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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANDRE DESHONE BISSERUP, Defendant and Appellant.	B261517 (Los Angeles County Super. Ct. No. NA091120)

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

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Andre Deshone Bisserup was convicted by a jury of first degree murder and premeditated attempted murder. On appeal, he contends: (1) the trial court erred in denying his motion for mistrial based on alleged juror misconduct occurring during voir dire and (2) it was an abuse of discretion to order a postsentence probation report to be sent only to the Department of Corrections and Rehabilitation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The procedural nature of defendant's contentions makes a detailed recitation of the facts unnecessary. It is sufficient to state that, viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that defendant was a member of a criminal street gang; murder victim Jeff Pouncil and attempted murder victim Roy Anderson were members of a rival gang. The 2000 block of Orange Avenue in Long Beach was within territory claimed by both of these rival gangs. At about noon on January 5, 2012, Pouncil and Anderson were walking on that block of Orange Avenue when they encountered defendant, who shot at them multiple times. Anderson was not hit but Pouncil suffered two fatal gunshot wounds.

Defendant was charged by amended information with the first degree murder of Pouncil (count 1) and the attempted premeditated murder of Anderson (count 2); enhancements for gun use (§ 12022.53, subds. (b), (c), (d) and (e)) and commission of the crime for the benefit of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)(C)) were alleged as to each count; it was further alleged that defendant had suffered three prior convictions within the meaning of the Three Strikes law (§ 1170, subds. (a) –(d), § 667, subds. (b)-(i)).[1]

A jury found defendant guilty on both counts and found true the gun use and gang enhancements. In a bifurcated proceeding, the trial court found true two of the Three

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[1] All undesignated statutory references are to the Penal Code; all undesignated rule references are to the California Rules of Court.

Strikes prior conviction allegations. Defendant was sentenced to 170 years to life in prison, comprised of 100 years to life for murder (count 1); plus 70 years to life for attempted premeditated murder (count 2).[2] He timely appealed.

DISCUSSION

A. Alleged Juror Misconduct

Defendant contends the trial court failed to adequately investigate alleged juror misconduct, and it was an abuse of discretion to deny his motion for mistrial based on such misconduct. The premise of defendant's argument is that it was misconduct for potential jurors to discuss with one another concerns for their personal safety arising from the gang-related nature of the case. Defendant asserts the alleged misconduct was prejudicial because it shows these jurors had prejudged the case and likely tainted the entire panel. We disagree.

We begin with the observation that the caption of appellant's first contention characterizes it as a challenge to the trial court's "failure to discharge the tainted jury *venire* . . . ." (Italics added.) The "venire" is the panel of *potential* jurors. Defendant made no motion to discharge the "venire" and he has cited no legal authority, nor has our independent research found any, which suggests the trial court has a sua sponte duty to discharge a jury venire absent a motion identifying the alleged misconduct. But the day

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[2] The 100-year sentence on count 1 (murder) was comprised of 25 years to life tripled pursuant to the Three Strikes law, plus a consecutive 25 years for the personal gun use (§ 12022.53, subd. (d)). The 70-year sentence on count 2 (attempted premeditated murder) was comprised of 15 years to life tripled pursuant to Three Strikes, plus a consecutive 25 years for the personal gun use (§ 12022.53, subd. (d)). (See § 12022.53, subd. (f) ["Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)."].)

after the jury was sworn, appellant moved for mistrial based on alleged misconduct that occurred before the jury was sworn. Notwithstanding the caption, it is the denial of the mistrial motion that is the focus of appellant's argument in support of his first contention. We treat the contention as a challenge to the denial of a mistrial.

1. The Alleged Misconduct

The two days of jury voir dire commenced on Monday, October 20, 2014. The trial court began by explaining that the clerk would call jurors to the jury box using the last four digits of their juror identification numbers. Most of the prospective jurors responded when called in this manner. But five jurors did not respond until finally the trial court called those jurors by their names. Eventually the five also took their seats in the jury box.

Next, the trial court read aloud the allegations of the information, including the gang enhancement allegation. Much of the ensuing questioning focused on the gang allegations. For example, defense counsel inquired of Juror No. 0401 whether hearing about gangs from a gang expert and seeing photographs of gang tattoos would make her very uncomfortable; Juror No. 0401 said it would not. Juror No. 8261 did not think it would be difficult to hear the gang evidence and weigh its importance. Juror No. 8188, a teacher, said she worked with parents involved in gangs and would try to keep an open mind, but it would be difficult not to think about what she knew about gang rules, codes and protocol. Juror No. 8188, also a teacher, agreed with that sentiment. Juror No. 2310 did not think a person who is a member of a gang is an inherently bad person, but he would question why they were in a gang. Juror No. 2320 believed a gang member is responsible for what the gang does even if that gang member was not involved in the activity. Juror No. 0632 said there were gangs where he grew up in Boyle Heights and "you had a choice, you could join or not join. But if you join, you were a soldier and if you are a soldier, you take your chances."

During voir dire, several jurors expressed concerns for their personal safety in light of the gang-nature of the case. Juror No. 4890, a nurse, said gangs make her very nervous as the result of an experience she had when rival gangs got into a gun fight in the

emergency room where she worked, but she would try to put those feelings aside. Juror No. 0703 said sitting as a juror in this case made him uncomfortable because he worked in a local hospital trauma center "and we have potential for retaliation and we've seen retaliations in the past. That would be my only concern." Juror No. 0703 said he could focus on the evidence during trial, "it's just a matter of walking out of the courtroom that would be the concern, potentially." Questioned outside the presence of the other jurors, Juror No. 2256 explained that she was a bank manager and felt "uncomfortable coming into a room with a possible murder suspect because I was involved in a takeover robbery and it was a gang connection and they came in with shotguns to the branch where I worked."

On the second day of voir dire, the trial court made the following statement: "Ladies and gentlemen, it was made apparent to me that some jurors have concerns about their name being called or whatever, concerns. [¶] I have been in this business 40 years. I've never had an issue with this. I think people are making it a bigger deal out of this than it really is. [¶] Names were called when people didn't respond to numbers. And, actually, it's only been recently we even used numbers. So, I think those of you that are concerned about it are concerned about things that really aren't in issue."

The trial court's statement suggested that the jurors who had expressed concerns had done so outside the normal voir dire process. It did not identify which jurors had expressed concern and neither the prosecutor nor defense counsel asked for that information. Defendant did not then seek any further action by the trial court; he did not ask the trial court to engage in any investigation, nor did he ask for a mistrial. A panel plus two alternate jurors were sworn shortly thereafter, and trial was adjourned for the day. The jury included three of the five jurors whose names had been called.[3]

The next day, before opening statements and outside the presence of the jury, the trial court and counsel engaged in the following colloquy:

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[3] The three who became sworn jurors were: Juror No. 1981, Juror No. 3826 and Juror No. 5949. Juror Nos. 1997 and 0703 were excused for varying reasons.

"[DEFENSE COUNSEL]: Yesterday, after I got home and got to thinking about what happened yesterday, it began to bother me more and make me angry, as the court is well aware, I was angry yesterday that jurors were stated or were upset that this court called names of jurors that did not respond to their juror I.D. numbers. They were – they made statements that they were concerned because this is a gang case, there will be retaliation and discussed family members and things of that nature.

My – They also stated that they were not the only two that had that concern. Which insinuates that they had talked to other jurors, that the two jurors had talked among themselves and maybe that they were also talking among other jurors.

If the jury were to have this emotion that ran through it that had nothing to do with the evidence of the case, I think that is improper. I do believe at this point I need to ask for a mistrial and I would submit on that. I'm very concerned that [defendant] will not have a fair trial because of this.

THE COURT: Well, any time you use the word 'gang' it's going to cause certain emotions to be aroused, that's just the nature of the beast.

The jurors were admonished. They've all indicated they can be fair and impartial. And for that reason, I'm going to deny the request for a mistrial.

[DEFENSE COUNSEL]: And, Your Honor, I apologize and I hear the court's ruling. I did also just want to state that what angered me and concerned me most was that I asked each and every juror and I believe [the prosecutor] asked several jurors whether there was anything that concerned them, whether there was any problem, anything we had not discussed and none of them said anything in open court, yet they felt compelled to talk about it not in open court behind closed doors and to alert the bailiff.

So, that is my main concern.

[THE PROSECUTOR]: Only thing I would say about that is I don't know that it didn't happen after they had already been spoken to. So maybe they had been spoken to and then somebody's name was called and came up at that point.

THE COURT: Jurors expressed concern about gangs throughout the pendency of the jury selection. Like I said, it's a problem we have with these cases and I don't know how to eliminate it. But I think it's been addressed and the motion for mistrial is denied."

The gist of defendant's argument on appeal is that the potential jurors who apparently discussed the gang-related nature of the case engaged in prejudicial misconduct under

section 1122, and it was an abuse of discretion to deny his motion for mistrial based on such misconduct. We find no error.

2. The Legal Principles

Whenever the trial court is put on notice that good cause to discharge a juror may exist, the trial court " 'must conduct a sufficient inquiry to determine facts alleged as juror misconduct' . . . . [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985.) Whether misconduct occurred is a question of fact which we review for substantial evidence. Under that standard, we " 'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 195.) If supported by substantial evidence of misconduct, we review for abuse of discretion the decision whether to discharge the juror as opposed to giving an admonition. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) Prejudice is presumed from a showing of misconduct, but the presumption can be rebutted by proof that there was no actual prejudice. (*People v. Pierce* (1979) 24 Cal.3d 199, 207.) Whether " 'a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*Jenkins*, at p. 986.)

"After the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct. The instructions shall include, among other matters, all of the following admonitions: [¶] (1) That the jurors shall not converse among themselves, or with anyone else, conduct research, or disseminate information on any subject connected with the trial. . . ." (Pen. Code, § 1122, subd. (a)(1).) The same admonishment must be given at each adjournment. (§ 1122, subd. (b).) Failure to object or call the trial court's attention to the lack of an admonishment constitutes a forfeiture of the issue on appeal. (*People v. Weaver* (2001) 26 Cal. 4th 876, 908.)

Section 1122 applies only after a jury is sworn. (*Weaver, supra*, 26 Cal.4th at p. 908.) While it has been held that giving the admonition to prospective jurors "constitutes a sound judicial practice," the failure to do so does not violate the statute

(*Weaver* at p. 909, citing *People v. Horton* (1995) 11 Cal.4th 1068, 1094.) Nor is it error under the state or federal constitutions. (*Weaver,* at p. 909 ["[W]e are unaware of any constitutional requirement that our trial courts admonish prospective jurors so far in advance of a trial. Certainly defendant does not cite any authority to that effect."].) In *Weaver,* our Supreme Court explained a defendant's rights under both the state and federal Constitutions to a fair trial, impartial jury, and reliable verdict are protected by his ability to excuse for cause or peremptorily prospective jurors who discuss the case. (*Id.* at p. 909.) Defendant does not claim as error any failure to instruct potential jurors in advance of the jury being sworn.

3. Analysis

Assuming for purposes of argument that it was misconduct for potential jurors to discuss among themselves the gang-related nature of the case, defendant's failure to timely ask the court to make further inquiry constitutes forfeiture of that issue. (*Weaver, supra,* 26 Cal.4th at p. 908.) Defendant was made aware of the discussions before the jury was sworn. He then had the opportunity to determine which jurors engaged in the alleged misconduct by asking the court for further voir dire, and to excuse for cause or peremptorily any such juror. By waiting until after the jury was sworn, such that the entire panel would have to be discharged and voir dire begun anew, defendant forfeited the issue.

Even if the issue was not forfeited, defendant has failed to show prejudice. Under *Weaver, supra,* 26 Cal.4th at page 909, a defendant's rights under both the state and federal Constitutions to a fair trial, impartial jury, and reliable verdict are protected by the ability to excuse for cause or peremptorily prospective jurors who discuss the case in violation of a section 1122 admonition. The record is clear that defendant knew of the alleged misconduct before he accepted the jury panel, but did not seek to have the jurors who engaged in such conduct excused. On this record, he has not shown how he was prejudiced by the denial of his mistrial motion.

The prospective jurors were examined at length on gangs and any biases they might have in a gang case. The trial judge also had some "plain talk" for the jury,

advising the panel that he had significant experience in these types of cases and was trying to address any concerns jurors might have had. We see nothing in the record that suggests any juror had a bias against either side in this case – both defendant and the victims were gang members – or that a juror had failed to answer fully all voir dire questions.

We are not persuaded otherwise by defendant's argument that "the trial court's perfunctory response to alleviate the juror fears is confirmed by" the fact that, after the prosecution had completed its case, Juror No. 4709 informed the trial court that she belatedly recognized "several faces of the people taking in the court proceedings." Juror No. 4709 did not know how these people were associated with defendant. Upon further questioning, Juror No. 4709 said it was not until a video was introduced into evidence that she recognized defendant as the grandson of her deceased neighbor. Juror No. 4709 was excused. We do not see how Juror No. 4709's late recognition of defendant relates to the alleged misconduct during voir dire.

B. The Postsentence Probation Report

Defendant contends it was an abuse of discretion for the trial court to direct that a postsentence probation report "be sent directly to the Department of Corrections and Rehabilitation" and not to him because it deprived him of the opportunity to review and contest its contents. He maintains the matter should be remanded for a new "sentencing hearing after [defendant] has had an opportunity to review the probation [report] . . . ." We find no error.

1. Presentence Reports

The flaw in defendant's argument is that he conflates presentence and postsentence probation reports. They are not the same. Presentence probation reports are "used by judges in determining the appropriate term of imprisonment in prison or county jail under section 1170(h) and by the Department of Corrections and Rehabilitation, Division of Adult Operations in deciding on the type of facility and program in which to place a defendant." (Rule 4.411(d).) Presentence probation reports are governed by section 1203. Pursuant to subdivision (g) of that statute, if a defendant convicted of a

felony is not eligible for probation, whether to order a presentence probation report is within the trial court's discretion. (§ 1203, subd. (b), (g); see *People v. Dobbins* (2005) 127 Cal.App.4th 176, 180.)

With "respect to presentence probation reports, fundamental fairness demands that such reports be founded on accurate and reliable information." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28.) Accordingly, the defendant may challenge a presentence probation report at the sentencing hearing. (*People v. Welch* (1993) 5 Cal.4th 228, 234.) To assure that a defendant has a meaningful review opportunity, section 1203 directs that any such report "shall be made available to the court and the prosecuting and defense attorneys at least five days, or upon request of the defendant or prosecuting attorney nine days, prior to the time fixed by the court for the hearing and determination of the report, and shall be filed with the clerk of the court as a record in the case at the time of the hearing." (§ 1203, subd. (b)(2)(E).) Failure to challenge the presentence probation report at the sentencing hearing constitutes a waiver of the issue on appeal. (*Welch,* at p. 234.)

2. ***Postsentence Reports***

By contrast, postsentence probation reports are governed by section 1203c, which in relevant part provides: "Notwithstanding any other law, whenever a person is committed to an institution under the jurisdiction of the Department of Corrections and Rehabilitation, . . . it shall be the duty of the probation officer . . . to send to the Department of Corrections and Rehabilitation a report of the circumstances surrounding the offense and the prior record and history of the defendant, as may be required by the Secretary of the Department of Corrections and Rehabilitation. [¶] . . . [¶] (b) These reports shall accompany the commitment papers. . . ." (§ 1203c, subd. (a)(1) & (b).) "Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report." (Rule 4.411(d).) Defendant has cited to no legal authority, and our independent research has found none, that requires copies of a section 1203c

postsentence probation report to be filed in the trial court or sent to the prosecutor or defense counsel.

3. ***Application***

Here, it is undisputed that defendant was statutorily ineligible for probation because he had committed murder and attempted murder while personally using a firearm. (See § 1203.06, subd. (a)(1)(A); *People v. Murray* (2012) 203 Cal.App.4th 277, 289, superseded by statute on other grounds as stated in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1370-1371.) As such, and because restitution was stipulated to and is not an issue on appeal, the trial court had discretion to order a presentence probation report but was not required to do so. (§ 1203, subd. (g); *People v. Middleton* (1997) 52 Cal.App.4th 19, disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745.) At no time did defendant request a presentence report and he does not claim on appeal that a presentence report should have been ordered. Thus, this point is waived. (See *People v. Franco* (2014) 232 Cal.App.4th 831, 834 [supplemental report for defendant ineligible for probation waived by failure to request].)

In contrast, a postsentence probation report was mandatory under section 1203c. In compliance with the statutory command, the sentencing minute order directs: "Probation to prepare and submit a postsentence report to the California Department of Corrections and Rehabilitation (CDCR) pursuant to Penal Code section 1203c." Defendant requested that the appellate record be augmented with the probation report prepared in response to the trial court's January 14, 2015 order. In response to that request, the superior court clerk certified that the "probation officer's report is not in the case file. According to the [judicial assistant], 'The report was ordered via Code 798, which means probation sent the report straight to' " the Department of Corrections and Rehabilitation.

The trial court complied with the statutory mandate by ordering the postsentence probation report be sent directly to the CDCR. Section 1203c did not require a copy of the postsentencing probation report be filed in the trial court or provided to the prosecutor or defense counsel. By definition, the trial court did not rely on the section 1203c

*post*sentencing report in sentencing defendant. The cases upon which defendant relies for a contrary result are inapposite because they all concern section 1203 presentencing probation reports.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.