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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. QUAN JEWEL MCKISSIC, Defendant and Appellant.	B231649 (Los Angeles County Super. Ct. No. VA115047)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dewey Lawes Falcone, Judge. Affirmed.

Marilee Marshall & Associates, Inc. and Marilee Marshall for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Quan Jewel McKissic appeals from the judgment entered upon his conviction by jury of first degree robbery (Pen. Code, § 211).[1] The jury found to be true the allegations that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b) and that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). The trial court sentenced appellant to state prison for the midterm of six years for his robbery conviction plus 10 years for his personal use of a firearm. The principal armed with a firearm enhancement was stayed. Appellant contends that (1) the trial court deprived him of his right to present a defense by refusing his request to instruct the jury on defense of others, (2) he was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel by virtue of his attorney's failure to argue for the admission of the victim's prior domestic violence conviction to show conduct in conformity, (3) he was deprived of his Sixth and Fourteenth Amendment rights to effective assistance of counsel by virtue of his attorney's failure to effectively present and argue a motion for a new trial based on juror misconduct, and (4) cumulative error requires reversal.

We affirm.

FACTUAL BACKGROUND

The parties

Larry Leflore (Leflore), a convicted felon,[2] lived with Sylvary in Lakewood.[3] At the time of the charged incident, he was never at their apartment because he was seeing another woman. But he still had the key to the apartment and had possessions there. A Monte Carlo

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Appellant was charged along with codefendants Christopher Earl Perera (Perera), Tracey Bernard Hale (Hale), and Simone Gaillander Sylvary (Sylvary). Appellant was tried only with Perera, as Hale and Sylvary did not go to trial, having entered a plea agreement.

2 Leflore had prior convictions for robbery, sale or possession of drugs with a gun and making false statements to police.

3 Sylvary, not LeFlore, was the named lessee on the lease, and she paid the rent while Leflore paid the utilities.

car registered to him, that he claimed was his, was left in the apartment parking space. Sylvary had use of the car and anything else in the apartment.

The incident

On April 24, 2010, near 2:00 or 3:00 p.m., Leflore and his new girlfriend drove by Sylvary's apartment to check on the Monte Carlo. It was parked in its usual place. Leflore told police that Sylvary was standing by the car and appeared angry when she saw him with another woman. At trial, he denied that Sylvary was by the car and telling the police that she was.

Leflore returned by himself approximately a half hour later. The Monte Carlo was gone, and an Impala belonging to Sylvary's friend, Shara, who was Perera's girlfriend, was parked in its place. Leflore used his key to enter the apartment and locked the door behind him. He was angry and confronted Sylvary about the missing car, which she said was hers. Leflore then pushed her onto the bed. He denied strangling, punching, hitting or beating her.

Leflore then felt a gun at the back of his head. He turned around and saw a Black man pointing a silver and black handgun at him. The man pushed Leflore into an open closet and onto a plastic storage bin. Then, two other Black men charged into the room, holding black handguns. They rummaged around the room. Sylvary walked out of the room when the guns were drawn.

One of the Black men told Leflore to "break it off," vernacular for, "Give me your property." Leflore gave the first gunman the chain and watch Leflore was wearing. He heard someone say, "one time," meaning the police were there. Someone also said, "I should kill him" or "just kill him." Leflore told Sergeant Scott Hoglund that it was appellant who said this. Two of the Black men quickly left, leaving Leflore with the gunman who had taken his jewelry. That man fled moments later.

Leflore went to get his gun in the other room but stopped when he looked outside and saw a police officer talking to Sylvary. He yelled to the officer not to believe her, he had not hit her, she had set him up to be robbed. He also yelled that, "They just robbed me. They have guns." He then went downstairs and accused Sylvary of setting him up.

While the robbery was going on, Sergeant Hoglund was on patrol in the area. Someone approached him and reported hearing shouting from an apartment. When Sergeant Hoglund got out of his car, he heard loud screaming which sounded like a heated argument by two or three people in Sylvary's apartment. He requested backup. The yelling stopped and moments later, appellant and Sylvary came out of the apartment building side by side. She had a brown Louie Vuitton bag in her hand, which Sergeant Hoglund saw her toss behind a parked car. He called to them, and Sylvary came over to him. Appellant kept walking. Sergeant Hoglund saw no visible injuries on Sylvary. After yelling out the window, Leflore came downstairs and approached the officer.

The investigation

Uncertain who was culpable, Sergeant Hoglund handcuffed both Leflore and Sylvary and placed them in separate patrol cars. He then retrieved the Louie Vuitton bag he had seen Sylvary toss. He showed it to Leflore, who said it was his and correctly described its contents.

Sergeant Hoglund also found a black, nine-millimeter, loaded handgun under a truck near where appellant had been walking, registered to a person residing at the same address appellant later gave as his home address. Deputy Robert Bankston recovered a silver and black, loaded, .45-caliber handgun, that was reported stolen from Victorville, from a flower bed near the gate leading into the pedestrian alleyway along the route appellant had taken. No latent fingerprints were found on the guns.

The three suspects were apprehended together. Sheriff's Deputy Wenceslao Agustin searched Hale and confiscated a watch and silver necklace with a cross. Deputy Edward Castro searched Perera and found seven pornographic DVDs, a brown wallet, some keys and currency. No gun was recovered from Perera. Deputy Castro also searched the area and found a vehicle pink slip with Leflore's name on it torn to pieces. Officer Jody Napuunoa searched appellant and found a fossil watch, keys and currency. All of these items were also identified by Leflore as belonging to him.

Field Show-up

Sergeant Hoglund took Leflore for a field showup to identify three men who had been detained. Separately, Leflore identified the suspects as the robbers, saying, "You got all three of them. I'm positive." Leflore did not identify the robbers at trial, testifying that he had identified them at the field showup without recognizing them because the police said that they recovered his belongings from them. He said that appellant was the one who pointed the black and silver gun at him.

Interview of Perera

Detective Mike Davis interviewed Perera after his arrest. Perera told him that his girlfriend, Shara, was Sylvary's friend and former roommate. Sylvary asked him to go with her to her apartment to pick up some belongings because she needed protection from Leflore, who was abusive. She told Perera that Leflore owed her money, and she was angry with him.

Sylvary asked Perera to move the Monte Carlo from its parking space and hide it because Leflore claimed it belonged to him when it was actually hers. Perera believed the car belonged to Sylvary and therefore did as she asked. When he returned to the apartment complex, he waited outside while Sylvary went inside to get her things. As he waited, he saw Leflore walk up to the apartment and heard yelling moments later. He remained outside.

Perera said he did not bring a gun to the apartment. Detective Davis told Perera that one of the guns found had been reported stolen from Victorville, where Perera said his son lived in foster care.

DISCUSSION

I. Failure to instruct on defense of others

A. Background

Appellant's counsel requested an instruction on defense of third party. The trial court denied the request on the ground that there was not substantial evidence justifying that instruction. The evidence that Leflore had merely pushed Sylvary onto the bed was insufficient.

B. Contention

Appellant contends that the trial court erred in refusing to instruct the jury on the defense of others. He argues that there was ample evidence from which "a properly instructed jury could have found that appellant was acting in defense of Sylvary and acquitted him of robbery." This contention is without merit.

C. Duty to instruct on defenses

If a jury instruction is requested, it must only be given on every material question "upon which there is any evidence deserving of any consideration whatever. . . ." (See *People v. Burns* (1948) 88 Cal.App.2d 867, 871.) Contrariwise, an accurate instruction may be refused if there is no evidence to which it may properly relate. (See *People v. Haag* (1954) 127 Cal.App.2d 93, 97.)

"'"[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]"'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This duty "'encompasses an obligation to instruct on defenses. . . .'" (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) "supported by substantial evidence [and] that are not inconsistent with the defendant's theory of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; see *People v. Salas* (2006) 37 Cal.4th 967, 982.) The trial court is not required to instruct on the defense of others unless there is substantial evidence to support an inference that the defendant acted to protect someone from injury. (*People v. Thomas* (1990) 219 Cal.App.3d 134, 144.)

D. The nature of the defense-of-other defense

"Lawful resistance to the commission of a public offense may be made: [¶] 1. By the party about to be injured; [¶] 2. By other parties." (§ 692.) Section 694 provides: "Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."

E. Defense-of-others inapplicable

Here, the trial court was not required to instruct the jury on defense of others for multiple reasons. First, there was no evidence that Sylvary was in need of intervention by others. Leflore did nothing more than push her onto the bed. He denied strangling, hitting,

beating or otherwise physically abusing her. Contrary to appellant's argument, there was no evidence that Leflore did, or intended to, beat Sylvary. Hence, there was no evidence that the robbers prevented him from doing so.

Second, and most significantly, there was no evidence that the force used by the perpetrators was in an effort to prevent injury to Sylvary. Nothing was said to indicate that appellant and the other men were coming to Sylvary's defense. They did not say, "Don't hurt Sylvary," or "Leave her alone," but rather said, "Break it off," meaning give us your property. The threat of force by use of the guns was employed to rob Leflore, to take his jewelry, ransack his room and take other personal possessions. Defense of others is not a defense to robbery.

Even assuming arguendo that the perpetrators were at Sylvary's apartment to protect her from Leflore and prevented her from being beaten, once she left the room, they continued to use their guns to rob Leflore. It was the robbery for which appellant was convicted.

II. Ineffective assistance of counsel

A. Failure to argue for admission of Leflore's prior domestic violence conviction

1. Background

Appellant's defense at trial was that he went to Sylvary's apartment to protect her from Leflore, who was angry at her and engaged in domestic violence as he pushed her onto the bed. A police officer outside heard what sounded to him like a domestic dispute.

2. Contentions

Appellant contends that he suffered ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights to counsel by virtue of his attorney's failure to seek admission of Leflore's prior conviction of domestic violence. He argues that under Evidence Code section 1103, subdivision (a)(1), evidence of that prior conviction was admissible to show Leflore's character for committing domestic violence, thereby supporting appellant's claim that he was defending Sylvary from Leflore's physical abuse.

The People contend that appellant has failed to provide an adequate record to raise this issue.

3. Inadequate record

While appellant asserts that Leflore had suffered a prior domestic violence conviction, he fails to cite to where there is evidence of that conviction in the record. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1025 ["this court has discretion to disregard contentions unsupported by proper page cites to the record"]; Cal. Rules of Court, rule 8.204(a)(1)(C).) We have reviewed the record and have found no such evidence. In the portion of the record where admission of Leflore's prior convictions is discussed, there is no mention of domestic violence, though there is a reference to a prior conviction under section 273.

An appellate court's review is limited to consideration of the matters contained in the appellate record. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534; see also *People v. Gonzales* (1970) 4 Cal.App.3d 593, 604.) Appellant has the burden of furnishing an appellate court with a record sufficient to consider the issues on appeal. (*People v. Neilson, supra*, at p. 1534.) The record before us fails to clearly establish that appellant had a prior conviction of domestic violence and is thus inadequate to allow review of appellant's contention.

4. No ineffective assistance of counsel

Even if we assume that Leflore had been previously convicted of domestic violence, we would nonetheless conclude that there was no ineffective assistance of counsel. The standard for establishing ineffective assistance of counsel is well settled. The defendant bears the burden of showing, "'first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) A reasonable probability "'is a probability sufficient to undermine confidence in the outcome.'" (*People v. Adkins* (2002) 103 Cal.App.4th 942, 950.) It is presumed that counsel's performance fell within the wide range of professional competence and that

counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland, supra*, at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

Here, appellant suffered no ineffective assistance of counsel by reason of his counsel's failure to argue the admissibility of Leflore's purported domestic abuse conviction because there is no evidence counsel's performance fell below professional norms, and it is not reasonably probable the result would have been more favorable for him.

The record gives no insight into why appellant's counsel failed to seek to introduce Leflore's claimed prior domestic violence conviction. If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Scott* (1997) 15 Cal.4th 1188, 1212.) The record does not indicate that counsel was asked for an explanation and failed to provide one, and we cannot say that there cannot be a satisfactory explanation. For example, appellant's counsel may have made the strategic decision that the prior incident of domestic abuse was so extreme that it would make the incident between Leflore and Sylvary on the day of the charged robbery appear to the jury to be insignificant.

Also, even had counsel requested admission of Leflore's prior domestic violence conviction, it is not reasonably probable that appellant would have obtained a more favorable result because it is unlikely that the trial court would have granted such a request. As stated in part ID, *ante*, there was no evidence that Leflore was engaged in domestic violence or abuse at the time of the charged incident. That being the case, a prior incident of such abuse would be irrelevant. Even if there was evidence that Leflore was abusing Sylvary at the time of the robbery, appellant was convicted of robbery after Sylvary was safely away from him. Thus, the claims of domestic abuse, past and current, were irrelevant to appellant's robbery conviction.

B. Failure to properly present and argue motion for new trial

1. Background

After trial, appellant's counsel filed a motion for new trial under section 1181, subdivision (3) based upon alleged juror misconduct. The motion stated that the jury was made up of 10 women and two men. After the verdicts were in, jurors told appellant's counsel that when deliberations began, the two male jurors indicated that deliberating was pointless because the defendants were all guilty, and they should vote immediately. The 10 remaining jurors talked about the case weighing evidence without the participation of the two male jurors. The motion also claimed that the trial court should have replaced a sleeping juror with an alternate juror and that the jury improperly created a time line that was not presented to it in testimony.

The trial court denied the motion for lack of sufficiency, stating: "In any event, based upon the motion itself, the supporting declaration, [there was] no evidence of any juror, no identification of any juror either by seat number or name as to who said what, no clarification as to what was meant by 'did not participate,' no request for an evidentiary hearing—"

2. Contention

Appellant contends that he suffered ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights to counsel by reason of his attorney's failure to "effectively present and argue a motion for a new trial." He argues that "[h]ad counsel effectively prepared the motion for trial, by indicating what jurors he spoke to, providing details about what he was told[,] . . . what specifically the two male jurors did to 'not participate,' and requesting an evidentiary hearing or access to the jurors information in order to further investigate the jurors [*sic*] statements, it is reasonably probable that the outcome would have been different." This contention is without merit.

3. No ineffective assistance on motion for new trial

Appellant concedes that the motion for new trial was a sloppy cut-and-paste job that erroneously included claims regarding a sleeping juror and improper time line, which "had nothing to do with the instant case." The only claim in the motion for new trial properly

relating to this matter is the claim that two male jurors refused to deliberate with the 10 female jurors. On that theory, under applicable Supreme Court authority, it would not have been reasonably probable that even a properly prepared and presented motion would have yielded a different result more favorable to appellant.

A juror commits misconduct where at the beginning of deliberations the juror refuses to deliberate. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1410–1411 (*Leonard*).) "'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.'" (*Ibid*.)

"Unlike other forms of juror misconduct that call into question a juror's impartiality (such as receiving extrinsic evidence or discussing the case with nonjurors)," a refusal to deliberate is not a question of impartiality and the juror's ability to be fair, "but to his behavior during deliberations." (*Leonard, supra,* 40 Cal.4th at p. 1411.) "Because both of these two entities [the 10 women and the two men], considering the case separately, unanimously reached the same conclusion (that defendant was guilty), the inference is inescapable that they would have reached the same conclusion if they had discussed the case together. Thus, the failure of the two entities to discuss the case with each other was harmless. . . . Because each group reached a verdict, this is not the type of 'structural error' that occurs when a jury, or even a single juror, fails to reach a verdict." (*Leonard, supra,* at p. 1411.)

Because appellant suffered no prejudice from the failure of the two male jurors to deliberate with the female jurors, it follows that it is not reasonably probable that had a properly prepared motion for new trial been presented a result more favorable to appellant would have ensued. As a result, appellant did not suffer ineffective assistance of counsel.

III. Cumulative error

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have concluded that appellant's claims of error are meritless, there are no errors to cumulate.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ