Filed 1/25/07 P. v. Anthony CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VANNIS JERMAIN ANTHONY,

Defendant and Appellant.

F048576

(Super. Ct. No. BF109124A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Law Offices of Simmons & Koester and James Koester for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson and Mary Jo Graves, Chief Assistant Attorneys General, William K. Kim and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted appellant Vannis Jermain Anthony of conspiracy to possess cocaine base for sale and possession of cocaine base for sale. The jury also found true a gang enhancement. Anthony raises numerous issues on appeal, including (1) error to deny motion to suppress; (2) instructional error; (3) error to dismiss a juror after commencement of deliberations; (4) the conviction of possession of cocaine base for sale

must be stricken because the prosecution failed to elect between two discrete acts; (5) the gang enhancement should be stricken; (6) sentencing error; and (7) cumulative error.

We disagree with Anthony's contentions and will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On January 21, 2005, at approximately 8:30 a.m., 10 officers of the Bakersfield Police Department charged with investigating gangs arrived at a residence on Bradshaw to execute a warrant. Some of the officers were detailed to the entry team; others were assigned to the perimeter. All the officers were in full uniform.

Officers proceeded down the driveway of the home, where they encountered a woman who discarded a glass-smoking pipe. As officers rounded the back corner of the house, they saw a man fleeing across the yard toward the back fence. They proceeded to approach the rear door, but notified one of the other unit members that a man was attempting to flee.

Six officers approached the rear door of the house; two officers were assigned to the bathroom window as a diversionary tactic. As officers approached the rear of the house, a commotion was heard inside the house. Just before reaching the back door, officers saw a man inside the house slam shut both the back door and screen door. The screen door was unlocked, but the rear door was locked.

Officers could hear people inside the house yelling and running. The police knocked, announced their presence and that they had a search warrant, and asked the occupants to open the door. The officers outside the bathroom window could hear the toilet being flushed and the water refilling; a shower curtain blocked their view. A few seconds after knocking, officers forced open the rear door.

After entering, officers saw one person in the living room and four people, including Anthony, running down a hallway away from them. Officers ordered them to halt and lie down; Anthony did not comply. Instead, Anthony squatted and began crawling toward a back bedroom. One officer forced Anthony into a prone position.

Anthony was ordered to place his hands at his side. When Anthony was lifted to a sitting position, there was a plastic baggie containing a single rock of cocaine base near his right hand. Police detained the five people found in the house.

Meanwhile, another officer had pursued the man attempting to flee over the fence. The unknown man threw something down and continued to flee. The pursuing officer retrieved what the man had thrown. It was a plastic baggie containing 11 rocks of cocaine base.

Inside the house, along with the plastic baggie containing cocaine base, officers found a police scanner, a handgun, ammunition, empty plastic baggies, and a playing card with derogatory names for two rival gangs of the Country Boy Crips. Three of those detained inside the house, including Anthony, had large amounts of cash on them.

Anthony was charged with conspiracy to possess cocaine base for sale and possession of cocaine base for sale. A gang enhancement and a personal arming enhancement were added to both counts. It also was alleged that Anthony had a prior strike conviction and that he had two prison priors.

At trial, one officer testified as a narcotics expert. He indicated that tools of the drug trade include police scanners, large amounts of currency, and plastic baggies. Of the five people found in the house, none appeared to be under the influence of any illegal substance.

It was stipulated that the Bakersfield Country Boy Crips was a criminal street gang within the meaning of Penal Code section 186.22.[1] The officer who testified as an expert on criminal street gangs testified that one of the primary activities of the Crips was weapons possession and narcotics sales, particularly cocaine base. The officer also testified that members of the Crips gang tend not to use drugs because it shows weakness.

---

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

Two of the five arrested at the house admitted membership in the Country Boy Crips. Gang members would gain the respect and trust of their fellow gang members by participating in narcotics sales for the benefit of the gang.

After the case was submitted to the jury, two jurors reported that one juror, Juror No. 8, was injecting extraneous information into the deliberations and had indicated an inability to decide the case based upon the evidence. The trial court replaced Juror No. 8 with an alternate and instructed the jury to begin deliberations anew.

The jury returned verdicts of guilty on both substantive counts. The gang enhancement was found true; the personal arming allegation was found not true. Anthony waived trial on the prior conviction and prison prior allegations and admitted them.

At the July 21, 2005, sentencing, the trial court found three factors in aggravation and one in mitigation. The trial court found that the factors in aggravation justified imposition of the upper term on both substantive counts and the gang enhancement.

DISCUSSION

I. Motion to Suppress

Anthony challenged the admission into evidence of items seized after entry into the home pursuant to a search warrant. In his written motion to suppress, he maintained the officers failed to comply with the knock-notice requirements. The trial court held an Evidence Code section 402 hearing, concluding that the officers substantially complied with the requirement and any failure to comply was excused by exigent circumstances.

On appeal, Anthony concedes the officers knocked and announced their presence, but contends that waiting a "couple of seconds" before entering was insufficient to satisfy the requirement. He asserts that the trial court "made an unreasonable factual finding" and consequently erred in denying his motion to suppress.

In reviewing a trial court's denial of a motion to suppress, the trial court's factual determinations are reviewed under the deferential substantial evidence standard. We

apply an independent standard of review to the question of whether, under the facts as found by the trial court, the action was constitutional. (*People v. Coulombe* (2000) 86 Cal.App.4th 52, 55-56.)

Factual summary

As officers approached the house, Officers Fred Torres and Ronald Stephenson heard a commotion inside the house. Officer Kevin Findley heard yelling and running footsteps. Officer Ryan Slayton heard "a bunch of people running" and someone yelling "rollers." The term "rollers" is street slang for the police. Several officers heard a door slam and saw one man go over the fence. Torres saw two or three people in the back yard. Findley and Stephenson saw a man inside the house run to close the back security door and shut the back door. Stephenson yelled, "Bakersfield Police Department, search warrant." Slaton yelled, "police department." The man watched both officers approach, in full uniform, before closing the door.

Slayton knocked once on the door; Stephenson banged on the door. Seconds after announcing their presence, officers forced the door open with a battering ram. Approximately 20 to 30 seconds elapsed from the time officers saw the back door slammed shut to the time the door was forced open with a battering ram. Slayton stated that the course of events was "pretty fluid" and a "continuous flow," but that there were "a few seconds" between the announcement of their presence and the striking of the door.

Simultaneously, or immediately after the door was hit with the battering ram, officers also broke a bathroom window and were prepared to stop people from flushing narcotics down the toilet in order to prevent destruction of evidence.

The trial court found that the bathroom window was broken after the battering ram hit the door. The trial court further found that the officers announced their presence and that "under all the circumstances of this case" there was "substantial compliance." The trial court further found that "the activity that both preceded and immediately followed the announcement of their presence" made "further efforts … to comply further with the

knock-notice requirements … futile." The trial court found that "exigent circumstances" excused any further attempts to comply with the knock-notice requirements.

Analysis

In *United States v. Banks* (2003) 540 U.S. 31, the defendant maintained that a 15- to 20-second wait between officers announcing their presence and forcing entry did not satisfy the Fourth Amendment. (*Id.* at p. 33.) The government claimed that a risk of destruction of evidence arose shortly after knocking and announcing. (*Id.* at p. 38.) The Supreme Court concluded that "the officers knocked and announced their presence, and forcibly entered after a reasonable suspicion of exigency had ripened." Therefore, their entry did not violate the Fourth Amendment. (*Id.* at p. 43.)

In the *Banks* case, the Supreme Court noted that the "issue comes down to whether it was reasonable to suspect imminent loss of evidence after the 15 to 20 seconds the officers waited prior to forcing their way." (*United States v. Banks, supra,* 540 U.S. at p. 38.) The "significant circumstances" that determined the exigency of the situation included the arrival of the officers during a time when occupants normally would be awake and that a period of 15 or 20 seconds was sufficient time to dispose of contraband. (*Id.* at p. 40.)

In *People v. Hill* (1970) 3 Cal.App.3d 294, officers attempting to execute a search warrant knocked on the door, announced their presence, and requested admittance. An occupant peeked out the window for three or four seconds then disappeared from sight, after which officers heard the sound of shuffling feet and people moving quickly. Officers then forced entry. (*Id.* at pp. 299-300.) This court held that under the circumstances, "officers had good cause to believe that defendant had denied them admittance and that he did not intend to open the door until all incriminating evidence had been destroyed." (*Id.* at p. 300.)

In Anthony's case, officers arrived when the occupants were awake; but, instead of allowing entry, the occupants deliberately closed and locked the door after seeing the

officers' approach. After the door was closed and locked as they approached, officers knocked and announced their presence. Officers waited a few seconds before forcing entry.

Clearly, as in *Hill*, the officers had good cause to believe entry was being denied until all incriminating evidence had been destroyed. (*People v. Hill, supra*, 3 Cal.App.3d at p. 300.) The occupants deliberately closed and locked the door as uniformed officers approached; running footsteps were heard behind the door. Under these circumstances, it was reasonable to suspect imminent loss of evidence if officers delayed further in entering the premises. (*United States v. Banks, supra*, 540 U.S. at p. 38.)

Furthermore, in *Hudson v. Michigan* (2006) 547 U.S. ___ [126 S.Ct. 2159], the Supreme Court noted that the "'reasonable wait time'" articulated in *Banks* is necessarily vague as it is dependent upon the particular circumstances. (*Id.* at p. ___ [126 S.Ct. at p. 2163.) In *Hudson*, the officers arrived with a warrant, knocked and announced, and waited "'three to five seconds'" before forcing entry. (*Id.* at p. ___ [126 S.Ct. at p. 2162.) There was no indication that the officers had been observed as they approached, or that there was activity inside indicating destruction of evidence. The State of Michigan conceded that the wait time was not reasonable. (*Ibid.*) The Supreme Court held that the violation of the knock-and-announce rule did not necessitate exclusion of the evidence obtained when officers arrived with a warrant, knocked and announced, but entered before what was ultimately determined to be a reasonable wait time. (*Id.* at p. ___ [126 S.Ct. at p. 2165.)

In Anthony's case, we conclude the forced entry was warranted under the circumstances and not a violation of Anthony's Fourth Amendment rights. Regardless, the evidence was not subject to suppression under *Hudson.* The trial court did not err in denying the motion to suppress.

II. Instructional Error

Anthony argues there are three instructional errors, all of which are based on the trial court's failure to instruct: (1) Conspiracy to possess cocaine base for personal use as a lesser included offense of conspiracy to possess cocaine base for sale; (2) attempted possession of cocaine base as lesser included offense to possession of cocaine base for sale; and (3) unanimity. None of these arguments is persuasive.

There is a sua sponte duty to instruct on a lesser included offense if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) In a noncapital case, a claim of instructional error based upon a failure to instruct on lesser included offenses is reviewed for prejudice exclusively under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. A conviction of the charged offense may be reversed only when it appears reasonably probable that an outcome more favorable to the defendant would have been obtained in the absence of the error. (*Breverman*, at p. 178.)

Conspiracy to possess for personal use

Anthony contends the trial court should have instructed the jury sua sponte on the lesser included offenses of conspiracy to possess cocaine base for personal use and attempted possession of cocaine base. The facts, however, do not support instructing the jury with these lesser included offenses.

When arrested, Anthony had $227 in cash stuffed into his right pants pocket. Next to him was a plastic baggie with a single chunk of cocaine base, .23 grams. Others in the house at the time of Anthony's arrest also had large amounts of cash. One man fled the house when officers arrived, dropping a baggie with 11 chunks of cocaine base with a total weight of 3.4 grams. There was a police scanner in the house, which was programmed to sheriff's department and police department frequencies. Officers also seized approximately 30 plastic baggies, which had the corners cut off.

Expert testimony established that those who sold cocaine base generally dealt in cash; no pay/owe sheets would be kept. Drug dealers often kept scanners tuned to law enforcement frequencies. Baggies that had the corners missing often were used to package cocaine base. The expert indicated that users generally smoke the cocaine base as soon as they get it. Of the five people inside the house that were detained and arrested, none of them displayed signs of being under the influence of a narcotic. No paraphernalia commonly used to smoke or ingest cocaine was found in the house.

Finally, expert testimony established that one of the primary criminal activities of the Country Boy Crips was sales of cocaine base. Gang members usually maintained a firearm and ammunition for protection of the enterprise and the gang members. Officers found a semiautomatic handgun and ammunition during the search.

Given this evidence, the trial court did not err when it failed to instruct on conspiracy to possess cocaine base for personal use as the evidence was not substantial enough to warrant such an instruction. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.) The evidence overwhelmingly pointed to conspiracy to possess for the purpose of sales, including the large amounts of money, presence of packaging materials and a police scanner, and no evidence of personal use of a narcotic by Anthony. Because of the overwhelming evidence of sales, it is not reasonably probable the outcome would have been more favorable to Anthony if an instruction on conspiracy to possess cocaine base for personal use had been given. (*Id.* at p. 178.)

Unanimity instruction

Anthony contends the prosecution relied on two discrete acts to prove the count two offense, possession of cocaine base for sale, and therefore the trial court should have given a unanimity instruction to the jury. The two discrete acts, according to Anthony, are (1) the baggie containing .23 grams of cocaine base that was inside the house and near Anthony, and (2) the baggie containing 11 rocks of cocaine base that was dropped by a man fleeing the house when officers arrived. The People contend that the

prosecution relied only on the baggie found inside the house to support the count two offense. Both contentions are wrong. No unanimity instruction was required, however, because they were part of one discrete act.

In closing argument, the prosecutor addressed constructive possession. The prosecutor also argued that Anthony could be guilty of the crime of possession of cocaine base for sale if he aided and abetted another's possession. The prosecutor commented, "When you look at a gang selling rock cocaine in a house, there's aiding and abetting everywhere." These arguments were made in the context of evaluating the evidence for count two. The prosecution never stated that it was relying upon the baggie inside the house as opposed to the baggie outside the house to form the basis of the count two offense.

The record reflects that Anthony did not request a unanimity instruction. Absent a request, the trial court is obligated to issue a unanimity instruction when the facts so warrant. (*People v. Davis* (2005) 36 Cal.4th 510, 561.) Regardless of whether the prosecution was relying on the baggie containing .23 grams or the baggie containing the 11 rocks of cocaine base to support the count two offense, under the facts of this case the trial court did not have a sua sponte duty to issue a unanimity instruction.

In *People v. Russo* (2001) 25 Cal.4th 1124, 1132, the California Supreme Court explained the unanimity requirement. The *Russo* court reasoned that the key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a specific offense. Unanimity as to exactly how the crime was committed is not required. (*Id.* at pp. 1134-1135.) The unanimity instruction is appropriate when conviction on a single count can be based on two or more discrete criminal events, but not where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event. (*Id.* at p. 1135.)

Where the evidence shows only a single discrete offense, "but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise

role was, the jury need not unanimously agree" on the theory whereby the defendant is guilty. (*People v. Russo, supra,* 25 Cal.4th at p. 1132.) "In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.)

In *People v. Wright* (1968) 268 Cal.App.2d 196, officers encountered a car parked in a high crime area, at night, with four youths sitting inside. As officers approached the car, one occupant fled from the car and dropped a package over a cliff; the package contained several hand-rolled marijuana cigarettes. (*Id.* at p. 197.) In the back seat of the car were three more hand-rolled marijuana cigarettes. The defendant, who had been seated in the right front seat of the car, was charged with possession of marijuana. (*Ibid.*)

The defendant in *Wright* asserted that the jury should have been instructed to agree on whether he possessed the marijuana in the car, the marijuana flung over the cliff, or both. (*People v. Wright, supra,* 268 Cal.App.2d at p. 198.) The appellate court disagreed, stating this was "not a case involving violation of a statute under which any one of several different acts is sufficient to constitute the offense." (*Ibid.*) The appellate court concluded that the "act of possession … was not fragmented as to time or space. The evidence showed all of the marijuana came from the car, some of it remained there and some was thrown over the cliff." (*Ibid.*)

In Anthony's case, as in *Wright*, the events are part of a single discrete act, where possession was not fragmented by time or space. All of the rocks of cocaine base came from the house. One man fled with a baggie of 11 rocks of cocaine base after officers arrived. As in *Wright,* the trial court was not required to instruct the jury to make a finding as to whether Anthony possessed the baggie in the house, the baggie dropped by the fence, or both.

Anthony's case is distinguishable from the case of *People v. King* (1991) 231 Cal.App.3d 493. In *King*, methamphetamine was found in the purse of one occupant, not the defendant. Methamphetamine also was concealed inside a statue located in the house and another occupant claimed ownership of the statue. (*Id.* at pp. 497-498.) The defendant was convicted of possession of methamphetamine for sale. The defendant asserted that the trial court should have given a unanimity instruction. (*Id.* at p. 499.) Under these circumstances, this court agreed, holding that "in a prosecution for possession of narcotics for sale, where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant," a unanimity instruction should be given. (*Id.* at p. 501.)

Unlike the facts of *King*, in Anthony's case the two units of contraband were not separated by time or space and there was no evidence from which a jury could conclude that either or both of the two units were owned solely by another individual.

Where "'multiple … acts may form the basis of a guilty verdict on one discrete criminal event,'" a unanimity instruction need not be given. (*People v. Russo*, *supra*, 25 Cal.4th at p. 1135.) There was only one discrete act of possession for sale in Anthony's case. It was for the jury to determine whether Anthony possessed the cocaine base for sale constructively or as an aider and abettor. These facts did not warrant a unanimity instruction and the trial court did not err in failing sua sponte to issue this instruction.

Attempted possession of cocaine base

Anthony contends the trial court had a sua sponte duty to instruct on attempted possession of cocaine base for sale because the baggie containing .23 grams of cocaine base was in close proximity to him, but not on his person. Further, he contends that a properly instructed jury, at most, would have convicted him of attempted possession of the baggie containing 11 rocks of cocaine base that was discarded outside the house.

Anthony's contention fails. First, his argument is premised on the contention that the baggie inside the house and the baggie outside the house constituted two discrete acts of possession or attempted possession. As set forth *ante,* the events constitute a single discrete act.

Second, he mischaracterizes the nature of the offense of possession for the purposes of sale. Anthony claims that at most he was guilty of attempted possession of cocaine base for the purposes of sale because "the criminal objective was thwarted when the officers showed up at the residence." As the prosecutor stated in closing argument, there is a distinction between possession for sale and actual sales. The arrival of the officers thwarted the actual sales of cocaine base, but Anthony was not charged with selling cocaine base. Anthony was charged with possession for the purpose of sale, an offense that was complete at the time officers entered the premises.

Finally, Anthony's contention that the jury should have been instructed on attempted possession because he did not have any cocaine base on his person misstates the law. Anthony need not have cocaine base on his person in order to be guilty of possession for the purpose of sale; constructive possession is sufficient. (*People v. Williams* (1971) 5 Cal.3d 211, 215.)

III. Gang Enhancement

Anthony challenges the true finding on the section 186.22, subdivision (b) gang enhancement, contending that the true finding is the result of the trial court's error in failing to instruct on the lesser offense of conspiracy to possess cocaine base for personal use. We concluded in part II, *ante*, that the trial court did not err in failing to instruct on conspiracy to possess for personal use; therefore, Anthony's contention with respect to the gang enhancement necessarily fails.

IV. Count Two Offense

Anthony contends that because the prosecutor failed to make an election between two discrete acts of possession, the baggie inside the house and the baggie dropped at the

fence, and the jury was not required to make a finding as to which act constituted the offense, the count two conviction must be reversed. We concluded in part II, *ante*, that there was only one discrete act; there were not separate discrete acts of possession. Therefore, Anthony's contention that the count two conviction must be reversed because the prosecutor failed to elect between two discrete acts necessarily fails.

V. Juror Misconduct

Anthony contends the trial court committed reversible error when it dismissed Juror No. 8 after the start of deliberations. We disagree.

Prior to the individual questioning of prospective jurors, the trial court asked the venire panel if any family or friends had been arrested for or charged with a drug offense. The trial court also instructed the venire panel to put aside their personal beliefs about controlled substances and to follow the law. When called to the jury box during voir dire, Juror No. 8 indicated that he had heard the questions, that he could be fair and impartial, and that he knew of no reason why he could not serve as a juror in the case. During voir dire, Juror No. 8 was specifically asked whether there was "any impact on [his] life from a drug issue, someone using drugs, something like that," to which Juror No. 8 responded unequivocally, "No."

After commencement of deliberations, Juror No. 9, the foreperson, and Juror No. 10 advised the trial court that "information with regard to the use" that was not evidence was inserted into the deliberations by a juror. The trial court excused all the jurors from the courtroom except the foreperson and questioned the foreperson as to what had occurred.

The foreperson related the comments made by Juror No. 8 during deliberations. Juror No. 8 told the other jurors that "he had used crack cocaine and he had, you know, experience buying that particular drug inside of a home." According to the foreperson, Juror No. 8 also stated that he did not know if he could separate his own personal experiences from the actual case.

The trial court then excused the foreperson and Juror No. 10 was questioned. Juror No. 10 stated that Juror No. 8 admitted purchasing and using rock cocaine. Juror No. 10 also reported that Juror No. 8 told the other jurors that he knew how rock cocaine was smoked. Juror No. 8 also told the other jurors that he had experience buying rock cocaine in houses and that the house as described by officers in the case did not fit the description of a "rock house."

Outside the presence of the jury, the prosecutor asked the trial court to excuse Juror No. 8 for good cause, admonish the jurors to disregard any comments from Juror No. 8, seat an alternate juror, and instruct the jury to begin deliberations anew. Anthony argued that an admonishment would not suffice and a mistrial should be declared.

The trial court chose not to ask Juror No. 8 any questions, but found that Juror No. 8 had committed misconduct and excused Juror No. 8 from the jury. The trial court then polled the remaining 11 jurors to ascertain whether they could disregard Juror No. 8's statements and reach a fair and impartial verdict based upon the evidence presented at trial. The trial court was satisfied that all remaining 11 jurors could be fair and impartial and render a verdict based solely on the evidence. The trial court then seated one of the alternate jurors.

We review for abuse of discretion a trial court's determination to discharge a juror and order an alternate to serve. (*People v. Ramirez* (2006) 39 Cal.4th 398, 458.) If there is any substantial evidence to support the ruling, we uphold it. (*Ibid.*)

Anthony's claim that the trial court committed reversible error when it failed to examine Juror No. 8 before excusing that juror is not persuasive. A trial court has discretion over what procedures to employ, including whether to conduct a hearing or engage in a detailed inquiry, when determining whether to discharge a juror. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159.) Prior to excusing Juror No. 8, the trial court conducted an examination of two jurors who had reported the remarks made by Juror No. 8 and the extraneous information introduced into deliberations. That inquiry provided

sufficient evidence that juror No. 8 had engaged in misconduct and supports the removal of Juror No. 8 for cause.

Whether Juror No. 8 purposefully or innocently withheld information regarding his use and familiarity with crack houses during voir dire is irrelevant in assessing the merits of the trial court's ruling excusing Juror No. 8. Juror No. 8 had indicated to the jurors that he was unable to separate personal experience from the facts of the case. Juror No. 8 also inappropriately introduced his personal knowledge of crack houses, which information was not evidence in the case, into deliberations in an effort to discredit the officers' testimony. The introduction of extraneous information into deliberations is misconduct. (*People v. Ramos* (2004) 34 Cal.4th 494, 519.)

Furthermore, an examination of Juror No. 8 in the courtroom under oath likely would have been fruitless. Juror No. 8 did not fully and completely answer the questions in voir dire. In addition, Juror No. 8's comments during deliberations indicated that the juror was engaging in criminal activity. Sharing this information in the confines of the jury room is far different from acknowledging it under oath in a courtroom.

There was substantial evidence supporting the trial court's ruling to dismiss Juror No. 8 and seat an alternate. Anthony has failed to demonstrate any abuse of discretion by the trial court. (*People v. Ramirez, supra,* 39 Cal.4th at p. 458.)

VI. Sentencing

Anthony contends the imposition of the upper terms of imprisonment violates his constitutional rights as set forth in *Blakely v. Washington* (2004) 542 U.S. 296.

Anthony did not raise this objection at sentencing, even though he was sentenced approximately one year after the issuance of the *Blakely* decision. The issue, therefore, is not cognizable on appeal. (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

VII. No Cumulative Error

Anthony argues that even if no single error was sufficiently prejudicial to warrant reversal, cumulatively the errors were prejudicial. Because we have determined that there was no error, it follows that there was no prejudicial cumulative error.

DISPOSITION

The judgment is affirmed.

_____
CORNELL, J.

WE CONCUR:

_____
WISEMAN, Acting P.J.

_____
HILL, J.