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

THE PEOPLE,

Plaintiff and Respondent,

v.

KELTON LEROY GARVIN,

Defendant and Appellant.

F066377

(Super. Ct. No. MF009985A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Gomes, J., and Kane, J.

A jury convicted appellant, Kelton Leroy Garvin, of assault with a firearm (count 1/Pen. Code, § 245, subd. (a)(2)) and discharging a firearm at an inhabited dwelling (count 2/Pen. Code, § 246) and found true a personal use of a gun enhancement (Pen. Code, § 12022.5, subd. (a)) in count 1. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACUTAL AND PROCEDURAL HISTORY

Garvin was in a relationship with Ernestine Sly for approximately five months and had been living with Sly and her family in her apartment in Mojave until around February 14, 2012.

On February 21, 2012, at approximately 1:00 p.m., Garvin met with Kern County Sheriff's Deputy Jesse Harker two blocks away from Sly's apartment and asked him to retrieve some of his property from Sly. Harker and another deputy then went to Sly's residence and she gave them some property that they returned to Garvin.

After the deputies left Sly's apartment, Sly's son, Joshua C., saw Garvin drive by the apartment three times. At approximately 4:00 p.m., as Joshua walked down the street to his cousin's house, he saw Garvin driving a car toward him. Joshua confronted Garvin and told him to stop driving by his mother's apartment because she did not want anything to do with him. Garvin replied that all he wanted was some of his toiletries. Joshua told Garvin that he would force him to leave and he started walking toward the car; Garvin drove away.

Joshua walked back to his mother's apartment and stayed on the front porch for a few minutes before he again began walking to his cousin's house. En route Joshua again saw Garvin driving towards him. Garvin stopped briefly when he was approximately 15 feet from Joshua and he then started driving slowly towards him. Garvin asked Joshua if he "really want[ed] to do this[.]" Joshua told Garvin to get out of the car and started walking toward him. As Garvin steered with his left hand, he stuck a revolver out of the

window with his right hand, pointed it at Joshua, and fired five to six shots. Joshua ran towards some apartments, through a fence, and back home. None of the bullets hit Joshua but one of them struck an apartment, penetrated the wall, and embedded itself in a box spring mattress in a bedroom.

Garvin fled and was not arrested until May 29, 2012.

On October 10, 2012, the district attorney filed an amended information charging Garvin with assault with a firearm (count 1) and discharging a firearm at an inhabited dwelling (count 2). Count 1 also alleged a personal use of a firearm enhancement.

On October 12, 2012, a jury found Garvin guilty on both counts and found the firearm enhancement true.

On October 16, 2012, defense counsel filed a motion to modify Garvin's conviction in count 2 to the lesser offense of discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3).

On November 9, 2012, the court denied the motion.

On December 13, 2012, the court sentenced Garvin to an aggregate 14-year term: the aggravated term of four years on Garvin's assault with a firearm conviction, the aggravated term of 10 years on the arming enhancement in that count, and a stayed, aggravated term of seven years on Garvin's discharging a firearm at an inhabited dwelling conviction.

Garvin's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) However, in a document filed on November 20, 2013, Garvin contends this court should overturn his conviction because of an appearance of bias or actual bias by several jurors (Nos. 4, 5, 7, 9, 10, 11, 12, and the alternate juror) or because his defense counsel failed to challenge these jurors for bias or

to exercise peremptory challenges to remove them from the jury.¹ Garvin attributes the jurors' bias or the appearance of bias against him² to a variety of circumstances including that: (1) some jurors had worked in law enforcement, or had friends or relatives working in law enforcement or in the prisons currently or in the past; (2) a juror who was a realtor had been friends with the judge for many years and had represented him in real estate transactions; (3) another juror knew all the officers who worked in his small community on a casual basis; (4) another juror had known one of the officers who was a prosecution witness since high school; and (5) some of the jurors knew other jurors. There is no merit to Garvin's contentions.

“In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

“The legal standard for evaluating the propriety of the exclusion or inclusion of a prospective juror is the same. [Citation.] A challenge to a prospective juror should be sustained when the juror's views would ‘prevent or substantially impair’ the performance of his or her duties as a juror in accordance with the instructions and oath. [Citations.] If the prospective juror's responses to voir dire questions are conflicting or equivocal, the

¹ Defense counsel did not exercise all of his peremptory challenges.

² According to Garvin, these jurors were predisposed to find him, “or anyone in [his] position, guilty.”

trial court's determination is binding on the reviewing court. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 456-457.)

Here, in response to questioning by the court some of the jurors responded individually that a particular circumstance noted above would not affect their ability to be fair and impartial. Additionally, when the court asked the jurors collectively whether there was any reason why any of the jurors could not be fair and impartial, there was no response from any of the prospective jurors that Garvin challenges. Thus, defense counsel did not provide ineffective representation by his failure to challenge the jurors noted above because the circumstances cited by Garvin did not provide a basis for successfully challenging any of them for cause.

Nor is there any merit to Garvin's contention that defense counsel should have exercised his peremptory challenges to remove some of these jurors. "We have repeatedly rejected similar contentions. "Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process.'" [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 448.) Defense counsel participated fully in the voir dire process and there is nothing in the record that suggests incompetence in questioning the prospective jurors. Further, our review of the record does not disclose any evidence that supports Garvin's claim that counsel acted unreasonably in failing to exercise more peremptory challenges. Accordingly, we reject Garvin's claim that he was denied the effective assistance of counsel during voir dire.

Following independent review of the record we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.