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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SALEH SHEIKH KHAZALY,

Defendant and Appellant.

B281797

(Los Angeles County
Super. Ct. No. GA096041)

APPEAL from a postconviction order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Dismissed.

Lori Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Saleh Sheikh Khazaly (defendant) of stalking (Pen. Code, § 646.9 subd. (b)) and disobeying a domestic violence protective order (Pen. Code, § 273.6, subd. (d)). We affirmed defendant’s conviction in an unpublished opinion.¹ (*People v. Khazaly* (June 13, 2017, B275346) [nonpub. opn.] (*Khazaly I.*))

While *Khazaly I* was pending, counsel appointed to represent defendant on appeal petitioned the trial court to unseal identifying information for one trial juror. The trial court denied the petition for lack of good cause. Defendant (now represented by different appointed counsel) again appeals, this time contending the trial court abused its discretion in denying the petition. The trial court’s order is not appealable, however, and we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. Voir Dire and Juror Interaction

The targeted juror is identified in the record as “Prospective Juror No. 13” and, once seated, “Juror No. 3.” The voir dire directed to, and concerning, him is as follows:

In response to the trial court’s inquiry as to whether any prospective jurors had a hardship that would prevent their serving as a juror, Prospective Juror No. 13 responded, “First of all, my English is not too good. . . . [¶] And second, I have a sickness problem. I have diabetes; high cholesterol. And sometimes I don’t feel too good.” Prospective Juror No. 13 added he had participated in jury selection in other cases, but was never

¹ We granted defendant’s request to judicially notice our file in *Khazaly I.*

selected to serve. In response to the trial court's asking if he had been excused because of the "English situation." Prospective Juror No. 13 answered, "I believe so, yeah."

Prospective Juror No. 13 remarked that he understood more English than he was able to read. He worked as a chef and sometimes spoke English at work. Apparently reading from written questions in front of the jury panel, Prospective Juror No. 13 told the trial court his son was in the Marines for 11 years, a nephew was "L.A.P.D.," and another nephew was in the Army. He previously testified as a witness in a trial concerning a cousin who was a homicide victim and believed he and his cousin were treated fairly.

Prospective Juror No. 13 also shared that after his divorce, his former wife obtained a restraining order against him; but again, he was treated fairly. He stated he could be a fair juror in this case.

Later, in response to defense counsel's expressed concern about Prospective Juror No. 13's health, the trial judge stated the juror did not seem ill. The trial judge also stated she was "not going to excuse [the prospective juror] for cause at this point," noting the juror's ability to speak and read English was "really adequate" and he "went into it in enough detail." The trial court said, "So if that's a challenge for cause,^[2] I will deny it at this time. But I will not ignore that situation."

At that point, defense counsel had not exercised any peremptory challenges. He went on to exercise 10 before the jury was impaneled.

² The record does not disclose an actual challenge for cause regarding Prospective Juror No. 13 by either counsel.

The next day, after the jury was sworn, the following exchange occurred between the trial court and the subject juror, now designated as Juror No. 3:

Juror No. 3: Like I said yesterday, all the questions try to understand what the situation. But the first I don't understand why [defendant] is here. What mean he's here. Like I understand only like something like emails or something like that.

The Court: All right. Well, we went through this yesterday. And unfortunately . . . we have already selected you as a juror. And so unless there is something new that you need to bring to my attention, I'm going to have to ask you to remain. . . .

Juror No. 3: I understand like 40 percent, not a lot.

The Court: Okay.

Juror No. 3: Okay. That's fine.

B. Petition to Unseal Juror Identifying Information

The petition to unseal the juror's identifying information was filed six months after appellate counsel was appointed to represent defendant in *Khazaly I* and two weeks after he filed the opening brief. *Khazaly I* counsel supported the motion with his own declaration. He averred he discussed with defendant's

father and trial counsel³ their “concern[] and shock[] that a possibly unqualified juror would have been seated on the jury” and added that trial counsel had previously been disciplined by the State Bar. *Khazaly I* counsel planned to bring the issues identified in the motion “before the Court of Appeal if the investigation shows them to be viable points that could reasonably provide relief to my client.”⁴ In the supporting memorandum of points and authorities, he asserted, “As defense counsel failed to use one of his peremptory challenges to remove an obvious and known unqualified juror, appellate counsel would raise this issue through a Petition for a Writ of Habeas Corpus on the basis of ineffective assistance of counsel.” The petition attached excerpts of the jury voir dire, but no declaration from trial counsel.

³ Defendant’s trial counsel was retained.

⁴ Almost immediately after his appointment, *Khazaly I* counsel asked to augment the record to include the reporter’s transcripts of voir dire: “It has come to undersigned counsel attention that one of the seated jurors told the court and the parties that he did not comprehend the English language sufficiently. Therefore, appellant requests the jury selection transcripts in order to assess whether a prospective juror was seated in the jury panel in spite of informing the court that his English language ability was severely limited.” We granted the request, and the augmented transcripts were lodged with this court on November 2, 2016. Defendant’s opening brief in *Khazaly I* was filed March 2, 2017.

Defendant raised no juror or ineffective assistance of counsel issues in *Khazaly I*.

The trial judge denied the petition without a hearing. (Code Civ. Proc., § 237.)⁵ The minute order provided in part, “The court denies this request. The defendant has failed to make a sufficient showing of good cause for the requested information. There is no showing that the juror’s expressed difficulty speaking English prevented him from fully participating in the deliberations. [¶] The concern of the family members that a possibly unqualified juror was seated in insufficient to justify disclosure of confidential identifying information.”

Defendant filed a timely notice of appeal. After briefing was complete, we invited counsel to submit letter briefs addressing whether the order (1) was appealable, (2) affected defendant’s substantial rights, and (3) involved collateral habeas proceedings. Both sides responded. For the reasons that follow, we conclude the order is not appealable.

DISCUSSION

A criminal defendant “may . . . petition the court for access to personal juror identifying information within the court’s records 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)) The petition may be denied without a hearing so long as the court issues a minute order that “set[s] forth the reasons and make[s] express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.” (Code

⁵ “If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause” (Code Civ. Proc., § 237, subd. (b).)

Civ. Proc., § 237, subd. (b).) “Absent a showing of good cause for the release of the information, the public interest in the integrity of the jury system and the juror’s right to privacy outweighs the defendant’s interest in disclosure.” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1430.)

A petition for identifying juror information in conjunction with a motion for a new trial is timely, and its denial is reviewable on appeal from the judgment. (See, e.g., *People v. Jones* (1998) 17 Cal.4th 279, 317.) An oral request for identifying juror information made at the hearing on a motion for new trial based on juror misconduct is untimely, but its denial is nonetheless reviewable on appeal from the judgment. (*People v. Duran* (1996) 50 Cal.App.4th 103, 122-123 (*Duran*).)

Counsel has not cited, however—nor have we found—any authority that postjudgment orders such as this one are independently appealable. To the contrary, *People v. Diaz* (2015) 235 Cal.App.4th 1239 (*Diaz*) unequivocally holds they are not: “[T]here is no authority that the postjudgment order denying a petition for the release of confidential juror identifying information is appealable.” (*Id.* at p. 1244.) We agree.

Six years after his conviction, the defendant in *Diaz* petitioned the trial court for release of juror identifying information in order “to investigate juror bias and misconduct as a possible basis for habeas corpus relief.” (*Diaz, supra*, 235 Cal.App.4th at p. 1242.) The trial court questioned the timeliness of the petition, characterized it as a “fishing expedition,” and denied it on the merits. (*Ibid.*)

As in this case, the defendant appealed from the order denying the petition to unseal juror identifying information. The *Diaz* court dismissed the appeal on the basis “the right of appeal

is statutory and . . . an order is not appealable unless expressly made so by statute. [Citation.] Here the appeal is purportedly founded on [Penal Code] section 1237”⁶ (*Diaz, supra*, 235 Cal.App.4th at p. 1244.) *Diaz* then quoted from the Supreme Court’s decision in *People v. Totari* (2002) 28 Cal.4th 876, 882: “Although section 1237, subdivision (b), literally permits an appeal from any postjudgment order that affects the “substantial rights” of the defendant, the right to appeal is limited by the qualification that . . . “an order ordinarily is not appealable when the appeal would merely bypass or duplicate [an] appeal from the judgment itself.” [Citation.]” (*Diaz, supra*, 235 Cal.App.4th at p. 1245.) Finally, the *Diaz* court observed, “If the rule were otherwise, a convicted defendant could bring serial appeals based on the bald assertion that former counsel did not thoroughly explore a juror misconduct issue at trial or in the first appeal.” (*Ibid.*)

In response to our request for supplemental briefing, defendant concludes the denial of his petition deprived him of a substantial right and is, accordingly, appealable. He supports the assertion thusly: “[Defendant] interprets the language from *Diaz* . . . as stating not that such an order does not affect the defendant’s substantial rights, but rather that *if* the petition was brought in an untimely manner, *and* the superior court elects to make a ruling, then the order is not an appealable order affecting [defendant’s] substantial rights within the meaning of Penal Code section 1237, subdivision (b).” This appears to be a strained reading of *Diaz*, where the Court of Appeal held a petition for

⁶ Penal Code section 1237, subdivision (b) provides a criminal defendant may appeal “[f]rom any order made after judgment, affecting the substantial rights of the party.”

identifying juror information is untimely if filed after entry of judgment. Defendant indisputably filed his petition postjudgment. (*Diaz, supra*, 235 Cal.App.4th at p. 1243; *Duran, supra*, 50 Cal.App.4th at pp. 122-123.)

Duran is particularly instructive on this point. As mentioned, *Duran* sought a new trial in part based on the misconduct of one juror who allegedly withheld relevant personal information during voir dire. The defendant's investigators had contacted the juror herself, but not anyone else on the panel. At the hearing on the motion for new trial, defense counsel orally requested identifying information for the rest of the jurors to determine if the juror shared this information during deliberations. The Court of Appeal agreed with the trial court that the oral request was both untimely and demonstrated a lack of due diligence: "[C]learly, if the defendant or the defendant's counsel is precluded from using the information for that expressed purpose [to support his motion for new trial] due to time constraints, his or her request cannot be said to have been made for a lawful purpose." (*Duran, supra*, 50 Cal.App.4th at p. 122.) And, "[s]ince he offered no explanation as to why it took so long . . . he failed to show due diligence was exercised" (*Id.* at p. 123.) So it is here.

During voir dire, Juror No. 3 identified his health and lack of English proficiency as reasons he should not serve. He further advised the court and counsel that he spoke English at work, previously testified as a witness in a criminal trial, and could be a fair juror in this case. A court previously issued a restraining order against him at the behest of his former spouse. Defendant and his trial counsel were aware of the potential juror issue before the jury panel was even sworn. *Khazaly I* counsel was

aware of, and acted on, it shortly after his appointment. He obtained the reporter's transcripts of the trial voir dire in early November 2016. The opening brief was filed five months later, in March 2017, followed by the petition. Defendant did not raise the juror issue on appeal. The lack of diligence remains unexplained. This appeal was taken from a nonappealable order.

DISPOSITION

The appeal is dismissed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.