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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RAMONTA FORTE, Defendant and Appellant.	B256109 (Los Angeles County Super. Ct. No. LA068401)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed with directions.

Janyce Keiko Imata Blair, 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, Paul M. Roadarmel and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found appellant Ramonta Forte guilty of first degree murder for shooting Tommy Valdez to death. The jury also found appellant personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury and death in committing the offense. The jury also convicted appellant of possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 12022.5, subd. (a), 12022.53, subds. (b), (c), & (d); former Pen. Code, § 12021, subd. (a)(1).)

Appellant raises four issues on appeal: (1) the court erred when it declined to appoint counsel to assist him with his motion for a new trial and sentencing; (2) the evidence was insufficient to support the premeditation and deliberation required to convict for first degree murder; (3) the court should have instructed the jury that it had to agree unanimously on which of two bullets actually killed Valdez; and (4) the abstract of judgment and sentencing minute order misstate the sentence on the possession of a firearm by a felon count. We affirm, with directions to the trial court to correct the abstract of judgment and sentencing minute order.

FACTUAL SUMMARY

On the evening of July 15, 2011, victim Tommy Valdez and two other men entered the VIP Showgirls Club (Club) and fanned out around appellant, who was seated at a table near the door. Valdez went directly up to appellant and sucker punched him. Appellant pulled out a gun and shot Valdez in the chin. Valdez fell to the floor, face down and motionless. Appellant paced, then cursed at, hit, kicked, and pistol-whipped Valdez. Appellant fired a second shot into the back of Valdez's head. The entire incident lasted three to four seconds. Amazingly, it was precipitated, as set out below, by a party gone awry and a subsequent month of hundreds of taunting, derogatory, and threatening text messages exchanged by appellant, Ana Baez (appellant's girlfriend), Valdez, and Ani Abramyan (Valdez's wife).

Appellant represented himself at trial.

1. A Month of Escalating Tension.

In June 2011, Abramyan and Valdez lived in Santa Clarita with their children. Abramyan worked as a dancer at the Club in North Hollywood under the stage name "Miracle"; Valdez had just lost his job as a medical biller. Valdez was an ex-gang member who had covered his gang tattoos when he married Abramyan. They were experiencing "normal" marital problems.

In June 2011, Ana Baez and appellant lived in North Hollywood. Baez worked with Abramyan as a dancer at the Club under the stage name "Baby." According to Baez, appellant was bipolar and "always trip[ping]."

That month, Baez and appellant invited Abramyan and Valdez over for dinner. A few weeks later, Abramyan and Valdez returned the favor; they invited Baez and appellant to their townhome for a barbeque. During the party, Valdez's African-American neighbor, Scoop, dropped by. Appellant became angry when he saw Valdez welcome Scoop into the residence. In front of Scoop, appellant asked what "this fucking mayate" (a disrespectful term for an African-American) was doing here. Abramyan and Valdez explained that Scoop was their friend, indeed "like a brother" to Valdez. Scoop left. The encounter was awkward. The party ended early.

Two weeks later, Baez asked Abramyan for a ride to work. They met at a park near Baez's residence. Baez was with appellant at the park. Baez asked Abramyan to get out of the car so appellant could see she was leaving with another woman. Appellant offered Abramyan a beer, which she declined. Appellant started to disparage Abramyan's husband, Valdez, saying, "Fuck your hoe-ass husband. He's a bitch. He's not about shit." Baez tried, unsuccessfully, to intervene. Abramyan told Baez she would have to find another way to work. As Abramyan was leaving, appellant yelled, "Hoe, I'm going to get you. I'm going to catch you slipping at the club. Bitch, watch out. I'll get you at VIP." After this incident, Baez and Abramyan exchanged text messages. Baez stated she hoped the two of them could remain friends despite appellant's outburst, which Baez attributed to appellant being bipolar. Later that day, Abramyan texted Valdez about

appellant's remarks at the park. Valdez texted back, "I'm so mad I can't stop shaking. I want to kill that fool. . . . I'm just so pissed off. I never disrespected that fool."

Baez asked Abramyan for Valdez's telephone number. Abramyan provided it. Valdez and appellant then embarked on an escalating flurry of voice and text messages to each other, Abramyan, and Baez. A few days before the night of the shooting, Abramyan listened by speaker phone while appellant told Valdez he was going to kill her and their children in front of Valdez and then "smoke" Valdez. Valdez also showed Abramyan text messages that appellant had sent him using both his phone and Baez's phone. Appellant also texted Abramyan directly, threatening to come to the house and get them. Baez texted Abramyan as well, saying Valdez should "come now or [appellant was] going to catch him later," which Abramyan interpreted as a threat. Abramyan got her digs in as well, texting that appellant was a "pussy ass fool." All in all, hundreds of text messages were exchanged among the two men and two women in a span of six weeks.

On July 13, 2011, two days before the fatal shooting, Valdez showed up at the Club in response to appellant's challenge to fight. Appellant, however, was not there. By text, Valdez boasted that appellant had failed to appear because he was scared of Valdez. Valdez and appellant continued to exchange derogatory insults and aggressive threats and challenges to fight.

2. The Shooting.

On July 15, 2011, the date of the shooting, both men exchanged insulting, provocative, and threatening text messages. That night, Abramyan was working at the VIP Club. With his wife working that night, Valdez, with his cousin Paulina, were hosting a barbeque at his home when appellant texted him to come to the VIP Club or else appellant would kill Abramyan when he saw her on stage. Valdez also received a text and a separate telephone call from a security guard at the Club who told him appellant was at the Club. Valdez immediately *dropped* everything, texted his friends to meet him at the Club, told his guests he would be back soon, and drove off. Valdez texted Abramyan to tell her he was coming to the Club because appellant had told him he was going to harm *her*. Abramyan told Club security not to let Valdez inside. When

Valdez arrived, she went out to the entrance, gave him gas money so he would not come inside, and went back inside alone.

When Valdez arrived at the Club, appellant was inside the building. Texting ensued between the two men. Valdez asked a security guard he knew, Misael Carrera, to tell appellant to come outside because he wanted to see him. Carrera told appellant that someone outside wanted to see him outside the Club. Appellant refused to leave the Club, responding, "I'm not stupid." Valdez then tried to enter the building, but the security guard at the main entrance would not admit him. One of the bouncers told Valdez that if he wanted to get appellant, he should go through the other entrance. Valdez and his two friends immediately ran around the building to the other entrance. They burst into the Club. Appellant was seated near the secondary entrance with his jacket on his lap.

Valdez ran up to appellant and sucker punched him in the mouth. Appellant shot Valdez in the chin. Valdez fell on his stomach and did not attempt to get up. Appellant stood over Valdez and paced. Appellant cursed at Valdez, hit or kicked him a few times, and pistol-whipped him. While standing over the motionless, prone Valdez, appellant shot him in the back of the head.[1] Three to four seconds elapsed between the shots.

3. The Aftermath.

Baez was at the Club during the shooting. After the shooting, appellant found her and they left the Club together. As he exited, appellant told one of the security guards, "I just shot that mother-fucker. I think I just killed that mother-fucker." Appellant and Baez ran to a nearby park. Police saw the two sitting under bushes. Appellant and Baez conversed as police approached. Baez fled. Police arrested appellant under the bushes. They found Baez hiding a short distance away. She had a duffle bag containing a loaded .40-caliber Glock pistol and a backpack containing a loaded .38-caliber revolver. Police

[1] The Club's video equipment recorded from several different angles the altercation between Valdez and appellant, and the shooting. The videos were shown at trial.

recovered spent .40-caliber cartridges from around Valdez's body. The cartridges were fired from the Glock pistol.

4. The Coroners' Reports.

Los Angeles County Deputy Medical Examiner Solomon L. Riley, Jr., M.D., autopsied Valdez's body. Valdez sustained two close range gunshot entry wounds to the head. One was to the left chin and the other was to the back of the head. Dr. Riley testified the cause of death was the gunshot to the back of the head. He also stated Valdez died as a result of "these two gunshot wounds."

According to Dr. Riley, the chin wound came from a gun fired less than a foot from the chin. The wound would not be expected to be rapidly fatal in and of itself and a person receiving medical treatment for the wound would have had a good chance of surviving the injury. Any wound involving the head and mouth "could" be fatal. Dr. Riley opined the chin wound "would not be fatal as rapidly as the one to the back of the head would be." Dr. Riley also testified "the possibility for fatality from this single wound exists."

The gunshot entry wound to the back of the head was very close to the middle of the back of the head. The exit wound was behind the left temple. The distance between the gun and the head wound was a little more than the distance between the gun and the chin wound. According to Dr. Riley, it was "highly unlikely" Valdez could have survived the wound to the back of his head.

A second coroner appeared as a witness on behalf of appellant. Frank Sheridan, M.D., the Chief Medical Examiner for San Bernardino County, testified both shots were fired when the firearm was about a foot or a foot-and-a-half from Valdez's head. The first shot to the chin rendered Valdez immediately unconscious and "clearly dropped him." The first shot "could" have been fatal on its own. Dr. Sheridan testified "we'll never know for sure whether that bullet would have been fatal on its own because there was a second [bullet]." Valdez was alive at the time of the second shot. The second shot entered the left rear portion of Valdez's head and [was] "definitely a fatal shot."

5. Firearms Analysis.

Amy Antaya, a criminalist employed by the Los Angeles Police Department, testified at least seven pounds of force were required to pull the trigger on the Glock pistol. By contrast, Dr. Bruce Krell, a firearms expert for the defense, testified four and one-half pounds of force were required to pull the trigger on the Glock pistol. This was a relatively lighter pull. Dr. Krell's measurements of trigger pull were consistently different from those of the Los Angeles Police Department because of the inherent inaccuracy of the weights. He suggested measurements were inaccurate below three-quarters of a pound and he acknowledged there was a big difference between seven pounds and four pounds. Dr. Krell suggested that appellant may have accidentally fired the fatal second shot because of the easier trigger pull. Dr. Krell also assumed that appellant had retrieved the firearm from the ground between the first and second shots.

6. Mental State Testimony.

Dr. Jack Rothberg, a forensic psychiatrist, testified appellant suffered from post-traumatic stress disorder (PTSD). He also testified human beings experience an autonomic "[fight-or-flight]" response to life-threatening danger. The response is automatic and does not involving thinking. When either PTSD or the fight-or-flight response is operating, the individual is essentially on "autopilot." Rothenberg opined appellant suffered from PTSD and his reaction to the sucker punch in this case was consistent with the fight-or-flight response.

7. The Theory of the Prosecution.

In its opening statement, the prosecution stated it would present evidence that appellant shot Valdez once, a shot which incapacitated but did not kill him. Appellant then shot Valdez a second time, a shot which was the "kill shot."

In its closing argument, the prosecution argued, with respect to the second shot, that appellant, in a cold, calculated decision, walked up to the victim and put a round to the back of his head. The prosecution argued that when Valdez was not dead after the first shot, appellant "went back and hit him, punched him, and executed him." The prosecutor pointed out that after the second shot was fired, appellant gave no startled

reaction and did not attempt to kick or punch the victim. The prosecutor commented, "[A]fter he intends to kill him, he's done."

8. The Theories of the Defense.

Appellant's experts testified that appellant's motions were consistent with him retrieving the pistol from the floor before he fired the second shot. Thus, appellant offered the jury several defense theories which he argued were consistent with the evidence: he accidentally fired the second shot because of the easier trigger pull; he acted autonomically due to the fight-or-flight response; the punch triggered his PTSD, which caused him to shoot in response; and he acted in perfect or imperfect self-defense because Valdez, after sending threats of physical harm to him and Baez, not only provoked him verbally, but attacked him physically.

ISSUES

Appellant claims (1) the trial court erroneously denied his request for appointed counsel to prepare a new trial motion and to assist at sentencing; (2) there was insufficient evidence of premeditation and deliberation; (3) the trial court erred by failing to give a unanimity instruction on the first degree murder count; and (4) the sentencing minute order and abstract of judgment must be corrected as to the sentence imposed on the felon in possession of a firearm conviction.

DISCUSSION

1. *The Trial Court Properly Denied Appellant's Request To Rescind His Pro Per Status.*

a. Facts.

Appellant represented himself at trial, with assistance by counsel he retained to examine only the testifying experts. After trial, appellant asked the court to appoint the public defender to assist him with preparing and filing a new trial motion and to assist with sentencing. The court denied the motion.

In July 2011, when appellant was arraigned, the court appointed the public defender to represent him. In October 2011, the court granted appellant's request to represent himself. On June 29, 2012, the scheduled date for appellant's preliminary hearing, the court granted appellant's request to be represented by retained counsel and

continued the preliminary hearing. The preliminary hearing began in November 2012, with appellant represented by retained counsel. Appellant was held to answer.

On January 16, 2013, the trial court arraigned appellant on the information and granted appellant's request to represent himself. The court appointed private attorney Michael Morse as standby counsel. At a pretrial conference on September 12, 2013, appellant indicated that he wanted retained counsel, Matthew Horeczko, to represent him at trial. The trial court asked Horeczko if he could be ready for trial by the previously set trial date of October 7, 2013. Horeczko said he could not be ready for trial by that date.

The court advised appellant that Morse was familiar with the case and could try it by October 7, 2013. Appellant claimed Morse "knows absolutely nothing about this case." Appellant stated he and Morse had not once spoken with each other. The trial court denied appellant's request for a continuance so that Horeczko could represent him. The trial court stated, "If [appellant] wants counsel, there's one who can be ready shortly, and that's Mr. Morse." The court continued the case to October 2, 2013, for jury trial. On October 2, 2013, appellant told the court that notwithstanding the pitfalls of self-representation, he wanted to represent himself at trial.

November 7, 2013, was the first day of trial. At appellant's request, the court allowed Horeczko to represent appellant for the limited purpose of examining and cross-examining the expert witnesses. On November 8, 2013, during a break in the testimony of the People's second witness,[2] the court granted appellant's request that Morse be relieved as standby counsel. On December 9, 2013, the jury convicted appellant.

On February 4, 2014, the court ordered appellant's new trial motion to be filed by February 21, 2014. It set March 4, 2014 as the hearing and sentencing date. When appellant objected that he could not be ready, the court indicated appellant had had ample time to bring the motion, but the court would give him additional time. The court also stated, "Just to be clear, we're going to handle everything on [March 4, 2014]."

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[2] At trial, 17 witnesses testified for the People and 15 for appellant.

On March 4, 2014, appellant told the court he wanted to be "represented once again by the public defender's office." A public defender, Judith Greenberg, was present. The court asked if appellant was requesting "[t]he help of the public defender's office in preparing a motion for new trial" and appellant replied yes.

The court summarized appellant's history of representation and then indicated it would not grant appellant's request for two reasons. First, if the court granted appellant's request, appellant's counsel would require preparation of the trial transcripts, resulting in months of delay, and the People had an interest in resolving the matter for the victim's family. Second, appellant had done a highly effective job of representing himself and his motions were as good as those of veteran attorneys.

Appellant argued his request was not a dilatory tactic; he himself would need the transcripts to prepare a new trial motion; he could not timely file the motion; he was "in over [his] head"; he had been forced to represent himself at trial; and a new trial motion was important. Appellant cited Ninth Circuit cases for the proposition that it was error to deny a request such as appellant's if it was not made in bad faith.

The court remarked that appellant's skill in articulating his point, his citation to authorities the court had not seen, and his familiarity with case law cited by the court, were proving the court's point about his effective self-representation. Appellant maintained his Sixth Amendment right to counsel entitled him to counsel in connection with his new trial motion and sentencing. The prosecutor commented that in the past when the court had ruled there would be no further continuances, appellant had asked for counsel, and had "used his pro per status as a tool in [effecting] delays in the prosecution of this case."

Ultimately, the trial court observed if it allowed appellant to be represented by counsel, it would appoint Morse because he had prepared the case for trial. The public defender agreed. The court indicated however that it would not appoint the public defender because another member of the office had previously created a conflict and appellant had previously "fired" the public defender's office. The court denied

appellant's "motion to relinquish the pro per status" because granting it would incur delay and appellant had proven himself more than capable of making his legal arguments.

Appellant asked if the court was denying his right to counsel and if the court was refusing to let him relinquish his in propria persona status. The court replied, "Yes. Let me clarify, not denying your right to counsel. I'm honoring the choice you made repeatedly, which is to represent yourself."[3] The hearing was cut short and continued to the next day. Appellant renewed his objections. The court pointedly told appellant, "I am going to make a factual finding here, which is I do not find you credible when you say you don't know what's going on here. You are the single most intelligent human being I have ever met in my life. I do not believe for a second that you do not understand these proceedings seeing as you have cited to me case law, chapter and verse, with more accuracy and more comprehensiveness than any lawyer who has ever appeared before me."

On April 23, 2014, appellant in propria persona filed a 177-page new trial motion. The trial court denied the motion with a detailed explanation of its decision.[4] The court rejected appellant's assertion that he had been denied his Sixth Amendment right to counsel, stating, "[y]ou did not avail yourself of the counsel that I would have appointed that you requested." Appellant again indicated he had been denied his right to counsel regarding his new trial motion, and said he wanted counsel for sentencing. The court stated, "You raise an issue that reminds me that I need to correct something you asserted

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[3] Later on March 4, 2014, Greenberg indicated appellant was "requesting the public defender's office because Mr. Morse has shown no interest in this case whatsoever, and I have never spoken to him," and Morse "was not here during the trial." The court indicated its ruling would stand. On March 4, 2014, the court partially granted appellant's request for transcripts and ordered transcribed the trial testimony of six witnesses and the Evidence Code section 402 hearing proceedings with respect to Dr. Krell's proposed expert testimony.

[4] Appellant does not contend the trial court erred when it denied his motion for a new trial, except to the extent he argues the court denied him his right to counsel in connection with the motion.

before, which is that I denied you the right to counsel flat out. I noted that, if you wanted counsel, the one that you would get would be Mr. Morse, the standby counsel. What I denied was your right to select the actual lawyer who was going to represent you, if it was going to be a publicly-appointed attorney." The court then found appellant had requested appointed counsel for a bad faith purpose.[5] The court sentenced appellant to prison for 50 years to life.

b. Analysis.

Appellant "claims the trial court erred in refusing to appoint counsel to represent him for sentencing and his new trial motion." We review for abuse of discretion a trial court's decision denying a defendant's request to change from self-representation to representation by court-appointed counsel. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994, 997 (*Elliott*).) To exercise meaningful discretion in ruling on a defendant's request to change from self-representation to counsel-representation, the court must consider relevant factors, which "should include, among others, the following: (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*Id*. at pp. 993-994; *People v. Lawrence* (2009) 46 Cal.4th 186, 192 [same].) Ultimately, however, the court's discretion must be based

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[5] The court stated, "I cited [*People v. Ngaue (*1991) 229 Cal.App.3d 1115], which states that generally speaking counsel should be appointed in a situation such as yours unless you're seeking representation for an improper purpose such as delay. I have the discretion to deny that request when it's made for a bad faith purpose[,] and factors such as your history . . . when it comes to substituting lawyers may bear on the determination as to whether such a purpose exists. I previously made the finding that I did." We understand the court to have indicated it denied appellant's request because he acted in bad faith, consistent with the court's previous finding on March 5, 2014, that it did not find appellant credible when he stated he did not understand the court proceedings.

not only on the listed relevant facts, but on the totality of the circumstances. (*People v. Gallego* (1990) 52 Cal.3d 115, 163-164.)

First, we note that appellant did not merely ask for court-appointed counsel. Having previously dismissed two court-appointed attorneys, including the public defender's office, he asked for a particular public defender to represent him in connection with his new trial motion and sentencing. Appellant has no right to a particular court-appointed attorney. (*People v. Young* (1987) 189 Cal.App.3d 891, 903.) Although appellant now disclaims on appeal that he only wanted the public defender's office or a particular attorney within that office, the record is clear that he wanted public defender Greenberg to represent him and he did not want standby counsel Morse to represent him.[6] The trial court also believed that appellant was requesting the appointment of the public defender's office only. In its May 1, 2014, written ruling denying the motion for new trial, the court stated: "At the outset, the Court again denies Defendant's request for the appointment of the Public Defender's Office to represent him on his motion for a new trial." The court did not abuse its discretion in denying appellant's request for the appointment of the public defender.

Second, even if appellant's request for court-appointed counsel can be considered a more generalized request for any appointed counsel, no abuse of discretion occurred. After appellant rejected the trial court's offer to reappoint Morse, the trial court not only considered the factors set out in *Elliott*, but concluded appellant made his request for appointed counsel in bad faith for purposes of delay. The record supports the court's conclusions. Three months after the initial arraignment on the complaint, the magistrate granted appellant's request to relieve the public defender and to represent himself. On the date scheduled for the preliminary hearing, the court granted appellant's request to change from self-representation to representation by retained counsel. The result was six

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[6] " 'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked." (*People v. Blair* (2005) 36 Cal.4th 686, 725.)

months' delay before the preliminary hearing began. After being held to answer and at the arraignment on the information in January 2013, appellant again asked to represent himself, only to ask again on September 12, 2013, one month before the tentative trial date, that the court allow retained counsel Horeczko to represent him at trial. Appellant claimed, although he had never spoken to standby counsel Morse, that Morse knew nothing about the case and was unprepared for trial. Horeczko would have had to familiarize himself with the case. Appellant's unfounded complaints about his standby counsel permit the inference appellant simply wanted to delay proceedings.

On the second day of trial, appellant asked the court to relieve Morse as standby counsel so he could proceed in propria persona with limited assistance from Horeczko. The record again permits the inference that appellant asked the court to relieve Morse, thinking the court would be forced to appoint other counsel if he asked for representation in the future.

After trial, when the next big step was a motion for a new trial, appellant decided to switch again from self-representation to representation by counsel. Appellant's pattern of asking for counsel right before a major event in the case and then dismissing counsel thereafter was another reasonable basis upon which to conclude appellant was acting in bad faith for purposes of delay. Thus, the trial court reasonably could have viewed as fabricated appellant's March 4, 2014 assertion he had been forced to represent himself at trial.

Finally, the trial court remarked that it did not believe appellant's claim that he was "in over [his] head." The record completely belies appellant's statement and supports the trial court's conclusion that appellant knew what he was doing. Upon review of the record, we agree with the trial court that appellant's examination of the witnesses was succinct and focused. His motions were well-researched and well-argued. He was able to win for himself a severance of some of the original charges against him, charges which were later dismissed. In short, he showed a mastery of the facts and applicable law that belied any argument that he could not effectively represent himself post-trial and at sentencing. It was reasonable for the trial court to conclude, based on the

court's consideration of the *Elliott* factors and the totality of the circumstances, that appellant's claims were not credible and he was acting in bad faith to delay the proceedings. The trial court did not abuse its discretion in denying appellant's bad faith request to relinquish his pro per status in connection with his new trial motion and sentencing.

2. *There Was Sufficient Evidence of Premeditation and Deliberation.*

Appellant claims there was insufficient evidence of premeditation and deliberation to support a conviction of first degree murder. In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Deliberation and premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) Thoughts can follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080 (*Koontz*).

Our Supreme Court has identified three categories of evidence relevant to reviewing findings of first degree murder based on premeditation: (1) planning activity, that is, facts about a defendant's behavior before the killing that show prior planning of it; (2) motive, that is, facts about the defendant's prior relationship, and/or conduct, with the

victim from which the jury could infer a motive; and (3) the manner of killing, that is, facts about the manner of the killing from which the jury could infer that the defendant intentionally killed the victim according to a preconceived plan. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

We find sufficient evidence of planning, motive, and manner of killing in support of the jury's findings of premeditation and deliberation. First, planning. Obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*Koontz, supra,* 27 Cal.4th at pp. 1081-1082.) Here, appellant brought a loaded Glock firearm into the Club and concealed it under a jacket while he sat at the table near the door.

Second, motive. Prior quarrels between a defendant and decedent and the making of threats by the former are competent to show the defendant's motive and state of mind. (*People v. Cartier* (1960) 54 Cal.2d 300, 311.) Here, there is ample evidence that the prior relationship between appellant and the victim consisted of numerous threatening and disparaging text messages they exchanged, including appellant's threats to kill the victim, his wife, and his children. The texting continued while appellant was in the Club. Indeed, appellant went so far as to make sure the victim knew he was in the Club and would not be coming outside. It is reasonable to infer appellant wanted to confront the victim on his own terms inside the Club with the weapon he had managed to get past security and concealed on his person.

Third, manner of killing. Shooting a victim in the back of the head in an execution-style murder is sufficient evidence of premeditation and deliberation. (*People v. Brady* (2010) 50 Cal.4th 547, 564.) Moreover, an assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333 (*Bolin*).) Firing at vital body parts, including a person's face, can show preconceived deliberation. (Cf. *Bolin,* at p. 332.; *People v. Mayfield* (1997) 14 Cal.4th 668, 768; *People v. Thomas* (1992) 2 Cal.4th 489, 518.) Here, appellant fired the first shot directly at the unarmed victim's face; he fired the second shot from a standing position directly into the back of the victim's head while the victim lay face down,

motionless, and unconscious. Appellant fired the second shot after cursing at, kicking, and pistol-whipping the victim who was prone on the floor. The manner of killing in this case supports a finding of premeditation and deliberation.

A jury may also determine whether premeditation exists by considering the assailant's immediate flight from the scene of the assault, the conduct of the assailant in neglecting to aid the victim, and efforts to conceal the weapon used. (*People v. Cook* (1940) 15 Cal.2d 507, 516; *People v. Clark* (1967) 252 Cal.App.2d 524, 529.) Here, appellant immediately fled the scene with Baez without aiding Valdez. They attempted to hide in bushes in a nearby park. Baez had the murder weapon in her purse when she was found. It is reasonable to infer that appellant gave the Glock to Baez in an attempt to conceal it.

The record is replete with sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant murdered Valdez with premeditation and deliberation and not, as he contends, as a result of PTSD, flight-or-fight response, accident, or unconsidered or rash impulse. None of the cases cited by appellant, nor the fact there may have been evidence to the contrary, compels a different conclusion.

3. *The Court Did Not Err by Failing to Give an Additional Unanimity Instruction as to the Murder Count.*

Appellant was charged with one count of murder. The videotape of the shooting showed that appellant shot Valdez twice. Valdez was alive when appellant shot him a second time. Both expert coroners testified the second shot was definitely fatal; they were unsure about whether the first shot was in and of itself fatal, without the second shot. Prosecution expert, Dr. Riley, believed a person receiving medical treatment for the first shot would have had a good chance of surviving; however, the possibility for fatality from the first shot existed. Defense expert, Dr. Sheridan, testified that the first shot "could" have been fatal on its own, but we would never know for sure whether that bullet would have been fatal on its own because there was a second [bullet]." According to Dr. Sheridan, Valdez was alive at the time of the second shot, which was "definitely a fatal shot."

During closing argument, the People argued Valdez was alive when appellant fired the second bullet at Valdez's head and that there was no evidence that Valdez was dead after the first shot alone. The People's theory was there was no evidence the first shot killed Valdez. Appellant argued to the jury he fired the first shot to Valdez's chin in self-defense. He also argued the first shot was "pure reflex" and a product of "robotic outrage." Appellant noted the psychiatrist's testimony a person impacted by PTSD and the fight-or-flight response would "go on automatic." Appellant urged that, after the first shot, he dropped the gun and, when he picked it up, unintentionally fired it.

The court gave a standard unanimity instruction applicable to both counts, i.e., CALCRIM No. 3500.[7] Nevertheless, appellant argues the jury could have convicted him of murder without all jurors agreeing on the same shot as the fatal shot. He argues the trial court should have given a unanimity instruction on this specific point as to the murder count. We disagree.

First, we note appellant did not object to the challenged instruction. Appellant has waived the asserted instructional ambiguity by failing to request clarifying language. (Cf. *People v. Nguyen* (2015) 61 Cal.4th 1015, 1051; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.)

Second, "[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." (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) The correctness of a jury instruction is to be determined from the

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[7] CALCRIM No. 3500 stated, "The defendant is charged with *murder* in Count 1 and with *possession of a firearm by a felon* in Count 2. [¶] The People have presented evidence of more than one act to prove that the defendant committed *this offense*. You must not find the defendant *guilty* unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed." (Italics added.) The court also instructed on murder, first degree murder, and voluntary manslaughter based on the theories of sudden quarrel, heat of passion, imperfect self-defense, self-defense, and accident.

entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

Here, there is no reasonable likelihood that some jurors could say the first shot alone killed Valdez and other jurors could say the second shot alone killed Valdez. The jury here reasonably would have understood the unanimity instruction that was given as referring to evidence of multiple acts presented to prove murder and evidence of multiple acts presented to prove the possession charge. As to the murder charge, Valdez was shot in the chin and was shot in the back of his head. However, there was no substantial evidence by which the jury could have concluded that the first shot alone killed Valdez. Dr. Riley and Dr. Sheridan each testified the first shot was *possibly* fatal, but each was unwilling to ascribe a higher probability of lethality to that shot alone. In other words, if the first shot contributed to Valdez's death, it did so only in combination with the second shot, which was sufficient by itself to kill Valdez.[8] Therefore, there is no reasonable likelihood that the jury disagreed on which shot actually killed Valdez. The testimony at trial does not support appellant's theory and does not compel giving a pinpoint unanimity instruction.

Nevertheless, assuming arguendo that either bullet was the fatal bullet, as a general rule when a violation of a criminal statue is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relies for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*); *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. (*People v. Maury* (2003) 30 Cal.4th 342, 422 (*Maury*)).

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[8] If the first shot did not contribute to Valdez's death, no unanimity instruction was required because Valdez was killed by the second shot alone.

There are several exceptions to the rule requiring a unanimity instruction. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises when the acts are so closely connected in time as to form part of one transaction. (*Jennings, supra*, 50 Cal.4th at p. 679; *People v. Crandell* (1988) 46 Cal.3d 833, 875 (*Crandell*).) The exception applies here.

In *Jennings*, the defendant was charged with the torture death of his son. The coroner (coincidentally Dr. Sheridan) testified that there were several causes of death, including combined drug toxicity, and acute and chronic physical abuse and neglect. The victim had numerous physical injuries -- one a few weeks old and one six hours old; he had three drugs in his blood system, all central nervous system depressants; and he had acute pneumonia at the time of his death and hemorrhaging around the optic nerves of the back of his eyes. Dr. Sheridan gave the cause of death as "the entire problem" -- the drugs, physical injuries, malnutrition, and emaciation.

Defendant argued a unanimity instruction was required because of the evidence of so many different acts and causes of death. The court found that a unanimity instruction was not necessary because the prosecutor proceeded on a "course of conduct" theory, arguing that the cumulative effect of the torture began in November and ended with the victim's death the following February. (*Jennings, supra*, 50 Cal.4th at pp. 679-680.)

Here, the prosecution argued a similar continuous-course-of-conduct theory, to wit, appellant went to the Club with an intent to kill Valdez. The expert testimony bears out the People's theory. Appellant fired the first shot and finished seconds later with punches, kicks, pistol-whipping, and, ultimately, a second execution-style shot. Dr. Riley testified the first shot "would not be expected to be rapidly fatal in and of itself." Dr. Riley opined further there would be a good chance of survival if the victim received medical treatment. According to Dr. Riley, Valdez "died as a result of these injuries due to . . . these two gunshot wounds." Thus, the two shots were not multiple independent acts, any of which could have led to Valdez's death, but were part of a continuous course of conduct, so closely connected in time as to form part of one transaction.

Dr. Sheridan's testimony also supports the continuous-course-of-conduct theory. He testified that the first shot could have been fatal on its own, but we would never know for sure whether that bullet would have been fatal on its own because there was a second one. If there had been only one shot, Valdez could have died from that shot. Dr. Sheridan was not absolutely sure whether Valdez "would or not," but it was a definite possibility. Dr. Sheridan testified we would never know if the first shot caused a lot of bleeding because everything happened so quickly and we had a second shot. He also testified the second shot was definitely a fatal shot. Based on this testimony, the continuous-course-of-conduct exception to the unanimity instruction rule applies. No further unanimity instruction was required. (Cf. *Maury, supra,* 30 Cal.4th at p. 423.)

Given the substantial evidence in support of the continuous-course-of-conduct theory and the lack of evidence in support of appellant's theory that each shot independently killed Valdez and must therefore be considered separately, the court had no obligation to give a pinpoint unanimity instruction sua sponte.

Finally, even if the unanimity instruction given by the trial court was erroneous, the error is harmless. Appellant's defense was the first shot was fired in self-defense or as the result of a "robotic outrage" suggestive of voluntary manslaughter, and the second shot was the product of an unintended discharge of the gun. However, the jury, by its finding of premeditation and deliberation, implicitly rejected any defense evidence consistent with self-defense (*Crandell, supra,* 46 Cal.3d at p. 874) or voluntary manslaughter (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [heat of passion]; *People v. Manriquez* (2005) 37 Cal.4th 547, 582 [imperfect self-defense].) Any error by the trial court in failing to give a unanimity instruction as to the two shots in light of the jury's rejection of the defense state of mind evidence was harmless under any conceivable standard.

4. The Abstract of Judgment and Sentencing Minute Order Must Be Corrected.

At sentencing, the court orally imposed a two-year concurrent middle term on the conviction for felon in possession of a firearm. The April 23, 2014, sentencing minute order and the abstract of judgment erroneously reflect the court imposed a three-year concurrent upper term. We order the correction of the minute order and abstract of judgment to reflect the two-year concurrent middle term.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend its April 23, 2014 minute order and the abstract of judgment to reflect the court imposed a two-year concurrent middle term on count 5, and the trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J. *

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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