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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARAGON FALETOGO,

Defendant and Appellant.

D059760

(Super. Ct. No. JCF25880)

APPEAL from a judgment of the Superior Court of Imperial County, Matias R. Contreras, Judge. Affirmed.

Aragon Faletoogo appeals from a judgment convicting him of assault with a deadly weapon by a life prisoner with malice aforethought and possession of a weapon by a prisoner. He argues the trial court erred by (1) allowing the prosecution to introduce evidence of an admission he made at a prison disciplinary hearing; (2) failing to make an adequate inquiry concerning possible juror bias; and (3) failing to consider his inability to pay a \$10,000 restitution fine. He also asserts the cumulative effect of the errors requires reversal. We reject these contentions of reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The charges in this case arose from an incident on June 3, 2009, when defendant (a prison inmate serving a life sentence) repeatedly stabbed a civilian prison employee with an inmate-manufactured "shank." Defendant was charged with attempted murder, assault with a deadly weapon by a life prisoner with malice aforethought, and possession of a weapon by a prisoner. In closing arguments, defense counsel conceded that defendant committed the attack, but disputed whether he had the specific intent to kill required for attempted murder. The jury deadlocked on the attempted murder charge, and convicted defendant of the assault and weapon possession charges.

At trial, the victim (plumber David Johnson) and several eyewitnesses described the events leading up to, and the circumstances of, the attack. In addition to the victim, the eyewitnesses included two other civilian prison employees (painter Joey Fennell and electrician Phillip Valenzuela) and a correctional officer (Sandra Perez) who was in a tower overlooking the prison yard.

Johnson testified that about three or four years before the stabbing incident, he had been a witness to a rules violation committed by defendant which resulted in defendant losing his prison job as a plumber's assistant. After defendant's removal from the job, Johnson noticed defendant's demeanor towards him changed. For example, defendant would smirk at Johnson and make comments like "Rat" or "Snitch." Generally, Johnson would "go about his business" and would not "take an offense to anything like that." However, about a week before the stabbing incident, Johnson told defendant, "Don't address me like that because you wouldn't like it if I addressed you like that." Defendant

responded in a derogatory manner, saying "Don't ever correct me the way I address you." Johnson testified that he thought defendant became angry during this exchange because another inmate was present and "when you correct them in front of someone else they don't like it."

On the morning of June 3, defendant brought a mop with a broken handle to the maintenance shop where Johnson was working; Johnson repaired the handle and defendant left the shop without incident. Later that same morning while Johnson was passing by the dining hall, defendant approached Johnson and calmly stated, "Mr. Johnson, I have something for you[.]" Defendant handed Johnson a complaint form. Johnson read the complaint and handed it back to defendant, telling defendant that he should follow the proper procedure through the chain of command whereby the complaint would be routed to Johnson's supervisor. When Johnson returned the form to defendant, defendant's demeanor became angry and he told Johnson, "I want to try to fire you." Johnson told defendant, "[D]o what you have to do. Do it the right way. It's going to take a lot of paperwork if you want to try to fire me over this because you have an attitude." Johnson testified that he thought defendant became angry because Johnson reacted without anger to the complaint and did not "freak out" as some employees do when handed a complaint.

Once Johnson handed the complaint form back to defendant, defendant had a look "like, Oh, you don't care?" and he then hit Johnson in the side of the face. Johnson, who was not challenging defendant in any way, was surprised and could not believe defendant had hit him. Johnson reacted by hitting defendant in the face with his fist. When

defendant hit Johnson again, Johnson recognized defendant had "something" that felt "cold" and it was not a "skin-to-skin" hit. Johnson hit defendant again, and then turned around and ran. Johnson ran to a grassy area, where he "blank[ed]-out" apparently because he was "knocked unconscious." At one point he "came to" and felt himself being stabbed in the back of the head, while he was "kicking as hard as" he could. Johnson's vision was blurry because he had blood in his eyes, but he noticed defendant had a dull "nickelish chrome object" in his hand.

Civilian employees Fennell and Valenzuela saw defendant chasing Johnson towards the grassy area, and then saw defendant on top of Johnson, holding him down. Defendant was stabbing Johnson in the face and upper part of his body with a shank. There was a lot of blood, and the weapon was covered with blood. From her position in the observation tower, Officer Perez saw that Johnson was covering his face with his hands. Valenzuela heard Johnson ask defendant, "Why are you doing this to me?" At one point Johnson appeared to be in shock and he was not fighting back.

Another inmate (Arthur) was standing at the scene of the assault. When Fennell arrived at the grassy area, he told defendant and Arthur to "get down," which meant they should "stop whatever they are doing and get on the ground." The two inmates did not comply with this directive. However, defendant stopped and looked up at Fennell. Arthur, who was standing between defendant and Fennell, blocked Fennell's path and told Fennell to "stay out of it; it's between them two, let them handle it." When Fennell heard Valenzuela arrive at the scene, Fennell ran into a building to alert correctional officer Manuel Silva about the attack.

When Valenzuela arrived near the grassy area, Arthur yelled at Valenzuela to "mind [his] own business and stay away." Valenzuela yelled an obscenity at Arthur and told him to go inside the building; Arthur complied with this command. Valenzuela then told defendant to drop the weapon and get down. Defendant turned and looked at Valenzuela; stabbed Johnson two more times; and then jumped up and ran inside a building.

Officer Silva chased after defendant and repeatedly yelled at him to get down. Defendant did not comply and continued running away through a dining hall and into a restroom. Just before defendant went into the bathroom, Silva sprayed defendant in the face with pepper spray. Silva heard flushing in the restroom. Other correctional officers who had arrived at the scene ordered defendant to get down and assume a prone position, but defendant refused to comply. Officer Ruben Velarde retrieved his baton and used it to hit defendant on his lower back. Defendant attempted to get up, but when additional correctional officers arrived he finally complied and was handcuffed.

When examining the pipeline under the toilet flushed by defendant, prison personnel found and retrieved an inmate-manufactured weapon. The weapon found in the pipe was identified by Fennell and Valenzuela as the shank used by defendant during the attack.

As a result of the attack, Johnson suffered stab wounds to his face, head, neck, arm, and leg. The medical personnel who examined him at the prison's emergency facility testified he had multiple serious stab wounds to his head area that were bleeding profusely. Johnson was initially unable to answer any questions. He had a large wound

on his cheek that "transected his entire cheek" and through which his teeth were visible. The attending physician (Dr. Michael Frazee) determined the wounds he received were not life threatening because they did not harm any critical organs, large arteries, or his airway. However, Dr. Frazee testified any wounds to the head and neck area are potentially life threatening because there are many vital organs in these areas (including blood vessels, the airway, and the brain). Dr. Frazee opined the inmate-manufactured weapon used by defendant could have killed Johnson if it had fully penetrated his neck.

After being examined at the prison emergency facility, Johnson was flown to a hospital where he stayed for one day. By the time of trial, he still had scarring from the wounds; he had not been released to return to work; and he was under psychiatric care because of the assault.

The prosecution submitted evidence to the jury showing that at a prison disciplinary hearing held after the attack on Johnson, defendant admitted the disciplinary charge, which was described as "Battery on staff, attempted murder." When defendant admitted the charge, he told the officer conducting the disciplinary hearing, "No one had nothing to do with it. It was just me."

Jury Verdict and Sentence

Defendant was charged with attempted murder (count 1), assault with a deadly weapon by a life prisoner with malice aforethought (count 2, Pen. Code,¹ § 4500), and

¹ Subsequent unspecified statutory references are to the Penal Code.

possession of a weapon by a prisoner (count 4, § 4502, subd. (a)).² The jury deadlocked on count 1 (which was later dismissed), and found defendant guilty of counts 2 and 4. For the count 2 assault, he was sentenced to life without the possibility of parole for nine years. For the count 4 weapon possession, he received a concurrent sentence of 25 years to life.³

DISCUSSION

I. *Failure To Exclude Defendant's Admission at Disciplinary Hearing*

Defendant argues the trial court abused its discretion by failing to exclude his admission at the prison disciplinary hearing. He asserts his admission was the product of coercion because he was being harassed by prison guards and feared for his safety in the administrative segregation unit, and he pled guilty to try to get transferred out of this unit. As we shall explain, we hold defendant's admission was not constitutionally involuntary because it did not involve governmental coercion designed to elicit an admission. Alternatively, there was no prejudice from the introduction of defendant's admission.

A. *Evidence Code Section 402 Hearing*

When defendant objected to the introduction of the admission he made at the prison disciplinary hearing, the trial court conducted an Evidence Code section 402 hearing outside the presence of the jury to evaluate the coercion issue. The court heard

² Before the case was submitted to the jury, count 3 (assault with a deadly weapon by a prisoner) was dismissed by stipulation of the parties because it was a lesser included offense of count 2.

³ At the time of sentencing, defendant was serving a 25-years-to-life sentence with the possibility of parole for a prior conviction.

testimony from the officer who conducted the disciplinary hearing (Lieutenant Louis Valenzuela) and from defendant.

Lieutenant Valenzuela testified inmates have the option of postponing a prison disciplinary hearing pending the outcome of any criminal proceedings, but defendant elected not to have his hearing postponed.⁴ At the disciplinary hearing, defendant was advised his statements at the hearing could be used against him at a criminal trial; he had the right to call witnesses at the disciplinary hearing; and he could have an investigator assigned to his disciplinary case. Valenzuela testified defendant was not threatened at the disciplinary hearing and he did not appear afraid. Valenzuela read defendant the charges against him, which were for battery on staff and attempted murder, and defendant entered a plea of guilty.

Defendant testified he pled guilty at the disciplinary hearing to try to expedite a transfer out of the administrative segregation unit where he was housed after the Johnson incident. He explained that when he was arrested for the Johnson incident the guards beat him with batons, and he later filed an assault and battery complaint against the guards.⁵ Thereafter, the guards started calling him a "snitch or rat" when bringing food trays or during showers. This conduct placed him in danger because other inmates who heard him being called a snitch or rat (but who did not necessarily know what the guards

⁴ Defendant's decision not to postpone his hearing was reflected in a document he signed stating he did not request the postponement.

⁵ Defendant submitted photos to the court to show the marks on his body from the beating with the batons.

were talking about) might think he was "snitching on somebody." He was afraid for his safety, and accordingly he pled guilty at the disciplinary hearing in the hopes that he would be transferred out of the administrative segregation unit as soon as possible.

The trial court ruled defendant's admission at the disciplinary hearing was not coerced and hence was admissible. The court stated defendant knew his statements at the hearing could be used against him, and he knew he was pleading guilty to battery and attempted murder. The court assessed defendant made a strategic choice to plead guilty because he decided it was in his best interests to do so in an attempt to get transferred out of administrative segregation, and this strategic decision did not show his admission was coerced. The court explained: "It appears that [defendant] suffered some injuries as a result of his arrest. And from his testimony there has been some harassment. . . . I can see why [defendant] would be willing to enter that plea [at the disciplinary] hearing. . . . [¶] [H]e wanted out of that Ad Seg. He was worried, and he entered the plea. To me that's not coercion that would warrant keeping this information from the jury. It's a strategy on [defendant's] part. He's going to do what he has to do to get out of there. And that's entering a plea even though he knows that it could be used against him later."

B. *Governing Law*

As a matter of constitutional due process, a defendant's admission is inadmissible if it was involuntary. (*People v. Mickey* (1991) 54 Cal.3d 612, 647.) The prosecution must prove by a preponderance of the evidence that the admission was voluntary in order to introduce it at trial. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) On appeal, we defer to the trial court's factual determinations that are supported by the evidence, and independently review the ultimate legal issue of voluntariness. (*Id.* at pp. 659-660.)

The constitutionally-required exclusion of involuntary confessions is designed to deter the use of coercive governmental misconduct to elicit confessions. (*Colorado v. Connelly* (1986) 479 U.S. 157, 163, 166 (*Connelly*); *People v. Hall* (2000) 78 Cal.App.4th 232, 240-241 (*Hall*)). However, the courts recognize the exclusion of highly relevant evidence imposes a substantial cost on the societal interest in law enforcement; because of this, the constitutional exclusionary rule for involuntary statements is limited to circumstances which advance the policy concerns underlying the rule. (*Connelly, supra*, at pp. 166-167; *Hall, supra*, at pp. 240-241.) Involuntariness in the constitutional sense does not refer to *any* indicia of lack of free will, but rather is confined to those situations where there is a close nexus between the governmental misconduct and the securing of the involuntary statements. That is, for a self-incriminating statement to be constitutionally involuntary, there must be (1) "coercive activity by the state or its agents[,]" and (2) a "causal connection between any such [governmental] activity and the

statements in question." (*People v. Mickey, supra*, 54 Cal.3d at p. 651; *Connelly, supra*, at p. 164.)

The requirement of *governmental coercion* precludes an involuntariness finding based merely on a defendant's subjective motivations for confessing. Regardless of a defendant's personal reasons for confessing, "coercive police activity is a necessary predicate" to constitutional involuntariness. (*Connelly, supra*, 479 U.S. at p. 167.) For example, in *Connelly*, the court held a confession was not constitutionally involuntary in the absence of governmental coercion even though the defendant's mental illness, rather than the exercise of his free will, was the impetus behind his confession. (*Id.* at pp. 162, 166-167.) Explaining the requirement of coercive activity by the government, the *Connelly* court stated: "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. . . . [s]uppressing respondent's statements [because of his mental illness] would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. [Citation.] Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained. . . . [¶] *Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State.*" (*Id.* at pp. 166-167, italics added.)

Under the *causal connection* requirement, there must be a link between the governmental coercion and the confession. This requires that the coercion be the motivating cause for the confession (*People v. Mickey, supra*, 54 Cal.3d at pp. 647, 650), and that the coercion was employed *for the purpose of extracting a confession* (*Hall, supra*, 78 Cal.App.4th at p. 240).

Concerning the purpose of the coercion, if the defendant is subjected to coercive-type activity by governmental agents that is *entirely divorced* from the investigation of the crime or the obtainment of the confession, the misconduct by the state—although not to be condoned—does not impact the admissibility of the confession. (*Hall, supra*, 78 Cal.App.4th at pp. 240-242.) For example, in *Hall* (a case from our court), the defendant claimed he confessed "not because of any impropriety by the interrogating officer but in an effort to escape the acts of violence instigated against him by guards at [the prison] and his fear based on general conditions at the prison that if he remained in the institution he would be killed." (*Id.* at pp. 238-239.) We observed that involuntary confessions are constitutionally inadmissible because of the "'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will[.]'" (*Id.* at p. 240.) We concluded these constitutional concerns are not present "when the improper influences which motivate a subject to confession *were not carried out with the intent to extract a confession.*" (*Ibid.*, italics added.) Our *Hall* opinion explains:

"We are cited no case, and have found none, which analyzes voluntariness when a defendant confesses to a crime not as the result of an improper interrogation but rather as a device to escape an environment made dangerous by official misconduct. Involuntariness cases invariably involve misconduct directed, in one way or another, at compelling a defendant to confess, and the vocabulary used to describe the policy basis for excluding such confessions is most often couched in terms reflecting that context. Thus, cases talk, for example, of 'extracting' or 'wringing' confessions from a suspect and state that ours is an accusatorial rather than an inquisitorial system.

"We conclude a confession should be excluded when the process undertaken to secure it involves threats, promises, violence or other forms of improper influence. *We do not believe, however, that due process requires a confession be excluded when, while misconduct may in whole or part motivate it, that misconduct was in no way part of the investigation of criminal activity or a part of the process of interrogation.* In our view the exclusion of confessions is supported by values concerned with attempts to secure incriminating statements and the desire to discourage improper and unfair investigations and interrogations. . . . [¶] . . . [¶] *The exclusion of a confession, however, is less supportable when the misconduct related to it was in no way related to the extraction of that confession or the solving of a crime. This is so since the threat of exclusion can have no meaningful effect on the conduct of those not engaged in investigation and interrogation.*" (*Id.* at pp. 240-241, italics added.)⁶

⁶ Although the *Constitution* does not compel exclusion of confessions unless the involuntariness arises from governmental misconduct related to the securing of the confession, other factors causing involuntariness may warrant exclusion on state evidentiary grounds. (See *Connelly, supra*, 479 U.S. at p. 167 ["A statement rendered by one in the [mentally ill] condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause"].) The issue before us concerns exclusion only on constitutional grounds.

C. Analysis

1. There Was No Coercion Designed To Elicit an Admission

Defendant does not assert there was any governmental coercion occurring at the disciplinary hearing. At the hearing, defendant was given the option of postponing the proceedings until any criminal charges were resolved, and he was warned any statements he made could be used against him in a criminal proceeding. He elected to proceed with the disciplinary hearing and to admit the disciplinary charges. The record shows defendant knew he was not required to undergo the disciplinary hearing prior to resolution of any criminal case, and he was warned his admission could be used against him in a criminal case. This shows his admission was uncoerced and given with knowledge of its consequences.

However, defendant asserts his admission was involuntary because it was motivated by his desire to be transferred out of administrative segregation due to harassment from the prison guards and his ensuing fear for his safety. Even assuming the court accepted defendant's explanation as true, the argument fails. The claimed harassment occurred because defendant had filed a complaint against the guards, not because the guards were trying to elicit a confession. There is nothing in the record suggesting the guards were calling defendant a snitch to convince him to confess to the assault. Further, there is no indication the guards were present at, or involved in, the prison disciplinary hearing. In short, there is no showing the guard harassment was designed to secure an admission from defendant at the disciplinary hearing. Because the

claimed governmental misconduct did not involve the constitutional proscription against coerced admissions, the trial court did not err in allowing the prosecution to introduce defendant's admission. (*People v. Hall, supra*, 78 Cal.App.4th at p. 240.)

In support of his claim of error, defendant cites *Arizona v. Fulminante* (1991) 499 U.S. 279, 283, 287-288, where the court found a confession was involuntary because it was induced by a government agent's promise that if the defendant told the agent about the crime he would protect the defendant from physical violence from other inmates. In *Fulminante*, the coercion was based on a governmental promise designed to elicit a confession; in contrast here, the guard's misconduct had no such design. The *Fulminante* decision does not support a finding of constitutional involuntariness in this case.

Noting that there is no right to an attorney at prison disciplinary proceedings, defendant also cites the fact that he was not advised of the right to counsel prior to making an incriminating statement that might be used in a criminal proceeding. He has not developed this argument and has not cited to any supporting legal authority. We note the failure to provide the prophylactic *Miranda*⁷ warnings does not alone show coercion. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1039.) In any event, because defendant has not developed or supported this argument, we need not further consider it. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.)⁸

⁷ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁸ Defendant makes no claim the disciplinary hearing was a custodial interrogation triggering the requirement that he be advised of his right to counsel under *Miranda*. (See *People v. Fradiue* (2000) 80 Cal.App.4th 15, 19-21.) Because he knew he had the right

2. *There Was No Prejudice*

Alternatively, even if we were to assume error, there was no prejudice from the introduction of defendant's admission of the disciplinary charges. Although the improper admission of a defendant's confession is more likely to be prejudicial than other categories of evidence, the error may be found harmless beyond a reasonable doubt if there is overwhelming evidence of guilt. (See *People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 86.) That is, the evidence of defendant's confession may be deemed harmless if it was " 'unimportant in relation to everything else the jury considered on the issue in question' " (*Neal, supra*, at p. 87.)

Defendant was found guilty of assault with a deadly weapon by a life prisoner with malice aforethought and possession of a weapon by a prisoner. The evidence was clear that defendant assaulted the victim in the head and facial area with a stabbing instrument. In closing arguments to the jury defense counsel conceded that, based on defendant's stabbing of the victim, defendant was guilty of the lesser included offense of assault with a deadly weapon by a prisoner for count 2. The primary disputed issue was whether defendant had the specific intent to kill required for attempted murder, and the jury deadlocked on this charge.

to postpone the disciplinary hearing pending resolution of any criminal prosecution (§ 2932, subd. (f)(1); Cal. Code. Regs., tit. 15, § 3316), it is doubtful he was in "custody" at the disciplinary hearing within the meaning of *Miranda*. (Compare *People v. Stamus* (Col. Ct. App. 1995) 902 P.2d 936, 937-938; *State v. Conley* (N.D. 1998) 574 N.W.2d 569, 576.) At any rate, because this issue was not raised we need not evaluate it.

Defense counsel also disputed that defendant had the malice aforethought required for the charged assault offense, arguing to the jury that (as for the attempted murder charge) defendant did not have the intent to kill. However, as the jury was instructed, even when there is no intent to kill, the malice element may be satisfied based on conscious disregard for life. (*People v. Cravens* (2012) 53 Cal.4th 500, 507 [malice may be express (intent to kill) or implied (deliberate performance of act that is dangerous to life with knowledge of danger and conscious disregard for life].) The evidence overwhelmingly establishes conscious disregard for life. Defendant repeatedly stabbed the victim in his facial and head areas, including his neck; the victim momentarily lost consciousness and experienced profuse bleeding; and the location of the stab wounds threatened vital areas including blood vessels, the airway, and the brain. Given the essentially undisputed evidence showing a purposeful attack to highly-sensitive body areas, there is no reasonable possibility the jury might have rejected a finding of conscious disregard for life if it had not heard about defendant's admission at the disciplinary hearing.

Additionally, the fact the jury deadlocked on the attempted murder count shows the jurors did not uniformly rely on defendant's admission to attempted murder to conclude he committed this offense. This supports that they likewise did not uncritically rely on his admission to infer that he committed the assault offense, but instead scrutinized the circumstances of the crime itself when reaching their guilty verdicts. We

are satisfied beyond a reasonable doubt the introduction of defendant's admission was not prejudicial.

II. *Inquiry About Jury Bias*

Defendant argues the trial court failed to conduct an adequate inquiry when the court was put on notice there might be a problem with jury bias. He asserts there was an unresolved concern about juror bias arising from an excused juror's statements to other jurors that defendant might order retaliation against the juror.

A. *Background*

During jury deliberations, the jury foreperson submitted a note to the trial court stating Juror No. 10 wanted to be dismissed from the jury because "he works with inmates regularly and fears for retaliation." The foreperson's communication included a note from Juror No. 10 explaining he worked along with fire crews comprised of prison inmates; this would put him "directly in harm[']s way should the defendant work with my crews"; and he did not want to "be put on 'a hit' as a result of [his] participation and [judgment]" in the case.

Outside the presence of defendant and the other jurors, the court questioned Juror No. 10 about his concerns. Juror No. 10 stated that on several occasions inmate crews were called out to assist with fires, and he believed the inmates were those in "trusted positions." When the court commented that given defendant's status as a life prisoner it was highly unlikely he would be placed on a work crew outside the prison, Juror No. 10 responded that because of "their way of behaving in prison," prisoners can "put a hit on a

person that they dislike" that is carried out by other persons. The court told Juror No. 10 that if this concern was "weighing on [his] mind," all had agreed he could be dismissed.

Before Juror No. 10 was dismissed, defense counsel inquired whether he had shared his concerns with other jurors. The court noted that it was apparent there had been some communication in this regard because the foreperson "indicated that [Juror No. 10] had fears for retaliation." Juror No. 10 responded that he had communicated his concerns to other jurors, stating:

"Yes, I did. *I asked them what the chances were that they may encounter with the defendant in their lifetime, and they say none.* And I go, I'm going to submit this to the judge because I'm concerned there is a chance. *There might be a chance that I'm exposed to him or his coworkers, and it's a concern.* And they say, well, put it in writing and we will submit it and see what happens." (Italics added.)

After Juror No. 10 left the courtroom, the court commented, "Apparently the other jurors aren't too concerned, and maybe he's right in being concerned." The court then made arrangements to swear in an alternate juror, and there was no further discussion concerning the impact of Juror No. 10's participation in the jury.

B. *Governing Law*

"A defendant has a constitutional right to a trial by an impartial jury." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1115.) "An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it." (*Ibid.*) Juror bias exists if there is a substantial likelihood a juror has been influenced by outside information, rather than solely by the evidence and instructions presented at trial. (*Id.* at p. 1116.) To require

discharge of a juror for bias, the bias must appear in the record as a demonstrable reality. (*People v. Holloway* (2004) 33 Cal.4th 96, 125.)

Juror misconduct occurs when a juror receives information about a party or the case from outside sources. (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Mincey* (1992) 2 Cal.4th 408, 467.) When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice. (*Nesler, supra*, at p. 578; *Mincey, supra*, at p. 467.) If the record shows no substantial likelihood that one or more jurors were influenced by the outside information, the presumption of prejudice has been rebutted. (*Mincey, supra*, at p. 467; *People v. Jenkins* (2000) 22 Cal.4th 900, 1049 [presumption rebutted based on showing jurors were able to put aside impressions or opinions from extrajudicial information and render verdict based solely upon evidence received at trial].)

" [O]nce the court is put on notice of the possibility a juror is subject to improper influences, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged" (*People v. Cleveland* (2001) 25 Cal.4th 466, 477.) The duty of inquiry is triggered upon a lower threshold of proof than the duty to actually discharge a juror. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349.) However, the trial court is given broad discretion in deciding whether and how to conduct an inquiry. (*People v. Clark* (2011) 52 Cal.4th 856, 971.) "[N]ot every incident involving a juror's conduct requires or warrants further investigation. The decision whether to investigate the possibility of juror bias, incompetence, or misconduct . . . rests within the sound discretion of the trial court. . . . [A] hearing is required only where the

court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case. . . . ' " (*People v. Cleveland, supra*, 25 Cal.4th at p. 478.) Mere speculation that there might be juror bias or misconduct does not require the court to conduct an inquiry. (*People v. Davis* (1995) 10 Cal.4th 463, 547-548; *People v. Espinoza* (1992) 3 Cal.4th 806, 821.)

C. Analysis

The jury foreperson sent a note to the court referring to Juror No. 10's fear of retaliation from inmates. Juror No. 10 sent a note and orally told the court that he was concerned for his safety if defendant was put on a work crew with him or if defendant put out a " 'hit' " on him. Further, Juror No. 10 told the court that he discussed his concerns with other jurors. This information suggests that other jurors were aware that Juror No. 10 was afraid that defendant could instigate retaliation against him, which raised the possibility that other jurors might also fear retaliation.

To the extent there was juror misconduct based on Juror No. 10's communications of his fear of defendant to other jurors, the record shows the presumption of prejudice arising from other jurors' possible fear of retaliation was rebutted without the need for further inquiry from the court. Juror No. 10 told the court that when he asked the other jurors about the chances that they might encounter the defendant in their lifetime, the jurors responded "none." After excusing Juror No. 10, the trial court commented that it did not appear the other jurors were "too concerned." Defense counsel expressed no disagreement with this assessment by the court. The trial court could reasonably infer

that if other jurors thought they might be exposed to prison inmates who could carry out a retaliation order from defendant, they would have joined Juror No. 10's request to be excused. Because the record shows no substantial likelihood the other jurors were fearful of retaliation, the trial court did not abuse its discretion in failing to pursue further inquiry about this fear.

To the extent defendant is suggesting the court should have conducted a further inquiry to determine if Juror No. 10's communications caused any jurors to be biased against defendant—not because they personally feared him—but because they viewed him as a person inclined towards retaliatory acts, we are not persuaded. Juror No. 10's description of his fear of retaliation did not suggest he had information about defendant's character from sources outside the trial evidence. If Juror No. 10 gleaned *from the trial evidence* that defendant was a retaliatory-type of person, this opinion did not introduce any *outside* material to the jury. Further, Juror No. 10's statements concerning the possible ordering of a "hit" were derived from general prison culture; i.e., he told the court that because "of their way of behaving in prison," other persons can carry out a "hit" for an incarcerated person. Because there was no indication that jurors were exposed to extraneous information about defendant's character, the trial court did not abuse its discretion in failing to conduct an inquiry on this matter.

Defendant's citation to *People v. Chavez* (1991) 231 Cal.App.3d 1471, does not convince us to reach a different conclusion. In *Chavez*, a prosecution witness (a police officer) was observed talking to a juror; counsel reported to the court that they had ascertained the conversation was not about the case; and the court conducted no inquiry

on the matter. (*Id.* at p. 1479.) The appellate court in *Chavez* concluded the trial court erred in failing to hold a hearing to determine whether the juror remained competent to serve because the "fact that the juror was seen speaking with a police officer who had been a witness in the trial constituted evidence that the juror may have been subject to improper or external influences." (*Id.* at p. 1482.) However, the court held the error was harmless beyond a reasonable doubt based on defense counsels' representations to the trial court that they were satisfied there were no communications about the case. (*Id.* at p. 1483.) Unlike the circumstances in *Chavez*, here, there was no showing the jurors might have received extrajudicial information about the case or defendant. The communications to the jury were from a fellow juror (Juror No. 10), not from a prosecution witness, and there was no suggestion Juror No. 10 had any outside information about the case or defendant that he may have communicated to the jury.

The record does not show the court conducted an inadequate inquiry of possible juror bias.⁹

III. Restitution Fine

Defendant asserts the court abused its discretion in imposing a \$10,000 restitution fine under section 1202.4, subdivision (b) because it ignored the evidence of his inability to pay.

⁹ Given our conclusion the court's inquiry was not deficient, we need not discuss the Attorney General's contention of forfeiture.

At the time of defendant's offense, section 1202.4 provided that when a defendant is convicted of a felony, the trial court must impose a restitution fine not less than \$200 and not more than \$10,000. (§ 1202.4, subd. (b)(1).)¹⁰ The fine "shall be set at the discretion of the court and commensurate with the seriousness of the offense. . . ." (*Ibid.*) A defendant's inability to pay cannot be used as a reason for excusing the fine; however, the court may consider a defendant's showing of inability to pay when deciding whether to increase the amount beyond the \$200 minimum. (§ 1202.4, subds. (c), (d).) When setting an amount in excess of \$200, the court should consider (in addition to inability to pay) any other relevant factors, including the seriousness and gravity of the offense and the circumstances of its commission. (§ 1202.4, subd. (d).)

In the probation report, the probation officer noted that defendant "brutally assault[ed] a Department of Corrections employee" while serving a 25-years-to-life sentence, and recommended the maximum \$10,000 restitution fine. At sentencing, the prosecutor told the court that he had handled a lot of prison cases and defendant's case was one of the "most violent," and defendant committed a "heinous, vicious assault" on the victim. Defense counsel, however, requested that the court not impose a \$10,000 fine, arguing defendant will be incarcerated for the majority, if not all, of his life; his income is extremely limited; and he was still paying restitution for his prior convictions.

¹⁰ The minimum amount of the fine set forth in section 1202.4 has now been changed.

The court commented that defendant had been "gentlemanly" throughout the trial; it was "hard to imagine what causes individuals to behave in this fashion"; it "could not fathom" what was "going through [defendant's] head at that time that caused [him] to behave that way"; and it hoped this was the last of his violent activities. Regarding the restitution fine, the court stated: "I considered reducing the fine. I thought about that seriously, but I'm not going to do that. I'm going to order that you pay the \$10,000. That's money that will go to victims, victims of other crimes. It may be that the individual that you injured so badly, who apparently is still not back to work yet, will benefit from that a little bit. I think that's probably a more just way to go."

The record does not show the court abused its discretion. The record shows defendant committed an egregious attack on a prison employee, stabbing him numerous times in a manner that could, but fortuitously did not, cause deadly injury. The court could reasonably conclude the seriousness of the offense justified imposition of the maximum fine.

To support his challenge to the fine, defendant states that because of his life sentence his only sources of possible income are prison wages and gifts from friends and family; he is still paying on fines from other cases; it is highly unlikely he will obtain a paying job in prison due to his conviction for assaulting a prison employee with malice aforethought; even if he obtains a job the low prison wages would not be sufficient to pay his accumulated fines; and he will never be able to pay off the \$10,000. These circumstances did not require the court to impose a lesser fine based on inability to pay.

The statute permits the court to consider *all* relevant factors, not just inability to pay. (See § 1202.4, subd. (d); *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505.) The record does not show defendant has absolutely no ability to pay; accordingly, the trial court was entitled to impose a fine that it determined was commensurate with the seriousness of the offense even if the fine may take a long time to pay off, or may even never be paid off. (*DeFrance, supra*, at pp. 489, 505 [absent showing of "absolute inability to ever pay" fine, amount of fine was not abuse of discretion even though, due to defendant's life imprisonment, payment would be difficult, lengthy, and perhaps never completed].)

Defendant also notes that although defense counsel raised the issue of inability to pay, the court made no mention of this issue and there is nothing in the record showing the court considered this factor when selecting the maximum possible fine. The contention is unavailing. The trial court is not required to make express findings as to the factors bearing on the amount of the fine. (§ 1202.4, subd. (d); *People v. Romero* (1996) 43 Cal.App.4th 440, 448.) We presume the court properly performed its duty to consider all relevant factors, including inability to pay. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836.) There was no abuse of discretion.

IV. *Cumulative Effect of Errors*

Defendant argues the cumulative effect of the errors requires reversal. Because we have found no error, the contention fails. Moreover, even if we were to assume error from the introduction of defendant's admission at the disciplinary hearing, for the reasons explained above, the error was harmless.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.