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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUCIO BONERGES RIVERA-AVILA,

Defendant and Appellant.

A139344

(Contra Costa County  
Super. Ct. No. 5-111839-7)

Defendant Lucio Bonerges Rivera-Avila appeals his conviction for second degree murder. He contends the trial court erred by (1) admitting evidence of prior bad acts, (2) excluding evidence of the victim's intoxication and mental health, (3) failing to investigate reports of juror intimidation, and (4) pressuring the jury to reach a verdict. We disagree and affirm.

**I. BACKGROUND**

Defendant was charged via information with murder with malice aforethought (Pen. Code, § 187), with the special allegation he personally used a deadly and dangerous weapon (*id.*, § 12022, subd. (b)(1)). A jury convicted defendant of second degree murder and found the special allegation true. The court sentenced defendant to 16 years to life.

The charges arise out of the death of Shelly Baker. Defendant met Baker in November 2010, and paid her to have sex with him. In the early morning of December 7, 2010, defendant and Baker were observed arguing next to a truck in a parking lot. A witness saw defendant throw bags or a backpack at Baker. As Baker was picking up those items, defendant got into the truck. According to the witness, defendant's truck

twice backed up and then accelerated forward to hit Baker. Upon the second collision, Baker yelled and was dragged under the truck.

Defendant testified as follows regarding the incident. Baker came to his home on the night in question, where he did her laundry and made her food. During this time, Baker was drinking alcohol and smoking something that “smelled bad.” Defendant asked her to have sex with him for money, but she refused. The two argued, and Baker’s behavior became erratic. Defendant tried to drive Baker home, but as they were driving, Baker said she wanted to die and kill someone, and then grabbed the wheel. Defendant eventually pulled over, at which point Baker punched him, knocking off his glasses. Defendant removed Baker’s bag from the car, and then tried to drive away while she was retrieving it. Defendant claimed he did not see Baker when he was driving away. He noticed his truck hit something, but he thought it was a bag of clothes or the curb. He also claimed he tried to brake but his foot slipped and he accidentally accelerated.

The paramedics tried to revive Baker and transported her to a local hospital. An autopsy of Baker revealed extensive external injuries, crushing injuries to the scalp, partially collapsed lungs, a ruptured liver, and a cut spinal cord. A sample of Baker’s blood taken after death tested at a 0.17 percent blood-alcohol level. A half-full bottle of vodka was found in Baker’s purse. Drug screening also revealed Baker had been using methamphetamine, but that evidence was excluded based on a motion in limine by the prosecution.

Defendant was apprehended a few hours after the incident when police found a truck matching the description of the suspect vehicle. When questioned, defendant denied being in an accident, did not reveal he had taken Baker to his home before the incident, and claimed he had picked her up at midnight and had her perform oral sex in his truck. Defendant also lied to the police about how many times he had been with Baker.

At trial, the jury heard testimony from various acquaintances of defendant. Jineane Wagner, who defendant had also paid for sex, testified defendant had run over her leg with his car in 2008. Patty Heller testified defendant had paid her for sex on

multiple occasions, and he was peaceful and polite. Defendant's ex-girlfriend, defendant's longtime friend, and defendant's neighbor also testified to his peaceful character. The jury also learned defendant had been convicted of assault with force likely to commit great bodily injury about 19 years prior.

## **II. DISCUSSION**

### ***A. Evidence of Uncharged Conduct***

Defendant argues the trial court erred by denying his motion in limine and allowing the prosecution to introduce evidence he had hit Jineane Wagner with his car in 2008. We disagree.

Defendant had previously paid Wagner for sex, though Wagner would sometimes run off with defendant's money without performing a sex act. In January 2008, while fleeing from a drug rehabilitation program to which she had been assigned after being released from jail, Wagner was approached by defendant in his car. Defendant accelerated and then stopped the car just short of Wagner. He demanded Wagner return his money and the two swore at each other. Wagner testified defendant then "kind of gutted the gas and like I don't think he meant to at first but—I don't know—he kind of like hit me and knocked me down [and] sped off." Wagner claimed defendant's tire ran over her leg, but she does not remember which leg. Wagner did not report the incident to the police because she was afraid there was an outstanding warrant for her arrest as she was running from a drug program. Nor did she seek medical treatment for her injuries. Wagner's mother also testified, stating she saw bruising on her daughter's side and tread marks on her leg after the incident occurred.

Prior to trial, defendant moved to exclude this evidence pursuant to Evidence Code sections 350 and 352, arguing Wagner's testimony lacked credibility and was unduly prejudicial to defendant. At the very least, defendant asserted, he was entitled to a hearing pursuant to Evidence Code section 402, to determine the relevancy and credibility of Wagner's testimony. The prosecution argued evidence of defendant's uncharged conduct was admissible to prove, among other things, intent and lack of

mistake or accident. After listening to a 35-minute interview with Wagner, the court ruled her testimony was admissible.

We review the trial court's rulings on the admissibility of evidence for an abuse of discretion. (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) Evidence of a person's character, including evidence of uncharged crimes, is generally inadmissible to prove that person's conduct on a particular occasion. (Evid. Code, § 1101, subd. (a).) This rule, however, does not preclude the admission of uncharged crimes to prove some other relevant fact, including motive, intent, or absence of mistake. (Evid. Code, § 1101, subd. (b).) As with other types of evidence, admission of evidence of an uncharged offense also depends upon the materiality of the fact sought to be proved or disproved, the tendency of the uncharged offense to prove or disprove the material fact, and the existence of any policies requiring the exclusion of such evidence, including those set forth in Evidence Code section 352. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 409, 404.) Section 352 provides the trial court has the discretion to exclude evidence if its probative value is substantially outweighed by the possibility its admission will create substantial danger of undue prejudice or of misleading the jury.

To the extent Wagner's account is accurate, it is clearly probative of defendant's intent on the night he hit Baker with his car. Where “ ‘a person acts similarly in similar situations, he probably harbors the same intent in each instance’ [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent.” (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) Where the evidence of an uncharged crime is offered to prove intent, the similarity between the charged and uncharged offenses must be substantial, but the prosecution need not show the same quantum of similarity as when the uncharged crime is used to prove identity. (*Id.* at p. 880.) Here, both the charged and uncharged offenses involved defendant using his car as a weapon against a pedestrian. Both incidents were immediately preceded by verbal altercations between the victims and defendant. The victims in both cases were women defendant had paid for sex. And in both incidents, defendant fled the scene. Thus, defendant

cannot plausibly contend his intent was immaterial, as he did not deny hitting Baker, but claimed the collision was an accident.

Moreover, the probative value of Wagner's testimony is not substantially outweighed by the possibility of undue prejudice to defendant. As the Attorney General points out, the facts of Baker's death were far more gruesome than those surrounding Wagner's injury. It is unlikely the jury sought to punish defendant for injuring Wagner by finding he murdered Baker. In any event, to the extent prejudice flowed from Wagner's testimony, it was outweighed by the high probative value of the evidence.

Defendant asserts Wagner's testimony is irrelevant because it did not describe any intentional or malicious act, and it did not tend to explain the absence of any accident as to the charged crime. As defendant points out, Wagner testified that, at first, she did not know if he intended to hit her. But Wagner also explained defendant accelerated toward her twice, once as an apparent feint. Taken together with Wagner's testimony that she and defendant were arguing and defendant ran over her leg, the trial court could have reasonably concluded defendant intended to hit Wagner with his car.

Defendant also argues the accounts of Wagner and her mother should have been excluded because they are not credible. Specifically, defendant asserts Wagner's story is unbelievable given the lack of any injury and the inconsistencies regarding what, if any injuries occurred, the lack of any medical treatment or records, the incident was never reported to police, and Wagner chose to come forward only after she learned defendant had been accused of murdering Baker. We find no abuse of discretion. As the incident between Wagner and defendant occurred in 2008, five years prior to trial, it is unremarkable Wagner might have forgotten some of the specifics concerning her injury. The trial court also had reason to believe Wagner was reluctant to report the incident as she was fleeing a drug rehabilitation program. Additionally, Wagner's account was confirmed in part by her mother. In any event, defendant had and took the opportunity to argue Wagner's credibility to the jury.

Finally, defendant contends the trial court erred by failing to conduct an evidentiary hearing under Evidence Code section 402. But the trial court did listen to a

telephone interview with Wagner prior to rendering its decision on the admissibility of the evidence. Even if further inquiry was warranted, the error was harmless since, as discussed above, we find Wagner's testimony was admissible under Evidence Code sections 352 and 1101.

***B. Evidence of Victim's Intoxication and Mental Health***

Defendant contends the verdict should be reversed because the trial court excluded evidence showing the presence of methamphetamine in Baker's system on the night she died, as well as Baker's mental health records. Defendant argues this evidence was important to his defense because it would have helped explain Baker's erratic behavior at the time of the incident, the impact of that behavior on defendant, and defendant's reasons for hurrying to drive away from the argument. We find the argument unavailing.

Prior to trial, the prosecution moved to exclude evidence showing Baker's past alcohol and drug use. The trial court permitted the introduction of evidence regarding Baker's blood alcohol content, but excluded other evidence related to the drug screening. The court reasoned Baker's methamphetamine use had little probative value since there was already evidence Baker abused alcohol and was inclined to engage in unprovoked violent acts when she did so. The court concluded the methamphetamine evidence was more prejudicial than probative and, thus, was inadmissible under Evidence Code section 352. The court stood by its ruling despite defense counsel's objection that methamphetamine could exacerbate the effects alcohol.

The prosecution also moved to exclude any reference to Baker's mental health treatment at John Muir Medical Center prior to her death, as well as acts of violence committed by Baker against anyone other than defendant. The trial court reviewed several exhibits regarding these issues, and ruled defendant could introduce nonhearsay evidence concerning unprovoked violent acts committed by Baker, including acts witnessed by staff of a mental institution. However, the court concluded Baker's mental health history was not relevant to the charged crime. Defense counsel protested Baker's mental health was relevant to defendant's state of mind on the night in question. The court responded defendant already had "plenty" of admissible evidence of unprovoked

violence by Baker. Counsel later asked the court to review Baker's records from Contra Costa County Mental Health Services from 2005 through 2010, explaining they might be relevant to explain prior incidents involving Baker's aggression. The court ruled the records were irrelevant and declined to review them.

We find the trial court did not abuse its discretion in excluding evidence of Baker's methamphetamine use or by declining to review the medical records from Contra Costa County Mental Health Services. The pertinent question is whether the probative value of this evidence is substantially outweighed by the probability its admission created a substantial danger of undue prejudice, confusion of the issues, or of misleading the jury. (Evid. Code, § 352.) We agree with the trial court the evidence was cumulative and its probative value minimal. The jury was already aware that, on the night in question, Baker had been drinking and behaving erratically and had a blood-alcohol level of 0.17 percent. Defendant was also permitted to introduce evidence concerning specific acts of unprovoked violence committed by Baker, including acts witnessed by mental health professionals. Further explanation of why Baker was prone to acts of violence would have added little to the jury's deliberations. There was also no indication Baker posed any threat to defendant in the moments before she was hit by his truck, as defendant was inside the vehicle and Baker was unarmed. On the other side of the scale, there was a risk evidence of Baker's drug use and mental health problems would have biased the jury.

Contrary to defendant's suggestions, *People v. Reber* (1986) 177 Cal.App.3d 523 (*Reber*) does not demand a different conclusion. In that case, it was held the trial court erred by failing to examine in camera the victims' mental health records to determine whether those privileged materials were essential to the vindication of the defendants' rights of confrontation. (*Id.* at p. 532.) The defendants had claimed the records would support their theory the victims had hallucinated the charged assaults. But the court also held the error did not warrant reversal, in part because the jury heard evidence the victims had been hospitalized and confined in mental health facilities, were on psychotropic

medications, and had a tendency to fantasize.<sup>1</sup> (*Reber*, at p. 533.) Likewise, in the instant action, the jury already had ample evidence concerning Baker’s alcohol use and prior violent acts.

### **C. Juror Intimidation**

Defendant argues the trial court committed reversible error by failing to investigate reports a juror was threatened by court spectators. The argument is unpersuasive. Even if the court should have investigated further, we conclude defendant forfeited the issue by failing to request an inquiry or otherwise object below.

The day after the case was submitted to the jury, the trial judge advised both parties of a communication from the jury foreperson. According to the court, the foreperson informed the bailiff that male relatives of Baker or court spectators told Juror No. 5 something to the effect of, “ ‘You better find him guilty.’ ” The court also said the foreperson told the bailiff: “[N]obody felt threatened or the impression was nobody felt threatened and that she did not feel that was going to affect the jury’s decision at all.” The court then stated: “It happened yesterday. It’s reported through a third party. It’s not reported by a person who supposedly heard the statement.” The court indicated it did not intend to do anything about the incident, but if the parties felt differently, the court was open to suggestions. Defense counsel stated he would have to think about it, but did not raise the issue again. The court took no further action.

When a court is put on notice improper external influences have been brought to bear on a juror, “it is the court’s duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors

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<sup>1</sup> Our Supreme Court later disapproved of *Reber*’s holding that the Sixth Amendment confers a right to discovery of privileged psychiatric information before trial because of the serious risk of unnecessary disclosure. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1127–1128.) To the extent Baker still has a privacy right in her medical information, such considerations are also relevant here. (See *Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62.) [“the right of privacy is purely a personal one . . . the right does not survive but dies with the person”].) Defendant did not assert self defense and the evidence did not show Baker posed any danger to defendant in the moments prior to the collision.

has been affected.” (*People v. McNeal* (1979) 90 Cal.App.3d 830, 839.) “Such an inquiry is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant’s right to a fair trial.” (*People v. Kaurish* (1990) 52 Cal.3d 648, 694.) The decision whether to make such an inquiry rests within the sound discretion of the trial court. (*People v. Fuiava* (2012) 53 Cal.4th 622, 702.) “The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.” (*People v. Ray* (1996) 13 Cal.4th 313, 343.) “A hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his or her duties and would justify his or her removal from the case.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348.)

A defendant may forfeit a claim of jury or spectator misconduct by failing to object below. For example, in *People v. Hinton* (2006) 37 Cal.4th 839, 898, the trial court was informed the victim’s mother said something to the effect of, “ ‘ ‘Thank you, Jesus. Kill him,’ ’ ” in front of the jury after the verdict was announced. The trial court declined to investigate when the incident was brought to its attention during the penalty phase. Our Supreme Court affirmed because the defendant failed to request a curative admonition or an evidentiary hearing to determine whether the jury heard the spectator’s comment. (*Ibid.*) In *People v. Williams* (2013) 58 Cal.4th 197, 287–288, a spectator reported a juror may have been sleeping during trial. On appeal, the defendant challenged the trial court’s failure to investigate. The challenge was rejected on the grounds defense counsel failed to object, expressly waived any defect, and affirmatively requested the procedure followed by trial court. (*Id.* at p. 289.) Likewise, in *People v. Burgener* (1986) 41 Cal.3d 505, 521–522, the defendant forfeited his jury misconduct challenge where defense counsel urged the court not to investigate reports of juror intoxication because such an inquiry would “ ‘destroy the jury.’ ” The court held the defendant’s objection to an evidentiary hearing may have been tactically motivated, and his claim was better suited for a petition for habeas relief. (*Id.* at p. 522.)

Defendant argues these cases are distinguishable because they involve instances where the trial court failed to conduct an investigation to determine if there were facts showing misconduct had occurred. In this case, defendant argues, the trial court was aware of facts raising potential or actual jury misconduct, and thus had an independent duty to conduct an evidentiary hearing, regardless of whether counsel requested one. We agree not every incident involving jury misconduct requires further investigation. (*People v. Fuiava, supra*, 53 Cal.4th at p. 702.) But waiver has been found even where the trial court was aware of facts raising a strong possibility of jury misconduct. For example, in *People v. Burgener*, the court affirmed despite finding the incidents reported to the court were sufficient to raise the possibility the juror in question was intoxicated during deliberations. (*People v. Burgener, supra*, 41 Cal.3d at pp. 520–521.)

We conclude defendant forfeited his challenge concerning potential jury intimidation here. Although the trial court raised the issue with counsel while deliberations were ongoing, and indicated it was open to suggestions, defense counsel failed to request an evidentiary hearing, an admonition, or any type of corrective action. Nor did defendant move for a new trial after the jury returned a verdict. Moreover, based on the record before us, we cannot determine whether the interaction involving the court spectators resulted in any prejudice, especially since the trial court was informed no one felt threatened. To the extent defendant seeks to prove otherwise, his claim is better suited for a petition for habeas relief.

#### **D. Jury Deliberations**

On Friday, May 17, 2013, the second full day of deliberations, the jurors sent three notes to the court indicating they were at an impasse. The first note, which was submitted at 11:20 a.m., stated: “(1) [W]e are not unanimous and each juror is set on their vote. [¶] (2) [N]eed additional instructions for 2nd degree murder for one juror.” In response, the court directed the jury to refer to several jury instructions. The second note was received at noon, and merely stated: “We are deadlocked.” This time, the court responded by asking the prosecution and defendant to present additional closing arguments. At 2:30 p.m., the jury submitted a third note, stating they appreciated the

additional information provided in response to their prior queries, “however after discussing all that was said we continue to be at a deadlock.” The court instructed the jurors to continue their deliberations. The following Monday morning, the jury returned a guilty verdict. Defendant argues the court erred because (1) it was not permitted to reopen closing arguments, and (2) the final instruction coerced the jury into reaching a verdict. We disagree on both counts.

### **1. *Reopening Closing Arguments***

In response to the second note, the court brought the jurors into open court and asked whether it would be helpful for the attorneys to provide additional argument on the issue of implied malice versus criminal negligence, and the jury responded it would. Both counsel then presented argument on the issue. Defendant argues the trial court lacked authority to order additional closing argument in the middle of deliberations. Not so. The California Rules of Court expressly allow for such action in the event of a jury impasse: “If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] . . . [¶] . . . Permit attorneys to make additional closing arguments.” (Cal. Rules of Court, rule 2.1036(b).) A similar argument was rejected by our colleagues in the Third Appellate District in *People v. Young* (2007) 156 Cal.App.4th 1165, 1170–1171. Even if such action was not authorized by the rules, defendant forfeited the argument by failing to object below. Additionally, he failed to demonstrate prejudice, especially since his counsel was also permitted to make additional arguments.

### **2. *Final Instruction Before the Verdict***

On the second full day of deliberations, after receiving a third note indicating the jury as was at an impasse, the court instructed the jury to continue deliberations. Among other things, the court stated: “It’s . . . the obligation of a jury to reach a decision if they can. Secondly, given the amount of time this trial took, I’ve noticed you feel like you’ve been out a very long time and you have been but there have been juries out on homicide cases for weeks. I’m not suggesting that you should be, but I’m just saying that in the grand scheme of things you actually haven’t been deliberating that long.” The court then

went on to tell the jurors, among other things: “You should not hesitate to reexamine your own views or to request your fellow jurors to reexamine theirs if you are convinced that it is wrong or to suggest other jurors changed their views if you are convinced that they are wrong. [¶] . . . [E]ach of you must decide the case for yourselves and you should do so only after a full and complete consideration of all the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict if you can do so.” The court also suggested having different jurors lead discussions for a period of time and reverse role-play, having one side present the other’s position. The court stressed it was not dictating or instructing the jurors how to conduct deliberations.

A jury cannot be discharged until after they have agreed upon their verdict unless (1) by consent of both parties, or (2) “at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.” (Pen. Code, § 1140.) The trial court has the discretion to determine whether to declare a hung jury or order further deliberations. (*People v. Debose* (2014) 59 Cal.4th 177, 209.)

While a court may instruct a jury to continue deliberations, it may not coerce a jury to return a verdict. In *Allen v. United States* (1896) 164 U.S. 492, 501–502 (*Allen*), the United States Supreme Court approved a charge encouraging minority jurors to reexamine their views in light of those expressed by the majority. Our Supreme Court later disapproved of *Allen* to the extent it allows trial courts to urge minority jurors to weigh their status as dissenters and reconsider their votes, or to suggest a case must at some time be decided and will be retried if the jury fails to reach a verdict. (*People v. Gainer* (1977) 19 Cal.3d 835, 848–852, disapproved on other grounds in *People v. Valdez* (2012) 55 Cal.4th 82, 163.) In providing supplemental instructions to a deadlocked jury, “The court must exercise its power . . . without coercion . . . , so as to avoid displacing the jury’s independent judgment ‘in favor of considerations of compromise and expediency.’ ” (*People v. Miller* (1990) 50 Cal.3d 954, 994.) Thus, “the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived ‘as a means of enabling the jurors to enhance their

understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.” ’ ’ ( *People v. Proctor* (1992) 4 Cal.4th 499, 539.)

Defendant claims the court’s statement that the jury had not been deliberating for long and other juries had deliberated much longer was an improper *Allen* charge and could only be interpreted by the jurors as a directive to render a verdict. According to defendant, those remarks improperly suggested the jury had not sufficiently discussed and deliberated the case and the length of jury deliberations is necessarily commensurate with the nature and seriousness of the case. Defendant also suggests any such charge would have been inappropriate in this situation because the jury had already deliberated for two days, heard additional oral argument, and indicated it was deadlocked on three separate occasions. Given this context, defendant maintains the instruction essentially forced the jury to reach a verdict on the basis of matters already fully discussed and considered.

Defendant’s contentions are unavailing. The court’s comments regarding the relative brevity of deliberations did not constitute pressure to reach a verdict. At no point did the court state the jury was obligated to reach a verdict or to deliberate for a certain amount of time. Rather, the court merely instructed the jury to reach a verdict if it could. As part of the instruction, the court also repeatedly reminded the jurors each of them should decide the case for themselves. We also disagree with defendant’s suggestion that, given the context, there was no reasonable probability the jury could reach a verdict. The jury had only been deliberating for two days after a two-week trial. Moreover, although the jury sent three notes concerning an impasse in deliberations, those notes were all submitted within three hours of each other. It was reasonable—and certainly not an abuse of discretion—for the trial court to conclude additional deliberations would enhance the jury’s understanding of the case.

### **III. DISPOSITION**

The judgment is affirmed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.