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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LEE MIDGET,

Defendant and Appellant.

E052883

(Super.Ct.No. SWF011971)

OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III,
Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and Emily R.
Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, David Lee Midget (hereafter defendant), appeals from the trial court's order denying his petition under Code of Civil Procedure section 237 to unseal identifying information about the jurors who found him guilty of various criminal charges, including assault with a deadly weapon and two counts of child endangerment. The trial court found defendant failed to show good cause and denied defendant's petition.

Defendant contends the trial court abused its discretion by denying his request to unseal the jurors' identifying information. We disagree and therefore will affirm.

BACKGROUND

This is defendant's second appeal. In his first appeal from the judgment entered after the jury found him guilty of assault with a deadly weapon, hit and run, and two counts of child endangerment (case No. E050356), defendant claimed that his constitutional rights had been violated because the bailiff had improperly communicated with the jurors. That claim stemmed from a hearing at which the jury was not present and in which the trial court told the attorneys that after the jury informed the bailiff they had reached verdicts, "my deputy told me not what the verdicts were, he doesn't know, but apparently they signed all the verdict forms. My deputy explained to them they can't sign all the verdict forms, that they need to sign the ones that, you know, this is what he's guilty or not guilty of. ¶] So my deputy communicated to the foreperson, go through and cross out or indicate which one's [sic] they're not let [sic] selecting." After the deputy confirmed that the trial court's description was accurate, the trial court continued,

“[A]pparently that’s what they’ve done. I don’t know what it is. And so my proposal was we bring them in, I take a look at them [presumably referring to the verdicts], if they’re absolutely clear to me what their verdicts are obviously I have my clerk read the verdicts and then of course she asks each juror, ‘Is that your verdict,’ and both [of] you indicated to me [in a unreported side bar discussion] that that was acceptable.” Both the prosecutor and defense counsel confirmed that they agreed with the proposed procedure.

The jury returned to the courtroom and the foreperson handed the verdicts to the bailiff. The trial court asked defendant to stand, and the clerk read the verdicts. The clerk then polled the jury collectively and individually with respect to the verdicts. The jurors confirmed their verdicts on each count. In his appeal from the judgment, defendant argued that the bailiff’s ex parte communication with the jury violated his constitutional rights to a fair trial, to representation by counsel, and trial by jury.

While his first appeal was pending,¹ defendant filed the petition for disclosure of the jurors’ identities. In that petition, defendant alleged that his attorney had reviewed the unredacted verdict forms; contrary to the trial court’s understanding that the jury had signed all the possible verdict forms, in fact only the verdict forms for counts 2 and 3, the child endangerment charges, were inconsistent; with respect to count 2, the jury foreperson signed the verdicts finding defendant guilty of that count, not guilty of that

¹ Filing the notice of appeal did not divest the trial court of jurisdiction to consider the petition, because the petition related to a matter not affected by the judgment, i.e., disclosure of juror identifying information for the purpose of developing a basis upon which to file a habeas corpus petition. (Code Civ. Proc., § 916, subd. (a); *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089.)

count, and guilty of the lesser included offense; the jury had dated the verdict finding defendant not guilty of the lesser included offense, but had not signed that verdict; and the foreperson's signature and the dates had been crossed out on all but the verdict form finding defendant guilty of child endangerment as alleged in count 2. With respect to the child endangerment charge alleged in count 3, the foreperson signed and dated both the guilty and not guilty verdict forms but crossed out the signature on the not guilty verdict form.

Defendant asserted in his petition that good cause under Code of Civil Procedure section 237, subdivision (b) existed to disclose the jurors identities "because speaking with the jurors is the only meaningful way that counsel can assess the full extent of the prejudice caused as a result of the violations to [defendant's] constitutional rights." The trial court disagreed and denied defendant's request without conducting a hearing.

Defendant appeals from that order.²

DISCUSSION

After the jury's verdict is recorded in a criminal case, personal identifying information about the jurors who served on the trial is sealed. (Code Civ. Proc., § 237, subd. (a)(2).) A defendant or the defendant's attorney may request access to that information in order to "communicate with jurors for the purpose of developing a motion

² The Attorney General moved to dismiss this appeal on the ground that the trial court's order denying defendant's petition to unseal the jury's identifying information is not an appealable order. We denied that motion without prejudice. The Attorney General does not raise the issue in the respondent's brief.

for new trial or any other lawful purpose.” (Code Civ. Proc., § 206, subd. (g).) The procedure for obtaining that information is set out in Code of Civil Procedure section 237, subdivision (b): “Any person may petition the court for access to these records. 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. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information” On appeal, we review a trial court’s denial of a petition to disclose juror identifying information for abuse of discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

Defendant’s showing of good cause to support his petition consists of his attorney’s statement that, “In order to permit meaningful review, it is necessary for me to assess the full extent of the prejudice caused [to defendant] as a result of the bailiff’s conduct. In order to do this, I need to know precisely what was said between the bailiff and the jurors, and what the jurors did in response. The only persons that have personal knowledge of what was said are the jurors and the bailiff. The only statement made on the record by any of these persons was the bailiff’s assent of ‘Yes, sir,’ when the court offered a paraphrased characterization of what happened.” Defendant’s suggestion that the bailiff’s explanation either was not true or was incomplete and that something more or different might have occurred is speculation.

Defendant also cannot demonstrate he made a diligent effort to contact the jurors through alternate means. Defendant's trial counsel knew all the pertinent facts before the jury returned their verdicts and could have asked the trial court to question the jury foreperson. That would have been the most diligent and direct method for determining whether anything more or different than what the bailiff described had taken place. Moreover, defendant's appellate counsel did not file the petition seeking disclosure of the jurors' identifying information in time to raise the issue in defendant's direct appeal, even though appellate counsel had sufficient information to warrant filing the petition.³ Instead, counsel waited nearly nine months before filing the petition and therefore was not diligent in seeking disclosure.

The circumstances here are equivalent to those in *People v. Carrasco*, in which the court stated, in holding the trial court did not abuse its discretion in denying disclosure of juror identifying information, "What strikes us even more is that defense counsel learned about the claimed juror misconduct during the trial, before a verdict was entered, and had an opportunity to try to rectify any problem she perceived. Defense counsel could have proposed an additional line of inquiry to the trial court if she believed jury misconduct had occurred which the court was overlooking. She did not." (*People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 991.)

³ Despite the suggestion in her declaration, defendant's attorney did not learn anything new by reviewing the unredacted verdict forms. Appellate counsel knew at the time she filed defendant's appeal, that the jury foreperson had only signed and/or dated all the verdict forms on counts 2 and 3; the only information redacted from those verdict forms was the foreperson's name.

Here, too, trial counsel had an opportunity to address the possibility of juror misconduct before the verdicts were entered. Trial counsel did not do that. Appellate counsel did not investigate the possibility of jury misconduct in a timely manner. Accordingly, we must conclude the trial court did not abuse its discretion by denying defendant's petition to disclose the jury's identifying information.

DISPOSITION

The order is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.
KING
J.