Filed 2/14/18 P. v. Kingsbury CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANDREW PHILLIP KINGSBURY, Defendant and Appellant.	B264578 (Los Angeles County Super. Ct. No. KA105923)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Andrew Phillip Kingsbury shot Juan Gonzalez in the neck. He was charged with attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664)[1] and possession of a firearm by a felon (§ 29800, subd. (a)(1)). At trial, Kingsbury explained he fired his weapon in self-defense, but the jury found him guilty of attempted murder and possession of a firearm by a felon.

Kingsbury argues the trial court erred in its instructions to the jury on the law of self-defense, and his counsel provided ineffective assistance. Kingsbury also requests that his case be remanded for resentencing in light of recent legislation giving the trial court discretion to strike the firearm enhancement. We deny his request for resentencing and affirm.

FACTS

A. *Prosecution Case*

On May 18, 2014, Gonzalez was standing on Olympus Avenue in Hacienda Heights, wearing headphones, getting ready to text his girlfriend, when he was shot in the neck. He did not see who shot him. Gonzalez had tattoos on his face, chest and legs, including an "H" tattooed on the front of each leg. He denied telling law enforcement he was Lencho from Happy Homes and denied being a member of Happy Homes, a gang in

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

Hacienda Heights. He said Lencho was the nickname his mother called him.

Los Angeles County Deputy Sheriff Jose Nanquil worked on a special gang team. He testified Happy Homes is a clique of the Puente 13 gang, which is a rival of the Varrio Trece gang. Happy Homes and Varrio Trece territories are adjacent to one another, separated by Hacienda Boulevard. Happy Homes is represented by the letters "HH."

By the time of the trial, Deputy Nanquil had known Gonzalez for five years. In their conversations, Gonzalez downplayed his association with Happy Homes, claiming he was only associated with the gang because he grew up and lived in the neighborhood.

Deputy Nanquil testified that several days prior to the shooting, someone had crossed out Happy Homes graffiti in Happy Homes territory on Olympus Avenue and written over it with Varrio Trece graffiti. Deputy Nanquil expected retaliation.

At about 3:40 p.m. on May 18, Deputy Nanquil responded to a call about a shooting in Hacienda Heights. When he arrived at the scene, a man pointed toward Galemont Avenue and said, "He ran over there." Deputy Nanquil turned onto Galemont Avenue and saw Kingsbury running down the sidewalk. When Kingsbury saw the deputy, he slowed to a normal pace. Deputy Nanquil got out of his patrol car, drew his gun and ordered Kingsbury to stop. Kingsbury stopped, turned and looked at the deputy, and then turned back and started running.

Deputy Nanquil returned to his car and drove after Kingsbury, eventually catching up with him on Walbrook Drive in Varrio Trece territory. Deputy Nanquil got out of his car, drew his gun, and ordered Kingsbury to stop. Kingsbury reached into

his pockets and began pulling things out; Deputy Nanquil heard the sound of a metal object hitting the ground. Shortly thereafter, Kingsbury dropped to the ground. Deputy Nanquil and other officers placed him under arrest.

Deputy Nanquil found two loaded magazine clips near where Kingsbury was arrested. Another deputy retraced Kingsbury's steps and found a gun.[2] Kingsbury had gunshot residue on his hands at the time of his arrest. Four cartridge casings were found at the scene of the shooting. The casings were fired from the gun recovered by the deputies.

Detective Liliana Jara, who worked with the sheriff's department gang unit, testified that a gang war started in May 2014 between Happy Homes and Varrio Trece. Based upon Gonzalez's tattoos and his self-admitted membership in the gang, Deputy Jara testified Gonzalez was a Happy Homes member with the gang moniker Lencho.

Detective Jara testified Kingsbury was a Varrio Trece gang member. Kingsbury had a "VT" tattoo, representing Varrio Trece, and a tattoo of the State of California with the number 187 inscribed inside the outline of the state. Detective Jara testified the 187 tattoo, a reference to Penal Code section 187, indicated Kingsbury was an active gang member who committed murder.

B. *Defense Case*

Kingsbury testified he grew up in Hacienda Heights, where he lived with his grandparents. He left his grandparents' house

---

[2] The parties entered into a testimonial stipulation that, if called as a witness, a criminalist would testify the magazine clips found by Deputy Nanquil functioned properly in the gun.

when he was 18 years old. After leaving, he was homeless and "started kicking it with the wrong people." He ended up joining Varrio Trece when he was 19 years old.

Kingsbury met Gonzalez in 2011, when he was 18 and Gonzalez was 50 years old. Gonzalez was often at Kingsbury's ex-girlfriend's house, where Kingsbury had been staying. Gonzalez was looking for someone to sell drugs for him, and Kingsbury agreed to sell marijuana. Gonzalez drove Kingsbury to a medical marijuana dispensary and gave him money, which Kingsbury used to purchase marijuana. Instead of selling the marijuana, Kingsbury smoked some and gave some to his friends. Gonzalez was angry, and Kingsbury told Gonzalez's girlfriend to tell Gonzalez that he would try to pay Gonzalez back. When Gonzalez found Kingsbury, Kingsbury gave him some money, but it was not enough. Gonzalez warned Kingsbury that he needed to pay him all of the money. Gonzalez threatened Kingsbury that he better not have to come looking for Kingsbury to get his money.

About a week before the shooting, Kingsbury bought a gun from "Termite." Kingsbury needed the weapon for his protection. He was living on the street, and people had shot at him and chased him with knives. He carried the firearm with him at all times because he was homeless and had no place to leave the firearm.

On the day of the shooting, Kingsbury rode his bicycle to visit a friend who lived on Olympus Avenue in Hacienda Heights. When he got to her house, he saw what looked like a family gathering, and a man and woman in front of the house. He decided not to visit because he had the gun on him.

As Kingsbury turned to leave, the man who had been in front of his friend's house, Edward Perez, walked toward the street and was "mad-dogging"—staring at—him. Kingsbury waved at him, thinking he might be a member of his friend's family.[3] The man yelled, "Come here, motherfucker! Come here!" Kingsbury thought Perez was trying to start a fight, so he rode away. Perez yelled, "Get that motherfucker, Lencho." Gonzalez walked into the street toward Kingsbury and told Kingsbury to get off the bicycle. Gonzalez had his hand in his pocket, as if he were reaching for something, and looked angry.

Kingsbury tried to ride away, but the chain came off his bicycle. He felt trapped between Perez and Gonzalez and was afraid of what Gonzalez might do to him. He turned and fired four shots over his shoulder in Gonzalez's direction, hoping to scare Gonzalez away. After firing the weapon, he tried to get away, pushing the bicycle with his feet instead of pedaling.

Kingsbury crossed Hacienda Boulevard into Varrio Trece territory towards a discount store. He heard Perez yelling at him. He dropped his bicycle and ran toward the store, believing no one would shoot at him in such a public place. As he ran, he saw Perez chasing after him with his hand in his pocket.

---

[3] The trial court noted, "When you demonstrated how you waved, you raised your left hand and you kind of made a peace symbol with your fingers. Is that how you waved to him?" Kingsbury responded that he did not wave like that and demonstrated again, "[w]ith all fingers extended rather than just the two." Kingsbury later demonstrated the "V" hand sign for Varrio Trece and said he did not make that sign when he waved at Perez.

Kingsbury heard the patrol car behind him and turned to find Deputy Nanquil pointing a gun at him. Kingsbury ran because he was in possession of a firearm. As he ran, he threw away the gun and the magazine clips. Because he was out of breath, he stopped and fell to the ground. When the police caught up with him, he did not tell Deputy Nanquil someone was trying to kill him because he was afraid of the officer. He explained he was afraid of Deputy Nanquil because the deputy was pointing a gun at him, and Kingsbury looked like a gang member.

Kingsbury testified he obtained his 187 tattoo about six months after his arrest, and the tattoo was not related to this case.

C. *Verdict and Sentencing*

The jury found Kingsbury guilty of attempted murder and possession of a firearm by a felon. The jury was unable to reach a verdict on the allegations that the attempted murder was willful, deliberate and premeditated, and was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). Consequently, those allegations were dismissed. The jury found true the allegations that Kingsbury personally used, and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c) & (d)).

The trial court sentenced Kingsbury to the upper term of nine years for the attempted murder plus a consecutive term of 25 years to life for personally and intentionally discharging a firearm causing great bodily injury, for a total term of 34 years to life. The court stayed the sentence for possession of a firearm by a felon.

DISCUSSION

A. *The Trial Court's Responses to the Jury's Questions Regarding Self-defense Do Not Require Reversal*

Kingsbury argues that when the court responded to several of the jury's questions, the court instructed the jury erroneously on the law of self-defense. Because the court's responses must be viewed in the context of the overall instructions given by the court, we set out in detail the relevant written instructions and the court's responses to the jury's questions.

1. *The Written Jury Instructions*

The trial court instructed the jury on attempted murder (CALCRIM No. 600) and on deliberation and premeditation (CALCRIM No. 601). The court instructed the jury on the right to self defense pursuant to CALCRIM No. 3470 as follows:

"Self-defense is a defense to attempted murder. The defendant is not guilty of that crime if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if:

"1. The defendant believed that he was in imminent danger of being killed or suffering great bodily injury.

"2. The defendant believed that the immediate use of deadly force was necessary to defend against the danger.

"AND

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to himself or an imminent danger that he would be touched unlawfully. Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense."

The court instructed the jury to consider various circumstances, including those involving Gonzalez, to determine whether Kingsbury's beliefs and reactions were reasonable.

The court instructed the jury on attempted voluntary manslaughter based on imperfect self-defense as a lesser included offense (CALCRIM No. 604). The instruction states:

"An attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant took at least one direct but ineffective step toward killing a person.

"2. The defendant intended to kill when he acted.

"3. The defendant believed that he was in imminent danger of being killed or suffering great bodily injury.

"AND

"4. The defendant believed that the immediate use of deadly force was necessary to defend against the danger.

"BUT

"5. At least one of the defendant's beliefs was unreasonable.

"*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have actually believed there was imminent danger of death or great bodily injury to himself."

The court instructed the jury to consider various circumstances, including those involving Gonzalez, to determine whether Kingsbury's beliefs and reactions were sincere.

The court instructed the jury pursuant to CALCRIM No. 3472 (Right to Self Defense: May Not Be Contrived) as follows: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force." The court instructed the jury pursuant to CALCRIM No. 3474 (Danger No Longer Exists or Attacker Disabled) as follows: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends."

2. *The Jury's Questions and the Court's Responses*

On the second day of deliberations, the jury asked three questions: (1) "Are we required to decide on the attempted murder BEFORE considering the lesser charge?" (2) "Why do the two charges appear to overlap?" (3) "Can self defense be a part of the attempted murder charge?"

The trial court brought the jury into the courtroom to answer its questions. As to the first question, the court explained "the law allows you to consider those charges in any order that you wish. But I cannot accept a verdict on that lesser charge only until or unless all of you have unanimously found the defendant not guilty of the greater charge, in this case being [an] attempted murder. . . ."

As to the second question, the foreperson said the question concerned the "overlap" between attempted murder and attempted voluntary manslaughter. The trial court then explained that "[a]ttempted voluntary manslaughter is just simply a lesser offense of attempted murder; and, again, you've received the instructions as to how to distinguish an attempted murder from attempted voluntary manslaughter. It all depends upon this concept of imperfect self-defense. If the accused actually believed that he was being threatened by death or great bodily injury but in an objective analysis that belief was unreasonable given the circumstances, then that person may be guilty of attempted voluntary manslaughter and not attempted murder. But if you find based upon the evidence that the person did not actually believe that his life was in danger, then he's not entitled to any defense at all including imperfect self-defense. It just depends on how you see the evidence."

Turning to the third question, the trial court explained that the jury had "been instructed on two separate concepts of self-defense. One is complete self-defense, and if a person acts in complete self-defense, that person is not guilty of any crime. If that person acts with what's called imperfect self-defense, meaning that he or she in his or her mind actually believed in the need to use deadly force but that belief was unreasonable given an objective analysis, that's imperfect self-defense.

"Perfect self-defense or complete self-defense means that, not only did that person have that subjective belief in the need to use deadly force to respond to an issue, but also that person's belief was reasonable when you look at it objectively. That means you or I or anybody in that person's situation would have acted the same way. That's complete self-defense. When everyone in that same situation would not have acted that same way, that's imperfect self-defense even though the defendant himself actually believed in the need to use deadly force. *If you find his belief was not supported by the evidence, that's not self-defense at all. You do what you need to do with respect to the charged crime.*[4] But, again, if it's imperfect self-defense which [is] an honest, natural belief in the need to use deadly force, but it was unreasonable under the circumstances, then you have an attempted voluntary manslaughter." (Italics added.)

Focusing on the defendant's state of mind, the trial court reiterated that if his belief "was reasonable under the circumstances, that's complete self-defense, and he's not guilty of any crime. If the defendant's belief you find was not supported

---

4 Kingsbury objects to these two italicized sentences in the trial court's answer.

by the evidence and that belief was unreasonable under the circumstances, there is no self-defense at all. You do what you need to do. It's not justifiable in other words."

After reiterating that the jury needed to find Kingsbury not guilty of attempted murder before the court could accept a verdict of guilty of attempted voluntary manslaughter, the trial court concluded, "So, again, if you find he didn't act in self-defense, *in other words, it was a volitional act on his part, then you do what you need to do.*[5] But I can't guide you in what verdict you can reach. All I can do is clarify the law and give you some guidance in that respect." (Italics added.)

About an hour later, the jury submitted another question: "What is the definition of intent according to the law?" The trial court responded with a discussion of intent to kill as an element of both attempted murder and attempted voluntary manslaughter. The trial court explained, "When you talk about attempted voluntary manslaughter for purposes of imperfect self-defense, sure, the person pulling the trigger wants that body dead but believes in his mind that 'I have to kill that person because, if I don't, *that person is going to kill me*.' I have that actual awareness. That's my honest belief. And whether or not you perceive under the circumstances that belief to be reasonable, that is complete self-defense. If you perceive that belief to be unreasonable, that's imperfect self-defense.

"But the common element of complete self-defense and imperfect self-defense is that honest, actual belief in the mind of the person pulling the trigger. But if you feel that person did not

---

5 Again, Kingsbury objects to the italicized portion of the response.

have that belief under the circumstances *or should not have had that belief under the circumstances, then perhaps complete self-defense and imperfect self-defense does not apply*."[6] (Italics added.)

3. *General Principles of Law and Standard of Review*

Kingsbury did not object to the trial court's instructions in response to the jury's questions. A defendant's "acquiescence in the trial court's response forfeits the claim of error on appeal." (*People v. Rogers* (2006) 39 Cal.4th 826, 877; see also *People v. Dykes* (2009) 46 Cal.4th 731, 802 ["When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal"].)

Nevertheless, instructional error may be preserved for appeal to the extent the error affects the defendant's substantial rights, notwithstanding counsel's failure to object at trial. (§ 1259 ["appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Johnson* (2016) 62 Cal.4th 600, 639 [where claimed instructional error "arguably would have affected [the] defendant's substantial rights," the court assumed the claim "was not forfeited for lack of objection and reached the merits of [the]

---

[6] Kingsbury objects to the italicized portions of these paragraphs.

claim, as permitted under [§] 1259"]; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233 [""""an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected""""].)

""""In this regard, '[t]he cases equate "substantial rights" with reversible error' under the test stated in *People v. Watson* (1956) 46 Cal.2d 818 . . . . [Citation]" [Citations.]"" (*People v. Jimenez* (2016) 246 Cal.App.4th 726, 730.) Under the *Watson* test, error is reversible if "'it appears "reasonably probable" the defendant would have achieved a more favorable result had the error not occurred.'" (*People v. Olivas* (2016) 248 Cal.App.4th 758, 773, quoting *People v. Breverman* (1998) 19 Cal.4th 142, 149.)[7]

---

[7] Kingsbury contends the more stringent *Chapman* [*v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]] standard applies because the alleged errors "eviscerated" Kingsbury's constitutional right to present a defense, namely perfect and imperfect self-defense. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" [Citation.]" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701]; see *People v. Woodward* (2004) 116 Cal.App.4th 821, 842 [the "[d]efendant received the statutory affirmative defense instruction. Therefore, the degree of harm is measured under the standard set forth in [*Watson*], rather than *Chapman* . . ."]; see also *People v. Beltran* (2013) 56 Cal.4th 935, 955 [""""[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error

"'"Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim . . . .'" [Citation.]" (*People v. Jimenez*, *supra*, 246 Cal.App.4th at p. 730; see also *People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183 [court must examine the merits of a claim of instructional error because "there is no other way of determining whether the instruction was reversibly erroneous"]; *People v. Olivas*, *supra*, 248 Cal.App.4th at p. 772 [court considered claim of instructional error "[n]otwithstanding defendant's failure to object below"].) Therefore, we review the merits of Kingsbury's claim of error to determine whether the trial court's response to the jury's questions affected his substantial rights.

The trial court "is under a general obligation to 'clear up any instructional confusion expressed by the jury,' but '[w]here . . . the original instructions are themselves full and complete, the court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citations.]" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 802; see also *People v. Lua* (2017) 10 Cal.App.5th 1004, 1016.)

In examining a claim of instructional error, we begin with the fundamental principle "'"that jurors are presumed to be

---

standard articulated" in *Watson*'"]; *People v. Williams* (1988) 45 Cal.3d 1268, 1314; *People v. Soto* (2016) 248 Cal.App.4th 884, 901.) The "ambiguity, inconsistency, or deficiency" (*Middleton*, *supra*, at p. 437) in the jury instructions provided by the court in this case do not rise to the level of a due process violation, especially because the court provided the jury with written instructions that correctly stated the law of self-defense. Consequently, the *Watson* standard applies.

intelligent and capable of understanding and applying the court's instructions." [Citation.]' [Citation.] ""A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] "'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."" [Citation.]' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905; see also *Middleton v. McNeil*, *supra*, 541 U.S. at p. 437 [""[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" . . . If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution"']; *People v. Tate* (2010) 49 Cal.4th 635, 696 ["In assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled"]; *People v. Wilson* (2008) 44 Cal.4th 758, 803 ["When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner"].)

4. *Analysis*

Kingsbury argues the court's responses to the jury's questions improperly instructed the jury at five different points.

He argues these responses individually and cumulatively require reversal. We examine each in turn.

First, Kingsbury challenges the trial court's statement, "But if you feel that person did not have that belief [of an imminent danger of being killed or suffering great bodily injury] under the circumstances *or should not have had that belief under the circumstances*, then perhaps complete self-defense and imperfect self-defense does not apply." (Italics added.) According to Kingsbury, this statement "essentially told the jury that an unreasonable belief in imminent death or harm precluded any finding of self-defense, which is contrary to the law of imperfect self-defense."

True, this statement, taken by itself, and when read in the disjunctive is erroneous. However, as stated above, we must look at the statement in the context of the instructions as a whole and determine whether a reasonable jury would have misunderstood the requirements of the imperfect self defense component of attempted voluntary manslaughter. (*Middleton v. McNeil, supra*, 541 U.S. at p. 436; *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 905; *People v. Tate*, *supra*, 49 Cal.4th at p. 696.)

In *Middleton v. McNeil*, *supra*, 541 U.S. 433, the United States Supreme Court confronted a similar issue. At trial McNeil argued she killed her husband in self defense, albeit imperfect self-defense. (*Id*. at p. 434.) The California trial court gave an erroneous written jury instruction on imperfect self-defense.[8]

---

[8] The trial court instructed the jury in relevant part: "'"The specific intent for voluntary manslaughter, as opposed to murder, must arise upon one of [the] following circumstances: [¶] . . . [¶]

The Ninth Circuit granted the habeas petition, finding the erroneous instruction "'eliminated'" McNeil's imperfect self-defense argument. (*Id*. at p. 437.) The high court reversed the Ninth Circuit and found the state appellate court did not unreasonably apply federal law when it determined the trial court's instruction "was not reasonably likely to have misled the jury given the multiple other instances (at least three . . .) where the charge correctly stated that [McNeil's] belief could be unreasonable." (*Id.* at pp. 437-438.) The court also noted the jury was not likely to be misled where the prosecutor's argument clarified the ambiguous jury charge. (*Id.* at p. 438.)

The same is true here. In light of the wealth of instructions on the issue of imperfect self-defense, the court's single, isolated phrase is not reasonably likely to have misled the jury on the law of imperfect self-defense. Kingsbury fails to acknowledge: (1) the court's written instructions were accurate; (2) the court referred

---

"'"[A]n honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. That would be imperfect self-defense. [¶] . . . [¶]

"'"An 'imminent' peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person.'" [Citation.]

"The last four words of this instruction—"'as a reasonable person'"—are not part of the relevant form instruction[] [CALJIC No. 5.17], and were apparently included in error. The prosecutor's closing argument, however, correctly stated the law," that if the slayer's belief was *unreasonable*, the crime would be voluntary manslaughter. (*Middleton v. McNeil*, *supra*, 541 U.S. at pp. 434-435.)

the jury to the written instructions;[9] (3) the court properly explained the law on at least three other occasions; and (4) both the prosecutor and defense counsel stated the law accurately in their closing arguments.

In his closing argument, the prosecutor discussed, without objection, the difference between perfect and imperfect self-defense and gave examples of a reasonable, honest belief and an unreasonable but honest belief. The prosecutor pointed out that if the jury found the defendant's belief to be honest, yet unreasonable, that would lessen the crime to attempted voluntary manslaughter.[10]

When all of the jury instructions on perfect and imperfect self defense are considered in their entirety, it is not reasonably likely the jury would have misunderstood the imperfect self-defense component of the attempted voluntary manslaughter instruction. We may assume the jury followed the written

---

[9] The court directed the jury's attention to the written jury instructions on two occasions during its responses to the jury's questions: "you've received the instructions as to how to distinguish an attempted murder from attempted voluntary manslaughter" based on self defense; "you've been instructed on two separate concepts of self-defense."

[10] The prosecutor told the jury that "after being caught red-handed, the defendant comes in, takes the stand, and says, 'Well, gee. It was self-defense.' And so now you have in front of you an option B, attempted voluntary manslaughter, which is simply saying that he did act in self-defense, but it's what we call imperfect self-defense." That is, "[i]f you act in self-defense but you're wrong but you really believe that you were acting in self-defense, then you have the subjective belief; but, objectively, you were wrong. Objectively could be the reasonable person."

instructions, and consequently Kingsbury was not prejudiced by the trial court's incomplete oral statement as to the requisite belief. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 901 [where written instructions and argument correctly stated the law, no reasonable possibility erroneous oral instructions affected the jury's verdict].) Accordingly, Kingsbury "fails to demonstrate any prejudice arising from any arguable error in the trial court's [unclear] response[] to juror questions." (*People v. Lua*, *supra*, 10 Cal.App.5th at p. 1018.)

Kingsbury's second argument refers to the trial court's statement: "If you find his belief was not supported by the evidence, that's not self-defense at all." Taken by itself and out of context, this statement could be, as Kingsbury contends, "the equivalent of instructing the jury that an unreasonable but actual belief in the need for deadly force was not a legally mitigating circumstance that would reduce an attempted murder to attempted voluntary manslaughter."

In context, however, the statement reads: "Perfect self-defense or complete self-defense means that, not only did that person have that subjective belief in the need to use deadly force to respond to an issue, but also that person's belief was reasonable when you look at it objectively. That means you or I or anybody in that person's situation would have acted the same way. That's complete self-defense. When everyone in that same situation would not have acted that same way, that's imperfect self-defense even though the defendant himself actually believed in the need to use deadly force. *If you find his belief was not supported by the evidence, that's not self-defense at all*. You do what you need to do with respect to the charged crime. But, again, if it's imperfect self-defense which [is] an honest, natural

belief in the need to use deadly force, but it was unreasonable under the circumstances, then you have an attempted voluntary manslaughter." When read in context, the court explained the lynchpin of either defense, perfect or imperfect, was Kingsbury's honest belief in the need to use deadly force, which is an accurate statement of the law.

Even if the court's statement were error, the error was harmless. When viewed in light of the written jury instructions and other instructions on both perfect and imperfect self-defense, the court's comment is not reasonably likely to have misled the jury on the honest, but unreasonable belief component of imperfect self-defense. (*People v. Contreras* (2013) 58 Cal.4th 123, 162 [""Jurors are not reasonably likely to draw, from bits of language in instructions,"" conclusions contrary to repeated correct instructions as to the applicable law; "[n]o reasonable juror would have 'parsed'" the instructions in that manner].)

Kingsbury's third challenge relates to the court's statement that "if you find he didn't act in self-defense, in other words, it was a *volitional act* on his part, then you do what you need to do." (Italics added.) Kingsbury argues this instruction "essentially told the jury that so long as [Kingsbury] intended to shoot the victim, he was not acting in self defense." While the court's use of the phrase "volitional act" was erroneous, it was not prejudicial when viewed in the context of the instructions as a whole.[11]

---

[11] A volitional act is one done willingly, e.g., as the result of making a choice or a decision. (See Webster's New World Dict. (3d college ed. 1991) p. 1496 ["volition" is "the act of using the will; exercise of the will as in deciding what to do"; "a conscious or deliberate decision or choice thus made"].) In the context of self defense, the court's use of the phrase "volitional act" is erroneous

Indeed, the trial court subsequently stated that "[w]hen you talk about attempted voluntary manslaughter for purposes of imperfect self-defense, sure, *the person pulling the trigger wants that body dead* but believes in his mind that 'I have to kill that person because, if I don't, that person is going to kill me.' . . . That's my honest belief. And whether or not you perceive under the circumstances that belief to be reasonable, that is complete self-defense. If you perceive that belief to be unreasonable, that's imperfect self-defense." (Italics added.) The court explained that perfect or imperfect self defense involves a volitional act and the jury's determination whether that act was done in self-defense, whether perfect or imperfect, depends upon the circumstances and the reasonableness of the person's belief. The written instructions also explained to the jury that a defendant's volitional act to kill may be justified or excused. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1132 [we presume the jury followed the correct written instructions].)

Next, Kingsbury challenges the trial court's use of the phrase "*you do what you need to do*." The trial court used the phrase—do what you need to do—twice before. First, it stated, "If you find his belief was not supported by the evidence, that's not self-defense at all. *You do what you need to do* with respect to the charged crime." (Italics added.) It then reiterated, "If the defendant's belief you find was not supported by the evidence and that belief was unreasonable under the circumstances, there is no self-defense at all. *You do what you need to do*. It's not justifiable in other words." (Italics added.)

---

because both perfect and imperfect self-defense involve volitional acts, albeit acts done under circumstances that may justify or excuse the conduct.

Kingsbury suggests the trial court's use of this phrase after describing circumstances in which a person would not have acted in self-defense unfairly suggested the jury should reject Kingsbury's defense and convict Kingsbury of attempted murder. Contrary to Kingsbury's interpretation, the court's instruction informed the jury that once it had decided on the facts and considered the law, it should render its verdict, and "do what [it] need[s] to do."

The court properly informed the jury concerning their role as the finder of the facts. The jury was instructed that "[y]ou must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you . . . ." (CALCRIM No. 200.) "It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." (CALCRIM No. 3550.) We presume the jury understood and followed these instructions. (*People v. Pearson* (2013) 56 Cal.4th 393, 414 ["We presume that jurors understand and follow the court's instructions"]; *People v. Rhodes* (2005) 129 Cal.App.4th 1339, 1348 ["we assume jurors understand and follow jury instructions"].) Kingsbury has shown no error.

Finally, Kingsbury argues the court improperly instructed the jury on self-defense when it explained "[i]t's an express intent to kill in the mind of the perpetrator. When you talk about attempted voluntary manslaughter for purposes of imperfect self-defense, sure, the person pulling the trigger wants that body dead but believes in his mind that 'I have to kill that person because, if I don't, that person is going to kill me.' I have that actual awareness. That's my honest belief. And whether or not

you perceive under the circumstances that belief to be reasonable, that is complete self-defense. If you perceive that belief to be unreasonable, that's imperfect self defense." Kingsbury complains the trial court's statement erroneously referred only to a belief the victim was going to kill the defendant, when self-defense applies if the defendant believes he is in imminent danger of great bodily injury. At this one point in time, the trial court's statement was incomplete.

However, both parts of imminent danger—death and great bodily injury—were included in the written instructions. Again, we may assume the jury followed the written instructions, and consequently Kingsbury was not prejudiced by the trial court's incomplete oral statement as to the requisite belief. (*People v. Mungia*, *supra*, 44 Cal.4th at pp. 1132-1133; *People v. Rogers*, *supra*, 39 Cal.4th at p. 901.)

Moreover, the distinction between death and great bodily injury was never an issue in the case. The court's failure to include a discussion of great bodily injury in this one portion of its response is not reasonably likely to have misled the jury on the issue of imminent danger. (*People v. Lucas* (2014) 60 Cal.4th 153, 286 [no error in failing to give instruction that "was not relevant to the jury's determination of defendant's guilt"], disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; see *People v. Cross* (2008) 45 Cal.4th 58, 67 ["giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal'""].)

Having failed to prevail on any individual claim of error, Kingsbury argues reversal is required because of the cumulative impact from the alleged errors. Reversal for cumulative error is

required only where "the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill* (1998) 17 Cal.4th 800, 845; accord, *People v. Roberts* (1992) 2 Cal.4th 271, 326 [reversal required where "the whole of [the errors] . . . outweigh[s] the sum of their parts"].) Prejudice is measured under the *Watson* standard, with reversal required only where the errors result in a miscarriage of justice. (*Hill*, *supra*, at p. 844; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) That is, reversal is required only where "'it appears "reasonably probable" the defendant would have achieved a more favorable result had the error not occurred.' [Citation.]" (*People v. Olivas*, *supra*, 248 Cal.App.4th at p. 773.)

In sum, the trial court's responses to the jury's questions, while in some respects incomplete, erroneous or potentially misleading, were not, in the context of the charge to the jury as a whole, likely to have misled the jury. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 905; *People v. Tate*, *supra*, 49 Cal.4th at p. 696.) Kingsbury's substantial rights were not affected.

B. *The Court Did Not Err by Instructing the Jury that Self-defense May Not Be Contrived*

The trial court instructed the jury pursuant to CALCRIM No. 3472: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force." Defense counsel objected to this instruction because she did not recall any testimony Kingsbury provoked a fight or quarrel "with an intent to create an excuse to use force." The trial court responded that Kingsbury's "conduct, as I observed, which I described initially when he first went into that area, he did hold up the two fingers, kind of a peace symbol, when he said

he waved to Mr. Perez. He did that almost subconsciously, whether or not that's the way he waves to people. But when I described it and gave him another chance to clarify, that's when he said it really wasn't that way, it was with all fingers waved. The jury can make certain inferences. Again, it may be an inference that they're certainly not willing to make, but to remove that option from them I don't think it would be appropriate. So over the defense objection, most certainly, [CALCRIM No.] 3472 will be given."

Kingsbury contends the trial court erred in giving the instruction because, "[i]n cases such as this one, the blanket rule in CALCRIM No. 3472 erroneously instructs the jury that self-defense is not available to a defendant who instigates a confrontation, even if the victim responds with unlawful force and the defendant reacts in kind." Kingsbury relies on *People v. Ramirez* (2015) 233 Cal.App.4th 940 and *People v. Vasquez* (2006) 136 Cal.App.4th 1176 in support of this contention, but his reliance on these cases is misplaced.

Ramirez stands for the proposition that the blanket rule set forth in CALCRIM No. 3472 does not apply in cases where the defendant intended to use non-deadly force, such as a fist-fight. The *Ramirez* court found that "[a] person who contrives to start a fistfight or provoke a nondeadly quarrel does not thereby 'forfeit[] . . . his right to live.' [Citations.]" (*People v. Ramirez*, *supra*, 233 Cal.App.4th at p. 943.) *Ramirez* is inapposite. No evidence was presented that Kingsbury intended to start a fist-fight or limit the nature of the response to his provocation.

In *People v. Vasquez*, *supra*, 136 Cal.App.4th 1176, the appellate court reversed the conviction because the trial court failed to instruct the jury on imperfect self-defense, not because

the court improperly instructed on the unavailability of the defense where the defense was contrived. In fact, in *Vasquez*, CALCRIM No. 3472 or CALJIC No. 5.55 was not discussed at all. Cases are not authority for propositions not considered. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 4; *People v. Mendoza* (2015) 240 Cal.App.4th 72, 81-82.)

Reaching to find some support from *Ramirez*, Kingsbury contends "assuming for the sake of argument that [he] flashed a gang sign, and assuming that the evidence was sufficient to show that this was provocation in the gang world (though no evidence established this)," the instruction was not appropriate because Kingsbury "contrived to provoke a confrontation to use only nondeadly force against Gonzalez." But Kingsbury failed to present any evidence that his provocation was limited to nondeadly force, such as a fistfight, and failed to request a modified CALCRIM No. 3472 instruction. Accordingly, his argument fails, and Kingsbury has shown no error.[12]

---

[12] The California Supreme Court has stated that CALCRIM No. 3472 is an accurate statement of the law. (*People v. Enraca* (2012) 53 Cal.4th 735, 761-762 [discussing the comparable CALJIC No. 5.55].) If Kingsbury's contention is that his use of a gang sign provoked a more limited response, then Kingsbury was obligated to seek a modification of CALCRIM No. 3472. (See CALCRIM No. 3472, Bench Notes, *Instructional Duty* ["This instruction may require modification in the rare case in which a defendant intends to provoke only a non-deadly confrontation and the victim responds with deadly force"]; *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334 [same].) Failure to request such a modification forfeits the claim on appeal. (*People v. Nilsson* (2015) 242 Cal.App.4th 1, 25 [where "'the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on [the defendant] to request a

C. *Any Instructional Error Related to Continuing Danger Was Harmless*

The trial court instructed the jury pursuant to CALCRIM No. 3474. The instruction reads: "The right to use force in self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends." Defense counsel objected to the inclusion of this instruction.

The trial court erred by giving this instruction.[13] From the prosecution's perspective, the need for self-defense never existed, and there was never a question of withdrawal or continuing danger. Indeed, the prosecution argued Gonzalez was standing on the street, texting his girlfriend when he was suddenly shot in the neck. From the defense's perspective, Kingsbury testified he fired four shots over his shoulder in Gonzalez's direction, hoping to scare Gonzalez away, and then Kingsbury fled. No evidence was presented that Kingsbury shot Gonzalez, disabled him, and then continued shooting after Gonzalez was no longer a threat.

---

modification if [he] thought it was misleading on the facts of this case,'" and the "'failure to do so forfeits the claim of error'" on appeal]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 [""[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language""].)

13 Over defense counsel's objection, the trial court gave the withdrawal instruction because the court believed an argument could be made that Gonzalez was hit by the first shot, and the other rounds were therefore unnecessary.

"A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]' [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) Because there was no evidence Gonzalez withdrew or Kingsbury continued to fire after the danger ceased to exist, defense counsel was correct the instruction should not have been given.

Nonetheless, any error in giving this instruction was harmless. The jury was instructed that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. . . ." (CALCRIM No. 200.) We may presume the jury followed this instruction and ignored the inapplicable instruction. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299 ["We presume the jury followed the instructions it was given"]; *People v. Holloway* (2004) 33 Cal.4th 96, 152-153 [court "cannot assume . . . that the jurors failed to follow the court's standard admonition . . . that they were to disregard any instruction inapplicable to the facts as they found them"].) As discussed above, the jury grappled with the concepts of perfect and imperfect self-defense; it did not grapple with issues related to withdrawal and continuing danger.

It is not reasonably probable the jury was misled or confused by CALCRIM No. 3474 and would have returned a more favorable verdict had the instruction not been given. (*People v.*

Cross, *supra*, 45 Cal.4th at p. 67 ["giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal'"']; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 ["Where, as here, the court gives a legally correct, but irrelevant, instruction, the error 'is usually harmless, having little or no effect "other than to add to the bulk of the charge"'"]; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [error in giving an inapplicable instruction is "one of state law subject to the traditional *Watson* test"].)

D. *Kingsbury Has Failed To Demonstrate Ineffective Assistance of Counsel*

Kingsbury argues his counsel was ineffective because of two misstatements made during her opening statement and because she undermined her client's integrity during her closing argument. Neither argument has merit.

1. *Defense Counsel's Opening Statement and Closing Argument*

In her opening statement, defense counsel told the jury this was a gang case and it should not expect to hear the full story from any of the witnesses "because there are consequences for snitching." After discussing the People's burden of proof, counsel stated the People "will not be able to prove each and every element beyond a reasonable doubt; and that being true and that is most likely what's going to happen because of the conflicting evidence, you will have to find Mr. Kingsbury guilty [*sic*] by law. You will have to find him guilty [*sic*] because they will not meet their burden of proof."

In her closing argument, counsel pointed out the misstatement she made in her opening. She told the jury she was glad the court was going to instruct the jury that what counsel says is not evidence because "in my opening, I said something stupid and I misstated what I was trying to say, which is that you will find my client did not commit this murder or attempted murder. But I said—I think I misspoke and didn't know that I did. So thank goodness what I say is not evidence."

She later discussed gang culture and how gang members "don't rely on the police. They have the rules of the streets. That's why [Gonzalez] didn't tell you what happened. That's why [Perez] didn't tell you what happened. That's why my client didn't tell you what happened. He told them what happened out in the streets. He's just running. He is just not getting out of the way. But he's not going to say, 'Hey, this guy just tried to shoot me. Help me. Help me.' That's just not reasonable. That's just not their lifestyle."

2. *General Principles of Law*

"'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) Defendant must establish prejudice as a demonstrable reality. (*People v. Lawley* (2002) 27 Cal.4th 102, 136.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant

must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008; accord, *People v. Rogers* (2016) 245 Cal.App.4th 1353, 1367.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656; *People v. Orloff* (2016) 2 Cal.App.5th 947, 956 ["Appellant 'must carry his burden of proving prejudice as a "demonstrable reality"'"].)

3. *Defense Counsel Was Not Ineffective*

In her opening statement, defense counsel misspoke, but in her closing argument she identified the mistake and corrected it. Kingsbury fails to cite any authority for the proposition such a misstatement falls below the standard of care, nor has he demonstrated any prejudice from counsel's misstatement. In light of counsel's discussion correcting the mistake, it is not reasonably probable that absent her misstatement in her opening statement the jury would have returned a different verdict.

As to defense counsel's closing argument regarding the witnesses—including Kingsbury—not telling the whole story, Kingsbury once again fails to cite any authority that such an argument falls below the standard of care. (*People v. Vines* (2011) 51 Cal.4th 830, 875 [defendant has burden of showing """"counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms""""]).

Kingsbury further fails to demonstrate prejudice. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876 [defendant """must also show prejudice flowing from counsel's performance or lack thereof"""].) Counsel explained the reason for the discrepancy

between Gonzalez's and Kingsbury's version of the shooting. She explained why Kingsbury did not tell the police he was running from people who were trying to kill him. "So let's just say you go back there and you say, 'You know what? I definitely don't believe [Gonzalez], but I'm not sure about Mr. Kingsbury either. I'm not sure if he's telling the truth, the whole truth either.' Well, if you go back there and you think like that, then, guess what? That's reasonable doubt. . . . [Y]ou don't know who to believe. There is not enough evidence for you to make a determination."

Contrary to Kingsbury's argument, defense counsel did not argue Kingsbury was guilty. Rather, she used the conflicts in the testimony to make a case for reasonable doubt. Kingsbury has failed to demonstrate counsel's performance during her closing argument fell below the standard of care or that there is a reasonable probability that, but for this portion of counsel's argument, the result would have been more favorable for Kingsbury.[14]

---

[14] Kingsbury also argues reversal is required because viewed cumulatively the prejudice from the court's erroneous instructions on self-defense and his counsel's ineffective assistance deprived him of a fair trial. But Kingsbury has not shown "the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (*People v. Hill*, *supra*, 17 Cal.4th at p. 845.) In fact, because Kingsbury's ineffective assistance of counsel claim lacks merit, it adds nothing to the assessment of prejudice. Nor do the errors related to the jury instructions, when viewed cumulatively, demonstrate to a reasonable probability that had these errors not occurred, Kingsbury would have achieved a more favorable result. "Under the 'cumulative error' doctrine, we reverse the

E. *Kingsbury Is Not Entitled To Resentencing*

At Kingsbury's sentencing, the court imposed a consecutive 25-year firearm enhancement pursuant to section 12022.53, subdivision (d). At the time of the sentencing, the enhancement was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h) (Stats. 2010, ch. 711, § 5); *People v. Kim* (2011) 193 Cal.App.4th 1355, 1363.)

Effective January 1, 2018, imposition of this enhancement was no longer mandatory. Subdivision (h) was added to section 12022.53 (Stats. 2017, ch. 682, § 2) to provide: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." The People agree this amendment applies retroactively, in that it contains a provision for retroactive application and may serve to impose a lesser punishment for criminal behavior. (*People v. Brown* (2012) 54 Cal.4th 314, 319-324.)

The People disagree, however, that remand for resentencing is necessary based on the trial court's statements at

---

judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to [the] defendant absent a combination of errors. [Citations.] 'The "litmus test" for cumulative error "is whether [the] defendant received due process and a fair trial."' [Citation.]" (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216-1217.) "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*Hill*, *supra*, at p. 844.) While Kingsbury's trial was not perfect, it was fair, and the errors which occurred did not result in a miscarriage of justice.

the time of sentencing that it would not strike the firearm enhancement even if it had the discretion to do so. At sentencing, the trial court rejected the defense's argument that 25 years to life on the firearm enhancement constituted cruel and unusual punishment. The court responded that "separate and apart as to whether or not the court even has the authority to dismiss a gun use enhancement, under these circumstances I wouldn't do it even if I had the ability to do it. It was an extremely violent encounter and a violent crime. It would be different if there was evidence, for example, which would support maybe an accidental discharge of a firearm that, unfortunately, resulted in injury to the victim regardless of what caused the initial encounter. But this was clearly an intentional shooting and the court cannot ignore that fact. It is very fortunate that the victim did not die and survived the wounds. Despite the uncooperative attitude that the complaining victim demonstrated before the jury, nonetheless, the jury did convict as charged with respect to count 1. But certainly found it was not willful, deliberate, or premeditated, and it was just more of a rash and impulsive encounter for a shooting on behalf of Mr. Kingsbury."

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; accord, *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 ["'A court

which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record"'].) In such cases, the matter must be remanded to allow the trial court to properly exercise its discretion unless doing so would be an "idle act" because "'the record shows that the trial court would not have exercised its discretion even if it believed it could do so.'" (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

In the present case, the record demonstrates remand would be an "idle act." The court specifically stated that "under these circumstances I wouldn't do it even if I had the ability to do it." (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13 [petition for writ of habeas corpus following change in sentencing law "may be summarily denied . . . if the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 ["In the present case, the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. . . . Under the circumstances, no purpose would be served in remanding for reconsideration"].) Given the foregoing, we deny Kingsbury's request to remand for resentencing.

DISPOSITION

The judgment is affirmed.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

---

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