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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDAL P. DUNKLIN,

Defendant and Appellant.

A134126

(San Francisco County
Super. Ct. No. 215595)

Randal P. Dunklin (appellant) was convicted, following a jury trial, of exhibiting a deadly weapon and vandalism and, pursuant to a plea agreement, of misdemeanor resisting a peace officer. On appeal, he contends the trial court erred when it denied his challenges for cause to five prospective jurors, which he asserts led to a biased juror sitting on the jury in his case in violation of his state and federal constitutional rights to due process and a fair and impartial jury. We shall affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by amended information with two counts of assault on a police officer with a deadly weapon (Pen. Code, § 245, subd. (c)—counts I and II);¹ five counts of resistance to an executive officer (§ 69—counts III through VII); one count of exhibiting a deadly weapon (§ 417, subd. (a)(1)—count VIII); and one count of misdemeanor vandalism of more than \$400 (§ 594, subd. (b)(1)—count IX). It was further

¹ All further statutory references are to the Penal Code unless otherwise indicated.

alleged, as to counts I and III through VII, that appellant personally used a deadly and dangerous weapon, a knife, in the commission of the offenses (§ 12022, subd. (b)(1)).

Following a trial, the jury found appellant guilty as to counts VIII (exhibiting a deadly weapon) and IX (misdemeanor vandalism of more than \$400). The jury found him not guilty as to counts I (assault on a police officer with a deadly weapon) and III (resistance to an executive officer). The jury did not reach verdicts on counts II, IV, and VII (resistance to an executive officer), and the court declared a mistrial as to those counts.²

On November 18, 2011, the trial court sentenced appellant to concurrent terms of six months in county jail for count VIII and 317 days in county jail for count IX. On November 30, 2011, the information was amended to add a tenth count of misdemeanor resisting a peace officer (§ 148, subd. (a)(1)). After appellant pleaded nolo contendere to count X, pursuant to an agreement to dismiss all remaining counts and allegations as to which the jury had not returned a verdict, the trial court sentenced him to one year in county jail on that count on December 2, 2011.

On December 5, 2011, appellant filed a notice of appeal.

FACTUAL BACKGROUND³

On the morning of January 4, 2011, appellant, who used a wheelchair, was sleeping in an alley near the Department of Public Health Behavioral Access Center (Department), located at 1380 Howard Street in San Francisco, when a Department employee told him that he needed to either leave or come into the building to get services. Appellant eventually entered the building, but became upset and frustrated because he could not meet with his primary case manager in the treatment access program.

² The trial court had previously dismissed counts V and VI, pursuant to defense counsel's oral motion for a judgment of acquittal on counts I through VII. (§ 1118.1.)

³ We shall only briefly summarize the underlying facts, due to their limited relevance to the issue raised on appeal.

He left the office and went outside to the sidewalk in front of the building, where he wheeled his chair back and forth, confronting and cursing at people as they walked past. He also threw a rock or piece of concrete at a passerby. When staff from the Department could not calm him down, they called the police. Department staff then saw appellant punch a parking meter and jab it with a knife, and also saw him use the knife to puncture two tires on a city vehicle.

When the police arrived, an officer told appellant to drop the knife or give it to him, but appellant refused and waved the knife around. During an ensuing struggle, appellant stabbed one of the police officers in the arm. After officers had drawn their weapons and appellant again refused to drop the knife, an officer shot appellant in the leg with a bean bag. Appellant threw the knife toward some officers, who then shot him in the groin, thighs, and right buttock.

DISCUSSION

Appellant contends the trial court erred when it denied his challenges for cause to five prospective jurors, one of whom served on the jury during his trial. According to appellant, the presence of a biased juror on his jury violated his state and federal constitutional rights to due process and a fair and impartial jury.

I. Applicable Law and Standard of Review

The federal and state Constitutions guarantee criminal defendants a fair trial by a panel of unbiased, impartial jurors. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *People v. Roldan* (2005) 35 Cal.4th 646, 689, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) A party may challenge potential jurors for cause on certain grounds, including, inter alia, actual or implied bias. (See Code Civ. Proc., §§ 225, subd. (b)(1)(B) & (C); 229.) In this case, appellant claims that the jurors he challenged demonstrated actual bias, which involves “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (Code Civ. Proc. § 225, subd. (b)(1)(C).)

“ “ “Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be “unable to faithfully and impartially apply the law in the case.” [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror’s responses in deciding whether to remove the juror for cause. The trial court’s resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] . . . ’ ” . . . The United States Supreme Court recently explained: ‘Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.’ (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.)” ’ (*People v. Hamilton* (2009) 45 Cal.4th 863, 889-890 (*Hamilton*); accord, *People v. Horning* (2004) 34 Cal.4th 871, 896 (*Horning*) [if a prospective “juror gives conflicting testimony as to her capacity for impartiality, the determination of the trial court on substantial evidence is binding on the appellate court”]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 489 (*Hillhouse*) [“The trial court is present and able to observe the juror itself” and “can judge the person’s sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript”].)

“ ‘To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted.’ ” (*Hillhouse, supra*, 27 Cal.4th at p. 487.) Here, appellant had exercised all of his peremptory challenges before the trial court denied his final challenge for cause as to a juror who ultimately, and over his objection, served on the jury.

II. Appellant’s Five Challenges for Cause

A. Juror No. 2817376

In her jury questionnaire, Juror No. 2817376 indicated that her cousin was the police chief of a New Jersey city. She also stated, however, that she was not more likely

to believe the testimony of a police officer, that she believed police officers can make mistakes, and that she could return a not-guilty verdict “where the alleged victims are police officers if the charges have not been proved.” She did have strong feelings about homeless people, stating, “I’ve been working at 6th [and] Market for 10 years [and] I’m tired of them ruining the area.” She believed that police should take into account people’s physical or mental disabilities when dealing with them, and did not believe that people with physical disabilities or “those bound to a wheelchair” could ever pose a real threat to others. Nor did she have any strong attitudes toward people who have mental illnesses. Finally, she had heard about the incident in question and felt “the police were right to use force on the attacker.” But she seemed to understand the incident as being related to BART protests.

During jury voir dire, Juror No. 2817376 confirmed that she had mistakenly believed the incident was related to BART protests when she filled out her jury questionnaire.⁴ She also stated that she and her police chief cousin “emailed during football season,” that they did not talk about police business, and that his role as a police chief would not affect how she evaluated police officer credibility.

Juror No. 2817376 did not believe that, just because appellant “sits here, he’s probably guilty.” When defense counsel asked whether, based on what she had heard during voir dire and, in light of her questionnaire, she had “any thoughts” about whether she believed appellant was “probably guilty or not,” Juror No. 2817376 responded, “No, I really can’t draw any conclusion right now.”

Finally, the prosecutor posited a series of somewhat confusing questions, in which she attempted to discern whether prospective jurors could find someone guilty of a crime even if police had used excessive force against that person in response to the commission of the crime. She used the example of someone who stole a watch from Nordstrom and

⁴ Near the start of voir dire, the court had advised all of the prospective jurors that there had been “some confusion in the questionnaires,” and that “this incident does not involve BART or the BART police, or anything that occurred in a BART station.”

then was roughed up by security guards to ascertain whether the prospective jurors could separate the theft from the use of force. Juror No. 2817376 initially expressed confusion, but eventually stated, “If I knew he stole—this person stole the watch, and security jumped on him and took him to the ground and he had a couple scrapes on his face, I wouldn’t have a problem with that.” When the prosecutor asked, how she would feel if “they took it a step further” and the thief “ended up with a broken arm,” Juror No. 2817376 first responded, to laughter, that it might depend on how much the watch was worth. She then answered in the affirmative to the prosecutor’s question, “So actually—so what happens outside of Nordstrom’s might affect you, as to what he did inside of Nordstrom’s.”

Defense counsel challenged Juror No. 2817376 for cause, arguing that she had a law enforcement bias and prejudice against homeless people. After the trial court denied the challenge for cause, defense counsel used a peremptory challenge to excuse Juror No. 2817376. The court later explained its reasons for denying the challenge for cause: “I recall being somewhat concerned when I saw the questionnaire. However, I think that in the course of the questioning and the discussion in open court, I think I was persuaded that a challenge for cause was not appropriate; that the attitudes that she had expressed had been sufficiently rehabilitated by the conversation and the questioning that occurred here.”

Substantial evidence supports the trial court’s finding that, during voir dire, any concerns about a possible law enforcement bias were “rehabilitated” when Juror No. 2817376 confirmed that she had mistakenly believed the case was about a BART protest, said that her relationship with her cousin who was a police chief would not affect her evaluation of police officer credibility, and further stated that she had not drawn any conclusions as to appellant’s guilt or innocence. Similarly, substantial evidence supports the court’s finding that the statement in her questionnaire that homeless people near her workplace were “ruining the area” did not warrant dismissal, given her statement that she

had not drawn any conclusions about appellant's guilt.⁵ (See *Hamilton, supra*, 45 Cal.4th at pp. 889-890.)

B. Juror No. 2731697

In his jury questionnaire, Juror No. 2731697, a high school teacher, indicated that his best friend was a sheriff's deputy and a close family friend had retired as a sergeant from the San Francisco Police Department. He had witnessed a police officer unfairly hit a friend with a baton for no apparent reason and, while he believed police officers are well trained, he also believed they can make mistakes. Juror No. 2731697 believed that police should be permitted to carry guns because "they understand the law, and [are] less likely to abuse the law." Both his brother and a neighbor had been a victim of violent crime. As to the mentally ill, his sister had become mentally unstable when her husband was sentenced to prison and, while he did not have strong attitudes toward people with mental illnesses, given "that they can be unstable, [he tried] to stay away from them."

During voir dire, Juror No. 2731697 confirmed that he had served on both a civil jury and a criminal jury in the past. His contact with police officers included both his two friends and law enforcement with whom he had contact in his former profession as a security guard. He "like[d] to think" that police officers are more likely to be honest than other people, but acknowledged that "they're only human." All other things being equal, he would lean toward believing a law enforcement witness. However, if there were some doubt about what had actually happened in a case, even after the evidence was presented, he "would have to say not guilty."

While he thought it was unlikely, Juror No. 2731697 still believed it was possible that a group of people would band together to cover up a rule or law violation, to protect

⁵ Moreover, contrary to appellant's assertion that Juror No. 2817376's response to the prosecutor's confusing Nordstrom theft hypothetical showed that she "believed that the police were justified in using excessive force against a suspected criminal offender," the court could reasonably find that her answer actually suggested that she would have difficulty convicting someone of a crime if he or she had also been the victim of excessive force by police.

each other. He did not respond when defense counsel asked whether any of the prospective jurors believed that, if a person does not immediately do what a police officer has said to do, the police officer “can do anything that they need to do to force obedience.” In addition, Juror No. 2731697 initially stated that a “police officer’s testimony would have a little more weight,” but he then affirmed that, if the judge were to instruct him to evaluate all witnesses with the same standard, he would be able to do so.

Defense counsel challenged Juror No. 2731697 for cause, arguing that responses in his jury questionnaire showed that he was biased in favor of law enforcement and against mentally ill people. After the trial court denied the challenge for cause, defense counsel used a peremptory challenge to excuse Juror No. 2731697.

The trial court explained its denial of the challenge for cause: “[Juror No. 2731697] had quite a varied questionnaire, as I recall, a number of different issues that he raised, and he indicated some initial thoughts about police officers, frankly on all parts of the spectrum about police officers, both good and bad, in what he was describing. [¶] And I think in the context of the questioning, the—I believe that any concerns that were reflected through the questionnaire were rehabilitated in the context of the questioning. The questioning was somewhat—I wouldn’t say confusing, but I did not feel, having heard all of his answers, that it was sufficient for a challenge for cause. So I denied that challenge, and I think his words rehabilitated any concerns expressed through the questionnaire.”

Substantial evidence supports the trial court’s finding that any concerns about Juror No. 2731697 had been rehabilitated during voir dire. Although, as the trial court acknowledged, in his questionnaire and initially during voir dire, Juror No. 2731697 expressed a law enforcement bias, during questioning, he affirmed both that if the judge were to instruct him to evaluate all witnesses by the same standard, he would be able to do so and that if there were some doubt about what had actually happened, even after the evidence was presented, he would have to vote not guilty. Nor did he express agreement with the prosecutor’s statement as to whether any jurors believed that a police officer can

do anything that he or she needs to do to force compliance. In addition, his statement in his questionnaire that he did not have strong feelings toward people with mental illness, but tried to stay away from them because they can be “unstable,” does not undermine the court’s conclusion that he had been rehabilitated during voir dire, given his expressed willingness to evaluate all witnesses by the same standard. Moreover, in light of the somewhat contradictory statements by Juror No. 2731697, the trial court’s determination of his actual state of mind is binding on us, given that it finds support in the record. (See *Hamilton, supra*, 45 Cal.4th at p. 897; *Horning, supra*, 34 Cal.4th at p. 896.)

C. Juror No. 2803187

In his jury questionnaire, Juror No. 2803187 stated that he worked for the Department of Homeland Security doing airport security. He was not more likely to believe the testimony of a police officer and believed police officers can make mistakes. He believed police should make “reasonable accommodation [for] physical disabilities, but mental disabilities should not be a reason to excuse behavior.” He also believed that people with disabilities or in a wheel chair could pose a threat to others because “they can conceal and be just as dangerous as someone fully mobile.” He further noted that, “at the Oakland airport[,] the few homeless that may or may not be mentally handicapped do not cause issues.” He did not have strong attitudes toward people who have mental illnesses, stating, “they cannot help their actions. Drugs are available to mitigate symptoms *if* they are provided treatment.”

During voir dire, Juror No. 2803187 stated that, in his work as a line supervisor in airport security, he did not consider himself to be “quasi law enforcement.” He occasionally worked with local police agencies, but nothing in his experience with police agencies or his own agency would affect his ability to be fair to both parties. He would not evaluate officer credibility by different standards than other witnesses. Nor would his experience of dealing with physically or mentally disabled people at the airport affect his ability to be fair to both parties. From doing pat-downs at the airport, he knew that disabled people were capable of wanting “to be difficult versus if they’re simply unable

to comply.” Juror No. 2803187 did not feel like he was “leaning towards any opinion” in the case.

Defense counsel challenged Juror No. 2803187 for cause, arguing that responses in his jury questionnaire suggested a law enforcement bias and that he had already formed the opinion that appellant was guilty. After the trial court denied the challenge for cause, defense counsel used a peremptory challenge to excuse Juror No. 2903187.

In explaining its reasons for denying the challenge for cause, the trial court stated: “There was nothing in his questionnaire itself that was of particular concern and I didn’t think that there was anything that came out in the actual questioning that showed that a challenge for [cause] was appropriate.”

Substantial evidence supports the trial court’s findings that none of Juror No. 2803187’s responses reflected actual bias. Although he worked at the airport in security and dealt with police regularly, Juror No. 2803187 did not consider himself “quasi law enforcement.” He believed he could be fair to both parties and evaluate the credibility of all witnesses by the same standards. While he did not believe mental disabilities should excuse a person’s behavior and, from his work, thought that some disabled people were capable of wanting “to be difficult,” he affirmed that his experience of dealing with disabled people in his job would not affect his ability to be fair to both parties. Finally, he expressed that he had not formed any opinion in the case. The record thus supports the court’s ruling. (See *Hamilton, supra*, 45 Cal.4th at pp. 889-890.)

D. Juror No. 2817829

In his questionnaire, Juror No. 2817829 stated that he had a friend in law enforcement, that he would be more likely to believe police officers due to their “being drug free/honest/ [and] professional,” but that he also believed they can make mistakes. He noted that a family member had been shot at a nightclub. He believed police should take into account a person’s physical or mental disabilities, but also believed that disabled or wheelchair-bound people could pose a threat to others. As a Muni transit operator, he dealt with substance abuse issues on a daily basis. Juror No. 2817829 had read a

newspaper article about this case and had formed an opinion that “self-defense” was involved.

During voir dire, Juror No. 2817829 said the case he had read about might have been a different one and that he had an open mind about this case. He also explained that, when he said he would be more likely to believe a police officer, he meant only in the context of his job, when a passenger had not paid the fare. As a juror, he would listen to both sides, evaluate their credibility, and make a fair judgment. He also confirmed that he had not formed any opinions in the case based on anything he had heard, and was open to whatever the evidence showed.

Defense counsel challenged Juror No. 2817829 for cause, arguing that he had written in his questionnaire that he was more likely to believe a police officer, that he refused to answer a question during voir dire related to that answer, and that he believed police had acted in self-defense in shooting appellant. After the trial court denied the challenge for cause, defense counsel used a peremptory challenge to excuse Juror No. 2817829.

In explaining its reasons for denying the challenge for cause, the trial court stated: “In his questionnaire, he made the comment . . . drug-free, honest and professional[;] he was asked about that comment in the course of his questioning. He elaborated more on what his experiences were with the police because he indicated that he had to call the police frequently related to his work on Muni.

“And by the end of the questioning, the Court was not persuaded that there was a challenge for cause regarding whether he was more likely to believe the police. I think he explained what he was describing in the questionnaire, and that by the end of the questioning, the Court was persuaded that he would be able to be fair to both sides.”

Substantial evidence supports the trial court’s finding that the questioning had demonstrated that Juror No. 2817829 was not biased in favor of police and that he had not already decided that appellant was guilty. Juror No. 2817829 clarified that he was more likely to believe police only in the context of passengers on Muni not paying their

fare, but that, here, he would make a fair judgment after listening to both sides and evaluating their credibility. Given that we defer to the court's credibility findings, Juror No. 2817829's statements that the case he had read about, in which he believed self-defense was involved, might have been a different case; that he had not formed any opinions in this case; and that he had an open mind all support the court's ruling. (See *Hamilton, supra*, 45 Cal.4th at pp. 889-890; *Hillhouse, supra*, 27 Cal.4th at p. 489.)

E. Juror No. 2572382

In her jury questionnaire, Juror No. 2572382 noted that she had been a buyer for United Airlines for 23 years. She was not more likely to believe a police officer and believed police can make mistakes. She believed police can be justified in shooting someone, "but he/she might made [sic] a wrong decision in [a] short time period." She did not believe police should take into account people's physical or mental disabilities when dealing with them, she believed people with physical disabilities and people in wheelchairs could pose a threat to others, and she did not have any strong attitudes toward people with mental illnesses. Finally, she wrote that she was born in Hong Kong and "English is not my mother language. I am afraid that will affect the fairness to both parties."

During voir dire, Juror No. 2572382 said she would have a hard time determining guilt if she did not hear evidence from both sides, and she would have to go with the side that presented evidence. She also said that she understood everything that was being talked about during voir dire, but was afraid she would not understand technical terms. She was concerned about slowing down the process if she had to ask questions and was also afraid that if she misunderstood, she would make a wrong decision.

After the prosecutor explained that the law required the prosecution to prove all of the elements of each crime beyond a reasonable doubt and that the defense did not have to present any evidence, Juror No. 2572382 affirmed that she would be able to follow the instructions on these points. She also said that she would let the court and counsel know if they needed to slow things down for her, to ensure that she understood what was being

said. The court refused Juror No. 2572382's request to bring a dictionary with her to court, but did advise her that if, during the trial, "there is a word or a term that you don't understand, I have no objection if you want to raise your hand and let us know."

Defense counsel challenged Juror No. 2572382 for cause, during jury voir dire and again after she had been seated on the jury and the trial had begun, arguing that she had said that she was not comfortable voting not guilty and that she would vote with the party that called the most witnesses. Counsel also noted that Juror No. 2572382 had stated that English was not her first language, that she did not understand everything that was said, and, after the jury was sworn, she had asked to bring a dictionary. Finally, counsel stated that she was "intermittently falling asleep" during counsel's opening statement. After the court denied the challenge for cause, Juror No. 2572382 remained on the jury because the defense had exhausted its peremptory challenges.

In denying the challenges for cause, the trial court discussed counsel's concerns at length, stating: "[Juror No.] 2572382 works as a buyer for United Airlines and has done that for over 20 years. And she described the nature of her work was buying equipment for the airlines. The—we had a pretty lengthy conversation with her during voir dire. She responded quickly, coherently and responsively to the questions that were asked. It did not appear to the Court that she had difficulty understanding or operating in English.

"And the Court was satisfied by the end of the conversation during voir dire that the issue with regard to any potential police bias, that she . . . put that aside and would be able to be fair to both sides and would not grant some extra credibility to the police officers.

"She asked at the end whether or not she could bring a dictionary. I advised her when she returned to court the next court day that she could not use a dictionary, and that if she had a concern of something that she did not understand that she could let the Court know by question if there was something that she did not understand.

"Throughout this trial I have watched. She has not asked us any questions in that regard. I have—was alert to the issue that counsel raised about whether or not she

appeared to be sleeping, and I would note I have not seen her sleeping. I have seen that she is somebody who puts her head down at times. We have a couple different jurors who do that. Sometimes they are looking at their notes, sometimes they are writing. But I have never seen her falling asleep at any time during the trial. The fact that somebody may put their head down, even the fact that sometimes occasionally people may listen [with] their eyes closed, I don't think that means they have been asleep. But I am conscious of the issue, and I have watched all the members of the jury with that in mind.”

Substantial evidence supports the trial court's findings. With respect to her English language ability, the court was able to observe and listen to Juror No. 2572382, and we defer to its determination that she sufficiently understood what was being said to serve as a juror. (See *Hillhouse, supra*, 27 Cal.4th at p. 489.) This is especially so in light of her statement that she had understood everything that was said during voir dire and her expressed willingness to inform the court if there was anything she did not understand.

In addition, the evidence supports the court's finding that Juror No. 2572382 had put aside her prosecution bias (misabeled as “police” bias), i.e., her initial position that she would vote for the side that presented the most evidence, when she affirmed that she would be able to follow the court's instructions regarding both the prosecution's burden to prove all of the elements of the charged crimes beyond a reasonable doubt and the defense's right to present no evidence of its own. (See *Hamilton, supra*, 45 Cal.4th at p. 897; *Horning, supra*, 34 Cal.4th at p. 897.) Finally, we must defer to the court's statements that it was conscious of the issue of jurors falling asleep, that it had watched all jurors with that issue in mind, and that it had not seen Juror No. 2572382 sleeping. (See *Hamilton*, at pp. 889-890.)

In sum, there is substantial evidence to support the trial court's finding that none of these prospective jurors had an actual bias. (See § 225, subd. (b)(1)(C).) The court

did not abuse its discretion when it denied appellant’s challenges for cause to the five prospective jurors. (See *Hamilton, supra*, 45 Cal.4th at pp. 889-890.)⁶

DISPOSITION

The judgment is affirmed.

Kline, P.J.

We concur:

Richman, J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

⁶ In light of our conclusion that there was no error, appellant’s constitutional claims, raised for the first time on appeal, must necessarily fail as well. (See *People v. DePriest* (2007) 42 Cal.4th 1, 19-20, fn. 6 [“On the merits, no separate constitutional discussion is required, or provided, where rejection of a claim that the trial court erred on the issue presented to that court necessarily leads to rejection of any constitutional theory or ‘gloss’ raised for the first time here”].)