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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY BASSURTO,

Defendant and Appellant.

B235792

(Los Angeles County
Super. Ct. No. BA380922)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed as modified.

Kevin D. Sheehy, 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, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Jeffrey Bassurto was convicted by a jury of assault with a firearm, shooting from a motor vehicle and unlawful possession of a firearm by a felon with a special finding he had personally used a firearm in committing the aggravated assault. In a bifurcated proceeding Bassurto admitted he had suffered two prior serious or violent felony convictions within the meaning of the “Three Strike” law and Penal Code section 667, subdivision (a)(1), and had also served three separate prison terms for felony convictions. The court sentenced him to an aggregate, indeterminate state prison term of 45 years to life.

On appeal Bassurto contends the trial court violated his fundamental right to a trial before 12 fair and impartial jurors when it denied his counsel’s request to replace a juror during trial. We affirm the judgment as modified.¹

FACTUAL AND PROCEDURAL BACKGROUND

1. Evidence at Trial

Laurisa Balam, the People’s first witness, was the manager of the apartment complex in which Natasha Miller and her three-year-old child lived. Bassurto spent a significant amount of time at Miller’s apartment, and other tenants frequently complained to Laurisa about Bassurto and Miller’s screaming arguments and fighting.²

In late August 2010 Laurisa received a telephone call from a tenant urging her to come upstairs because there was a fight going on in the hallway and blood was “all over.” As Laurisa went up the stairs toward Miller’s apartment, she passed Bassurto going down. No words were exchanged. At the apartment she spoke with Miller, whose nose was bleeding and hair tangled, and told her, “This needs to stop. He’s no longer allowed

¹ Bassurto and the People agree the trial court miscalculated his presentence custody credit as 422 days (367 actual days of custody plus 55 conduct days), rather than 423 days (368 actual days and 55 conduct days). We order the judgment modified to reflect the actual presentence custody credit earned by Bassurto.

² Because Laurisa Balam and her husband, Jose Balam, who also testified at trial, share the same last name, we refer to them by their first names for convenience and clarity. (See *People v. Jones* (1996) 13 Cal.4th 535, 538, fn. 2.)

here. He's not on the lease. And if I see him again, I will call the police and he will go to jail for trespassing." Laurisa noticed blood splattered on the doorway to the apartment and on Miller's son's face and warned her, "He's going to end up killing you"

As Laurisa was leaving Bassurto came back up the stairwell holding a chrome-plated revolver. Bassurto said to Laurisa, "You're going to do what?" Fearing she would be shot, Laurisa responded, "I'm not going to do nothing." Bassurto then left the building with this sister and got into the backseat of a car parked outside. Laurisa immediately told her husband Jose that Miller's boyfriend had pulled a gun on her and asked him to call the police emergency number. While still on the telephone with the 911 operator, Jose went outside to get the license number of Bassurto's car. As Jose approached the car, Bassurto thrust his hand out the window and fired four shots at him. The car then drove away.

Laurisa also testified that some time after the shooting she returned to her apartment and was told by her husband that he had been threatened by several men who warned him not to go to court to testify against Bassurto. Following the threat, she and her family moved from the building and entered a witness protection program.

Jose testified after his wife and confirmed her account of the shooting incident. He also testified he had told the men who visited the apartment that he would not go to court but explained the detectives might pick him up and make him go. He was then told, "If they do that, well, go to court, but say it wasn't him."

Bassurto did not testify in his own defense. His mother testified Bassurto was at home with her at a barbecue party when the crimes allegedly occurred. Two other guests at the party also testified Bassurto was there during the relevant time period.

2. The Challenge to Juror No. 5

After the court excused the jury on Friday afternoon, July 15, 2011, at the conclusion of Laurisa's testimony, it stated for the record it had received a note earlier in the day from Juror No. 5. The note read, "I am Juror No. 5 and I wanted to let you know that I experienced an extreme emotional reaction to this case, one that I did not expect. I

think that I am not the right person to sit on this jury and would request that I be dismissed with sincere apologies. Also, I unintentionally mentioned my reaction to another juror who said nothing in response.”

The court initially asked defense counsel and the prosecutor whether they wanted to discuss the note at that time or to hold it over until the next court day (Monday). Bassurto’s counsel responded, “I think the letter is really tantamount to her saying that she really can’t give the defendant a fair trial if she’s traumatized.” He asked that Juror No. 5 be replaced by an alternate. The court replied, “Is this without any questioning? . . . Do you want to question her first at some point, perhaps on Monday, and see exactly what she means by this?” The court explained that typically it would ask a juror about a communication of this sort before concluding that replacement was necessary. Bassurto’s counsel agreed to hold the matter in abeyance until Monday.

The People completed their case and rested on Monday, July 18, 2011. Neither the court nor either counsel raised the issue of Juror No. 5. The trial was in recess on Tuesday, July 19, 2011. On Wednesday morning, July 20, 2011, before the jury was called into the courtroom, the prosecutor reminded the court it had not yet addressed Juror No. 5’s note and any concerns about her ability to fairly determine the case. She suggested the court inquire what the juror’s feelings were and whether she had, in fact, discussed the case with other jurors. Defense counsel agreed, “We should at least make a brief inquiry unless perhaps the court would allow us to stipulate to remove her at this time.” The prosecutor responded, “I would prefer an inquiry.”

The court called Juror No. 5 into the courtroom, had her sit in her seat in the jury box and questioned her about the note, initially asking her whether the extreme emotional reaction she had initially experienced still existed. Juror No. 5 replied: “I feel that I think I was overwhelmed by not only the importance, but just the reality of it. I don’t know. Just with the opening remarks and because I couldn’t discuss it, it became a bit—I couldn’t talk about it. So that’s why I think I couldn’t process it very well. But then over the weekend I sort of relaxed. I feel how important it is. I feel much better, so I feel

okay about it. I just was overwhelmed. I think I didn't expect—I just couldn't expect. I didn't know.”

Following this explanation the court commented, “But you're tearing up. What is that?” Juror No. 5 responded, “I'm nervous. I'm always, I'm nervous.” The court reassured her, “Okay. All right. But you need not be.” The juror added, “I'm embarrassed as well,” The court said, “Nor should you be embarrassed. Okay?” The following exchange then occurred:

“The Court: . . . Now, as far as being fair to both sides, that still obviously is our main objective.

“Juror No. 5: Right, yes.

“The Court: Is there anything changed in that regard from the way you felt before we impaneled you or selected you to serve on the case?

“Juror No. 5: No. It's not about being fair. I think I can be. I think it was I reacted to the whole idea of it before I even knew what was happening.

“The Court: Yes, which is only natural, which is only natural, so don't be ashamed about that.

“Juror No. 5: Okay, but no, I do feel that I can be fair.”

The court then turned to the portion of the note in which Juror No. 5 said she had unintentionally mentioned her reaction to another juror. Juror No. 5 explained, “As we were walking out, I was like this, shaking and nervous. And I walked out saying, ‘I can't believe I'm reacting like this. I'm shaking,’ you know. I was. And then she looked at me like I was crazy. And oh, I realized I was still reacting emotionally. . . . And I just looked at her and I apologized and then that was it.” The court told Juror No. 5 her reaction was understandable “and certainly not a breach of any order that the court has given you so far.” Asked if she understood the importance of not discussing the case prematurely, Juror No. 5 said, “Yes, I think which is why I wrote the note because I didn't know what to do. I didn't know if what I'd done was so terrible that I needed to be—I needed to talk to you about it.”

After telling Juror No. 5 she had not done anything terrible, the court asked both lawyers whether there was any further question “or is the matter submitted?” Both counsel stated, “Submitted.” The court then said, “Okay. All right. So we’ll ask the other jurors to come out now?” Bassurto’s counsel answered, “Yes.” And the prosecutor said “Sure.”

Trial resumed with Juror No. 5 participating throughout deliberations and verdict. There was no other formal request by Bassurto’s counsel to remove Juror No. 5, and no formal order by the court denying the earlier request to replace her with an alternate juror.

DISCUSSION

“‘[T]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.’” (*People v. Earp* (1999) 20 Cal.4th 826, 852; see *In re Hitchings* (1993) 6 Cal.4th 97, 110 [“one accused of a crime has a constitutional right to a trial by impartial jurors”].) Bassurto contends the trial court’s failure to replace Juror No. 5 violated his right to trial by impartial jurors. To the contrary, the court conducted a reasonable inquiry into Juror No. 5’s ability to serve and acted well within its discretion in permitting her to remain on the jury.

Penal Code section 1089 provides, if a juror upon “good cause shown to the court” is found to be unable to perform his or her duty, the court may order the juror discharged and an alternate juror seated. “[A]n inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist.” (*People v. Williams* (1997) 16 Cal.4th 153, 231.) “‘“A ‘good cause’ determination in this context is one calling for the exercise of the court’s discretion [citations], and if there is any substantial evidence to support the decision, it will be upheld on appeal.”’” (*Id.* at p. 232.)

As discussed, although defense counsel initially moved for Juror No. 5’s immediate replacement, he quickly agreed to the trial court’s suggestion that the matter be held in abeyance and the juror questioned regarding the meaning of her note and her ability to be fair following the weekend recess. Thereafter, defense counsel did not

object to the timing or the manner and substance of the court’s inquiry and, in fact, declined an invitation to ask the juror any follow-up questions. To the extent Bassurto now argues the hearing into Juror No. 5’s ability to serve was somehow inadequate, that claim has been forfeited. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1250 [“defendant’s claim that the court’s questions of Juror No. 8 constituted reversible error because they were improper, intrusive, and coercive is forfeited because defendant failed to object”].)

The court’s questioning of Juror No. 5, in any event, was appropriate and reasonable. The court adequately explored the basis for the juror’s strong emotional reaction to the initial phase of the case and confirmed that, after processing her feelings over the weekend, she was no longer overwhelmed by the experience. Juror No. 5 reaffirmed her ability to be fair, insisting “It’s not about being fair. I think I can be.” Finally, the court determined the juror had not breached her obligation not to discuss the case with other jurors before deliberations began. The conclusion that Juror No. 5 did not need to be replaced was supported by substantial evidence and fell well within the trial court’s discretion. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 231.)

DISPOSITION

The judgment is affirmed as modified to reflect the actual presentence custody credit earned by Bassurto. The superior court is directed to prepare an abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

JACKSON, J.

SEGAL, J.*

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