

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN A. BANNER,

Defendant and Appellant.

B282717

(Los Angeles County
Super. Ct. No. BA436140)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Vanessa Place, 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, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Beginning in 2011, Calvin A. Banner befriended three young women in succession, coerced them into working for him as prostitutes, and physically and psychologically abused them. He was convicted on 10 counts of pimping, pandering by procuring, kidnapping, and human trafficking, and sentenced to 67 years eight months in prison.

At trial, the women testified Banner's moniker was "Payday," a name one had tattooed on her thigh and another on her ankle. Testifying on his own behalf at trial, Banner denied that he was a pimp or that his nickname was Payday.

After trial, one or more Payday candy bar wrappers were found in the jury room during cleaning. The only evidence we have of this fact is that defendant's counsel brought a motion for new trial based on the presence of the Payday wrappers, and during argument on the motion the trial judge stated he had been informed about the wrappers.

In his motion for a new trial, Banner contended the Payday wrappers indicated a juror communicated his or her irreverence and disrespect for Banner to other jurors, which harmed his credibility and undermined his defense. The trial court ruled that while having a Payday candy bar in the jury room during trial "may be a bad joke," it did not amount to misconduct or warrant a new trial.

Banner appealed from the judgment of conviction. On appeal, he contends the Payday wrappers demonstrate juror bias. We disagree.

Jurors must not "form or express any opinion about the case until the cause is finally submitted to them." (Pen. Code, § 1122, subd. (b).) "A criminal defendant 'has a constitutional right to a trial by unbiased, impartial jurors. [Citations.]' [Citation.]

That means ‘12, not 11, impartial and unprejudiced jurors. . . . “[A] conviction cannot stand if even a single juror has been improperly influenced.” ’ ” (*People v. Weatherton* (2014) 59 Cal.4th 589, 598.) “Prejudgment ‘constitute[s] serious misconduct’ [citation], raising a presumption of prejudice. The presumption is rebutted ‘if the entire record . . . indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.’ [Citation.] ‘On appeal, . . . whether jury misconduct was prejudicial presents a mixed question of law and fact “ ‘subject to an appellate court’s independent determination.’ ” [Citation.] We accept the trial court’s factual findings and credibility determinations if supported by substantial evidence.’ ” (*Ibid.*) “Although prejudice is presumed once misconduct has been established, the initial burden is on defendant to prove the misconduct.” (*In re Carpenter* (1995) 9 Cal.4th 634, 657.)

No evidence indicates how many Payday bars were in the jury room, who brought them in or when, or who saw them, but we will accept for purposes of argument that at least one juror possessed a Payday bar in the jury room before the case was submitted. We will also assume as a matter of fair inference that the juror was prompted by testimony at trial to obtain the Payday bar.

The jury was instructed before presentation of evidence to “[k]eep an open mind throughout the trial” and not prejudge “any issue” until after deliberations. Presuming, as we must, that the owner of the Payday bar followed the court’s instructions (*People v. Daveggio* (2018) 4 Cal.5th 790), the most we can infer is that

testimony during trial about Banner's nickname put the owner in mind of obtaining a Payday bar.

Other inferences are possible: The Payday owner may have purchased the candy bar as a gesture of disrespect to Banner, or to indicate his disbelief of Banner's testimony, or to communicate his thoughts to other jurors. But we can presume no greater misconduct than the evidence allows. (*In re Carpenter, supra*, 9 Cal.4th at p. 657.) Because no evidence supports these or any similar inferences, the presumption that jurors follow court instructions must prevail.

Banner speculates that Payday candy bars were displayed to the jury and influenced their verdict. But juror misconduct must be established by evidence, not speculation. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419; *People v. Avila* (2006) 38 Cal.4th 491, 605.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.