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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. FRANCISCO JAVIER MORA, Defendant and Appellant.	A151458 (San Mateo County Super. Ct. No. 15-NF-000665)

This is an appeal from judgment following the conviction by jury of defendant Francisco Javier Mora of battery with serious bodily injury (count 1), assault with a deadly weapon (count 2), first degree burglary (count 3) and false imprisonment (count 4), with count 1 enhanced for use of a deadly weapon and counts 1 and 2 enhanced for causation of great bodily injury under circumstances involving domestic violence. After receiving a five-year sentence, defendant has appealed, contending he did not receive a fair trial because the trial court and defense counsel failed to adequately question a prospective juror regarding his possible racial bias or prejudice. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 2, 2016, a criminal information was filed charging defendant with battery with serious bodily injury (Pen. Code, § 243, subd. (d))[1] (count 1), assault with a deadly weapon (§ 245, subd. (a)(1)) (count 2), first degree burglary (§ 460, subd. (a)) (count 3) and false imprisonment (§ 236) (count 4), with count 1 enhanced for use of a

[1] Unless otherwise stated, all statutory citations herein are to the Penal Code.

deadly weapon, a glass vase (§ 12022, subd. (b)(1)), and counts 1 and 2 enhanced for causation of great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).

At trial, the prosecution presented evidence that defendant and A.G. lived together in A.G.'s house during their two-year relationship. On September 4, 2015, about a month before the underlying incident, defendant moved out, giving A.G. his house keys. Around this time, A.G. began a new romantic relationship with a childhood friend, G.H. On the night in question, September 30, 2015, the new couple returned to A.G.'s house at about 11:00 p.m., after having dinner out, and retreated to the downstairs bathroom (away from A.G.'s sleeping children and her roommate), where they began to engage in sexual activity.

Suddenly, defendant burst into the locked bathroom, dragged G.H. out and began physically attacking G.H. Defendant punched and kicked him several times and broke a vase over his head, causing G.H. to sustain lacerations requiring hospitalization and stitches. When A.G. tried to intervene, defendant "maybe pushed" her, tearing her dress.

Defendant testified in his own defense at trial, insisting that he had not broken up with A.G. prior to the September 30, 2015 incident and that the couple continued to spend time together. On September 30, defendant went to A.G.'s house and was waiting in her bedroom for her to come home. He went downstairs then heard suspicious moaning in the bathroom. Concerned, defendant broke into the bathroom and was shocked to see G.H. and A.G. together in the bathroom. Quite upset, defendant grabbed G.H. and dragged him from the bathroom. According to defendant, G.H. then attacked him and it was when defendant responded in self-defense that he seriously injured G.H.

Defendant had a prior misdemeanor false imprisonment conviction that arose from an incident involving A.G. in a parking lot. Specifically, during an argument in A.G.'s car, defendant would not let A.G. leave, grabbing and tearing her sweater and taking her personal cell phone. She was eventually able to call the police with her work cell phone. Defendant also had a 2010 felony conviction for commercial burglary and was on probation for forgery at the time of trial.

On February 28, 2017, the jury found defendant guilty as charged and the enhancements true.[2] The trial court thereafter sentenced defendant to a total prison term of five years. This timely appeal followed.

DISCUSSION

Defendant raises one issue for our review: Did the trial court and defense counsel each discharge their respective duty to adequately question a prospective juror, Trial Juror No. 1 (TJ-1), regarding possible racial bias? We first turn to the relevant record.

During voir dire on February 22, 2017, the trial court asked the prospective jurors whether "you or a member of your family or any friends, to your knowledge, [have] ever been a complaining witness and/or victim of a crime?" TJ-1 responded that, yes, he had been a crime victim when he "was assaulted by three Hispanic guys probably about 25 years ago, and I received considerable dam—injuries." TJ-1's response prompted the following exchange:

"[TJ-1]: And—but they never caught the guys.

"THE COURT: Where did it happen?

"[TJ-1]: By the San Francisco Zoo, on Sloat, outside the Irish Cultural Center.

"THE COURT: Okay. All right. And do you think they did everything—when I say 'they,' referring to law enforcement. Do you believe they did everything that they could to investigate the case?

"[TJ-1]: Yeah.

"THE COURT: And do you harbor any resentment as a result of that?

"[TJ-1]: I would like to think not, but I think I might have some prejudices.

"THE COURT: Okay. And, you know, obviously, it's okay to have prejudices. We all have [them]. [¶] The question that comes up, however, is: Do you think that you could put those prejudices aside and judge this case fairly?

"[TJ-1]: I'd like to think so, yeah.

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[2] The enhancement for use of a deadly weapon (§ 12022, subd. (b)(1)) that was originally alleged as to count 2 (as well as count 1) was stricken as unauthorized on the prosecutor's motion.

"THE COURT: Now, when you say, 'I'd like to think so'—[¶] . . . [¶]—you know that I can't leave it right there; right?

"[TJ-1]: Okay.

"THE COURT: You know that I'm going to ask some follow-up questions to that, because we all would like to think so. [¶] And I've heard attorneys ask questions like this: I'd like to think I could run a three-minute mile. But what are the chances of that actually happening? Not very good; right? [¶] So when you say that you'd like to think so, give me a little more about how likely it is that you'll be able to do that. Because we're sitting here, a hundred of us, having a conversation, just you and me; and out of all of us here, you're the only one that can tell us. So I have to pry and dig a little deeper.

"[TJ-1]: Right.

"THE COURT: Or if you feel more comfortable talking about it in private, we can do that.

"[TJ-1]: No. It's fine. It's fine. [¶] Truthfully, I think I do have some prejudices; but, I mean, I would certainly try my best to make a fair judgment.

"THE COURT: Okay. As you sit there now, are you able to presume Mr. Mora to be innocent?

"[TJ-1]: Yeah.

"THE COURT: Okay. And do you understand that the People have the burden of proof?

"[TJ-1]: Yes.

"THE COURT: They have to prove his guilt, and if they don't prove his guilt beyond a reasonable doubt, then you have to return a verdict of not guilty.

"[TJ-1]: Yes.

"THE COURT: Okay. And the defendant doesn't have to put on any proof at all. Do you understand that? He doesn't have to prove that he's innocent.

"[TJ-1]: Right.

"THE COURT: And are you okay with that?

"[TJ-1]: Yeah. I understand how it works, yeah.

"THE COURT: Okay. All right. Thank you."

Voir dire continued and, after other inquires, the court asked the prospective jurors whether the fact that one or more of the parties, attorneys or witnesses "come from a particular national, racial, or religious group, or that they have a lifestyle different than your own" would "affect your judgment or the weight and credibility that you give to their testimony?" No juror raised his or her hand.

The next day, counsel had the opportunity to conduct voir dire. Defense counsel questioned TJ-1 as follows:

"[DEFENSE COUNSEL]: Just a couple other specifically directed questions I have. And one which kind of surprised me. I want to go over it again. . . . [¶] You talked about—and I hope I'm not misquoting you, but I wrote it down twice because you said it—that you think you feel a bit of prejudice.

"[TJ-1]: Um-hmm.

"[DEFENSE COUNSEL]: What did you mean by that?

"THE COURT: Is that 'yes'?

"[TJ-1]: Yes.

"[DEFENSE COUNSEL]: Oh, yeah. I'm sorry. Again, the court reporter cannot take down 'um-hmm.'

"[TJ-1]: So I just—since the people that hurt me, attacked me were never caught, I kind of carry a, you know—you know, I like to see people that commit a crime get the price. But that doesn't mean I can't be fair when presented with—

"[DEFENSE COUNSEL]: Okay. But when you're talking about prejudice, does that carry over to being inclined to believe that because this man has been arrested and this man is here on trial, that there is a prejudice against him because of that, because he wouldn't be here otherwise?

"[TJ-1]: Right. Like I said yesterday, I would like to think not, but I do feel a little pre-judgment, if that makes sense.

"[DEFENSE COUNSEL]: Well, it makes sense, but you also said that you could, right now, presume him to be innocent.

"[TJ-1]: Yeah. I mean, I'm a rational person. I could, you know, hear everything and make a decision. But I just feel, going into it, that's how I feel.

"[DEFENSE COUNSEL]: Thank you, Your Honor. That's all the voir dire I have at this time."

Voir dire subsequently ended with defense counsel, having used just three of his 10 peremptory challenges, confirming to the court he was "satisfied with the jury as presently constituted . . . ." The jury, in turn, was given numerous instructions to guide its deliberative process, including that jurors must not "let bias, sympathy, prejudice, or public opinion influence your decision" (twice) and "must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial."

Later, the quality of defense counsel's voir dire of TJ-1 arose as one of the grounds asserted by defendant in making a *Marsden* motion to remove his trial counsel.[3] Specifically, defendant advised the trial court, "I believe this jury panel number one. I forgot his name. He had explained to the district attorney and my lawyer that he was prejudice of Mexicans. I had asked [defense counsel] that I didn't want him there and he kept him on there, so I don't know if—to me that one person could have been replaced and could have found me not guilty." (*Sic.*) Defendant further explained that TJ-1 "had been jumped by some gang members and they never caught them and he said he would try his best. And then when I asked [defense counsel], 'Can you please take him off.' [Defense counsel] said, 'No. We're going to leave him on there. I will tell you why later.' Never told me why later."

The trial court asked defense counsel to respond to defendant's concerns, and counsel explained as follows: "With respect to the juror, I remember [defendant] said something. [He] said something to me at the break. And I said . . . , 'Is there anybody you really want to get off the jury?' I always ask my client. I tell them that's my decision. You tell me. He mentioned. I said no because his responses after mentioning this incident seemed to me [to] be somebody who was embarrassed by the fact that that

[3] *People v. Marsden* (1970) 2 Cal.3d 118.

had occurred to him and not somebody who was going to be against—against the Mexican person."

After hearing from counsel, the trial court denied defendant's *Marsden* motion, reasoning that defendant's complaints about his counsel's advocacy "were all [about] strategy matters and trial tactic matters" that should be left to counsel's discretion.

In turning now to the legal issue at hand—whether the trial court and defense counsel discharged their legal duty to properly voir dire TJ-1 regarding his potential racial prejudice or bias—the governing law is well established. Unquestionably, " 'the right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.' (*Lombardi v. California St. Ry. Co*. (1899) 124 Cal. 311, 317 [citation], quoted in *People v. Galloway* (1927) 202 Cal. 81, 92 [citation].) And 'in carrying out its duty to select a fair and impartial jury . . . , the trial court is not only permitted but required by inquiry sufficient for the purpose to ascertain whether prospective jurors are, through the absence of bias or prejudice, capable of participating in their assigned function in such fashion as will provide the defendant the fair trial to which he is constitutionally entitled.' [Citation.] Voir dire is critical to assure that the Sixth Amendment right to a fair and impartial jury will be honored. 'Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [68 L.Ed.2d 22, 28, 101 S.Ct. 1629].)" (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1312.)

However, "the conduct of voir dire is an art, not a science." (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1313.) While the case law provides many examples of appropriate voir dire, ultimately, " '[t]here is no single way to *voir dire* a juror.' [Citation.] Sometimes a broad question or statement will elicit responses that call for follow-up questions which eventually disclose a bias. Or the prospective juror's response may be innocuous in words, yet uttered with such hesitation or expression as to signal a basis for further questioning." (*Ibid*.) In addition, "the role of the attorney [in voir dire]

remains significant, even vital. Counsel are present, and observe the text and manner of the prospective jurors' answers and reactions to questions, and to the responses of other prospective jurors. Based on these voluntary and involuntary responses, the facts and issues of the case, and their own skill and experience, counsel may formulate specific questions and areas of inquiry for further questioning by the court." (*Ibid.*)

"Finally, the exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in voir dire is entitled to considerable deference by appellate courts. Addressing the deference accorded federal judges . . . , the United States Supreme Court has observed that 'because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.' (*Rosales-Lopez v. United States*, *supra*, 451 U.S. 182, 189 [68 L.Ed.2d 22, 29].) And 'despite its importance, the adequacy of *voir dire* is not easily subject to appellate review.' (*Id*. at p. 188 [68 L.Ed.2d at p. 28].) . . . [¶] . . . [T]he trial judge, aided by the advocacy of counsel, is in the best position to assess the amount of voir dire required to ferret out latent prejudice, and to judge the responses. . . . [Thus,] the decision of a trial judge is entitled to great deference. [¶] The findings of a trial judge on the issue of juror impartiality should be upheld absent ' "manifest error." ' [Citations.]" (*People v. Taylor*, *supra*, 5 Cal.App.4th at pp. 1313–1314.)

Stated otherwise, the trial court only "abuses [its] discretion if its failure to ask questions renders the defendant's trial ' "fundamentally unfair" ' or ' " 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.' " [Citation.]' [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 608; accord, *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1313 ["failure to ask specific questions is reversible only on a showing of abuse of discretion: questioning that is not reasonably sufficient to test the jury for bias or partiality"].)

Here, defendant makes two related arguments in claiming that his due process rights to a fair trial were violated, such that his conviction "should be overturned

automatically, without an inquiry into prejudice, because this is a structural error." First, defendant argues that the trial court abused its discretion by not specifically examining TJ-1 regarding his "professed racial prejudice" or ensuring defense counsel sufficiently examined TJ-1 on this issue, after TJ-1 "repeatedly stated that he retained residual racial prejudice against Hispanic men, based on having been assaulted by a group of Hispanic men." Second, defendant states that, to the extent this court might consider it a prerequisite for preserving his due process claim on appeal, his trial attorney provided ineffective assistance by failing to adequately examine TJ-1 and then exercise a peremptory challenge to remove him.

Moving directly to defendant's substantive argument, we first address his characterization of the record and, in particular, his claim that TJ-1 "professed racial prejudice" and "repeatedly stated that he retained residual racial prejudice against Hispanic men . . . ." Defendant's statements are not accurate. Rather, the record, set forth above, reflects that, in response to a question about whether the prospective jurors or their family or friends have ever been a crime victim, TJ-1 stated that he had been a crime victim when he "was assaulted by three Hispanic guys probably about 25 years ago, and I received considerable dam—injuries. [¶] . . . [¶] . . . but they never caught the guys." TJ-1 then responded affirmatively when asked whether he "harbor[ed] any resentment" as a result of the incident, explaining, "I would like to think not, but I think I might have some prejudices." Thereafter, TJ-1 confirmed in further questioning that he understood defendant was presumed to be innocent and, among other things, that the prosecution bears the burden to prove his guilt beyond a reasonable doubt.

Contrary to defendant's argument, this colloquy does not reflect an admission by TJ-1 of harboring *racial prejudice against Hispanics*; rather, it reflects his acknowledgment that he may harbor prejudices from having been the victim of a violent crime in a situation where his attackers (identified as three Hispanic men) were never brought to justice. While it is true this colloquy, considered on its own, could implicitly reflect racial prejudice, TJ-1 did not raise his hand when asked by the trial court whether the fact that one or more of the parties, attorneys or witnesses come from a particular

national or racial group "might affect your judgment or the weight and credibility that you give to their testimony?" And later, when questioned by defense counsel, TJ-1 again acknowledged "feel[ing] a bit of prejudice" as a result of his experience but then explained his feeling was based on the fact his attackers were never brought to justice: "[S]ince the people that hurt me, attacked me were never caught, I kind of carry a, you know—you know, I like to see people that commit a crime get the price." And when asked by defense counsel whether he was "inclined to believe that because this man has been arrested and this man is here on trial, that there is a prejudice against him because of that," TJ-1 added that he does "feel a little pre-judgment, if that makes sense," but that, as a "rational person . . . I could . . . hear everything and make a decision."

Considering this record as a whole, we conclude the trial court acted within its discretion when deciding that further inquiry into TJ-1's views on racial bias or prejudice was not necessary. The trial court could have reasonably interpreted TJ-1's responses as not reflecting personal bias against Hispanic persons (as opposed to personal bias toward violent criminals, more broadly), particularly when considered in light of his failure to raise his hand when the jury pool were asked if their judgment would be affected by the fact that one or more of the parties, attorneys or witnesses may come from a particular national or racial group, and his acknowledgement that the rules of law, including the presumption of innocence and requirement of proof beyond a reasonable doubt, must prevail over any prejudices in court. (See *People v. Chaney* (1991) 234 Cal.App.3d 853, 862–863 [no abuse of discretion where "the court did voir dire in the area of racial prejudice" and "either of the general questions were sufficient to focus the attention of the prospective jurors on any racial prejudice they might entertain"]; *People v. Box* (2000) 23 Cal.4th 1153, 1179 [no abuse of discretion where the trial court's "inquiry clearly sought to ascertain from the prospective jurors whether they harbored any improper bias. That the prospective jurors understood the inquiry as such is evidenced by the fact that several did come forward and discuss their strong emotional reaction in chambers"], overruled on other grounds by *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.)

In so concluding, we agree that "bias is seldom overt and admitted. More often, it lies hidden and beneath the surface." (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1312.) At the same time, the standard this court must apply in reviewing defendant's challenge on appeal is highly deferential for good reason—the trial judge and defense counsel were charged with questioning TJ-1 and, in doing so, had the opportunity to "observ[e] [his] responses and demeanor and thereby glean[] 'valuable information' about [his] state[] of mind." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 610.) We did not. Under these circumstances and given this record, we find no good cause for disturbing the trial court's judgment that TJ-1 could serve as an impartial juror.[4]

Moreover, even assuming for the sake of argument that more could have been done by the trial court or defense counsel in questioning TJ-1 regarding possible racial bias or prejudice, we would nonetheless conclude the failure to do so in this case was harmless.[5] First, the trial court repeatedly instructed all jurors not to "let bias, sympathy, prejudice, or public opinion influence your decision." In addition, the trial court

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[4] Further supporting our conclusion, we were afforded in this case the rare opportunity to learn what defense counsel was actually thinking when deciding *not* to exercise one of his peremptory challenges to remove TJ-1 from the jury pool. Specifically, during the *Marsden* hearing, after defendant complained to the trial court regarding his attorney's failure to seek to remove TJ-1, his attorney explained to the court that he made this decision because "[TJ-1's] responses after mentioning this incident seemed to me to be somebody who was embarrassed by the fact that that had occurred to him and not somebody who was going to be against—against the Mexican person." The trial court, in denying defendant's motion, implicitly accepted defense counsel's decision as reasonable.

[5] We reject defendant's argument that the "structural error rule" should apply and require automatic reversal of the judgment without inquiry into whether any harm occurred in order "to ensure the 'essential demands of fairness' and to prevent 'invidious discrimination on the basis of race.' (*Ham* [*v. South Carolina* (1973)] 409 U.S. [524,] 526–527 [(*Ham*)]." As defendant acknowledges, *Ham* does not hold that the structural error analysis applies in a case, like his, where a criminal defendant challenges the adequacy of a trial court's voir dire on due process grounds. (*Ham*, at pp. 526–529.) A decision is not authority for issues not considered. (*People v. Knoller* (2007) 41 Cal.4th 139, 154–155 [" 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided" ' "].) Defendant directs us to no on-point authority supporting his argument; nor do we know of any.

instructed the jury that it "must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial." The trial court thus appropriately guided the jurors on the importance of deciding the case based on the evidence alone and not their subjective ideas or beliefs. (See *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1317 [inadequate voir dire on racial bias was harmless where "the trial court repeatedly emphasized the importance of juror neutrality and a fair trial"].)

Secondly, defense counsel took the opportunity presented him by the trial court to question TJ-1 regarding the nature and extent of his prejudice or bias stemming from his attack by the three Hispanic men and, afterward, expressed satisfaction with the jury "as presently constituted . . . ." Defendant directs us to nothing in the record indicating that counsel's judgment in this regard was irrational or arbitrary. (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1317.)

And thirdly, this is not a case where racial issues were "inextricably bound up with the conduct of the trial." (*Ristaino v. Ross* (1976) 424 U.S. 589, 597.) Rather, both the victim and the defendant are Hispanic, such that special circumstances were not present that may, in another case, have triggered more specific questioning on the issue of race. (*Ibid*. [noting that, in rare cases, more specific race-based questioning may be required where "an assessment of . . . all of the circumstances presented [reflects] a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne,' " first bracketed insertion added].)

Accordingly, we affirm the trial court's judgment based on our conclusion, stated above, that defendant's due process rights were adequately protected during the voir dire process as conducted and overseen by the trial court. We, thus, need not address defendant's ancillary claim that he received ineffective assistance of counsel based on his trial attorney's failure to adequately examine TJ-1 and to use a peremptory challenge to remove him. (See *People v. Hinds* (2003) 108 Cal.App.4th 897, 901 [claims of ineffective assistance of counsel not favored on appeal].)

DISPOSITION

The judgment is affirmed.

Wick, J.*

WE CONCUR:

Siggins, P. J.

Petrou, J.

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