenter it; the perpetrator rummaged through the glove compartment of Cokley's car; the perpetrator was wearing black gloves, which would have been unnecessary if he intended to steal the car; and Cokley did not observe the perpetrator in possession of any burglary tools.

stipulation that the perpetrator did, in fact, intend to steal the car." (Internal record reference omitted.)

We do not agree that defense counsel's stipulation constituted ineffective assistance of counsel. The trial judge's comments made clear that she intended to allow the prosecution to admit evidence of defendant's prior crimes if defendant did not stipulate that the perpetrator intended to steal the car. Specifically, the judge told counsel that the threshold for allowing evidence of prior crimes was much lower if intent was at issue, and that she had excluded the evidence of defendant's prior crimes only because she "thought identification was the only real issue in this case when we discussed the People's motion." The court also asked counsel whether his client would stipulate to the perpetrator's intent to steal the car—a stipulation the judge would not have sought had she intended to exclude the evidence of defendant's prior crimes in any case. She did so, moreover, even after defense counsel had argued strenuously that the court should not reconsider its prior ruling and had stated on the record that he believed the ruling to be "unfair and . . . prejudicial to the defendant."

Defense counsel's decision to stipulate to intent was a reasonable one under the circumstances. Counsel was concerned about permitting the jury to hear evidence of defendant's prior crimes, both of which involved attempted theft of cars. The priors, moreover, would have told the jury that defendant had a criminal history spanning at least 13 years. The defense attorney made a rational tactical decision to stipulate to the element of intent rather than to permit the jury to hear this evidence, and we will not second-guess that tactical choice on appeal.

C. Failure to Offer Evidence of Defendant's Deportation

A crime report prepared by Officer Andrew Enriquez on February 2, 2011, stated that a woman who identified herself as defendant's sister told Officer Enriquez on January 27, 2011, that defendant had been deported a few months earlier, but she was not sure of the precise date. The report further stated that Officer Enriquez determined through department resources that defendant "had been arrested for DUI and the

deportation proceedings had begun," but the officer "was not able to obtain any further information on [defendant's] current status."

Defendant contends that his trial attorney failed to provide effective assistance of counsel because he failed to present evidence that defendant was deported "a few months prior to January 27, 2011." According to defendant, "[i]f true, it is circumstantial evidence that appellant was not in the United States on October 9, 2010," and thus counsel should have elicited testimony from appellant's sister and presented other evidence supporting appellant's alibi defense. His failure to do so, defendant urges, constitutes ineffective assistance of counsel.

We do not agree. As noted above, if the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.) Here, counsel was not asked for an explanation and we can conceive of many potentially satisfactory ones: defendant may have been deported *after* October 9, 2010, or, if he was deported before that date, may have returned to the United States before October 9. Alternatively, defendant's sister may have been mistaken—defendant may not have been deported at all. Defendant's attorney's failure to elicit testimony on the subject of the alleged deportation thus does not establish that defendant received ineffective assistance of counsel.

II. The Evidence Established Defendant's Intent to Drive or Take Cokley's Vehicle

Defendant contends that his attorney's stipulation was insufficient to prove intent to steal the car because defendant "did not personally express his desire to enter the stipulation that the perpetrator intended to unlawfully take Mr. Cokley's vehicle." Although defendant concedes that a defendant is not required to personally utter his or her consent to a stipulation, he says there is evidence in the present case that he "did not enter the stipulation intelligently. The only reason appellant entered the stipulation was

so that the jury would not hear evidence regarding his criminal record. However, if appellant had known that he could have requested that the court exclude evidence of his prior record as prejudicial, and then entered a stipulation if the court denied his request, appellant very likely would not have stipulated that the perpetrator actually intended to unlawfully take the car. There is no evidence that the court or defense counsel explained to appellant that evidence of his prior bad acts could be excluded, and that he could enter a stipulation if the court denied his request to exclude the information. If appellant had known he had this option he would likely have taken it."

As we have said, we do not agree with defendant that the trial court would have excluded the evidence of defendant's criminal record had defendant not agreed to stipulate to intent. Instead, we find the court's on-the-record comments, quoted above, to be quite clear that had defendant not accepted the proposed stipulation, the court would have allowed the prosecutor to introduce evidence of defendant's prior criminal acts.

Defendant also contends that the prosecutor did not introduce sufficient evidence to establish beyond a reasonable doubt that he intended to take Cokley's vehicle. We need not reach this contention on the merits. "Generally, stipulations are binding upon the parties. 'Unless the trial court, in its discretion, permits a party to withdraw from a stipulation [citations], it is conclusive upon the parties, and the truth of the facts contained therein cannot be contradicted. [Citations.]' (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142.)" (*Robinson v. Workers' Comp. Appeals Bd*. (1987) 194 Cal.App.3d 784, 790.) In the present case, because defendant never sought to withdraw from his stipulation, it conclusively established the element of intent.

III. Permitting Juror No. 4 to Remain on the Jury Did Not Deprive Defendant of a Fair Trial

A. Factual Background

During defense counsel's cross-examination of the victim, the following colloquy ensued:

"The Court: Okay. We're just going to take a little break right now.

"Mr. Ziselman [defense counsel]: Break?

"The Court: Hold on one second. Juror No. 4, Juror No. 4, do you need to stretch? Take a little break?

"Juror No. 4: I'm okay.

"The Court: You're okay. What do you remember hearing? What was the last thing you heard?

"Juror No. 4: Um —

"The Court: What was the subject matter if you can recall?

"Juror No. 4: You were asking him about — I have to go back. I don't remember.

"The Court: Okay. Are you — were you hearing anything about the parking lot? Did you hear anything about that at all?

"Juror No. 4: I think that's what he was talking about that.

"The Court: Okay. Do you remember anything that you heard and what the subject matter was about the parking lot?

"Juror No. 4: Um —

"The Court: All right. We're going to take an afternoon break here, Ladies and Gentlemen. . . ."

After the jury left the courtroom, the court inquired of defense counsel as follows:

"The Court: Mr. Ziselman, I want to know what you want to do about that juror, if anything.

"Mr. Ziselman: If I got rid of her, I'd have to get rid of my wife.

"The Court: She doesn't listen to you either.

"Mr. Ziselman: I don't know.

"The Court: I think —

"Mr. Ziselman: Hopefully, I drove her asleep.

"The Court: Yeah, I don't — I notified the bailiff probably about 30 seconds after I had noticed that she was asleep and then he went up to her, you know, probably about 10 seconds after that.

"Mr. Ziselman: Your Honor, I don't have a problem. I just —

"The Court: What do you want to do? You want to leave her?

"Mr. Ziselman: I have no objection.

"The Court: Okay. All right. I just wanted the record to be clear."

B. Analysis

Citing *People v. Bonilla* (2007) 41 Cal.4th 313, 350, and *People v. Bradford* (1997) 15 Cal.4th 1229, 1348, defendant contends that the court abused its discretion by retaining Juror No. 4 without seeking defendant's express consent. Because the trial court did not obtain that consent, defendant contends he is entitled to a new trial. The Attorney General disagrees, urging that defendant waived the issue and, in any event, the court did not abuse its discretion by retaining Juror No. 4. For the following reasons, the Attorney General is correct.

It is undisputed that the trial court has the authority to discharge jurors for good cause, including for sleeping during trial. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1348-1349.) "When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. (*Bradford*, at p. 1348; *People v. Burgener* (1986) 41 Cal.3d 505, 520-521.) Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court. (*Bradford*, at p. 1348.)" (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 350.)

In the present case, defendant concedes that the trial court made the necessary inquiries of Juror No. 4. We agree. As soon as the court became aware that Juror No. 4 had fallen asleep, it paused the proceedings, instructed the bailiff to awaken the juror, and then asked the juror what she last remembered hearing. When the juror could not recall, the court instructed the jury to take a break and then asked defense counsel how he wished to proceed. The court resumed the proceedings only after counsel stated that he had no objection to retaining the juror.

Defendant urges that his attorney's consent to retaining the juror was not sufficient—that he should have been asked personally whether he consented to having the trial proceed. We do not agree. To preserve a claim of juror misconduct, a defendant

must "seek the juror's excusal or otherwise object to the court's course of action." (*People v. Holloway* (2004) 33 Cal.4th 96, 124 [rejecting claim that trial court erred and deprived defendant of his Sixth Amendment right to an impartial jury by failing to discharge a juror for misconduct]; see also *People v. Stanley* (2006) 39 Cal.4th 913, 950 ["At the outset, we note defendant has conceded that his counsel failed to object to Juror C.'s continued service on the jury, and failed to request a mistrial on grounds of juror misconduct. *As such, the claim is waived on appeal*."], italics added.) Here, defendant did not ask to have Juror No. 4 excused; to the contrary, through his attorney, he affirmatively agreed to permit the juror to remain on the jury. Thus, his claim of juror misconduct is waived on appeal.

In any event, the record does not establish that the trial court deprived defendant of a fair trial by leaving Juror No. 4 on the panel. "'[A]lthough implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, . . . [the] cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during *material portions of the trial*." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1349, italics added.) In the present case, there was no such showing. The evidence suggested that Juror No. 4 was asleep for a very short time—perhaps less than a minute. Moreover, immediately before the court halted the proceedings, defense counsel had been questioning the victim as to where he had parked his car the day of the burglary. While these questions may have been relevant, they were not a "material portion[] of the trial." (*Ibid.*) The trial court therefore did not abuse its discretion in declining to discharge Juror No. 4.

DISPOSITION

The judgment is affirmed.[4]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

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[4] Defendant's reply brief purports to raise an additional issue. Defendant's appellate attorney says that defendant may have served only one prior prison term and, "[i]f this is so (and appellant's counsel is in the process of confirming this fact with [defendant]), then his sentence on Count One should not have been enhanced two years under Penal Code 667.5(b) because [defendant] has not served two separate prison sentences. It appears appellant's sentence should be reduced by one year to reflect that he has only served one prior prison sentence." (Internal record reference omitted.)

We do not reach this issue on the merits on the present record. Although counsel suggests that defendant may have served only one prior prison term, he does not direct us to anything in the record that would establish this purported fact—indeed, he concedes that he cannot do so. If defendant can establish such error in the future, he may seek relief through a petition for writ of habeas corpus.