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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JEREL DEMONT ROBINSON, Defendant and Appellant.	B282510 (Los Angeles County Super. Ct. No. BA441348)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine Olmedo, Judge. Affirmed and remanded with directions.

Robert E. Boyce, 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, Assistant Attorney General, Jonathan M. Krauss and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jerell Demont Robinson of second degree murder after he stomped his inebriated girlfriend to death. The trial court sentenced Robinson to an indeterminate state prison term of 15 years to life. On appeal, Robinson contends the judgment must be reversed due to jury tampering and, alternatively, if the judgment is not reversed, he is entitled to a limited remand for the purpose of making a record for use at a future youthful offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261.) We remand the matter so that Robinson can make a record for a youth offender parole hearing and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. *Summary of Trial Evidence*

1. *Prosecution evidence*

One evening in November 2015, a male acquaintance of Robinson, M.H., saw Robinson's girlfriend, K.B., and Robinson's father "partying and drinking" inside the father's house. M.H. later saw Robinson hit Robinson's father. K.B. was lying on the floor, drunk, and Robinson kicked her three or four times in the head and stomach.[1]

Shortly thereafter, a second male acquaintance of both Robinson and K.B. came upon K.B. lying on the sidewalk. She was naked, snoring and bleeding from her nose, eyes, ears, and mouth. This second acquaintance asked Robinson, "Why did [you] do [your] girl like that if you love her?" Robinson answered, "It's her fault. She's stupid," and then Robinson left.

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[1] M.H. acknowledged that he had been convicted of assault with a deadly weapon after stabbing Robinson in 2014.

Paramedics were called and K.B. was taken to the hospital where she died within two days. K.B. had been beaten severely, dragged, and stomped or kicked based on the shoe prints on her chest. Her nose was fractured and some bottom teeth were knocked out. The cause of K.B.'s death was "[m]ultiple traumatic injuries." Her blood alcohol level at the time of her death was at least .338.

Police officers arrested Robinson the same day near his father's house. At the time of the arrest, he was agitated and combative. There was blood on his hands, face, and shoes. Robinson was not wearing a shirt; a blood-stained shirt was found nearby. Robinson's blood tested negative for alcohol and drugs.

Following his arrest, Robinson told officers that when he came home and found K.B. partially clothed and Robinson's father asleep on the couch, he became upset.[2] Robinson slapped and punched K.B. in the face and head, attempted to pick her up but dropped her, and stomped on her head, face, and side six times.

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[2] Before being interviewed by the police, Robinson was advised of his rights: to remain silent, to have the presence of an attorney, and, if indigent, to be appointed counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436), which he waived.

2. *Defense evidence*

A psychiatrist repeatedly evaluated and treated Robinson while he was in custody awaiting trial. Robinson told the psychiatrist that he was depressed and had been hearing voices since the age of five years. The psychiatrist prescribed Robinson an anti-psychotic medication for impulse control and anger issues; she did not diagnose him as psychotic or out of touch with reality. Nor did she observe Robinson displaying any symptoms consistent with someone experiencing auditory hallucinations.

B. *Reported Jury Misconduct*

The jury trial commenced on April 10, 2017, and a verdict was rendered on April 27, 2017. On April 20, 2017, the trial court informed counsel that two people had separately talked to Juror No. 14 about how he should vote, and Juror No. 14 had spoken to other jurors sitting on this case about the incident. The trial court held a hearing and inquired of the jurors involved. Both counsel also questioned the jurors.

1. *Juror No. 14*

Juror No. 14 stated that his conversation with another juror was overheard by prosecution witness M.H. Juror No. 14 was saying that he needed a ride to a doctor's appointment. M.H. approached and handed Juror No. 14 a card "for a so-called Uber taxi company." Juror No. 14 called the telephone number on the card and arranged for a ride.

While Juror No. 14 was waiting for the driver outside the courthouse, an African-American woman yelled at Juror No. 14 from across the street: "You're the only Black man that is on that jury, and you make sure you vote him innocent or guilty."

Juror No. 14 responded, "I can't do either. I have to first hear the verdict." When Juror No. 14 asked how the woman knew that he was the only African-American juror, she said that she had "looked [into the courtroom], and you [were] the only one up there." The woman added, "You are the only one who can save him." Juror No. 14 replied that he could not talk to her anymore. The woman got into her car and left.

Juror No. 14 told the court that he did not recognize the woman as anyone he had seen in the courtroom or the jury room.

When the driver arrived, Juror No. 14 realized the man was not an Uber driver. He entered the car, but it "blew up" so he got out. The driver told Juror No. 14, "Make sure you—whoever that is down here to deal with on a trial, make sure you try to not hang him by his neck." Juror No. 14 was not wearing a juror badge and the driver did not seem to be referring to Robinson's case specifically. Juror No. 14 told the driver, "You know what? I go with the law." He said nothing else, returned to the courthouse, and took a taxi to his doctor's appointment. Juror No. 14 told the trial court that he had never seen the driver before, and that the driver did not know anything about the case; the driver just assumed he was a juror.

The following day, Juror No. 14 told Juror No. 51 what had happened. Juror No. 51 advised him to be careful. A third juror overheard the conversation and repeatedly urged Juror No. 14 to notify the court. Juror No. 14 said he did not want to inform the court about what happened, but he would take another route home.

The trial court asked Juror No. 14, whether he could still be fair and impartial to Robinson. Juror No. 14 answered, "I don't see any reason why I shouldn't be. But I'm going with the

evidence." He said that his interaction with M.H. did not influence how he viewed the witness's testimony. Juror No. 14 indicated he did not feel pressure to vote one way or the other, but he was "definitely a little bit concerned" about his safety.

2. *Juror No. 51*

Juror No. 51 asked Juror No. 14 how his doctor's appointment went and Juror No. 14 told him about the "fake Uber driver." Juror No. 51 thought that "someone was, kind of, intimidating him that was . . . in the court" and advised Juror No. 14 to be careful. Juror No. 51 told the court his conversation with Juror No. 14 lasted about two minutes, and he "could still be fair to both sides."

3. *Juror No. 63*

Juror No. 63 suggested that Juror No. 14 use Uber to go to his doctor's appointment. An unknown man (M.H.) overheard their conversation and gave Juror No. 14 a card, suggesting that he call up the driver; he is downstairs. At that point, Juror No. 63 "tuned them out. But the gist of [the conversation] was, I think, [M.H.] belonged to this room. And come Monday, he was a witness. But [M.H.] just, basically, said that he didn't want to be here."

The next day, Juror No. 14 told Juror No. 63 about the "Uber incident," that the driver's car "went up in flames or whatever" and that "he got threatened" by two African-American men or an African-American man and woman. Juror No. 63 "freaked out" about her safety and asked Juror No. 12 what to do because she was afraid to walk by herself. Juror No. 63 took Juror No. 12 into the bathroom and started crying. Juror No. 12 advised Juror Nos. 63 and 14 to talk to the court clerk.

Juror No. 63 said there was no discussion between Juror No. 14 and M.H. about the case. She told the court that she "[could] still be fair and impartial to both sides," and "return whatever verdict [she thought was] appropriate based on the evidence, regardless of [her] being anxious or a little scared right now." Juror No. 63 also said she could "completely objectively" review the evidence already presented and any additional witnesses who may be testifying. Juror No. 63 told the court that she did not believe that Juror No. 14 was connected to Robinson in any way. She further stated that it was her "norm" to be apprehensive about "walking to and from and driving." She had asked Juror No. 12 to walk with her and was satisfied with that arrangement.

4. *Juror No. 12*

Juror No. 12 said she was unaware of any conversation between Juror Nos. 14 and 51 until Juror No. 63 pulled her into the bathroom. Juror No. 63 related that she was "really scared and nervous" because Juror No. 14 "was approached by two African-American men on the street, and they told him that they needed to vote—vote in favor of the defendant. They needed him to vote in favor of the defendant, and if he didn't—I can't remember if they said they would hurt him or kill him." Juror No. 12 did not know what to do. She asked Juror No. 53, and he told her to tell the judge.

Juror No. 12 told the court she did not know how she felt about what she was told by Juror No. 63. She said that she "[could] still be fair and impartial to both sides." Juror No. 12 said that she could evaluate the evidence already presented and any additional witnesses who may be testifying in an objective manner and give Robinson a fair trial. Juror No. 12 also said she

did not have enough information to attribute to Robinson any threats made to Juror No. 14 or to have a bias against him.

5. *Juror No. 53*

Juror No. 53 told the court that Juror No. 12 asked for his advice on what to do because Juror 63 had indicated that Juror No. 14 had "been approached." Juror No. 53 advised that Juror No. 14 should talk to the court clerk, the bailiff, or the court. Juror No. 53 said all that he had learned from Juror No. 12 was that there was "some contact," and Juror No. 14 was told that he " 'had to make the right decision,' quote, unquote." Juror No. 53 said there was nothing he had heard that caused him any concern. He could still be fair and impartial to both sides, view the evidence and testimony objectively, and give Robinson a fair trial.

6. *Trial court's ruling*

At the conclusion of the hearing, the trial court tentatively ruled against discharging any jurors and made the following findings: M.H. had initiated a conversation with Juror No. 14, which was "innocuous, as it related, simply, to the car"; and Juror No. 14 did not discuss the case with the woman on the street and the driver, neither of whom appeared affiliated with Robinson. The court observed that none of the courtroom spectators to date had been members of Robinson's family. The court credited the five jurors' statements that, notwithstanding some safety concerns, they could remain impartial and fair to both sides.

Before the trial court issued its final ruling on April 24, 2017, defense counsel argued that four of the five jurors, Juror Nos. 14, 12, 51 and 63, were "tainted" and should be discharged.

The trial court concluded, in accordance with its tentative ruling, that Juror No. 14's conversations with M.H., the woman on the street and the driver were not misconduct. But, even if they were, the presumption of prejudice was rebutted by Juror No. 14's credible statement that he could still be fair and impartial. The court further concluded that the communications among the five jurors were misconduct, but here too, the presumption of prejudice was rebutted by each juror's assurance that he or she could be fair and impartial. The court did not discharge any jurors, but offered the jury panel transportation between the courthouse and parking lot to alleviate any safety concerns. Four jurors, including Juror No. 14, declined the transportation.

DISCUSSION

I. Claim of Jury Tampering

Rather than cast the issue as one of juror misconduct, Robinson contends the impartiality of Juror Nos. 14, 12, 51, and 63 was compromised by jury tampering, which is "qualitatively more prejudicial." He argues these jurors were intimidated by the communications that Juror No. 14 received from M.H., the woman on the street, and the driver, which affected their "freedom of action" as jurors. The trial court thus committed reversible error by not discharging these jurors.

A. *Governing Legal Principles*

Every criminal defendant has a constitutional right to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) " 'An impartial jury is one in which no member has been improperly influenced [citations] and every member is " 'capable

and willing to decide the case solely on the evidence before it.' " ' " (*People v. Harris* (2008) 43 Cal.4th 1269, 1303.)

Citing *Remmer v. United States* (1954) 347 U.S. 227 (*Remmer*), involving attempted bribery of a juror, and a Ninth Circuit Court of Appeals' decision interpreting it, Robinson contends a presumption of prejudice should be applied here because this was a case of jury tampering. "Since the *Remmer* case[], it has been clear that jury tampering creates a presumption of prejudice and that the government carries the heavy burden of rebutting that presumption." (*U.S. v. Henley* (9th Cir. 2001) 238 F.3d 1111, 1115 (*Henley*).) The Ninth Circuit Court of Appeals explained "allegations of jury tampering are qualitatively more prejudicial than other kinds of extraneous influence on the jury's deliberations: 'Because jury tampering cuts to the heart of the Sixth Amendment's promise of a fair trial, we treat jury tampering cases very differently from other cases of jury misconduct.' " (*Ibid.*)

Similarly, California state court decisions also generally apply a rebuttable presumption of prejudice where a nonjuror has "tampering contact or communication with a sitting juror." (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) In *People v. Federico* (1981) 127 Cal.App.3d 20, the Court of Appeal reaffirmed that the *Remmer* presumption applied where there was "a showing of attempts by outsiders to influence jurors." (*Id.* at p. 38.) "[W]hen the alleged misconduct involves an unauthorized communication with or by a juror," however, the *Federico* court observed, "the presumption does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant." (*Ibid.*; accord, *In re Hamilton, supra,* 20 Cal.4th at pp. 305-306.)

Whether prejudice arose from jury tampering or juror misconduct is a mixed question of law and fact, subject to independent appellate review. We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Merriman* (2014) 60 Cal.4th 1, 95.)

B. *This Is Not a Case of Jury Tampering*

1. *There was no presumption of prejudice*

The federal cases upon which Robinson relies to support his claim of jury tampering involved outsiders communicating with jurors for the purposes of influencing them. (See *Remmer, supra*, 347 U.S. at p. 228 [third party directly contacted a juror to offer a bribe]; *Henley, supra,* 238 F.3d at pp. 1112-1113 [defendant and a former juror intermediary attempted to bribe a juror].) Here, in contrast, nothing in the record suggests that M.H. tried to bribe or otherwise influence Juror No. 14. Although M.H. was a prosecution witness, his conversation with Juror No. 14 did not concern any substantive issue or evidence from the trial. M.H.'s remarks were "innocuous," as found by the trial court, limited to Juror No. 14's transportation needs. Thus, his conversation with Juror No. 14 did not meet the required threshold triggering the jury tampering presumption of prejudice.

Nor can the comments made to Juror No. 14 by the woman on the street and the driver be considered jury tampering. First, substantial evidence supports the trial court's finding that neither individual was affiliated with Robinson. Juror No. 14 stated that an African-American woman on the street called out to him, claiming to have seen him when she looked inside the

courtroom. But Juror No. 14 neither recognized the woman nor recalled seeing her in the courtroom or the jury room. The court observed that none of Robinson's family members had been in the courtroom. As for being urged by the driver "not to hang" whoever was on trial, Juror No. 14 did not think the driver was specifically referring to Robinson. Here, too, we conclude the presumption of prejudice did not arise.

With respect to Juror Nos. 12, 51, and 63, there was no evidence that a nonjuror attempted to communicate with them in an effort to influence their decision. Nonetheless, Robinson attempts to fashion a claim of jury tampering based on the fear that some of them reportedly experienced after learning about the incidents between Juror No. 14 and the woman on the street, and the driver. Juror No. 51 expressed concern that Juror No. 14 was being intimidated. Juror No. 63 "freaked out" and started crying because she feared for her own safety. Juror No. 12 did not know how she felt about any possible "threats." Other than describing these jurors' responses at a hearing, Robinson fails to explain why the presumption of prejudice should be applied in this context. He appears to suggest that any external incident may suffice to raise the presumption of prejudice—even if there is no nonjuror communication aimed at influencing a juror—if the external incident raises a juror's concerns about personal safety. We do not read the case law so broadly; the presumption of prejudice did not arise.

2. *Any presumption of prejudice was rebutted*

Even if this were not the case, however, "[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.] [¶] The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]." (*In re Hamilton, supra*, 20 Cal.4th at p. 296; see *People v. Harris, supra,* 43 Cal.4th at p. 1303 [" 'whether an individual verdict must be overturned for jury misconduct or irregularity " ' "is resolved by reference to the substantial likelihood test, an objective standard" ' " ' "].) As our Supreme Court has affirmed, "[i]t is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " (*In re Hamilton*, *supra,* 20 Cal.4th at p. 296; accord, *In re Price* (2011) 51 Cal.4th 547, 560.)

Here, the record does not reflect a substantial likelihood that Juror Nos. 14, 12, 51, and 63 harbored an actual bias against Robinson. "[A]ctual bias [is] defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488.) At the hearing, these jurors voiced personal concerns in varying degrees, but also stated they could meet their juror obligations. Nothing in the jurors' answers raised the specter of partiality stemming from

Juror No. 14's experiences. While each juror remembered the recitation of the incidents slightly differently, each and every juror, including Juror No. 14, assured the trial court that this knowledge would have no impact on his or her evaluation of the evidence at trial.

The trial court could reasonably conclude that the jurors were trying to be honest in admitting their initial fears, but were also sincerely willing and able to listen to the evidence and instructions, and to tender an impartial verdict. We accept the trial court's credibility determinations, because the trial court is in a far superior position to evaluate the tenor and demeanor of each juror's responses. (*People v. DePriest* (2007) 42 Cal.4th 1, 21; see *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 489 [The trial court "can judge the person's sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript."].)[3]

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[3] Robinson asserts the presumption of prejudice that he claims arose in this case was not rebutted because the record showed the communications that Juror No. 14 received from M.H., the woman on the street, and the driver, affected their "freedom of action" as jurors. To the extent he is asserting that the presumption of prejudice may only be rebutted by a showing that there was "no reasonable possibility" the incidents affected the jurors' "freedom of action" as jurors (see, e.g., *Henley, supra*, 238 F.3d at p. 1117), the California Supreme Court has repeatedly applied the "substantial likelihood of actual bias test" (see, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1342; *People v. Lewis* (2009) 46 Cal.4th 1255, 1309) and has rejected the notion that it is inconsistent with federal law (*People v. Loker* (2008) 44 Cal.4th 691, 747).

II. Limited Remand Is Necessary

Robinson contends he is entitled to remand for a hearing to make a record of information relevant to his eventual youth offender parole hearing because he was 25 years old at the time of the murder. The Attorney General agrees, as do we.

Robinson was sentenced on May 5, 2017, prior to the January 1, 2018 effective date of Assembly Bill No. 1308 (2017-2018 Reg. Sess.), which amends Penal Code section 3051 to extend eligibility for youth offender parole hearings to individuals who were 25 years of age or younger when they committed their controlling crimes. (Stats. 2017, ch. 675, § 1.) When the sentence for the controlling offense—here, second degree murder—is less than 25 years to life, the youth offender shall be considered for release at a youth offender parole hearing during his 20th year of incarceration. (Pen. Code, § 3051, subd. (b)(2).) At that hearing, the Board of Parole Hearings must "give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (Pen. Code, § 4801, subd. (c).)

Here, the amended statute applies to Robinson. It has retroactive effect (Stats. 2017, ch. 675, § 1), Robinson was 25 years old at the time of the murder, and he was sentenced to an indeterminate term of 15 years to life for the controlling offense. The California Supreme Court held that juvenile offenders must be given the opportunity to make a record of information relevant to a future youth offender parole hearing. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 283.)

DISPOSITION

The matter is remanded to allow Robinson sufficient opportunity to make a record of information relevant to a youth offender parole hearing. The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

CURREY, 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.