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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

B277927

Plaintiff and Respondent,

(Los Angeles County  
Super. Ct. No. TA135945)

v.

JOVANY RODRIGO RANGEL,  
et al.,

Defendants and Appellants.

APPEAL from the judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed and remanded.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Jovany Rodrigo Rangel.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Abel Eduardo Casillas.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants and appellants Jovany Rodrigo Rangel and Abel Eduardo Casillas were convicted by jury of assault with a firearm and kidnapping, and various special allegations were found true. On appeal, defendants contend the trial court committed error by discharging a juror for misconduct after deliberations had begun, and for replacing two other jurors with alternates. Defendant Rangel also contends the court erred in giving an instruction on flight.

We affirm both convictions. However, during the pendency of this appeal, amendments to Penal Code section 12022.53 became effective. Under the amended version of the statute, the trial court now has discretion to strike a gun use enhancement. As we explain below, we therefore remand for resentencing.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On November 27, 2014, Thanksgiving Day, Juan Cossio drove to his aunt and uncle's house on 105th Street in south Los Angeles. He was seated in his truck at the curb in front of the house when he saw two cars pull up and stop near him, blocking him from pulling away from the curb. One of the cars was a white Nissan.

Several young men got out of the cars at the same time, including two people from the Nissan, later identified as defendants Rangel and Casillas. All of them approached Mr. Cossio's truck. One of the men opened the driver's door of the truck and grabbed Mr. Cossio's arm. Mr. Cossio got out. Several of the men started pushing him and punching him. Someone yelled "where's the money." Mr. Cossio tried to punch back at his attackers as he yelled for his uncle. At some point, Casillas said "Get out [of the] way, I'm going to shoot him." Mr. Cossio saw Casillas pointing a handgun at him. Casillas shot Mr. Cossio in

the stomach. Casillas and Rangel, with help from some of the others, dragged and pushed Mr. Cossio into the back seat of the Nissan.

The Nissan then took off down Wilmington Boulevard. Casillas was driving and Rangel was in the front passenger seat. Casillas handed Rangel the handgun. Rangel pointed the gun at Mr. Cossio in the back seat, and repeatedly yelled “don’t move or I will kill you.” Rangel reached over the seat and took Mr. Cossio’s ring, watch and money from his pockets.

Mr. Cossio saw a patrol car coming down Wilmington Boulevard from the opposite direction. Casillas and Rangel appeared to start “panicking” and Rangel dropped the gun down below the seat. Mr. Cossio decided to jump out of the moving car, despite his wound. He opened the car door, jumped, and rolled several times across the asphalt. He got up as the patrol car approached and pointed at the Nissan. The patrol car made a U-turn and started pursuing the Nissan. Shortly thereafter, an ambulance arrived and transported Mr. Cossio to the hospital where he was treated for a gunshot wound, a pelvic fracture and various scrapes and bruises.

Officer Manuel Armenta was driving the patrol car and his partner, Officer Morales, was with him. After making the U-turn on Wilmington Boulevard, they followed the Nissan as it headed toward the 105 freeway. After getting onto the freeway, the Nissan started making “erratic movements,” and, at one point, drove along the shoulder. Officer Armenta activated his lights and siren. The Nissan got off the freeway and pulled over. Officers Armenta and Morales executed a “high-risk” stop, drawing their guns and ordering Casillas and Rangel to get down on the ground. Casillas and Rangel were taken into custody

without further incident. Inside the Nissan, the officers found a gold ring, gold watch and loose money. A handgun was later discovered near the Wilmington Boulevard on-ramp to the freeway.

Defendants were charged with one count of attempted murder (Pen. Code, §§ 664, 187, subd. (a); count 1), and one count of kidnapping to commit robbery (§ 209, subd. (b)(1); count 2). Personal firearm use and great bodily injury allegations were alleged against defendant Casillas, as well as a prior prison term allegation. As to defendant Rangel, it was alleged that a principle personally used and discharged a firearm during the commission of the offenses. Finally, it was alleged the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang.

Trial by jury proceeded in November 2015. During deliberations, three jurors were excused and replaced with alternates. We reserve our summary of the facts relating to the removal of the jurors to part 1 of the Discussion below.

The jury found defendants Rangel and Casillas guilty of assault with a firearm, the lesser included charge on count 1, and guilty of kidnapping to commit robbery. The jury also found true the personal use of a firearm and great bodily injury allegations against Casillas, and the allegation that a principle personally used a firearm in the commission of the offenses as against Rangel on count 2. The gang allegations were found not true.

The court identified count 2 as the base count and sentenced Rangel to life with the possibility of parole, plus a 10-year term on the enhancement (§ 12022.53, subds. (b) & (e)). The court stayed the sentence on count 1. As to defendant Casillas, the court struck, pursuant to Penal Code section 1385, the prison prior

allegation. The court sentenced Casillas to life with the possibility of parole on count 2, plus a consecutive term of 25 years to life on the firearm enhancement pursuant to section 12022.53, subdivision (d). The court stayed sentences on count 1 and the remaining enhancements. Various fines and fees were imposed and both defendants were awarded 765 days of custody credits.

This appeal followed.

On January 18, 2018, we sent the parties a letter requesting supplemental briefing on the effect of Senate Bill No. 620, amending Penal Code section 12022.5 and section 12022.53. (Stats. 2017, ch. 682, §§ 1, 2.) All parties filed timely letter briefs.

## **DISCUSSION**

We find the trial court acted well within its discretion in discharging Juror Nos. 6, 8 and 12, and that ample evidence supported the flight instruction. We further find a limited remand for resentencing is warranted in light of the amendment of Penal Code section 12022.53, subdivision (h).

### **1. The Removal of Juror Nos. 6, 8 and 12**

Both defendants contend the court erred in removing Juror Nos. 6, 8 and 12, and replacing them with alternates after deliberations had begun. We find no error.

#### **a. Background**

During voir dire, the court admonished the prospective jurors that their role was to decide the facts based on the evidence presented in court, and not on things that may have happened “to your family members or what you read about or have seen on the internet or read in books or have seen on [television].” The court also advised the prospective jurors that all witnesses must be treated and judged by the same standards regardless of what they do for living. The court asked if all jurors would apply the same

standards to all witnesses, and all prospective jurors answered yes.

When the court began asking more specific questions, Juror No. 8 disclosed she had a son serving a sentence in federal prison for fraud. The court asked her if she had any “distrust or concerns about our criminal justice system” as a result. Juror No. 8 said no. The court asked if any prospective juror had had a bad experience with law enforcement that would affect his or her ability to be fair and impartial. Juror No. 8 did not raise her hand. Juror No. 8 was seated as a juror.

The case was given to the jury on November 23, 2015. On November 24, Juror No. 6, the foreperson, sent out a note asking to speak with the judge regarding two issues: “[u]pcoming air travel next week” and “[o]ne juror who I feel withheld important information during the voir dire.”

The court addressed the note with counsel and Juror No. 6 at sidebar. When asked for an explanation, Juror No. 6 told the court she had nonrefundable tickets for travel the following Monday and was concerned since the trial had run longer than the court had indicated. She had not raised the issue at the start of trial because the court told everyone the case would only last seven to eight days. As to the second issue, Juror No. 6 said that Juror No. 8 “has shared with [the other jurors] that she has a son who is incarcerated, and she will refuse to believe anything that is police testimony. [¶] She’s also told us that she’s already made up her mind on all of the counts and that nothing that any one of us say will change her mind.”

Juror No. 6 went on to explain that she and some other jurors had tried to explain they were supposed to be discussing the issues and had made lists of evidence to discuss, but Juror

No. 8 would not even look at them. She said Juror No. 8 was refusing to deliberate and would not state a basis for her views other than to “continually” say that she knows “ ‘what the police are like.’ ‘I know how they treated my son.’ ‘I know that he was not treated fairly.’ And, ‘I think that the police would trump up any charges against anybody.’ ” Juror No. 6 said she was uncomfortable with having to go on the record with this information but it had been bothering her since they began because “the very first thing” Juror No. 8 did was pronounce “ ‘they’re not guilty. You’re not going to convince me otherwise.’ ”

The court dismissed the jurors for the day and discussed with counsel how to proceed. It was decided that in the morning, the court would question each juror separately.

The following morning, Wednesday, the court received another note from the jury room which stated “ ‘Juror No. 8 has told us she is refusing to deliberate.’ ” Because of problems concerning the availability of one of the defense attorneys, the court excused the jurors for the Thanksgiving holiday and the matter was put over until the following Monday. Juror No. 6 was excused because of her nonrefundable flight plans scheduled for early Monday. No counsel stated any objection to her dismissal.

On Monday, November 30, defendants moved for a mistrial on the grounds the jury’s notes to the court indicated they had reached an impasse in deliberations. The motion was denied. The court proceeded to separately question the individual jurors regarding Juror No. 8’s alleged refusal to deliberate.

The transcript of the questioning reflects the court did not single out or identify Juror No. 8 in its questions of the jurors, but rather, used only generally worded questions inquiring whether

all jurors were participating in the deliberative process. The jurors responded as follows.

Juror No. 1 said Juror No. 8 was not deliberating and was “done” on the second day and nothing would change her mind. Juror No. 2 said Juror No. 8 was not deliberating, would not listen to anyone, and said there was not enough evidence. Juror No. 3 said Juror No. 8 was not deliberating and would not respond when other jurors tried to talk to her. Juror No. 4 said Juror No. 8 seemed biased and had made a statement early on the first day of deliberations about an incident with the police and one of her children. Juror No. 5 said Juror No. 8 had made up her mind and was not going to change it. Juror No. 7 said Juror No. 8 was not trying to convince anyone that her view was correct, only that she was going to “stick” with how she felt and was not going to discuss anything. Juror No. 9 said Juror No. 8 told the rest of the jurors on the first day what she thought of the case and had refused to participate since then. Juror No. 10 said Juror No. 8 had not participated for two days. Juror No. 11 said that “from day one” Juror No. 8 wrote down her verdict and told the rest of them she was not going to move from that position.

Juror No. 12 failed to appear that morning and therefore could not be questioned.

When Juror No. 8 was asked if all of the jurors were deliberating, she said that several jurors simply “go with what their neighbor is thinking.” She asserted that she was deliberating and explained that most of the other jurors just did not understand that “you need proof.” When specifically asked, Juror No. 8 conceded she may have discussed her son during the deliberations.



Outside the presence of all jurors, both defense counsel argued against the dismissal of Juror No. 8, arguing primarily there was insufficient evidence she had failed to deliberate and that it appeared she was just a holdout juror with a different view of the evidence. After listening to argument, the court stated its intention to dismiss Juror No. 8 for misconduct. The court said it also intended to dismiss Juror No. 12 for failing to appear. Counsel for defendant Rangel did not object to excusing Juror No. 12. Counsel for defendant Casillas objected, but did not state any grounds.

The court excused Juror No. 8 and Juror No. 12. The court replaced Juror No. 6, who had been dismissed the previous Wednesday because of her travel plans, with Alternate Juror No. 1. The court replaced Juror No. 8 with alternate Juror No. 2 and Juror No. 12 with Alternate Juror No. 3, who later became the new foreperson. The court instructed the newly constituted jury with CALCRIM No. 3575 that it must begin deliberations anew.

The newly constituted jury began deliberations shortly after 10:30 a.m. on November 30, 2015, and deliberated until the end of the court day. The jury continued their deliberations on December 1. They sent out a question during the morning session concerning application of the special allegations relative to both counts. The jury was provided an answer, and at noon, notified the court it had reached a verdict.

We find no error in the dismissal of any of the three jurors and explain our reasons below.

**b. Juror No. 6**

Juror No. 6 was excused because of nonrefundable travel plans on November 30. The jury had been told during voir dire on

November 10 that the trial would last seven to eight days, or until November 20. Instead, the case was not submitted to the jury until November 23, 2015, the Monday before Thanksgiving. No objection was raised by any attorney to the court excusing Juror No. 6. The court acted well within its discretion in excusing Juror No. 6. (Pen. Code, § 1089 [“If at any time, whether before or after the final submission of the case to the jury, [upon] good cause shown to the court a . . . juror is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box”]; *People v. Green* (1995) 31 Cal.App.4th 1001, 1010 [trial court is empowered with discretion to discharge a juror, upon a showing of good case, after deliberations have begun].)

**c. Juror No. 12**

Juror No. 12 failed to appear, without any explanation, on November 30, in the middle of deliberations. The court therefore discharged that juror and chose an alternate. Counsel for Casillas did object but did not state any grounds. Defendants have not shown any error in the court’s decision to replace a juror who had failed to appear without explanation. (Pen. Code, § 1089; *People v. Green, supra*, 31 Cal.App.4th at p. 1010.)

**d. Juror No. 8**

Juror No. 8 was discharged for misconduct. “ “ “The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.’ ” ” ” ( *People v. Williams* (2013) 58 Cal.4th 197, 290.) The Supreme Court has explained that while a trial court’s decision to discharge a juror is reviewed for abuse of discretion, the

discharged juror’s “ ‘inability to perform’ his or her duty ‘must appear in the record as a demonstrable reality.’ [Citations.]” (*People v. Armstrong* (2016) 1 Cal.5th 432, 450 (*Armstrong*).) “Under the demonstrable reality standard, . . . ‘the reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.’ [Citation.]” (*Id.* at p. 451.)

On the second day of deliberations, Juror No. 6 raised her concerns about the conduct of Juror No. 8 in a note to the court. After discussing the matter with counsel, the trial court questioned each of the jurors. The court did not pose questions or use language that would telegraph any improper information to the jury about the reasons for the court’s inquiry. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*) [a “trial court’s inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible;” the “inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations”].)

The record of the court’s inquiry demonstrates that Juror No. 8 was refusing to deliberate, had refused to deliberate since day one of the deliberations, and was relying on improper personal experiences and biases against law enforcement officers which she had deliberately concealed during voir dire.

“A juror who refuses to deliberate may be removed ‘on the theory that such a juror is “unable to perform [her] duty” within the meaning of Penal Code section 1089.’ [Citation.]” (*Armstrong, supra*, 1 Cal.5th at p. 450.) “A refusal to deliberate consists of a juror’s unwillingness to engage in the deliberative process; that is,

he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.” (*Cleveland, supra*, 25 Cal.4th at p. 485.)

Juror No. 6 told the court the first thing Juror No. 8 did at the start of deliberations was pronounce the defendants not guilty. She reported that Juror No. 8 refused to look at the evidence, even after several other jurors tried to make lists for the group to discuss. Juror No. 8 did not try to explain the bases for her opinion, but simply asserted her distrust of all police officers based on her personal experience regarding her son. Juror Nos. 4, 9 and 11 echoed Juror No. 6’s statement that Juror No. 8 had refused to participate since the first day of deliberations.

Despite defendants’ arguments to the contrary, the record does not support the conclusion that Juror No. 8 reasonably deliberated for a fair amount of time, reached a conclusion based

on the evidence presented, and then simply held out against a guilty verdict. The other jurors explained that she refused to talk to them, would not even look at the list of evidence they had created as a talking point, expressed a fixed conclusion at the very outset of deliberations, and was focused almost exclusively on her distrust of law enforcement and her son's experience in the criminal justice system as opposed to the actual evidence presented in the case.

In explaining its ruling, the court stated it was significant that several jurors said Juror No. 8 was using her personal experiences with her son in the jury room, instead of looking at and relying on the evidence in the case to come to a decision about guilt or innocence. Juror No. 8 was "not following the court's instructions to refrain from considering something that's not in evidence. And that's misconduct. It reveals a bias."

The court also emphasized that Juror No. 8's "demeanor was very evasive," even untruthful, in answering the court's questions, pointing the finger at other jurors as refusing to deliberate, when all the other jurors identified only Juror No. 8 as the person who had refused to discuss the evidence from the very beginning. The trial court's credibility determinations are entitled to deference "because 'a trial judge who observes and speaks with [a juror] and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record. [Citation.]'" (*People v. Lomax* (2010) 49 Cal.4th 530, 569 [discussing court's assessment of prospective jurors' responses during voir dire and removal for cause in a capital case]; accord, *Wainwright v. Witt* (1985) 469 U.S. 412, 425-426; *People v. Diaz* (2002) 95 Cal.App.4th 695, 704 [acknowledging

significance of trial court's observation of juror's demeanor and affirming discharge of juror for misconduct after deliberations had begun].)

Moreover, the record does not support defendants' contention that the timeframe in which the newly constituted jury reached a verdict necessarily demonstrates that it failed to begin deliberations anew, as instructed, and must have been improperly influenced by the dismissal of three jurors. The newly constituted jury deliberated for over a day and a half, and sent out a fairly detailed question asking for clarification about how the various special allegations applied to both of the counts. One of the alternate jurors was voted as the foreperson. There is nothing in the record to suggest the jury failed to begin deliberations anew or that the alternate jurors were cowed into going along with the other jurors' views of the evidence.

We find no fault in the trial court's discharge of Juror No. 8.

## **2. The Flight Instruction**

Defendant Rangel argues the court committed error by instructing the jury with CALCRIM No. 372. Rangel contends there was no evidence supporting the instruction. We disagree.

The court, over defense objection, instructed with CALCRIM No. 372 as follows: "If the defendant fled or tried to flee (immediately after the crime was committed), that conduct may show that (he) was aware of (his) guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Penal Code section 1127c provides, in relevant part, that "[t]he flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt, but is a

fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.” “It is settled law that the reason flight is relevant is because it may demonstrate consciousness of guilt.” (*People v. Hill* (1967) 67 Cal.2d 105, 120; accord, *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31 [rejecting challenge to CALCRIM No. 372]; *People v. Price* (2017) 8 Cal.App.5th 409, 455-458.)

After assaulting and shooting Mr. Cossio in the stomach, defendants threw him into the back of their car and fled the scene of the shooting. As defendants were heading toward the freeway, Mr. Cossio escaped by jumping out of defendants’ moving car in front of a passing patrol car. Defendants did not stop the car to render aid to Mr. Cossio, call 911 or otherwise attempt to determine his condition. They instead continued pell-mell onto the freeway as they threw the handgun out of the window of the car. There was ample evidence warranting the giving of a flight instruction.

### **3. Remand for Resentencing Is Warranted**

While this appeal was pending, the Legislature amended Penal Code section 12022.53, subdivision (h) to provide that, effective January 1, 2018, “[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 2.) Under the former version of the statute, the trial court lacked such discretion. (Former § 12022.53, subd. (h) [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation

under this section or a finding bringing a person within the provisions of this section”].)

In their respective letter briefs, defendants argue remand is warranted here because the amended statute is properly given retroactive effect, and the trial court must be afforded the opportunity to consider its sentencing choices in light of the new law. Respondent concedes the amended statute is appropriately given retroactive effect, but argues that remand is unnecessary given that the record demonstrates the trial court would not have exercised its discretion to strike the gun use enhancement for either defendant.

We are not persuaded the record demonstrates unequivocally that the court would decline to exercise its discretion under the amended language of Penal Code section 12022.53, subdivision (h). Accordingly, we remand for the limited purpose of allowing the court to conduct a new sentencing hearing for both defendants in light of the change in the law.

### **DISPOSITION**

The judgment of conviction as to Jovany Rodrigo Rangel and Abel Eduardo Casillas is affirmed. The cause is remanded to the superior court for the limited purpose of conducting a new sentencing hearing consistent with this opinion.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

HALL, 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.