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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDDIS C. SHEPHERD, Defendant and Appellant.	B271310 (Los Angeles County Super. Ct. No. BA424441)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xaiver Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

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When another motorist did not appropriately yield the right-of-way to him, Eddis C. Shepherd (defendant) cussed at him, chased after him, bumped him from behind, and ultimately got out of his minivan, stabbed the motorist and went after two others with a knife. On appeal from his convictions for attempted voluntary manslaughter and assault with a deadly weapon, defendant argues that there was insufficient evidence to support one of the two assault with a deadly weapon convictions and that the trial court's inquiry into juror misconduct was inadequate. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

As defendant was making a right turn in his minivan at an intersection, Juan N. (Juan) made an unprotected left turn in his work van onto the same street. Because Juan had not yielded the right-of-way, defendant began cussing at him as Juan drove past. Defendant gave chase, pulling up alongside Juan on the wrong side of the street, rolling down his window and screaming, "What's up, motherfucker?" and ordering Juan to pull over. Juan reciprocated the taunts, but did not pull over. Defendant then dropped back behind Juan's van and bumped him from behind. Juan sped up to get away from defendant, swerving back and forth to keep defendant from coming up alongside him again; defendant tailgated.

Juan then drove to a nearby automobile repair shop where he worked part time. As soon as Juan stopped his van, defendant pulled his minivan in front of Juan's van at an angle to prevent Juan from driving away. Both men got out of their vehicles. Defendant ran toward Juan, all the while slashing a knife with a four or five inch blade. Juan pushed defendant back with his

hands and started to back away. Juan tripped and fell back onto the pavement. Defendant then stood over Juan, slashing and stabbing with the knife as Juan flailed his arms and legs to keep defendant at bay. As he slashed and stabbed, defendant screamed, "I'm going to kill you, motherfucker," and "I'm going to get you, motherfucker." Defendant landed two attacks, stabbing Juan in the calf and the buttocks.

Three of Juan's coworkers, including Alex G. (Alex) and Ricardo S. (Ricardo), heard screeching brakes, and came outside to find defendant standing over Juan. When Alex approached the melee, defendant stepped away from Juan and ran at Alex, swiping the knife back and forth and saying something about "killing" (which Alex did not fully understand because he did not speak English well). One of the swipes came within five or six feet of Alex before Alex turned and fled into a nearby 99 Cent store. When Ricardo shouted for defendant to leave Juan alone, defendant approached Ricardo, slashing with the knife and screaming, "I'm going to kill you."

Juan and Ricardo fled to the auto shop. Defendant followed, and then paced back and forth between the shop's two entrances, brandishing the knife and screaming in an enraged voice, "I'll kill you, motherfucker" over and over. Defendant came at Ricardo once again with the knife, screaming that he was going to kill him, and Ricardo blocked the blow with a bar he had grabbed to defend himself. Juan threw an alternator at defendant, and defendant threw it back. When Juan and Ricardo refused to come out of the auto shop, defendant walked back to Juan's van, slashed one of its tires with a knife and took Juan's cell phone.

The police arrived soon thereafter, and took defendant into custody.

II. Procedural Background

The People charged defendant with (1) the attempted premeditated murder of Juan (Pen. Code, §§ 187, subd. (a) & 664),[1] (2) assaulting Alex with a deadly weapon (§ 245, subd. (a)(1)), and (3) assaulting Ricardo with a deadly weapon (§ 245, subd. (a)(1)).[2] With respect to the attempted murder count, the People further alleged that defendant personally used a dangerous or deadly weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 12202.7, subd. (a)). The People additionally alleged defendant's 1999 first degree burglary conviction and his 1996 juvenile robbery adjudication constituted "strikes" under our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) and prior serious felonies (§ 667, subd. (a)(1)).

The matter proceeded to trial. Defendant testified. He admitted stabbing Juan, but stated that Juan had started it and that defendant was acting to protect himself and his wife, who was a passenger in his minivan.

The trial court instructed the jury on the crimes of attempted premeditated murder and assault with a deadly weapon. As to the attempted murder charge, the court also instructed on the lesser included offenses of attempted voluntary

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Defendant's wife was charged in the same pleading with making criminal threats (§ 422), but she is not part of this appeal.

manslaughter due to heat of passion and attempted voluntary manslaughter based on imperfect self-defense. As to all three charged crimes, the court gave a self-defense instruction.

The jury convicted defendant of attempted voluntary manslaughter and both counts of assault with a deadly weapon, and found true the enhancements for personal use of a dangerous or deadly weapon and personal infliction of great bodily injury.

The trial court imposed a prison sentence of 16 years. After striking the earlier juvenile adjudication as a strike and a prior serious felony, the court imposed a 12-year sentence on the attempted voluntary manslaughter count, calculated as a three-year base sentence (18 months, doubled due to the remaining prior strike), plus one year for personal use of a dangerous or deadly weapon, plus three years for the personal infliction of great bodily injury, plus five years for the prior serious felony. The court then imposed a consecutive two-year sentence for each of the assault with a deadly weapon counts, calculated as one-third the middle term of three years, doubled due to the prior strike.

Defendant filed this timely appeal.

DISCUSSION

I. Sufficiency of the Evidence Underlying the Assault on Alex

Defendant argues that there is insufficient evidence to support his conviction of assaulting Alex with a deadly weapon because he was five to eight feet away from Alex when he slashed at him with the knife. In assessing whether substantial evidence supports a conviction, we ask whether the record contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.) There was sufficient evidence in this case.

The crime of assault with a deadly weapon has two elements: "(1) the assault, and (2) the means by which the assault is committed." (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481; § 245, subd. (a)(1) [defining crime as "an assault upon the person of another with a deadly weapon or instrument other than a firearm"].) "An assault is an unlawful attempt, coupled with a *present ability*, to commit a violent injury on the person of another." (§ 240, italics added.) A defendant has the "'present ability to injure'" "'[o]nce [he] has attained the means and location to strike immediately.' [Citation.]" (*People v. Chance* (2008) 44 Cal.4th 1164, 1174 (*Chance*).) In this context, immediacy means that the defendant has "equip[ped] and position[ed] himself to carry out a battery . . ., even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Id.* at p. 1172.) It does *not* mean that the defendant "must . . . do everything physically possible to complete a battery short of actually causing physical injury to the victim." (*Id.* at p. 1175.) Accordingly, an assault can occur when a defendant throws a bad punch (*People v. Wingo* (1975) 14 Cal.3d 169, 176, superseded on other grounds by § 1170), misses when throwing a tranquilizer dart (*People v. Cook* (2017) 8 Cal.App.5th 309, 314), or shoots a bullet that goes wide (*People v. Bradford* (1972) 28 Cal.App.3d 695, 707). Actual, physical contact is not required. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Under this precedent, there is sufficient evidence that defendant assaulted Alex when he came at him swiping the knife, even though defendant did so while still five to eight feet away

from Alex. The fact that defendant needed to take one or two steps closer before his blade met flesh does not preclude the jury's finding that defendant had equipped and positioned himself to carry out his intended battery.

Defendant contends that language in other Supreme Court decisions is to the contrary. Specifically, he points to passages indicating that "'"[a]n assault . . . must precede the battery, but [must] do[] so immediately. The next movement would, at least to all appearance, complete the battery."'" (*People v. Colantuono* (1994) 7 Cal.4th 206, 216, citing Perkins on Criminal Law (2d ed. 1969) ch. 2, § 2, pp. 118-119; *People v. Williams* (2001) 26 Cal.4th 779, 786 [using same language].) Our Supreme Court has already rejected arguments like defendant's based on this language. In *Chance*, the Court expressly noted that the above-cited language was relevant to—and "confined to"—"the *intent* requirement for assault"—namely, that the defendant "be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Chance*, *supra*, 44 Cal.4th at pp. 1170-1171, italics added; *Williams*, at p. 788.) The use of this language to describe the intent element of assault, the *Chance* Court explained, "did not mention or change the well-established understanding of the 'present ability' element" of assault. (*Chance*, at p. 1171.) Defendant's reliance on this language is consequently misplaced, and provides no basis for disturbing the jury's verdict.

II. Adequacy of Investigation Into Juror Misconduct

A. Additional Facts

During his cross-examination, defendant had several exchanges with the prosecutor in which defendant admitted that

he was "upset" with Juan while insisting that he was not "angry" with him.

The day after that testimony, and before closing arguments, one of the jurors reported to the trial court that Juror No. 4 had engaged in two instances of misconduct: (1) Juror No. 4 "on day one" "walked in and started drawing diagrams on the board and talking about the case," but was immediately told by other jurors not to discuss the case; and (2) Juror No. 4, after defendant's cross-examination, tried to start a game of "hangman" on the board where the word to be guessed was "upset" (although one other juror, upon seeing the letter "U," guessed "guilty").

In response, the trial court proposed to the parties the following procedure for investigating this claim: The court would question Juror No. 4 as to whether this happened and, if so, ask the other jurors whether they were "affected" by any of Juror No. 4's conduct. Defendant agreed with the court's proposal.

Juror No. 4 was individually questioned by the court, and admitted to both incidents. The court excused Juror No. 4 because "he directly violated the court's admonition" not to discuss the case prior to deliberations "not once, but twice in the jury room."

The court then spoke to the remaining jurors as a group. The court explained that it had excused Juror No. 4 for "deliberate[ly] violat[ing] . . . the court's admonition." The court then asked the jurors whether they "were influenced by whatever it was that [Juror No. 4] drew up on the board" on the first day. Three jurors responded that they were not aware of anything being on the board, and none of the others indicated that it had "affected" them or had any "influence on" them. The court next

asked whether the "recent incident involving a game of hangman" "had any impact" or "any tendency to influence" the jurors. Again, none of the jurors responded that it had.[3]

The court selected an alternate juror to replace Juror No. 4, and the trial resumed.

B. Analysis

Defendant does not challenge the trial court's removal of Juror No. 4; instead, he asserts that the court erred in not conducting a full evidentiary hearing to question each juror individually. We review this claim for an abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 702 (*Fuiava*).) The trial court did not abuse its discretion in this case.

Whenever a trial court is "'put "on notice"'" that a juror may have engaged in misconduct, the court has a duty "'"'to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of the other jurors has been affected."'"' (*Fuiava*, *supra*, 53 Cal.4th at p. 702, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 694; *People v. Virgil* (2011) 51 Cal.4th 1210, 1284.) If the court's inquiry uncovers juror misconduct, reviewing courts will presume that the misconduct was prejudicial unless evidence to the contrary appears in the record. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1178.) A juror's discussion of a case prior to the commencement of deliberations is juror misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 118; § 1122, subd. (b).) The court's

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3 Although the reporter's transcript reflects that the trial court posed both questions to the jury, it does not indicate how they responded. However, the court's actions in response to the jury's unreported response indicated that none of the jurors responded in the affirmative.

inquiry of other jurors regarding the effect of juror misconduct—and the jurors' answers that there was no effect—can rebut the presumption of prejudice. (*People v. Foster* (2010) 50 Cal.4th 1301, 1342-1343.)

As an initial matter, defendant forfeited any objection to the adequacy of the trial court's inquiry by telling the court he agreed with its proposed strategy for addressing Juror No. 4's possible misconduct. (*People v. Ramirez* (2006) 39 Cal.4th 398, 460.)

Moreover, defendant has failed to show that the trial court's inquiry was inadequate. "'[N]ot every incident involving a juror's conduct requires or warrants further investigation'" (*Fuiava*, *supra*, 53 Cal.4th at p. 702, quoting *People v. Cleveland* (2001) 25 Cal.4th 466, 478), and for good reason—"intrud[ing] too deeply into the jury's deliberative process" while a trial is ongoing can "invad[e] the sanctity of the deliberations or creat[e] a coercive effect on those deliberations" (*Fuiava*, at p. 710). Here, the court took a logical, two-step approach to investigating the existence and effect of any misconduct by Juror No. 4: It directly asked Juror No. 4 what had happened and, upon verifying that misconduct had happened, removed Juror No. 4 and asked the remaining jurors whether they were influenced or otherwise affected by this misconduct. The court did not further attempt to ascertain which of the remaining jurors had guessed the word "guilty," and had a basis for this caution: The end result of such an inquiry would have been the court's questioning of that specific juror as to whether he or she could be impartial (which is something the court had already ascertained), and such individual questioning would have further invaded the sanctity of

the jury's deliberations. The court took a reasonable course of action.

Defendant urges that a more probing and individualized inquiry was required, but relies on cases involving postverdict challenges to deliberations. (E.g., *People v. Hedgecock* (1990) 51 Cal.3d 395, 414-415.) Those cases are less helpful because, at that point, the deliberations are over and the risk of advertently injecting *more* error into the deliberations is gone.

Defendant also argues that the trial court erred in taking the other jurors at their word when they indicated they were not influenced by Juror No. 4's misconduct. He is wrong. As noted above, courts may ask jurors whether they were affected by misconduct and may accept those jurors' answers if they find them to be credible. (*People v. Riggs* (2008) 44 Cal.4th 248, 281 ["The trial court did not abuse its discretion in crediting the jurors' assurances"].) Defendant cites several cases indicating that courts may disbelieve jurors accused of misconduct who disclaim their misconduct and may, in some circumstances, disbelieve jurors who indicate they can be impartial. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838; *People v. Farris* (1977) 66 Cal.App.3d 376, 386-387; *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639.) But these cases do not *require* a court to disbelieve them. More to the point, defendant provides no basis for us to second-guess the trial court's implicit finding that the jurors in this case were credible when they indicated the absence of any adverse impact from Juror No. 4's misconduct. That misconduct was fleeting, brief, and quickly squelched by the other jurors; this is not a case where a juror's statement that he or she could not set aside the effect of misconduct is inherently unbelievable.

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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