

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN STEVEN DILLON,

Defendant and Appellant.

E052344

(Super.Ct.No. FMB1000169)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lynne G. McGinnis, Kristine A. Gutierrez, and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Appellant.

I. INTRODUCTION

Defendant Brian Steven Dillon appeals from his conviction of burglary of an occupied residence (Pen. Code,¹ §§ 459, 667.5, subd. (c)) and assault by means likely to cause great bodily injury (§ 245, subd. (a)). Defendant contends the trial court erred in denying his motion for new trial after a juror testified she considered extrinsic evidence regarding the reliability of tracking in reaching a guilty verdict. Defendant further contends the trial court erred in failing to conduct a hearing regarding juror misconduct or, in the alternative, to release juror information to the defense. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

John Ernst, a retiree, lived in Yucca Valley. Defendant lived with his parents in a house behind Ernst's property. In November 2009, Ernst loaned defendant \$30 to pay a fine and to buy a present for his daughter. Defendant came to Ernst's house three or four times a month to do odd jobs, and Ernst paid him \$50. Defendant had last been to Ernst's house in January or February 2010.

Between 5:45 and 6:00 a.m. on April 28, 2010, Ernst entered his garage, and someone put a rag over his face, wrestled him to the floor, dragged him into the kitchen, choked him, and pulled his clothing over his head. He did not see his assailant, but the man said something like Ernst was a menace to the neighborhood and not to struggle. The man repeatedly banged Ernst's head on the floor, broke his glasses, and kept asking

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

him “where is it,” which Ernst understood to mean money. Ernst did not respond. After about 10 minutes, the assailant left. Ernst did not recognize the assailant’s voice, although he thought it sounded familiar.

Ten minutes or so later, defendant knocked on Ernst’s back patio door and asked if Ernst was all right. Defendant said he had seen Ernst fall in his kitchen and then had seen a couple cars in front of the house. Defendant got Ernst a towel, some ice and aspirin, and told him not to call the police. Defendant offered to clean up blood from the floor.

Ernst and defendant talked for awhile, and defendant fell asleep in the living room. Ernst later saw defendant looking at books of rare coins in Ernst’s living room. When defendant left, Ernst said he did not have to repay the \$30 loan because he had helped Ernst after the attack. Defendant departed in a different direction from his parents’ house. Ernst later checked his coin collection and discovered that some coins were missing, along with some jewelry and a religious medal.

Ernst telephoned his sister, Joanne Osgood, and told her he had been attacked, and Ernst’s brother-in-law called the sheriff’s office. The brother-in-law told the deputy he had seen a neighbor at Ernst’s house several times, and the neighbor had once told Osgood he needed money.

Deputy Sheriff Jeffrey Dieckhoff arrived at Ernst’s house around noon, and Ernst told him about the attack. Ernst’s head and face were severely swollen; he had bruises on his forehead and cheeks; his eye was swelling shut; and he had abrasions on his neck consistent with being choked from behind. The deputy summoned paramedics, who recommended that Ernst go to the hospital because of a potential skull fracture or

bleeding on the brain, but Ernst refused. Ernst showed the deputy the clothing he had been wearing during the attack, which had blood on it. There was also blood on the kitchen tile grout. Ernst said he did not want to report the crime because he feared the assailant had friends who would come back to the house. The deputy did not see any signs of forced entry into Ernst's house, although Ernst said he locked his doors each time he left.

Deputy Dieckhoff believed Ernst was being evasive. In a later interview, Ernst said defendant, his neighbor, had come over because he heard Ernst scream and saw something strange. Ernst testified that he told the deputy he did not think his assailant sounded like defendant. However, the deputy testified that Ernst had said defendant's voice "rang a bell in his head," and "it could have been [defendant's] voice." Ernst said that defendant had eventually told him not to call the police.

Deputy Dieckhoff saw shoe prints near Ernst's back patio area that did not match Ernst's shoes. The deputy had been trained in tracking, had used tracking in dozens of cases in the last 10 years, and had hunted coyotes and game for 42 years. He testified that the soil around Ernst's house and the weather conditions were good for tracking. He found a set of shoe prints leading to Ernst's house from the roadway and a second set of shoe prints that led from the back of Ernst's garage along a wash in the desert. The deputy did not see any blood on defendant's shoes or on the clothes defendant had been wearing.

Deputy Mark Kennicutt, also an experienced tracker, testified that the area around Ernst's house was good for tracking. He found two fresh inbound sets of tracks and one

outbound set of tracks from Ernst's house that matched each other, but did not belong to Ernst. Two sets of fresh tracks led from the garage, and a zigzagged set of tracks led to defendant's parent's house.

The deputies went to defendant's parents' house. Defendant said he had gone outside between 5:45 and 6:00 a.m. to smoke a cigarette when, through Ernst's kitchen window about 200 yards away, he saw Ernst spin and fall. He then saw two people run from the house, get into separate cars, and speed away. Defendant said he went over to help Ernst. He stayed there about four hours and fell asleep for awhile, but he did not call the police or call for medical aid, and he did not tell anyone Ernst had been attacked.

Defendant was wearing shoes that matched the tracks the deputies found. The deputies did not find any footprints in the area where defendant said he had seen people running, and they did not find any footprints, spin marks, or tire tracks in the area where defendant said the cars had been parked.

Defendant testified in his own behalf. He said he had been outside smoking a cigarette when he looked towards Ernst's house and saw Ernst twirl and fall down. Defendant saw two people run from the house and saw two cars speed away. Defendant walked over to Ernst's house to see if Ernst was okay. Defendant got Ernst an ice pack and offered to help clean up. Ernst said he was worried about retaliation and did not want to get the police involved, so defendant, in response, told him not to call the police. Defendant also did not call the police or an ambulance and did not tell anyone about the attack. Defendant denied attacking Ernst.

Defendant admitted he took coins, a ring, and a gold watch while he was at Ernst's house. After defendant was arrested, he telephoned his brother and asked him to get rid of the stolen items he had left at his parents' house. An audio recording of the telephone call was played for the jury.

A defense investigator trained in tracking testified that the road in front of Ernst's house was hard-packed dirt that would show footprints and tire tracks, but that they could be erased by later vehicle traffic. Some sections of the road and Ernst's yard would show footprints, while others would not. The investigator also testified that from where defendant said he had been standing that morning, he could see someone walking in Ernst's kitchen at 6:10 in the morning.

The jury found defendant guilty of first degree burglary of an occupied residence (§§ 459, 667.5, subd. (c)) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The trial court sentenced him to the aggravated term of six years for the burglary and a consecutive term of one year for the assault.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Denial of Motion for New Trial

Defendant contends the trial court erred in denying his motion for new trial after a juror testified she considered extrinsic evidence regarding the reliability of tracking in reaching a guilty verdict.

1. Additional Background

After the verdict, defendant filed a motion for new trial based on the declaration of Juror V.K. Juror V.K. declared she had been a holdout juror for finding defendant not guilty. She stated that another female juror who had worked at the national park stated about five times during deliberations that she “had seen law enforcement officers repeatedly track lost hikers successfully,” and she “had experience with seeing the tracking of footprints be successful where she worked.” A third juror, described as a grey-haired nurse, changed her vote to guilty after the national park employee stated that “their tracking ability is so good.”

The trial court held a hearing on the motion, at which V.K. testified. She stated her decision had been based on the national park employee juror’s opinion about law enforcement’s success rate in tracking lost hikers, not on the evidence presented in court. She believed that juror had been referring to Deputies Dieckhoff and Kennicutt. She had come to regret her vote for a guilty verdict.

The trial court denied the motion, finding that the national park employee juror’s comment did not refer to specific evidence outside that presented at trial, but was instead part of the general life experience of the juror. The trial court explained:

“In this case, we are not given information that she used specialized information that she vouched for the specifics of the foot tracking other than they’ve done foot tracking out in the monument and they’ve always been successful. She didn’t talk about how they were accurate in terms of comparing the shoe to the print. That would be specialized.

“[H]ere we are talking about injecting a person’s background. And that’s the information this court has, is that this person injected her background as an employee out there at the monument. That they have used foot tracking out there to find people. We don’t have more information about them using scientific comparisons like we did in this trial where we actually had the comparison of the foot and the shoe print. That would be specialized information which we have no information provided. [¶] . . . [¶]

“I find this was common life experience.”

2. *Analysis*

A criminal defendant has a constitutional right to a trial by unbiased and impartial jurors (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and the jury’s verdict “must be based on the evidence presented at trial, not on extrinsic matters.” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1414 (*Leonard*) [finding no misconduct when a juror formed an opinion about the accuracy of a firearm based on his personal experience and shared his view with the other jurors during deliberations].) Thus, “[a] juror commits misconduct if the juror conducts an independent investigation of the facts [citation], brings outside evidence into the jury room [citation], injects the juror’s own experience into the deliberations [citation], or engages in an experiment that produces new evidence [citation].” (*People v. Wilson* (2008) 44 Cal.4th 758, 829.) However, jurors may properly interpret the evidence based on their own life experiences. (*Id.* at p. 830.) In *In re Malone* (1996) 12 Cal.4th 935 (*Malone*), the court explained, “It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial.

Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]" (*Id.* at p. 963.)

In *People v. Steele* (2002) 27 Cal.4th 1230 (*Steele*), the defendant contended jurors committed misconduct when four jurors with military experience and two jurors with medical experience offered their expertise during deliberations. (*Id.* at p. 1265.) On appeal, the Supreme Court found no misconduct. The court explained: "In this case, as the trial court noted, extensive evidence was produced concerning the nature and extent of defendant's military training and Vietnam experience and its effect, if any, on his crimes, as well as evidence concerning the validity of BEAM [brain electrical activity mapping] testing. This evidence was susceptible of various interpretations. The views the jurors allegedly asserted here were not contrary to, but came within the range of, permissible interpretations of that evidence. All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citations.] A juror may not express opinions based on asserted personal experience that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use

their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations.” (*Id.* at pp. 1265-1266.)

Here, the national park employee's comments, based on her background and experience, were of the same general nature as those the court condoned in *Steele*, *Leonard*, and *Malone*. We conclude the juror did not cross the fine line “between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting ‘an opinion explicitly based on specialized information obtained from outside sources,’ which [the Supreme Court has] described as misconduct. [Citation.]” (*Steele*, *supra*, 27 Cal.4th at p. 1266.)

Defendant argues, however, that this case is more like *People v. Ault* (2004) 33 Cal.4th 1250, in which the court found juror misconduct. During the trial, a juror had told her manicurist that she was on the jury in a child molestation case, and the manicurist told the juror that an acquaintance had been molested by her father but had nonetheless had him escort her down the aisle at her wedding. The juror then related that conversation during deliberations when another juror expressed skepticism about the victim's demeanor. (*Id.* at p. 1258) The court found misconduct both in the juror's speaking to an outside source while the trial was still pending and in using the information from that conversation about how child molestation victims may react to influence other jurors. (*Ibid.*)

Here, in contrast, the record does not suggest the national park employee juror spoke to any nonjuror about the case while it was pending. Moreover, although defendant asserts the juror necessarily had learned information about tracking from hearsay sources because the record does not indicate she herself was a tracker, the record does not support that assertion: As recounted above, V.K.'s declaration stated the juror said "she had *seen* law enforcement officers repeatedly track lost hikers successfully," and she "had experience with *seeing* the tracking of footprints be successful where she worked." (Italics added.) Thus, insofar as the record shows, the juror's familiarity with tracking was direct. That familiarity was part of her life experience which she could properly bring into the jury room. (*Leonard, supra*, 40 Cal.4th at p. 1414; *Malone, supra*, 12 Cal.4th at p. 963; *Steele, supra*, 27 Cal.4th at p. 1266.)

The trial court did not err in denying the motion for new trial.

B. Failure to Conduct a further Hearing on Juror Misconduct or to Release Juror Information

Defendant also contends the trial court erred in failing to conduct a further hearing regarding juror misconduct or, in the alternative, to release juror information to the defense.

1. Additional Background

After the trial court denied defendant's motion for new trial, defense counsel moved to unseal juror contact information based on the declaration of Juror V.K. Defense counsel's declaration in support of the motion for disclosure stated his purpose in bringing the motion: "[V.K.] has recalled some, but not necessarily all, of the out-of-

court evidence that was brought into the jury room by the employee of the National Park.” (Underlining in original.) The declaration stated that defense counsel had no means of locating other jurors unless the court granted disclosure, and counsel “would be foreclosed from the *possibility of determining* if the National Park employee (juror) said anything more egregious to a fair jury deliberation than what was heard and recalled by [V.K.]” (Italics added.)

The trial court held a hearing on the motion, at which defense counsel argued the court should contact the female jurors so he could interview the grey-haired nurse and the national park employee described by V.K. to see if that juror made additional statements about her experience with tracking that V.K. had not heard.

The trial court denied the motion, stating: “Based upon my prior ruling and the information that has been received up until this point, the court is satisfied that . . . good cause has not been provided. I am satisfied with the information that has been provided by the one juror as to the information that was disclosed, and I am satisfied that this should no longer be at issue.”

2. *Standard of Review*

We review the trial court’s decision to deny a request for an evidentiary hearing to resolve factual disputes concerning a claim of juror misconduct under the deferential abuse of discretion standard. (*People v. Avila* (2006) 38 Cal.4th 491, 604.) Similarly, we review the trial court’s denial of a motion to disclose juror information after trial under an abuse of discretion standard. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

3. Analysis

a. Failure to conduct a hearing on juror misconduct

A defendant is not entitled to an evidentiary hearing on the issue of juror misconduct as a matter of right. (*People v. Avila, supra*, 38 Cal.4th at p. 604.) Rather, such a hearing should be held only “when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred,” and “the court concludes an evidentiary hearing is ‘necessary to resolve material, disputed issues of fact.’” (*Ibid.*)

Here, the trial court did conduct a hearing on potential juror misconduct, as discussed above. After the trial court denied that motion, defendant moved for release of juror information so he could investigate the possibility of further misconduct, and he requested a hearing on whether the juror contact information should be unsealed. However, defendant never requested a further hearing on the issue of whether misconduct had occurred. We therefore conclude the trial court did not abuse its discretion in failing to conduct a further hearing on the issue of juror misconduct.

b. Denial of motion to release juror information

In a criminal proceeding, jurors’ personal identification information “shall be sealed,” unless the defendant submits a declaration stating facts that establish good cause for release of that information. If the defendant establishes a prima facie showing of good cause, the court shall set the matter for a hearing unless the record shows a compelling interest against disclosure. (Code Civ. Proc., § 237, subds. (a)(2), (b); see also Code Civ. Proc., § 206, subd. (g) [authorizing a criminal defendant to petition to

court for access to juror information “for the purpose of developing a new trial or any other lawful purpose”].) A defendant’s motion for disclosure of jury information must be “accompanied by a sufficient showing to support a reasonable belief jury misconduct occurred” (*People v. Wilson* (1996) 43 Cal.App.4th 839, 850.) As the court explained in *Wilson*, “Although [the language of Code of Civil Procedure section 206] is broad, it does indicate a legislative intent to require the defendant to show good cause for disclosure and not engage in a fishing expedition.” (*Id.* at p. 852.)

Here, defendant based his motion for disclosure of juror information on the declaration of Juror V.K. The trial court had already read that declaration and had heard the testimony of V.K. at the motion for new trial, and, as we have already concluded, that declaration did not support granting the motion for new trial. For the same reasons, the declaration did not support disclosure of juror information.

Moreover, in his declaration in support of the motion, defense counsel stated he hoped to determine if a juror had made improper comments. The motion was thus nothing more than a fishing expedition. The governing statutes do not permit disclosure of juror information for such a purpose. (See *People v. Wilson, supra*, 43 Cal.App.4th at p. 852.) The trial court did not abuse its discretion in denying the motion. (*People v. Jones, supra*, 17 Cal.4th at p. 317.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MILLER

J.

CODRINGTON

J.