Filed 10/17/13 P. v. Cardenas CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RAYMOND CARDENAS, Defendant and Appellant.	B241082 (Los Angeles County Super. Ct. No. VA 114568)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Rachel Lederman, 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 David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Raymond Cardenas challenges his conviction on two counts of attempted murder and shooting at an occupied vehicle, arguing the trial court violated his constitutional rights by denying a motion to strike a victim's in-court identification and denying a motion for a new trial based on juror misconduct. We affirm.

PROCEDURAL HISTORY

Appellant was charged in a four-count information arising from two separate shooting incidents. As to the first incident, appellant was charged with first degree murder (Pen. Code, § 187, subd. (a))[1] (count 1) and attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664) (count 2). As to the second incident, appellant was charged with attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664) (count 3) and shooting at an occupied vehicle (§ 246) (count 4). The information also alleged firearm and gang enhancements for each count.[2]

After trial, the jury found appellant guilty on counts 3 and 4 and found the firearm and gang enhancements true as to those counts. The jury deadlocked on counts 1 and 2. The court took the verdict on counts 3 and 4, denied a motion for a mistrial, dismissed two jurors and replaced them with alternate jurors, and ordered the jury to resume deliberations. The jury was still unable to reach a verdict on counts 1 and 2, so the court declared the jury deadlocked, excused the jurors, and declared a mistrial on counts 1 and 2. Thereafter, the court denied appellant's petition to disclose juror information and motion for a new trial based on juror misconduct.

Pursuant to a plea agreement, the court dismissed counts 1 and 2 and appellant pled no contest to one count of voluntary manslaughter (§ 192, subd. (a)) (added as count 5 to the information by interlineation) and no contest to a personal gun use enhancement

---

[1] Undesignated statutory citations are to the Penal Code.

[2] The following enhancements were alleged: for counts 1 and 2, personal use and discharge of a firearm (§ 12022.53, subds. (b), (c) & (d)); for count 3, principal use and discharge of a firearm (§ 12022.53, subds. (c) & (e)(1)); for counts 1, 2, and 3, criminal street gang (§ 186.22, subd. (b)(1)(C)); for counts 2, 3, and 4, criminal street gang (§ 186.22, subd. (b)(4)); and for count 4, criminal street gang (§ 186.22, subd. (b)(1)(B)).

for that count. On count 3, the court sentenced appellant to life in prison, plus 20 years for the firearm enhancement, and stayed the term for the gang enhancement. For the manslaughter count, the court sentenced appellant to the upper term of 11 years, plus four years for the firearm enhancement, which would run concurrent with the sentence on count 3. The court stayed appellant's sentence on count 4 pursuant to section 654. The court imposed various fines, fees, and custody credits not at issue here. Appellant timely appealed.

STATEMENT OF FACTS

The counts alleged in the information were based on two separate shooting incidents: the shooting supporting counts 1 and 2 (and later, count 5) took place during a birthday party in Norwalk on February 12, 2010, during which one person was killed and another injured; and the shooting supporting counts 3 and 4 took place in the City of Paramount on February 26, 2010, which resulted in no injuries. Appellant raises only issues related to the second incident and his conviction on counts 3 and 4, so we will focus our discussion on the facts supporting those counts.[3]

On February 26, 2010, Isaiah Aguilar arrived by car to a friend's house in the area of Paseo Street and Pimenta Avenue in the City of Paramount. He noticed a four-door Volkswagen carrying three Hispanic males drive slowly by the house, about five to 10 miles per hour. He looked at the men for five to 10 seconds. At the time, he was not afraid and felt calm, getting a "good look" at the people inside the car. He parked and went into his friend's house, and about 30 minutes later (around 4:20 or 4:30 p.m.), he left in his car, making a left on Paseo Street. At the intersection of Oliva Avenue and Paseo Street, he saw a male youth named Timothy W. engaged in a verbal altercation with the men he had seen in the Volkswagen.

The men returned to the Volkswagen and proceeded in the direction of Aguilar's car, and when Aguilar stopped at a stop sign, the Volkswagen pulled alongside. Aguilar

---

[3] The trial court declined appellant's request to sever the two incidents into separate trials, finding the jury could differentiate between the two incidents on the two dates.

recognized the same three men he saw earlier. They looked at him, and he looked at them for approximately five seconds, looking at each one's face individually. The person in the front passenger seat, who Aguilar later identified as appellant, was wearing a blue Pittsburgh Pirates baseball cap with a "P" on it and he yelled out, "Dog Patch," referring to the Dog Patch gang. The man in the back seat of the Volkswagen moved and then jumped out of the car with a small handgun, at which point Aguilar drove away. Aguilar heard three gunshots and saw the shooter in his rear-view mirror standing and shooting at him. He was not hit, but a bullet struck the left taillight and went through the trunk.

The Dog Patch gang and a gang called East Side Paramount are enemies. Aguilar knew at the time Timothy's brother was a member of the East Side Paramount gang. Aguilar's own brother was a member of the East Side Paramount gang and Aguilar himself had associated with that gang in the past, although he denied being a member.

Aguilar testified that Detective Kasey Woodruff interviewed him at his house two days later on February 28. Aguilar identified appellant in a six-pack photographic lineup (six-pack photo lineup) as the one wearing the blue hat with the "P" on it and who yelled, "Dog Patch." He testified Detective Woodruff did not force him to select anyone and he identified appellant "[b]ecause it was who [he] saw." He described appellant as a "dark little Mexican cat" or "that little dark fool" and recognized his complexion, but not his facial features. Aguilar testified when he selected appellant's photograph, Detective Woodruff told him something like, "You're right on, boss. You hit the nail right on the head."

Detective Woodruff recorded the interview and defense counsel played part of the recording for the jury. On the recording, Aguilar described the individuals in the car as "three fools, there was a regular cat driving with hair, mustache, that was the driver, light skinned like Mexican guy, and then there was a dark little Mexican cat like a little young fool, like maybe I would say 17, 18 or 19 years old." Detective Woodruff told Aguilar, "All right I'm going to show you some photos. Just because people are in the photos doesn't mean it is them. Now, just take it for what it is. If the person is there, the person is there, if they are not, they're not. All right? My job is to eliminate people not to . . .

You know what I'm saying?" They discussed the route of the cars for a few moments. Detective Woodruff repeated, "Like I said, persons involved may or may not be in these photos. Okay? Don't assume anything. Just take a good look. I can tell you right now before we do this, I already knew who it was. All right? Like I told you about your brother's CD and everything? I already know I (*inaudible*) you, so I'm just trying to figure out if we are looking at the same people here." The following exchange then took place:

"[Aguilar:] Okay, I'll be able to let you know (*inaudible*).

"[Detective Woodruff:] Where was he sitting at? Shotgun?

"[Aguilar:] Yeah.

"[Detective Woodruff:] Circle him. (*inaudible*) got to go?

"[Aguilar:] Yeah, I think yeah. That was this little fool.

"[Detective Woodruff:] You're already right on boss, you hit it right off the top of the nail.

"[Aguilar:] I know it was for sure it was that guy.

"[Detective Woodruff:] He was riding shotgun?

"[Aguilar:] The fool was shotgun, but he wasn't [the] one that was shooting."

Aguilar confirmed the person he identified was the one who yelled "Dog Patch." Detective Woodruff also told him, "Well, you did that one quick," and "I know for sure that guy was in the car."[4]

In preparing to show Aguilar the six-pack photo lineup, Detective Woodruff did not provide Aguilar with a form admonition usually used for six-pack photo lineups. He explained at trial he did not use the form admonition because gang members are often reluctant to report crimes and the form might scare them into not talking to him; instead, he recorded the conversation without Aguilar's knowledge. At trial, Detective Woodruff confirmed he told Aguilar he knew who was in the car during the incident, but he denied

---

[4] Detective Woodruff showed Aguilar a second set of photographs, and Aguilar said one person looked "kind of familiar," but he did not identify anyone.

pointing to appellant's photograph or mentioning appellant's name at any time. He admitted on cross-examination he confirmed Aguilar's identification of appellant three separate times during the interview.[5]

When he testified at trial, Aguilar denied Detective Woodruff's comment about identifying the right person had influenced him, and he "knew who it was before he even proclaimed that." Defense counsel showed Aguilar his preliminary hearing testimony during which Aguilar testified he "thought" appellant "might be" the front passenger, but by the end of the interview, he was "sure" appellant was the front passenger.

Aguilar identified appellant at the preliminary hearing. After testifying at the preliminary hearing, Aguilar saw Dog Patch gang graffiti in front of his house, next to his house, at the dead end of his block, and on the corner of his block, which made him worried for his safety and his family.

Aguilar also identified appellant at trial as the man who said, "Dog Patch." He testified he got a good look at appellant in the car but not as good a look at the other two men. He had never seen appellant or the others in the Volkswagen and he had no contact with appellant since.

The parties stipulated that, on February 26, 2010, Deputy Rocio Encinas recovered four expended .22-caliber casings in the middle of the street in front of 8827 Paseo Street in Paramount.

Detective Woodruff testified as a gang expert for the prosecution as to all the counts. He described the territory and membership of the Dog Patch gang; the gang's primary activities of vandalism, drug and weapons violations, assaults, robberies, car thefts, carjackings, illegal shootings, and murder; members' intimidation of the community in their territory; and the fact that members often wear tattoos. The gang's enemies include East Side Paramount, which claims territory around Paseo Street and Pimenta Avenue. He explained if Dog Patch graffiti crossed out a rival gang's graffiti, as

---

[5] Based on three field identification cards from 2009 and 2010, Detective Woodruff also testified he believed Aguilar was an East Side Paramount gang member.

occurred near Aguilar's house, it signaled the gangs were enemies or Dog Patch wanted to kill the other gang. Also, he testified two Dog Patch members had been convicted of firearm and drug offenses in 2008 and 2010.

Detective Woodruff testified appellant had Dog Patch gang tattoos, he had appeared in photographs making gang signals with other Dog Patch members, and he had admitted in February 2009 he was a Dog Patch member with the moniker (nickname) "Crook." Detective Woodruff also explained the blue hat with a "P" on it would be worn by several gangs in Paramount, including Dog Patch.

As relevant to counts 3 and 4, Detective Woodruff had downloaded a rap video from Youtube.com, which included an individual identifying himself as "Cartoon," who was Aguilar's younger brother. In the video, certain terms were used that Detective Woodruff interpreted as insults to Dog Patch and a challenge by East Side Paramount telling Dog Patch members not to come into their neighborhood or they would be shot or killed. There was a reference to "Squeal" on the video, which was derogatory for "Squirrel," a Dog Patch member, who uploaded a responsive video. The word "Squirrel" also appeared on graffiti outside Aguilar's house. Given a hypothetical set of facts based on the facts underlying counts 3 and 4, Detective Woodruff opined the vehicular shooting in Paramount was committed for the benefit of, and in association with, a criminal street gang.

Appellant did not testify. In defense of counts 3 and 4, Jose Franco testified he was inside a house on Paseo Street about 4:30 p.m. on February 26, when the shooting took place. He heard gunshots and saw a gray car drive away, but he was unable to see the faces of anyone inside. He saw the car for only two or three seconds. He did not see Aguilar or his car that day. Deputy Encinas arrived at the scene about 5:00 p.m. that day and interviewed Franco, who said he had heard five gunshots and went outside, saw a vehicle with five male Hispanics yelling something toward the direction of the gunshots, and noticed the driver wore a blue hat with the letter "P." At trial, however, Franco denied going outside, could not remember telling Deputy Encinas there were five occupants in the car, and denied saying the driver wore a blue hat with a "P" on it.

Forensic psychologist Dr. Mitchell Eisen testified as an expert on eyewitness memory and suggestibility. He explained the reconstructive nature of memory and how errors can occur because all memories contain gaps the mind tries to fill. Sometimes an individual also mistakes the source of information. He described the effect of stress and trauma on memory, such as during a traumatic event, which creates a "massive distraction" that can limit the details a witness remembers and can skew a witness's sense of time. Intoxication and the presence of a weapon can also affect memory. And memory reports given closer to an incident are generally more accurate than reports given later.

In the context of photographic lineups, Dr. Eisen testified an admonition is used because witnesses assume the police know something they do not. If an officer tells a witness she knows who committed the crime, that would be counter to the admonition that the officer does not know whether a photo of the actual culprit is in the lineup, which could lead to false identification. Thus, using an admonition is a "best practice," but it does not guarantee against a false identification. Dr. Eisen also explained the person administering the lineup can influence the identification if the lineup is not double-blind, that is, the person administering the lineup does not know who the suspect is. If the suspect is not in the lineup, the witness may also use "relative judgment" to select a person out of the options presented who most closely matches the suspect. And a witness may be confident in a selection, but confidence is generally not a good predictor of accuracy, especially if the witness is given feedback the identification is correct. Confidence also increases over time, but accuracy decreases as the witness feels more confident by resolving details in his or her mind. Likewise, a witness's memory can conform to other witnesses' memories as they discuss the incident.

He further testified that feedback confirming an identification, even a mistaken identification, can increase a witness's confidence in the identification to 100 percent and affect the witness's confidence in their memory of the event. When given a hypothetical based on Detective Woodruff's confirming comments to Aguilar after his identification, Dr. Eisen declined to opine on that specific scenario, but reaffirmed positive feedback

can increase a witness's confidence in a false identification. Even if a witness is wrong in an initial identification, he or she will continue to identify that person over time.

DISCUSSION

1. Motion to Strike Aguilar's Identification

After Aguilar testified at trial, defense counsel moved to strike his in-court identification of appellant on the ground that appellant's due process rights were violated by Detective Woodruff's overly suggestive police identification procedure during the interview at Aguilar's house. The trial court denied the motion, explaining there was no single correct identification procedure and finding Detective Woodruff did not "unduly prejudice the identification, or suggest to Mr. Aguilar who he should pick out." While we agree most of the circumstances leading to Aguilar's initial identification of appellant were not unduly suggestive, Detective Woodruff's confirmation of Aguilar's selection several times created an unduly suggestive procedure that undermined Aguilar's later in-court identification. However, because Aguilar's identification was reliable, appellant's due process rights were not violated and the trial court properly refused to strike Aguilar's in-court identification.

In determining whether an identification procedure violates due process, we consider (1) whether the identification procedure was unduly suggestive and unnecessary; and (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. (*Perry v. New Hampshire* (2012) __ U.S. __, __, 132 S.Ct. 716, 724-725; *People v. Thomas* (2012) 54 Cal.4th 908, 930 (*Thomas*).) The defendant bears the burden to demonstrate an unreliable identification procedure. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*).) We review the trial court's decision de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459.)

A. Unduly Suggestive and Unnecessary Procedure

Appellant claims the identification procedure Detective Woodruff used with Aguilar at his house was unduly suggestive and, as a result, tainted Aguilar's in-court identification because Detective Woodruff said he already knew who the perpetrators

were before Aguilar identified appellant; he suggested appellant was sitting in the front passenger seat of the Volkswagen; he told Aguilar to circle appellant's photograph after Aguilar said something inaudible on the recording of the interview; and he confirmed Aguilar's identification after Aguilar selected appellant. With the exception of Detective Woodruff's confirmation of Aguilar's selection (discussed below), these circumstances did not render the identification procedure unduly suggestive. Detective Woodruff used a six-pack photo lineup and admonished Aguilar before the identification that the suspect may not have been in the lineup at all, both of which guarded against singling out or drawing attention to appellant. (*Thomas, supra*, 54 Cal.4th at p. 932 [finding live lineup was not unduly suggestive when police compiled a "reasonably balanced group of subjects" and warned that perpetrators may not be in the lineup].) There is nothing in the record to suggest Detective Woodruff did anything to influence Aguilar before he made his initial identification.

However, Detective Woodruff's repeated and unnecessary confirmation that Aguilar correctly identified appellant tainted Aguilar's later in-court identification and rendered it the result of an unduly suggestive and unnecessary procedure. Aguilar appeared fairly confident when he initially identified appellant, saying "Yeah, I think yeah. That was this little fool." Immediately, however, Detective Woodruff confirmed his selection: "You're already right on boss, you hit it right off the top of the nail." Aguilar responded, "I knew it was for sure it was that guy," suggesting that any lingering doubts in Aguilar's mind instantly disappeared. Aguilar's response was consistent with Dr. Eisen's expert testimony that a witness's confidence level in even a false identification can rise to 100 percent certainty under these circumstances. Although at trial Aguilar denied being influenced by Detective Woodruff and he "knew who it was before he even proclaimed" that Aguilar had selected appellant correctly, it is difficult to imagine a witness maintaining an independent belief in the correctness of his in-court identification in light of such forceful confirming statements.

Thus, while Aguilar was not improperly influenced before initially identifying appellant, his later in-court identification was improperly influenced by Detective

Woodruff's unnecessary confirming statements. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242-1243 [admitting witness's initial "virtually certain" identification but excluding later identifications after police had confirmed initial identification, which "had a corrupting effect on any identification that did, or might, follow -- but that in view of [the witness's] certainty, it did not have such an effect on the preceding identification, as it were, 'retroactively.'"], overruled on another ground by *People v. Edwards* (1991) 54 Cal.3d 787, 835; see also *People v. Wash* (1993) 6 Cal.4th 215, 243-245 [allowing testimony on photographic lineup identifications that were later confirmed by police because witnesses did not make in-court identifications and confined their testimony to the circumstances of the preconfirmation lineups and identifications].) We must therefore determine whether Aguilar's identification was nevertheless reliable.

B. Reliability of Identification

In assessing reliability, we consider a host of factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116 (*Manson*); *Thomas, supra*, 54 Cal.4th at p. 930.)

Applying these factors here, Aguilar's identification of appellant was reliable. When Aguilar first saw the Volkswagen and its occupants, it was daylight (around 4:00 p.m.), and he noticed the vehicle because it was driving slowly by. He felt calm at the time and got a "good look" at the men in the car for five to 10 seconds. He saw the men again around 30 minutes later when they were engaged in a verbal altercation with Timothy and when they pulled up next to him at the intersection, recognizing they were the men he saw drive by earlier. At the intersection, Aguilar looked at them for approximately five seconds, looking at each one's face individually. He noticed appellant in the front passenger seat with the blue baseball cap with a "P" on it and remembered him yelling out, "Dog Patch." Two days later he identified appellant in the six-pack photo lineup with Detective Woodruff, appearing fairly confident of his

identification before Detective Woodruff confirmed his selection. Aguilar was unable to identify appellant's facial features, but he described appellant as a "dark little Mexican cat" or "that little dark fool" and recognized his complexion. Under these circumstances, Aguilar's identification was not so unreliable to create the "'very substantial likelihood of irreparable misidentification'" rising to the level of a due process violation, and any weaknesses in his identification were for the jury to consider. (*Manson, supra*, 432 U.S. at p. 116.)

2. Motion for New Trial Based on Juror Misconduct

Appellant challenges the trial court's denial of a new trial motion based on juror misconduct, arguing the court erred in denying the motion and, alternatively, the court should have granted his request to disclose juror information. We disagree.

A. Background

Prior to the jury's deliberations, the trial court instructed the jury with CALJIC No. 2.60 regarding appellant's decision not to testify: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way."

After the jury returned guilty verdicts on counts 3 and 4 and the court declared a mistrial on counts 1 and 2, appellant filed a petition pursuant to Code of Civil Procedure section 237 to disclose juror information, based on allegations of juror misconduct stemming from counsel's discussion with jurors after trial. In his declaration in support of the petition, counsel explained he had spoken with Juror Nos. 1, 2, 3, 6, 7, and 8 after trial about their deliberations. He stated: "At one point during the conversation I asked the jurors if they were bothered at all by the fact that the Defendant did not testify. A few of the jurors answered, 'no' and stated that the fact that Defendant did not testify did not affect their decision. I explained that I always ask that question when talking to jurors because I have no way of knowing if the Defendant's failure to testify played a part in their decision. Juror 8 then stated, 'there were a few of us who said, "if he's really

innocent, why wouldn't he take the stand in his own defense," but that didn't affect our decision.' Juror 3 was nodding in agreement as Juror 8 said this."

The court delayed ruling on the petition so it could send out inquiry letters to jurors regarding misconduct. In relevant part, the letter indicated the court was going to hold a hearing on "whether and to what extent the defendant's failure to testify entered into your vote of guilty in counts 3 and 4." Jurors were given the option of either appearing at the hearing, or calling or writing the court to indicate "whether you discussed this matter in jury deliberations, and if so whether it affected your verdict in any way." Thereafter, on April 5, appellant filed a motion for a new trial on counts 3 and 4, again raising the same juror misconduct issue, among other issues.

The court held a hearing, noting it had received written responses or telephone calls from six jurors.[6] Juror No. 6 appeared at the hearing. Juror No. 8 did not respond or appear. When asked whether appellant's failure to testify entered into deliberations, Juror No. 6 stated the issue did not come up during deliberations on counts 3 and 4, but came up with regard to counts 1 and 2. Juror No. 6 explained, "Basically, in there there was two women that said something about it, but it was also stated to them that the jury instructions said that we weren't suppose to take anything from that. . . . [B]ut that was about it." Also, as to counts 1 and 2, the two jurors "would have liked to have heard what he said. But it was also stated that there was really nothing offered that he was any place else, and there was nothing, the person that came in was talking about they're under, you know, possible threats to themselves for coming up there and even testifying, so he's not going to do that just halfheartedly." In Juror No. 6's view, "none of that, I think, affected any of what was stated." The court then asked, "Insofar as the guilty verdict in counts 3 and 4, whatever was said in there didn't affect your deliberations, did it?" Juror No. 6 responded, "No. I mean it actually came fairly fast." Juror No. 6 also indicated, "after the weekend break, especially one girl said in there that she was worried about somebody

---

[6] The written responses were not included in the record on appeal. We presume they contained no information helpful to appellant because he has not argued otherwise.

taking descriptions . . . of the jurors. And basically it was said when they go out in the hallway their pictures to be taken in the hallway by people sitting on the benches out there. So I think that was, that part of it was intimidating to that one person."

Because Juror No. 8 did not respond to the court's letter, defense counsel requested the court disclose Juror No. 8's contact information or order Juror No. 8 to appear in court. The court denied the request, relying on "confidentiality of the identity of jurors. Not only in this particular case, which is a very serious case with gang overtones, but in all criminal cases I want to protect the sanctity of the jury. I don't want to run the risk of this getting around and somehow in the future have it [affect] open, candid deliberations of jurors in any case. [¶] Additional to that, I don't think this rises to a level that we need to talk to Juror number 8. She made comments to you after the case was over and after the jury was excused. In response to that we sent out letters to all of the jurors involved. We receive[d] responses now of seven of them. While at least one has confirmed the fact that Juror number 8 had a conversation outside the courthouse with you, with the defense attorney, he over heard that. None of them had indicated to me, in any of these juror responses, that if it did come within their ear shot that it affected their deliberations in any way. So I don't think we need to release any information as far as Juror Number 8 is concerned."

The court also denied the motion for a new trial based on juror misconduct: "I think case law also is such that passing references to comments like that don't rise to a level of misconduct that warrants a new trial. Innocent mentions of the facts too, as long as it doesn't substantially [affect] the deliberative process of the jurors, then it's basically harmless error. That is at most what we have in this case. If, in fact, it even occurred prior to them coming back with a unanimous verdict in counts 3 and 4. It was harmless. It did not prejudice the defendant in any way. [¶] So in any event, we have six, now seven responses from jurors. They will be made part of the official court record indicating that it didn't affect them in any way. Some of them didn't even realize that it happened. So I will acknowledge the fact there was maybe a passing reference to the fact

that he did not testify in this case[;] however that did not rise to a level where I have to grant a new trial on counts 3 and 4."

B. Denial of New Trial Motion

A jury commits misconduct when it violates the court's instruction not to discuss a defendant's failure to testify. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425 (*Leonard*).) "This misconduct gives rise to a presumption of prejudice, which 'may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.'" (*Ibid.*) In denying the motion for a new trial, the trial court here appeared to assume admissible evidence demonstrated misconduct when the jurors mentioned appellant's failure to testify, but concluded appellant was not prejudiced by the misconduct. We, too, focus on the prejudice requirement.[7] We review de novo whether the defendant was prejudiced by the jurors' comments on his failure to testify. (*Ibid.*)

---

[7] Normally, the trial court should undertake a three-step inquiry in addressing juror misconduct claims in the context of a motion for a new trial: "'First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.]'" (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1338.) Evidence Code section 1150 provides in relevant part: "Upon inquiry as to the validity of the verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." In other words, "[t]o challenge the validity of a verdict based on juror misconduct, a defendant may present evidence of overt acts or statements that are objectively ascertainable by sight, hearing, or other senses. [Citations.] No evidence may be presented concerning the subjective reasoning processes of a juror that can neither be corroborated nor disproved; rather, the effect of any misconduct is evaluated based on an objective standard of whether there is a substantial likelihood of juror bias. [Citations.]" (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116.)

Like the trial court, we find the record rebuts the presumption of prejudice, that is, there was no substantial likelihood appellant suffered actual harm from juror misconduct. Although Juror No. 8 told defense counsel, "'"there were a few of us who said, 'if he's really innocent, why wouldn't he take the stand in his own defense,'"'" the comment was apparently brief, and Juror No. 6 clarified that the issue did not come up at all during deliberations on counts 3 and 4; it only came up with regard to counts 1 and 2. To argue otherwise, appellant points to Juror No. 6's comment that "it was also stated that there was really nothing offered that [appellant] was any place else," suggesting the jury must have been discussing counts 3 and 4 at the time because it was undisputed appellant was at the scene of the shooting for counts 1 and 2. But that inference is not supported by the context of the comment, which was made in direct response to the trial court's question, "It was only as to 1 or 2 that one or two jurors mentioned the fact he didn't testify?" Juror No. 6 also explained two of the jurors who had mentioned appellant's refusal to testify were told "that the jury instructions said that we weren't supposed to take anything from that."

Given the jurors' discussion and consideration of appellant's failure to testify was brief and unrelated to counts 3 and 4, and the jurors were reminded not to consider that fact, there is no substantial likelihood of harm justifying a new trial. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 727 [no prejudice from brief discussion of defendant's failure to testify, given offending juror was immediately reminded he could not consider

---

In this case, the trial court did not analyze the admissibility of any of the jurors' statements under Evidence Code section 1150. (Indeed, the court appears to have solicited inadmissible evidence when it asked jurors in the letter it sent whether discussion of appellant's failure to testify "affected your verdict in any way.") Had the court undertaken this inquiry, it likely would have found at least some of those statements inadmissible, such as Juror No. 8's comment that appellant's failure to testify did not affect the decision, and Juror No. 6's testimony that it did not affect deliberations on counts 1 and 2. But the parties on appeal do not raise any evidentiary errors, so we decline to consider them. In future cases, the trial court should be sure to carefully undertake that analysis first, before determining whether prejudicial misconduct occurred.

that fact]; *People v. Loker* (2008) 44 Cal.4th 691, 749 [no prejudice from juror comments on defendant's failure to testify in light of foreperson's reminder it could not be considered]; *People v. Hord* (1993) 15 Cal.App.4th 711, 727-728 (*Hord*) [no prejudice from jurors' "[t]ransitory comments of wonderment and curiosity" and "oblique remark" about defendant's failure to testify, given discussion was not lengthy, jurors knew defendant had not testified, and foreperson admonished fellow jurors they could not consider defendant's not testifying].) Indeed, "the purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself." (*Leonard*, *supra*, 40 Cal.4th at p. 1425.) If the jury had drawn an adverse inference from appellant's refusal to testify, it would have convicted appellant on all counts, instead of deadlocking on counts 1 and 2, while convicting on counts 3 and 4. Thus, the trial court properly denied appellant's new trial motion.

C. Denial of Request to Disclose Juror No. 8's Information

Appellant alternatively argues the trial court abused its discretion in denying his request for identifying information for Juror No. 8 and the other jurors who did not respond to the trial court's inquiry. We disagree.

As relevant here, Code of Civil Procedure section 237, subdivision (a)(2) provides, "Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section." "'Any person'" seeking this information must petition the court and submit a "declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (Code Civ. Proc., § 237, subd. (b).) That includes a criminal defendant or defense counsel, provided he or she demonstrates the information is "necessary" for a new trial motion or "any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).)

The trial court "shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal

juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (Code Civ. Proc., § 237, subd. (b).) If the court sets a hearing, a juror may appear to protest the granting of the petition, and the court must sustain the protest if, "in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner." (Code Civ. Proc., § 237, subds. (c), (d).) The court must also make express findings in ruling on the petition. (Code Civ. Proc., § 237, subd. (d).)

"Good cause" is established when the jurors' alleged conduct was "'of such a character as is likely to have influenced the verdict improperly.'" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322 (*Jefflo*).) We review the trial court's order denying disclosure of the jurors' identifying information for abuse of discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

This is not a case in which the trial court denied appellant's request for juror information based only on defense counsel's declaration and without holding a hearing or further inquiring into the alleged misconduct. (See, e.g., *Jefflo*, *supra*, 63 Cal.App.4th at pp. 1322-1323 [finding defense counsel's declaration insufficient to justify holding a hearing on disclosure of juror information or sending letters to jurors].) Instead, the court sent out letters to all jurors, received responses from six of them, and held a hearing at which Juror No. 6 appeared. Because Juror No. 8 did not respond, however, defense counsel requested that the court either order disclosure of Juror No. 8's contact information or order her to appear in court. We must therefore decide whether, on this

record, appellant established good cause for further inquiry regarding Juror No. 8. We conclude he did not.[8]

As discussed above, Juror No. 6 explained that appellant's failure to testify came up only with regard to counts 1 and 2, so Juror No. 8's statement likely had no impact on the jury's deliberations on counts 3 and 4. Juror No. 8's statement also reflected merely curiosity on appellant's failure to testify, and not that she or any other juror drew an adverse inference from that fact. (*Hord, supra*, 15 Cal.App.4th at p. 727.) And the trial court heard from seven of the 12 jurors, none of whom indicated they considered or discussed appellant's failure to testify as part of counts 3 and 4. We cannot say the trial court abused its discretion in finding the jury's brief discussion of appellant's failure to testify did not influence the jury on counts 3 and 4 such that further disclosure of Juror No. 8's information was warranted.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J. GRIMES, J.

---

[8] We do not reach the trial court's holding that confidentiality of jurors in all cases generally, and in this case in particular with gang overtones, provided a compelling interest in preventing further disclosure of Juror No. 8's identifying information. We reject appellant's attempt to expand his argument on appeal to include a request for the identifying information of the other four jurors who declined to respond to the court's inquiry. Not only did appellant fail to make this request in the trial court, but he also cites nothing in the record to suggest those jurors had any information not already disclosed by the jurors who responded to the trial court's letter or testified.