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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD LOUIS MCCARTER, Defendant and Appellant.	B226289 (Los Angeles County Super. Ct. No. TA108017)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ricardo R. Ocampo, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Louis McCarter (McCarter) is allegedly a member of a street gang. He appeals his robbery, burglary and firearm convictions on the ground that the trial court abused its discretion and violated McCarter's right to due process and an impartial jury when it denied defense counsel's challenge for cause to prospective Juror No. 13 (Juror No. 10).[1] According to McCarter, voir dire revealed that Juror No. 10 is biased against gang members. We find no error and affirm.

FACTS

The crimes

On August 19, 2009, McCarter and another man entered Baby Blue Market in Los Angeles County, pointed a gun at the market's owner, and asked for money. McCarter took approximately $400 from a cash register and handed it to the other man. McCarter told the owner to open her purse and wallet. She did and gave him $5. He took her Blackberry telephone, which was on the countertop. Then he told the owner to get on the ground, and when she did, he left the store.

The charges

McCarter was charged with second-degree robbery (Pen. Code, § 211);[2] assault with a firearm (§ 245, subd. (a)(2));[3] second-degree commercial burglary (§ 459); carrying a loaded firearm (former § 12031, subd. (a)(1);[4] and possession of a firearm by a felon (§ 12021, subd. (a)(1)). Multiple enhancements were alleged, including a gang enhancement and two different types of gun enhancements (§§ 186.22, subd. (b)(1), 12022.5, subd. (a), 12022.53, subd. (b)).

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[1] Juror No. 10 started out as prospective Juror No. 13. She eventually moved into seat No. 10 and became a member of the jury. For ease of reference, we give her an appellation consistent with her final seating.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] The second count, assault with a firearm, was eventually dismissed.

[4] Section 12031, subdivision (a)(1) was repealed effective January 1, 2012, and has been readopted as section 25850, subdivision (a). We continue to refer to the former statute.

Jury selection

During voir dire of the jury, the defense counsel stated: "Let's assume that in this case[,] you thought that [McCarter] was a gang member[,] but you weren't sure of whether or not he committed this crime[.] [H]ow do you vote?" Juror No. 10 said she needed the question explained. Defense counsel started explaining that being a gang member is not illegal. Juror No. 10 interrupted, asking, "It is okay?" Defense counsel responded, "Anyone, let's say you can go join a gang if you wanted to and there can be no sanction against you for that[.] [T]hat is not prohibited[.] [A]nyone uncomfortable with that? Anyone like, no, I think that should be illegal[?] If you are a gang member you should be punished for it[?]" Juror No. 10 answered: "Kind of feels like you should be [punished] if you are a gang member. I don't know."

Later, defense counsel asked Juror No. 10 if she could put aside her personal feelings. Juror No. 10 answered: "For me personally[,] I would think that it would be kind of hard[.] I mean if he is associated with a gang, to me it is like all the same. You associate with them, even if you said you are one or not one[.] [T]o me[,] if you are involved with it, it would be kind of hard to put that aside. Does that make sense what I am saying?" As a follow up, defense counsel stated: "It makes perfect sense to me. I guess the reason I paused is oftentimes many jurors sort of speak about what is hard for them, and I think that is probably the best answer that you can give, but we are here[.] [T]his is the trial[,] and so your best guess, can you or can you not [put your feelings aside]?" To this, Juror No. 10 answered, "I don't think so. No. I am just going to say no."

The prosecutor told Juror No. 10 that "gang evidence may be considered in ways regarding intent to commit the crime, knowledge, maybe used in ways regarding the enhancement. You are not going to be asked to completely set it aside[,] but [can] you . . . limit it to what the law allows you to consider versus what the law doesn't allow?" Juror No. 10 did not answer, and the prosecutor continued, saying: "You don't know[,] [o]f course[,] because you haven't heard [the law] yet. Can you do your best to follow the law and when the judge tells you you can consider this type of evidence for this

purpose, you can't do it in another way because that is too prejudicial, [can] you . . . do your best to segregate them?" Juror No. 10 answered, "I will do my best."

Defense counsel challenged Juror No. 10 for cause.

The trial court asked Juror No. 10 to confirm that she had represented to the prosecutor that she would do her best to use gang evidence only in the manner detailed in the jury instruction. She confirmed her representation. Then the trial court stated: "If that changes, if at any point in time . . . , will you promise to tell me immediately[?]" Juror No. 10 responded, "Yes."

The challenge was denied.

Defense counsel eventually used all his peremptory challenges.

Trial and sentencing

The case proceeded to trial. McCarter was found guilty and convicted on all four counts. The jury found the gun enhancements to be true, and all gang enhancements to be not true. McCarter received a total of 17 years 4 months in state prison.

This timely appeal followed.

DISCUSSION

A criminal defendant has a constitutional right to a trial by "unbiased, impartial jurors." (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) A juror may be challenged for actual bias under Code of Civil Procedure section 227, subdivision (d). Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).)

When a trial court denies a defendant's challenge to a juror based on cause, we will not disturb the ruling absent a manifest abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 715.) A trial court abuses its discretion when no substantial evidence exists to find that a juror is impartial. (*Ibid*.) "When, as here, a juror gives conflicting testimony as to her capacity for impartiality, the determination of the trial

court on substantial evidence is binding on the appellate court. [Citations.]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 675 (*Kaurish*).)

McCarter contends that there is no substantial evidence to support the finding that Juror No. 10 could be impartial. We disagree. Decades ago, the United States Supreme Court explained: "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [Citations.]" (*Irvin v. Dowd* (1961) 366 U.S. 717, 723, superseded by statute on other grounds as stated in *Moffat v. Gilmore* (7th Cir. 1997) 113 F.3d 698, 701.) When asked by the prosecutor and the trial court whether she could follow the jury instruction regarding gang evidence even if she disagreed with the law, she said she would try her best. These responses were an indication that she could lay aside her personal feelings.

McCarter argues that Juror No. 10 "made clear that she could not be an impartial juror in light of the gang allegations." He points to statements made by Juror No. 10 indicating that she thought gang membership warranted punishment, that she would have a hard time putting her feelings aside, and that she could not follow the law. He contends that the only contrary statement she made was that she would do her best, and that statement was too equivocal to qualify as substantial evidence. But, as we have indicated, the trial court was vested with the power to determine Juror No. 10's "actual state of mind." (*People v. Farley* (2009) 46 Cal.4th 1053, 1089 (*Farley*).) In making that determination, the trial court observed Juror No. 10's demeanor and was in the best position to judge not only her veracity but also her capacity to be impartial. We decline to second guess the trial court.

A couple of cases argued by McCarter do not change our analysis.

In *People v. Bittaker* (1989) 48 Cal.3d 1046 (*Bittaker*), a prospective juror "had heard something about the case on television and in the newspaper. She recalled that the case involved people being picked up and raped in a van, and also that pictures were

taken of the people who were killed. [She] told the judge that she had worked at a rape crisis center, and did not believe she would be impartial in a case involving charges of rape. Her voir dire presents no unqualified statement that she actually felt that she could be fair and impartial in the penalty phase of this case." (*Id*. at p. 1089, fn. omitted.) The defense asked if she would be unable to fairly and impartially judge a rape case. She unequivocally said yes. "The prosecutor, attempting to rehabilitate her, could obtain only a statement that she would act impartially at the guilt phase. The judge asked if she would be willing to listen to the evidence and be a fair and impartial juror; she said that 'I could try, but I believe it would be difficult. . . . [One] of the questions I do remember was about listening to gruesome testimony. And I think I would have a tendency to have a saturation point perhaps below what other people—an anger point, perhaps, or something to that effect. So that I wouldn't be listening wholly to the evidence.'" (*Id*. at p. 1090.) Based on the record, *Bittaker* concluded "that the trial court erred in denying [a] challenge for cause." (*Ibid*.)

A second prospective juror in *Bittaker* formed an opinion of the case based on reading a newspaper account. He said he would try to be impartial, but he doubted that he could and said he would have a very difficult time. The trial court denied the defendant's challenge for cause. The *Bittaker* court found error. It held that the challenge for cause should have been sustained because a statute (now repealed section 1076) provided "that if a juror has an opinion based upon public journals, he is qualified only if he *affirmatively declares that he can and will action impartially*." (*Bittaker*, *supra*, 48 Cal.3d at p. 1090.)

Bittaker is inapposite because Juror No. 10 never stated that she might not be able to not listen to the evidence. Moreover, section 1076 was repealed in 1988 and cannot be applied. Even if it was not repealed, Juror No. 10 did not form an opinion about the case based on a public journal.

No aid flows from *People v. Vitelle* (1923) 61 Cal.App. 695 (*Vitelle*), either. In *Vitelle*, it was conceded by the counsel on both sides "that at the time of the examination of [the] jurors it was well understood that the evidence would show that the defendant

was a member of an organization known as the Ku Klux Klan [(Klan)], and that his alleged [assault] and conduct toward the [victim] . . . were, according to the prosecution, a part of his activities as a member of that organization." (*Id*. at p. 696.) A prospective juror named McAdam said he knew the defendant, had read about the case and had also heard it talked about. (*Id*. at p. 697.) He was asked: "If it should transpire in this case that he was a leading member of the Klan, would that create in your mind any bias and prejudice against him?" (*Ibid*.) McAdam replied: "It would." (*Ibid*.) He said that with his bias he did not think he could be fair and impartial. Also, if he were in the defendant's shoes, McAdam would not want to be tried by 12 men who felt the way McAdam felt. Asked why, he stated: "Well, my membership [in the Klan] would be against me, I think." (*Id*. at p. 698.) He agreed, when asked, that Klan membership would be so significant that he would be influenced when listening to the defendant's testimony. (*Ibid*.) McAdam said he would follow the jury instructions and vote to acquit if there was reasonable doubt. (*Id.* at pp. 698–699.) But he said "it would take evidence to remove my bias against the Klan." (*Id*. at p. 699.)

The *Vitelle* court reversed because it found "no escape from the conclusion that there existed in the mind of McAdam a state of mind . . . which necessarily prevented him from acting with entire impartiality and without prejudice." (*Vitelle*, *supra*, 61 Cal.App. at p. 700.) It noted: "A juror cannot be said to be fair or impartial toward a defendant, and he cannot be qualified to weigh the evidence touching the guilt or innocence of a defendant upon a criminal charge, when such juror admits that in weighing the evidence he will be prejudiced against the defendant solely by reason of the fact that the defendant is a member of an organization to which the juror feels that he is opposed." (*Id*. at pp. 701–702.)

We perceive critical distinctions. There is no evidence that Juror No. 10 knew McCarter, read accounts of the case in the newspaper, or heard people talking about it. Nor did Juror No. 10 unequivocally say that she would be influenced by a bias when listening to testimony and could not be impartial. Rather, she said it kind of felt like gang membership should be punished, but she expressed doubt. When asked for her best guess

as to whether she could put her feeling's aside, she said no. But she also said that she would try her best to consider gang evidence only as instructed. The record reveals a prospective juror who was struggling with her feelings and perceptions of the law. As indicated by *Kaurish* and *Farley*, the trial court was empowered to determine whether Juror No. 10 could be impartial.

Given the record, we draw more guidance from *People v. Hillhouse* (2002) 27 Cal.4th 469 (*Hillhouse*). In that case, a prospective juror wrote in a juror questionnaire that due to information he read in the newspaper, he believed the defendant was guilty. The court explained that the "juror gave some answers that certainly would have warranted the court in removing him. He gave other answers, however, warranting the conclusion that he could be impartial. He made clear that he had preconceptions about the case, but he also understood he had to base his decision on the evidence at trial rather than what he read in newspapers, and he said he would try to be impartial. He summarized his feelings: 'I think the defense attorney has an up-hill battle, *if I were asked to make a judgment today* I already stipulated what that judgment would be [i.e., guilty], but as I hear conflicting information I think I could be fairly impartial to listening to that.'" (Italics in original.) (*Id*. at p. 488.) The court concluded that "the trial court could reasonably conclude the juror was trying to be honest in admitting his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions." (*Ibid*.)

While Juror No. 10 did not say she thought she could be "fairly impartial" like the prospective juror in *Hillhouse*, her representation that she would try her best to follow the law could properly be taken, and apparently was, as a sincere willingness to listen to the evidence and instructions and be impartial.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD