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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FAUSTINO AYALA, Defendant and Appellant.	A122412 (San Mateo County Super. Ct. No. SC 061086)

Defendant Faustino Ayala is a member of the Sureños criminal street gang and was convicted of second degree murder for his participation in the shooting death of a young man who had once associated with the rival Norteños gang. Defendant drove a vehicle filled with gang members, and one of those members fired the fatal shot. On appeal, defendant contends that (1) the evidence is insufficient to support his murder conviction under the natural and probable consequences doctrine; (2) the court erred in discharging a juror for misconduct and substituting an alternate juror during deliberations (Pen. Code, § 1089); and (3) a gang-related firearm enhancement must be stricken because the jury failed to find that defendant was a principal in the murder (Pen. Code, § 12022.53, subd. (e)(1)). We reject the contentions and affirm the judgment.

In the published part of this opinion, we discuss defendant's first contention and conclude that the fatal shooting was a natural and probable consequence of a planned physical attack by multiple gang members upon perceived rival gang members even though the shooting occurred at the start of the confrontation and no assault with fists,

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III B and III C.

baseball bats, knives, or other weapons preceded the shooting. A defendant may be convicted under the natural and probable consequences doctrine even if the target criminal act (here, allegedly assault with a baseball bat) was not committed. An aider and abettor may be liable where he intentionally aids one criminal act but the perpetrator actually commits some other, more serious criminal act that is reasonably foreseeable. The ultimate factual question is one of reasonable foreseeability, to be evaluated under all the factual circumstances of the case. Here, evidence establishing the gang-related nature of the planned assault showed that escalation of the confrontation to a deadly level was reasonably foreseeable.

I. FACTS

The Sureños and Norteños are rival street gangs. Defendant joined the Sureños around 1996, when he was 12 years old. In 1997, at age 13, defendant committed assault with a deadly weapon—he stabbed someone in the back at school. In 1998, at age 14, defendant gave a gun to another Sureño to shoot at a car full of Norteños, and defendant's accomplice fired four or five shots at the vehicle. The juvenile court held defendant responsible for attempted murder and placed him in the California Youth Authority. Defendant remained incarcerated until February 2005, when he was 20 years old. Five months after his release, he participated in the gang shooting at issue here.

The gang attack occurred on the afternoon of July 12, 2005, in a Norteño neighborhood. On that day Francisco Rodriguez was standing outside his apartment building talking with his brother-in-law and a friend when a blue car drove past. Rodriguez was a former Norteño gang member who left the gang when he married a couple of years earlier. Defendant was driving the blue car, and it was filled with four or five other Sureño gang members, including Josue O. and Daniel V. who were both 15 years old. At age 20, defendant appears to have been the oldest person in the car.

Josue shot and killed Rodriguez, and the victim's brother-in-law described the events at trial. The brother-in-law, Richard Padilla, testified that a blue car slowly drove past them, then returned at an even slower rate of speed. The car was full of occupants. A male exited the car from behind the driver's seat, with a Mexican flag bandana

covering the lower part of his face, and approached Rodriguez, Padilla, and Rodriguez's friend, Jose Navarret. The individual approached to within about eight feet of the threesome, then raised his hand in a pointing gesture. Padilla thought the individual had a weapon and ran. Padilla's companions ran, too, but Rodriguez's foot had a malformation that caused him to walk with a "bad limp" and prevented him from running fast. Padilla heard a gunshot and returned to see Rodriguez on the ground.

Navarret, Rodriguez's friend who was talking with him just before the shooting, also testified that a blue car stopped in the street and a male with his face covered immediately exited the vehicle from the rear seat behind the driver and approached the threesome. The threesome ran and, seconds later, Navarret heard a gunshot followed by the sound of running, a door slamming, and a car taking off. He returned to see Rodriguez lying on the ground in a puddle of blood.

Rodriguez died from a gunshot to the back of his head. The police found a small kitchen knife near Rodriguez's feet when they arrived on the scene, but his companions never saw a knife and Rodriguez's brother-in-law insisted that Rodriguez was not holding a knife or any weapon when Rodriguez was attacked.

Defendant was arrested hours later driving the blue car, with Josue and another Sureño in the car. Josue admitted being the shooter and said he obtained the gun from a hidden compartment in the car. A car search found the hidden compartment (then empty) and also uncovered a baseball bat and a stabbing shank.

The gun used to kill Rodriguez was recovered later by the police, from a Sureño named Juan O. Juan testified that Daniel telephoned on the afternoon of the shooting and arranged to meet him. Daniel arrived in a blue or gray car driven by defendant, accompanied by Josue. Daniel asked Juan to hide two guns and a box of bullets. Daniel told Juan that one of the guns had been used by Josue to shoot a Norteño. Juan hid the weapons but a police search the next morning recovered them. A criminalist testified that one of those guns was the one used to killed Rodriguez.

Defendant admitted being the driver of the vehicle used in the shooting but denied making any plans to kill a Norteño. In a statement admitted into evidence at trial,

defendant told the police that he had methamphetamine for "breakfast" and was driving the car with five occupants, "just cruising around," when he passed three men that seemed to be Norteños who were "disrespecting" them. The car occupants asked defendant to drive by again. Defendant did not own the car; he had been asked to drive because he looked older than the others.

Defendant knew there "was gonna be some funk," and "[s]ome gang related ass shit" when he and his friends returned. Defendant said he thought his friends were "gonna go over there and beat the shit out of the guy." Defendant knew there was "a bat and shit" in the car, but claimed he did not know anyone had a gun. Defendant did admit that everyone in the car except him covered their faces when they returned to confront the threesome.

The police officer interviewing defendant asked: "What were you gonna do? What were you planning on doing? Obviously you were gonna handle business, right?" Defendant answered: "Yeah, I was gonna get out and beat up on somebody." But defendant said: "I didn't know they were gonna shoot him or nothing." Defendant said that when he stopped the car in the street, one of the men (Rodriguez) approached the car with a knife in his hand. Josue got out of the car with a gun and said "[w]hat's up puta?," which is a Spanish obscenity. The men ran. Jose fired a shot and a man "dropped." Josue returned to the car, yelled "go, go, go, go," and defendant sped away.

Defendant told the police that, after the shooting, some of the car occupants said the man was dead and kept telling Josue he was a murderer. Josue "was like, nah, fuck that." Defendant said Josue was "scared" by the talk, and Josue told the others that he thought he shot the man in the back. A couple of hours after the shooting, the group heard that the man who was shot was dead. Defendant and his friends met Juan, and Daniel gave Juan the gun used in the shooting.

Defendant's girlfriend testified at trial and cast doubt on defendant's claim that he and his friends had no plan to attack Norteños on the day of the shooting. The girlfriend testified that Josue, Daniel, and three other Sureños arrived in a blue car on the afternoon of July 12, 2005, and informed defendant that they just had an argument with Norteños,

and the Norteños threw things at the car. The group in the car told defendant they wanted to return for "payback." They asked defendant to drive because he looked older. Defendant grabbed the keys and got in the car, according to his girlfriend.

A police officer with expertise in gang behavior testified that there was a gang war being waged on city streets between Sureños and Norteños at the time of the shooting. Violent attacks by gang members upon rivals were frequent and those attacks often involved shootings. The expert testified that the "ultimate goal" in gang culture is to kill a rival gang member. Defendant was a long-term Sureño gang member with a violent past who wrote a letter bragging about "smashing" on Norteños and proudly reporting that a Norteño got "pop[ped]" recently.

The gang expert also testified that there is a gang hierarchy starting at the bottom with associates and topping out at original gangster (OG) status that is achieved by those who have been in the gang a long time and have committed violent acts on rival gang members. The officer said the OG is the "shot caller" on the streets, who directs younger members of the gang. The officer opined that defendant was the "OG" and "shot caller" in the group that attacked Rodriguez. The officer noted that defendant was the oldest person in the group, and the one who had "done the most violent acts against rival gang members." When defendant was interviewed by the police, an officer referred to defendant as "the OG in the car," and defendant did not dispute the characterization. The gang expert also testified that gang members do not cover their faces in most gang attacks because they want notoriety and know a rival gang victim will not report the attack to the police. According to the gang expert, gang members only conceal their faces "[w]hen there's going to be a preplanned shooting, most notabl[y] a murder," because a murder will be reported by citizens and investigated by the police.

II. TRIAL COURT PROCEEDINGS

The prosecution presented its case, consisting of the testimony summarized above as well as other evidence. The defense did not present any witnesses. In closing argument to the jury, the prosecutor argued that defendant was guilty of first degree murder because he was the "shot caller" in a group that intended to retaliate against the

Norteños by killing one of their members, and was a knowing accomplice in the premeditated shooting. Alternatively, the prosecutor argued that defendant was guilty of at least second degree murder because defendant admitted to the police that he intended to commit assault with a deadly weapon (a baseball bat), and the shooting was a natural and probable consequence of the gang assault.

Defense counsel, in his argument to the jury, conceded that defendant was a Sureño gang member but maintained that defendant never intended to kill anyone. Counsel said that the evidence showed only that defendant planned to engage in a gang fight and did not show the intent to use a dangerous weapon in the attack. While defendant knew there was a baseball bat in the car, counsel noted that defendant never told police he intended to use the bat.

The jury began its deliberations on the afternoon of Monday, June 16, 2008. On June 18, 2008, two days later, the jury foreperson accused one of the jurors (S.R., Juror No. two) of misconduct. The court investigated the matter the next day by questioning the foreperson and juror S.R. The foreperson said S.R. was claiming familiarity with gangs, drugs, and the neighborhood where the murder occurred, and interjecting her claimed expertise of these matters into the deliberations. The foreperson said he did not remember the juror disclosing these experiences during voir dire and said he thought the juror was being "coach[ed]" or was under some outside "influence."

A questionnaire had been completed by all prospective jurors concerning their personal experiences, and the prosecutor reviewed the questionnaire completed by S.R. The prosecutor argued that the juror lied on the questionnaire by saying she had no knowledge of gangs and was never the victim of a crime. The prosecutor introduced police incident reports showing that S.R. had been the victim of several minor crimes but failed to disclose that fact on the questionnaire. The court discharged S.R. for misconduct and replaced her with an alternate juror. (Pen. Code, § 1089.)

The reconstituted jury resumed deliberations that day, Thursday, June 19, 2008. The court recessed for a long weekend, and deliberations continued on Monday, June 23, 2008. That afternoon, the jury returned its verdict.

The jury found defendant guilty of second degree murder. (Pen. Code, §§ 187, subd. (a), 189.) The jury also found that the murder was committed for the benefit of a criminal street gang and that defendant was a principal in a gang murder committed by the intentional discharge of a firearm. (Pen. Code, §§ 186.22, subd. (b)(1), 12022.53, subds. (d), (e).) The court sentenced defendant to prison for an indeterminate term of 15 years to life for the murder, plus an additional 25 years for the gang-related firearm enhancement. (Pen. Code, §§ 190, 12022.53, subds. (d), (e).) The gang participation enhancement was stayed. (Pen. Code, §§ 186.22, subd. (b)(1), 12022.53, subd. (e)(2).)

III. DISCUSSION

Defendant argues on appeal that (1) his second degree murder conviction was based on the jury finding that murder was a natural and probable consequence of assault with a deadly weapon (a baseball bat), and there was insufficient evidence to instruct, and convict, on the natural and probable consequences doctrine because no assault with a bat ever occurred (CALCRIM No. 403); (2) the court's discharge of a deliberating juror was without good cause, and in violation of defendant's constitutional rights to a jury trial and due process of law (Pen. Code, § 1089; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 16, 29); and (3) the gang-related firearm enhancement (Pen. Code, § 12022.53, subd. (e)), must be stricken because the jury's murder verdict rests on the natural and probable consequences doctrine, which means that the jury found him to be a principal only in the commission of assault with a deadly weapon and not a principal in the commission of murder. We discuss each of these claims in turn.

A. *Substantial evidence supports the murder conviction*

Defendant contends that he "was convicted on the theory that he had intended to aid and abet an assault on perceived rival gang members that would have included use of a bat, which is a deadly weapon, and that murder is a natural and probable consequence of such an attack." Defendant argues that "[i]nsufficient evidence supports the 'natural and probable consequences' theory" because any "intended assault with fists and perhaps a bat" never took place; instead, Josue shot Rodriguez with a handgun. Defendant insists: "There was no evidence from which a jury could reasonably conclude that if [defendant]

only intended a fistfight, even a fight with a bat or a club, he should have expected that someone in his car would use a gun." We reject the claim. Substantial evidence supports defendant's murder conviction.

1. Introduction

"Substantial evidence is evidence which is ' "reasonable in nature, credible, and of solid value." ' " " 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.' " ' " (*People v. Medina* (2009) 46 Cal.4th 913, 919 (*Medina*).)

Defendant participated with five fellow gang members in a planned physical attack upon perceived rival gang members during which defendant's confederate shot and killed one of the intended victims. The shooting was a natural and probable consequence of the gang attack, and thus defendant was properly convicted of murder.

2. The natural and probable consequences doctrine

"The natural and probable consequences doctrine is based on the recognition that those who aid and abet should be responsible for the harm they have naturally, probably, and foreseeably put in motion." (*People v. Avila* (2006) 38 Cal.4th 491, 567.) Accordingly, " '[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of

the act aided and abetted.' [¶] . . . A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury." (*Medina, supra,* 46 Cal.4th at p. 920.) The doctrine exists not only in California, but also in most other jurisdictions. (*Gonzales v. Duenas-Alvarez* (2007) 549 U.S. 183, 190-191.)

3. Gang confrontation cases

Our Supreme Court recently affirmed murder convictions under the natural and probable consequences doctrine on facts similar to those presented here involving a gang confrontation. In *Medina*, three Lil Watts gang members had a fistfight at a party with a rival gang member and, after the fight was broken up, one of the three Lil Watts members shot the rival as he drove away in a car. (*Medina, supra,* 46 Cal.4th at p. 917.) The shooter and the other two Lil Watts members were each convicted of murder. (*Id.* at pp. 917-919.) The court affirmed the convictions imposed on those who participated in the fistfight, but did not fire the gun, concluding that "a rational trier of fact could have found that the shooting of the victim was a reasonably foreseeable consequence of the gang assault." (*Id.* at p. 922.)

Jurors in a number of cases have found shootings to be a foreseeable consequence of gang confrontations, and those findings have been affirmed on appeal. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11, [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1053, 1056, [shooting of rival gang member during retreat from fight was natural and probable consequence of gang fight in which defendant wielded a chain]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [defendant's punching of victim during gang confrontation foreseeably led to fatal shooting of victim by fellow gang member]; *People v. Montano* (1979) 96 Cal.App.3d 221, 226, [defendant's aiding and encouragement of battery on victim foreseeably led to shooting of victim by fellow gang members].)

4. The fatal shooting here was a natural and probable consequence of assault with a deadly weapon

The jury was instructed that, to convict defendant of second degree murder or voluntary manslaughter under the natural and probable consequences doctrine, it would have to find that (1) "defendant knowingly and intentionally aided and abetted an assault with a deadly weapon"; (2) "a co-participant in that offense committed the crime of murder or voluntary manslaughter"; and (3) "[u]nder all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder or voluntary manslaughter was a natural and probable consequence of the commission of an assault with a deadly weapon." The type of deadly weapon (whether a gun, baseball bat, or shank) was not specified in the jury instructions.[1] The jury found defendant guilty of second degree murder.

The evidence here strongly supports a finding that the fatal shooting was a natural and probable consequence of defendant aiding and abetting an assault with a deadly weapon during a gang confrontation. Defendant disputes the sufficiency of the evidence supporting that finding by relying upon isolated pieces of evidence favoring his version of events, specifically his self-serving statements to the police that the attack was unplanned and the presence of a gun unknown. But we must view the evidence in the light most favorable to the prosecution and not, as defendant does, in the light most favorable to the defense. (*Medina, supra,* 46 Cal.4th at p. 922.)

The prosecution's evidence includes the testimony of a gang expert who explained that there was a gang war being waged between Sureños and Norteños at the time of the shooting. Violent attacks by gang members upon rivals were frequent and those attacks often involved shootings. The expert testified that the "ultimate goal" in gang culture is to kill a rival gang member. Evidence at trial also established that defendant was a long-

[1] A court must identify the target crime relied upon by the prosecution, and the court did so here by identifying assault with a deadly weapon as the target crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267-268.) Defendant does not question the adequacy of the jury instruction on appeal.

term Sureño gang member with a violent past who wrote a letter bragging about "smashing" on Norteños and proudly reporting that a Norteño got "pop[ped]" recently. Defendant's girlfriend testified that defendant's Sureño confederates told defendant, shortly before the shooting, that they had an argument with Norteños and the Norteños threw things at the car. The Sureños told defendant they wanted to return for "payback," and defendant got into the car with his five confederates. The gang expert opined that gang members would take guns with them when entering a rival gang's territory to retaliate. Evidence seized after the shooting showed that the car driven by defendant contained two guns, a box of bullets, a baseball bat, and a stabbing shank. Defendant admitted his intention to attack the perceived rival gang members when he drove back to confront them, whatever his intention when he and his confederates first entered the car.

Defendant argues that his case is distinguishable from other gang attacks where homicide was found to be foreseeable because any "intended assault with fists and perhaps a bat" never took place; instead, Josue shot Rodriguez with a handgun. But we cannot assume that the jury found the bat, and not the gun, to be the deadly weapon in the targeted assault. An assault with a gun did occur. In finding defendant guilty of second degree murder, the jury may well have found that defendant knew that Josue intended to shoot at Rodriguez (while lacking specific intent to kill) and that Rodriguez's death was a foreseeable consequence of the shooting. Defendant told police he did not know there were guns in the car but the jury was free to disbelieve defendant on this point. A rational trier of fact could conclude that the car occupants did know there was a gun in the car and planned to shoot a Norteño with the intention of either killing or injuring the victim.

Even if the jury credited defendant's claimed ignorance of the gun—and found the deadly weapon in the targeted assault to be a baseball bat instead of a gun—the jury could still find murder to be a foreseeable consequence of the violent gang confrontation. "[P]rior knowledge that a fellow gang member is armed is not necessary to support a defendant's murder conviction as an aider and abettor." (*Medina, supra,* 46 Cal.4th at p. 921.) "[A]lthough evidence indicating whether the defendant did or did not know a

weapon was present provides grist for argument to the jury on the issue of foreseeability of a homicide, it is not a necessary prerequisite." (*People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5.) In the context of a gang war, a jury could rationally conclude that an attack by six gang members wielding a baseball bat upon rival gang members could escalate into a fatal confrontation.

The fact that the baseball bat was never actually used in the confrontation does not change the analysis. Defendant was still properly found liable for the homicide as a natural and probable consequence of the planned gang assault. In arguing otherwise, defendant notes that the California Supreme Court once commented: "we need not address, and therefore we do not decide, whether a defendant may be convicted under the 'natural and probable consequences' doctrine when the target criminal act was not committed." (*People v. Prettyman, supra,* 14 Cal.4th at p. 262, fn. 4.) The comment reflects the insight that foreseeability of harm in a given case is likely to be attenuated if the target criminal act is only contemplated and never committed. But the comment does not compel a categorical rule that foreseeability of harm never exists if the target criminal act was not committed, and a different criminal act committed. Aiders and abettors are "responsible for the harm they have naturally, probably, and foreseeably put in motion." (*People v. Avila, supra,* 38 Cal.4th at p. 567.)

The California Supreme Court has emphasized that "the ultimate factual question is one of reasonable foreseeability, to be evaluated under *all* the factual circumstances of the case." (*Medina, supra,* 46 Cal.4th at p. 927.) "[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for *any* reasonably foreseeable offense committed as a consequence by the perpetrator." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, italics added.) Therefore, it is not true that "the perpetrator must actually commit the criminal act which the aider and abettor intentionally aids and encourages. . . . [T]he aider and abettor may be liable where he intentionally aids and

encourages one criminal act, but the perpetrator actually commits some other, more serious, criminal act." (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1464-1465.)

Defendant seems to concede the possibility that an aider and abettor may properly be convicted under the natural and probable consequences doctrine when the target criminal act was not committed but argues that, in this case, there is "no logical basis for a conviction." Defendant asserts that "[t]here was no evidence from which a jury could reasonably conclude that if [defendant] only intended a fistfight, even a fight with a bat or a club, he should have expected that someone in his car would use a gun." While the assertion may have some force in a common fistfight, it has no force in the context of the gang attack at issue here. This was not a spontaneous fistfight but a pitched battle in an ongoing gang war. Our Supreme Court has recognized that the gang-related nature of an assault—even one without weapons—may provide the trier of fact with sufficient evidence to conclude that "escalation of the confrontation to a deadly level was reasonably foreseeable." (*Medina, supra,* 46 Cal.4th at pp. 922-923.) In *Medina*, sufficient evidence of a foreseeable escalation from a fistfight to a shooting was found where there was testimony that the attacking gang used deadly violence to gain respect, and gang members were commonly armed and regularly committed gun offenses. (*Id.* at p. 923.) Such is the case here. The jury could reasonably conclude that a reasonable person in defendant's position would have known that escalation was likely to occur when defendant and five other Sureños confronted three perceived Norteños with the intention of physically attacking them—even if the attack was originally intended as a fistfight. Josue's shooting of Rodriguez was a reasonably foreseeable consequence of the assault defendant aided and abetted.

B. *A deliberating juror was properly discharged for misconduct*

A juror was discharged for misconduct during deliberations and replaced with an alternate juror. (Pen. Code, § 1089.) On appeal, defendant contends that the juror's misconduct was minor and did not constitute good cause to discharge her, and that her unjustified discharge from the jury violated his constitutional rights. (Pen. Code, § 1089; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 16, 29.) We reject the contention. The juror lied during voir dire in concealing material information about her familiarity with gangs and prior experiences as a crime victim and was evasive when confronted with the lies. The juror's intentional deceit established grounds for finding bias and discharging her from the jury.

1. Facts

The presentation of evidence at trial took five days. The jury began deliberations on Monday, June 16, 2008 at 3:14 p.m. About an hour after beginning deliberations, the jury submitted a note to the court, asking: "Should drug influence be considered when deciding whether defendant intended to commit [a] crime[?]" Intoxication had not been presented as a defense and no instruction on its relevance had been included in the original instructions to the jury, except to note that "[v]oluntary intoxication is not a defense to assault." Defendant's police statement, however, did include references to his being "high" on methamphetamine on the day of the shooting.

The following morning, on Tuesday, June 17, 2008, the judge responded to the jury's inquiry (after consulting with counsel) by giving an instruction on the relevance of intoxication: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with intent to kill, and whether the defendant acted with deliberation and premeditation, and[/]or the defendant acted with the intent to aid and abet the commission of a crime." That same morning, the jury requested defendant's police statements that had been admitted into evidence and multiple copies of specified jury instructions. The jury recessed for lunch around noon.

On the afternoon of June 17, 2008, the jury wrote: "After deliberating half the day, we are at an impasse regarding the effect of drugs" on defendant "being 'responsible [ ] for his actions' " and that the same juror who has concerns about defendant's intoxication "feels that the assault that was to take place would not have resulted in a deadly outcome. Since we have not been able to decide whether [defendant] aided or abetted in this crime, we cannot move forward with our deliberations. [¶] Please advise us on what we should do." The court asked for further explanation of the problem and the jury wrote: "We can't reach unanimous agreement that (1) The defendant knew that a deadly weapon was going to be used as part of the retaliation and (2) That, because of the influence of intoxication, he was not a 'reasonable person' to know the probable consequence of assault . . . ." The jurors reported: "We don't think we will overcome this. What do we do next?" The court had the jurors adjourn around 3:00 p.m. and consulted counsel concerning a response.

On the morning of Wednesday, June 18, 2008, the court asked the jurors if additional argument by the attorneys concerning voluntary intoxication and its application to the facts of the case would be helpful. The jurors responded that they would appreciate a discussion of the issue "in hopes of removing the deadlock." Defense counsel objected to the procedure. He noted that he had not presented expert testimony to support an intoxication defense but did not want to leave the prosecutor to argue the matter unrebutted. Ultimately, both attorneys argued the matter before the jury. The prosecutor argued that intoxication was unsupported by the evidence and was "not an issue in this case." The prosecutor dismissed defendant's police statement that he was intoxicated on the day of the shooting as a lie and argued that defendant's conduct showed conscious and intentional acts. Defense counsel countered that defendant was a long time drug user, was intoxicated on the day of the shooting, and his intoxication was relevant to his ability to premeditate and form specific intent. Deliberations resumed.

Late that Wednesday morning, just before the jury recessed for lunch, the jury wrote a note to the court stating: "We have one juror who feels very strongly that the prosecution did not present a case for murder beyond a reasonable doubt. This one

person will not budge from this position, despite several attempts from all members to change their view. We have gone 'round and 'round, and are not making progress. We do not think we can reach agreement on a decision." (Underlining original.)

The court was considering giving an additional jury instruction on how to conduct deliberations when the court received a note from the jury foreperson after lunch suggesting that there had been misconduct by the hold-out juror. The foreperson wrote: "I would like to relay to you my concern that juror #2 may be influenced by circumstances of her background that will not allow her to provide adequate explanation as to why she cannot follow the law in this case. During our conversations, juror #2 relayed to us that she had family members involved in the gang life and that she had a relative who was in the witness protection program. [¶] I am concerned that there may be some influence on her that we cannot be allowed to understand. [¶] We are deadlocked in our deliberations because of her actions and inability to articulate her position in any detail that would allow us to continue to deliberate. Were you aware of her particular situation and open to the possibility that there would be outside influence to our deliberation[?]"

The court had the jurors adjourn around 3:00 p.m. and consulted counsel concerning a response. The court determined that a hearing was necessary to explore the possibility of juror misconduct and the prosecution agreed. Defense counsel objected and maintained that either the jurors should be instructed to continue deliberations or the court should declare a mistrial based on a hung jury.

A hearing was held the next morning, on Thursday, June 19, 2008, at which the court questioned both the jury foreperson and Juror No. 2 (S.R.) under oath. The foreperson testified that he was concerned about S.R.'s conduct and that about seven other jurors had expressed similar concerns to him. The foreperson said S.R. was claiming familiarity with gangs, drugs, and the neighborhood where the murder occurred, and interjecting her claimed expertise of these matters into the deliberations. The foreperson said he did not remember the juror disclosing these experiences during voir

dire, and said he thought the juror was being "coach[ed]" or was under some outside "influence."

Specifically, the foreperson testified that S.R. said "someone in her family had been involved with a gang" and she had "more of an insight into what gangs were about." She also reportedly said one of her relatives was in the witness protection program, although she did not specify if the person had been charged with a crime or was a victim of a crime. The foreperson said S.R. provided this last piece of personal information to the jurors in order to present herself "as a person that had some knowledge or background that we didn't have . . . ." S.R. also reportedly said she was familiar with drugs and their effects on people, and relied on that familiarity "as an explanation for her unwillingness to make any decisions that would un-deadlock the jury." The foreperson testified that S.R. also claimed familiarity with the street where the shooting occurred, described its layout, and said the street is too narrow for defendant's stopping the car in the street to "be such a big deal." The foreperson said he and other jurors "tried to draw out" S.R.'s reasoning "behind her unwillingness to work with the charges and try to use the law to make a determination" on the verdict but were "not getting anywhere." The foreperson did acknowledge "some progress" on the previous afternoon, after he wrote his note to the court complaining about S.R.'s conduct, but remained "concerned about the possibility that she could have been influenced," and that "somebody may have put undue pressure on her." The foreperson said he thought "someone may be coaching her" because of her unwillingness to share "her thought process" and "to address the charges." The foreperson felt that S.R. "had already locked in this opinion" of the case. The foreperson said S.R. became "defensive" when asked by the other jurors to explain her reasoning and accused them of being "racist" because she is "Hispanic or Mexican" and "nobody else in the room seems to be Mexican."[2]

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[2] The record on appeal shows that S.R. has a Spanish surname. The record does not include the surnames of other jurors, or provide any other indication concerning ethnicity or national origin of the jurors. Defendant does not claim that ethnic discrimination played any part in the juror's discharge.

After the foreperson was excused from the courtroom, the prosecutor argued that there was evidence of misconduct in S.R.'s failure to disclose her personal experiences on the juror questionnaire she completed as part of the voir dire process and in introducing those experiences as "outside facts" into the deliberations. The court decided to question S.R. "about the issues that are at odds with her questionnaire."

On the questionnaire, S.R. indicated that she was a 43-year-old single woman employed as a grocery clerk. The questionnaire provided an account of the allegations, including the fact that defendant was accused of murder in a Sureño gang shooting. S.R. answered the questionnaire under penalty of perjury. On the questionnaire, S.R. said she had no knowledge or experience of street gangs, that gang violence had never touched her life or the life of anyone close to her, and that she had never seen or met any individuals who she believed to be members of a street gang. The questionnaire did not ask about experience with drugs or familiarity with the neighborhood of the crime. But the questionnaire did identify the street where the shooting occurred and broadly asked if there were any matters that should be brought to the attention of the court. S.R. said "no." When directly questioned on voir dire, S.R. was asked about her experience and attitude toward gangs but not questioned about drugs or familiarity with the neighborhood of the crime. On voir dire, S.R. said she did not have strong feelings about gangs and, when asked if her ideas about gangs were based on media accounts rather than personal experience, she replied "pretty much." S.R. was asked if she had seen gang activity or incidents of violence and she recounted only a purse snatching she witnessed from her car before driving away.

In exploring the foreperson's allegations of misconduct, the court asked S.R. if she said during deliberations that she had a family member in the gang life. S.R. told the court: "No, I said I knew people from my past. I mean 25 to 30 years ago but that's nothing that's current." The court asked S.R. exactly what she said about having experience with the gang life and S.R. replied: "That that could have been—that could have been my lifestyle but I didn't—don't associate." The court asked S.R. why she did

not write anything about her experience with gangs on her juror questionnaire and S.R. said: "It doesn't apply" because it was "25, 30 years ago."

The court also asked S.R. if she said she had a relative in the witness protection program, and S.R. told the court that she said only that she "knew people." When asked about her familiarity with the neighborhood of the shooting, S.R. said she does not frequent the area, had once "stumbled on to it," and only became familiar with the area by seeing maps in court. The court asked S.R. if she had "been open about stating what [her] views are and invit[ing] others to exchange ideas with [her]" while deliberating. S.R. said yes, but that there was "a lot of hostility in the room" and the other jurors interrupt her and "jump[] on" her when she expresses her views.

S.R. was excused and the prosecutor argued that S.R. lied on the juror questionnaire when she said she had never seen or met anyone she believed to be a member of a street gang. The prosecutor noted that familiarity with gangs was "a very relevant issue in this case" and asked that S.R. be discharged for misconduct.

The court recalled S.R. and renewed its questioning. The court read a portion of the pretrial juror questionnaire to S.R. in which she answered "none" when asked if she had any knowledge of, or experience with, street gangs. The court noted that S.R. had just told the court that she had known people in the gang life. S.R. replied: "Not this particular . . . people" and that "it didn't come back to me until after the fact." Questioning continued. "THE COURT: But you just told me a few minutes earlier that but for circumstances you would have been in the gang life. [¶] THE JUROR: Correct, but I mean I haven't thought about that until now. I haven't thought that, that wasn't even a memory that was current with right now until this. [¶] THE COURT: Okay. But my question would be why didn't you—I appreciate that you may have forgotten about it when you were filling out the questionnaire, but why didn't you bring that up? You clearly knew this was a gang case, it's all we talked about. Is there some reason you didn't bring it up during voir dire? [¶] THE JUROR: It didn't—didn't feel like it was something that from 25 to 30 years ago felt that it was. [¶] THE COURT: Okay. [¶] THE JUROR: And I didn't know per se the gang life, I just knew of." [¶] THE

COURT: Then [the questionnaire] says, . . . 'have you seen or met any individuals who you believe to be members of a street gang, please explain,' and you wrote down 'none.' [¶] THE JUROR: No persons that are—what do they say—what was the words used here, wannabees, that's it. Nothing, no one that's with tattoos or locked up or anything of that nature. [¶] THE COURT: Okay. I'm trying to—I'm having difficulty reconciling your earlier comment that but for circumstances you could have been in a gang life with what you're saying right now. [¶] THE JUROR: With the wannabees. [¶] THE COURT: Right. [¶] THE JUROR: With the wannabees that were headed in that direction, if I chose to stick around with them I'm sure. [¶] THE COURT: Wannabees usually are associated with people who are actually members, so have you ever in your life met any members of a gang? [¶] THE JUROR: No."

After this round of questioning, the prosecutor said S.R. made misrepresentations about her experience with gangs on the questionnaire and was now "backtracking" in trying to reconcile her questionnaire answers with her statement to the court that she had almost been in the gang life. As additional instances of misconduct, the prosecutor argued that S.R. was bringing in "outside information" about drugs and the layout of the street where the shooting occurred.

The court recalled the foreperson to clarify some of his statements. The foreperson said S.R. had not been specific about any experience with gangs and only suggested that she knew about gangs. The foreperson said S.R. had been specific about the width of the street where the shooting occurred but did not say how many times she had been on the street. As to drug use, the foreperson said S.R. told the others jurors that she "had been on a prolonged high" on methamphetamine and that "a person couldn't be responsible for their actions because when you are on methamphetamine, it's not that you're high and not aware it's that you don't care."

The court recalled S.R., and she admitted mentioning her experience on methamphetamine but said she was not relating her experience to the evidence. The court asked why she did not mention her familiarity with methamphetamine during voir dire and S.R. said she "didn't think it was important." The juror questionnaire did not

ask any questions about drugs, and it appears that drugs were only briefly mentioned during jury voir dire. When the jurors were individually questioned, S.R. was not asked any questions about drugs.

The prosecutor renewed his request to discharge S.R., and the court recessed to research the matter. The prosecutor soon notified the court that he had additional information to present. The prosecutor presented several police incident reports obtained by the investigating officer in the case. S.R. had been asked on the juror questionnaire if she had ever been the victim of a crime, and she answered no. The incident reports contradicted that statement by showing that S.R. had been the victim of four crimes between 2000 and 2004.[3]

In November 2000, S.R. was the victim of a restraining order violation when the offender paged and sent electronic messages to her. In August 2001, she was the victim of a sexual battery at work when a grocery store customer grabbed her buttocks. In May 2004, she was the victim of vandalism when someone slashed her car tire. And, in August 2004, she was the victim of a residential burglary when a burglar pried open a window screen and stole $500 in coins. On each incident report, S.R. is listed as a witness and her personal contact information is stated, which suggests that S.R. spoke to the police concerning each incident. The court questioned S.R. on the matter, and she said she could not recall any of the crimes except the burglary, which she remembered only when the court asked her about it. She testified that she did not remember any of the crimes at the time she completed the questionnaire.

The court decided to discharge S.R. for misconduct. (Pen. Code, § 1089.) The court told counsel: "I had my doubts about [S.R.'s] credibility before this, but I think this is very clear that she simply is not credible. She is not believable to me that she would be the victim of—let me count them up—five [actually, four] incidents where she talked to the police and only recalls one maybe, but doesn't recall the others. It's just simply not

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[3] Two other incident reports were presented but they do not show S.R. to be the victim of a crime. One is a vehicle accident report, and the other is the registration of a restraining order for S.R.'s benefit.

believable. [¶] So clearly she made a misconduct when she's filling out the questionnaire. I think there are other things that indicate on other issues that she was not credible as well, and of course the court was concerned that she was essentially becoming a witness in the jury room, but essentially above and apart from that, she clearly committed misconduct with not answering the questionnaire truthfully, specifically with regard to whether she's been [the] victim of a crime. So the court is excusing [S.R.]." The court brought S.R. back into the courtroom and told S.R.: "I'm going to excuse you from this case. I'm concerned about the fact that you weren't forthcoming on the questionnaire with regard to [being] a victim of a crime. So you're excused from this case."

The court replaced S.R. with an alternate juror and the reconstituted jury resumed deliberations late on the morning of Thursday, June 19, 2008. At the end of the day, the court recessed for a long weekend. Deliberations continued on Monday, June 23, 2008, and, that afternoon, the jury returned its verdict.

2. General legal principles concerning discharge of a juror

"A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict." (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484.) Section 1089 of the Penal Code "authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is 'found to be unable to perform his or her duty.' " (*People v. Bennett* (2009) 45 Cal.4th 577, 621.) "Removing a juror is, of course, a serious matter, implicating" constitutional protections of a right to jury trial and due process of law. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051-1052.) Accordingly, a juror's bias must appear on the record as a demonstrable reality. "The demonstrable reality test entails a more comprehensive and less deferential review" than a substantial evidence inquiry. (*Id.* at pp. 1052-1053.) The demonstrable reality test "requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established." (*Ibid.*) "[T]he reviewing court

must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Id.* at p. 1053.)

A juror's concealment of material information on voir dire is misconduct. (*In re Hitchings* (1993) 6 Cal.4th 97, 111-116.) Such misconduct has been held to warrant discharge of a juror and substitution with an alternate juror. (*People v. Johnson* (1993) 6 Cal.4th 1, 16, 21-22, [juror discharged for concealing two prior arrests and falling asleep during trial], overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879; *People v. Price* (1991) 1 Cal.4th 324, 399-400 [juror discharged for concealing a prior conviction and arrest]; *People v. Farris* (1977) 66 Cal.App.3d 376, 387 [juror discharged for concealing prior criminal record, among other things].)

"A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process." (*In re Hitchings, supra,* 6 Cal.4th at p. 111.) "[T]he pretrial voir dire process is important because it enables the trial court and the parties to determine whether a prospective juror is unbiased and both can and will follow the law. But the voir dire process works only if jurors answer questions truthfully. 'As the United States Supreme Court has stated, "*Voir dire* examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." ' " (*People v. Wilson* (2008) 44 Cal.4th 758, 822.)

A court may infer bias from a juror's intentional concealment of material information on voir dire. (*People v. Wilson, supra,* 44 Cal.4th at p. 823.) " '[I]n most cases, the honesty or dishonesty of a juror's response [to a question on voir dire] is the best initial indicator of whether the juror in fact was impartial.' " (*In re Hitchings, supra,* 6 Cal.4th at p. 119.) "[W]hen a juror conceals material information on voir dire, 'that information establish[es] substantial grounds for inferring that [the juror] was

biased . . . despite . . . protestations to the contrary.' " (*Id.* at p. 120.) Intentional concealment during voir dire may therefore raise an inference of bias whereas " 'mere inadvertent or unintentional failures to disclose are not accorded the same effect' " and require a positive showing of bias. (*People v. Wilson, supra,* 44 Cal.4th at p. 823.)

"Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175, abrogated by statute on another point as noted in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) "[T]he trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination." (*People v. McPeters, supra*, 2 Cal.4th at p. 1175.) Evidence of intentional concealment was found where "the voir dire questioning [was] sufficiently specific to elicit the information which [was] not disclosed, or as to which a false answer [was] later shown to have been given." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.)

Credibility determinations as a whole rest with the trial court. "The evidence bearing on the question whether a juror has exhibited a disqualifying bias during deliberations may be in conflict. Often, the identified juror will deny it and other jurors will testify to examples of how he or she has revealed it. [Citation.] In such a case the trial court must weigh the credibility of those whose testimony it receives, taking into account the nuances attendant upon live testimony. The trial court may also draw upon the observations it has made of the jurors during voir dire and the trial itself. Naturally, in such circumstances, we afford deference to the trial court's factual determinations, based, as they are, on firsthand observations unavailable to us on appeal." (*People v. Barnwell, supra,* 41 Cal.4th at p. 1053.)

3. Juror S.R. was properly discharged for intentional concealment on voir dire

Juror S.R.'s inability to perform as an impartial juror is shown as a demonstrable reality on this record. The trial court found that S.R. lied during voir dire by saying she had never been the victim of a crime. That finding is well-supported by the evidence. The juror questionnaire phrased a clear, and comprehensive, inquiry as to any possible experience as a crime victim. S.R. was asked: "Have you, a relative, or anyone close to

you ever been a victim of a crime? If so please provide details about the nature of the crime, whether you or they reported it to the police, whether someone was arrested, whether someone was prosecuted for the crime, and what the result was. Also please describe how you or they were treated by the police, the prosecution, any defense attorney if the case went to court, and the court system. Is there anything about this experience that would substantially interfere with your ability to be a fair and impartial juror in this case?" S.R. answered the question: "No."

In fact, S.R. had been the victim of four separate crimes within the previous eight years, as the prosecutor discovered during the jury's deliberations after the jury foreperson raised other concerns about S.R. S.R. claimed she did not remember any of the crimes at the time she completed the questionnaire. The trial court disbelieved her, remarking: "I think this is very clear that she simply is not credible." We must defer to that credibility determination. (*People v. Barnwell, supra,* 41 Cal.4th at p. 1053.)

The determination is, in any event, supported by the record. S.R.'s inability to remember one crime, or two, is arguably plausible. But four crimes? Defendant notes that the crimes were relatively minor. Nevertheless, the crime reports indicate that S.R. spoke to the police in each instance, which suggests that S.R. would likely recall at least some of the incidents when directly asked on the juror questionnaire if she had ever been the victim of a crime and when other prospective jurors were questioned on the subject during voir dire. We also question defendant's claim that only the burglary of S.R.'s residence was sufficiently serious that it "should reasonably have been remembered and cited in [S.R.'s] answer to the question dealing with having been a victim of a crime." The other crimes—a restraining order violation, sexual battery, and vandalism—are not so minor that one is likely to forget them entirely when directly asked to state whether one has ever been the victim of a crime. Also, S.R.'s claim of forgetfulness concerning crimes in which she was personally involved and apparently spoke about the crimes with the police is difficult to reconcile with the fact that she was able to recall, and recount during voir dire, a purse snatching incident she witnessed on the streets and never reported to the police.

There is also the fact that S.R.'s credibility was called into question by other inconsistencies between her answers on voir dire and later statements to the court. On the juror questionnaire, S.R. denied all knowledge and experience with gangs when responding to ten separate inquiries that explored the subject in depth. S.R. said she had no "knowledge of, or experience with, street gangs." S.R. declared, under penalty of perjury, that gang violence had never touched her life or the life of anyone close to her, and that she had never even *seen* anyone she believed to be a member of a gang. In direct questioning on voir dire, S.R. denied having strong feelings about gangs and, when asked if her ideas about gangs were based on media accounts rather than personal experience, she replied "pretty much."

Yet, when the court asked S.R. if she had claimed familiarity with gangs during deliberations (as the foreperson asserted), S.R. grudgingly admitted familiarity. S.R. said "I knew people from my past. I mean 25 to 30 years ago but that's nothing that's current." The court asked S.R. exactly what she told the other jurors about having experience with the gang life and S.R. replied: "That that could have been—that could have been my lifestyle but I didn't—don't associate." The court asked S.R. why she did not write anything about her experience with gangs on her juror questionnaire and S.R. said: "It doesn't apply" because it was "25, 30 years ago." The questionnaire, and voir dire examination of the prospective jurors, was never limited in time but asked about any experience with gangs, even remote experiences. When the court confronted S.R. with this fact, S.R. became evasive. "THE COURT: Then [the questionnaire] says, . . . 'have you seen or met any individuals who you believe to be members of a street gang, please explain,' and you wrote down 'none.' [¶] THE JUROR: No persons that are—what do they say—what was the words used here, wannabees, that's it. Nothing, no one that's with tattoos or locked up or anything of that nature. [¶] THE COURT: Okay. I'm trying to—I'm having difficulty reconciling your earlier comment that but for circumstances you could have been in a gang life with what you're saying right now. [¶] THE JUROR: With the wannabees. [¶] THE COURT: Right. [¶] THE JUROR: With the wannabees that were headed in that direction, if I chose to stick around with them I'm sure. [¶] THE

COURT: Wannabees usually are associated with people who are actually members, so have you ever in your life met any members of a gang? [¶] THE JUROR: No." S.R.'s evasiveness makes her claimed association with gang "wannabees" only, and never actual members, open to question. Even assuming the truth of this last statement, it is not credible that S.R. honestly believed that her experience with gang "wannabees" was not encompassed by the juror questionnaire and voir dire examination that exhaustively explored any and all experiences with gangs. The trial court could reasonably conclude that S.R. lied on the juror questionnaire in denying familiarity with gangs, and could weigh that fact when determining that S.R.'s failure to disclose her experiences as a crime victim was also intentional and not inadvertent.

S.R.'s intentional concealment during voir dire shows bias and warranted her discharge in this case. As noted above, a court may infer bias from a juror's intentional concealment of material information on voir dire. (*People v. Wilson, supra,* 44 Cal.4th at p. 823.) "[W]hen a juror conceals material information on voir dire, 'that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary." (*In re Hitchings, supra,* 6 Cal.4th at p. 120.) Not only did S.R. perjure herself on voir dire, but she repeatedly engaged in obfuscation and evasion when the court confronted her with her lies. These are not the actions of an impartial, fair-minded juror.

Defendant minimizes the significance of a juror's intentional concealment of material facts on voir dire and maintains that "[e]ven willful misstatements on voir dire are grounds for removal only if the true facts would have supported a challenge for cause." Defendant is mistaken. A juror's willful misstatements on voir dire are grounds for removal if the misstatements are material and show the existence of bias under the totality of the circumstances. (*People v. Wilson, supra,* 44 Cal.4th at p. 823; *People v. Barnwell, supra,* 41 Cal.4th 1038, 1051-1053; *People v. Price, supra,* 1 Cal.4th 400-401.)

The rigid rule defendant proposes is drawn from a federal civil action concerning proof of prejudice when seeking postjudgment relief for juror misconduct. (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556 (plur. opn. of Rehnquist,

J.) (*McDonough*).) In *McDonough*, a plurality of the United States Supreme Court said "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." (*Id.* at p. 556; but see *id.* at pp. 556-559 (conc. opns. of Blackmun, J. & Brennan, J.) [five justices applied a totality of the circumstances bias standard]; see *In re Hitchings, supra*, 6 Cal.4th at p. 115, fn. 5 [explaining *McDonough* split].) Our Supreme Court has not adopted the *McDonough* plurality rule. (*In re Hitchings, supra,* 6 Cal.4th at pp. 115, fn. 5, 119.)

In any event, *McDonough* is irrelevant to the situation presented here involving the discharge and substitution of a juror before rendition of judgment rather than a motion for new trial after judgment. The *McDonough* standard "applies to a party seeking to overturn a jury verdict and obtain a new trial on the ground that a juror made a misrepresentation in voir dire. [Citation.] It is based on the policy favoring the finality of jury verdicts, and thus has no application" to cases where jurors are removed before verdict is rendered. (*Com. v. Cousin* (Mass. 2007) 873 N.E.2d 742, 752, fn. 20; accord *People v. Diaz* (1984) 152 Cal.App.3d 926, 937-938 [limiting *McDonough* to new trial motions].) Our Supreme Court has emphasized that the two situations are distinct and dismissed as irrelevant cases concerning new trial motions when the discharge of a juror is at issue on appeal: "The present case does not involve a claim of juror misconduct sufficient to overturn a verdict. Instead, we must determine whether the trial court abused its discretion in discharging one juror and substituting an alternate." (*People v. Johnson, supra*, 6 Cal.4th at p. 21.)

The relevant consideration is whether the juror intentionally concealed material information such that, under the facts and circumstances of the case, bias is shown. (*People v. Wilson, supra,* 44 Cal.4th at p. 823; *People v. Price, supra,* 1 Cal.4th at pp. 400-401.) Here, S.R. intentionally concealed information about her experiences as a crime victim. Defendant denies the materiality of this information by arguing that the crimes were minor, and thus unlikely to affect "her impartiality at all, but, if [they] had, it would have made her more favorable to the prosecution." It is not true that all crime

victims favor the prosecution. Crime victims have varied experiences, some of which may lead to dissatisfaction with the criminal justice system. For this reason, prosecutors commonly explore on voir dire a prospective juror's experience as a crime victim to assess whether a prospective juror had a negative experience with law enforcement that would impact impartiality. The California Supreme Court has " 'repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement' " (*People v. Lenix* (2008) 44 Cal.4th 602, 628), which shows the materiality of the information. A juror's failure to disclose that he or she was a victim of a crime may warrant discharge of the juror. (*People v. Diaz, supra,* 152 Cal.App.3d at pp. 931-939.)

Also, a finding of bias is supported by more than S.R.'s intentional concealment of her experiences as a crime victim. We must consider the case as a whole and determine whether the trial court relied on "evidence that, in light of the entire record, supports its conclusion that bias was established." (*People v. Barnwell, supra,* 41 Cal.4th at pp. 1052-1053.) Here, S.R.'s deceit tended to show bias because she also concealed her prior gang experiences and was evasive when confronted with the inconsistencies between her responses to the juror questionnaire and later statements to the court. The trial court specifically found that S.R. was not credible on issues apart from her experiences as a crime victim. There also was evidence that S.R. was relying on facts not in evidence. " 'A jury's verdict in a criminal case must be based on the evidence presented at trial, not on extrinsic matters.' " (*People v. Wilson, supra,* 44 Cal.4th at p. 829.) Here, no intoxication defense was presented at trial, yet S.R. introduced her personal experience with methamphetamine into the deliberations and used that extrinsic information to weigh defendant's culpability. The trial court was rightly concerned that S.R. "was essentially becoming a witness in the jury room." Under the circumstances as a whole, S.R. was properly discharged from the jury and replaced with an alternate juror.

We reject defendant's characterization of this case as "a disturbing abuse of judicial and prosecutorial power" in which S.R. was subjected to an "inquisition" designed to eliminate a juror holding out for acquittal. There was no "inquisition," only a

lawful and carefully circumscribed investigation into assertions of misconduct made by the jury foreperson. Once the foreperson raised the possibility of juror misconduct, the court was duty-bound to investigate. "[A]n inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) Failure to do so is error. (*People v. Burgener, supra*, 41 Cal.3d at p. 520.) As the trial court rightly noted, it was required to investigate possible misconduct by S.R. when the foreperson wrote a note to the court advising it of "misconduct or outside influence affecting the deliberation."

It is true, of course, that a trial "court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined." (*People v. Cleveland* (2001) 25 Cal.4th 466, 484.) The trial court here took great care to limit its inquiry to allegations of misconduct. When the trial judge began her inquiry with the foreperson, she said: "I want you to be very careful and do not volunteer any information about the determination of guilt or innocence in this case, that's not why you are here. What the court is trying to find out is what the issues are with regard to the deliberation process. So we're talking about conduct not content." The trial judge emphasized: "I am focusing on the conduct of the jurors not the content of the deliberation." That focus was maintained throughout the proceedings. The inquiry was properly conducted, and S.R. properly discharged as a juror.

C. *The gang-related firearm enhancement was properly imposed*

The Penal Code adds a consecutive 25-year-to-life term of imprisonment if a person murders with personal and intentional discharge of a firearm. (Pen. Code, § 12022.53, subds. (a)(1), (d).) If a criminal street gang is involved, all principals (the shooter and accomplices alike) receive the sentence enhancement. (Pen. Code, § 12022.53, subds. (d), (e)(1).) In recognition of the serious threats posed by gang members using firearms, the Penal Code "extends liability to aiders and abettors to

crimes by a principal armed with a gun, for crimes committed in furtherance of the purposes of a criminal street gang." (*People v. Garcia* (2002) 28 Cal.4th 1166, 1176.)

"[I]n order to find an aider and abettor—who is not the shooter—liable under [Penal Code] section 12022.53, subdivision (d), the prosecution must plead and prove that (1) a principal committed an offense enumerated [in the Penal Code, such as murder]; (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*People v. Garcia, supra,* 28 Cal.4th at p. 1174.)

Standard jury instructions incorporate these stated elements and were administered in this case. (CALCRIM Nos. 1401, 1402.) The jury returned a verdict finding defendant guilty of murder and further finding "the allegation that Defendant Faustino Ayala was charged as a principal in the commission of the above offense within the meaning of Penal Code section 12022.53(e) to be TRUE."

Defendant challenges imposition of the enhancement. Defendant first focuses on the language of the verdict form in arguing that "[t]he law requires that the jury actually *find* that [defendant] was a principal, not merely someone who was 'charged as a principal.' " The argument is untenable. The jury clearly found that defendant was, in fact, a principal in the murder. The jury returned three separate verdict forms: one for the offense of murder (Pen. Code, § 187, subd. (a)), one for the gang-related firearm enhancement at issue here (Pen. Code, § 12022.53, subd. (e)), and one for a gang participation enhancement (Pen. Code § 186.22, subd. (b)(1)). The gang-related firearm enhancement verdict form stated: "WE THE JURY IN THE ABOVE-ENTITLED CAUSE having found Defendant Faustino Ayala guilty of the above crime further find the allegation that Defendant Faustino Ayala was charged as a principal in the commission of the above offense within the meaning of Penal Code section 12022.53(e)

to be TRUE." Arguably, the verdict form is less than perfect in stating that the jury finds the allegation that defendant *was charged as a principal* to be true, rather than stating that the jury finds the allegation that defendant *was* a principal to be true. But this is a minor imperfection. Clearly, the jury found that defendant was a principal in the commission of murder—the other verdict form plainly states the jury's finding that defendant is guilty of murder.

Defendant acknowledges this fact but argues that the jury's murder verdict rests on the natural and probable consequences doctrine, which means that the jury found him to be a principal only in the commission of assault with a deadly weapon and not a principal in the commission of murder. The argument fails to appreciate the import of the natural and probable consequences doctrine. A person who aids and abets the commission of a crime is a "principal" and shares the guilt of the actual perpetrator. (Pen. Code, § 31; *People v. Prettyman, supra,* 14 Cal.4th at p. 259.) An aider and abettor is liable not only for the offense one aids or abets but also for any other reasonably foreseeable offense committed by the person aided and abetted. (*People v. Price, supra,* 1 Cal.4th at p. 442.) Thus, an aider and abettor " ' "is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable consequences of any act that he knowingly aided or encouraged." ' " (*People v. Croy, supra,* 41 Cal.3d 1, at p. 12, fn. 5, italics omitted.) In short, a principal in the commission of assault with a deadly weapon is a principal in the commission of murder if murder was a reasonably foreseeable consequence of the assault, as it was here. Defendant was a principal in the murder and thus subject to the gang-related firearm enhancement for his confederate's intentional and personal discharge of a gun that killed Rodriguez.

Our conclusion is in accord with *People v. Gonzales, supra,* 87 Cal.App.4th at pages 13-15, where the court of appeal held that the Penal Code section 12022.53 firearm enhancement applies to a gang accomplice who is convicted of murder as a natural and probable consequence of assault. As the *Gonzales* court noted, the "statute is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang

members who aid and abet that offense in furtherance of the objectives of a criminal street gang." (*People v. Gonzales, supra,* 87 Cal.App.4th at p. 15.) The statute does not limit the enhancement to those who directly aid and abet the enumerated felony (here, murder) but necessarily includes those who aid and abet a lesser crime if murder is a natural and probable consequence of the aided crime. Any other conclusion is "contrary to aider and abettor jurisprudence in California," which imposes liability upon aiders and abettors for both the crimes they intend and the crimes that are natural and probable consequences of the intended crimes. (*Ibid.*) The gang-related firearm enhancement was properly imposed here.

IV. DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Ruvolo, P. J.

_____
Rivera, J.

Trial Court	San Mateo County Superior Court
Trial Judge	Honorable Barbara J. Mallach
For Plaintiff and Respondent	Edmund G. Brown, Jr., Esq. California Attorney General Dane R. Gillette, Esq. Chief Assistant Attorney General Gerald A. Engler, Esq. Senior Assistant Attorney General Stan Helfman, Esq. Supervising Deputy Attorney General Christopher J. Wei, Esq. Deputy Attorney General
For Appellant and Defendant	Ozro William Childs