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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.** **DARVIN HEATH,** **Defendant and Appellant.**	**A107676** **(Contra Costa County Super. Ct. No. 032216-4)** **ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on November 28, 2005, be modified as follows:

1. On page 9, the third full paragraph, beginning "Appellant's new trial motion" is deleted and the following is inserted in its place:

> Appellant's new trial motion relied, in part, on a declaration by a juror submitted in support of the motion that she assumed the deadly weapon referenced in the question was a gun. On appeal, appellant argues that the juror's declaration demonstrated that defense counsel's poorly phrased question was prejudicial. Juror A.F.'s undated declaration stated, in relevant part: "When [appellant]

* This modification affects only the nonpublished portion of this opinion.

testified, the defense attorney asked him about prior crimes. When the defense attorney asked [appellant] whether or not he had been convicted of assault with a deadly weapon, and [appellant] answered yes, I assumed that the deadly weapon was a gun and if [appellant] had, had a gun before he probably had a gun this time. If I had known different and that someone else owned the gun and put it in the car, probably I would have voted not guilty."~(CT 272)~

Although not raised by the People, the portion of the juror declaration relied upon by appellant is inadmissible under Evidence Code section 1150, subdivision (a), which provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent or to dissent from the verdict or concerning the mental processes by which it was determined."

Evidence Code section 1150 "distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . .' [Citation.] 'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citations.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

Here, the juror declared she incorrectly assumed appellant had a prior firearm-related conviction because of the phrasing of counsel's question. Further, the juror stated that a correct understanding of the details of the prior felony conviction would "probably" have affected her decision. These statements fall within the prohibition of Evidence Code section 1150 because they attempt to impeach the verdict with evidence of a juror's mental processes. Consequently, the declaration was inadmissible.

> As we noted previously, the trial court denied the motion for new trial without expressly addressing appellant's claim that defense counsel's phrasing of the question left the jury with the impression that appellant had previously possessed a gun. We are entitled to presume that the trial court followed the law (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913, 915) and did not consider the affidavit. We thus conclude that appellant has failed to establish that the court abused its discretion in denying the motion for new trial on the ground of ineffective assistance of counsel. No admissible evidence in the record before us establishes that the jury was misled by counsel's question, and we cannot conclude that had the question been rephrased, a different result would have been obtained.

2. On page 10, the first full paragraph, beginning "We conclude that no abuse" is deleted.

This modification changes the judgment.

Respondent's petition for rehearing is denied.

Dated: _____ _____, P.J.