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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE PEQUENO, Defendant and Appellant.	B245734 (Los Angeles County Super. Ct. No. KA094928)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

H. Russell Halpern, 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, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Pequeno appeals from the judgment entered after he was convicted of attempted murder, possession of a firearm by a minor, assault with a firearm, and shooting at an occupied vehicle. We reject his contentions that the trial court erred by denying his motion to either release juror contact information or conduct an evidentiary hearing regarding juror misconduct. We also reject his contentions that the trial court erred by admitting certain gang evidence and that he received ineffective assistance of counsel. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the morning of February 21, 2011, Michael Vargas was a passenger in a car stopped at an intersection in Long Beach. Vargas saw a man wearing a dark baseball cap and dark clothing, whom he later identified as Jose Pequeno, staring at him from across the street. Vargas was having "a rough day" and wanted to "start a problem," so he yelled out to Pequeno, "Do you know who I am?", then got out of the car and walked toward him.

Pequeno yelled out "Eastside Long Beach," which Vargas, who was not a gang member, believed to be the name of a gang in the area. Vargas said "I don't care about your gang" but stopped walking toward Pequeno when he saw that Pequeno had pulled out a gun and pointed it at him. Vargas asked, "That's what you need?" and turned back toward the car. Pequeno fired twice as Vargas got back into the car. One round struck Vargas's arm and the other shattered a window of the car. The driver sped away as soon as Vargas entered the car.

Joaquin Aguilar lived nearby and witnessed the shooting. Aguilar heard a loud argument coming from outside, looked out his window, and saw a man with his back to him who was wearing a baseball cap and dark clothing. The man was standing on the sidewalk and had his arms outstretched and hands clasped together. It looked to Aguilar as if the man was using his outstretched hands to track a car as it began to turn. Aguilar heard two gunshots, saw the passenger window of the car shatter, and then saw the car

drive off as the shooter ran away. Aguilar did not see the gun in the man's hands and could not identify the shooter.

After Vargas identified Pequeno from a photographic lineup, a search warrant was issued for Pequeno's apartment, which was .10 miles from where the shooting took place. In a bedroom at the residence officers found 231 bullets, a .32 caliber magazine clip, and a gun cleaning kit, but no gun. Sixty-nine of the bullets were .32 caliber semiautomatic bullets, and the .32 caliber magazine was for a semiautomatic handgun. Pequeno's school identification card was found in the same bedroom, along with plastic bags containing a white powdery substance. The evidence was photographed and later shown to the jury.

Pequeno was charged with two counts of attempted murder, three counts of assault with a firearm, possession of narcotics, possession of a firearm by a minor, and shooting at an occupied vehicle. He pled no contest to the possession of narcotics charge. In addition to the testimony of Vargas and Aguilar, the jury saw photos of the items seized from Pequeno's bedroom. Pequeno did not put on a defense. He was found guilty of one count each of attempted murder, possession of a firearm by a minor, assault with a firearm, and shooting at an occupied vehicle, but was acquitted of the other counts.

Pequeno raises five issues on appeal: (1) the trial court abused its discretion by choosing not to hold an evidentiary hearing regarding juror misconduct; (2) the trial court abused its discretion by not releasing juror names and contact information; (3) the trial court erred by allowing Vargas to testify about the gang name he believed Pequeno shouted at him; (4) he received ineffective assistance of counsel because his lawyer did not call an expert witness to testify regarding the reliability of eyewitness identification testimony; and (5) he received ineffective assistance of counsel because his lawyer did not object to the introduction of evidence regarding the bullets found in Pequeno's bedroom.

DISCUSSION

1. *The Trial Court Did Not Err By Denying Pequeno's Juror Misconduct Motions*

A. Background Facts

Pequeno brought a posttrial motion requesting either the disclosure of juror names and contact information or an evidentiary hearing regarding juror misconduct. The motion was based on the declaration of a defense investigator recounting statements made by juror J.P. The investigator set forth several allegations made by J.P. concerning statements made by other jurors during their deliberations. The court denied the motion without prejudice because there was no declaration from juror J.P.

Pequeno renewed his motion, this time with a declaration by J.P. detailing the following statements made by jurors during deliberations that she felt amounted to misconduct: (1) a juror said that Pequeno's arrest was evidence of his guilt and was sufficient evidence for him to convict; (2) a juror commented on the photographs taken during the search of Pequeno's bedroom showing plastic bags that could have contained drugs, and said Pequeno was probably a drug dealer; (3) another juror brought up the subject of gangs several times and speculated that Pequeno belonged to a gang; (4) a juror noted that the bullets found in Pequeno's bedroom showed he possessed a gun in order to kill someone, not for hunting; (5) a juror questioned why defense counsel did not call appellant's girlfriend to testify when he mentioned her in his opening remarks; and (6) a juror commented that she wished appellant would have testified.

J.P. concluded her declaration by stating that "the discussion in the jury room seemed to me to infer that the Defendant was a drug dealing, gang member, who had a propensity for violence and that even if not guilty of this charge, he was a danger to society and should be locked up anyways. The comments described previously, along with pressure I felt from other jurors to come to a decision, had a sufficient influence on me to change my previous position of not guilty to guilty. Once outside of the influence of the other jurors, I realized the detrimental influence the discussions regarding, gangs, bullets, drugs, missing witnesses and the Defendant not testifying had on me."

The trial court denied both motions. The court first noted that the jury acquitted Pequeno of some counts, which indicated it had not been influenced by improper considerations. The court then turned to the statements in juror J.P.'s declaration. Concerning the gang evidence, the court said there was evidence that Pequeno shouted out a gang-type name, noting that the jury was told the evidence was limited to showing how it affected Vargas's state of mind and that there were no gang allegations in the case. Regarding the search warrant photos that showed not just ammunition but plastic bags containing what looked like drugs, those bags were alongside the ammunition and "it was clear what they were seeing." There was no problem with the juror who said the ammunition showed Pequeno possessed a gun for defense, not for hunting, because it was proper to consider whether Pequeno owned a handgun. The trial court saw no problem with the juror who wondered why Pequeno's girlfriend had not been called as an alibi witness because her supposed testimony had been raised by defense counsel during opening statements. Finally, as to the juror who wished Pequeno had testified, the trial court saw no misconduct because wishing for a defendant to testify is not the same as punishing him for the failure to do so.

B. The Denial of An Evidentiary Hearing Was Not Error

The trial court conducts a three-part inquiry when deciding whether to grant a new trial based on juror misconduct. First, the court determines whether the evidence presented to support the motion is admissible. Second, if the court finds the evidence is admissible, it considers whether the facts establish misconduct. Third, if it finds that misconduct occurred, the court must determine whether the misconduct was prejudicial. (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 475.)

As a component of the second step, the trial court has discretion to grant an evidentiary hearing to resolve material disputed issues of fact. (*People v. Avila* (2006) 38 Cal.4th 491, 604.) "The hearing . . . should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be

unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Ibid.*)

Pequeno contends the trial court erred by denying this motion. Respondent contends the trial court did not err because the declaration of juror J.P. did not contain admissible evidence of misconduct.[1] We agree with respondent.

The admissibility of evidence to show juror misconduct is governed by Evidence Code section 1150, subdivision (a), which provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Only evidence of "objective facts" is admissible to prove juror misconduct. Evidence Code section 1150 "may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.) If during the course of deliberations a juror "gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150." (*Id.* at p. 419.)

Each of the five statements that J.P. attributed to her fellow jurors falls into this category. For instance, the juror who supposedly said that Pequeno's arrest was sufficient evidence to convict was only uttering his own internal thought processes when he made that statement (*Krouse v. Graham* (1977) 19 Cal.3d 59 81 [assertion that juror privately considered a particular matter in arriving at his verdict concerned his mental

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[1] Even though the trial court's stated reasons for denying the motion did not directly address this point, we can affirm on any valid basis. (*People v. Jones* (2012) 54 Cal.4th 1, 50.)

processes and was inadmissible]) and the same is true as to the other statements. This also applies to J.P.'s statements concerning how the other juror's statements affected her decision-making process. (*People v. Ozene* (1972) 27 Cal.App.3d 905, 910, disapproved on another ground in *People v. Gainer* (1977) 19 Cal.3d 835, 844, disapproved on another ground in *People v. Valdez* (2012) 55 Cal.4th 82, 163.) Because there was no admissible evidence of misconduct, the trial court did not abuse its discretion by denying the motion for an evidentiary hearing.

C. No Error For Refusing to Disclose Juror Information

Similarly, the court did not abuse its discretion by denying Pequeno's alternative request to disclose juror names and contact information so that he could obtain more information regarding the alleged juror misconduct.

Code of Civil Procedure section 206, subdivision (g), states that a criminal defendant may apply for access to juror identifying information when such information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." Such a petition must include a declaration that includes facts sufficient to show good cause for the release of the information. (Code Civ. Proc., § 237, subd. (b).) To establish good cause, defendant must make a sufficient showing "to support a reasonable belief that jury misconduct occurred" (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990-991), and the misconduct must be "of such a character as is likely to have influenced the verdict improperly" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322). The California Supreme Court has stated that a juror's thought processes are "immaterial and of no jural consequence" to an attempt at impeaching a verdict and are irrelevant to the determination of "any legal issue." (*People v. Steele* (2002) 27 Cal.4th 1230, 1264.)

In the preceding section we held that Pequeno presented no admissible evidence that misconduct occurred. As a result, there is no basis for a reasonable belief that

misconduct occurred and the trial court did not err by denying the motion to release juror contact information.

2. *The Trial Court Did Not Err By Allowing Gang-Related Evidence*

A. Background Facts

Vargas testified that he heard Pequeno call out "Eastside Long Beach" as Vargas approached him, and that he replied, "I don't care about your gang." According to Pequeno, the trial court erred by allowing the jury to hear this gang evidence in a case where there were no gang allegations because it was unduly prejudicial under Evidence Code section 352. Pequeno also contends that this error violated his constitutional due process rights.

The issue arose before trial when the trial court recounted an off-the-record discussion concerning this evidence. According to the court, Vargas and other witnesses heard Pequeno use a gang name with which they were unfamiliar, but there was a gang with a similar sounding name.[2] The trial court said the gang name was not the issue and that the prosecution wanted to introduce the evidence "not as a gang allegation, but simply that it's spoken to victims and witnesses as a means of intimidation so they would not be later cooperating or willing witnesses . . . ." The trial court then asked if defense counsel had an objection. Defense counsel replied, "I'm just objecting for the record. I know where the court's coming from, and just as long as I object for the record, I think it's clear it's coming in. I know you have the limiting instruction, the general one, in there."

During the trial the court instructed the jury that Vargas's testimony on this point was not offered to prove that Pequeno was a gang member but was instead relevant to only Vargas's state of mind. Later on the trial court admonished the jury again, stating that even though the jury heard evidence that Pequeno shouted out Eastside Long Beach,

[2] According to the record, there is no Eastside Long Beach gang, but there is one called Eastside Longos.

"the court received that for the limited purpose not that the defendant is a member of any criminal street gang, not for the evidence that Eastside Long Beach is, in fact, a criminal street gang or the defendant is a member of a criminal street gang. [¶] It was offered only for the limited purpose of how it was taken by those who overheard it and explain their state of mind and actions thereafter, and that's the limited purpose for which it's offered or considered by you. There are no gang allegations in this particular case."[3]

B. The Issue Was Waived

Respondent contends the issue was waived by defense counsel's failure to make a proper and timely objection. We agree.

A judgment will be reversed due to the erroneous admission of evidence if an objection or motion to strike was "timely made and so stated as to make clear the specific ground of the objection." (Evid. Code, § 353, subd. (a).) Even "placeholder" objections on grounds such as relevance are insufficient if the appellant later asserts some other ground for challenging the evidence. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Pequeno did not even make such a placeholder objection to the gang evidence. Instead, his lawyer objected "for the record," which was insufficient to allow for either an appropriate response from the prosecution or the trial court to make a fully informed ruling. (*People v. Abel* (2012) 53 Cal.4th 891, 924.)

C. The Trial Court Did Not Err By Allowing the Gang Evidence

We alternatively hold that even if the objection had not been waived, there was no error in admitting the evidence.

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[3] This second admonition followed Pequeno's motion for a mistrial after a police detective testified that he believed Pequeno was a gang member. The motion was based on the fact that the prosecution had assured defense counsel there was no evidence that Pequeno was a gang member. The trial court denied that motion, but sustained defense counsel's objection, struck the answer, and gave the second admonition concerning the use of gang evidence. Pequeno does not challenge that ruling.

Evidence Code section 352 gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. This provision gives the trial court "broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124, citations omitted.) The admission of such evidence is only a violation of due process if there are no permissible inferences the jury may draw from such evidence. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229.)

The California Supreme Court has noted the prejudicial effect of gang membership evidence on juries. (*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [condemning the introduction of "evidence of gang membership if only tangentially relevant, given its highly inflammatory impact."].) However, evidence that a defendant was afraid to testify because he feared defendants and their gang is relevant to that witness's credibility. (*People v. Gonzales* (2011) 52 Cal.4th 254, 317.)

Vargas testified that when Pequeno called out Eastside Long Beach he thought Pequeno was associated with a gang by that name. Vargas said he had reservations about testifying because he did not know Pequeno or whether he had family members such as brothers or cousins. Vargas testified, "you guys pretty much showed him where I live, where my grandfather lives, and now he can just tell anyone, you know. And I felt like my life is at risk."[4] Because the evidence was relevant on this issue and the jury

[4] At this point the trial court gave its first jury admonishment that this evidence was limited to Vargas's state of mind in regard to cooperating with the prosecution.

was properly instructed to limit its use of the evidence, we hold that its admission did not violate Evidence Code section 352 or Pequeno's due process rights.[5]

3. *Defense Counsel Was Not Ineffective*

Pequeno claims he received ineffective assistance of counsel because his trial lawyer did not present an expert witness about the psychological factors that can make eyewitness testimony unreliable and did not object to evidence concerning the ammunition found in his bedroom.

To establish a claim of ineffective counsel, Pequeno must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms" resulting in prejudice such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688.) The reviewing court should "indulge in a presumption that counsel's performance fell within the wide range of professional competence and . . . can be explained as a matter of sound trial strategy." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Further, "if the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

As to the first contention, although expert testimony on the nature and pitfalls of eyewitness testimony is proper (*People v. McDonald* (1984) 37 Cal.3d 351, 377),[6] that does not mean defense counsel's failure to call such a witness amounts to ineffective

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[5] We also believe the evidence was properly admitted as part of the intrinsic factual backdrop of Vargas's encounter with Pequeno. (*People v. Albarran, supra,* 149 Cal.App.4th at p. 224 [gang evidence may be relevant to some fact concerning the charged offenses].)

[6] *McDonald* was overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.

assistance of counsel (*People v. Datt* (2010) 185 Cal.App.4th 942, 952 (*Datt*)). The *Datt* court rejected the same claim raised here because the defendant in that case failed to show that his trial counsel could have presented any favorable expert testimony. (*Id.* at pp. 952-953.) On appeal here Pequeno fails to make the same showing. We therefore reject his ineffective assistance of counsel claim.

As for defense counsel's failure to object to evidence regarding the large amounts of ammunition found in appellant's room did, we conclude this did not amount to ineffective assistance of counsel because such an objection would have been futile. (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24.)

Although no gun or ballistics evidence was recovered from the scene of the shooting, it is apparent that Pequeno used a handgun of some type: Vargas testified that Pequeno pulled a gun out from his pocket and pointed it at him with both hands. "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon." (*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649 and *People v. Chapman* (1959) 52 Cal.2d 95, 98.) We believe this rule extends to the facts of this case. The discovery of a large cache of ammunition in Pequeno's bedroom – including bullets and a magazine that fit a handgun – was highly probative of the fact that Pequeno owned or had access to the type of gun that could have been used during the shooting. Combined with the fact that Pequeno lived only .10 miles, this evidence showed he had the ability and opportunity to commit the crime.

As a result, we conclude that any objection to the evidence would have been futile and reject this claim of ineffective assistance of counsel as well.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.