

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JABAZ HEBERT,

Defendant and Appellant.

B259884

(Los Angeles County
Super. Ct. No. MA061195)

APPEAL from the judgment of the Superior Court of Los Angeles County,
Charles A. Chung, Judge.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E Winters, Senior Assistant Attorney General, Mary Sanchez and David
Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Jabaz Hebert (appellant) was convicted, following a jury trial, of one count of forcible oral copulation in violation of Penal Code section¹ 288a, subdivision (c)(2)(a) (count 3), one count of forcible oral copulation in concert in violation of section 288a, subdivision (d)(1) (count 4), one count of rape by foreign object in violation of section 289 (count 5), and false imprisonment in violation of section 236 (count 6). The court declared a mistrial on three other charges (counts 1, 2, and 12). The court found true the allegations that appellant had suffered a prior felony conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 (the Three Strikes Law) and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to a total term of 50 years in state prison and imposed various fees, fines and assessments, including a \$14,000 restitution fee pursuant to section 1202.4, subdivision (b).

Appellant appeals from the judgment of conviction, contending the trial court erred in refusing to permit a full investigation into allegations of juror misconduct. We affirm the judgment of conviction.

FACTS

On the night of October 25, 2013, thirty-one-year-old Cassandra C. went to Lancaster to work as a prostitute in the vicinity of Snooky's bar. Her plan was to work for the night, find a room to sleep in and return home the next day. Cassandra had schizophrenia and was a methamphetamine user.

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

At about 2:00 a.m. on October 26, Cassandra saw appellant and Ramaul James² drive into Snooky's parking lot in an SUV. Appellant was the driver. The men spoke with Cassandra and she agreed to have sex with them for \$40. Cassandra agreed to go to a motel with the men and got into the back of the SUV. She did not get the money upfront.

Once inside the SUV, the two men told Cassandra that they were going to pimp her out. She objected. When the SUV stopped at a stoplight, she attempted to get out of the SUV but was unable to open the door. She asked to be let out, but appellant refused.

After Cassandra asked to get of the SUV, James got into the back of the SUV and told her to orally copulate him. She refused. Appellant told her that he had a gun and she should comply with James's demand. She did so, against her will. This act formed a possible basis for the count 4 forcible oral copulation in concert charge and conviction.

Appellant and James drove to a 7-Eleven, where they got out and made purchases. Cassandra remained in the SUV, locked inside. The men then drove to the Townhouse Motel, where appellant rented a room. The men escorted Cassandra into the room. Appellant's movement of Cassandra up to this point formed the basis for the count 12 kidnapping for rape charge against appellant, a charge upon which the jury deadlocked.

Appellant and James both slapped Cassandra once she was inside the room. Cassandra did not want to stay in the motel room, but did so because she was afraid of the men. Cassandra's confinement in the room was the basis of appellant's count 6 false imprisonment conviction.

Over the course of the next few hours in the room, appellant and James engaged in various sexual activities with Cassandra, all of which Cassandra claimed were against her will. These acts form the basis of the charges against appellant in counts 1 through 5 of

² At some point, James was charged as a co-defendant with appellant. The charges against James were alleged in counts 7 through 11 of an amended information. These charges were identical to the counts 1 through 6 charges against appellant. On April 30, 2014, the day before the jury retired to deliberate, the court found James not competent to stand trial and declared a mistrial.

the information. The jury deadlocked on count 1, which alleged forcible rape and count 2, which alleged forcible rape and rape by a foreign object in concert. The jury convicted appellant of counts 3, 4, and 5 as set forth above. Cassandra testified that both appellant and James forcibly orally copulated her in the motel room. Count 4, which alleged forcible oral copulation in concert, may have been based on this conduct.

At about 5:00 a.m., the men took Cassandra's identification and cell phone from her purse and left, telling her that they would return with clients and methamphetamine for her. They also told her that she could keep the room until 11:00 a.m. in lieu of the \$40 they had promised earlier. Appellant and James did not return, and Cassandra left the room and reported the sexual assaults to the front desk clerk at the motel.

At trial, during cross-examination, Cassandra agreed that if appellant and James had paid her \$40 upfront, everything they did afterward would have been okay.

PROCEDURAL BACKGROUND

The jury began deliberations on May 1, 2014, and elected Juror No. 10 as the foreperson before recessing. Deliberations resumed on May 5. At 3:18 p.m. on May 6, the jury announced that it was deadlocked on all counts, with a 7 to 5 split. The court sent the jury back for further deliberations.

At 11:35 a.m. on May 9, the fifth day of deliberations, the jury informed the court that it had reached verdicts on some counts. The clerk read the verdicts for counts 3, 4, 5 and 6. The jury found appellant guilty on all four counts. The jurors were individually polled and agreed that those were their verdicts. The foreperson told the court that a vote had been taken on counts 1, 2 and 12 between 4 and 6 times. The breakdown on the last vote was 8 to 4. The jurors were polled and each agreed that they were hopelessly deadlocked. Appellant's counsel asked the court to declare a mistrial. The request was granted without opposition from the People. The foreperson then informed the court that the vote was 8 to 4 in favor of conviction. The jury was discharged.

The day after being discharged, Juror No. 11 wrote a letter to the court stating that she believed that appellant was only guilty of the false imprisonment charge and she had

voted guilty on the other three charges because she felt pressure from the foreperson. She suggested that three other jurors, Jurors Nos. 5, 8, and 9, had changed their votes from not guilty to guilty for similar reasons. The court informed counsel of the letter.

On June 6, 2014, appellant's counsel filed a motion for new trial based on jury misconduct and related due process grounds. The basis of the motion was the letter written by Juror No. 11. That same day, appellant's counsel also filed a motion for disclosure of the jurors' identifying information, also based on Juror No. 11's letter. The People filed an opposition to the new trial motion.

On August 7, 2014, the court held a hearing on the motion to disclose. The court denied appellant's motion for disclosure of the three jurors referred to in Juror No. 11's letter, but agreed that appellant's counsel could contact Juror No. 11 and attempt to gain more information.

On September 29, 2014, an investigator from the Public Defender's office interviewed Juror No. 11. At some point, the investigator prepared a report summarizing the interview.

On October 15, 2014, the court held a hearing on appellant's motion for a new trial. The court denied the motion.

DISCUSSION

Appellant contends that the trial court abused its discretion in denying her motion to disclose juror identifying information and in failing to investigate on its own motion two additional instances of potential juror misconduct not raised in the motion. We do not agree.

a. Law

After a verdict is entered, a criminal defendant 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).)

“Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires ‘a sufficient showing to support a reasonable belief that jury misconduct occurred. . . .’ (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; accord, *People v. Wilson* (1996) 43 Cal.App.4th 839, 850-852.)” (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346.) “Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported.” (*Id.* at p. 346.)

“Absent a showing of good cause for the release of the information, the public interest in the integrity of the jury system and the jurors’ right to privacy outweighs the defendant’s interest in disclosure. (*People v. Avila* (2006) 38 Cal.4th 491, 604; *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096.)” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1429.)

We review the denial of a petition for disclosure for an abuse of discretion. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096-1097.)

b. Motion to disclose

Appellant’s motion to disclose was brief and focused on the domineering nature of the foreperson and pressure she supposedly applied to jurors to vote guilty. Appellant’s counsel sought identifying information for Jurors Nos. 5, 8 and 9, the three jurors whom Juror No. 11 believed were pressured into voting guilty on counts 3, 4 and 5. Appellant’s counsel did not raise the issue of a potential misstatement of the law by a juror in this motion.³

³ Appellant’s motion for a new trial based on juror misconduct was similarly circumscribed.

Because of the freedom accorded jury deliberations, courts are historically reluctant to entertain claims of coercive deliberations. (*People v. Keenan* (1988) 46 Cal.3d 478, 541, fn. 34.) Problems of proof are substantial, as Evidence Code section 1105 prohibits proof of the subjective reasoning processes of the individual juror.

Here, in denying appellant's motion, the trial court noted that Juror No. 11 stated that, "I believe we all did not possess an abiding conviction but we did all have different points of the story at reason and question." The trial court found Juror No. 11's belief the other three jurors were somehow pressured into changing their votes was "not based on any statements that she attributes to them or any objective evidence. It is purely her own conjecture that they changed their vote because they, like her, felt pressured, and that is certainly not enough to disclose their identity."

The trial court did not abuse its discretion in denying the motion to disclose the identity of the three jurors. The court reasonably viewed Juror No. 11's comments about the three other jurors as speculation, particularly in light of her statement that each juror questioned different aspects of the victim's story and the fact those three jurors voted not guilty on three of the seven charges against appellant.

Further, as the trial court would later explain in its ruling on the motion for a new trial, Juror No. 11's letter describes healthy deliberations, not misconduct. Frustration, impatience or anger are part of the normal deliberative process and not misconduct. (*People v. Keenan, supra*, 46 Cal.3d at pp. 540-541.) Jurors can be expected to disagree, even vehemently, and to attempt to persuade fellow jurors by strenuous and sometimes heated means. (*Id.* at p. 541; *People v. Orchard* (1971) 17 Cal.App.3d 568, 574.)

The court did grant appellant's request "to further contact Juror Number 11 so that perhaps you can put together further factual arguments for a new trial." Appellant's counsel requested, and received, a hearing date of October 15, more than two months away.

Appellant's investigator interviewed Juror No. 11 and prepared a brief written summary of that interview. Appellant's counsel provided a copy of her investigator's report of the interview with Juror No. 11 to the court, but did not file any supplemental

briefing. At the hearing on the new trial motion, appellant’s counsel stated, “I’d basically submit on the motion for new trial I have submitted I think back in June. The only thing I want to add is the court’s exhibit 2, which was prepared by one of the investigator’s from my office. [Juror No. 11] talked about—essentially she talked about the same thing, but I think the new revelation is that she talked about how the foreperson controlled the exhibits. . . . [¶] . . . With that I submit, Your Honor.” The foreperson’s perceived improper control of the exhibits was simply an additional example of her supposed domination of deliberations. Thus, appellant raised no additional arguments in support of disclosure at the new trial motion.

c. Court’s independent duty to investigate

On appeal, appellant identifies two references to the law during deliberations which she claims showed potential juror misconduct and warranted disclosure of juror identification. She acknowledges that she did not raise these references in the trial court, but contends that the trial court had a duty to investigate whether the references were made and constituted misconduct. We do not agree.

“When a trial court is aware of *possible* juror misconduct, the court ‘must “make whatever inquiry is reasonably necessary”’ to resolve the matter. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 417.) It must do so, however, only when the defense comes forward with evidence that demonstrates a ‘strong possibility’ of prejudicial misconduct. (*Id.* at p. 419.)” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255 (*Hayes*) [italics in original].) “Normally, hearsay is not sufficient to trigger the court’s duty to make further enquiries into a claim of juror misconduct.” (*Id.* at p. 1256.)

As the Supreme Court pointed out in *Hayes*, it had previously considered a claim “where the appellant had offered to submit both the unsworn statement of a juror and a defense investigator’s affidavit recounting the juror’s statement to the investigator regarding alleged juror misconduct. We found no abuse of discretion in the trial court’s denial of the new trial motion [based on juror misconduct] without a hearing.” (*Hayes, supra*, 21 Cal.4th at p. 1256, discussing *People v. Cox* (1991) 53 Cal.3d 618 (*Cox*).)

Here, the claims concerning the legal references were before the court only as hearsay, and there were indicia that it was particularly unreliable hearsay. Juror No. 11's letter was unsworn, and the defense investigator's report was unsigned, unsworn and constituted double hearsay. Further, even taking Juror No. 11's statements at face value, those statements do not demonstrate a "strong possibility" of prejudicial misconduct. As we discuss in more detail below, the trial court did not abuse its discretion in failing to investigate the legal references.

i. False imprisonment discussion

Appellant contends that the foreperson's discussion of false imprisonment and how it related to other charges was potentially an instance of a juror who insisted on applying an incorrect statement of law despite the court's instructions and constituted misconduct. (See *In re Stankowitz* (1985) 40 Cal.3d 391, 400.) As appellant acknowledges, a mere misstatements of law by a juror is not misconduct. (*People v. Riel* (2000) 22 Cal.4th 1153, 1219.)

Juror No. 11's descriptions of this discussion were unclear and unreliable, and do not suggest that the foreperson was deliberately applying an incorrect statement of law. Juror No. 11 first described the discussion as follows: "I was pressured into saying that because I believe he hit her and False Imprisonment that 'by default', 'by the law', I [had] to find him guilty on anything that followed the hits to Cassandra. So I did." However, Juror No. 11 did not vote guilty on counts 1 and 2, which occurred in the motel room after the false imprisonment. Thus, her statement appears to be false at least in part. This topic was also discussed in the defense investigator's report, where Juror No. 11 is quoted as saying that the foreperson "and others who agreed with her led me to believe that since I agreed to vote guilty on the false imprisonment charge it followed that I would have to vote guilty on the other two charges. I asked, 'So, by default I have to vote guilty on the other charges? and they said yes.'" In this statement, Juror No. 11 does not claim that she was told that "by law" she had to find appellant guilty on other counts.

This is a significant change from her statement in the letter and there is no explanation for it.

Given the unreliability of Juror No. 11's statements on this issue, the trial court did not abuse its discretion in failing to further investigate the issue. Further, even taking her reference to "by law" in isolation and at face value, there is nothing to suggest that the foreperson was deliberately misstating the law.

ii. Comparison of law

Appellant contends that a juror's comparison of federal and state law during deliberations was potential misconduct. Appellant's contention assumes that the juror improperly researched the law or received information from outside of court, since "[t]he introduction of much of what might strictly be labeled "extraneous law" cannot be deemed misconduct." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219 [explaining that jurors bring to their deliberations knowledge and beliefs about general matters of law acquired from everyday life].)

Juror No. 11's mention of the fellow juror's comparison was brief and belated and in no way suggests that the juror improperly researched the law or received outside information. Although Juror No. 11 mentioned this fellow juror in her letter to the court, she stated only that the juror "explained [to the foreperson] in a calm manner the importance of no dominance within the group." She did not recount any other statements by that juror. Months later, in the investigator's report, Juror No. 11 is quoted as saying that the juror who objected to the foreperson's conduct was "white and in his 40's. She also recalls that he "compared federal and state laws during deliberations." Her late assertion of this claim, with no specifics about the laws the juror was comparing, and no explanation of how she suddenly remembered this discussion, cast considerable doubt on the claim.

Given the brief and belated nature of Juror No. 11's statements on this issue, the trial court did not abuse its discretion in failing to further investigate the issue. Further, at

most, the statement describes the mere discussion of extraneous law with no indication the juror's knowledge of that law was acquired improperly.

d. Federal claim

Appellant claims that he has a due process right to access confidential juror identifying information. “Absent a prima facie showing of jury misconduct, a defendant has no fundamental right to access confidential juror identifying information after trial. (*Townsel v. Superior Court, supra*, 20 Cal.4th at p. 1092; *People v. Jefflo, supra*, 63 Cal.App.4th at p. 1323.)” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1430.) Appellant did not make such a showing.

DISPOSITION

The judgment is affirmed.

KIRSCHNER, J.*

We concur:

TURNER, P.J.

BAKER, J.

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