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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. AARON L. STRIBLING, Defendant and Appellant.	C059979 (Super. Ct. No. 07F03385)

Defendant Aaron Stribling appeals his conviction for second degree robbery contending the trial court abused its discretion by denying his petition to disclose identifying juror information. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 2007, at about 9:00 p.m., Whitney Pham and her daughter were loading up her van, which was parked in front of the nail salon where she was the manager. Three men approached her, one of whom was wearing a black hooded sweater. The man wearing the black sweater pointed a handgun at Pham and said, "Give me your purse." Pham froze with fear and the man with the

gun snatched her purse and a paper bag she was holding. The men ran down the street and jumped over a fence heading toward a church. As they were running, one of the men fired three shots into the sky.

Pham's purse contained her driver's license, credit cards, Social Security card, and between $2,800 and $3,200 in cash. The bag she was holding contained her prescription medications.

Responding to her mother, Pham's daughter called the police. Sacramento Sheriff's Deputy Shaun Hampton responded to the scene with Kyzmo, a certified tracking dog. After determining the general direction the perpetrators had gone, Hampton and Kyzmo got in the car and went to search the area. A person wearing a black long-sleeved shirt and dark jeans ran across the street in front of Hampton's car and jumped over a fence. Hampton parked his car and went up to the fence, where he found a loaded .22-caliber revolver in the driveway behind a gate. Hampton secured the gun in his vehicle.

Hampton announced over his vehicle's public address system that the sheriff's department was looking for an armed felony suspect in an armed robbery and the neighbors should stay inside or risk being bitten by a police dog. He and Kyzmo then began to search.

Kyzmo alerted to a human scent in the backyard of the home where Hampton had seen the person jump over the fence. They went into the yard and Kyzmo found a black peacoat which he began shaking. Defendant's identification was found in the coat. Hampton and Kyzmo continued to search and shortly

thereafter, defendant yelled from across the street "Okay. Okay. I give up. I am the one you are looking for. Don't kill me."

Officers brought Pham to the location to determine if she could identify defendant. She immediately identified defendant as the person who pointed the gun at her. Because it was so soon after the robbery, she was 95 percent certain defendant was the robber. Pham was taken to a second subject, wearing a white paisley sweatshirt. She thought the clothing looked familiar, but was unable to positively identify him.

Defendant had $340.16 in cash in his pocket. His cell phone was recovered nearby by a civilian. On the sidewalk near where defendant was arrested, officers found some envelopes and prescription medication bottles with Pham's name on them. A gunshot residue test performed on defendant's hands was negative.

Dr. Mitchell Eisen testified as an expert witness on the impact of stress and trauma on memory and suggestibility. He discussed the difficulty that stress and trauma can create for people in recalling the details of an event, weapon focus, cross-racial identification issues, the impact of length of exposure to a stimulus on memory, and an increase in false identifications when there is only one person in a lineup.

Defendant was charged with second degree robbery and discharging a firearm in a grossly negligent manner. As to the robbery charge, it was also alleged defendant personally used a firearm and intentionally and personally discharged a firearm.

Following a jury trial, defendant was found guilty of robbery with a true finding on the personal use firearm enhancement. The intentional discharge of a firearm enhancement was found not true and he was found not guilty of negligently discharging the firearm.

Following the jury verdict and the sealing of the juror identifying information, defendant filed a "PETITION AFTER TRIAL FOR ACCESS TO PERSONAL JUROR IDENTIFYING INFORMATION OF TRIAL JURORS." The petition sought the information for purposes of investigating potential juror misconduct. One of the alleged instances of misconduct was a statement by a juror during deliberations regarding defendant's failure to testify in his defense.[1] Attached to the petition were statements from five jurors given to the defense investigator and a declaration by counsel.

Of the five jurors interviewed, two said defendant's failure to testify had been mentioned during deliberations, but not deliberated over or discussed. Juror No. 2 indicated "[t]he question was posed during our deliberations as to why [defendant] did not testify. However, we did not discuss this fact. It was merely posed. I know that I myself wondered why he did not testify, and I'm would [*sic*] think that others did too. However, we did not deliberate this fact." Juror No. 7 stated, "I would have liked [defendant] to have testified in

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[1] The other claims of misconduct are not raised on this appeal.

this trial, but I didn't hold that against him. Our instructions were to use only the facts presented in the trial. During the deliberation someone mentioned that [defendant] didn't testify, but we didn't discuss it further than that." The other three jurors indicated there was no discussion about defendant not testifying.

The court denied the motion to release the juror identifying information finding there was no good cause for the release. In making this ruling, the court stated, "Whether or not someone said, *I wonder why he didn't testify*, or just made that observation, some of the jurors [whom] the defense contacted indicated that that occurred. Others did not recall hearing anything like that. But it seems to me that the consistency among all of these jurors [who] have been contacted, including the ones [who] did hear that statement, was there was not any discussion about the fact that he did not testify, other than a query. And that it did not -- they did not deliberate on that fact or allow it to affect their decision in any way. [¶] And I do not believe that the idle reference to the fact that [defendant] did not testify without more amounts to misconduct. And I would not release the juror identifying information on that basis." After addressing the other two claimed areas of misconduct, the court went on to state, "I do not find that there has been a [prima facie] showing of good cause. [¶] Even if there is good cause, the Court would have to analyze whether or not there has been misconduct to the extent that would affect or -- [defendant's] right to a fair trial or the verdict in this

case, and I don't find that it would. [¶] In light of the fact . . . the circumstantial evidence of the identity of [defendant], including the fact that Whitney Pham identified [defendant] as the person, suspect with the gun on the evening of the event in a field showup shortly after the robbery had occurred, I think circumstantially this case -- the verdicts in this case are supported by the circumstantial evidence regardless of the fact that . . . there was a passing reference to the fact that the defendant did not testify. [¶] So based on all of these, I do not find that there is a prima facie showing, and also do not show there has been any prejudice to [defendant], and I would deny the defense request or petition to access of juror identifying information."

Defendant moved for a new trial based on juror misconduct, receiving materials outside of the evidence presented in the matter, and newly discovered evidence. The motion incorporated by reference the allegations of juror misconduct set out in the petition for release of the juror identifying information. In denying the motion for new trial on the claim of juror misconduct, the court incorporated its previous analysis and findings on the petition to release the juror identifying information. The court went on to state, "I don't believe there has been juror misconduct in this case. And if there is any misconduct, I don't believe it has -- was reasonably likely to have affected the outcome."

Defendant was sentenced to an aggregate term of 12 years, consisting of the low term of 2 years, plus a consecutive 10

years for the personal gun use enhancement. Defendant was awarded 502 actual days of custody credit and 75 good time days of credit under Penal Code section 2933.1, for a total of 577 days of credit. Various fines and fees were imposed.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his motion to disclose identifying juror information.

He argues he was required to show only a "'reasonable belief that jury misconduct occurred'" to establish good cause, and that he met this burden by providing "evidence that jurors disregarded a direct court instruction."

A criminal defendant may petition the court for access to personal juror identifying information when the sealed information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g); see § 237, subd. (a)(2).) The petition must be supported by an affidavit that establishes good cause for the information's release. (*Id.*, § 237, subd. (b).) If a prima facie case of good cause is established, the court must set the matter for hearing, and if not, it must state its reasons and make express findings regarding either the lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure. (*Ibid.*) We review the trial court's decision regarding the hearing and the release of juror information for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 604.)

To establish good cause, the defendant must make a preliminary showing of facts sufficient "'to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.'"[2] (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093-1094, quoting *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; see also Code Civ. Proc., § 206, subd. (g) [criminal defendant may obtain juror information if he demonstrates the information is necessary for a new trial motion or for "any other lawful purpose"].)

To set forth "a sufficient showing to support a reasonable belief that jury misconduct occurred" (*People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552) the misconduct alleged must be "'of such a character as is likely to have influenced the verdict improperly'" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322). Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852; *Rhodes*, at pp. 553-554.) Even where good cause exists, juror identifying information may not be had if the record establishes a compelling interest against disclosure to protect the jurors from threats. (Code Civ. Proc., § 237, subd. (b).)

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[2] Counsel testified at the hearing as to the diligent efforts made to contact the jurors.

Generally, violating the trial court's instruction not to discuss defendant's failure to testify is jury misconduct. (*People v. Loker* (2008) 44 Cal.4th 691, 749; *People v. Leonard* (2007) 40 Cal.4th 1370, 1425.) "'This misconduct gives rise to a presumption of prejudice, which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." [Citations.]'" (*Loker*, at p. 749, quoting *Leonard*, at p. at p. 1425.) Here, the jury was instructed with CALCRIM No. 355, which provides: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

We are not convinced that a solitary passing comment about defendant's failure to testify constitutes a violation of the court's instruction not to discuss this issue. To discuss is to "investigate by reasoning or argument" or "to present in detail for examination or consideration." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 358.) It implies a "sifting of possibilities esp. by presenting considerations pro and con." (*Ibid.*) A solitary comment standing alone hardly meets this definition. Even the jurors who indicated the failure to testify was mentioned noted this distinction between a comment

and a discussion and took pains to indicate the issue was not discussed, only mentioned.

Nonetheless, even if the mere mention of the fact that defendant did not testify constituted jury misconduct, a reasonable belief of misconduct alone is not sufficient to establish a prima facie showing of good cause to release juror identifying information. Contrary to defendant's argument, a court may deny a request for the disclosure of juror identifying information when prejudice cannot be established. (*People v. Box* (2000) 23 Cal.4th 1153, 1222-1223.)

Thus, to establish good cause for the release of juror identifying information, the defendant must establish misconduct and must show that the alleged misconduct was likely to have improperly influenced the jury or that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial. That showing was not made here.

Only two of the five jurors interviewed recalled any comment being made about defendant's failure to testify. The others either did not recall any such comment or expressly denied any such comment. This indicates to the extent there was a mention of defendant's failure to testify, there was no discussion of any length or significance on that point. (*People v. Avila* (2009) 46 Cal.4th 680, 727.) There is nothing in the jurors' statements which suggests "'any open discussion or agreement among the jurors evidencing a deliberate refusal to follow the court's instructions.' [Citation.]" (*People v. Hord* (1993) 15 Cal.App.4th 711, 726.) "'Transitory comments of

wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.' [Citation.]" (*Avila*, at p. 727.)

Nor is there anything in the jurors' statements which suggests further investigation of the comment was necessary to provide the court with adequate information to rule on a motion for new trial. The statements of the two jurors who heard a comment about defendant's failure to testify were entirely consistent with each other that the comment was a passing comment, with no further discussion of the matter.

"'[T]he purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself.' [Citation.]" (*People v. Loker*, *supra*, 44 Cal.4th at p. 749.) Both jurors expressly indicated no adverse inference was drawn from the failure and that it did not enter into jury deliberations in any way. "It is natural for jurors to wonder about a defendant's absence from the witness stand." (*Ibid.*) Merely wondering aloud about defendant's failure to testify "is not the same as punishing the [d]efendant for not testifying. It is not the same as drawing negative inferences from the absence of testimony." (*People v. Leonard, supra,* 40 Cal.4th at p. 1425.) "Under these circumstances, the purpose of the rule against commenting on defendant's failure to testify was served, and the presumption of prejudice is rebutted." (*Loker*, at

p. 749.) The court acted within its discretion in denying the request for juror identifying information.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.