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CERTIFIED FOR PARTIAL PUBLICATION*

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** **(Solano County** **Super. Ct. No. FCR 178124)**

Michael Glenn Braxton appeals his conviction by jury verdict of attempted murder (Pen. Code, §§ 187/664[1]). The jury also found true the allegations that he personally and intentionally discharged a firearm in the commission of the attempted murder, which proximately caused great bodily injury to the victim. (§§ 12022.53, subd. (d), 12022.7, subd. (a).) Appellant contends the trial court erred in refusing his oral motion for new trial. He also asserts evidentiary and instructional error.

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

* Pursuant to California Rules of Court, rules 976(b) and 976.1, part II of this opinion is not certified for publication.

[1] Unless otherwise noted, all further section references are to the Penal Code.

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 a street nickname "the hit man." He was 50 years old in 1999.

September 12, 1999 Eviction

Because of appellant's arrest, the park's owner, managers, and attorney decided to evict him. On September 12, after his release from jail, he was served with a 60 day notice of eviction.

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 her house. She then heard Bruno say, "No, Mike, don't," after which 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,

[2] According to the presentence 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 incident from which this appeal derives.

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.

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 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. 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 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

Appellant contends the court committed reversible error in refusing to hear his oral motion for new trial.

A. *Procedural Background*

The jury returned its guilty verdict on June 14, 2001, and the case was set for sentencing on August 9.

At the outset of the sentencing hearing defense counsel announced he was not prepared to proceed to sentencing.

"[DEFENSE COUNSEL]: . . . There's a matter that must be resolved prior to [appellant's] being sentenced. [¶] I've got affidavits from three of the jurors that indicate there may be possible misconduct by the jury in reaching their verdicts. And I think --

"THE COURT: How come there's no motion that's been filed? It's been eight weeks since this matter was set.

"[DEFENSE COUNSEL]: Your Honor, I haven't filed a written motion for new trial. I could make it orally, but I prefer to do it in writing.

"THE COURT: Let me just state, Counsel, today is the date and time for sentencing. Normally motions for new trial are filed before the date for sentencing, and I haven't received anything. So as far as this Court is concerned, we are going to proceed to sentencing.

"[DEFENSE COUNSEL]: Certainly on [appellant's] behalf, I would like to make a motion for new trial.

"THE COURT: I think that, given the seriousness of these charges, any motion of that magnitude should be done in writing and in advance of today's hearing. I will certainly not entertain any oral motion.

"[DEFENSE COUNSEL]: Well, if that's the case, I'd like to make a record, then. [¶] . . . The investigation I've received, reports I've received so far, indicate that three

jurors have advised me of possible misconduct. And I have three declarations signed by jurors [number 8, 11, and 12.] All three of these jurors signed a declaration in which they declared the following --

"THE COURT: [Defense counsel], this all seems quite out of order. Again, you seem to be continuing to try to make a motion for a new trial. As I indicated, the Penal Code and the Rules of Court require that such a motion is to be made in writing. There's supposed to be notice provided to the other side, an opportunity to be heard, and such a motion is to be entertained at the time of sentencing. [¶] Again, this Court has not received anything. So I don't quite understand what it is that you're trying to do.

"[DEFENSE COUNSEL]: Your Honor, I'm not certain that a motion for new trial must be made in writing. As I indicated, I would prefer that the matter be continued so that . . . I could file a written motion.

"THE COURT: Perhaps, then, if the Court heard a reason for continuing this -- why wasn't a motion to continue filed in advance of the hearing as required by Penal Code Section 1050? Good cause is needed. Motions to continue are supposed to be filed at least two days before the hearing.

"[DEFENSE COUNSEL]: Your Honor, only recently was I able to obtain the declaration of [juror number 8, who] was on vacation.

"THE COURT: When did you receive it?

"[DEFENSE COUNSEL]: I believe it was approximately July 28th.

"THE COURT: [Deputy District Attorney], did you wish to be heard regarding this matter?

"[DEPUTY DISTRICT ATTORNEY]: Yes, Your Honor. Apparently [defense counsel] says he has three declarations. The last one, I take it, would be [juror number 8, whose declaration was received] at least a week and a half or more ago. The others pre-date that. I don't understand why -- we're here today, the victims are here today, obviously with a great expectation of proceeding. And there is the emotional impact of preparing to come forward today and also speak to this Court today on sentencing to resolve this matter. And I think it does a great injustice to them to find themselves in this

situation of basically coming in here, sitting, and within a matter of just a few seconds, having their expectations and all that impact upon them, their victimization continued. And I really want to make that known . . . I think it's a great injustice to them.

"THE COURT: Are you objecting to allowing an oral motion to be entertained by the Court at this time?

"[DEPUTY DISTRICT ATTORNEY]: Oh, absolutely.

. . . . . .

"THE COURT: The sole concern that this Court has is whether or not there's good cause to proceed in the manner that you [defense counsel] are proposing. I've heard [deputy district attorney's] comments, but, again, today is the date and time for sentencing. A motion for a new trial, if one were to be filed, should have been on file today, so that the Court could address that issue and, if it was to be denied, then to proceed to sentencing. [¶] The Court is not going to entertain an oral motion for a new trial, there being no excuse offered for the failure to file a written motion. I think in a case of this magnitude, if there's going to be a motion for new trial, it has to be done in writing. I've not heard yet a complete explanation as to why that was not done. I'm not going to entertain an oral motion for a new trial. [¶] And the Court is prepared to go forward with sentencing, unless you can establish some good cause for why you have not filed it.

"[DEFENSE COUNSEL]: My explanation is this: It's always difficult to contact jurors, especially when we're not given the personal identification information. Secondly, that the issue that I believe is a basis for the new trial has to do with misconduct. I have researched the issue, and it's somewhat complicated. It's a serious enough case that I . . . don't want to just file a very quick boilerplate motion. . . . I . . . think it's necessary that it be briefed adequately and written properly. [¶] Again, I . . . think that [appellant] . . . has a right to make a motion for new trial, for those reasons. . . ."

. . . . . .

THE COURT: "The Court will deny defense counsel an opportunity to make an oral motion for a new trial."

B. *Analysis*

1. *Failure to hear the oral new trial motion was error.*

"A motion for a new trial is a legislatively established procedure which it is the right of any convicted defendant to invoke." (*People v. Sarazzawski (*1945) 27 Cal.2d 7, 17.) Juror misconduct is a statutorily authorized ground for seeking a new trial. (§ 1181, subds. (2)-(4).)

A defendant must move for new trial before pronouncement of judgment, and must specify the ground(s) on which his motion is based. (§ 1182[3]; *Thurmond v. Superior Court* (1957) 49 Cal.2d 17, 19; *People v. Taylor* (1967) 250 Cal.App.2d 367, 372; *People v. Grake* (1964) 227 Cal.App.2d 289, 292.) Although a motion for new trial based on juror misconduct is generally supported by writings, e.g., juror affidavits (see *People v. Hedgecock* (1990) 51 Cal.3d 395, 415, 419; *People v. Pierce* (1979) 24 Cal.3d 199, 208), the motion itself need not be written, and, historically, may be oral. (*People v. Ah Sam* (1871) 41 Cal. 645, 651; *People v. Simon* (1989) 208 Cal.App.3d 841, 847; *People v. Haldeen* (1968) 267 Cal.App.2d 478, 481; *People v. Grake, supra,* 227 Cal.App.2d at p. 292.) When a motion for new trial is properly before the court before pronouncement of judgment, the court must determine the motion. (§ 1182; *Thurmond v. Superior Court, supra,* 49 Cal.2d at p. 19; *People v. Taylor, supra,* 250 Cal.App.2d at p. 372; *People v. Grake, supra,* 227 Cal.App.2d at p. 292.)

Here, appellant made a timely motion for new trial by applying for it before judgment. (§ 1182.) He specifically articulated the permissible ground on which he based his motion: jury misconduct. He was simultaneously prepared to offer three juror declarations to support the motion. Because appellant satisfied the essential criteria for

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[3] Section 1182 states, in relevant part: "The application for a new trial must be made and determined before judgment . . . and the order granting or denying the application shall be immediately entered by the clerk in the minutes."

moving for new trial, the court was obligated to determine his motion. Its refusal to entertain the motion was error.

The People assert the court did not err, relying on the well-established rule that a court has broad discretion to grant or deny a motion for new trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 693.) However, the rule presupposes that the trial court has in fact exercised its discretion as to the merits of the motion, which it does not do if it refuses to consider the motion at all. Here, the court did not purport to exercise any discretion on the motion's merits because of its mistaken belief that statutes and court rules mandate that motions for new trial can only be made in writing.

The People also assert the court's refusal to consider the motion avoided unfair treatment to the People, insofar as they had no advance warning of the motion, and thus no time to prepare a rebuttal. The assertion is unfounded.

When a defendant seeks a new trial based on juror misconduct, the court must first determine whether the juror declarations offered to test the verdict are admissible. (Evid. Code, § 1150, subd. (a); *People v. Perez* (1992) 4 Cal.App.4th 893, 906.) If the court, after reviewing appellant's three proffered declarations, had determined they were inadmissible, it could have denied the motion on that basis, and the People would not have been denied an opportunity to respond. (4 Cal.App.4th at pp. 906-907.) On the other hand, if the court determined the declarations were admissible and demonstrated possible misconduct, and the People then professed difficulty in offering an appropriate extemporaneous rebuttal, the court could readily have granted them a continuance to prepare a more thorough response.

In fact, the deputy district attorney's objection to permitting appellant to make his motion for new trial did not derive from the fact the deputy was unprepared to respond to it. His objection stemmed from his concern that delaying, and possibly canceling, the sentencing that was scheduled for that day in order to hear the motion for new trial would be unjust to the victim and other interested parties who were gathered in the courtroom in anticipation of the scheduled sentencing.

Finally, the People argue that the court did not abuse its discretion because defense counsel failed to offer a satisfactory explanation why he had not filed a written motion for new trial, even though he stated he would have preferred to do so. The adequacy of defense counsel's explanation has no bearing on the propriety of the court's ruling. Defense counsel's gratuitous remarks notwithstanding, appellant presented a timely, specifically-grounded, oral motion for new trial.

2. *Availability of a new trial remedy under section 1202.*

Appellant relies on section 1202 to argue that the court's refusal to hear his new trial motion requires that we grant him a new trial.[4] We disagree. Generally, motions for new trial are governed by sections 1179-1182. Section 1179 defines a new trial[5], while section 1180 provides that the grant of a new trial places the parties in "the same position as if no trial had been had."[6] Section 1181 sets forth nine specific grounds for the grant of such a motion[7], and section 1182 requires the motion to "be made and determined before

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[4] Section 1202 states: "If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in Section 1191, why judgment should not be pronounced, it shall thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of Section 1191, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial."

[5] Section 1179 states: "A new trial is a reexamination of the issue in the same Court, before another jury, after a verdict has been given."

[6] Section 1180 states: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading."

[7] In abbreviated form, the specified grounds of section 1181 are (1) defendant's absence from trial; (2) jury's receipt of extra-judicial evidence; (3) jury's departure from deliberation without court permission and juror misconduct; (4) verdict by lot; (5) erroneous instruction, evidentiary ruling, or prosecutorial misconduct; (6) and (7) verdict contrary to law or evidence; (8) newly discovered evidence not, despite reasonable diligence, available to defendant during trial; and (9) lack of phonographic report.

judgment . . .[8] In effect, section 1202 adds two additional bases for a new trial to those listed in section 1181: when the court fails to pronounce judgment in a timely manner or when the court refuses to hear a new trial motion or fails to resolve it before pronouncing judgment. (See generally, 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 92.) Appellant contends that the right to a new trial, granted by section 1202, is self-executing. We are not persuaded and conclude that, in the absence of a motion for a new trial relying on one of the grounds set forth in that statute, the defendant waives his right to a new trial.

First, we note that section 1181 not only limits the grounds for a new trial, but expressly conditions a new trial on a defense motion. Although section 1202 contains no such statutory language, appellate courts have consistently imposed a similar requirement and concluded that a defendant waives the right to a new trial when judgment is not timely pronounced unless he or she specifically demands it. For example, in *People v. Von Moltke* (1931) 118 Cal.App. 568, the trial court pronounced judgment over the defendant's objection that it had been unduly delayed. While agreeing that the delay was improper, the appellate court declined to order a new trial "since the defendant, although he objected thereto, did not ask for a new trial. . . ." (*Id.* at p. 573.) In *People v. Manes* (1930) 104 Cal.App. 493, 498, the defendant also was sentenced beyond the prescribed date. Prior to sentence he had made a motion for a new trial, but not on the ground that judgment had not been pronounced. Relying on *People v. Okomoto* (1915) 26 Cal.App. 568, 573, the court in *Manes* concluded there was no merit to the contention that the court had lost jurisdiction to pronounce sentence and defendant was entitled to a new trial. "'Here it appears that the defendant was entitled to a new trial; but it appears that a new trial was not refused, inasmuch as he did not ask for it . . . It has been held by this court that, in the absence of any demand made by him *for a new trial upon the ground that the legal time limit had expired, the court might rightfully enter the judgment.*'" (*People v. Manes, supra*, 104 Cal.App. at p. 498, citing *People v. Okomoto, supra,* 26 Cal.App. at p. 573, italics in original.) And, in *People v. Cunningham* (2001) 25 Cal.4th 926, 1044, our

[8] See footnote 3, *ante*.

Supreme Court observed, "Section 1202 provides that if the judgment is not rendered or pronounced within the statutory time . . . the defendant is entitled to a new trial *if he or she requests one* . . . Although defendant objected generally to the 28-day continuation of sentencing from the June 16, 1989, hearing to the hearing that was held on July 14, 1989, he did not move for a new trial. In any event, that delay between the two hearings did not result in a miscarriage of justice." (Italics added.)

We believe this same requirement should be imposed when a defendant seeks a new trial on the basis that the trial court refused to rule on a timely new trial motion. Both grounds -- failure to announce judgment in a timely manner and failure of it to hear or resolve a motion for new trial -- are contained in the same statute, and each contains parallel language directing a new trial when the trial court fails to follow the statutory directive. Both have the same goal: prompt imposition of judgment and sentence. Requiring the defendant to call the trial court's attention to this specific problem by a separate new trial motion enhances the likelihood of accomplishing this goal. Had defense counsel in this case supplemented his new trial motion with a new motion specifying the ground of refusing to hear or decide such a motion as required by section 1202, the trial court might well have realized its error and would certainly have been alerted that a refusal to hear the motion would require a new trial regardless of the motion's merits.

Finally, a refusal to hear a motion for new trial, as in this case, will often preclude any harmless error analysis. When defense counsel is not permitted to present evidence, no record exists for us to analyze. Under the holding of our Supreme Court in *Sarazzawski*, the refusal to permit a defendant a reasonable opportunity to both prepare and present a motion for a new trial, under the circumstance existing there, is reversible per se. (*People v. Sarazzawski, supra,* 27 Cal.2d at pp. 11, 17.)[9] This result provides an

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[9] In *Sarazzawski*, *supra*, 27 Cal.2d at pages 11 and 17 the Supreme Court held that the trial court's refusal to hear the motion for a new trial constituted a miscarriage of justice under article VI, section 13, of the California Constitution [then article VI, section 4 1/2]. The harmless error rule would, therefore, be inapplicable. (Cf. *People v. Flood* (1998) 18 Cal.4th 470, 488.) *Sarazzawski* seems to rest on the common sense notion that the

additional basis for requiring a defendant who asserts a violation of section 1202 to raise his claim of error first in a new trial motion. In the absence of evidence that appellant sought to obtain a hearing or "trial" on his section 1202 claim of error via a new trial motion, we decline to impose the remedy of a new trial as defined in sections 1179 and 1180.

While the statutory remedy of a new trial is not available to defendant, because he never demanded one on the basis of a violation of section 1202, he is entitled to the hearing on his motion, which the trial court denied him. In short, any structural error is cured by a remand for the "trial" on the motion heretofor denied. (*People v. Grake, supra,* 227 Cal.App.2d at pp. 292-293; *People v. Jaramillo* (1962) 208 Cal.App.2d 620, 627-628.) "Justice requires that the judgment be vacated with directions to hear and determine the motion for a new trial. [Citation.]" (208 Cal.App.2d at p. 627.)

II. Evidentiary and Instructional Errors

We also address appellant's claims of error on appeal that he did not assert as grounds for granting his motion for new trial. He contends the court erred in admitting evidence of his purported character for violence and in giving and/or refusing certain jury instructions.

A. *Evidentiary Rulings*

1. The court admitted into evidence appellant's August 30 statement 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. The People had argued the statement was probative

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defendant should not be held responsible for the court's failure to create a record. We note, however, that one Court of Appeal adopted without analysis the harmless error rule, where a sufficient record existed to permit an assessment of prejudice, despite the court's refusal to hear the motion. (*People v. Teddie* (1981) 120 Cal.App.3d 756.) According to *Teddie*, section 1202 error "has long been . . . subject to the redeeming grace of Article VI, section 13, (formerly sec. 4 1/2) of the Constitution. . . . Thus tardy pronouncement of judgment is reversible error only if the defendant can show prejudice." (*People v. Teddie*, *supra*, 120 Cal.App.3d at pp. 763-764; see also, 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 148.) We need not comment on the apparent evolution of the concept of reversible per se error.

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.

Appellant's statements were, effectively, generic threats to do harm. Given the short time span between his making them and the charged offense, 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.)

2. 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, as relevant to his motive and intent for the September 14 shooting. (Evid. Code, § 1101, subd. (b).) Appellant agrees that evidence of the confiscation of his guns on August 30 was admissible as probative of intent. He argues that the events leading up to and surrounding the confiscation had no tendency in reason to prove "anything of legitimate relevance" to the charge of attempted murder of Bruno on September 14.

The admissibility of evidence of uncharged offenses 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. Carter* (1993) 19 Cal.App.4th 1236, 1246.) Whether appellant intended to kill Bruno was the pivotal issue of the case. When intent is the question, the similarity between the charged and uncharged offenses must be substantial, although it need not be of the same "quantum" necessary when the issue is identity. (*Ibid*.)

The August 30 discharge of the firearm is not substantially similar to the charged offense of attempted murder to logically, naturally, and by reasonable inference (Evid. Code, § 210) establish that the attempted murder was committed with the charged intent of malice aforethought.[10] The August 30 incident involved appellant firing his gun into

[10] The information also alleged that the attempted murder was willful, deliberate, and premeditated, but the jury specifically found this allegation not true, so it is not an issue

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, it was improperly admitted under Evidence Code section 1101, subdivision (b) as uncharged conduct probative of the disputed material fact of appellant's specific intent to kill Bruno.

3. Appellant'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 appellant 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 relevant to material facts sought to be proved (Evid. Code, § 1101, subd. (b)), 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, subd. (a), 1102.)

Even though admission of the latter two pieces of evidence was erroneous, the error was not prejudicial. Bruno testified that after appellant called out her name specifically, he pulled a gun from his belt and pointed it at her head. One neighbor saw him hold the gun to Bruno's head, then her torso, and fire multiple shots. Another

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on appeal. The jury was instructed that "malice aforethought" was the "specific intent to kill unlawfully another human being."

neighbor saw him shoot her in the chest once and several times after she fell to the ground. Appellant admitted pointing a loaded gun at Bruno's head. He also admitted that drinking can make him violent, and that he began a drinking binge two days before the shooting. Furthermore, 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, and had an elevated blood sugar level that could cause diminished thinking, yet the jury rejected this expert hypothesis. Given the strong evidence establishing appellant's intent to shoot Bruno and the rejection of 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.)

B. *Instructions*

1. Appellant contends the verdict form improperly instructed the jury that 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, 332.) The jury was instructed with CALJIC No. 17.10, which encompasses this principle.[11]

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11 CALJIC No. 17.10, as read to the jury, 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."

The court then read the jury the verdict form it would be required to answer. The form first asks whether the jury finds the defendant guilty or not guilty of the crime of attempted murder. It then asks whether the jury finds him guilty or not guilty of assault with a firearm; this question is prefaced with the statement that the question should be answered only if the jury has found the defendant not guilty of attempted murder.

When read together with CALJIC No. 17.10, the verdict form did not improperly preclude the jury from evaluating the crime charged and the lesser offense in any order it chose during its deliberations. It merely instructed the jury on the sequence in which the verdicts themselves were to be returned. If a defendant is concerned that the instructions are imprecise, he may request more specific ones, which appellant did not do. (See *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.)

2. Relying on *People v. Rios* (2000) 23 Cal.4th 450, 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. (23 Cal.4th 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, italics in original.) 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.

3. 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 the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this 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 not be given 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, & citations therein.) There was no error in giving the flight instruction.

4. Appellant contends the court erred in giving CALJIC No. 2.62, which provides that the jury may draw an adverse inference from a defendant's failure when testifying to explain or deny evidence against him.[12] The People sought the instruction because

[12] CALJIC No. 2.62 states: "In this case defendant has testified to certain matters. [¶] If you find that a 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 be reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against him does not, by itself,

appellant failed to explain or remember what occurred during the shooting of Bruno, claiming he suffered a "black out" 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.

Nevertheless, the error in giving this instruction was not prejudicial. "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756.) It favors a defendant to the extent that it explains when drawing an unfavorable inference is unreasonable; it cautions that the failure to deny does not create a presumption of guilt or, by itself, warrant an inference of guilt; and it reiterates that the failure does not relieve the prosecution of its burden of proving each element beyond a reasonable doubt. Furthermore, any prejudicial effect of CALJIC No. 2.62 is diminished when, as here, the jury is instructed to disregard any instruction that applies to a set of facts it determines does not exist. (CALJIC No. 17.31.) It is not reasonably probable appellant would have obtained a more favorable result absent the instruction. (*Ballard*, *supra*, 1 Cal.App.4th at pp. 756-757; *Kondor*, *supra*, 200 Cal.App. 3d at pp. 57-58.)

5. 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

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warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him, because of his failure to deny or explain this evidence."

intent, plan, motive, 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, supra* 49 Cal.3d at page 1014 held that a generic threat is admissible to show homicidal intent "where other evidence brings the actual victim within the scope of the threat." Insofar as appellant's comments to the police following the August 30 incident were provoked by an incident at the mobile home park, the victim, as a mobile home park employee, may be construed as "within the scope" of appellant's threat, so there was evidence to support the instruction.

Similarly, because appellant's August 30 comments 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 do 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 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 absent this instruction. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278.)

DISPOSITION

The judgment is reversed and the matter remanded with directions to permit appellant to renew his motion for new trial within 30 days of the remittitur. If the trial court determines that appellant has established grounds for a new trial, it shall set the case for retrial. If it determines that appellant is not entitled to a new trial, or if appellant fails to make a timely motion, it shall re-arraign appellant for judgment and pronounce judgment on the verdict. (See *People v. Minor* (1980) 104 Cal.App.3d 194, 200; *People v. VanBuskirk* (1976) 61 Cal.App.3d 395, 407.)

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Jones, P.J.

We concur:

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Simons, J.

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Gemello, J.

Trial court:	Solano County Superior Court
Trial judge:	Hon. Ramona J. Garrett
Counsel for plaintiff and respondent:	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Ronald A. Bass Senior Assistant Attorney General René A. Chacón Supervising Deputy Attorney General Bruce Ortega Deputy Attorney General
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