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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
RONNIE LOUVIER,
Defendant and Appellant.

A127955
(San Francisco County
Super. Ct. No. 207079)

Defendant Ronnie Louvier appeals the judgment imposed following his jury-trial conviction for second degree murder. Defendant contends the judgment should be vacated and the matter remanded for a new trial because the trial court coerced the jury verdict. We shall affirm.

PROCEDURAL BACKGROUND

In November 2008, the People filed an information accusing defendant in count 1 of the murder of Marquise Washington on or about March 20, 2008, in violation of Penal Code, section 187, subdivision (a).¹ The People also accused defendant of participation in a criminal street gang, in violation of section 186.22, subd. (a) (count 2); possession of a firearm by a person under 30, in violation of section 12021, subd. (e) (count 3); possession of a controlled substance with a firearm, in violation of Health and Safety Code, section 11370.1, subdivision (a) (count 4); and possession of a controlled substance, in violation of Health and Safety Code, section 11350, subdivision (a)

¹ Further statutory references are to the Penal Code unless otherwise stated.

(count 5). Further, the information alleged defendant personally discharged a firearm (§ 12022.53, subd. (d)) in the commission of count 1, committed the offenses charged in counts 1 and 3 for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)) and committed all offenses while on bail (§ 12022.1).

The evidentiary phase of defendant's jury trial began on August 10, 2009. On October 13, 2009, the jury returned guilty verdicts on the firearm and drug offenses charged in counts 3-5 and found true the allegation defendant committed those offenses while on bail. Following further deliberations, on October 16, 2009, the jury found defendant guilty of second degree murder as charged in count 1, found true the allegations that he personally discharged a firearm in the commission of the offense and committed the offense while on bail. However, the jury found the allegation that he committed the murder for the benefit of a street gang not true and acquitted defendant of participating in a criminal street gang as alleged in count 2.

On February 10, 2010, the trial court sentenced defendant to an indeterminate term of 43 years-to-life in state prison. Defendant filed a notice of appeal on the date of sentencing.

FACTS

The issue raised on appeal does not require an extensive summation of the evidence adduced at trial. In brief, the evidence showed Marquis Washington died from a bullet to the head in a drive-by shooting at the intersection of Gough and Turk Streets in San Francisco at around 8:00 p.m. on March 20, 2008. A witness heard the shots, saw a black Camaro leave the scene, wrote down the license plate number of the car and gave it to the police. Utilizing the information provided by the witness, police traced the vehicle to defendant, who lived with his aunt in San Leandro at that time.

On the morning after the shooting, police observed defendant cleaning the driver's side window on the Camaro and then apprehended him as he was getting into the vehicle. After taking him into custody, police tested for, and found, gunshot residue on defendant's hands. During a search of the Camaro, police found a hidden compartment in the dashboard containing a Glock semi-automatic pistol loaded with nine .9 mm Luger

RP cartridges, as well as a quantity of rock cocaine. No fingerprints were found on the gun. The weapon was subjected to DNA testing, which showed defendant was a major donor of the DNA found on it. Police also searched defendant's bedroom at his aunt's house and recovered a box of Remington cartridges with several cartridges missing from the box. Ballistics evidence showed that the bullets found at the scene of the crime were fired from the Glock semi-automatic found in the Camaro and that the head stamps on the bullets found at the scene matched those found on the box of ammunition seized in defendant's bedroom.

Defendant testified in his own defense at trial. He denied any involvement in the shooting. Defendant testified that on the day of the shooting he was in San Francisco and his car was towed. He retrieved his car around 4:00 p.m. and then went to a barber shop where he met his friend Charles Heard. Heard asked if he could borrow defendant's Camaro. Defendant agreed on the condition Heard return the vehicle to San Leandro later that night. Heard agreed. Defendant allowed Heard to use his car and took BART back to San Leandro. He arrived home shortly after 7:00 p.m. Heard returned the Camaro about 10:30 p.m. and warned defendant to wipe the car because "some shit went down." Defendant testified that the Glock found in the Camaro did not belong to him, he never touched it and he did not know how his DNA got on the gun. He also denied any knowledge of the box of cartridges found in his bedroom and the cocaine found in the vehicle.

DISCUSSION

Defendant's sole contention on appeal is that the trial court coerced the jury's verdict with respect to the murder charge. We first outline the pertinent events that occurred during deliberations before discussing the merits of the issue.

A. *Background*

Deputy District Attorney Khine and defense counsel presented closing argument on October 1, 2009. On October 5, prior to instructing the jury, the court introduced Deputy District Attorney Allen to the jury and explained she would be "sitting in" for

Mr. Khine, who was unavailable. With respect to murder charge, count one of the indictment, the court instructed the jury on the elements of murder, including malice aforethought, defined express and implied malice, and specifically stated, “If you decide that the defendant committed murder, you must decide . . . whether it is murder of the first or second degree.” The court defined first degree murder as one committed “willfully, deliberately, and with premeditation,” adding, “All other murders are the second degree.” Near the end of its instructions to the jury, the court told the jurors they would receive verdict forms “in a little while.” After the jury adjourned to begin deliberations, defense counsel informed the court that he and prosecutor Khine had reached an agreement that the case would go to the jury on first degree murder and no verdict form for second degree murder should be provided to the jury. Prosecutor Allen pointed out that the court had instructed the jury on second degree murder and, despite her colleague’s preference, the jury should not be limited to a verdict of first degree murder and should also receive a verdict form for second degree murder. The court asked counsel to research “whether or not I am required to give a second degree murder verdict for the jury’s consideration.” The jury adjourned for the day. When the jury resumed deliberations the next morning, October 6, the court took up the matter of the verdict forms. After hearing the views of counsel, the trial court decided to “wait and see how the jury deals . . . with at least the first count, and . . . [¶] if they are unable to reach a verdict on the first degree murder charge, then we can send them back with — after instruction — the verdict form for second degree murder.” Jury deliberations continued on October 7 and 8. At the conclusion of deliberations on October 8, jurors had not reached a verdict. The court adjourned proceedings at the end of the day on October 8 and continued the case to October 13 for continued deliberations.

Deliberations resumed on October 13. During the morning session, the court received a note from the jury foreperson which stated, “Juror # 8 is alleging that Juror # 9 said early in the trial she was determined to hang the jury. Please advise.” After consulting with counsel, the trial court concluded the note was not evidence of current misconduct in deliberations, declined the prosecutor’s request to inquire further and

instructed the jury to “Continue deliberating.” Subsequently, the jury returned its guilty verdicts on counts 3, 4 and 5 and the jury foreperson announced the jury would continue deliberations on the two remaining counts the following day.

The following morning the jury foreperson sent a note to the court stating, “We’ve voted many times on counts 1 and 2 and can’t come to a decision. How do we communicate this on the form?” The court assembled the jurors in open court and the foreperson advised the court that the jury had voted two or three times on counts 1 and 2 but could “still continue deliberating.” The jury returned to the jury room to continue deliberations. Later, the court received a note from Juror No. 6 stating, “I need to speak with the judge.” The court convened a meeting with Juror No. 6 and counsel in chambers. Juror No. 6 told the court that she was upset on account of the fact that yesterday she learned “one of the jurors may have misled the attorneys in the jury selection process” because the juror emphatically stated she could not convict if she “didn’t witness the defendant commit the crime.” Juror No. 6 also stated she had attempted to bring the matter to the court’s attention the day before but the court told the jurors to keep deliberating. After consulting with counsel, the court decided to investigate Juror No.6’s assertion of possible juror misconduct by interviewing several jurors the next morning.

On the morning of October 15 the trial court, in the presence of counsel, spoke with Juror No. 6. Juror No. 6 stated that during deliberations she heard Juror No. 8 tell a fellow juror that Juror No. 9 asked for Juror No. 8’s assistance in finding defendant innocent. Juror No. 6 also heard Juror No. 9 say she “would not convict unless she saw it happen a hundred percent.”

The court then interviewed Juror No. 9. Juror No. 9 denied asking another juror’s help to find defendant innocent. Juror No. 9 also stated she did not need to see something happen in order to find it proven and denied telling another juror she intended to hang the jury. Juror No. 9 informed the court that she had “taken the most notes” and that she was “involved in the process” of deliberating. In view of her answers, the court allowed Juror No. 9 to remain on the jury. The jury then resumed its deliberations.

Later that afternoon, the court received a question from the jury foreperson stating, “If we found him guilty of murder but can’t agree unanimously on first or second degree, how do we fill out the form?” The court discussed the foreperson’s inquiry with counsel, and responded by instructing the jury pursuant to CALCRIM 640. In addition, the court provided the jury with a verdict form on the lesser charge of second degree murder.² Thereafter, the jury continued deliberations until the evening adjournment.

On the morning of October 16 the court addressed the jury as follows: “We were sort of rushed at the end of the day yesterday when I passed out the verdict form and I read the instruction to you, and this morning the parties asked if they could make a brief presentation to you, about 15 minutes each. So I thought that was appropriate under the circumstances so I told them I would permit that.” Defense counsel addressed the jury first and argued that the prosecution had failed to produce evidence of defendant’s guilt beyond a reasonable doubt to support a conviction for either first or second degree

² The court instructed the jury according to CALCRIM 640, as follows: “You have been given a verdict form for guilty and not guilty of First Degree Murder and will be given a verdict form for guilty and not guilty of Second Degree Murder. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of the greater crime. [¶] As with all the charges in this case, to return a verdict of guilty or not guilty on a count you must all agree on that decision. [¶] Follow these directions before you give me any completed and signed final verdict forms. Return the unused verdict forms to me, unsigned. [¶] 1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of First Degree Murder, complete and sign that verdict form. Do not complete or sign any other verdict forms for that count. [¶] 2. If all of you cannot agree whether the defendant is guilty of First Degree Murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms for that count. [¶] 3. If all of you agree that the defendant is not guilty of First Degree Murder but also agree that the defendant is guilty of Second Degree Murder, complete and sign the form for not guilty of First Degree Murder and the form for guilty of Second Degree Murder. [¶] 4. If all of you agree that the defendant is not guilty of First Degree Murder but cannot agree whether the defendant is guilty of Second Degree Murder, complete and sign the form for not guilty of First Degree Murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms for that count. [¶] 5. If all of you agree that the defendant is not guilty of First Degree Murder and not guilty of Second Degree Murder, complete and sign the verdict forms for not guilty of both.”

murder and asked the jury “to be steadfast, maintain your positions. Nothing has changed.” The prosecutor argued the evidence presented “supports first degree murder. There’s no question about that. But it also supports second degree murder. It’s both. Either way you look at it, this man is a murderer.” Following supplemental argument, the jury resumed deliberations. Shortly thereafter, the jury returned its verdicts on count 1 (guilty of second degree murder) and count 2 (not guilty of participation in a criminal street gang).

B. Merits

Defendant contends the court’s “intrusive” questioning of Juror No. 9 “coerced” her into changing her verdict. However, the record does not support defendant’s characterization of the court’s interaction with Juror No. 9.

The trial court interviewed Juror No. 9 only after Juror No. 6 alleged Juror No. 9 was not deliberating in good faith. A trial court is duty-bound to “conduct reasonable inquiry into allegations of juror misconduct.” (*People v. Engelman* (2002) 28 Cal.4th 436, 442 (*Engelman*)). Nevertheless, “a trial court’s inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury’s deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court’s instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.” (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*)). Here, the record reveals that the trial court conducted its inquiry in a manner consistent with the standards established in *Cleveland, supra*. The record shows the trial court’s investigation of alleged juror misconduct was narrowly focused on whether Juror No. 9 was refusing to deliberate as instructed. The court did not pry into the content of the jury’s deliberations, and its inquiry ceased once the court was satisfied the allegations of juror misconduct against Juror No. 9 were unfounded, at which point it sent her back to continue deliberating. The court’s inquiry was not coercive: Rather, the court’s inquiry

was investigative and remained narrowly focused on Juror 9's conduct, as required under *Cleveland, supra*, 25 Cal.4th 466.

Defendant also asserts that the trial court's inquiry into Juror No. 9's alleged misconduct amounted to a "de facto *Allen* charge."³ In *Allen, supra*, the high court approved a charge (the *Allen* charge) which encouraged the minority jurors to reexamine their views in light of the views expressed by the majority, noting that a jury "should consider that the case must at some time be decided." (*Allen, supra*, 164 U.S. at pp. 501-502.) However, in *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*), the California Supreme Court disapproved an *Allen* charge under California law. Specifically, the *Gainer* court found "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views" was improper, and by counseling minority jurors to consider the majority view the charge encouraged jurors to abandon a focus on the evidence as the basis of their verdict. (*Gainer, supra*, 19 Cal.3d at p. 845.)

Defendant acknowledges that the California Supreme Court rejected *Allen* but he nevertheless argues that the trial court gave, in essence, an *Allen* charge in its discussion with Juror No. 9. We disagree. The *Gainer* court held it is error under California law to give an *Allen*-type charge "which either (1) encourages jurors to consider the numerical division or preponderance of opinion on the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Gainer, supra*, 19 Cal.3d at p. 852.) Here, the trial court, in speaking with Juror No. 9, stated she had a duty "to participate in the process with the other jurors and to reach an agreement, if you can, [¶] . . . [¶] [but] you aren't required to agree [and] [¶] . . . [¶] we understand that if you can't reach an agreement then we have to accept that." Thereafter, the court sent Juror 9 back to continue deliberating. In no way did the court suggest, either implicitly or explicitly, that Juror 9 should sacrifice her

³ *Allen v. United States* (1896) 164 U.S. 492, 501 (*Allen*).

views to attain jury unanimity. Accordingly, we reject defendant's contention that the court's remarks to Juror 9 amounted to a de facto *Allen* charge.⁴

Defendant also asserts that broader indicia of coerciveness, not limited to the court's discussions with Juror No. 9, warrant an *Allen* analysis under the totality of the circumstances test described by the Ninth Circuit Court of Appeal in *Weaver v. Thompson* (1999) 197 F.3d 359 (*Weaver*).) As a threshold matter, we are not bound by the decisions of the federal courts. (*People v. Romero* (2006) 140 Cal.App.4th 15, 19.) However, even under the totality-of-the-circumstances test described in *Weaver, supra*, the record does not support a finding the court coerced the jury verdict.

In *Weaver*, the federal appellate court noted that although "the archetypal *Allen* charge" involves a judge instructing a deadlocked jury to strive for a unanimous verdict, there is "nothing talismanic about any single element either making the charge valid or invalid; the fundamental question is whether the jury was improperly coerced, thus infringing the defendant's due process rights. Accordingly, courts have not hesitated to apply an *Allen* charge analysis where the instruction is delivered by someone other than the judge (citations), or where the improper coercion is implicit in the circumstances, rather than explicit in a formal instruction, (citations). So long as the defendant has offered facts that fairly support an inference that jurors who did not agree with the majority felt pressure from the court to give up their conscientiously held beliefs in order to secure a verdict, we must proceed to the *Allen* charge analysis." (*Weaver, supra*, 197 F.3d at p. 365.) In assessing the claim of jury coercion presented, the *Weaver* court considered four factors in assessing whether the jury was coerced: "1) the form of the

⁴ Nor is this case, as asserted by defendant, similar to *Jiminez v. Myers* (9th Cir.1993) 40 F.3d 976. In *Jiminez*, a divided panel of the Ninth Circuit concluded that the trial judge improperly gave a de facto *Allen* charge by telling jurors he approved of the fact they were gradually reaching a unanimous verdict, apparently by pressuring the holdout juror to capitulate. (*Ibid.*) In this case, the trial court did no numerical polling of the jury at any time.

jury charge, 2) the amount of time of deliberation following the charge, 3) the total time of deliberation and, 4) other indicia of coerciveness or pressure.”⁵

Defendant contends the verdict was coerced under *Weaver*’s four-part test. Specifically, defendant asserts that the form of “the jury charge”—referring to the trial court’s discussions with Juror No. 9 — indicates coercion. However, we have already rejected defendant’s assertion in this regard, see *ante*.

Defendant also argues that the second and third *Weaver* factors concerning the timing of the verdict indicate coercion because the jury was in its seventh day of deliberations and returned with a murder verdict hours after Juror 9 was called before the judge. We disagree. The trial court interviewed Juror No. 9 on the morning of October 15. After the interview, which we have determined was non-coercive, Juror No. 9 rejoined the jury. The jury continued to deliberate into the afternoon and then the foreperson sent a note seeking guidance because the jury had found defendant guilty of murder but couldn’t agree unanimously on the degree of the offense. In response, the court provided the jury with a second degree murder verdict and instructions thereon. Thereafter, the jury continued deliberations until the evening adjournment. The next day the jury returned its verdict of second degree murder. In our view, these circumstances are not indicative of coercion. (Cf. *Weaver, supra*, 197 F.3d at p. 366 [timing of verdict indicated coercion where the jury returned its guilty verdicts only five minutes “after the bailiff deliver[ed] her erroneous answer” to the jury”].)

Next, under the fourth factor of the *Weaver* test, defendant identifies “other indicia of coerciveness” including Juror No. 9’s treatment by the trial court; the manner in which the trial court handled the issue of a verdict form for second-degree murder; and the

⁵ Defendant does not assert *Weaver* is on point factually; rather, he asks we apply *Weaver*’s totality-of-the-circumstances analysis. In *Weaver*, the jurors, not yet having reached a verdict on all counts, sent a note to the judge inquiring whether they must decide all counts. The note was sent out at 8:30 p.m., after a full day of trial followed by four hours of deliberations. After departing to deliver the note to the judge, the bailiff returned and informed the jury it was required to return a verdict as to all four counts. Five minutes later, the jury reached guilty verdicts on all counts. (*Weaver, supra*, 197 F.3d at pp. 365–366.)

court's alleged failure to inform counsel that the jury had actually decided unanimously on second degree murder prior to adjourning on October 15 and before argument reopened on the morning of October 16. Again, none of these factors indicate coerciveness.

Specifically, defendant asserts the trial court intimidated Juror No. 9 by singling her out for questioning and sending her a clear message that a hung jury "was not an option." This assertion, in turn, is premised upon defendant's characterization of Juror No. 9, as the "only holdout on Counts 1 and 2—murder and participation in a street gang." However, there is no evidence to support defendant's assertion Juror No. 9 was a sole holdout on those counts. Moreover, the trial court did not instruct Juror 9, either implicitly or explicitly, to sacrifice her position in order to reach unanimity.

Defendant fares no better on the other alleged indicia of coerciveness. Defendant concedes the manner in which the court instructed the jury with respect to the second degree murder jury verdict was "legally correct" but "could only have reinforced Juror 9's decision to give in to the pressure and compromise." We find this contention meritless. The court gave the instruction only after the foreperson asked for guidance on how to proceed "if we found him guilty of murder but can't agree unanimously on first or second degree" and the instruction was for the guidance of the jury as a whole, not Juror No. 9 in particular. Indeed, after the jury asked for guidance, the court was presented with the statutory obligation "to provide the jury with information the jury desires on points of law." (*People v. Smithey* (1999) 20 Cal.4th 936, 985; see also *People v. Waidla* (2000) 22 Cal.4th 690, 746.)

Last, defendant asserts the "outrageous matter of the court's failure to inform counsel that the jury had actually decided unanimously on second degree murder prior to adjourning on October 15" is an indicium of coerciveness. Defendant concedes he was not prejudiced by the court's failure to inform counsel the jury had likely reached a verdict before argument reopened on the morning of October 16, but he argues the court's action "could well have contributed to Juror 9's decision to remain with the

majority in finding [defendant] guilty of second degree murder.” Because this assertion is entirely speculative and unsupported by any record evidence, we reject it.

DISPOSITION

The judgment is affirmed.⁶

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.

⁶ While we find defendant’s contentions on appeal lack merit and affirm defendant’s conviction on the record before us, we admonish the trial court regarding its duty to apprise counsel of, and “record[] all oral communications, formal or informal, received from a jury . . . from the time the jury is sworn until it is discharged.” (Cal. Rules of Court, rule 2.1030(b).)