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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.

ARMANDO JOHN RAMIREZ,

Defendant and Appellant.

E057990

(Super.Ct.No. FSB1201482)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed.

Cynthia M. Jones, 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 Eric A Swenson and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Armando John Ramirez, of corporal injury to a spouse (Pen. Code, § 273.5, subd. (a), count1),¹ criminal threats (§§ 422, 1192.7, subd. (c)(38), count 2), and first degree burglary committed with another person present (§§ 459, 667.5, subd. (c)(21), count 3). The trial court determined defendant had suffered a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). Defendant was sentenced to an aggregate term of 13 years in state prison.

In this appeal, defendant maintains the trial court erred in denying his motion for new trial based on jury misconduct. We reject defendant's contention, and conclude the motion for new trial was properly denied because the misconduct at issue here was not inherently prejudicial and there was no substantial likelihood of actual juror bias. Accordingly, the judgment will be affirmed.

I. FACTUAL BACKGROUND

On the afternoon of April 5, 2012, Jane Doe, defendant's ex-wife, was home with her 15-year-old son, Raymond, and her two younger daughters. Raymond was playing video games when defendant entered Doe's home through the front door. Concerned for his sisters' safety, Raymond told the girls to go to a back room. Doe had previously obtained two active restraining orders against defendant, which had been validly served on him. Both restraining orders directed defendant not to have any negative contact with Doe. Defendant was also ordered not to attempt to dissuade any victim or witness from

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

attending a hearing, testifying, or making a report to any law enforcement agency or person.

Defendant grabbed Doe by her hair and took her into her bedroom. He told Doe, “You better not say anything or cry,” before throwing her on her back onto the floor. Defendant hit Doe two or three times with his right fist on the back of her head near her left ear. Defendant threatened Doe, telling her: “If you put me in jail again, I swear to God I’ll get my family to kick your ass.” He added, “I already talked to my sister and my cousins. We’re all from the same hood” and “They have the green light to toss you up.” Doe understood this to mean defendant had given his family permission to beat her up or hurt her in some way.

Raymond called 911, and told the dispatcher defendant was hitting his mother, and added that defendant was not supposed to be in the home. San Bernardino County Deputy Sheriff Jeremiah Reynolds responded to the unwanted person call at 4:55 p.m., and Raymond met him in the front yard. Raymond told the deputy that defendant was in the bedroom with Raymond’s mother, though defendant was not supposed to be at the residence. Raymond stated that he saw defendant grab his mother by her hair and take her into the bedroom. Raymond told Deputy Reynolds he was afraid of defendant.

Deputy Reynolds entered Doe’s bedroom and saw defendant and Doe standing near each other. Doe was crying. The deputy instructed defendant to turn around and get down on his knees. Defendant cooperated, and Deputy Reynolds handcuffed him and escorted defendant to the backseat of his patrol car.

Deputy Reynolds then interviewed Doe in her living room. Doe cried throughout the interview, but was rational, coherent, and able to comprehend and answer questions clearly. Doe told the deputy that defendant did not have permission to be in her home, but had entered anyway, grabbed Doe by her hair, and hit her several times on the left side of her head behind her ear. Deputy Reynolds put on medical gloves and examined the area underneath Doe's hairline where she complained of pain. The deputy felt a very significant swelling half the size of a golf ball behind Doe's left ear. Doe told Deputy Reynolds that defendant threatened her that he would have his family members harm her if she said anything. Doe believed defendant was capable of carrying out his threats, and she was afraid for her safety and that of her children.

At trial, Doe denied that defendant assaulted or threatened her. Raymond testified that he had lied about everything, and that he never saw defendant hit Doe.

Defendant did not testify at trial. An employee of the San Bernardino County Human Social Services Department testified that defendant went to the welfare office on April 5, 2012, and was issued an EBT card to purchase food around 2:15 p.m. that day.

Two investigators with the public defender's office testified they had interviewed Jane Doe and her son Raymond. Doe said defendant did not hit her, and denied that she had a bump on her head. Raymond similarly denied that defendant had assaulted his mother. Raymond stated that he only called 911 because he woke up mad that morning, and just wanted defendant to leave his home.

II. DISCUSSION

A. *Defendant's Motion for New Trial*

Following the jury's verdict, defendant filed a motion for new trial claiming, among other things, that two jurors had engaged in misconduct. This claim was supported by a declaration from defendant's sister-in-law, Delores Garcia. Garcia stated that she had been waiting outside the courtroom in the hallway before the jury returned its verdict when she overheard two female jurors discussing the trial. According to Garcia, the two jurors spoke about "how the tattoos on [defendant's] neck were clearly visible and that the shirt and tie did not cover up his tattoos and that he looked guilty because he appeared to be a gang member."

At the hearing on defendant's motion for new trial, the prosecutor stipulated to the admissibility of Garcia's declaration. In denying defendant's motion, the trial court made the following remarks:

"As to the jury misconduct issue, the declaration is brief from the witness who says I heard them talk, this is two female jurors, about how the tattoo on [defendant's] neck was clearly visible and that the shirt and tie did not cover up his tattoos. All of that is absolutely factual.

"I sat through the trial, and I agree completely with that analysis. [Defendant] has significant tattooing on his neck that emerges above the neck line. At one point during the trial counsel actually brought in make up and tried to cover that up with less than overwhelming success and then abandoned that attempt. [Defendant] tended to pull his

shirt up to a level that looked frankly uncomfortable as he was sitting there in an effort to conceal [his] tattoos as best as possible, but they were still very visible. The jurors obviously saw that. Juries don't miss much. They saw that.

“So what it boils down to is the statement he looked guilty because he appeared to be a gang member. That is not a statement that he was guilty, but he looked guilty because he was a gang member. It's clear there is speculation there.

“I would point out that there was no gang evidence of any sort at the trial. We had issues regarding that and the evidence of any gang affiliation past or present was excluded. There was no viewing of tattoos. There was no discussion of tattoos. There was no evidence about gang involvement whatever. They were simply expressing an opinion based on the defendant's appearance.

“No matter how we instruct jurors, they are human beings and jurors will make observations. They should not have been discussing it outside the jury room. That's true. However, . . . I heard the evidence in this case, I do not believe that the level of jury misconduct here rises to the level of rendering this an unfair trial. I do not believe that there's an adequate showing of prejudice from these relatively innocuous statements. And on that basis the motion for retrial is denied now as to all grounds.”

B. Applicable Law

“A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors.” (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*)). Due process requires that the jury be “capable and willing to decide the case solely on the evidence

before it” (*Ibid.*, italics omitted, citing *Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 102 S.Ct. 940].) A juror is not impartial if that juror cannot ““lay aside his impression or opinion *and render a verdict based on the evidence presented in court.*”” (*Nesler, supra*, at pp. 580-581, quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 [6 L.Ed.2d 751, 81 S.Ct. 1639].)

It is misconduct for jurors to obtain evidence from sources other than in court, and this constitutes grounds for a new trial if the defendant has been prejudiced thereby. (§ 1181, cl. 2; *People v. Marshall* (1990) 50 Cal.3d 907, 949-951.) Whether this rule applies to jurors’ perceptions of a defendant is unclear; however, as a matter of policy, a defendant is not permitted to profit from his own volitional conduct. (*People v. Williams* (1988) 44 Cal.3d 1127, 1156 [new trial denied where the defendant threatened jurors after guilt phase, but before penalty phase], citing *People v. Manson* (1976) 61 Cal.App.3d 102, 157 [testimony about witness’s observations of an “X” on the defendant’s forehead, and “X’s” on the foreheads of the defendant’s associates the following day, was properly admitted and could not be prejudicial because “[t]he stigmatic effect of this circumstance, if any, was produced entirely by the voluntary act of appellants”]; see also *People v. Pride* (1992) 3 Cal.4th 195, 253-254 [the defendant cannot claim prejudice when he chose to appear at the penalty phase in jail clothes and shackles].)

Misconduct by a juror usually raises a rebuttable presumption of prejudice. (*People v. Danks* (2004) 32 Cal.4th 269, 302, citing *In re Hamilton* (1999) 20 Cal.4th

273, 295.) However, “[t]he introduction of much of what might strictly be labeled ‘extraneous . . .’ cannot be deemed misconduct. The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. ‘[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.’” (*People v. Loker* (2008) 44 Cal.4th 691, 747, quoting *People v. Danks, supra*, at p. 302.)

A presumption of juror misconduct is rebutted “if the entire record in the . . . case, including the nature of the misconduct . . . , and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]” (*In re Hamilton, supra*, 20 Cal.4th at p. 296; *People v. Danks, supra*, 32 Cal.4th at p. 303.) Factors to consider in making this determination include “the nature of the juror’s conduct, the circumstances under which the [extraneous] information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant.” (*In re Carpenter* (1995) 9 Cal.4th 634, 654.)

We review defendant's challenge to the trial court's ruling under the abuse of discretion standard. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478 [trial court has discretion whether to investigate the possibility of juror bias or misconduct]; see also *Nesler, supra*, 16 Cal.4th at p. 582.) In determining whether jury misconduct occurred, we accept the trial court's credibility determinations and findings of fact if supported by substantial evidence, but determine whether any prejudice resulted by independent review. (*People v. Collins* (2010) 49 Cal.4th 175, 242; *People v. Majors* (1998) 18 Cal.4th 385, 417.)

C. The Motion for New Trial Was Properly Denied

The People initially contend that defendant has forfeited his claim on appeal because he failed to affirmatively show that the defense had no knowledge of the alleged jury misconduct prior to the rendition of the verdict. Because the prosecution failed to object to the absence of a "no-knowledge" declaration in the trial court, we reject the People's argument and conclude defendant's claim has been properly preserved for our consideration in this appeal. (*Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 186-187 [failure to raise absence of "no-knowledge" averment deprives trial court and parties of opportunity to cure procedural defect and constitutes a waiver].)

Defendant maintains his right to a fair trial was violated because the jurors who discussed defendant's tattoos were actually biased against him, and that reversal is thus warranted without any prejudice analysis. Actual bias arises when a juror is "unable to put aside her impressions or opinions based upon the extrajudicial information she

received and to render a verdict based solely upon the evidence received at trial.”

(*Nesler, supra*, 16 Cal.4th at p. 583.)

No evidence of actual bias has been demonstrated in this case. Garcia’s declaration does not reveal the jurors’ receipt of, or reliance upon, any extrajudicial information that was not readily apparent to everyone in the courtroom. It is undisputed in this case that defendant’s tattoos were prominent and plainly visible throughout the proceedings. In fact, before the presentation of evidence commenced, the trial court noted that defendant’s tattoos were visible to all the prospective jurors. Defense counsel initially attempted to cover defendant’s tattoos with makeup when a prospective juror walked into the courtroom. The trial court denied counsel’s ensuing request for an in camera hearing, stating:

“Well, the fact of the matter is your client on Wednesday—when we began the jury selection process, some portion of your client’s tattoo was visible to all. Any of the jurors could have noticed that that was visible on Wednesday and might notice that it’s not visible today. I don’t think a level of prejudice that that entails—nobody has had a close enough look to see what the tattoo actually is or what it says, merely that there’s some kind of . . . tattooing present. On that basis, I don’t think that’s sufficient to justify an in camera proceeding.

“If you choose to apply make-up to cover it up to reduce the visibility of it, I’m fine with that, but I don’t think it rises to any level of justifying an in camera inquisition of a prospective juror, especially when this is a situation where the jurors have already

had an opportunity to see the fact that there was a tattoo on his neck. So on that basis the request for an in camera hearing's denied.”

The circumstances in this case are analogous to those presented in *People v. Hord* (1993) 15 Cal.App.4th 711, 727-728. In *Hord*, the court found juror's discussions concerning the defendant's decision not to testify and his possible sentence did not establish a substantial likelihood of bias because the comments were transitory and involved information of which the jury was obviously previously aware. The Court of Appeal found that the jury should not have discussed the defendant's decision not to testify or his possible sentence, but that “the discussion was very different than when a juror performs experiments or brings in new law or facts into deliberations.” (*Id.* at p. 727.) The *Hord* court concluded that: “Transitory comments of wonderment and curiosity, although misconduct, are normally innocuous, particularly when a comment stands alone without any further discussion.” (*Id.* at pp. 727-728.)

The facts presented here stand in sharp contrast to those in cases where actual juror bias has been found. (See, e.g., *Nesler, supra*, 16 Cal.4th at pp. 570-574, 583 [actual bias found where juror negatively influenced in deliberations by information obtained outside courtroom about defendant's drug use]; see also *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1120 [declarations of a juror and his friend showed they engaged in pervasive and substantive discussions about the merits of the case, including the implications of the defendant's decision not to testify, violating the constitutional requirement that the case is to be considered and decided solely by sworn jurors].)

Nothing in the brief juror remarks overheard in this case indicated any intention by the jurors to disregard their oath and decide the case based on anything other than the evidence presented

Because the prosecution stipulated to the admissibility of Garcia's declaration, we agree with the trial court that the record does not establish that jury misconduct occurred in this case. "Misconduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually occurred." (*People v. Williams, supra*, 44 Cal.3d at p. 1156.)

Defendant claims the jury saw his tattoos and inferred he was guilty because he "appeared to be a gang member." Defendant's reliance on cases involving the prejudicial effect of the admission of gang evidence are not applicable here because, as the trial court observed, no evidence of gang membership was introduced at trial. As previously noted, defendant may not complain of prejudice he caused by his own voluntary act. (*People v. Pride, supra*, 3 Cal.4th at pp. 253-254.) Defendant could have covered his tattoos, and the record reflects that defense counsel chose to cease his efforts to cover the tattoos with makeup. Defendant never asked the court to admonish the jury not to consider his tattoos or to speculate regarding their meaning.

Even assuming that the jurors' observations of defendant's tattoos could be considered the receipt of extraneous information, defendant makes no showing that such information was inherently likely to have negatively influenced the jurors. Garcia's declaration does not state she heard the jurors opine defendant actually was guilty based

on his tattoos, only that he “looked guilty.” As our high court explained in a case involving spectators intimidating a jury, “understandable concern does not amount to misconduct” where there is no evidence to support the defendant’s claim that the jury was biased against him. (*People v. Panah* (2005) 35 Cal.4th 395, 480.) Similarly here, the trial court found no adequate showing of prejudicial misconduct, correctly noting that, “[n]o matter how we instruct jurors, they are human beings and jurors will make observations.”

Finally, we note the trial court instructed the jury pursuant to CALCRIM No. 200 that they must decide the case based only on the evidence presented, and not let bias or prejudice influence their decision. We presume that the jurors understood and followed the court’s instructions. (*People v. Harris* (1994) 9 Cal.4th 407, 426; *People v. Houston* (2005) 130 Cal.App.4th 279, 312.)

In summary, the record does not support defendant’s claim that the jury was actually biased against him, or that the misconduct in this case was inherently and substantially likely to have influenced the jurors. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion for new trial.

III. DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER
J.

KING
J.