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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA KENNETH BRINGAZI,

Defendant and Appellant.

A141541

(San Mateo County
Super. Ct. No. SC074769A)

Defendant Joshua Bringazi appeals a judgment of conviction entered after a jury trial, contending the trial court improperly declined to investigate allegations of juror bias and misconduct. We conclude the trial court did not abuse its discretion in deciding not to investigate the allegations and therefore affirm.

I. BACKGROUND

A. The Charges and the Evidence

Bringazi was charged in an amended information with (1) a lewd act committed upon a 15-year-old child, who was at least 10 years younger than he was (Pen. Code, § 288, subd. (c)(1)) (count one), and (2) statutory rape by a person over the age of 21 (Pen. Code, § 261.5, subd. (d)) (count two). The information also alleged Bringazi had suffered prior convictions and served a prior prison term.

At trial, the prosecution presented evidence that Bringazi encouraged a 15-year-old girl (Brittany Doe) (the sister of the former girlfriend of Bringazi's roommate) to drink beer while at Bringazi's apartment. At some point, Bringazi picked up Brittany Doe and carried her into his bedroom, undressed her, fondled her, and had sexual

intercourse with her. Afterwards, Brittany Doe went into the bathroom, crying, but would not tell her sister what had happened. Evidence of a prior act of unlawful sexual intercourse with another 15-year-old girl (E. Doe), also plied with alcohol, was admitted pursuant to Evidence Code section 1108. Bringazi testified and denied having sexual relations with Brittany Doe. He admitted he had sexual relations with E. Doe, but claimed he believed she was 18 years old.

A jury found Bringazi guilty of both charged counts and found true the allegations that he had suffered prior convictions and served a prior prison term. The trial court sentenced him to eight years in prison.

B. The Allegations of Juror Misconduct and the Trial Court's Decisions

After jury deliberations had commenced, the bailiff advised the trial court that the foreperson had notified the bailiff of a problem. The night before, Juror Two had recreated a photograph in evidence, using himself and his wife as models, and the next morning he showed that picture to the other jurors. Juror Two used the recreated photograph to demonstrate that two people could be in the same positions as the people shown in the photograph in evidence without physically touching.

After calling the jurors into the courtroom, the trial court explained it had to investigate, stating, "It's been brought to my attention that there is an issue with regard to outside potential evidence and/or outside experimentation with regard to photography. I'm going to conduct an investigation into that because the law requires that I do so when I have such information." The trial court conducted a hearing with Juror Two. The court asked Juror Two if he had taken a photograph to compare to a photograph in evidence and showed it to the other jurors. Juror Two admitted he had done so.

The trial court then held a meeting with the foreperson with both counsel present. The court began by saying, "I want to commend you for your conduct this morning. You did exactly what we want a foreperson to do pursuant to the instructions. And it allowed us to reach this point which is a point we should be at. So thank you." The trial court called the jurors into the courtroom and instructed them that they could not rely on any tests and experiments and that "you have to rely on what you hear in the courtroom and

nothing but what you hear in the courtroom.” The court confirmed with each juror individually that he or she could follow the court’s instructions. The trial court excused Juror Two, stating to the juror that “your conduct in taking the picture was misconduct in light of the court’s instructions.” The court swore in an alternate juror.

After the swearing in of the alternate juror, the court instructed the full jury to begin deliberations again, from the beginning. The next morning, defense counsel notified the court that Former Juror Two had made a statement to defense counsel. Defense counsel stated that Former Juror Two claimed that Juror Seven made a statement during the beginning of deliberations that her sister had been raped and she knew “how these guys worked.” Former Juror Two stated he felt that Juror Seven was making decisions about the case based on her sister’s rape. Based on these statements, defense counsel requested an investigation and moved for a mistrial.

The court stated that its tentative ruling was to not investigate, in the absence of further evidence. The court noted that there was a credibility question as to Former Juror Two, and additionally that the alleged statements had been conveyed indirectly (i.e., through defense counsel). The court also said that, even taking the statements at face value, “the fact that jurors have experience, the fact that they state that they have such experience does not necessarily indicate misconduct.” The court also said that any issue as to Juror Seven’s statement during the earlier phase of the deliberations was moot because deliberations had been restarted. The court stated it was willing to instruct the jury again to reinforce the applicable rules of conduct. The court did not rule on Bringazi’s request for a mistrial.

After these rulings, the court recessed at 11:55 a.m. The jury returned with a verdict at 2:15 p.m.

C. Information Provided by Juror Seven During Jury Selection

During voir dire, Juror Seven stated, “I’ve had family members that have been victims of a crime.” She stated that nothing about that experience made her think she could not be a fair juror.

In a written questionnaire completed by prospective jurors, one question asked, “Have any of your close friends or any relative ever been the victim of or accused of a sexual assault?” Juror Seven replied, “Yes sexual abuse occurred in my immediate family (sister, niece raised by my mom) by a family member.” On the questionnaire, Juror Seven stated she could put her experiences aside and base her decision on the evidence in the case, and could be a fair and impartial juror.

II. DISCUSSION

A. Legal Standard Governing When a Court Must Investigate

A trial court has discretion to decide whether to investigate any alleged juror bias or misconduct. “ “The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.” ’ ’ (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348.)

The standard of review on appeal is abuse of discretion. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) In reviewing the trial court’s decision not to investigate allegations of bias, the appellate court should only consider the information the trial court was aware of when it made its decision. (*People v. Fuiava* (2012) 53 Cal.4th 622, 703 (*Fuiava*).) The appellant must present evidence of “actual bias on the part of the juror,” and on appeal we will not presume bias. (*People v. Martinez* (2010) 47 Cal.4th 911, 943 (*Martinez*).)

A trial court is not required to investigate every allegation of bias coming to its attention. “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 (*Ray*).) But that said, a trial court has a continuing duty to consider inquiring into a report of possible juror misconduct, regardless of the stage of the proceedings when the report comes to light.¹ The investigatory steps a trial court must

¹ See *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 972–973, 978–979, 985 (reversing convictions and sentences in capital case for failure to conduct adequate inquiry into corroborated report of possible juror bias at the end of long trial,

take—and most importantly whether it decides to take any steps at all—will turn on the specific facts presented, viewed in the context in which those facts arose.

The importance of protecting jury secrecy during deliberations always counterbalances the trial court’s interest in ferreting out juror misconduct. (*People v. Cleveland* (2001) 25 Cal.4th 466, 475 (*Cleveland*)). In *Cleveland*, the Supreme Court recognized that the secrecy of jury deliberations may give way to an inquiry by the court when there has been an allegation of juror misconduct. (*Id.* at p. 476.) “Claims of misconduct may merit judicial inquiry even though they may implicate the content of deliberations.” (*People v. Engelman* (2002) 28 Cal.4th 436, 443.)

While the voir dire process must generally be relied upon as a sufficient screen for bias, there can be circumstances where allegations of bias call for investigation during, and sometimes even well into, jury deliberations. If a juror displays an actual bias, then he or she is unable to perform the duties of a jury member and is subject to discharge. (*People v. Keenan* (1988) 46 Cal.3d 478, 532 (*Keenan*)). “Grounds for investigation or discharge of a juror [for bias] may be established by [the juror’s] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.” (*Ibid.*)

The Supreme Court has held that such an inquiry “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 duties and would justify his removal from the case.” (*Ray, supra*, 13 Cal.4th at p. 343.) Put another way, “when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud.” (*Keenan, supra*, 46 Cal.3d at p. 532.) In *Ray*, after the close

acknowledging the “extremely delicate situation [presented in any case] when a juror is suspected of prejudice or misconduct,” and the “difficult position” the trial judge faced in that case, with “five weeks of trial completed and a verdict in hand,” but concluding that was no justification for inaction and “attribut[ing] the trial judge’s complacency to an ostrich-like desire to avoid learning anything that would jeopardize the verdict”).

of the evidence in the guilt phase of a capital case, but before jury instructions were given, a juror submitted a note informing the judge he worked at the high school the daughter of the victim attended. (*Ray, supra*, at pp. 342–343.) The defense argued that, at that point, the trial court was obligated to inquire into “ ‘possible bias.’ ” (*Id.* at p. 343.) The Supreme Court disagreed, explaining that the note itself contained no evidence of bias, and that the manner in which it surfaced suggested that, by coming forward voluntarily, the juror was just trying to discharge his duties in good faith. (*Id.* at p. 344.)

Keenan illustrates another application of the governing standards, but affirms a trial judge’s decision to investigate, while rejecting an argument from the defense that doing so was unduly coercive. There, the Supreme Court held in another capital case that a hearing was appropriate when information surfaced during deliberations that a juror was refusing to consider imposing the death penalty. In that case, the foreman sent a note to the court stating, “we have a juror who cannot morally vote for the death penalty.” (*Keenan, supra*, 46 Cal.3d at p. 529.) Because the note indicated that a juror was “expressing absolute refusal to consider the death penalty *under any circumstances*” (*Keenan, supra*, 46 Cal.3d at p. 533)—contrary to something every juror in a capital case must swear in voir dire he or she is capable of doing impartially (see *Wainwright v. Witt* (1985) 469 U.S. 412, 423–424)—it was proper for the court to conduct a limited investigation. (*Keenan, supra*, at p. 533.)²

² Any number of other examples may be found in the reported cases where courts found a need to inquire further, and found no such need, depending on the facts. (Compare, e.g., *People v. Burgener* (1986) 41 Cal.3d 505, 516–521, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753–754, 756 (*Burgener*) [hearing required where foreman informed court that juror was intoxicated more than once during trial]; *People v. McNeal* (1979) 90 Cal.App.3d 830, 840 (*McNeal*) [hearing required under Pen. Code, § 1120 where it appeared a juror might have personal knowledge of a fact in the case], with, e.g., *Fuiava, supra*, 53 Cal.4th at p. 702 [no hearing required where the conduct of spectators allegedly could have had an influence on jurors]; *Martinez, supra*, 47 Cal.4th at pp. 939–943 [no hearing required where a juror worked at juvenile hall and had a limited phone conversation with a district attorney’s investigator about the defendant’s juvenile records]; *People v. Davis* (1995) 10 Cal.4th 463, 546–548

B. The Trial Court’s Decision Not to Investigate Was Not an Abuse of Discretion

On this record, we cannot conclude that the trial court abused its discretion. The court was faced with an opaque statement, conveyed by a former juror who had been dismissed for misconduct, and the statement itself had come to the court’s attention indirectly through defense counsel. The trial court was skeptical of the credibility of the reported information. In addition, putting aside the credibility concerns, the court also looked to the substance of the alleged statement itself: Juror Seven said that her sister had been raped and “she [knew] how these guys worked.” The court noted that the fact that a juror refers to his or her life experiences “does not necessarily indicate misconduct.”

We see no basis to overturn the court’s assessment of the situation. The Supreme Court has repeatedly recognized it is not misconduct for jurors to bring their life experiences to the jury room. “Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.” (*People v. Fauber* (1992) 2 Cal.4th 792, 839.)³ The Supreme Court elaborated on this point in *People v. Steele* (2002) 27 Cal.4th 1230, 1266, stating, “during the give and take of deliberations, it is virtually impossible to divorce completely one’s background from one’s analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. ‘Jurors are not automatons. They are imbued with human frailties as well as virtues.’ ”

[no hearing required absent evidence that foreman’s note was the product of improper discussion among jurors]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [no hearing required absent evidence juror was actually asleep during trial]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required absent evidence juror’s derogatory remark reflected bias against the defense as opposed to impatience with the proceedings].)

³ See also *Warger v. Shauers* (2014) 574 U.S. ___, ___ [135 S.Ct. 521, 525] (citing to the lower court’s point that “ ‘[j]urors’ personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room’ ”).

In the following cases where jurors have shared their personal experiences with the rest of the jury, the Supreme Court has found that no misconduct occurred. In *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 66, 76–78, the Supreme Court found no misconduct where a juror said, “I know Hispanics, they never cheat on timecards” during deliberations and cited this personal experience to explain why he disbelieved the testimony of one witness. In *People v. Yeoman* (2003) 31 Cal.4th 93, 162, the Supreme Court found no misconduct where jurors referenced their own experiences with drugs in evaluating the defendant’s drug use.

Juror Seven’s alleged reference to her sister’s rape did not constitute misconduct. During voir dire, Juror Seven stated she could set aside her experiences and base her decision on the evidence in the case. But in the above cases, the courts held that it is impossible to expect a juror to completely shed his or her previous experiences and never refer to those experiences during deliberations. It logically follows that, although Juror Seven may have mentioned the rape of her sister during deliberations, this does not indicate that she committed misconduct. Thus, regardless of whether the trial court recalled Juror Seven’s questionnaire answers at the time it considered the allegation, the trial court was correct to conclude that Juror Seven’s alleged reference to her life experiences was not misconduct.

We also note this jury demonstrated it understood its ability to bring misconduct allegations to the attention of the court. In the incident involving Former Juror Two, it was the jury foreperson who brought the issue to the court’s attention. When the trial court met with the foreperson, the court praised the foreperson for bringing forward the concern. The court said, “I want to commend you for your conduct this morning. You did exactly what we want a foreperson to do pursuant to the instructions.” If the jury had concerns about Juror Seven’s statement, the jury knew how to bring the issue to the judge’s attention.

As in *Ray*, nothing in the information received by the court suggested actual bias on the part of a juror. In light of the lack of evidence of actual bias, the trial court chose not to disturb the sanctity of the jury deliberation process. Because Bringazi has failed to

present evidence suggesting “actual bias on the part of the juror” that called for an investigation, there is no evidence to support a claim that the trial court abused its discretion. (See *Martinez, supra*, 47 Cal.4th at p. 943.)

On appeal, Bringazi places significant emphasis on that fact that Former Juror Two believed Juror Seven was biased. Bringazi argues that Former Juror Two’s opinion that Juror Seven was making decisions about the case based on her sister’s rape is evidence that Juror Seven was, in fact, biased. Bias is a question for the trial court to determine, not a former juror. (See *Martinez, supra*, 47 Cal.4th at p. 943.) It is irrelevant to consider how Former Juror Two interpreted the statement.⁴

Bringazi cites extensively to *McNeal, supra*, 90 Cal.App.3d at p. 840, going so far as to characterize it as the only California case “possessing all of the essential attributes of this case.” In *McNeal*, a juror appeared to have personal knowledge of a fact in the case. (*McNeal, supra*, 90 Cal.App.3d at pp. 837–838.) Defense counsel requested a hearing pursuant to Penal Code section 1120, which explicitly requires a hearing when the court receives information that a juror has personal knowledge of a fact in the case. (*Id.* at p. 835.) The trial court conducted a cursory investigation, and the Court of Appeal reversed, finding that a more extensive hearing was required. (*Id.* at p. 839.) In this case, there was no allegation that Juror Seven had personal knowledge of any fact in the case, and there was no statute mandating a hearing. Whether to hold a hearing was discretionary, as it generally is in cases of this kind. *McNeal* is not on point.

Bringazi also relies on *Burgener, supra*, 41 Cal.3d at pp. 518–521, which held that a hearing was required where the foreperson informed the court that a juror was

⁴ The timing of Juror Seven’s statement is also irrelevant. The court stated that because the alleged statement was made before deliberations were restarted and the jury was instructed to disregard all prior deliberations, the issue was moot. Although the result the court reached here was correct, this aspect of its reasoning was not. In addressing a question of bias, it is only relevant whether Juror Seven had an actual bias toward the defendant, regardless of whether the statement purportedly showing bias occurred during final deliberations. What is important is that the trial court found no evidence of actual bias, not when Juror Seven’s alleged statement was made.

intoxicated during the trial. Clearly, juror intoxication, if true, can provide a basis for dismissal. By contrast, in this case the trial court was faced with an ambiguous statement of questionable credibility. The holding in *Burgener* does not suggest that this circumstance required a hearing.

III. DISPOSITION

The judgment is affirmed.

Streeter, J.

We concur:

Ruvolo, P.J.

Rivera, J.