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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RASHAD SHAREEF,

Defendant and Appellant.

D059152

(Super. Ct. No. SCD211091)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed.

A jury found Rashad Shareef guilty of assault with a deadly weapon in violation of Penal Code (undesigned statutory references will be to the Penal Code) section 245, subdivision (a)(1), and found true allegations that Shareef committed a hate crime in violation of section 422.75, subdivision (a), and personally used a deadly weapon (a hammer) within the meaning of section 1192.7, subdivision (c)(23). The court suspended imposition of sentence and placed Shareef on three years' formal probation.

Shareef appeals, contending the judgment of conviction should be reversed as to the finding he committed a hate crime because (1) the court coerced the verdict on the hate crime allegation and thereby denied Shareef a fair trial, by ordering the jury to continue deliberating after the jurors indicated they were hopelessly deadlocked on that allegation; and (2) the court erred by failing to declare a mistrial when it learned the jury was hopelessly deadlocked. We conclude the court did not abuse its discretion or deny Shareef a fair trial. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND¹

On January 9, 2008, Shareef struck a glancing blow on the victim's right hand with a hammer as the victim, who had kneeled down in a mosque, was coming up after bowing to pray. Others in the mosque restrained Shareef.

When police officers arrested Shareef in his apartment, he said, "I am the guy." Shareef said he told the victim, "I don't mess around with gay people." After the officers transported Shareef to jail, he volunteered the statement, "I always bring a hammer to prayer because there's vicious faggots" at the mosque. Shareef referred to the victim as a "faggot" and said the attack on the victim was a "homosexual assault."

Shareef testified on his own behalf. He indicated he was 73 years of age at the time of the incident with the victim. He claimed that, prior to the attack, the victim tried to run him off the road with his car several times while Shareef was walking to and from the mosque. Shareef testified he carried a hammer around the time of the attack to

¹ As Shareef does not challenge the sufficiency of the evidence supporting the verdicts, our summary of the evidence presented at trial is brief.

protect himself from stray dogs. He denied telling an officer that the victim was a faggot. He denied saying the attack in this case was a homosexual assault. He denied hitting the victim with the hammer, but said they struggled over the hammer after the victim grabbed it from Shareef's jacket pocket. Shareef stated he knew that homosexuals were leading the prayers at the mosque because they, like the victim, were "hitting" on him. He also stated the victim often tried to ask him out for a date. Shareef indicated that, although his faith condemns homosexuality, he does not harbor any animosity toward homosexuals.

DISCUSSION

We conclude the record belies both Shareef's contention that the court coerced the jury's verdict on the hate crime allegation and thereby denied him a fair trial by ordering the jury to continue deliberating after the jurors indicated they were hopelessly deadlocked on that allegation, and his contention the court prejudicially erred by failing to declare a mistrial when it learned the jury was hopelessly deadlocked.

A. Background

The parties gave their opening statements in the morning on December 14, 2010 (all further dates are to calendar year 2010), and the prosecution's five witnesses testified that day. The next day, December 15, Shareef testified on his own behalf, the parties rested at 11:23 a.m., gave their closing arguments after the lunch break, and the case was submitted to the jury at 3:53 p.m. The jurors recessed at 4:30 p.m.

The jurors resumed their deliberation at 9:14 a.m. the following day, December 16. At 11:04 a.m., the jury sent a note to the court asking, "Does a 'not true' require a

unan[i]mous vote?" At 11:15 a.m., after conferring with counsel, the court directed the bailiff to deliver to the jury a note that said, "Yes." At 11:21 a.m., the jury sent a second note that stated:

"We have reached agreement on the assault but we do not agree on true or not true on the hate crime allegation, we do not feel we can reach agreement on this allegation, what do we do if we can't reach agreement?"

At 11:54 a.m., in the presence of the parties and the jury, the court confirmed with the foreperson that the jury had reached a verdict on the felony assault charge and personal use of a deadly weapon allegation, but it had been unable to reach a verdict on the hate crime allegation. The court then asked whether, in the foreperson's opinion, the jury was hopelessly deadlocked on that allegation, and the foreperson answered, "Yes." The foreperson also indicated there was nothing more the court could do to assist the jury in reaching a verdict.

The court then asked how many ballots or votes had been taken by the jury on the hate crime allegation, and the foreperson mistakenly answered, "None." After that, the court individually polled the jurors, and all indicated they believed the jury was hopelessly deadlocked and further deliberations would not result in a verdict. During the in camera conference that followed, the court and both counsel agreed the jury should continue deliberating and a ballot should be taken on the hate crime allegation.

When the proceedings resumed in the presence of the jury, the foreperson informed the court that one ballot had been taken on the hate crime allegation. The court asked the parties whether they objected to the court's inquiring about the numerical

breakdown without asking if it was in the direction of guilt or innocence, and neither party objected. The court inquired and foreperson indicated the jurors were split by a vote of 11 to 1.

After an unreported sidebar conference, the court advised the jury:

"The court has decided along with counsel to go ahead and take the balance of the verdicts or the verdict that has been reached. And after I take the verdict, then I'm going to make an inquiry of the jurors concerning the verdict, and then *it's the court's order that I'm going to send the jury back into deliberations as to the hate crime allegation.*" (Italics added.)

The court then read the partial verdict, finding Shareef guilty of assaulting the victim with a deadly weapon in violation of section 245, subdivision (a)(1) and finding true the allegation that he personally used a deadly weapon within the meaning of section 1192.7, subdivision (c)(23). After individually polling the jurors regarding the verdict, the court released the jurors for a lunch break.

At 1:09 p.m., the jurors resumed their deliberations. At 2:22 p.m., the bailiff notified the court that the jury had reached a verdict on the hate crime allegation. At 2:40 p.m., the court read the verdict finding true the hate crime allegation.

B. Applicable Legal Principles

Section 1140 states that, "[e]xcept as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

The determination under section 1140 of "whether there is a 'reasonable probability' of agreement rests within the sound discretion of the trial court." (*People v. Proctor* (1992) 4 Cal.4th 499, 539 (*Proctor*); see also *People v. Bell* (2007) 40 Cal.4th 582, 616 ["[T]he question whether to declare a hung jury or order further deliberations rests, as both statute and case law provide, in the trial court's sound discretion."].) However, the court must exercise its discretion "without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency."" (*People v. Sandoval* (1992) 4 Cal.4th 155, 195-196 (*Sandoval*)). "The question of coercion is necessarily dependent on the facts and circumstances of each case." (*Id.* at p. 196.)

In *Sandoval*, the Supreme Court concluded the trial court acted within its discretion and had not coerced the deadlocked jury in any way when (1) it ordered the jury, which had already deliberated for 14 hours, to continue deliberating even though, when polled, each of the jurors indicated there was no reasonable possibility they could arrive at a verdict with further deliberations; and (2) the jury arrived at the verdicts shortly after it resumed its deliberations. (*Sandoval, supra*, 4 Cal.4th at pp. 194-197.)

In *Proctor*, the high court held the trial court did not abuse its discretion when, after hearing the jury was deadlocked, it requested that the jury foreman inform the court as to the numerical division of the jury without revealing the respective numbers for a guilty verdict or a not guilty verdict. The court learned the jury had taken a vote and was "at a standstill" and divided 11 to 1. It then instructed the jury to take a recess and

resume deliberations the next morning. (*Proctor, supra*, 4 Cal.4th at pp. 538-539 & 538, fn. 6.)

C. Analysis

Here, as in *Sandoval, supra*, 4 Cal.4th 155, and *Proctor, supra*, 4 Cal.4th 499, there is nothing in the record that suggests the court abused its discretion or coerced the jury in any way. The circumstances of this case support a determination there was a reasonable probability the jury could reach a verdict on the hate crime allegation. (§ 1040.) The case was submitted to the jury for deliberation at 3:53 p.m. on December 15, and the jurors were released at 4:30 p.m. for their evening break. They resumed their deliberations the next morning at 9:14 a.m. and informed the court at 11:21 a.m. that they were unable to reach a verdict on the hate crime allegation. Thus, the jurors had deliberated for less than three hours when they informed the court they had reached a verdict on the felony assault charge and the personal use of a deadly weapon allegation, but were unable to reach a verdict on the hate crime allegation.

Although the evidentiary phase of the trial proceedings was relatively short—the prosecution presented its first witness at 10:48 a.m. on December 14 and the parties rested at 11:23 a.m. the next day—the jury had to sort through the testimony of the prosecution's five witnesses and Shareef's conflicting testimony about what happened. After finding Shareef guilty of the assault with a deadly weapon charge, the jury was required under CALCRIM No. 1354, the standard hate crime allegation instruction, to assess Shareef's intent in committing that crime and make a determination whether the prosecution had met its burden of proving beyond a reasonable doubt that Shareef

committed the assault "in whole or in part because of the alleged victim's actual or perceived sexual orientation." The task of making such a determination necessarily involved a time-consuming deliberative process.

Given the number and relative complexity of the contested factual issues the jury was required to decide, the short amount of time it deliberated—less than three hours—before it reported it had reached an impasse on the hate crime allegation, and the fact that the jury reached that impasse after only one ballot, we conclude the court acted well within its legal discretion when it determined there was a reasonable probability the jury would be able to reach a verdict on that allegation if it continued its deliberations.

Furthermore, nothing in the record suggests the court coerced the jury in any way. When the court ordered the jurors—who, like the jurors in *Proctor, supra*, 4 Cal.4th 499, were divided 11 to 1—to continue deliberating, it "made no threats, no statements that could be interpreted as exerting undue pressure on any juror." (*People v. Breaux* (1991) 1 Cal.4th 281, 320.) The court simply told the jury, "[I]t's the court's order that I'm going to send the jury back into deliberations as to the hate crime allegation."

Shareef cites *Brasfield v. United States* (1926) 272 U.S. 448, 450, in support of his claim that the court "exerted pressure by inquiring into the jury's numerical split." His reliance on *Brasfield* is misplaced. As the California Supreme Court observed in *People v. Rodriguez* (1986) 42 Cal.3d 730, *Brasfield* "concluded that inquiry into the jury's numerical division is inherently coercive and thus reversible per se *in federal courts*, even where the number for conviction and acquittal is not requested or revealed. Subsequent federal decisions make clear that *Brasfield* is a rule of procedure *not binding on the*

states." (*Rodriguez*, at p. 776, fn. 14, italics added.) California law permits trial courts to inquire into the numerical division of a jury, and, thus, does not follow the federal *Brasfield* rule. (*People v. Howard* (2008) 42 Cal.4th 1000, 1030-1031 ["We find the federal rule, which is not binding on us, unpersuasive because this information obviously bears on the question the court is obliged to address: whether there is a reasonable probability the jury will be able to reach a verdict if it continues to deliberate."]; *Proctor*, *supra*, 4 Cal.4th at p. 539.)

Shareef's reliance on the Ninth Circuit's decision in *Jiminez v. Myers* (1993) 40 F.3d 976 is also unavailing. Ninth Circuit authority is not binding on this court (see *People v. Bradford* (1997) 15 Cal.4th 1229, 1292), and *Jiminez* is factually distinguishable in that the trial court in that case encouraged the minority holdout jurors to follow the majority. (*Jiminez*, at pp. 980-981.)

For all of the foregoing reasons, we conclude the court did not abuse its discretion or deny Shareef a fair trial. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.