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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EFRAIN ORTIZ,

Defendant and Appellant.

B230181

(Los Angeles County
Super. Ct. No. BA362218)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Kimberly Howland Meyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Efrain Ortiz of second degree robbery (Pen. Code, § 211¹) and found true the allegations that he personally used a firearm in the commission of the robbery within the meaning of sections 12022.5, subdivisions (a) and (d) and 12022.53, subdivision (b). The trial court sentenced defendant to state prison for 12 years. On appeal, defendant contends that the trial court erred in coercing him to withdraw his motion for mistrial and in failing to declare a mistrial, in denying his motion for new trial, and in denying his request to conduct further inquiry into his claim of juror misconduct. We affirm.

BACKGROUND

During the evening of August 29, 2009, Richard Mayerik, Alex Oigny, and Andrea Kistler were en route to the Bigfoot Lodge on Los Feliz Boulevard. They parked, and walked on Glenfeliz Avenue toward Los Feliz Boulevard. A man approached them from behind and told Mayerik to hand over his wallet. Mayerik turned around and saw defendant holding a gun. Defendant was not wearing a mask and made no effort to hide or disguise his face. Defendant stood about five feet from Mayerik and asked him also to hand over his cell phone. Mayerik gave his wallet and cell phone to defendant.

Defendant told Mayerik, Oigny, and Kistler to turn around and walk away. They complied and returned to Mayerik's car. As Mayerik and his companions were leaving the area, they noticed a Los Angeles Police Department or California Highway Patrol officer performing a traffic stop. Mayerik contacted the officer and reported the robbery. The officer called for a second unit to take statements from Mayerik and his companions.

When the second unit arrived, Mayerik described the robber to the investigating officer as a very large Hispanic male who had a short, cropped hairstyle and no facial hair other than a "5:00 shadow." Mayerik said that the robber was wearing a white T-shirt and dark jeans. Kistler described the robber as being tall and big with short, dark hair.

¹ All statutory citations are to the Penal Code unless otherwise noted.

Kistler said the robber wore a hat and may have said that he had facial hair. Later, Kistler told a Los Angeles Police Department detective that the robber was very fat and probably weighed around 300 pounds. Kistler testified at trial that she was uncertain of the robber's weight, but estimated it at 250 or more pounds. Oligny described the robber as an Hispanic male who was over six feet tall and was very large, weighing over 300 pounds. Oligny said that the robber wore a baggy white T-shirt and baggy denim bottoms. Oligny believed that she did not tell the officer that the robber had a moustache, and was 95 percent certain that the robber did not have a moustache. The investigative report listed the robber's height as "62," his weight as "200," and his hair color as black. Mayerik, Oligny, and Kistler did not recall telling the investigating officer that the robber weighed 200 pounds. When defendant was arrested, he told the police that he weighed 415 pounds.

Christopher Guerra knew defendant and testified in his defense. Guerra testified that he saw defendant in a recreation center parking lot about 6:30 p.m. on August 29, 2009. Defendant was wearing a T-shirt and gray basketball shorts. Defendant had a moustache.

Liza Ortiz², defendant's sister-in-law, testified that defendant lived with his brother and her at the time of the robbery. Defendant slept in the living room. Liza believed that defendant weighed at least 450 pounds at that time, and testified that defendant always had a mustache.

On August 29, 2009, Liza arrived home about 6:00 p.m. and remained there the rest of the night. At some point, Liza and her husband fell asleep. Sometime between 9:30 p.m. and 11:00 p.m., defendant knocked on Liza and his brother's bedroom door to wake them up. Liza spoke with defendant and then watched the 11:00 p.m. news in the living room. Defendant fell asleep during the news. Liza continued to watch T.V. until 2:00 a.m. Defendant remained in the living room while Liza watched T.V. Liza woke up

² Because she has the same last name as defendant, we refer to Liza Ortiz as "Liza."

about 10:30 a.m. the next morning. Defendant was still asleep. Defendant did not leave the apartment until 4:00 p.m. that day.

DISCUSSION

I. Motion for Mistrial

Defendant contends that the trial court should have granted his motion for mistrial. The trial court abused its discretion, defendant contends, when it failed to rule on his motion and instead coerced him into withdrawing his motion by proposing to interview the jurors to determine if they had been prejudiced by the introduction of certain inadmissible testimony. Because defendant withdrew his motion for mistrial, he has forfeited review of this issue.

A. Background

Prior to the presentation of evidence, the prosecutor moved, under Evidence Code section 1101, subdivision (b), to introduce evidence that defendant had been arrested on November 26, 2005, for possession of a firearm in the same general area as the robbery. The trial court denied the motion.

During direct examination, Los Angeles Police Department Detective Brian Miyakawa testified that Seneca Avenue was within a mile of Los Feliz Boulevard and Glenfeliz Avenue. The prosecutor asked the detective if he knew where defendant lived at the time of the investigation. Detective Miyakawa responded, “No. He was—during other investigations, his documented residence address was—” Defense counsel objected that the detective’s testimony was irrelevant and violated Evidence Code section 352. The trial court sustained the objection, finding the testimony irrelevant.

At a sidebar conference, the trial court said to the prosecutor, “I thought you weren’t going to go into this?” The prosecutor responded that he only was trying to establish that defendant lived in the area where the robbery took place. The trial court told the prosecutor to ask Detective Miyakawa if defendant lived near the area where the robbery took place.

Detective Miyakawa's testimony resumed and, after the noon break, defense counsel moved for a mistrial based on the detective's testimony about prior investigations. The trial court stated that it could not rule on defendant's motion without asking the jurors what they understood the detective's testimony to mean, which, the trial court observed, would highlight the issue to the jurors. The trial court stated it would have to ask the jurors if they could disregard the testimony, and would instruct them to disregard it.

Defense counsel stated that he did not want to bring more attention to the issue and would rather not "do anything further with the jury." Defense counsel stated his belief, however, that "once that statement is out, you cannot unring the bell" The trial court responded that it could not grant a mistrial without determining if there was prejudice based on the detective's testimony. Defense counsel stated that he understood and asked the trial court instead to remind Detective Miyakawa of the court's order that defendant's criminal history was not to be addressed.

The trial court stated that the record should reflect that defense counsel discussed the motion for mistrial with defendant. Defense counsel agreed. The trial court asked defendant if he understood the issue and asked defendant to inform the court how he would like to proceed. Defendant stated that he understood. The trial court said that Detective Miyakawa testified about how he learned of defendant's address. Defendant responded, "Correct." The trial court stated that the detective testified that defendant "had been investigated previously; right? He did not say what you were investigated for. He didn't say that you were arrested. But it's possible that a person might take from that the idea that you've been involved in other crimes." Defendant stated that he understood. The trial court explained to defendant that defense counsel had asked for a mistrial, but that the trial court could not declare a mistrial without determining whether the detective's statement prejudiced the jurors. The trial court could not determine prejudice without speaking to the jurors, which would highlight an issue the jurors might have forgotten. Defendant stated that he understood the potential negative side effect of the jury inquiry.

The trial court explained to defendant that if the jurors all said that they could disregard Detective Miyakawa's testimony, then it would not grant the mistrial. At that point, however, the jurors would have heard twice that defendant had been investigated. The trial court explained that that was the issue with which defense counsel was dealing. The trial court asked defense counsel to discuss the issue with defendant. Defendant said, "Actually, I'm okay. I think we should go on although I do feel as far as the address of my residence, it—we can go on without bringing more attention to what was said." The trial court asked, "You don't want me to conduct a motion for a mistrial?" Defendant responded, "No, sir." The trial court asked, "Is that right?" Defense counsel responded, "Yes, your honor." The trial court stated, "So then I will not rule on this since you are withdrawing it; is that right?" Defense counsel responded, "That is correct, your Honor."

B. Defendant Forfeited Review of This Issue by Withdrawing His Motion for Mistrial

A defendant may not object to the trial court's failure to grant his motion for mistrial when he voluntarily withdrew the motion. (See *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 276 ["the withdrawal of the motion [for mistrial] would have allowed the trial to proceed and would have amounted to a waiver of any claim of prejudice from the incident by petitioner thereafter, either on appeal or on motion for a new trial or otherwise"]; *People v. Boyd* (1972) 22 Cal.App.3d 714, 719 [same]; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1255 [express withdrawal of objection to the admission of evidence relating to prior crimes waived issue on appeal].) Here, the trial court asked defendant if he wanted to proceed with his mistrial motion. Defendant said, "No, sir." The trial court asked defense counsel if the court was not to rule on the mistrial motion because he was withdrawing the motion. Defense counsel responded, "That is correct, your Honor." Accordingly, defendant withdrew his motion for mistrial and, in doing so, has forfeited review of this issue.

Defendant contends that we should disregard his withdrawal of the motion for mistrial because it was impermissibly coerced by the manner in which the trial court

proposed to determine whether Detective Miyakawa's testimony prejudiced the jury. The trial court stated that it could not rule on defendant's motion for mistrial without asking the jurors what they understood the detective's prior testimony to mean. The trial court stated it would have to ask the jurors if they could disregard the testimony, and would instruct them to disregard it. Defendant contends that such proposed inquires forced him to withdraw his motion for mistrial because they would have exacerbated the prejudice caused by the detective's testimony by highlighting the issue to the jurors.

A trial court is to grant a mistrial if it has been "apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) Here, Detective Miyakawa's testimony made only a brief reference to defendant and "other investigations" in the context of defendant's address. The detective did not say that defendant was the subject of, or explain the nature of, those investigations, although the jurors reasonably could have inferred that defendant was the subject of prior criminal investigations. Because the trial court was to grant a mistrial only if it found prejudice that was incurable by admonition or instruction, it properly proposed to inquire of the jurors what they understood the statement to mean and whether they could ignore the statement. (*Ibid.*) Because the trial court's proposed inquiries of the jury were appropriate and did not amount to impermissible coercion, we will not disregard defendant's withdrawal of his motion for mistrial.

II. Motion for New Trial

Defendant contends that the trial court erred in denying his new trial motion based on juror misconduct. According to defendant, the jury impermissibly considered his failure to testify and his "prior history."

A. *Background*

The trial court instructed the jury on defendant's right not to testify with CALCRIM No. 355 which stated, "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

After his conviction, defendant filed a motion for new trial based in part on juror misconduct. Relying on a declaration from a juror filed in support of the motion, defendant contended that the jurors committed misconduct by discussing defendant's failure to testify and by considering Detective Miyakawa's testimony that he learned about an address for defendant in "prior investigations."

As for defendant's failure to testify, the juror stated in her declaration, "[W]e . . . wondered why the defendant didn't testify on his own behalf. It was remarkable that he didn't say anything in his own behalf. [¶] If the defendant had testified I would have had to take it into account as to whether he was truthful if the Defendant did take the stand." Apparently concerning Detective Miyakawa's testimony, the juror stated, "There was juror discussion of the defendant's prior history in connection with the proximity of the defendant's parent's home to the scene of the crime" The juror further stated, "I do not recall discussion by the jurors of prior investigations of the Defendant."

The trial court found that the jury committed misconduct by discussing defendant's failure to testify. It further found, however, that the juror's declaration showed that defendant did not suffer prejudice from the misconduct. The trial court reasoned that the juror's comment that she would have had to take into account whether defendant was truthful if he testified showed that the jurors understood that they could not use defendant's silence against him and that they could only consider evidence presented by persons who took the witness stand. The juror's declaration reflected the jurors' common sense desire to hear defendant testify, but also showed that no adverse inference had been drawn by his failure to testify.

As for Detective Miyakawa’s testimony concerning defendant and prior investigations, the trial court appears to have found no juror misconduct. The trial court found that the jurors’ reported discussion of defendant’s “prior history” could have concerned defendant’s prior addresses. The trial court said that the juror’s statement that she did not recall the jurors discussing prior investigations of the defendant did not support a finding of misconduct. The trial court further found that there was no showing of prejudice. The trial court denied the new trial motion.

B. Standard of Review

When ruling on a motion for new trial, “[i]t is the trial court’s function to resolve conflicts in the evidence, to assess the credibility of the declarants, and to evaluate the prejudicial effect of the alleged misconduct.”” (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 311.) “We accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]” (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) An appellate court reviews de novo whether there was misconduct. (*People v. Cumpian, supra*, 1 Cal.App.4th at p. 311.) ““Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court’s independent determination.” [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 726-727.)

C. Application of Relevant Principles

1. Defendant’s failure to testify

A jury commits misconduct by violating a trial court’s instruction not to discuss a defendant’s failure to testify. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425.) Such “misconduct gives rise to a presumption of prejudice, which ‘may be rebutted . . . by a reviewing court’s determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.’ [Citations.]” (*Ibid.*)

Substantial evidence supports the trial court's finding that the jury discussed defendant's failure to testify. (*People v. Nesler, supra*, 16 Cal.4th at p. 582.) The trial court properly found that the jury committed misconduct when it discussed defendant's failure to testify. (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.) Defendant was not prejudiced, however, by the jury's misconduct because there is not a substantial likelihood that defendant suffered actual harm. (*Ibid.*) The juror's statements that the jury "wondered why" defendant did not testify and found defendant's failure to testify "remarkable" do not reflect that the jury drew an adverse inference from defendant's failure to testify. (*Ibid.* ["the purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself"].) Rather, they reflect a natural, benign curiosity about defendant's failure to testify. (*People v. Loker* (2008) 44 Cal.4th 691, 749 ["It is natural for jurors to wonder about a defendant's absence from the witness stand"]; *People v. Avila, supra*, 46 Cal.4th at p. 727 ["'Transitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.' [Citation.]"]) We agree with the trial court that the juror's statement that she would have taken into account defendant's truthfulness if he had testified demonstrated that she understood that evidence concerning defendant's guilt was to be presented from the witness stand and that defendant's silence was not such evidence.

2. Defendant's "prior history"

A jury does not commit misconduct if it considers inadmissible evidence it has inadvertently been provided. (*People v. Gamache* (2010) 48 Cal.4th 347, 397-398.) The jury's consideration of such evidence is only ordinary error, not misconduct. (*Id.* at p. 398; *People v. Clair* (1992) 2 Cal.4th 629, 665, 667-668 [consideration by the jury of an unredacted audiotape and a transcript of the defendant's statements to the police, which

the court clerk had inadvertently provided to the jury and portions of which had been excluded as irrelevant and unduly prejudicial, was ordinary error and not misconduct].)

The jury did not commit misconduct with respect to Detective Miyakawa's testimony concerning defendant and prior investigations. Defense counsel objected to the testimony, and the trial court sustained the objection. In connection with defendant's motion for mistrial, the trial court stated that if defendant proceeded with his motion, it would, as appropriate, instruct the jury to disregard Detective Miyakawa's testimony. Defendant withdrew his motion. The juror's declaration stated that the jury considered defendant's "prior history," but that prior history concerned the fact that defendant previously lived with his parents in a location apparently near the scene of the crime. The juror did not recall the jury discussing "prior investigations" of defendant, which prior investigations were the subject of defense counsel's objection and defendant's motion for mistrial. Even assuming the jury discussed Detective Miyakawa's inadmissible prior investigations testimony, the jury's discussion of such testimony was analogous to the discussion of inadvertently provided inadmissible evidence, the consideration of which involves ordinary error and not misconduct. (See *People v. Gamache, supra*, 48 Cal.4th at pp. 397-398; *People v. Clair, supra*, 2 Cal.4th at pp. 665, 667-668)

III. Investigation of Juror Misconduct

Defendant contends that the trial court abused its discretion when it denied his petition for release of personal juror identifying information so that he could investigate juror misconduct and when it failed to conduct its own investigation of juror misconduct in connection with his motion for new trial. The trial court acted within its discretion.

A. Background

Following his conviction, defendant filed a petition under Code of Civil Procedure section 237 for the release of personal juror identifying information. Defendant contended that such information should have been released so that he could assess the

impact on the jurors of Detective Miyakawa's improper testimony that he was familiar with defendant from prior investigations. The trial court denied the petition, finding that defendant had not shown misconduct by any of the jurors

Defendant filed a motion to reconsider his request for the release of personal juror identifying information.³ The motion apparently was based on a declaration from a defense investigator concerning conversations he had with two jurors. The investigator reportedly stated in his declaration that the jurors discussed defendant's prior criminal history and his failure to testify. Defendant sought access to the all of the jurors to determine whether those issues were a factor in the jury's verdict. The trial court denied the motion without prejudice, finding that the investigator's declaration was hearsay, the jurors' reported statements in the investigator's declaration were vague and did not establish prejudice to defendant, and defendant had the identity and cooperation of two jurors whose declarations could be used as the basis for a new trial motion. The trial court stated that defendant could file another petition for the release of personal jury identifying information if he believed he could present additional information justifying disclosure. Defendant suggested that he would obtain juror affidavits.

Thereafter, defendant filed his motion for new trial to which he attached the juror declaration discussed above in connection with defendant's motion for mistrial. Defendant did not renew his request for the release of personal juror identifying information.

B. Standard of Review

We review a trial court's denial of a Code of Civil Procedure section 237 petition for access to personal juror identifying information under the deferential abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

³ The record on appeal does not contain a copy of the motion.

C. *Application of Relevant Principles*

Pursuant to Code of Civil Procedure section 237, “a defendant or defendant’s counsel may . . . petition the court for access to personal juror identifying information within the court’s records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose.” (Code Civ. Proc., § 206, subd. (g).) “The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror’s personal identifying information.” (Code Civ. Proc., § 237, subd. (b).) A defendant establishes good cause for the release of such information by “set[ting] forth a sufficient showing to support a reasonable belief that jury misconduct occurred.” (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) The alleged misconduct must be “of such a character as is likely to have influenced the verdict improperly.” (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322, quoting Evid. Code, § 1150, subd. (a).)

With respect to the jury’s discussion of defendant’s failure to testify, the trial court found that defendant showed that the jury committed misconduct. That being so, defendant did not need juror identifying information to establish misconduct. As for prejudice, defendant had personal identifying information for two jurors. Those jurors were willing to discuss the jury’s deliberations with defendant’s investigator, and those discussions were the basis for defendant’s motion for reconsideration of his petition for release of personal juror identifying information. Defendant submitted a declaration from one of the two jurors with his motion for new trial based on juror misconduct. The juror whose declaration defendant submitted provided no information that any juror improperly used defendant’s failure to testify against defendant. As we held above, that juror’s statement that she would have considered defendant’s truthfulness if he had testified demonstrated that she understood that defendant’s silence was not evidence in the case. Accordingly, as to the jury’s discussion of defendant’s failure to testify, defendant did not provide the trial court with a basis for it either to grant defendant’s petition for release of personal juror identifying information or to conduct its own investigation of juror

misconduct. (Code Civ. Proc. §§ 206, subd. (g) & 237, subd. (b); *People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552; *People v. Jefflo*, *supra*, 63 Cal.App.4th at p. 1322.)

As for the jury's discussion of defendant's "prior history," as explained above, defendant's petition did not demonstrate juror misconduct. The juror's declaration stated that the jury considered defendant's "prior history," and that she did not recall the jury discussing "prior investigations" of defendant. Detective Miyakawa's testimony to which defendant objected concerned prior investigations. Accordingly, because defendant failed to make a showing of good cause for access to personal juror identifying information based on the jury's discussion of Detective Miyakawa's testimony, the trial court did not abuse its discretion in denying defendant's petition or in not conducting its own investigation of juror misconduct. (Code Civ. Proc. §§ 206, subd. (g) & 237, subd. (b); *People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552; *People v. Jefflo*, *supra*, 63 Cal.App.4th at p. 1322.)

DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.