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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL CARLOS GARCIA,

Defendant and Appellant.

F061480

(Super. Ct. No. BF130873B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Louis P. Etcheverry, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Dawson, J.

A jury convicted appellant, Paul Carlos Garcia, of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)),¹ and found true an allegation that another person, other than an accomplice, was present in the house at the time of the burglary (§ 667.5, subd. (c)(21)). In a separate proceeding the court found true allegations that appellant had suffered a prior felony conviction that qualified as both a “strike”² and a prior serious felony within the meaning of section 667, subdivision (a), and that he had served a prison term for a prior felony conviction (§ 667.5, subd. (b)). The court struck the prior prison term enhancement and imposed a prison term of 13 years, consisting of eight years on the substantive offense—the four-year midterm, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1))—and five years on the prior serious felony enhancement (§ 667, subd. (a)).

On appeal, appellant contends the court failed to conduct an adequate inquiry of a juror upon learning that juror was acquainted with a prosecution witness. Alternatively, appellant argues, if that contention is deemed waived by his counsel’s failure to raise the issue below, he (appellant) was denied his right under the United States Constitution to the effective assistance of counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

Fanny Rendon was at home in her apartment when, during the early morning hours of February 3, 2010,³ she heard a man, later identified as “Mr. Cordova,” knocking

¹ All statutory references are to the Penal Code.

² We use the term “strike” as a synonym for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

³ All references to dates of events are to dates in 2010.

incessantly on her front door. Frightened, she telephoned her next door neighbor, Mayra Ochoa, who opened her door and shouted at Cordova. He ignored her and continued knocking, eventually stopping and walking off in the direction of the patio in Rendon's backyard. Ochoa, still on the phone with Rendon, told her neighbor she had seen the man walking toward Rendon's backyard. At that point, Ochoa telephoned the police.

Rendon, looking out a window, from her vantage point in her kitchen, saw Cordova unscrew the porch light on her patio, and then open the back door and enter her apartment. At that point, Rendon ran to Ochoa's apartment to take refuge.

At approximately 1:30 a.m. on February 3, City of Bakersfield Police Officer Chris Ward, responding to the report of a prowler, drove to the area of Rendon's apartment, parked approximately one block away, and approached on foot. When he was 20 to 25 feet from Rendon's apartment, he saw a man, whom he identified in court as appellant, enter Rendon's backyard through an open gate. The officer then heard what sounded like an object falling to the ground, and within seconds appellant emerged from the backyard and approached Officer Ward. The officer handcuffed appellant.

By then, another officer had arrived on the scene. He took charge of appellant and Officer Ward entered Rendon's backyard where, in a bucket near the back door, he found a filet knife. He checked the back door and found that the weather stripping in the area of the doorknob had been stripped away. Officer Ward then made contact with Rendon at Ochoa's apartment and, thinking that appellant was the man whom Rendon and Ochoa had seen earlier, advised Rendon to return to her apartment so she could determine if anything was out of place.

Rendon entered her apartment and found Cordova "ducked down" in her kitchen. She ran screaming from her apartment, and Cordova came out after her. Officer Ward and another officer took Cordova into custody.

Rendon did not recognize the knife found in the bucket. Approximately one month later she found another knife that did not belong to her, in a flower pot in her backyard.

Rendon testified that at approximately 8:30 p.m. on February 2, she had seen appellant standing with Cordova outside a house across the street from her apartment.

Procedural Background

On July 8, during jury selection, before reading to the prospective jurors a list of potential witnesses that included “Officer Christopher Ward with the Bakersfield Police Department,” the court asked prospective jurors “to make a mental note if you recognize [any] of these names,” and stated: “And so that when I ask the question when you are brought into the jury, you will be able to tell me that you recognize this witness. And then when somebody tells me that, then I will ask more questions and find out what the relationship is that exists between you and this particular witness.”

Later that day, shortly after the jury was empanelled, Juror No. 1944768 was brought into the courtroom, and the following exchange between the court and the juror occurred:

“Q. I got the word that evidently you know Officer Ward.

“A. I didn’t recognize the names when you said it. I just knew him as Chris, as our neighbor. I saw him, though, out in the hall.

“Q. So that triggered you. [¶] Is there anything about the fact that you know him that is going to keep you from being fair and impartial in this case? [¶] In other words, he’s going to testify, obviously, but the key is, just like you heard the lawyers talk about and I talked about it, you apply the same standards of credibility to both Officer Ward’s testimony and any civilian testimony. [¶] And you know he could be sworn to take the oath and say well, you know, I was on Mars last week and that would be easy for you to make that decision. [¶] The question is is there anything about the relationship

you have with him -- because I have neighbors too and a lot of neighbors I don't even know their names, sad to say. Is there anything about the relationship you have with Officer Ward that would make you feel that you would weigh his testimony stronger than a civilian witness just from the start? [¶] Do you see what I'm saying?

“A. Yeah. [¶] No, I don't think so.

“Q. And you understand he can make a mistake like any other, like you can and I can, right?

“A. Right.

“Q. So you'll listen, and I'll give you a lot of guidelines, and you'll use your common sense and you'll use your life's experiences and weigh his testimony the same way you would any other witness?

“A. Right. Yes.”

At that point, the court asked both counsel, “Any problems[?]” Defense counsel responded, “No, your Honor,” as did the prosecutor.

On August 13, appellant sought an order for the appointment of substitute counsel, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). At the hearing on the motion that day, appellant told the court: “ ... I asked Mr. Revelo [defense counsel] to remove one of the [jurors] due to the fact that she lied when she -- when they -- [¶] When you asked her if they knew anyone on the witness list, they all said ‘no.’ They all testified under oath saying they did not know none of the witnesses. [¶] The date of the trial, one of the [jurors] stood up and said she knew the witness, which is Officer C. Ward. That was her next door neighbor. [¶] You asked her if she would give me a fair trial. She stated, ‘Yes.’ But before she stated ‘yes,’ she looked at me, she looked at Officer Ward, she looked back at me, grinned at me, looked back at Officer Ward, and then she told you ‘yes.’”

DISCUSSION

Appellant contends the court failed to conduct an adequate inquiry of Juror No. 1944768 to determine whether she could be impartial, and thereby violated appellant's rights under state law and the United States Constitution.

Governing Legal Principles

“[O]ne accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] “The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.”” (*In re Hitchings* (1993) 6 Cal.4th 97, 110.)

Under section 1089, “The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty.”⁴ (*People v. Lomax* (2010) 49 Cal.4th 530, 588 (*Lomax*)). Good cause for discharge includes actual bias (*id.* at p. 589) and personal knowledge of controverted facts (*People v. McNeal* (1979) 90 Cal.App.3d 830, 835-839 (*McNeal*)).

“[O]nce a juror's competence is called into question, a hearing to determine the facts is clearly contemplated.” (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.) “If the trial court has good cause to doubt a juror's ability to perform his duties, the court's failure to conduct a hearing may constitute an abuse of discretion on review.” (*Lomax, supra*, 49 Cal.4th at p. 588.)

⁴ Section 1089, provides, in relevant part: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.”

Additionally, section 1120 requires that the court, upon learning that a juror has personal knowledge of a fact in controversy, must conduct a hearing, at which the juror “must be sworn as a witness and examined,” to determine whether that knowledge constitutes good cause to discharge the juror. (§ 1120.)⁵ However, “While a hearing with sworn testimony by the juror is required by section 1120, it appears that a less formal inquiry is adequate to determine ‘good cause’ to discharge a juror under other circumstances.” (*McNeal, supra*, 90 Cal.App.3d at p. 837.) Thus, the mode of investigation under section 1089 is left to the trial court’s broad discretion. (*People v. Keenan* (1988) 46 Cal.3d 478, 538-539.) The court has the discretion “to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.” (*People v. Beeler* (1995) 9 Cal.4th 953, 989; see also *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 [“Clearly it is up to the trial court to determine the appropriate procedure to follow when a question arises about a juror’s continued service”].) The trial court’s “duty,” upon being “put on notice of the possibility a juror is subject to improper influences” is simply “to make whatever inquiry is reasonably necessary to determine if the juror should be discharged” (*Burgener, supra*, 41 Cal.3d at p. 520.)

Forfeiture

By failing to object to the trial court’s inquiry, or lack thereof, appellant forfeited his claim that the trial court’s inquiry was inadequate. “[A]s a general rule, ‘the failure to

⁵ Section 1120 provides: “If a juror has any personal knowledge respecting a fact in controversy in a cause, he or she must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact that could be evidence in the cause, as of his or her own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his or her discharge as a juror.”

object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.’ [Citations.] This [rule] applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights.” (*In re Seaton* (2004) 34 Cal.4th 193, 198.) In *People v. Russell* (2010) 50 Cal.4th 1228, while the jury was deliberating, the trial court received a report that a juror was unable to perform her duties; the court questioned the juror; and on appeal, the defendant argued the court’s questioning was “improper, intrusive, and coercive” (*Id.* at p. 1250.) Our Supreme Court held that the defendant forfeited his challenge to the court’s questioning because he “failed to object.” (*Ibid.*; see also *People v. Wisely* (1990) 224 Cal.App.3d 939, 947-948 [claim of jury misconduct may be waived for failure to object below].)

In the instant case, the court, following its colloquy with Juror No. 1944768, asked both counsel if they had “[a]ny problems.” Defense counsel did not object to the trial court’s inquiry, nor did he request any additional inquiry by the court. Had defense counsel done either, the trial court could have exercised its discretion to determine whether further inquiry was warranted. By failing to object, appellant deprived the trial court of the opportunity to correct any deficiency in the inquiry it had already conducted. We therefore conclude appellant forfeited on appeal the issue of whether the trial court’s inquiry regarding the juror’s relationship with the prosecution witness was insufficient.

Appellant argues in summary fashion that *McNeal, supra*, 90 Cal.App.3d 830 “disposes of respondent’s leading argument that appellant forfeited his claim by not demanding a more searching inquiry.” We disagree.

In *McNeal*, the trial court, after learning that a particular juror may have had personal knowledge of one or more facts in controversy, questioned the juror, but deliberately declined to “get into factual matters,” and instead confined questioning to whether the juror “could deliberate fairly and impartially” (*McNeal, supra*, 90

Cal.App.3d at p. 836.) Satisfied with the juror's assurances that she could do so, and that she could "set aside" any "information" she had received "outside the evidence," the court instructed the jury to resume deliberations. (*Ibid.*) Insofar as the opinion reveals, defense counsel did not object to the court's inquiry. The appellate court held that "the [trial] court's inquiry was inadequate under the circumstances." (*Ibid.*)

As best we can determine, appellant argues that because the appellate court reversed the judgment on the ground that the trial court conducted an inadequate inquiry of the juror even though nothing in the opinion indicates the defendants objected to the court's inquiry, *McNeal* is authority for the claim that failure to object in the trial court to the court's inquiry, or lack thereof, does not operate as a forfeiture of that claim. We disagree. *McNeal* did not address the forfeiture issue, and "'cases are not authority for propositions not considered.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

Analysis of Merits

Assuming for the sake of argument that appellant's contention that the court's inquiry of Juror No. 1944768 was inadequate is properly before us, that contention is without merit.

Here, the court's factual inquiry revealed that Juror No. 1944768 and Officer Ward were neighbors, the juror knew the officer only by his first name, and she did not suspect that the potential witness identified as Officer Christopher Ward and the neighbor she knew as Chris were the same person until she saw Officer Ward in the hall, well after she was asked if she recognized any of the names on the witness list. The court also questioned Juror No. 1944768 as to whether she could be fair and impartial. In our view, the scope of the court's inquiry was well within its broad discretion and sufficient to discharge its duty "to make whatever inquiry is reasonably necessary to determine if the juror should be discharged" (*Burgener, supra*, 41 Cal.3d at p. 520.) No more is required.

Appellant bases his challenge to the adequacy of the court's inquiry of Juror No. 1944768 chiefly on *McNeal, supra*, 90 Cal.App.3d 830. In that case, the jury foreperson sent the court a note indicating that one of the jurors had some "personal knowledge" that would "definitely [have] a bearing on the way she will vote." (*Id.* at p. 835.) The court asked if the juror had "discussed what this knowledge is," and the foreperson told the court, "She mentioned a couple of names, and that's about it." (*Ibid.*) In response to the court's question as to whether the juror had asked for the note to be sent to the court, the foreperson answered, "Yes. She just broke down and said that there was some--that she had too much to lose, and it would definitely affect her decision now." (*Id.* at p. 836.)

During discussion with counsel as to how to proceed, the court stated, "*I'm not going into the facts.*" (*McNeal, supra*, 90 Cal.App.3d at p. 836.) The court thereafter questioned the juror in chambers, but told her, "*we don't want to go into factual matters.*" (*Ibid.*) The court asked the juror if she could be impartial. The juror answered, "Well, after giving it some thought, since yesterday, I still can't find that I can say "guilty" when I can't believe it." (*Ibid.*) The court did not pursue this. Rather, the court questioned the juror further as to whether "she could deliberate fairly and impartially." (*Ibid.*) Upon receiving the juror's assurances, the court instructed the jury to resume deliberations.

The *McNeal* court stated: "Once a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors has been affected." (*McNeal, supra*, 90 Cal.App.3d at p. 839.) The trial court did not fulfill its duty because, the appellate court stated: "[T]he court's cursory questioning of [the juror] did not justify its conclusion that she could properly perform her duties as a juror. Despite her provocative

comments that she had ‘too much to lose’ and that she couldn’t ‘say guilty’ when she didn’t believe it, the court did not determine whether she had been subjected to some kind of duress. Here the court’s failure to make *at least a minimal factual inquiry* left unresolved the essential question: [The juror’s] ability to deliberate impartially.” (*Ibid.*, italics added.)

Appellant argues that the court’s inquiry of Juror No. 1944768 was, like the inquiry of the juror in *McNeal*, “perfunctory and not sufficiently probing” as to factual matters because (1) it focused solely on whether the juror “could avoid elevating the credibility of the officer simply based on the fact that he was a police officer,” and (2) the court did not inquire as to “the number and quality of interactions the officer had with the juror and whether the juror was aware of the officer’s reputation within the local community.” In addition, appellant argues that the “factual predicate” for the necessity of a more extensive inquiry in the instant case was “stronger, or at least equal to that in *McNeal*” because, according to appellant’s statements at his *Marsden* hearing, Juror No. 1944768 grinned at appellant and looked twice at Officer Ward when she was questioned by the court. These points are not well taken.

First, appellant did not raise his claim regarding Juror No. 1944768’s conduct until his *Marsden* hearing, more than a month after the trial. There is nothing in the record to indicate that the court, defense counsel or anybody else observed this conduct at the time it occurred, if it occurred.⁶ Therefore, on this record, the court cannot be faulted for failing to act based on this conduct. (Cf. *People v. Badenthal* (1935) 8 Cal.App.2d 404, 412 [action of a court in discharging a juror must be tested in the light of the evidence before it at the time of the decision].)

⁶ We have reviewed the reporter’s transcript of the *Marsden* hearing. During the hearing, neither the court nor defense counsel addressed appellant’s claim regarding Juror No. 1944768’s conduct.

Moreover, *McNeal* is distinguishable. In that case, there were indications the juror was under duress, but virtually no information regarding the source and severity of that duress. More factual information was needed to determine whether the juror was under such duress that she could not perform her duties as a juror. Here, by contrast, the relevant facts were made known to the court during its inquiry of Juror No. 1944768: She and Officer Ward were neighbors and she knew him by his first name only. With that information, it was reasonable for the court to move to an inquiry as to whether her familiarity with the officer would affect her ability to impartially discharge her duties as a juror. Although it would have been within the court's discretion under section 1089 to inquire further into such matters as the officer's reputation and the juror's contacts with him, the court did not abuse its discretion in not doing so.

Finally, appellant also argues the court violated section 1120 because the court failed to swear Juror No. 1944768 as a witness. We disagree. This is not a case in which the court had information that a juror "ha[d] any personal knowledge respecting a fact in controversy in a cause" (§ 1120.) Therefore, section 1120 has no application here.

Ineffective Assistance of Counsel

Appellant argues that counsel's failure to request that the court conduct a more extensive inquiry of Juror No. 1944768 deprived appellant of his right under the United States Constitution to the effective assistance of counsel. We disagree.

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, "a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant" (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) "Such prejudice exists only if the record shows that but for counsel's defective

performance there is a reasonable probability the result of the proceeding would have been different.” (*People v. Cash* (2002) 28 Cal.4th 703, 734.)

“[T]he [defendant] must carry his burden of proving prejudice as a “demonstrable reality,” not simply speculation as to the effect of the errors or omissions of counsel.” (*People v. McPeters* (1992) 2 Cal.4th 1148, 1177; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [“prejudice must be affirmatively proved”].) And the defendant must make this showing based on the record on appeal. (*People v. Williams* (1988) 44 Cal.3d 893, 917, fn. 12 [“[t]he scope of an appeal is, of course, limited to the record of the proceedings below”].) “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding” (*People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, internal quotation marks omitted.) “Finally, ‘there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.’” (*Ibid.*)

The record here does not tell us what further inquiry of Juror No. 1944768 would have revealed. Thus, there is nothing in the record that affirmatively proves that the juror’s assurances that she could discharge her duties should be disregarded. Based on the appellate record, it is sheer speculation that there is a reasonable probability that further inquiry would have resulted in the discovery of information that Juror No. 1944768 could not perform her duties as a juror. Therefore, we reject appellant’s claim of ineffective assistance of counsel. (Cf. *People v. Berryman* (1993) 6 Cal.4th 1048, 1082, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [ineffective assistance of counsel claim based on asserted inadequate investigation failed where defendant “[did] not demonstrate that the investigation would have yielded

favorable results and hence [did not] demonstrate that its omission adversely affected the outcome within a reasonable probability”]; *In re Avena* (1996) 12 Cal.4th 694, 730 [defendant could not show prejudice from counsel’s failure to file a motion to discover police personnel records absent showing of what counsel would have discovered had he made the motion].)

DISPOSITION

The judgment is affirmed.