Filed 1/30/07 P. v. Braxton CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL GLENN BRAXTON, Defendant and Appellant.	A096083, 110446 (Solano County Super. Ct. No. FCR 178124)

Following his conviction by jury verdict of attempted murder (Pen. Code, §§ 187/664[1]), appellant Michael Glenn Braxton made a timely oral motion for new trial on grounds of jury misconduct, which the trial court refused to hear. (*People v. Braxton* (2004) 34 Cal.4th 798, 814.) In his first appeal (A096083) he contended the refusal of his motion was error. He also asserted various evidentiary and instructional errors, which he had not claimed in his motion for new trial.

We concluded the court's refusal to hear the motion for new trial was error, and that, under the peculiar facts of the refusal, appellant was entitled to a new trial. We addressed the evidentiary issues, as they were likely to recur on a retrial. We declined to address the claimed instructional errors as premature, because the evidence presented at retrial, as yet uncertain, would govern the appropriate instructions.

The Supreme Court granted the People's petition for review to address the issues related to the motion for new trial. (*People v. Braxton, supra,* 34 Cal.4th at p. 805.) It

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

concluded the trial court erred in not hearing appellant's motion, but it reversed our judgment and directed us to remand the matter to the trial court for a hearing on appellant's motion for new trial on the ground of jury misconduct. (*Id*. at pp. 814, 820.) Pursuant to California Rules of Court, then rule 26(b)(2), now rule 8.272(b)(2), we issued a remittitur and sent the trial court our remittitur, a copy of the Supreme Court remittitur, and a file-stamped copy of the Supreme Court opinion.

The trial court has now heard and denied appellant's motion for new trial, and he appeals the order of denial (A110446).

Subsequent to his appeal in A110446, appellant asked us to recall the remittitur in our original opinion in order to address the evidentiary and instructional claims of error, the resolution of which was not necessary for our conclusion in that opinion. He also asked that we consolidate the two appeals. We granted his request.

BACKGROUND

Since 1995 or 1996 appellant owned and lived in a mobile home which he parked in a lot rented from a Vacaville mobile home park. Gail Billa and her husband managed the park; Beatrice Bruno was the assistant manager.

In early 1997, Carol Prange and her teenage son, Adam, moved into the mobile home adjacent to appellant's. The relationship between appellant and Prange was strained. Prange claimed that appellant became upset about "stupid little things," such as her dog lying on his lawn or "something growing in his yard" about which she knew nothing. He threatened several times to shoot the dog if she did not keep it at her house.

Appellant claimed that Prange's dog was intimidating and roamed in his yard, occasionally preventing him from retrieving his mail. He also claimed that Adam Prange and his companions hung around Prange's house, drinking, smoking, and cursing, and threw debris into his yard. He once saw Adam Prange arrested for possession of a handgun. Appellant complained several times to the park managers about the Pranges' conduct, but he received no response to his complaints.

August 30, 1999 Shooting Incident

Prange was inside her house when she heard appellant yelling "hysterically" at Adam and Adam's friends, Brandy and Matt. When she went outside to see what was going on, appellant yelled obscenities at her. He eventually returned to his house, and Prange learned from Adam and his friends that appellant was angry because Matt had leaned his bicycle against appellant's fence.

Shortly after Prange returned to her house, she heard a gunshot. She ran outside and saw nothing. Adam and his friends told her the shot came from near appellant's house. Prange ran to assistant manager Bruno's house and told Bruno she thought appellant had fired a gun. At Bruno's direction, Prange called the police.

Officer Tim Garrido arrived within minutes and contacted appellant, who was calm and cooperative with him. Appellant told Garrido that several teenagers, including Adam, were riding their bicycles on his lawn; all complied with his request to stop except Adam, who remained on the lawn and stared at him. He told Garrido that the incident angered him, so he fired a gun into the ground of his own backyard to release his frustration. He also related his ongoing dispute with Prange about her dog.

Garrido noted a strong odor of alcohol on appellant's breath, but no signs of intoxication. Appellant permitted Garrido and another officer to search his house. They found two loaded handguns lying on a dresser; one had the odor of a recent firing. They arrested appellant and placed him in jail.[2] When they informed him the guns would be confiscated, he replied he could easily obtain another one. He also told them he had shot at people in the past, would not hesitate to hurt people in the future, and as a teenager had the street nickname "hit man." He was 50 years old in 1999.

September 12, 1999 Eviction

Because of appellant's arrest, the mobile home park's owner, managers, and attorney decided to evict him. On September 12, after his release from jail, he was

[2] According to the pre-sentence report, appellant was arrested for discharging a firearm in a grossly negligent manner (§ 246.3), and threatening to kill or seriously injure another person (§ 422). The charges were dismissed after he was arrested for the September 14, 1999, incident giving rise to this appeal.

served with a 60-day notice of eviction. He had lost his 13 year job at American Home Foods the previous December when the plant closed, his finances were low, and he did not know where he would go.

September 14, 1999 Shooting

Manager Gail Billa and assistant manager Bruno left the mobile home park office simultaneously, walking in separate directions to their houses. Bruno passed appellant, going the opposite direction. They did not acknowledge each other. Bruno and appellant had always had a cordial relationship, without any disputes. She knew about his eviction, but had not participated in the decision. A few seconds after passing Bruno, appellant called her name and she turned around. He reached in his belt, pulled out a gun, and pointed it at her head. He was standing approximately five feet from her. She told appellant, "Mike, I did nothing to you. Don't do it." Appellant did not reply. Bruno grabbed the gun and felt something "swish" past her head. Her feet got "tangled up" as she tried to run away, and she fell to the ground, hitting her head. Her next memory was of a neighbor praying by her side.

Billa had arrived home when she heard a loud noise. She looked outside to see appellant fire two shots. As the smoke cleared, she saw Bruno walking unsteadily toward Billa's house. She then heard Bruno say, "No, Mike, don't," but appellant fired at her chest, slamming her to the ground. He then fired two more shots at her.

Mobile home park resident Donna Stefani heard a cap gun sound outside her house and went to the window. She saw appellant holding a gun to Bruno's forehead, then lower the gun and shoot her in the abdomen. Stefani heard two or three more shots as she was going to the telephone to call "911." After making the call, she went outside to Bruno, who lay 10 to 15 feet from the spot where Stefani had first seen her.

Bruno was shot in the index finger of her right hand and three times in the chest. She suffered a cracked rib and bruised lung. She lost part of her liver; her finger does not bend properly; and she has difficulty breathing and holding long conversations.

Appellant was arrested within the hour of the shooting while driving west on Interstate 80. His blood alcohol level two hours after the shooting was 0.18 percent, and

he had an odor of alcohol, but he did not manifest signs of intoxication, e.g., unsteady gait, slurred speech. He was calm and polite with the arresting officers. After one of them thanked him for his cooperation, he replied, " 'I'm always cooperative with the police when I shoot someone.' " When another officer at the arrest site explained that he would be returned to Vacaville, he replied, " 'That's okay. I know I'm hung. I'll cooperate.' "

Defense

Appellant testified in his own defense. He has been an alcoholic for much of his life, occasionally suffering alcoholic blackouts. He can be violent when drunk. He has been in residential treatment centers for substance abuse several times. He is also a diabetic, but he stopped taking his new medication several days before the September 12 eviction because it upset his stomach.

The September 12 eviction notice shocked and angered appellant because he believed he had always been a good tenant. His financial circumstances were also precarious. He then began a drinking binge, during which he stopped eating. He seriously contemplated suicide and bought two guns and some bullets.

Sometime on September 14, appellant fixed the details of his suicide: he would drive to a familiar location in an Oakland park and shoot himself in the head. He put one of the guns in his waistband, got into his car, and drank until he departed.

As he was driving to an exit of the mobile home park, he saw Bruno walking home. He liked her and they had never had problems. He decided to ask her about the eviction, and then leave. He got out of his car and for no explicable reason he pointed his gun at her head. She grabbed his gun, a shot rang out, and he blacked out. He next remembered getting back in his car, departing for the Oakland park where he had planned to kill himself, and being stopped by the police, with whom he was cooperative. At trial he was extremely remorseful for his conduct toward Bruno. He did not know why he shot her, and denied having any intent to kill her.

Appellant's estranged wife testified that when he telephoned her on September 12 after receiving the eviction notice, he sounded drunk. He called again on the morning of

September 14. Crying, he told her he was preparing to kill himself, then hung up. She tried calling him several times afterwards, but received no answer. She recounted that he could be violent when drunk, a "Dr. Jekyll and Mr. Hyde."

Dr. Samuel Benson, a forensic psychiatrist, reviewed appellant's medical and police records and examined him five times. Dr. Benson diagnosed appellant as an alcoholic with a history of blackouts that indicated brain damage. He explained that during such blackouts a person, although ambulatory, is not conscious and loses impulse control. He opined that appellant had a blood-alcohol level of .21 to .23 percent when he shot Bruno and was highly intoxicated. Such a blood alcohol level can, but does not always, cause a blackout in a person with a blackout history. Dr. Benson also opined that on September 14 appellant was suffering from mental illness, including major depression; was under intense stress due to his loss of job, estrangement from his wife and son, fear of eviction and possible homelessness; and had an elevated blood-sugar level that would cause diminished thinking in almost any person.

Trial and Sentence

Appellant originally entered a plea of not guilty by reason of insanity. He withdrew it following the presentation of evidence and before jury instructions. The jury found him guilty of attempted murder but found not true the allegation that the attempted murder was committed willfully, deliberately, and with premeditation. Following his conviction he was sentenced to a total prison term of 34 years to life: the upper term of nine years for the attempted murder, plus a consecutive 25 years to life for personally discharging a firearm during the attempted murder and causing great bodily injury (§ 12022.53, subd. (d)). The court also imposed a three year consecutive term for personal infliction of great bodily injury in the commission of a felony (§ 12022.7), but stayed the term pursuant to section 654.

DISCUSSION

I. *Motion for New Trial (*A110446)

After we issued the remittitur, appellant filed a written motion for new trial based in part on grounds of jury misconduct. He submitted three juror declarations, each of

which stated that "some of the other jurors" had refused to discuss lesser included offenses until there was a unanimous decision on the charged offense.

The court concluded the juror declarations were inadmissible under Evidence Code section 1150 because they described statements made during the deliberations that had an effect on the jurors' mental processes. It therefore denied defendant's motion for new trial on the ground of juror misconduct.[3]

Appellant now contends the jurors' declarations are admissible and demonstrate that the jury failed to follow the court's instructions.

A court may grant a new trial when the jury has "been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (§ 1181, subd. (3).) In ruling on a motion for new trial, the court undertakes a three-step inquiry: (1) are the supporting affidavits or declarations admissible? (2) if so, do the facts therein establish misconduct? (3) if so, was the misconduct prejudicial? (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.) The trial court has broad discretion in ruling on each question, and its discretion will not be disturbed on appeal absent a clear abuse of that discretion. (*Id*. at p. 704.)

Misconduct may occur when a juror, who is required to apply the law as instructed by the court, refuses to do so during deliberations. (*People v. Engelman* (2002) 28 Cal.4th 436, 443.) It may also occur when the jury explicitly or implicitly agrees to violate an instruction. (*People v. Perez* (1992) 4 Cal.App.4th 893, 908.)

---

[3] Despite the Supreme Court's directive that the matter be remanded to the trial court for a hearing on "[appellant's] motion for a new trial on the ground of jury misconduct," (*People v. Braxton, supra*, 34 Cal.4th at p. 820), appellant's post-remittitur written motion for new trial was also based on the evidentiary and instructional errors he asserted in his first appeal. After the trial court denied appellant's motion for new trial on the ground the juror statements were inadmissible, it additionally denied the motion on the ground there were no evidentiary or instructional errors, or, if any, the errors were not prejudicial. Because appellant's written motion and the trial court's ruling based on these latter two grounds exceeded the scope of the Supreme Court's directive, we limit our review of the trial court's order denying the motion for new trial to the issue of the asserted jury misconduct. We address the asserted evidentiary and instructional errors in parts II-IV of this discussion.

Here, the jury was instructed with CALJIC No. 17.10, assault with a firearm as a lesser offense of attempted murder.[4] As part of its instructions, the court read the verdict forms. Page one of the forms, entitled "COUNT I," states: "We [] find [defendant] _____(not guilty) _____(guilty) of the crime of felony, to wit: Attempted Murder of [Beatrice Bruno]. . . ." Pages two and three direct the jury to make special findings only if it has found the defendant guilty of attempted murder. The first paragraph of page four states: "ANSWER THE FOLLOWING ONLY IF YOU HAVE FOUND THE DEFENDANT NOT GUILTY OF ATTEMPTED MURDER." It then directs the jury to find appellant not guilty or guilty of assault with a firearm on Bruno.

The three juror declarations submitted by defendant in support of his motion for new trial identically stated: "Throughout most of the deliberations I did not believe that the prosecution had proved beyond a reasonable doubt that [defendant] was guilty of attempted murder, although I was convinced that he was guilty of assault with a firearm. [¶] I asked other members of the jury to discuss the crime of assault with a firearm, but some of the jurors refused to do so, saying that the judge had instructed us that we were not allowed to consider that charge until we had unanimously agreed that [defendant] was not guilty of attempted murder. [¶] In part because other jurors refused to discuss the assault with a firearm charge, I finally and reluctantly agreed to vote guilty on the attempted murder charge."

To test the validity of a verdict, "any otherwise admissible evidence may be received as to statements made . . . within . . . the jury room, of such character as is likely

---

[4] As read to the jury, CALJIC 17.10 states: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of assault with a firearm is lesser to that of attempted murder. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the greater crime."

to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) However, "[n]o evidence is admissible to show the effect of such statement . . . upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which [the verdict] was determined." (*Ibid*.) Evidence Code section 1150, subdivision (a) permits a juror to testify to "overt acts" that are open to the senses and thus subject to corroboration, but it does not permit testimony regarding the subjective reasoning process of the individual juror. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398; accord, *People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

Generally, Evidence Code section 1150 proscribes not only the admission of a declarant juror's description of his or her own mental process, but also the admission of testimony concerning statements made by other jurors during deliberations. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.) In rare instances, a juror's statement made during deliberation is itself an act of misconduct, and thus admissible, e.g., a juror's expression of erroneous legal advice based on the juror's experience as a police officer. (*Stankewitz, supra*, 40 Cal.3d at p. 398-399.)

Appellant concedes that the three declarants' statements that they "did not believe" the prosecutor had proved attempted murder, and that they were "convinced" that defendant was guilty of assault were not admissible, because they were not "overt" (*Stankewitz, supra*, 40 Cal.3d at p. 398) statements, i.e., acts, made in the jury room. However, he argues, the remainder of the declarations constituted an admissible "overt act," particularly the declarants' statements that "some of the jurors refused to [discuss the lesser offense of assault with a firearm], saying that the judge had instructed us that we were not allowed to consider that charge until we had unanimously agreed that [defendant] was not guilty of attempted murder."

The statements attributed to "some of the jurors" regarding the instructions do not constitute the kind of overt act that permits testing a verdict's validity. They suggest, at most, " ' "deliberative error" ' " in the collective mental process of these other jurors: confusion, misunderstanding, and/or misinterpretation of the law, particularly the way these other jurors appear to have interpreted and applied the instructions. Such

declarations are inadmissible to impeach the verdict. (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 476 (*Sanchez*); see also *People v. Morris* (1991) 53 Cal.3d 152, 231: evidence of how juror understood court's instructions is not competent.) "The mere fact that such mental process was manifested in conversation [among] jurors during deliberations does not alter this rule." (*Sanchez, supra,* 62 Cal.App.4th at p. 476.)

We also observe that these declarations do not suggest an intentional agreement by "some of the jurors" to disregard the instructions, a situation that would constitute misconduct. (*Sanchez, supra,* 62 Cal.App. at p. 476.) The declarations in this case may show confusion on the part of "some of the jurors" regarding the instructions, but they do not indicate an open discussion or joint decision deliberately to refuse to follow the instructions.

Given the trial court's broad discretion to rule on the admission of evidence on motions for new trial, we find no abuse in the court's declining to admit the declarations to impeach the verdict. (*People v. Cox* (1991) 53 Cal.3d 618, 697.)

II. *Evidentiary Errors (A096083)*[5]

Defendant contends the court erred in admitting evidence of his purported character for violence.

a. August 30, 1999 Shooting and Arrest

Over appellant's objection that it was inadmissible propensity evidence (Evid. Code, § 1101, subd. (a)), the People were permitted to present as part of their case-in-chief the details of his August 30 discharge of a gun. The court deemed the evidence relevant to his motive and intent for the subsequent September 14 shooting and to giving the jury "a full and clear picture of the relationship between [appellant] and the people at the trailer park." (Evid. Code, § 1101, subd. (b).) Appellant agrees that evidence of the fact of the confiscation of his guns by the police on August 30 was admissible because it created possible inferences of motive and intent to kill "with respect to the trailer park's

[5] In our order recalling the remittitur in A096083, we permitted the parties to submit supplemental briefing discussing any decisions filed after February 10, 2003, the date our original opinion was filed, that they deemed relevant to appellant's claims of error in A096083.

management," particularly taken together with the fact of his subsequent eviction. He argues that the details of the entire underlying August 30 incident that led to the confiscation "added nothing to the weight" of those inferences and "had no tendency in reason to prove anything of legitimate relevance" as to whether he was guilty as charged of the attempted murder of Bruno on September 14.

Evidence of a person's character, in the form of specific instances of his conduct, is inadmissible to prove the person's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, evidence that a person committed a crime or some other act is admissible if relevant to prove some fact, such as motive or intent, other than his disposition to commit such an act. (Evid. Code, § 1101, subd. (b).) The admissibility of evidence of such uncharged offenses or other acts depends on the materiality of the fact to be proved, the tendency of the uncharged conduct to prove the material fact, and any policy against admission of relevant evidence. (*People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*); *People v. Carter* (1993) 19 Cal.App.4th 1236, 1246 (*Carter*).)

To satisfy the materiality requirement, the fact sought to be proved by the uncharged conduct may be either an ultimate fact, or an intermediate fact from which such ultimate fact may be inferred. (*Thompson, supra*, 27 Cal.3d at p. 315.) Because intent to kill is an element of attempted murder, intent was an ultimate fact in appellant's trial. (CALJIC No. 8.66.) Motive is an intermediate fact. (*Thompson, supra*, 27 Cal.3d at p. 315, fn. 14.) Evidence of motive satisfies the materiality requirement only if it tends logically and reasonably to prove an ultimate fact in dispute. (*Ibid*.) Evidence that appellant had a motive to kill Bruno would logically prove his intent to kill her. It was undisputed that appellant's intent to kill Bruno was the pivotal issue of the case. To the extent the evidence of his conduct on August 30 was proffered to demonstrate his motive for an intent to kill Bruno, it satisfied the materiality requirement.

To ascertain whether the evidence of uncharged conduct has a tendency to prove the material fact, the trial court must determine whether it " ' "logically, naturally, and by reasonable inference" ' " establishes that fact. (*Thompson, supra*, 27 Cal.3d at p. 316.) When intent is the question, the similarity between the charged offense and uncharged

acts must be substantial, although it need not be of the same " 'quantum' " necessary as when the issue is identity. (*Carter, supra,* 19 Cal.App.4th at p. 1246.)

Appellant's August 30 angry shouting at his neighbors in the front area of his house, followed by his discharge of a firearm in his backyard is not substantially similar conduct to the charged offense of attempted murder to " ' "logically, naturally, and by reasonable inference" ' " (*Thompson, supra,* 27 Cal.3d at p. 316; Evid. Code, § 210) demonstrate either a motive for appellant's September 14 attempt to kill Bruno, or that her attempted murder was committed, as charged, with the intent of malice aforethought.[6] According to the undisputed evidence, the relationship between appellant and Bruno had always been cordial, and Bruno was not present and played no part in the August 30 altercation between appellant and his neighbors. Furthermore, the reasonably inferred motives for the September 14 shooting—the gun confiscation and the eviction—had not yet occurred when this altercation took place. Thus, the details of the August 30 altercation between appellant and his neighbors was not relevant to his motive, and, by extension, his intent to kill Bruno two weeks later.

Other than the fact they both involved shooting a gun, appellant's August 30 discharge of his gun was markedly different from the charged attempted murder. In the former incident, appellant fired a gun into the ground in the privacy of his backyard. There were no other people in the backyard at the time, and he did not aim the gun in the vicinity of the neighbors with whom he had just quarreled, nor in the direction of any place occupied by people, e.g., another residence, a public sidewalk, a front yard. Insofar as nothing in this factual scenario implies an intent to kill anybody, let alone Bruno specifically, evidence of the August 30 firearm discharge was not admissible under Evidence Code section 1101, subdivision (b), as uncharged conduct probative of the disputed material fact of appellant's motive or specific intent to kill Bruno on September 14.

---

[6] The information also alleged that the attempted murder was willful, deliberate, and premeditated, but the jury specifically found this allegation not true. The jury was instructed that "malice aforethought" was the "specific intent to kill unlawfully another human being."

b. Admission of Defendant's August 30 Statement to Police

The court admitted into evidence appellant's August 30 statements to the investigating police officers that he had shot people in the past and had the nickname of "hit man" when he was a teenager 30 years ago. Before trial the People argued the statements were probative of his state of mind. At trial appellant objected to the statements on relevance and Evidence Code section 352 grounds, and on appeal argues they are inadmissible propensity evidence.

In isolation, appellant's statements that he was called "hit man" as a teenager and had shot people in the past were arguably inadmissible character evidence. Appellant's teenage nickname was too remote to be relevant to prove motive, intent, etc., and the "shot people in the past" statement was too vague, standing alone, to prove a material fact in this case. However, when these two statements are read in context of the other statements appellant made to the police at the same time, they are admissible.

The officers who found the guns in appellant's bedroom testified that when they told him the police were going to confiscate the guns, appellant not only volunteered his "hit man" teenage street nickname, he responded that "it would be no big deal to go get another gun . . . that he had hurt people in the past and that he wouldn't hesitate to hurt people in the future." Taken together, these statements constituted, effectively, a generic threat to do harm. Given the short time span between his making them and the charged offense (August 30-September 14), they were admissible as circumstantial evidence of his mental state when he shot Bruno. (Evid. Code, § 1250; *People v. Lang* (1989) 49 Cal.3d 991, 1014-1015; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 461, fn. 1.)

c. Testimony of Defendant's Estranged Wife

Defendant's estranged wife, Ivella Braxton, was called as a defense witness and testified that a police officer telephoned her at her house on September 14 and told her defendant shot someone. Over appellant's hearsay and relevance objections, she was asked on cross-examination (1) whether she recalled telling the officer during this telephone conversation that appellant was a "violent drunk," and (2) whether appellant "is" in fact a violent drunk. She did not remember making any such statement to the

officer, and, in response to the second question, stated that when appellant drinks, he sometimes acts like "Dr. Jekyll & Mr. Hyde." Appellant argues that Mrs. Braxton's opinions were inadmissible character evidence.

Insofar as Mrs. Braxton's testimony did not pertain to any specific prior acts of misconduct, it was inadmissible character evidence. (Evid. Code, § 1101.) Nor, in the context in which the questions were asked, was it admissible opinion or reputation evidence because it was not offered by the prosecution to rebut character evidence introduced by appellant. (Evid. Code, § 1101.)

d. Prejudice

Having concluded that the evidence of appellant's August 30 angry outburst at his neighbors and his firearm discharge, and Mrs. Braxton's "violent drunk"/"Dr. Jekyll and Mr. Hyde" testimony were improperly admitted, we now assess the prejudice from their admission.

No judgment shall be set aside for erroneous admission of evidence unless "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) The prejudicial effect of evidentiary error is measured by the reasonable-probability test embodied in article VI, section 13, and articulated in *People v. Watson*: is it reasonably probable that a result more favorable to the appellant would have been reached absent the error? (*People v. Cahill* (1993) 5 Cal.4th 478, 509-510; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

On this record, we cannot say the erroneously admitted evidence was prejudicial. The mobile home park staff, of which Bruno was a member, was responsible for appellant's eviction. From his perspective, the eviction was undeserved because he had been a good tenant, and he was arrested for discharging a firearm after his neighbor, with whom he had a tense relationship, telephoned the police at Bruno's direction. These facts reasonably implied a motive, if not to kill, at least to exact revenge on the mobile home park staff.

On September 14, when appellant called out Bruno's name specifically after walking past her, he pulled a gun from his belt and pointed it directly at her head. He did not pull it away when she told him she had done nothing to him, and he fired at her head and torso multiple times at point blank range. He acknowledged knowing the gun was loaded, that it could kill, that he pointed it at Bruno's head, and that he lowered the gun toward her when she fell to the ground. The jury had expert opinion evidence suggesting that appellant lacked an intent to shoot because he was highly intoxicated at the time and may have been suffering a blackout, yet the jury rejected this expert hypothesis. Given the strong evidence establishing appellant's intent to shoot Bruno and the jury's rejection of contrary evidence favorable to appellant, it is not reasonably probable the jury would have reached a different result had the erroneously-admitted evidence been excluded. (See *People v. Whitson* (1998) 17 Cal.4th 229, 251.)

III. *Instructional Errors*

a. Lesser Included Offense

Appellant contends the trial court erroneously directed the jury it could not consider the lesser offense of assault with a firearm unless it first determined he was not guilty of the charged offense of attempted murder.

A jury must acquit a defendant of a charged greater offense before it may return a verdict on a lesser included offense, but it "may consider charges in any order it wishes to facilitate ultimate agreement on a conviction or acquittal." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 324, 332.) As noted in Part I, footnote 4, *ante*, the jury was instructed with CALJIC No. 17.10, which encompasses this principle, and it was given verdict forms that directed it to answer the question of guilty/not guilty of assault with a firearm only if it found the defendant not guilty of attempted murder.

When read together, CALJIC No. 17.10 and the verdict forms do not improperly preclude the jury from evaluating the crime charged and the lesser offense in any order it chooses during its deliberations. It merely instructs the jury on the sequence in which the verdicts themselves are to be returned. The court emphasized this distinction in response to the following jury request made during deliberations: "Were there 2 counts against the

defendant? (attempted murder and assault)." Ultimately, after an unreported sidebar with counsel, the court replied: "Ladies and gentlemen of the jury, there was a jury instruction that I read to you that said that while you're deliberating you can look at both crimes, you can look at the evidence as to both crimes and you can decide the order in which you're going to evaluate the crimes. [¶] But in terms of the verdicts that you can bring back to the court, this court cannot accept a verdict on the lesser crime until you have unanimously found the defendant not guilty of the greater crime. And, again, if there is a finding of guilt as to the greater crime, there's no need to go any further to deal with the lesser crime. [¶] But in terms of how you choose to look at the crimes before you get to the point of actually rendering a verdict, you can debate and evaluate them in any order that you want. It's just that I can't accept a verdict on the lesser crime until there's been a unanimous finding by you that the defendant is not guilty of the greater crime."

While the court's use of the phrase "deal with the lesser crime" could be viewed, as appellant argues, as synonymous with "consider" and to have clouded the clear direction of CALJIC No. 17.10, the trial court correctly restated the instruction in its very next sentence. We find no error.

b. Voluntary Manslaughter

Relying on *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*), appellant contends the court erred in refusing his request for a voluntary manslaughter instruction.

Voluntary manslaughter is an unlawful, intentional killing without malice that occurs in a heat of passion or sudden quarrel (provocation), or in the actual but unreasonable belief in the need for self-defense (imperfect self-defense). (*Rios, supra,* 23 Cal.4th at p. 460; § 192.) The circumstances of provocation or imperfect self-defense negate the element of malice, but they are not elements of the crime of voluntary manslaughter. (*Id*. at pp. 454, 461.) Therefore, *Rios* concluded, the People do not have to prove these circumstances beyond a reasonable doubt when the charge is voluntary manslaughter only, because their existence precludes a finding of malice where malice is an element of the charge, and malice is not an issue in a charge of manslaughter. (*Id*. at

p. 463.) Because the People do not have to prove provocation or imperfect self-defense when the charge is voluntary manslaughter only, the court is not required to instruct that the defendant was provoked or unreasonably sought to defend himself. (*Id*. at p. 463.) "Accordingly, a conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that the defendant killed intentionally and unlawfully." (*Ibid*.)

However, when the charge is murder, a voluntary manslaughter instruction must be given where there *is* evidence to negate malice, i.e., evidence of provocation or imperfect self-defense. Conversely, "a murder defendant is not *entitled* to instructions on the lesser included offense of voluntary manslaughter if evidence of provocation or imperfect self-defense . . . is lacking." (*Rios*, *supra*, 23 Cal.4th at p. 463, fn. 10.) Here, appellant was charged with attempted murder, and he conceded there was no evidence of provocation or imperfect self-defense. Consequently, he was not entitled to an attempted voluntary manslaughter instruction.

c. CALJIC No. 2.52

Appellant contends there was no basis to give CALJIC No. 2.52, the standard instruction on flight. The jury was instructed: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which the circumstance is entitled is a matter for you to decide." Appellant argues the evidence does not support the instruction because there was no dispute he shot Bruno unlawfully; the only question for the jury to resolve was whether the shooting was an attempted murder or a lesser offense.

Our Supreme Court has repeatedly rejected the claim that consciousness-of-guilt instructions, such as CALJIC 2.52, should only be given when the perpetrator's identity is disputed, and not when the principal disputed issue is the defendant's mental state at the time of the crime. (See *People v. Smithey* (1999) 20 Cal.4th 936, 983, and citations therein.) There was no error in giving the flight instruction.

d. CALJIC No. 2.62

Appellant contends the court erred in giving CALJIC No. 2.62, which states: "In this case, the defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable." The People sought the instruction because appellant failed to explain or remember what occurred during the shooting of Bruno, claiming he suffered a "blackout" at the time.

CALJIC No. 2.62 is not warranted when the defendant explains or denies matters within his knowledge, regardless of his explanation's improbability. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.) The credibility of his explanation is a question for the jury. (*People v. Peters* (1982) 128 Cal.App.3d 75, 86.) Appellant testified that he pointed the gun at Bruno's head, she grabbed the gun, a shot was fired, and he then blacked out, not remembering any subsequent shots. Because appellant provided an explanation for the circumstances of the actual shooting spree, CALJIC No. 2.62 was not warranted.

Error in giving CALJIC No. 2.62 is measured by the *Watson* harmless error standard. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471.) As *Lamer* observes, no published opinions have found the error prejudicial, largely because the text of the instruction tells the jury that drawing an adverse inference is "unreasonable" if the defendant lacks the knowledge necessary to explain or deny the evidence against him, and because juries are uniformly instructed with CALJIC No. 17.31 to " 'disregard any instruction which applies to a state of facts which you determine does not exist.' " (*Id*. at p. 1472.)

It is presumed that the jury obeys the court's instructions. (*People v. Chavez* (1958) 50 Cal.2d 778, 790). This jury was instructed with CALJIC No. 17.31. Given appellant's testimony of what he remembered about shooting Bruno, or, more precisely,

his testimony that he could not remember all the details due to his blackout, we may reasonably conclude that the jury, heeding the directive of CALJIC No. 17.31, found CALJIC No. 2.62 inapplicable, and, instead, examined whether his explanation of a blackout was credible. We conclude it is not reasonably probable that appellant would have obtained a more favorable result absent this erroneous instruction.

e. CALJIC No. 2.71.7

Appellant contends there was no basis for giving CALJIC No. 2.71.7, which states: "Evidence has been received from which you may find that an oral statement of intent, plan, motive or design was made by the defendant before the offense with which he is charged was committed. It is for you to decide whether the statement was made by the defendant. Evidence of an oral statement ought to be viewed with caution." The People based their request for the instruction on appellant's statement to the officers investigating the August 30 incident that he had hurt people in the past and would not hesitate to hurt people in the future.

Before a jury may be instructed that it may draw a particular inference, there must be evidence in the record, which, if believed by the jury, supports the suggested inference. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) *People v. Lang* (1989) 49 Cal.3d 991, 1014 (*Lang*), held that "a generic threat is admissible to show [ ] homicidal intent where other evidence brings the actual victim within the scope of the threat." Appellant's comments to the police about hurting people were inferentially provoked by his August 30 altercation with his mobile home park neighbors, the Pranges. However, there was no evidence that, as of August 30, appellant had any dispute or reason to be angry with victim Bruno. Consequently, there was no evidentiary basis to bring Bruno "within the scope" of appellant's threat, and thus no inference of intent to be drawn from his comments.

However, because appellant's August 30 comments that getting another gun was no big deal and that he'd hurt people in the past and would not hesitate to hurt them in the future were made only two weeks before the charged shooting, they could be construed as state-of-mind evidence of design. In other words, his comments that he would hurt

anyone who crossed or harmed him implied a state of mind on August 30 that still existed on September 14 when he saw an employee who, he believed, harmed him by participating in the eviction. (*Lang*, *supra*, 49 Cal.3d at p. 1015.)

We appreciate that appellant's August 30 statement to the police is arguably insufficient evidence to warrant the instruction. It is a vague, generic threat that does not necessarily imply a plan to kill Bruno, who had no connection to appellant's altercation with his neighbors. Insofar as the eviction, the event that presumably aroused appellant's homicidal rage, had not yet occurred as of August 30, his remarks may not reasonably show a plan to harm a person he may later have mistakenly thought participated in the eviction decision. Furthermore, *Lang* speaks of evidence of a generic threat being admissible to provide a possible motive where no other motive for the charged killing is apparent. (*Lang*, *supra*, 49 Cal.3d at p. 1015.) Here, appellant's motive for shooting Bruno is apparent: he mistakenly thought that she, as an employee of the mobile home park, decided to evict him.

Even assuming error, however, we cannot say on this record that the error was prejudicial. CALJIC No. 2.71.7 does not direct the jury to find that the defendant's pre-offense oral statement constituted a plan, design, etc. Rather, it benefits the defendant because it admonishes the jury to be dubious of such statements. Furthermore, as discussed, *ante*, there was ample evidence of appellant's intent to shoot Bruno independent of any inference of motive or design that could be drawn from his August 30 comments to the police. Again, it is not reasonably probable appellant would have obtained a more favorable result in the absence of this instruction. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278.)

IV. Cumulative Error

Appellant contends that even if no one error was individually prejudicial, the cumulative effect of the evidentiary and instructional errors was prejudicial. We disagree. There was substantial evidence of motive and eyewitness accounts of the shooting. The jury reasonably discredited appellant's testimony that he blacked out after Bruno grabbed his gun and a shot rang out, given his testimony recalling all other details

surrounding the shooting (e.g., seeing Bruno as he was leaving the mobile home park to commit suicide, getting out of his car to talk to her about the eviction, pointing a gun at her head, getting back in his car and leaving for Oakland). The jury rejected defense psychiatrist expert Benson's opinion that appellant could have been suffering a blackout at the time of the shooting. Appellant responded to the arresting officers that he had shot someone and knew he was "hung." On such a record it is not reasonably probable he would have obtained a more favorable result absent the cumulated errors. (See *People v. Holt* (1984) 37 Cal.3d 436, 458.)

DISPOSITION

The judgment is affirmed.

_____

Jones, P.J.

We concur:

_____

Simons, J.

_____

Gemello, J.