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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON LEON LEBAR,

Defendant and Appellant.

F061879

(Fresno Sup. Ct. No. F08906665)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

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, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

STATEMENT OF THE CASE

On September 1, 2009, the Fresno County District Attorney filed an information in superior court charging appellant Brandon Leon Lebar as follows:

Count 1 – assault on a peace officer/firefighter with a semiautomatic weapon (Pen. Code,¹ § 245, subd. (d)(2)) with personal use of a firearm (§§ 12022.53, subd. (b), 667, 1192.7);

Count 2 – exhibiting a firearm in the presence of an officer (§ 417, subd. (c)) with personal use of a firearm (§§ 667, 1192.7);

Count 3 – carrying a loaded firearm (§ 12031, subd. (a)(1)) to which he was not the registered owner (§ 12031, subd. (a)(2)(F)) with prior felony convictions (§ 12031, subd. (a)(2)(A)); and

Count 4 – possession of a firearm by a felon (§ 12021, subd. (a)(1)).

The district attorney specially alleged appellant had sustained a strike prior (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)).

On September 2, 2009, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegations.

On November 17, 2010, the court granted appellant's motion to bifurcate trial of his prior conviction allegations.

On November 22, 2010, jury trial commenced.

On December 3, 2010, the jury returned verdicts finding appellant guilty as charged of the substantive offenses and found the related special allegations to be true. That same day, appellant admitted the truth of the remaining special allegations.

On February 3, 2011, the court denied appellant probation and sentenced him to a total term of 30 years in state prison. The court imposed the doubled middle term of 14

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

years on the strike prior, a consecutive 10-year term on the section 12022.53, subdivision (b) enhancement, a consecutive five-year term on the section 667, subdivision (a)(1) prior felony conviction, and a consecutive one-year term for the prior prison term (§ 667.5, subd. (b)). The court stayed four-year terms on counts 2 and 3 (§ 654) and imposed a concurrent four-year term on count 4. The court imposed a \$6,000 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine (§ 1202.45), and awarded 963 days of custody credits.

On February 3, 2011, appellant filed a timely notice of appeal.

STATEMENT OF FACTS²

At 4:00 a.m. on October 19, 2008, Fresno County Sheriff's deputies were dispatched to a "shots-fired" call. Deputies arrived at the scene and found appellant on his back with one Josh Orona standing over him. Appellant's right hand was located underneath his bleeding leg. When a deputy asked to see appellant's hand, appellant took his hand from under his leg and revealed a handgun. The deputy instructed appellant several times to drop the gun, but appellant refused to do so. The deputy backtracked into the road by the front fender of his patrol car, located about 20 feet from appellant. Appellant attempted to stand up and pointed his handgun at the deputy. The deputy, fearing for his life, shot appellant in the arm. Further examination revealed that appellant's handgun was loaded and cocked.

Defense Evidence

Appellant testified he sustained gunshot wounds to his left leg and chest on October 19, 2008. He remembered being at several parties that evening but could not remember how much alcohol he had consumed. With respect to the gun found at the crime scene, appellant acknowledged his possession of the gun at the time of the parties

² Because the issues on appeal turn primarily on points of law, we will initially offer an abbreviated statement of facts and supply additional facts, as necessary, in our discussion.

but did not recall whether he possessed the gun at the time he was shot. Appellant remembered walking with friends in the Mayfair District when a car drove by and fired shots at appellant and his friends. He remembered being wounded in the leg and then staggering into a nearby backyard and collapsing. The next thing he recalled was awakening in a hospital room about two weeks later.

Avak Albert Howsepian, M.D., Ph.D., a defense psychiatrist, testified that at the time the deputy contacted him, “Mr. Lebar had a profoundly altered mental state as a result of some combination of hemorrhagic shock, dissociation, and alcohol intoxication delirium, and that profound alteration was of a species we call delirium which by definition is a disturbance in consciousness impairment retention and is often, as it was in this case, accompanied by severe memory deficits and misperceptions.”

Rebuttal Evidence

Fresno County Correctional Officer Lee Forlines testified he was assigned to watch appellant at Community Regional Medical Center (CRMC) as he underwent treatment for his injuries. Officer Forlines said he and appellant had several conversations in November and December 2008. During those conversations, appellant said he was shot by the passing car, fell down, and then pulled out his own weapon and fired back. According to Officer Forlines, appellant said he fell on the ground and remembered bright lights coming up to him. Appellant told Forlines he was not sure what was going on around him, although appellant thought he heard voices.

Surrebuttal Evidence

Appellant testified that he had never seen or conversed with Office Forlines prior to trial.

DISCUSSION

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY DENYING APPELLANT’S REQUEST TO DISMISS A SEATED JUROR DURING TRIAL.

Appellant contends the trial court committed reversible error by denying his request to dismiss seated Juror No. 11 after that juror expressed concerns to the trial judge about two members of the courtroom audience who appeared to be gang members.

A. Procedural History

During a recess in proceedings on the morning of November 29, 2010, the courtroom clerk advised the trial judge that seated Juror No. 11 “wanted to talk to the judge to request that two gang members be excluded from the audience.” According to the clerk, nothing else was said. The court invited Juror No. 11 to enter the courtroom in the presence of counsel but without the other jurors present. Juror No. 11 advised the court that appellant had a right to his full attention and acknowledged his need to pay attention to the witnesses. The juror nevertheless advised the court that, based on some unspecified specialized training, he had been distracted by several individuals on the right side of the courtroom. The juror expressed concern about the mannerisms and demeanor of the individuals. He referred to their behavior as “USO” meaning “unusual, suspicious, out of the ordinary.” Upon further questioning by the court, Juror No. 11 said “they keep coming in and out. It’s a distraction.” In pointing out the distraction, the juror acknowledged the individuals in question had “a right to be here if they want.”

The trial judge stated: “I did not observe any specific conduct of anybody in the audience that would merit my admonishing them about their behavior or exclude them from the proceedings.” The juror again acknowledged that the individuals had a right to be present in the courtroom but noted “they’re somewhat of a distraction.” The juror emphasized, “[T]he defendant has a right to have my full attention when the witnesses are being put up there.” The court then asked the juror whether he would be able to focus attention on the job at hand “as long as I keep my eyes on the situation [and] Deputy

Stokes keeps his eyes on the situations ...?” The juror responded affirmatively. The juror also indicated that he had been able to focus attention sufficiently on the evidence that had been presented up to that point in the proceedings.

The court noted that “[t]he trial is about the charges that have been brought against Mr. Lebar and that’s what we’re here to decide” The court also noted that “[w]hatever is going on with the individuals who may come and go from this courtroom has nothing to do with what we’re going to be focusing on.” The juror indicated that he understood what the court was saying. The court asked, “You’re going to be able to focus your attention on those issues and do the job that I’ve advised you of in jury selection?” The juror responded, “Yes, your Honor.”

The court invited counsel to make further inquiries. Defense counsel asked Juror No. 11 about the nature of his specialized training. The juror said it was “in the nature of concealed weapons training.” Defense counsel reminded the juror that there were no gang allegations in appellant’s case and the juror replied, “I’m aware of that.” In response to further questioning by defense counsel, the juror said he had not formed an opinion about whether appellant had anything to do with gangs. The juror replied, “No. I’m here to listen,” and indicated that he would listen to both sides. In response to defense counsel’s further questioning about the distractions, the juror said, “It doesn’t matter to me.... I just wanted to make sure that the judge was aware of it. He controls the court, that was it.” The prosecutor asked the juror whether he personally knew if the two audience members were gang members. The juror responded, “No. They’re just walking in and out. They’re a distraction.” The juror also indicated that he did not know them personally.

The court indicated to the Juror No. 11 that “people are going to be coming and going during this proceeding and it may very well involve these two individuals as this trial proceeds” The court asked whether the juror would be able to focus attention on the testimony, witnesses, exhibits, and evidence brought for his consideration. The juror

responded, “Yes, your Honor. That’s my job.” The court went on to ask, “You would be able to do the job that we’ve asked you to do when we swore you in as a juror?” Juror No. 11 replied in the affirmative.

After Juror No. 11 returned to the jury room, defense counsel expressed concern as follows:

“ ... Mr. Lebar, as we are all aware sitting here, has a number of tattoos, and the tattoos are prominently displayed on his face. My concern is that the [juror] – I did ask him directly and he said he had not formed an opinion, but the statement that he made alluding that people in the audience were gang members was distracting to him gives me cause for concern that he’s already prejudged and that for him to continue sitting would be prejudicial.”

Defense counsel declined to ask for a mistrial but expressed concern about the ability of Juror No. 11 to be fair. Counsel asked that an alternate juror be substituted in place of Juror No. 11.

The prosecutor disagreed with defense counsel and pointed out that Juror No. 11 acknowledged numerous times that appellant had a right to his full attention. She noted that the juror said he had been focused and had given his full attention. She also pointed out that Juror No. 11 had mentioned his specialized training during voir dire.

The court declined the request to excuse Juror No. 11 and replace him with an alternate, stating:

“I’m satisfied that through our voir dire he has responded in the appropriate manner to his ability to fairly and impartially assess the evidence, devote his attention to the trial proceedings and follow my instructions throughout this process.

“With regard to the disclosure of specialized training, my recollection of the voir dire process in jury selection is that he shared a lot of information about a number of different types of credentials, training, certifications, information on many levels. Counsel were all given the opportunity to follow up on that and did. What he has disclosed here today this morning has not changed any of the essential qualifications he disclosed to further voir dire in the jury selection process and nothing he has said this morning would indicate that he has an inability or

unwillingness to do the job of serving as a trial juror. However, we will monitor the situation if there are other inquiries from this juror or other jurors, and we will have to deal with them and keep an open mind to the process of outside influences affecting a juror's ability to be fair and impartial in this case.

“At this time I'm satisfied that the record establishes Juror Number 11 is capable and willing to be fair and impartial in him continuing as a trial juror.”

B. Appellant's Specific Contention

Appellant contends: “The juror told the clerk that he was concerned about gang members in the audience. [Citation.] But, he leapt to the conclusion that the two were gang members without any evidence, based solely on the individuals' mannerisms, walk, and general demeanor. Based solely on this observation, he claimed the individuals were ‘... USO, unusual, suspicious, and out of the ordinary ...’ [Citation.] Such a juror, who engages in prejudgment and leaps to conclusions not based on evidence, could never properly and fairly judge appellant's case. [¶] Also, the fact that the juror had sufficient time and opportunity to actually observe and discern the mannerisms, walk, and general demeanor of two people in the audience shows that he was not giving appellant's case the attention required of a juror in a criminal case. He should have been dismissed. [Citation.]”

C. Applicable Law

1. Law Regarding Inattentiveness

The trial court may discharge a juror who “becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty...” (§ 1089.) Such good cause may exist if a juror is sleeping or inattentive. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411; *People v. Bradford* (1997) 15 Cal.4th 1229, 1349 (*Bradford*); *People v. Bonilla* (2007) 41 Cal.4th 313, 350; *People v. Johnson* (1993) 6 Cal.4th 1, 21, overruled on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826, 878-879.)

A juror commits misconduct if he or she fails to pay attention to the evidence presented at trial. (*Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 411; *Bradford*,

supra, 15 Cal.4th at p. 1349.) Although misconduct may constitute grounds to believe a juror will be unable to fulfill his or her functions as a juror under section 1089, “such misconduct must be ‘serious and willful.’ [Citation.]” (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) Juror misconduct raises a rebuttable presumption of prejudice, and a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

The court has discretion on whether to conduct an evidentiary hearing to determine the truth or falsity of allegations of juror misconduct. (*People v. Avila* (2006) 38 Cal.4th 491, 604 (*Avila*)). “[The] defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is ‘necessary to resolve material, disputed issues of fact.’ [Citation.] ‘The hearing should not be used as a “fishing expedition” to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties’ evidence presents a material conflict that can only be resolved at such a hearing.’ [Citations.]” (*Ibid.*)

Moreover, as explained by the California Supreme Court, “the mere suggestion of juror ‘inattention’ does not require a formal hearing disrupting the trial of a case. [Citation.]” (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) A trial court’s “self-directed inquiry, short of a formal hearing,” may be adequate under the state and federal Constitutions where the court is alert to the danger of juror inattention, closely observes the jurors, and makes specific observations about their demeanors. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1234.) “The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] [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 [or her] duties and would justify his [or her] removal from the case. [Citations.]” (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

2. Law Regarding Prejudging

A defendant has a constitutional right to a trial by an impartial jury. 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. Further, to preserve impartiality, the jury’s deliberative process is shielded from all outside influences. To challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or the other senses. When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttal presumption of prejudice. Juror bias does not require that a juror bear animosity toward the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror’s verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1115-1117.)

The trial court’s decision whether or not to discharge a juror under section 1089 is reviewed for abuse of discretion and will be upheld if supported by substantial evidence; to warrant discharge the juror’s bias or other disability must appear in the record as a demonstrable reality. (*People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Lucas* (1995) 12 Cal.4th 415, 489.) A juror’s misconduct creates a rebuttable presumption of prejudice, but reversal is required only if there is a substantial likelihood one or more jurors were improperly influenced by bias. (*In re Hitchings* (1993) 6 Cal.4th 97, 118-119; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.)

D. Analysis

With respect to bias, appellant contends “the juror was concerned enough about gangs to bring his worry to the trial court’s attention. The concern is especially critical here where appellant has visible tattoos on his face which could indicate gang membership.” In speaking with the trial judge during the recess, the clerk of court indicated that Juror No. 11 wanted “to request that two gang members be excluded from the audience.” This alleged comment to the clerk was never reiterated or verified during the in camera proceedings that followed. Moreover, Juror No. 11 expressly acknowledged that appellant was not subject to gang charges, that there were no gang allegations in the case, that he had not formed an opinion as to whether appellant had any gang involvement, and that he did not personally know whether the two individuals who walked in and out of the courtroom were gang members. Juror No. 11 stated the two audience members “were somewhat of a distraction,” but he was nevertheless able to sufficiently focus his attention on the evidence presented in the first session of court.

After questioning Juror No. 11 and hearing the juror’s responses to the questions of counsel, the court ruled: “I’m satisfied through our voir dire he has responded in the appropriate manner to his ability to fairly and impartially assess the evidence, devote his attention to the trial proceedings and follow my instructions throughout this process.” In matters of alleged juror misconduct, the reviewing court defers to the observations and credibility determinations of the trial court. (*People v. Pride* (1992) 3 Cal.4th 195, 260.)

In view of the extended in camera inquiry and the extensive findings at the end of that inquiry, the trial court did not abuse its discretion by declining to excuse Juror No. 11 and replace him with an alternate juror.

II. THE JUDGMENT OF CONVICTION OF EXHIBITING A FIREARM SHOULD NOT BE REVERSED AS A LESSER INCLUDED OFFENSE OF ASSAULT ON A PEACE OFFICER WITH A SEMI-AUTOMATIC FIREARM.

Appellant contends the crime charged in count 2 (§ 417, subd. (c)) is a lesser included offense of that charged in count 1 (§ 245, subd. (d)(2)) and therefore the judgment of conviction on count 2 must be reversed and the stayed sentence imposed on that count must be vacated.

He specifically argues:

“In count 2, based on the *same* facts and conduct, appellant was charged with and convicted of the lesser included offense of exhibiting a firearm in the presence of a police officer. (Penal Code sec. 417, subd. (c).) In count 1, appellant was convicted of assault with a semiautomatic firearm on a police officer. (Penal Code sec. 245, subd. (d)(2).) However, as a matter of law, appellant could not properly be convicted of both the greater offense and its necessarily included lesser offense. Thus, the lesser exhibiting conviction must be reversed and its stayed sentence must be vacated.”

At the time of the charged offense, section 417, subdivision (c) stated:

“Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, and who knows or reasonably should know that the victim is a peace officer engaged in the performance of his or her duties, and that peace officer is engaged in the performance of his or her duties is guilty of a felony punishable by imprisonment in the county jail for a term of not less than nine months and not to exceed one year, or in the state prison.” (Stats. 2000, ch. 478, § 1.)

Brandishing a weapon may be committed by drawing or exhibiting a weapon in a rude, angry, or threatening manner. A weapon need not be pointed at the victim to be threatening. Rather, it is enough that the brandishing be in public, in the presence of the victim. The thrust of the offense is to deter the public exhibition of weapons in a context of potentially volatile confrontations. (*People v. Booker* (2011) 51 Cal.4th 141, 189.) “Indeed, ‘the chief evil to be avoided by criminalizing exhibition of weapons is the potential for further violence’ [Citation.]” (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1092)

In 1957, the Third Appellate District held in an assault case arising in Merced County: “Section 417 of the Penal Code forbids the unlawful use in a fight or quarrel of a deadly weapon and the exhibition of such a weapon in the presence of another person in a rude, angry, or threatening manner. An assault with a deadly weapon can be committed without violating any provision of Penal Code, section 417, as by firing a gun through a coat pocket without either drawing or exhibiting the weapon and without then being engaged in a fight or quarrel.” (*People v. Torres* (1957) 151 Cal.App.2d 542, 544-545.)

A decade later, the Supreme Court decided the cases of *People v. Wilson* (1967) 66 Cal.2d 749, 764, and *People v. Coffey* (1967) 67 Cal.2d 204, 222 (*Coffey*), disapproved on another point in *People v. Colantuano* (1994) 7 Cal.4th 206, 218, fn. 8. In *Wilson*, the Supreme Court impliedly held that brandishing of a weapon was a lesser included offense to assault with a firearm. In *Coffey*, the Supreme Court addressed the defendant’s multiple charges of assault with intent to commit murder (§ 217) and assault with a deadly weapon upon the person of a peace officer (§ 245, subd. (b)). At one point in its discussion, the Supreme Court briefly noted: “The jury herein was properly instructed that section 417 sets forth a lesser offense necessarily included in those charged. [Citation.]” (*Coffey, supra*, at p. 222, fn. 21.)

In *People v. Steele* (2000) 83 Cal.App.4th 212 (*Steele*), reviewed denied December 13, 2000, Division Two of the Second Appellate District acknowledged those Supreme Court cases but then elected to follow “almost a century of established law” – including the *Torres* case – and held that brandishing cannot be a lesser included offense to assault with a firearm. (*Id.* at p. 221.) The Second District explained:

“Even though most assaults with a firearm undoubtedly include conduct fitting into the definition of brandishing, it has long been held that brandishing is a lesser related offense, rather than lesser included. [Citations.] The reason of course, is that it is theoretically possible to assault someone with a firearm without exhibiting the firearm in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim’s back. (*People v. Escarcega* [(1974)] 43 Cal.App.3d 391, 398)” (*Steele, supra*, 83 Cal.App.4th at p. 218, fn. omitted.)

In reaching this conclusion, the Second District observed that at least four appellate court decisions published between 1911 and 1965 had decided that brandishing a firearm was not a lesser included offense to assault with a deadly weapon (firearm). (*Id.* at pp. 314-315.) The *Steele* court noted that “[t]he most outspoken of the opinions” is *People v. Escarcega, supra*, 43 Cal.App.3d 391. (*Id.* at p. 220.) In *Escarcega*, Division One of the First Appellate District held that the footnote in *Coffey* “was not responsive to any issue raised and was unnecessary to the decision of that case. The statement is dictum, and under well-known rules may be considered as without precedential value. [Citations.]” (*People v. Escarcega, supra*, at p. 400.)

In view of the appellate case law set forth in *Steele*, brandishing of a weapon is not a lesser included offense of assault with a semiautomatic firearm. Appellant was properly convicted of both offenses in this case.

DISPOSITION

The judgment is affirmed.

Poochigian, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.