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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DOUGVONE JACKSON, Defendant and Appellant.	B275658 (Los Angeles County Super. Ct. No. BA439645)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed.

Lenore De Vita, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Colleen M. Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Dougvone Jackson (defendant) of conspiracy to commit robbery (Pen. Code, §§ 182, subd. (a)(1), 212.5, subd. (c)[1] (count 1)) and possession of a firearm by a felon (§ 29800, subd. (a)(1) (count 2)) and found two enhancements to be true (principal armed with a .22 revolver (count 1); prior serious felony conviction (counts 1 and 2)). On appeal, defendant contends the trial court abused its discretion in refusing to remove and replace a juror and denying his *Romero*[2] motion. He also challenges the sufficiency of the evidence to justify the imposition of a concurrent sentence for count 2. (§ 654.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Co-defendant Adrian Clarke,[3] with defendant as his passenger, was stopped at a red light on Western Avenue just before midnight on September 4, 2015. Los Angeles Police Department (LAPD) Officers Jesus Carrillo and Fernando Cuevas noticed the car was not displaying license plates so they activated the lights and siren on their unmarked vehicle, made a U-turn, and drove up behind Clarke's car. As the officers did so, they saw Clarke toss a black backpack into the back seat and defendant lean down in the front seat.

Officer Carrillo asked defendant and Clarke to step out of the car before he approached. Peering into the car, the officer

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1 All statutory references are to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

3 At the request of Clarke's appointed appellate counsel, we dismissed his appeal.

saw two license plates and pair of plastic gloves on the rear seat. He illuminated the car's interior with his flashlight and saw a nine-millimeter pistol and a ski mask in the open backpack on the rear floorboard. On the floor of the front passenger seat, the officer found a brown backpack containing six plastic zip ties, a roll of tape, and a ski mask. Officer Carrillo retrieved defendant's wallet and a .22 caliber revolver from under the front passenger seat. Loose .22 caliber bullets were in a plastic pill bottle on the floorboard behind the passenger seat. Defendant and Clarke were arrested at the scene.

During the booking process, defendant told an officer, "Sir, I'm just thankful for you guys and for treating us with respect. I'm glad you stopped us. Last time I did this I ended up hurting someone bad, and I went to prison for a long time."

Clarke admitted the nine-millimeter gun was registered to him. It was fully loaded with a live round in the chamber. Defendant told LAPD Officer Cuevas the .22 revolver belonged to him and had been in his possession for approximately six months. The extra .22 caliber bullets were also his. Defendant said he found the brown backpack that very evening and the "plastic things" were already inside it.

Defendant and Clarke told investigating officers they agreed to rob a marijuana dispensary, but when they met that evening, neither one wanted to go through with the plan. Instead, they went to a nearby park and smoked marijuana. Clarke was driving defendant back to his house when the police stopped them.

As part of the investigation, police retrieved text messages from defendant's and Clarke's cell phones. Texts revealed the

two men discussed the planned crime between August 30, 2015 through September 4, 2015.

Defendant was charged in count 1 with conspiracy to commit robbery (§§ 182, subd. (a)(1), 212.5, subd. (c)) and in count 2 with possession of a firearm by a felon (§ 29800, subd. (a)(1)). The District Attorney alleged two enhancements: as to count 1, that a principal was armed with a .22 caliber revolver; as to both counts, that defendant had a prior serious felony conviction for burglary.

The jury convicted defendant on both counts and found the enhancements to be true. The trial court denied defendant's *Romero* motion.

Defendant was sentenced to low term of four years on count 1, with a consecutive five-year term for the prior serious felony conviction (§ 667, subd. (a)(1)) and an additional year for being armed with a firearm (§ 12022, subd. (a)(1).) A concurrent midterm sentence of four years was imposed on count 2. Defendant timely appealed.

DISCUSSION

I. Defendant's Request to Remove Juror 48

A. Trial Court Proceedings

Defendant first contends the trial court abused its discretion when it denied his request to remove "juror 48" for bias after she told the trial judge her nephew recently had been arrested for robbery.

Testimony in defendant's trial began on a Friday. Monday morning began with a discussion outside the jurors' presence concerning a letter the court clerk received from juror 48: "I found out that my nephew was arrested last week. The following

is the information that I've been given by my family. My nephew was arrested on a felony robbery charge. He was not arrested at the scene but later. I'm not sure when the robbery was supposed to have occurred. During the robbery a gun and ski mask were used. There was another person involved. My nephew used his mother's car. I felt that you should be aware of this information, as I am serving on a jury in a case you are judging. Thank you for your time."

Juror 48 was brought into the courtroom. She had not shared this information with any fellow jurors. The following colloquy occurred:

> The Court: [I]n light of what's happened, do you think you could continue to be fair to both parties in this case?
>
> Juror 48: I think so. I just know my emotions right now are all over the place, but I am ready to serve.
>
> The Court: Any follow-up by the People?
>
> [The Prosecutor]: Would you be able to set aside what you know about your nephew's case and listen, continue to listen, to the evidence in this case?
>
> Juror 48: I will try. I just know that every now and then I keep seeing his face in my head.
>
> [The Prosecutor]: Would you feel more sympathetic towards these defendants knowing what you know about your nephew?
>
> Juror 48: No. I think it's the other way around. By being on this case, I kind of concede what he's going through, my nephew.

[The Prosecutor]: Okay. Do you think you'll be fair and impartial?

Juror 48: I think so.

The Court: All right. [Co-defendant Clarke's counsel]?

[Co-defendant Clarke's counsel]: Yes, briefly. [¶] So you said that your emotions are all over the place?

Juror 48: Yeah.

[Co-defendant Clarke's counsel]: You also said you could be fair and impartial. If you continue and then you're in the back deliberating and you feel that your emotions are getting the best of you to the point where you're not being fair and impartial, would you let us know?

Juror 48: I would. I think that my emotions would affect me more here than in the jury room because by then they start settling down because I just found out Friday.

The Court: All right.

[Co-defendant Clarke's counsel]: Thank you.

The Court: [Defendant's counsel], do you have any follow-up questions?

[Defendant's counsel]: If I may, Your Honor. [¶] So on Friday you found out from your family?

Juror 48: Yeah, my daughter called me. I was on my way home from here.

[Defendant's counsel]: And said that your nephew had been arrested?

Juror 48: Yeah, she told me the charges, and I just at that point, I'm like, what is he thinking. I realize where I went with that was I immediately went with him being guilty of it instead of being innocent. It kind of surprised me because you talked about that. [¶. . .¶]

[Defendant's counsel]: Okay. So your thought went to what was your nephew thinking when you heard about the nature of the allegations against him?

Juror 48: Yes.

[Defendant's counsel]: And how do you feel about the nature of the allegations against your nephew as they compare to this case? [¶. . .¶]

Juror 48: Um, well, as soon as I heard it, I instantly did compare it to [this case].

[Defendant's counsel]: Made you think about the current case?

Juror 48: Exactly. Immediately said I need to tell the judge because it was so similar in my mind.

[Defendant's counsel]: You think that similarity might make it difficult for you to separate the two?

Juror 48: I'm not sure because the way I'm feeling right now. So I have to really say I'm not sure. I think I can separate but I'm not positive.

[Defendant's counsel]: Okay. You think you can continue to hear evidence in this case? Is your mind going to wander to your nephew?

Juror 48: Today I think my mind would because of going back and forth the last couple days . . . .

[Defendant's counsel]: I can tell. I know you're feeling emotional.

Juror 48: Yeah.

[Defendant's counsel]: You think you will get preoccupied today?

Juror 48: I do think so today.

[Defendant's counsel]: You think that would make it difficult for you to follow along with what's going on because your mind might drift off?

Juror 48: Possibly. Just being at home, I'm doing different things and all of a sudden I get where I was going and I couldn't remember what I was going there for, standing there.

[Defendant's counsel]: It's a difficult time for you?

Juror 48: It is.

After the juror stepped outside, the trial judge observed: "Counsel, seems to me that she could continue to participate and will let us know if she thinks it's going to be a problem. [¶] Anyone want to be heard on this? Co-defendant Clarke's counsel and the prosecutor submitted. The following exchange then occurred:

[Defendant's counsel]: I don't think it's a good idea, Your Honor. I would move that she be excused and replaced.

The Court: What's the People's position?

[The Prosecutor]: She indicated that she could continue to be fair and impartial and try her best to listen to the evidence in this case.

The Court: [Co-defendant Clarke's Counsel]?

[Co-defendant Clarke's Counsel]: I think that I'm prepared to accept her representation that she's going to do what she can and feels that she can continue to participate.

The Court: We're going to keep her for now. We'll hear further argument later, if necessary."

The trial immediately resumed. Witnesses testified Monday and Tuesday. The parties rested Tuesday. The jury heard closing arguments and deliberated Wednesday and returned a verdict Thursday afternoon. There were no further discussions concerning juror 48.

B. Analysis

Our federal and state Constitutions guarantee a criminal defendant the right to a trial by an impartial and unbiased jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) Section 1089 additionally provides in relevant part: "If at any time, whether before or after the final submission of the case to the jury, 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 to be discharged and draw the name of an alternate."

The bias of a single juror may deprive a criminal defendant of his constitutional right to a trial by impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) But the reviewing court

"""will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.""" (*People v. Martinez* (2010) 47 Cal.4th 911, 943 (*Martinez*).)[4] Federal authority also recognizes trial courts "have broad discretion in deciding whether to replace a juror at any time before the jury retires for deliberation. [Citations.] Indeed, the [trial] court is in 'the best position to evaluate the juror's demeanor and to determine . . . whether the juror could fairly and impartially hear the case.'" (*United States v. Zichettello* (2d Cir. 2000) 208 F.3d 72, 106.) Reviewing courts affirm if the trial court's decision is supported by substantial evidence. (*Ibid.*)

Juror 48 openly described herself as emotional as she disclosed her nephew's arrest, but she was unequivocally willing to serve and advise the trial court if, going forward, she could not be fair to both sides. Couching her answers in terms of "I think" reasonably may be viewed as a polite response to questions

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4 Federal decisions have discussed presumed bias in the context of, and apparently as synonymous with, implied bias. (See, e.g., *United States v. Gonzalez* (2000) 214 F.3d 1109, 1112 ["actual bias is the more common ground for excusing jurors for cause, 'in extraordinary cases, courts may presume bias based upon the circumstances.' [Citations.] 'Unlike the inquiry for actual bias, in which we examine the juror's answers on voir dire for evidence that she was in fact partial, "the issue for implied bias is whether *an average person in the position of the juror in controversy* would be prejudiced."' [Citation.] Accordingly, we have held that prejudice is to be presumed "'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances'"'].)

asking "do you think . . . ." She did respond to one question posed by the prosecutor with "I will try." The trial judge gave counsel the opportunity to ask follow-up questions. That no one asked juror 48 to clarify or elaborate on the "I will try" response suggests her demeanor and tone gave no one pause. Substantial evidence supports the trial court's decision here, and we find no abuse of discretion. Juror 48's inability to perform her functions was not a "'demonstrable reality.'" (*Martinez*, *supra*, 47 Cal.4th at p. 943.)

II. *Romero* Motion

Defendant next contends the trial judge abused his discretion when he declined to strike his 2004 serious felony conviction for first degree burglary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) We disagree.

In *Carmony,* the Supreme Court explained, "the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*Id.* at p. 378.)

In determining whether to strike a prior serious or violent felony conviction, the trial court considers whether a defendant falls outside the "spirit" of the Three Strikes sentencing scheme. The trial court looks to "the nature and circumstances of his present [and prior felony convictions], and the particulars of his background, character, and prospects." (*People v. Williams*

(1998) 17 Cal.4th 148, 161.) It is not necessary for the trial court to state reasons for declining to strike a prior serious or violent felony conviction. (*Carmony*, *supra*, 33 Cal.4th at p. 375.)

Here, however, the trial court did explain its rationale. Defendant committed the burglary when he was 17 years old. He was found unfit for juvenile court, tried as an adult, and convicted. He remained in custody until he was 25 years old and was 30 years of age at the time of sentencing for these offenses; these were his sole post-release felony convictions. The trial judge recognized defendant was young when he committed the prior felony, but also noted its "very violent" nature.[5] Addressing the current offenses, the judge observed, "in this case, he was ready, willing and able to engage in violent behavior, in particular, deadly violence given he and his co-conspirator were prepared—armed with guns and prepared to use them. So that motion is denied. I believe he falls within the spirit of the Three Strikes Law."

The decision not to strike defendant's prior burglary conviction was well within the trial court's discretion. That offense was "very violent," and defendant was prepared to engage in more violence in committing the current offenses. The items retrieved from Clarke's car included two fully loaded weapons, additional ammunition, ski masks, tape, and zip ties. This was not a situation where the defendants had only casual burglary tools, e.g., screwdrivers and flashlights, in their possession.

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5 According to the police report attached to the prosecution's opposition to the *Romero* motion, defendant entered the home of the 81-year-old grandfather of one of his friends and beat the victim in the head multiple times with a metal bar or lamp. The victim sustained facial bone fractures and required stitches.

III. Section 654 Does Not Bar the Concurrent Sentence on Count 2

Defendant's trial counsel initially asked for a stay on any sentence for count 2 "since being armed was alleged as an overt act" in support of count 1, conspiracy to commit robbery. In response to the trial court's invitation to submit supplemental briefing on the question, defense counsel revised his position: "Based on counsel's research, alleged overt acts do not rise to the level of an element of the crime. People v. Jones (1986) 180 Cal.App.3d 509, 516-517.[fn.] Therefore, it is unlikely the Court can stay sentencing pursuant to 654." Defense counsel accordingly urged the trial court to impose a concurrent sentence for count 2. The trial court did so.

In determining whether multiple punishments run afoul of section 654, we look to "defendant's intent and objective . . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *People v. Hester* (2000) 22 Cal.4th 290, 294 ["Section 654 precludes multiple punishments for a single act or indivisible course of conduct"].)

The first question we ask is when did defendant obtain the .22 handgun? As the Court of Appeal has noted, "Whether a violation of section 12021 [now, § 29800], forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary

offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143-1144, internal quotation marks and fn. omitted.) We affirm the trial court's decision if supported by any substantial evidence. (*Id.* at p. 1143.)

Officer Cuevas, after refreshing his recollection with his report, testified defendant said he obtained the weapon approximately six months before his arrest on these charges. That testimony provided sufficient evidence of an intent to possess a firearm independent of the intent to conspire to commit a robbery.[6]

Nor are we persuaded the true finding on the "principal armed" enhancement precluded the imposition of a concurrent one-year sentence on count 2. Substantial evidence supported the finding that defendant, a felon, possessed the .22 months before he and Clarke decided to rob a marijuana dispensary. Section 654 did not preclude the imposition of a concurrent term on count 2.

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[6] Clarke's statements concerning defendant's possession of the firearm were consistent as well.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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