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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE GERMAN MENJIVAR, Defendant and Appellant.	B271774 (Los Angeles County Super. Ct. No. VA139096)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Affirmed.

Linda L. Gordon, 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, and Stephanie Brenan and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Jose German Menjivar appeals from his judgment of conviction of two counts of second degree robbery (Pen. Code,[1] § 212.5, subd. (c)). On appeal, Menjivar challenges the sufficiency of the evidence supporting each robbery conviction. He also contends that the trial court erred in denying his motions for a new trial based on juror misconduct and to disclose personal juror identification information. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In a June 10, 2015 information, the Los Angeles County District Attorney charged Menjivar with the second degree robbery of Oscar Alvarez (count 1), and the second degree robbery of Sohel Khan (count 2). After Menjivar pleaded not guilty to the charges, the case was tried in December 2015.

II. The Evidence At Trial

A. The Prosecution Case

On May 8, 2015, Oscar Alvarez was working as a cashier at a 7-Eleven store in Los Angeles when Menjivar entered the store. When Alvarez first saw him in the store that day, Menjivar was holding an open can of beer in his hand, but did not appear to be drunk. Alvarez told Menjivar to leave because he had caused a disturbance in the store the week before. In response, Menjivar started to act "kind of crazy," becoming verbally aggressive and

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

threatening to beat up Alvarez. When Alvarez refused to sell anything to Menjivar, he slammed the beer can on the counter and left.

Sohel Khan, the manager of the 7-Eleven store, was in the back office when Menjivar first entered the store that day. Khan came out of the office when he heard loud screaming, and saw Menjivar drinking a 24-ounce can of beer near the cash register. Kahn told Menjivar that he was not allowed to drink beer inside the store. Menjivar continued drinking while he screamed and cursed at Alvarez and another store employee. Khan believed that Menjivar was drunk at that time. According to Khan, Menjivar eventually threw the empty can of beer behind the cash register and then left the store.

About 30 minutes to an hour later, Menjivar again entered the store and walked to the back near the cooler section. Alvarez alerted Khan, who went to confront Menjivar. Khan saw Menjivar grab a bottle of milk and some pastries and start to consume them inside the store. Menjivar smelled of alcohol and appeared to be drunk. When Khan told Menjivar that he could not eat the merchandise without paying for it, Menjivar began arguing with him. Menjivar then pushed Khan into a wall with his forearm. Khan, who had difficulty walking that day due to a medical issue, slowly made his way to the back office to call the police. Meanwhile, Menjivar grabbed another pastry and bottle of milk and started to walk out of the store. Alvarez, who was at the cash register, saw Menjivar leaving the store and demanded payment for the merchandise. Menjivar walked past Alvarez with the items in his hand and left without paying for them.

As soon as Menjivar left the store, Alvarez went outside through an emergency exit door to confront Menjivar and demand

payment. In a parking lot outside the store, Alvarez told Menjivar that he had to pay for the items he had taken. In response, Menjivar said, "No, I'm not paying for this, mother fucker." According to Alvarez, he put his hands out in front of him to stop Menjivar, but did not touch him. Menjivar then threw the bottle of milk at Alvarez's face and began hitting him. Menjivar poked Alvarez once in the eye and punched him repeatedly with a closed fist. After Menjivar punched him four to five times, Alvarez began punching Menjivar back. The other items that Menjivar had been holding fell to the ground when the fighting started. At some point, Menjivar grabbed Alvarez by his hair and pulled him to the ground. Two bystanders tried to get Menjivar to let go of Alvarez, but could not do so. The altercation ended when another store employee was able to pry Menjivar's hands away from Alvarez's hair, which allowed Alvarez to get up and escape into the store.

Khan was standing outside the store during the altercation between Menjivar and Alvarez. According to Khan, at some point during the altercation, Khan called for the other store clerk to intervene and stop the fight. In response, Menjivar hit the side of Khan's face with an open hand.

Douglas Kramer, a regular customer at the store, also witnessed the altercation between Menjivar and Alvarez in the parking lot. According to Kramer, he was walking toward the store to buy coffee when he saw the doors "fly open." Menjivar exited the store with some items in his hand, which Alvarez tried to retrieve from him. In response, Menjivar threw the items to the ground and immediately began swinging at Alvarez. At first, Alvarez backed away, but Menjivar continued swinging and struck Alvarez repeatedly in the head and face. Alvarez then

began swinging back and hit Menjivar several times, knocking him to the ground. Menjivar "just got up and kept coming at him." The altercation lasted about 10 minutes and ended when Alvarez, appearing exhausted, stumbled back into the store. Another store clerk and some of the customers held the doors shut to prevent Menjivar from getting in. Menjivar then fled the scene on foot, leaving behind the items he had taken.

B. Defense Case

Menjivar testified on his own behalf. According to his testimony, when Menjivar first went to the 7-Eleven store on May 8, 2015, he had already consumed a half pint of cognac, but was not feeling the effects of the alcohol. Once inside the store, Menjivar grabbed a 24-ounce can of beer and waited in line to pay. He became impatient when another customer cut in front of him, so he opened the can of beer and took a small sip. The clerk at the cash register called over Alvarez, who was very aggressive. Alvarez grabbed the beer out of Menjivar's hand and threw it in the trash. Khan came over and told Alvarez to leave Menjivar alone, but Alvarez cursed at Menjivar and then went outside to fight him. Once outside the store, Alvarez struck Menjivar in the face three times and knocked him down.

Menjivar left the store, but returned a short time later after drinking another 24-ounce can of beer. Menjivar grabbed milk, a chocolate milk shake, and some bread, and began consuming these items while inside the store because he was hungry. He then placed a $10 bill on the counter to pay for the items, but Alvarez became angry and began cursing at him. Menjivar left the store without the merchandise and saw Alvarez waiting outside. Menjivar tried to walk past Alvarez, but Alvarez

immediately attacked him. Alvarez repeatedly hit Menjivar in the face and head and threw him to the ground. The fight ended when someone separated the men and Menjivar walked away. Later that day, Menjivar was arrested by the police and taken to the hospital where he was treated for his injuries. Menjivar denied that he ever struck or pushed Khan, or that he had any contact with Khan the second time he was in the store.

III. Verdict and Sentencing

At the conclusion of the trial, the jury found Menjivar guilty as charged of the second degree robbery of Alvarez and the second degree robbery of Khan. Following the denial of Menjivar's motions for a new trial, the trial court sentenced him to a total term of three years in state prison.

DISCUSSION

I. Sufficiency of Evidence on the Robbery Convictions

On appeal, Menjivar challenges the sufficiency of evidence supporting each of his convictions for second degree robbery. Menjivar contends that the evidence was insufficient to support a finding that, while inside the store, he had a specific intent to take the items from Khan by means of force or used the amount of force required for robbery. Menjivar also claims that the evidence was insufficient to support a finding that, during the altercation outside the store, he acted with a specific intent to use force against Alvarez or Khan to retain the items he had taken.

A. Relevant Law

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The California Supreme Court has described the crime of robbery as "larceny with the aggravating circumstances that 'the property is taken from the person or presence of another …' and 'is accomplished by the use of force or by putting the victim in fear of injury.' [Citation.]" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) "If the other elements are satisfied, the crime of robbery is complete without regard to the value of the property taken. [Citations.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.)

"In California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking [and does not end] until the robber reaches a place of relative safety.' [Citation.]" (*People v. Anderson*, *supra*, 51 Cal.4th at p. 994.) "A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to retain it or carry it away in the victim's presence. [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 686; see also *People v. Gomez* (2008) 43 Cal.4th 249, 256 ["'if one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence, . . . the crime of robbery has been committed'"].) In contrast, "[i]f a defendant does not harbor the intent to take another's property at the time the force or fear is applied, the taking is a theft, not a robbery." (*People v. Harris* (2013) 57 Cal.4th 804, 851.)

In assessing a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Substantial Evidence Supported the Conviction for the Robbery of Alvarez (Count 1)

Menjivar was convicted in count 1 of the second degree robbery of Alvarez. He argues on appeal that the evidence was insufficient to support this conviction because the record showed that he had relinquished the items he had taken from the store

prior to his physical altercation with Alvarez; he claims this demonstrates he did not have a specific intent to retain the goods at the time he used force against Alvarez in the parking lot. Menjivar also asserts that the evidence established that, given their history of hostile exchanges, the altercation with Alvarez occurred for a reason unrelated to an intent to steal. We conclude that the conviction in count 1 was supported by substantial evidence.

As our Supreme Court has observed, "'[a] robbery is not completed at the moment the robber obtains possession of the stolen property. The crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. . . . [A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property.'" (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 686-687, quoting *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28 (*Estes*); see also *People v. Gomez*, *supra*, 43 Cal.4th at p. 258 ["[i]f the aggravating factors are in play at any time during the period from caption through asportation, the defendant has engaged in conduct that elevates the crime from simple larceny to robbery"]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8 ["theft becomes robbery if the perpetrator, having gained possession of the property without use of force or fear, resorts to force or fear while carrying away the loot"].)

In *Estes*, a security guard at a store saw the defendant remove clothing from a rack, put it on, and leave the store without paying. The guard followed the defendant outside to the

parking lot. About five feet from the door, the guard identified himself and confronted the defendant about the items he had taken. The defendant refused to return to the store and began walking away. When the guard tried to detain him, the defendant pulled out a knife, swung it at the guard, and threatened to kill him. (*Estes*, *supra*, 147 Cal.App.3d at p. 26.) In affirming the defendant's conviction for robbery, the appellate court rejected his argument that robbery requires that the use of force be contemporaneous with the taking of the property. The court reasoned: "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety. It is sufficient to support the conviction that [the defendant] used force to prevent the guard from retaking the property and to facilitate his escape. . . . The events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether [the] defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Id.* at p. 28.)

In this case, the evidence was sufficient to support a finding that Menjivar used force against Alvarez in the parking lot to prevent Alvarez from retaking the items he had stolen and to facilitate his escape. At trial, Alvarez testified that, as soon as Menjivar walked out of the store with the stolen merchandise, Alvarez went outside to confront him and to demand payment. When Alvarez tried to detain Menjivar in the parking lot of the store, Menjivar threw the bottle of milk he had taken at Alvarez and then immediately began hitting him. Alvarez further

testified that the other items Menjivar had taken "fell from his hands . . . when [they] started fighting." Kramer, the store customer, testified that, when Alvarez tried to detain Menjivar in the parking lot, Menjivar "took the goods, what was left in his hand, . . . threw them down and immediately began swinging at [Alvarez]." Kramer also testified that, as Menjivar was striking Alvarez, "at least some of [the goods] were on the ground at some point," and "very shortly thereafter, all of it was on the ground." Contrary to Menjivar's claim on appeal, the evidence at trial did not establish that he relinquished or abandoned the goods prior to the physical altercation with Alvarez. Rather, the jury reasonably could infer that Menjivar threw the bottle of milk at Alvarez to resist the clerk's attempt to detain him, and then either dropped or threw the other items to the ground so that his hands would be free to hit Alvarez as part of his effort to escape.

Under these circumstances, Menjivar's reliance on *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*) is misplaced. In *Hodges*, the evidence at trial showed that the defendant entered a grocery store, placed several items in a bag, and left without paying for them. When a security guard followed the defendant to his car and asked him to return to the store, the defendant offered to give back the goods. When the guard refused the offer and tried to detain him, the defendant threw the goods at another guard, got back into his car, and began to drive away. As he was driving away, the defendant hit one of the guards with his car. (*Id*. at pp. 535-536.) During its deliberations, the jury asked the trial court whether the defendant could be found guilty of robbery if "'the force/fear was subsequent to the act, in the parking lot, after the defendant had surrendered the goods (throwing them at [the guard]).'" (*Id*. at p. 538.) In response, the trial court told

the jury that "'the theft is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted by the security guards,'" and that the element of force or fear required for robbery "'applies to the confrontation in the parking lot.'" (*Ibid.*) In reversing the defendant's conviction for robbery, the appellate court concluded that this response "failed to address the crux of the jury's inquiry" about "the timing of defendant's surrender of the property," and was "misleading because it allowed the jury to conclude defendant was guilty of robbery without regard to whether defendant intended to permanently deprive the owner of the property at the time the force or resistance occurred." (*Id.* at p. 543.)

Here, Menjivar contends that the evidence was insufficient to support a finding that, at the time he used force against Alvarez, he did so with the intent to maintain possession of the items he had taken from the store. In reviewing a challenge to the sufficiency of the evidence, however, we must view the evidence in the light most favorable to the jury's verdict and must presume the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.) The jury heard the evidence about the sequence of events in the store and the parking lot, including Menjivar's act of throwing or dropping the goods when confronted by Alvarez outside the store. From this evidence, the jury reasonably could have concluded that Menjivar had not abandoned the items but instead used force against Alvarez "in furtherance of the robbery" to prevent Alvarez "from retaking the property and to facilitate his escape." (*People v. Estes*, *supra*, 147 Cal.App.3d at p. 28; see *People v. Pham* (1993) 15 Cal.App.4th 61, 67 [affirming robbery conviction where "there was sufficient

evidence for the jury to conclude that defendant forcibly asported or carried away the victims' property when he physically resisted their attempts to regain it"].) Menjivar's conviction in count 1 for the robbery of Alvarez was supported by substantial evidence.

C. Substantial Evidence Supported the Conviction for the Robbery of Khan (Count 2)

Menjivar was convicted in count 2 of the second degree robbery of Khan. On appeal, Menjivar contends that there was insufficient evidence to support this conviction because the record showed that he did not have the specific intent to take the goods from Khan by means of force, and did not use the amount of force required for robbery when he made physical contact with Khan inside the store. Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence was sufficient to support Menjivar's conviction in count 2.

At trial, Khan testified that, during Menjivar's second visit to the store, he saw Menjivar take a bottle of milk and a pastry and begin consuming the items without paying for them. When Khan approached Menjivar and told him that he had to pay for the goods before eating them, Menjivar responded by pushing Khan into the wall. As demonstrated by Khan at trial, Menjivar pushed Khan by using his forearm with a closed fist to shove Khan in his chest. After pushing Khan, Menjivar took another bottle of milk and pastry, and then walked out of the store without paying. Khan further testified that, at some point during the physical altercation between Menjivar and Alvarez in the parking lot, Menjivar hit the side of Khan's face with an open hand when Khan called for the other store clerk to help stop the fight.

Menjivar argues that his physical contact with Khan inside the store was "no more than incidental" and does not show an intent to use force because he merely "brushed past Khan with his forearm which touched Khan's chest." It is true that, in the case of a robbery by means of force, "[t]he law does require that the perpetrator exert some quantum of force in excess of that 'necessary to accomplish the mere seizing of the property.'" (*People v. Anderson*, *supra*, 51 Cal.4th at p. 995.) However, "'[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.'" (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1259.) Therefore, in *People v. McKinnon*, *supra*, 52 Cal.4th 610, the Supreme Court rejected the defendant's argument that he did not engage in sufficient force to constitute robbery, concluding that the "defendant's act of shoving [a] teacher out of the way in his effort to escape the cafeteria with the [property] completed a robbery of the teacher." (*Id*. at pp. 687-688; see also *People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2 [defendant committed robbery where he "did not simply brush against the cashier as he grabbed for the money," but "intentionally pushed against her to move her out of the way"]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709 [substantial evidence supported robbery conviction where victim testified that defendant shoved her shoulder and then snatched her purse].)

Contrary to Menjivar's characterization on appeal, the evidence at trial did not establish that he merely brushed past Khan in a drunken state or made incidental contact with Khan's body as he was leaving the store. Rather, Khan testified that Menjivar pushed him into a wall with his forearm when Khan

confronted Menjivar inside the store and warned him that he had to pay for the goods he had taken. Based on such testimony, the jury reasonably could have concluded that Menjivar's act of intentionally pushing Khan inside the store as he was stealing the goods was "'"sufficient to overcome [Khan's] resistance,"'" and thus, to constitute a robbery. (*People v. Burns*, *supra*, 172 Cal.App.4th at p. 1259.) Menjivar's conviction in count 2 for the robbery of Khan was supported by substantial evidence.[2]

II. Motions for a New Trial Based on Juror Misconduct

Menjivar next contends that the trial court committed reversible error when it denied his motions for a new trial based on alleged juror misconduct. The specific misconduct claimed by Menjivar consisted of a juror allegedly failing to follow the law as instructed by the court and rendering a verdict based on improper bias rather than the evidence presented at trial.

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[2] Menjivar also asserts that the force used against Khan outside the store cannot support his conviction for the robbery of Khan because such force occurred after Menjivar had already abandoned or relinquished the goods. For the reasons discussed above, however, the jury reasonably could have concluded that Menjivar had not abandoned or relinquished the goods prior to the physical altercation in the parking lot, and only did so when the fight ended and Menjivar fled the scene on foot. In any event, Menjivar's separate act of intentionally pushing Khan inside the store as he was taking the goods was sufficient, in and of itself, to support his conviction in count 2.

A. Relevant Background

On December 23, 2015, the trial court held a hearing involving Juror No. 1. The court indicated that the juror had contacted the court on December 10, 2014, four days after the jury's verdict was entered. After being sworn in, Juror No. 1 testified that, since the verdict, she had been "questioning [the jury's] final vote and verdict" because she felt that "the severity of the charge was too harsh for the crime." Juror No. 1 also stated that she did not feel "confident or comfortable with . . . [her] vote" because she "felt that [she] was too fixated on the elements."

When defense counsel asked Juror No. 1 if she had followed the law as instructed by the court, she responded: "Yes and no. Yes, I followed the laws as far as how we were instructed, yes." When asked about the "no" part of her answer, Juror No. 1 stated: "That's the part of me that's questioning what the verdict or the vote was, the outcome of it." Defense counsel asked Juror No. 1 if "there was anything anybody else did during the deliberations that [she] felt was inappropriate, or some kind of misconduct that may have influenced [her] decision making." In response, Juror No. 1 stated: "I don't know if it was necessarily misconduct, but I do feel that, yes, there was . . . someone in there that was very swayed one way only that kind of led everybody that way." When asked to elaborate, Juror No. 1 explained that she felt "like there was one person in particular who was very biased and referring to the defendant in a kind of derogatory way." Juror No. 1 also stated that this other juror "somewhat" influenced her "to go with the vote" that she did. Defense counsel then asked Juror No. 1 if she based her guilty vote on "the facts of what [she] saw, or . . . because everybody else was deciding that." She responded, "A little bit of both." When

asked to quantify how much of her vote was based on the facts versus the vote of the other jurors, Juror No. 1 answered, "Half and half, I guess."

The prosecutor asked Juror No. 1 to clarify what she meant by her statement that she was "fixated on the elements." Juror No. 1 responded: "Fixated as in just saying, you know, okay, these things occurred. But I don't necessarily believe that the things on that list . . . occurred. I don't necessarily feel that it was part of the crime; it was . . . because of something else that happened. So it wasn't necessarily directly related to the crime. I felt like one of those elements happened because of something else, and . . . it had nothing to do with the actual crime as far as the intention. It was the result of -- . . ." At that point, the prosecutor interrupted to state that the juror "lost [her] a little bit." The prosecutor then asked Juror No. 1 whether she "followed the law that the judge instructed to [her]." She answered, "Yes." In response to additional questions posed by the prosecutor, Juror No. 1 denied that she had any contact with Menjivar, his family, or his counsel following the verdict, or had any external influences during the jury's deliberations. When the prosecutor asked Juror No. 1 to clarify if she was saying that she "felt like robbery was a harsh offense," she responded, "Yes." She then added that she only felt robbery was a harsh offense "in relation to this case, in particular the crime and the charges."

The trial court then asked Juror No. 1: "Just so I'm clear, you said initially that you looked at the facts and the elements and you followed the law, correct?" Juror No. 1 answered, "Yes." The court also asked the juror: "And then afterwards you kept thinking because it's called a robbery that that's too harsh for the facts in this case; is that correct?" She responded: "I looked at

the elements and the law, but it was even hard to put the two together in this case in particular. I'm saying the things that happened and what constitutes petty theft versus robbery, I think that is what I really questioned, and I questioned in there, too, not just after."

After dismissing Juror No. 1 from the courtroom, the trial court asked defense counsel how he wanted to proceed. Defense counsel stated that he would like to move for a new trial based on juror misconduct because Juror No. 1's testimony showed that her "decision making in regards to her verdict was based on . . . what the rest of the other jurors were deciding," and not "based on the facts and the law." The prosecutor argued that this was "a case of buyer's remorse." The prosecutor noted that, while Juror No. 1 did "not believe that the name robbery should apply to these facts," she "did state early in her responses . . . that she was fixated on the elements, that she followed those elements and convicted the defendant based on the law." The prosecutor also asserted that it was not misconduct for jurors to discuss their view of the facts during the deliberations and to change their vote based on the those discussions prior to reaching a final verdict.

After hearing the argument of counsel, the trial court denied Menjivar's motion for a new trial. The court explained: "I think, based on the fact that [Juror No. 1] deliberated, a verdict was entered. We polled the jurors. She said that was her verdict. And the first thing she said is she started questioning it after she left but that she did follow the law." The court also noted that, with respect to the juror's testimony about "one person swaying everyone, . . . that's what sometimes happens in deliberations."

Menjivar subsequently retained new counsel to represent him in the post-verdict proceedings. On February 29, 2016,

Menjivar's new counsel filed a motion for the disclosure of the jurors' personal identifying information on the ground that such information was necessary to determine whether any prejudicial jury misconduct occurred at trial. At a hearing on the motion, defense counsel acknowledged that Juror No. 1 previously had testified in a posttrial proceeding, but asserted that she would like to investigate whether "other jurors may have had the same issue" that Juror No. 1 had disclosed during her testimony. The prosecutor argued that the motion should be denied because the parties and the court previously had an opportunity to question Juror No. 1, and her testimony revealed that there was no juror misconduct, "but rather just the natural course of deliberations in which she had been convinced to change her mind." The trial court noted that Juror No. 1 had been questioned by the court, the prosecution, and the defense at the prior proceeding, and that the juror's testimony showed that her issue with the verdict was solely "her own personal issue." The court concluded that defense counsel had not made "a sufficient showing to get any of the other juror information," and noted that "there was nothing that [Juror No. 1] mentioned about any contact with any of the jurors, any conversations with the other jurors or anything of that nature."

On April 8, 2016, Menjivar's counsel filed a written motion for a new trial based on the same juror misconduct alleged in the prior motion. At the hearing on the motion, the prosecutor argued that the issue had "already been litigated" and that the trial court had decided the issue when it denied Menjivar's first motion for a new trial. The trial court agreed that it had already ruled on the matter, and on that basis, denied Menjivar's second new trial motion.

B. Relevant Law

"'When a defendant moves for a new trial based on jury misconduct, the trial court undertakes a three-part inquiry. "First, the court must determine whether the evidence presented for its consideration is admissible. . . . [¶] Once the court finds the evidence is admissible, it must then consider whether the facts establish misconduct. . . . [¶] Finally, if misconduct is found to have occurred, the court must determine whether the misconduct was prejudicial."' [Citation.]" (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1483.) "'Misconduct by a juror . . . usually raises a rebuttable "presumption" of prejudice. [Citations.]' [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 302.) "'[T]his presumption of prejudice "'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . .""' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1208.)

"On appeal, the determination whether jury misconduct was prejudicial presents a mixed question of law and fact "'subject to an appellate court's independent determination.'" [Citation.] We accept the trial court's factual findings and credibility determinations if supported by substantial evidence. [Citation.]" (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 192.)

C. The Motions for a New Trial Based on Juror Misconduct Were Properly Denied

Menjivar argues that the trial court erred in denying his motions for a new trial based on juror misconduct. In particular, he asserts that Juror No. 1's testimony at the post-verdict

proceeding showed that she committed misconduct by failing to follow the law as instructed by the trial court, and by allowing her vote to be improperly influenced by the bias of another juror. Based on the totality of the record, however, we conclude that the trial court did not err in denying the new trial motions.

In support of his argument that Juror No. 1 failed to follow the law, Menjivar relies on the juror's statement that she did not believe "beyond a reasonable doubt that the elements of the crime were met." Menjivar also points to the juror's statement that she had an issue with the element of intent, and that she believed that particular element "happened because of something else, and . . . had nothing to do with the actual crime." Menjivar reasons that such testimony showed that Juror No. 1 did not apply the law to the facts of the case as instructed by the court, and did not base her verdict on a finding that each element of the crime was proven beyond a reasonable doubt.

The record reflects that Juror No. 1 was often equivocal in her testimony and that she made a number of vague and conflicting statements about the manner in which she reached her guilty verdict. For instance, when Juror No. 1 was first asked if she followed the law as instructed by the court, she answered, "Yes and no." She then clarified that she "followed the laws as far as how [the jurors] were instructed," but there was a "part of [her] that's questioning . . . the outcome" of the case. Considered as a whole, however, Juror No. 1's testimony was sufficient to support the trial court's finding that she properly followed the law in reaching her verdict, despite her concern about the severity of a robbery charge. Juror No. 1 explained that she was "fixated on the elements" of the crime in finding Menjivar guilty of robbery, but she was not "comfortable" with

the verdict because she "felt the charges were too harsh for what the crime was." When asked by the prosecutor if she "followed the law that the judge instructed [her] on," Juror No. 1 answered, "Yes." Likewise, when asked by the trial court if she "looked at the facts and the elements and . . . followed the law," Juror No. 1 again replied, "Yes." She further explained that she had "looked at the elements and the law," but found it difficult "to put the two together in this case" in deciding whether the conduct "constitute[d] petty theft versus robbery." The record thus demonstrated that, while Juror No. 1 had some remorse about the verdict because she believed the crime of robbery was too harsh an offense "in relation to this case," she nonetheless followed the law and applied the law to the facts in finding Menjivar guilty of that crime.

Menjivar also contends that Juror No. 1 committed misconduct because she did not base her verdict solely on the evidence presented at trial, but rather was influenced by the improper bias of another juror. In support of this claim, Menjivar points to Juror No. 1's statement that "there was one person in particular who was very biased and referring to the defendant in a kind of derogatory way," and that this juror "somewhat" influenced her decision making. Menjivar also relies on Juror No. 1's testimony that there was one juror who "kind of led everybody" toward a guilty verdict, and that her own verdict was based "half" on the evidence and "half" on "the fact that everybody else was voting guilty."

It is well-established that "'[w]here a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance . . . which suggests a *likelihood* that one or more members of the jury were influenced by improper bias.'" (*People*

v. Tafoya, *supra*, 42 Cal.4th at p. 192.) Although Juror No. 1 testified that her vote was "somewhat" influenced by a "very biased" juror, she did not explain how that juror was actually biased, except to state he or she "was very swayed one way only" and referred to the defendant "in a kind of derogatory way" during deliberations. However, there was no indication that the allegedly biased juror prejudged the case, relied on any information from outside sources, or exerted an improper influence on the other jurors when he or she "kind of led" them toward a guilty verdict. As the trial court noted, it is not improper for a juror to try to persuade fellow jurors to accept his or her viewpoint during deliberations, and there may be times when one particularly persuasive juror is able to convince other jurors to change their vote prior to reaching a final verdict. Attempts to persuade disagreeing fellow jurors, even if done vehemently, do not establish improper bias or misconduct. (*People v. Cowan* (2010) 50 Cal.4th 401, 508 ["'jurors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means'"]; *People v. Engelman* (2002) 28 Cal.4th 436, 446 ["jurors, without committing misconduct, may disagree during deliberations and may express themselves vigorously"].)

Menjivar further claims that Juror No. 1 was coerced into her guilty vote by the other juror's derogatory remark about him. However, Menjivar's claim about coercion is based solely on Juror No. 1's conclusion. There is no indication in the record what the juror's remark was, how it was derogatory, and whether it reflected an improper bias by the juror. Moreover, Juror No. 1 never asserted in her testimony that she felt threatened or coerced into voting a certain way by another juror. Although

Juror No. 1 testified that she partially based her vote "on the fact that everybody else was voting guilty," she also repeatedly stated that she considered the facts and followed the law in reaching her verdict. Because there was substantial evidence to support the trial court's determination that no jury misconduct occurred, the court did not err in denying Menjivar's motions for a new trial.

III. Motion for Disclosure of Personal Juror Information

In a related argument, Menjivar asserts that the trial court erred when it denied his motion for the disclosure of each juror's personal identification information for purposes of investigating potential juror misconduct. We conclude, however, that the trial court did not abuse its discretion in denying the motion.

A. Relevant Law

Following a verdict, a 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 shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release" of the requested information. (Code Civ. Proc., § 237, subd. (b).)

To demonstrate good cause, the party seeking disclosure must "'set[] forth a sufficient showing 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.'" (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) "Good cause does not exist where the allegations of juror misconduct are speculative, conclusory, vague, or unsupported. [Citation.]" (*People v. Cook* (2015) 236 Cal.App.4th 341, 346.) We review the trial court's denial of a petition for the disclosure of jurors' personal identification information for an abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Cook*, *supra*, at p. 346; *People v. Carrasco*, *supra*, at p. 991.)

B. The Motion for Disclosure of Personal Juror Information Was Properly Denied

Menjivar argues that the trial court abused its discretion in denying his motion for disclosure of personal juror information because he made a sufficient showing of good cause. Menjivar specifically asserts that Juror No. 1's testimony demonstrated good cause for the disclosure because it showed that another juror harbored an actual bias against Menjivar and improperly coerced other jurors into reaching a guilty verdict.

For the reasons discussed above, however, Juror No. 1's testimony about the allegedly biased juror does not support a reasonable belief that jury misconduct occurred. According to Juror No. 1's testimony, she believed this other unidentified juror was biased because he or she "was very swayed one way only," "kind of led everybody that way," and referred to the "defendant in a kind of derogatory way" during deliberations. Apart from these ambiguous statements, Juror No. 1 did not describe what this juror said or did to persuade the rest of the jury to reach a

guilty verdict, nor did she identify what purportedly derogatory reference this juror made about Menjivar. Juror No. 1's testimony about the alleged bias of another juror was simply too vague and speculative to demonstrate good cause for the disclosure of the jurors' identification information.

Additionally, we disagree with Menjivar's suggestion that the mere fact that this other juror appeared to have a strong opinion about his guilt was sufficient to show that he or she "may have concealed pertinent information during voir dire," or "harbored a preconceived notion to convict [him] despite the evidence." There is no indication in the record that this juror concealed any relevant information in voir dire, or failed to base his or her verdict on the evidence presented at trial. We likewise reject Menjivar's contention that the disclosure of the jurors' identification information was necessary to investigate whether their verdicts were improperly influenced by the allegedly biased juror. Without any basis for concluding there had been misconduct, the trial court did not abuse its discretion in failing to release juror's personal information.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J. BENSINGER, J.*

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