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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WINDER ESTUARDO BARRIOS,

Defendant and Appellant.

B234002

(Los Angeles County
Super. Ct. No. BA354909)

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

James Koester, 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, and William N. Frank, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Winder Estuardo Barrios appeals from the judgment entered following a jury trial in which he was convicted of five counts of second degree robbery, two counts of home invasion robbery, two counts of false imprisonment by violence, two counts of assault with a firearm, and one count of first degree burglary. Personal firearm-use enhancement allegations were found true with respect to all but one of the charges. Defendant contends the trial court erred by denying his second motion for a mistrial and that insufficient evidence supports the jury's finding that he personally used a firearm in the commission of the offenses against one victim. We affirm.

BACKGROUND

Defendant, codefendant Jose Aldana, and a third man committed four robberies in the Hollywood area between about 9:30 and 10:00 p.m. on March 26, 2009. (All further unspecified date references are to 2009.) Each victim was alone in a parked car when a black pickup truck pulled alongside the victim's car. Two men emerged from the truck, one pointed a shotgun at each victim, and they demanded money. Each victim handed over one or more items to the men. The men took victim Kate Taylor's GPS system. Three of the four victims (Jerry Baxter, Julio Licon, and Taylor) identified defendant and Aldana at trial as the robbers. Baxter testified that the robbers' truck was a Nissan, and victims Dane Woodward, Baxter, and Licon testified that the black truck had a paper license plate that said "Miller" and appeared to be the same truck in which defendant and Aldana were riding when arrested.

On the morning of March 27, defendant, Aldana, and a third man went to the gated Encino home of Robert Smith. Smith's 19-year-old daughter Jenna and the family's housekeeper, Olga Carpio, were in the house. Carpio opened the gate for the men, who stated over the intercom that they were the gardeners. A black truck drove in, and few minutes later, defendant and Aldana appeared outside the glass entry door, which Carpio was cleaning. Aldana pointed a shotgun at Carpio's stomach and demanded that she open the door. After she did, they forced her back to the kitchen. By the time they reached the kitchen, defendant had the shotgun and was pointing it at Carpio. Aldana

taped her to a chair and covered her eyes with masking tape. A little later, Jenna awoke and entered the kitchen. She saw Carpio taped to a chair and a man standing behind Carpio pointing a gun at Carpio's head. The gun looked like the one in the photograph of the shotgun recovered from the black truck when defendant and Aldana were arrested. Jenna ran, but the man with the gun ran toward Jenna. The men chased her, threw her down, and carried her to the kitchen, where they taped her to a chair and taped her eyes nearly shut. Jenna felt the barrel of the gun pressed against her cheek and heard the men moving around quickly. After she heard the front door close and no longer heard the men in the house, she phoned her father and 911. The men had ransacked the house and taken two large flatscreen televisions and two laptop computers. Smith identified as his two laptops recovered from defendant's apartment.

The Smith's real gardener arrived the same morning and saw a black Nissan Frontier pickup truck with a paper dealer plate that said "Miller" parked near the house with televisions in the truck bed. The truck in which defendant and Aldana were arrested looked like the truck the gardener saw. Security camera footage from the home of one of Smith's neighbors showed a black Nissan truck driving toward the Smith house with an apparently empty bed, then driving in the opposite direction about 30 minutes later with what appeared to be big screen televisions in the bed. Portions of the video were played at trial.

On the night of March 30, a silver Escalade pulled up next to Wesley Swafford as she sat in her parked car in the Hollywood area. Aldana got out of the passenger side of the Escalade, pointed a shotgun at Swafford's face, and demanded that she give him "everything." She handed over her purse, car keys, and phone. Her phone was recovered from the rear floorboard of a silver Escalade registered to defendant.

Defendant and Aldana were arrested in the Hollywood area on the night of April 2 in the black Nissan truck with "Miller" plates. The police found Taylor's GPS system, a loaded shotgun, and additional shotgun shells inside the truck.

Over the course of two interviews by police, defendant admitted committing the five robberies in the Hollywood area, personally using the shotgun in each of the Hollywood robberies (including the Swafford robbery), the burglary at the Smith home, and the crimes against Carpio. Initially, defendant tried to minimize his responsibility, claiming that although he entered the house with the gun, he held it at his side, did not point it at anyone, did not see anyone taped up, did not see Jenna, and almost immediately after entry, went outside to remain by the truck while his two companions did everything else. He gradually admitted that he remained inside the house, he had the gun on Carpio while Aldana taped her, he kept the gun with him and remained in the kitchen with Carpio after she was taped, he saw Jenna on the floor, and he talked to Jenna, but he denied being the one who used the shotgun on Jenna. Near the end of the interview, when a detective confronted defendant about the anxiety Jenna experienced, defendant said, “I was talking to her.” The detective said, “Yeah—yeah, okay. You have a shotgun; right?” Defendant said, “No, but I didn’t—I didn’t pull out—” The detective repeated, “Yeah, but you had a shotgun.” Defendant replied, “Yeah, I understand.” A videotape of defendant’s interview regarding the crimes at the Smith home was played at trial. The prosecution also introduced a surreptitiously recorded video of defendant and Aldana conversing in a holding cell. Defendant insisted that they would “[o]nly accept four” robberies “[a]nd no more.”

The registered owner of the black Nissan truck was Hector Carpio, who was Olga Carpio’s cousin. The third robber, Quinones, was married to another of Carpio’s cousins, who had helped Olga at the Smith home for several months two years before the crimes.

Defendant recalled the investigating officer for the crimes at the Smith house as a witness regarding her attempts to question Olga Carpio about Hector Carpio.

Defendant and Aldana were tried by separate juries. Defendant’s jury convicted him of five counts of second degree robbery, two counts of home invasion robbery, two counts of false imprisonment by violence, two counts of assault with a firearm, and one count of first degree burglary. The jury further found that defendant personally used a

shotgun in the commission of every offense except the robbery of Swafford. (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subd. (b); undesignated statutory references are to the Penal Code.) The court sentenced defendant to 42 years 8 months in prison, consisting of 9 years for the home invasion robbery of Jenna Smith plus 10 years for the section 12022.53, subdivision (b) enhancement; 1 year for each of the five Hollywood robberies plus 3 years 4 months each for the section 12022.53, subdivision (b) enhancements to four of those robberies; and 2 years for the home invasion robbery of Carpio, plus 3 years 4 months for the section 12022.53, subdivision (b) enhancement.

DISCUSSION

1. Sufficiency of evidence

Defendant contends the evidence was insufficient to support the jury's finding that he personally used the shotgun in the commission of the offenses against Jenna Smith.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Substantial evidence is ““evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”” (*People v. Tully* (2012) 54 Cal.4th 952, 1006.) We presume the existence of every fact supporting the judgment that the jury could reasonably deduce from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) Where substantial evidence supports the verdict, we must affirm, even though the evidence would also reasonably support acquittal. (*People v. Towler* (1982) 31 Cal.3d 105, 118.)

Although Jenna Smith was unable to identify which of the three burglars had the shotgun, substantial evidence supports the jury's finding of personal use by defendant. Carpio testified that defendant was the man who pointed the shotgun at her while Aldana taped her to the chair, and defendant admitted this. Defendant further admitted that he kept the gun and stayed with Carpio in the kitchen after she was taped. He insisted that

his two accomplices were the ones who gathered the loot from the house. Jenna Smith testified that when she walked into the kitchen, she saw a man pointing a gun at Carpio, and that man then chased her when she attempted to run away. The jury could reasonably infer that defendant was the man who was pointing a gun at Carpio when Smith entered the kitchen, and that he was thus the man who chased Smith. The jury could further infer that defendant continued to hold the gun as he chased Smith and helped his accomplices to subdue her. Carrying the gun while overcoming Smith's attempt to flee and while she was being restrained constitutes personal use in the commission of robbery and false imprisonment. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.) In addition, defendant's statements when confronted by the detective about Smith's anxiety were reasonably viewed as an adoptive admission that he had the shotgun when was talking to Smith. Accordingly, we conclude that substantial evidence supports the jury's finding on the personal firearm-use allegations with respect to Smith.

2. Denial of second motion for mistrial

On the fourth day of trial, a representative of the Los Angeles County Sheriff's Department informed the trial court that defendant and Aldana had escaped from custody. Jailers realized they were missing at 3:00 a.m. and began searching the Pitchess facility, grounds, and surrounding area for them. The sheriff's department had already put out news releases, including photographs of defendant and Aldana, and had asked for the public's help in locating them. The trial court found defendant and Aldana had escaped from custody and exercised its authority, pursuant to section 1043, subdivision (b), to proceed with the trial in their absence.

The trial court told counsel that it had decided to inform the juries of the escape: "The information concerning the defendants' escape is now out in the news media, their names have been revealed. I do not believe this information can be contained. Most people already know that this escape has happened. [¶] So it seems to me that not revealing that fact would be ineffectual, that they will indeed find out sooner or later.

And if they find out in the trial process, that itself can lead to misuse of that information.” The court went through its proposed admonition to jurors with all counsel, who requested no changes.

When the court brought defendant’s jury into the courtroom, the court explained the situation: “I need to talk to you and give you some admonishments and then ask you some questions about something that has happened concerning this case. [¶] And so now you see that in the courtroom, neither of the defendants are here. The fact that the defendants are not here does not alter the rules that relate to the trial process. [¶] Each defendant is still entitled to the presumption of innocence. Each defendant still retains their right not to be compelled to testify. [¶] The burden of proof still rests with the prosecution, and the standard of proof remains beyond a reasonable doubt. [¶] A fair trial depends upon the jurors’ ability and competence to follow these rules. [¶] Now, it has come to this court’s attention that the defendants have escaped from jail. That fact is on the news, it is on the Internet, and I suspect some of you know already and many of you will probably find out later. [¶] Now, this is again on the local news and on the Internet. Their escape, if that is a fact, is not evidence of guilt. [¶] The jury cannot use that fact against the defendant as evidence of guilt in this case. It cannot become the subject of discussion during deliberations, and cannot be used as evidence to establish any of the elements of the charged offenses. [¶] Each juror must be able to abide by these rules. The integrity and fairness of the jury trial process requires each juror to strictly adhere to these rules. [¶] Each juror must be able to set this fact aside and not use it as evidence of guilt against either of the defendants. [¶] To the extent that it is within your control, each juror must not read, listen to, or watch any news report, or commentary about this purported escape.”

The court continued, “I thought about the issue of not telling you that the defendants had escaped. I’ve been on the phone with the sheriff’s department since this morning and have discussed this issue, but it is important for the sheriff’s department to have released this information. So their names have been released. So it is out there. [¶]

And because it was out there in the public domain, the approach of not telling you that they had escaped was probably one that, in the end, would have proved futile, you probably would have found out, and so I've told you, and some of you might have inquiries about that. It's only natural to want to begin to think why is this happening, where did they go. Things of that nature. [¶] Now, I can't tell you don't let your mind go there, it might go there. You might think about it. But what I'm saying to you is it cannot be used as evidence of guilt, you cannot think they're guilty because they have escaped. It's absolutely critical that you don't do that, because that's not evidence that's being presented in the courtroom. [¶] Remember I told you that the trial has to be based only on the evidence presented in the courtroom. And so therefore, I've given you this admonishment that you have to abide by the rules that the defendants are entitled to the presumption of innocence, that they retain their right to remain silent, cannot be compelled to testify, that the burden is on the prosecution to prove the case beyond a reasonable doubt to the jury, and that you all are able to abide by these rules, set aside what I've said about the fact that the defendants might have escaped and that they're not here, to set that aside in your deliberation process and not talk about that as evidence in this case, and then to render a verdict, if you can, based only on the evidence presented in the trial. [¶] And then to the extent that it is within your control, don't watch any news reports or read about this issue, because probably if you turn on the news, it will be on it, okay."

The court then inquired of each juror, including the alternates, whether he or she understood the admonition and would be able to follow it. Every juror answered both questions affirmatively.

Attorneys for defendant and Aldana then unsuccessfully sought a mistrial.

The next day, defendant and Aldana were present for trial. The trial court explained the circumstances and re-admonished defendant's jury: "Yesterday I had a discussion with you concerning the absence of the defendant, and now you see that the defendant is with us again. I also spoke with you concerning the defendant's

constitutional rights. [¶] I indicated to you that he is entitled to the presumption of innocence, that the defendant retains his right not to be compelled to testify, that the burden of proof rested with the prosecution, and that for you the burden is beyond a reasonable doubt, meaning that that is the burden that the prosecution must meet before you are allowed by law to convict anyone of a crime, including [defendant]. [¶] I also spoke to you about—to the extent possible, that you were not to view any news reports or commentaries about the alleged escape by [defendant] and . . . Aldana, and I asked you that—I asked you two questions: Number 1, I asked you whether or not you understood the admonition; and, No. 2, whether or not you were able to follow the admonition; and all of you indicated to me that you understood the admonition and that you were able to follow that admonition. [¶] Now that he is here . . . nothing has changed concerning your duties. It remains the same. It’s constant. It doesn’t change because the defendant is here or he is not here. It doesn’t matter. It remains the same. [¶] Do all or you understand?” All of defendant’s jurors responded affirmatively, and, when asked by the court, no juror indicated he or she would have “a problem” applying the rules the court had set forth.

The next day, defendant renewed his motion for mistrial on the theory that it was impossible for the jury to be fair in light of the numerous news reports, some of which included statements by Supervisor Mike Antonovich “indicating that both defendants are illegal immigrants” and wondering why they had not been deported instead of being housed in the county jail. Defendant did not ask the court to inquire of jurors whether they had been exposed to any news accounts or comments regarding the escape or capture.

The trial court denied the renewed mistrial motion, stating, “The jury indicated they—that they understood my admonishment and that they would be able to follow it. I’ve admonished them two times. I admonished them when the defendants escaped and then I admonished them when they were caught. So I have admonished the jury two times about the fact that all of the rights applied, that the rights did not depend on

whether the defendant was present or not, absent from the courtroom. [¶] I admonished them that the escape was not evidence to be used in the trial and I indicated that it is important for the jury to the extent possible not to watch the news reports that might be aired or read any accounts of it, either in the newspaper or internet. The jurors said they understood that and would be able to abide by it two times. There is no reason for me to conclude that any of the jurors violated that admonishment. There is no evidence before me any of them have. The only evidence that I have is they understood my admonishment and that they would follow it. [¶] So I have no basis to believe that any information you're now talking to me [*sic*] has spilled over into their consciousness. Without that information, I have no basis to conclude that the jurors would be prejudiced against your client. So on that ground the motion for a mistrial is denied.”

Defendant challenges the denial of his second motion for a mistrial on the ground that the trial court denied it “reflexively,” “without any new consideration or investigation into whether the changed circumstances discussed by counsel may have adversely affected any of the jurors.” Defendant does not challenge the trial court’s decision to proceed with the trial during his absence or the denial of his original mistrial motion.

The trial court should grant a mistrial if it “is 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.” (*People v. Collins* (2010) 49 Cal.4th 175, 198, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.) “Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis.” (*People v. Chatman* (2006) 38 Cal.4th 344, 369–370.) We review the denial of a motion for mistrial for abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

The California Supreme Court’s decision in *People v. Prieto* (2003) 30 Cal.4th 226 (*Prieto*) is instructive. There, a newspaper published an article during trial stating that a witness in the trial had received threats. Prieto “asked the court to question jurors

individually regarding whether they had read the article [and] moved for a mistrial” The trial court “denied the motion for a mistrial and declined to question the jurors about the article.” (*Id.* at p. 272.) The Supreme Court rejected an appellate claim that the trial court erred by refusing to question jurors, stating, “Although a juror who ‘read[s] newspaper articles about the case he or she is deciding’ commits ‘misconduct, raising a presumption of prejudice [citation] and triggering a duty of the trial court to make appropriate inquiry,’ nothing in the record, aside from defense counsel’s speculation, suggests that any juror did so. (*People v. Marshall* (1996) 13 Cal.4th 799, 864.) Throughout the trial, the court admonished the jurors to avoid reading articles about the case. ‘[I]n the absence of evidence to the contrary we must presume they followed the court’s admonition.’ (*Ibid.*) Although the prudent course may have been to question the jurors (see *People v. Adcox* (1988) 47 Cal.3d 207, 253), we will not ‘presume prejudice’ absent a threshold showing that some jurors had, in fact, seen the newspaper article (*Marshall*, at p. 864). Because there was no such showing, the court ‘was put on no duty of inquiry.’ (*Ibid.*) Accordingly, the court did not err by refusing to question the jurors.” (*Prieto*, at pp. 272–273.)

Here, defendant did not ask the court to make any additional inquiry of the jurors. He also did not allege, let alone make “a threshold showing that some jurors had, in fact, seen” any of the news coverage, much less Antonovich’s comments. The trial court had already repeatedly told the jury to avoid exposure to news in general and news stories about defendant’s escape in particular. The court had also repeatedly told the jury that it could only base its verdicts upon evidence presented in court, that the escape was not evidence in the case and could not to be used as evidence against defendant or even considered or discussed during deliberations. We presume that the jury followed the court’s admonitions and instructions. (*People v. Williams* (2010) 49 Cal.4th 405, 469 (*Williams*); *Prieto, supra*, 30 Cal.4th at pp. 272–273; *People v. Adcox, supra*, 47 Cal.3d at p. 253.) The trial court’s prior inquiries to the jurors regarding their ability to follow the admonitions provided no reason to believe that jurors disobeyed the admonition.

Even if we were to conclude that the trial court abused its discretion, we would find no prejudice, even applying the more stringent standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]. Defendant concedes “that there was overwhelming evidence related to his commissions of the Hollywood area robberies, and that he admitted his involvement with the Smith residence burglary during the taped interview Thus, any error in the court’s failure to reconsider [the] renewed new trial [sic] motion and its failure to re-examine the jurors in light of the additional publicity following [defendant’s] capture would be harmless, as to those counts, under any standard of review.” Defendant nonetheless argues that, given “a decided paucity of evidence” that defendant personally used the shotgun during the crimes against Jenna Smith, there was “a reasonable probability that some jurors” found true the personal firearm-use allegations with respect to Smith “based upon the inflammatory comments made by Supervisor Antonovich regarding [defendant’s] illegal immigration status.” We disagree. Substantial evidence, not “a decided paucity of evidence,” supported the jury’s true findings on the personal firearm-use allegations regarding Smith, as previously addressed. Defendant’s argument is necessarily based upon speculation; we presume the jury abided by the court’s admonitions not to listen to or read news reports or commentaries about the escape, and its instructions to decide the truth of the allegations solely upon the basis of the evidence presented in court and the law provided by the court, without being influenced by bias, prejudice, or public opinion, to apply the presumption of innocence and reasonable standard, and to find the firearm-use allegations true only if it found every element had been proven beyond a reasonable doubt. (*Williams, supra*, 49 Cal.4th at p. 469.) In addition, the behavior of defendant’s jury indicates that it did not base its finding on the firearm-use allegations on the basis of defendant’s immigration status or publicity regarding the escape: it sent the court three notes, asking for a transcript of the testimony of four witnesses, then narrowing it to four questions regarding the testimony of the witnesses; it deliberated for about 2 hours and 48 minutes over the course of two days; and it did not find true the personal firearm-use

allegation with respect to Swafford (consistent with Swafford's testimony that Aldana had the gun), even though a detective testified that defendant admitted pointing the shotgun at Swafford. It thus appears beyond a reasonable doubt that neither publicity about the escape nor Antonovich's statements about defendant's immigration status contributed to the jury's findings.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.