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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MYTCHELL MORA,

Defendant and Appellant.

B291488

(Los Angeles County
Super. Ct. No. MA066814)

APPEAL from an order of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Carlo Andreani, 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, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mytchell Mora purports to appeal from an order denying his petition to access confidential juror identifying information.

(Code Civ. Proc., § 237, subd. (b).)¹ In May 2018, we affirmed his conviction for two counts of stalking (Pen. Code, § 646.9, subd. (a)) and rejected his assertions of error based on the empanelment of a hearing-impaired juror and the use of a “CART” reporter to assist that juror. (*People v. Mora* (May 17, 2018, B280345) [nonpub. opn.] (*Mora I*.)

After we filed the opinion in *Mora I*, defendant filed a petition in the trial court to unseal the hearing-impaired juror’s information. Defendant asserts that he must be permitted to speak to that juror to determine whether her hearing impairment affected his right to a fair trial, and that his counsel was ineffective at trial for failing to ascertain the identity of the hearing-impaired juror and to question her concerning her impairment. The People contend the order appealed from is nonappealable and request that we dismiss the appeal.

We conclude the order, based on a petition filed after the conclusion of defendant’s appeal, is nonappealable, and that in any event, defendant failed to make a prima facie case relief under section 237.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Prior Appeal

At defendant’s trial, Juror No. 8 was hearing impaired. The trial court appointed a “CART” (Communication Access Realtime

¹ All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

Transcription) reporter to assist the juror during the proceedings.² (*Mora I* at pp. 10–12.) During voir dire, the hearing-impaired juror was placed in seat No. 8 in the jury box, and participated in voir dire questioning. Juror No. 8 was not challenged and remained on the panel. (*Mora I* at p. 10.)

In his prior appeal, defendant asserted that the trial court erred in instructing the jury on the role of the CART reporter during deliberations, in failing to obtain his stipulation to the empanelment of the hearing-impaired juror, and in failing to identify the impaired juror. We rejected these contentions and affirmed defendant’s conviction. (*Mora I* at pp. 12–21.)

2. Defendant’s Postappeal Ex Parte Request for Juror No. 8’s Identifying Information

On June 25, 2018, after we filed the opinion in this case but while defendant’s petition for review was pending in the Supreme Court, defendant filed an ex parte request in the trial court to unseal discharged Juror No. 8’s identifying information pursuant to sections

² According to the National Court Reporters Association, CART services are “the instant translation of the spoken word into English text using a stenotype machine, notebook computer and realtime software.” The website of the National Association for the Deaf explains that “[t]he text produced by the CART service can be displayed on an individual’s computer monitor, projected onto a screen, combined with a video presentation to appear as captions, or otherwise made available using other transmission and display systems.” (<https://www.nad.org/resources/technology/captioning-for-access/communication-access-realtime-translation/>.)

206 and 237.³ Defendant asserted that Juror No. 8, a behavioral therapist who worked with special-needs children, had a hearing impairment and it was necessary to interview Juror No. 8 to determine whether her hearing impairment affected his right to a fair trial.

Defendant claimed that during trial, although he knew one of the jurors was being assisted by the CART reporter, the trial court refused to inform him which juror was receiving such assistance. He asserted that “not knowing the identity of the special needs juror potentially impacted [his] right to a fair trial, because defense counsel was not able to properly question the potential juror during voir dire regarding the nature and [extent] of the hearing impairment/special need.” Further, “the court’s decision to not reveal the identity of the special needs juror to defense counsel impacted defense counsel’s decision to not object to the CART reporter being present in the jury room during deliberations.”

The trial court denied defendant’s petition, finding no good cause to justify unsealing the information. The trial court pointed out that juror information is confidential and “such information [will not be] released unless a prima facie showing of good cause has been made.” Relying on the strong public policy against disclosing juror information, the court found defendant was not entitled to the release of the juror’s information.

³ Defendant requests that we take judicial notice of the file in B280345, appellant’s prior appeal. We grant the request. (Evid. Code, §§ 459, subd. (a); 452, subd. (d)(1).)

DISCUSSION

A. *The Trial Court's Order Denying the Petition is Not Appealable*

In *People v. Diaz* (2015) 235 Cal.App.4th 1239 (*Diaz*), the defendant filed a petition in the trial court six years after his conviction, seeking to uncover juror information for purposes of filing a habeas corpus petition. (*Id.* at p. 1242.) Although the trial court questioned the timeliness of the petition, it reached the merits and denied the petition on the ground it was a “fishing expedition” and the defendant had not made a showing of good cause. (*Ibid.*) *Diaz* first found the petition untimely because the defendant had raised jury misconduct at trial, in a new trial motion, and on appeal. (*Id.* at pp. 1243–1244.) “[A] motion to release personal juror identifying information . . . made after conviction, sentence, and affirmance on appeal is untimely [and t]he superior court should not rule on the merits of such a petition.” (*Id.* at p. 1245.) Second, *Diaz* found the order was not appealable as a postjudgment order affecting a substantial right under Penal Code section 1237, subdivision (b) because ““an order ordinarily is not appealable when the appeal would merely bypass or duplicate [an] appeal from the judgment itself.”” (*Ibid.*) In conclusion, *Diaz* held that a petition to release confidential juror information is untimely when it is made after conviction, sentence, and affirmance on appeal. “Where the superior court elects to rule on the merits of the petition, and denies relief, the order is not an appealable order affecting appellant’s substantial rights.” (*Ibid.*)

Here, the same logic applies. Defendant filed his petition in the trial court while his petition for review in the Supreme Court was pending. However, the relief sought in his petition was relief that should have been sought in the trial court in the first instance, and raised on appeal. Defendant failed to do so, making his petition untimely and nothing more than an appeal from an order that seeks to bypass or duplicate his appeal from the judgment.

B. *Mora's Conclusory Allegations Failed to Make a Prima Facie Case for Relief Under Section 237*

Even assuming the order was appealable, defendant failed to establish entitlement to relief. Section 206 governs contact with jurors after the conclusion of trial, and provides that jurors in a criminal case have a right after trial to decline to discuss their verdict or deliberations with the parties. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 380–381.) Moreover, to protect juror privacy, upon the recording of the verdict in a criminal proceeding, the court's record of juror identifying information is sealed. (§ 237, subd. (a)(2).)

For good cause, a person may petition the court for access to the jurors' identifying information. (§ 237, subd. (b).) A petition for the release of personal juror identifying information must be supported by a declaration of facts sufficient to establish good cause for disclosure. (§ 237, subd. (b).) Good cause means facts that support a reasonable belief that jury misconduct occurred, “and that further investigation [was] necessary to provide the court with adequate information to rule

on a motion for new trial. . . .’ [Citation.]” (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093–1094.) If a prima facie showing of good cause is made, the court sets a hearing, notifies each affected former juror, and any affected former juror may appear in person, in writing, by telephone, or by counsel to protest granting the petition. (§ 237, subds. (b), (c).) If a juror is unwilling to be contacted, the trial court must deny disclosure. (*People v. Johnson* (2013) 222 Cal.App.4th 486, 492; § 237, subd. (d).)

“Discovery of juror names, addresses and telephone numbers is a sensitive issue which involves significant, competing public-policy interests.” (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 548.) As a result, “[t]rial courts have broad discretion to manage these competing interests by allowing, limiting, or denying access to jurors’ contact information. [Citations.]” (*People v. Tuggles, supra*, 179 Cal.App.4th at p. 380.) A trial court’s “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. [Citations.]’ [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

Here, other than conclusory statements in his petition in the trial court that contact with Juror No. 8 was necessary to provide defendant with a fair trial, defendant offered no specific information in support of disclosure. On appeal, he asserts that his inability to question Juror No. 8 concerning the extent of her disability denied him his right to a fair trial. However, there is no evidence in the record of defendant’s

trial or in the petition that (1) Juror No. 8 did not understand the proceedings; (2) the CART reporter improperly influenced Juror No. 8's deliberations; (3) Juror No. 8 had difficulty understanding the proceedings; or (4) the jury as a whole was affected by the presence of the CART reporter in the deliberation room. We find the conclusory statements in his petition are insufficient and present nothing more than a "fishing expedition." (*People v. Cook* (2015) 236 Cal.App.4th 341, 345–346.)

C. *Defendant's Ineffective Assistance Claim is Not Cognizable in a Direct Appeal from the Denial of his Petition*

Defendant asserts that counsel was ineffective for failing to object to the CART reporter being present in the jury room. However, given that his appeal from the denial of his petition to unseal Juror No. 8's identity was untimely and not an appealable order, we decline to reach this issue.

Even if we were to reach the issue, defendant has failed to show his entitlement to relief. The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–694; see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on

as having produced a just result. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Prejudice is shown where there is a reasonable probability, that but for counsel’s errors, the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832–833.)

Our review of counsel’s performance is deferential, and strategic choices made after a thorough investigation of the law and facts are “virtually unchallengeable.” (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. (*People v. Mai, supra*, 57 Cal.4th at p. 1009.)

Jury selection is a matter of trial strategy, and “[m]yriad subtle nuances’ not reflected on the record may shape an attorney’s jury selection strategy.” (*People v. Hartsch* (2010) 49 Cal.4th 472, 489, fn. 16.) Here, on the record before us, we cannot determine whether trial counsel’s lack of objection to Juror No. 8 had a reasonable tactical basis. Therefore, a petition for habeas corpus is the appropriate vehicle for a determination whether counsel’s performance at trial was defective and defendant was prejudiced thereby.

DISPOSITION

The order of the superior court is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.