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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN BERDETT LEE,

Defendant and Appellant.

C062520

(Super. Ct. No.
F-08-312)

Defendant Steven Berdett Lee appeals from his conviction of one count of felony cruelty to animals. (Pen. Code, § 597, subd. (b).) We affirm, concluding substantial evidence supports the conviction, and defendant’s other claims of judicial error are harmless or without merit.¹

FACTS

Defendant lived in a camper on rural property near Alturas. On August 15, 2008, Modoc County Sheriff’s deputies arrived at

¹ Undesignated references to sections are to the Penal Code.

the property and observed several dogs the deputies described as "painfully thin." "Their ribs were showing, hip bones showing, shoulder bones showing." Some "had lost clumps of hair," and some "were missing a lot of teeth."

After deputies took defendant into custody, they retrieved the dogs. Sergeant Marcus Pearce picked up five little dogs from inside defendant's camper. The camper "was full of dog feces, new stuff and old stuff, partially decayed. Flies by the hundreds. It was 97 degrees outside, by what the patrol unit said, and it was well over 100 [degrees] inside the trailer, with no water or food visible anywhere."

The deputies had heard barking coming from the second floor of a nearby shed, so they went there to investigate. There was no way for the dogs to get in or out of the shed other than a door up on the wall that Sergeant Pearce could access only by using a ladder. When he opened the door and looked in, he saw three dogs in the same condition as the others, "ribby and bones protruding and stuff. They were lethargic, didn't really get up or do anything."

He climbed into the room and retrieved the three dogs. The room was "[t]otally walled off, no windows, just one little solid door that opened to the outside. It was hard to walk up there without stepping in dog feces, either old decayed or newer stuff. There was a couple little empty pans up there. No food, no water visible or anything. . . . It smelled like dogs and dog feces. It was well over 100 degrees up in there

Sergeant Pearce was getting ready to go back down the ladder when he heard whimpering coming from the opposite side of the room and behind a small, chest-high wall. When he looked over the wall, he saw two more dogs down in a hole. The area was about two feet deep and six feet wide. There was no way for those dogs to get in or out. Sergeant Pearce had to tear part of the wall down to get to the dogs.

The entire time he was on the property, Sergeant Pearce saw no food or water left out for the dogs. The deputies found a few stacks of dog food in another shed about 150 to 200 yards away from the camper. That food was in bags that "appeared to be palletized and unopened."

Dr. Joseph Catania, a local veterinarian, testified as an expert witness for the prosecution. He examined the 10 dogs removed from defendant's property. Two of the dogs were in fair condition and were released to the pound. These two were bright and very active. The other eight dogs were severely underweight and dehydrated. Dr. Catania kept them overnight for observation and to see how they would respond to food. He also started several of the dogs on fluids and antibiotics.

The following day, August 16, 2008, Dr. Catania examined the eight dogs again. From his examination, he concluded the dogs as a group "were just not being fed properly. They didn't have enough nutrition to support themselves. And that was the biggest part of what was wrong with them, the medical issues that pertained to this group of animals, the majority of which was related to malnutrition."

Dr. Catania compared each dog's weight on August 16, 2008, the day after defendant was arrested; 10 to 12 days later; and several months later on May 19, 2009, the day before defendant's trial began. Most of the dogs showed significant weight gain over those time periods, some even doubling their weight. The weights were as follows:

	Weight on Aug. 16, 2008	Estimated pounds underweight	Weight 10 or 12 days later	Weight on May 19, 2009
Dog 1	7.7	6	12.1	15.4
Dog 2	15	N/A	21.2	17
Dog 3	9	8	11.9	16.9
Dog 4	8	6	Died	--
Dog 5	8.3	7	>11.3	16.6
Dog 6	9.3	7	12.3	17.6
Dog 7	11.6	8	14.8	14
Dog 8	8.4	N/A	12.1	12.3

Dog 4 was released to the pound on August 18, 2008, but he died shortly thereafter from renal failure. Dr. Catania stated this dog's death was not related to malnutrition.

The two dogs released to the pound the day they were impounded, Dogs 9 and 10, actually lost weight over time. Their initial weights were not taken. Dog 9 was first weighed on August 28, 2008, and weighed 19 pounds. By the time of trial, Dog 9 had lost 4.6 pounds, weighing 14.4 pounds. Dog 10 weighed 15.4 pounds on August 28, 2008, but by the time of trial had lost 2.4 pounds and weighed 13 pounds.

In Dr. Catania's opinion, the eight dogs he kept were all cachectic, meaning they were "grossly underweight." They were cachectic because "they were not receiving enough nutrition.

They weren't being fed enough." All the dogs looked like they were malnourished or underfed.

The prosecution asked Dr. Catania if the dogs could have died because of their cachectic condition. He responded: "Could they have died because of being -- well, if malnutrition is prolonged enough, sure." The prosecution followed up: "Are you able to -- well, if these dogs' conditions remained as they were, would they eventually have died from that condition?" Dr. Catania answered: "You know, you're asking me to -- if you don't provide adequate nutrition for an animal for a long enough period of time, yes, it can die."

Defendant testified he lived with the dogs in the camper. He tried to keep them alive as best he could. His camper did not have water, sanitary facilities, or electricity. Some of the dogs lived on the second floor of a nearby shed. Except during winter when there is runoff, he obtained water for himself and the dogs from a sump hole he had dug in a ravine about 700 feet away from his property. He filtered the water he used for himself through a cloth and a colander. If runoff groundwater filled the hole, it would become "algae-fied," and he would treat it with a capful of Clorox.

Defendant and his dogs lived primarily on dog food. He fed the dogs only Atta Boy dog food, which he believed was higher in protein than normal dog food. He bought it by the pallet (500 or 1,000 pounds), and a neighbor would bring it up onto his

property. He kept the food in a utility building some 300 to 400 feet from his camper.²

During winter, the dogs would stay with defendant inside the camper. The dogs would sleep inside his sleeping bag with him if it was cold enough. He also would use about six inches of blankets on top of the bag during those times.

Defendant believed the dogs were not underweight. He admitted people had told him the dogs looked thin, but he deliberately controlled their diet because he believed a lean dog responded better to commands and would shed less. He thought being thin also helped the dogs cope with warm weather. He stated he made sure they gained weight in the winter.

Defendant acknowledged he had an obligation to provide adequate care for his dogs. He had no reason to believe any were diseased. He wormed the dogs, cleaned them, and cut their nails. If one was weak, he gave it extra food. He had owned dogs since 1984, and he had never had a dog die of starvation.

Upon considering the evidence, the jury convicted defendant of one count of felony cruelty to animals. (Pen. Code, § 597, subd. (b).) The trial court denied defendant's motion for new trial. The court suspended sentence and placed defendant on formal probation for three years. He was ordered to serve 87 days in the county jail, and was given credit for 87 days

² Defendant estimated that dog food constituted 90 percent of his diet. He would eat it "along with flour and cornmeal and sweetener and Kool-Aid and flavorings of many different sorts."

served. The court ordered him to pay \$13,010 in restitution, plus other fines, fee, and assessments.

Defendant now appeals. He asserts (1) substantial evidence does not support his conviction. He also claims the trial court committed reversible error when it (2) told a juror it disagreed with her apparent factual conclusion; (3) refused to remove a juror for misconduct; (4) denied a motion for new trial made on the basis a juror failed to disclose during voir dire her support of organizations dedicated to preventing cruelty to animals; and (5) instructed the jury with CALCRIM No. 361 regarding a defendant's failure to explain or deny adverse testimony. Defendant also argues (6) the cumulative effect of the court's errors requires reversal.

DISCUSSION

I

Sufficiency of the Evidence

Defendant claims the evidence does not support his conviction. He argues the evidence at best establishes only that his dogs should have been fed more food, not the elements of felony cruelty to animals. We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate

court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.

[Citations.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Section 597, subdivision (b), at the time of defendant’s conviction, established the crime of cruelty to animals and its elements as follows in pertinent part: “[E]very person who . . . deprives of necessary sustenance, drink, or shelter . . . any animal, or causes or procures any animal to be so . . . deprived of necessary sustenance, drink, [or] shelter . . . ; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, . . . is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty thousand dollars (\$ 20,000).” (Stats. 1998, ch. 450, § 1.)

To establish the commission of this crime, the prosecution had to prove three elements: (1) the defendant owned or had charge or custody of an animal; (2) the defendant committed any of the acts or omissions specified in the statute with criminal negligence; and (3) the acts or omissions caused danger to the animal’s life. (*People v. Speegle* (1997) 53 Cal.App.4th 1405, 1412-1415 (*Speegle*); *People v. Brian* (1980) 110 Cal.App.3d Supp. 1, 3-4.)

Substantial evidence supports each of these elements. The first element was easily established. Defendant admitted he owned the dogs.

The evidence also supports the second element, the commission of an act prohibited by section 597, subdivision (b) with criminal negligence. "Criminal negligence requires conduct more egregious than mere civil negligence; a defendant's dereliction must be such a gross departure from the reasonably prudent that it amounts to reckless indifference with actual or imputed knowledge of the consequences. [Citation.]" (*Speegle, supra*, 53 Cal.App.4th at p. 1414, fn. 7.)

Substantial evidence demonstrates defendant's care of the dogs amounted to reckless indifference with actual or imputed knowledge of the consequences. Despite defendant's experience with raising dogs, he did not properly feed these dogs even though he possessed food to do so. The arresting officers found no food or water available for the dogs except for the unopened packages kept in storage. When impounded, the dogs were severely malnourished and dehydrated. Most gained substantial weight after only two weeks of normal feeding.

Defendant's conduct was not merely reckless, it was, in his own words, intentional. He testified he deliberately kept the dogs thin so he could control them easier and they would shed less. He claims before us the evidence shows, at worst, he did not feed his dogs enough, not that he committed an act of animal cruelty proscribed by section 597, subdivision (b). But intentionally keeping a dog at half its normal weight, the

condition in which these dogs were found, was determined by expert testimony to be an act of malnutrition, a condition that is prohibited by section 597, subdivision (b). It is the deprivation of necessary sustenance and the failure to provide proper food. Substantial evidence demonstrated defendant engaged in these actions recklessly, and intentionally, thereby satisfying the criminal negligence element of section 597, subdivision (b).

Substantial evidence also supports the third element of the crime, that defendant's acts caused danger to the dogs. Dr. Catania testified defendant's failure to feed the dogs caused them to be cachectic and malnourished, conditions that if not corrected would ultimately place the dogs in danger of dying prematurely.

Substantial evidence thus supports the conviction.

II

Court's Comment Disagreeing with Juror's Statement

Defendant asserts the trial court committed reversible error when, after a juror stated in chambers that no dog died due to defendant's treatment, the court stated the juror's statement was not true. We conclude the court's comment, while incorrect, was not prejudicial error.

A. *Additional background information*

After the first day of deliberations, Juror No. 3 gave the court a note claiming Juror No. 8 was disobeying the court's instructions and referencing items not in evidence. The following morning, the court and counsel examined Juror No. 3 in

chambers. After counsel and the court asked Juror No. 3 to give an example of what type of evidence Juror No. 8 was referencing, this dialogue ensued:

"JUROR: Okay. Let me answer that with an example. She said that many dogs have died. And I said, 'We don't have any evidence of that.' She says, 'Well, he had fifty dogs. There's only nine left.' [¶] So that's going back to -- I don't think that was evidence that those dogs died because of his treatment, which is what she was saying.

"THE COURT: Actually --

"JUROR: No dogs died in evidence due to his treatment.

"THE COURT: Actually, that's not true --

"[DEFENSE COUNSEL]: Well, Judge, I would prefer the Court not give an opinion on what the evidence is. I would ask the Court to --

"JUROR: One died, but not because of his treatment."

At this point, defense counsel asked Juror No. 3 to provide other examples. The examination continued, and no further statements were made by any party concerning the court's comment.

B. *Analysis*

"Article VI, section 10 of the California Constitution provides, in pertinent part: 'The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.' We have interpreted this provision to require that such comment 'be accurate, temperate, nonargumentative, and

scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." [Citations.] Thus, a trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict.' [Citation.] 'We determine the propriety of judicial comment on a case-by-case basis.' [Citation.]" (*People v. Monterroso* (2004) 34 Cal.4th 743, 780.)

The trial court's comment here did not usurp the jury's ultimate factfinding power or otherwise control the verdict. The comment was only a disagreement with a juror's statement that no dogs had died due to defendant's treatment. The comment had no apparent effect on the juror, as she disagreed with the comment after it was made and after counsel objected to it, and she repeated her correct interpretation of the evidence. That was the last word on the subject. The comment obviously did not control the verdict and thus did not constitute prejudicial error.

III

Refusal to Remove Juror No. 8

Defendant faults the trial court for not removing Juror No. 8 after investigating her alleged misconduct. He claims the alleged error is structural as well as prejudicial and requires reversal. We disagree.

A. *Additional background information*

During her examination in chambers, Juror No. 3 accused Juror No. 8 of using improper information and hypothetical questions as part of her deliberations. Juror No. 8 allegedly commented on the attorneys' manner of speaking, would use a hypothetical to ask the jurors how they would feel if their dogs were taken from them and given to defendant, and asked the jurors to consider the fact that defendant's dogs could be returned to him if he was not convicted. She would say she knew the judge did not want them to discuss some of these topics, but she would discuss them anyway. Juror No. 3 believed Juror No. 8 was not approaching deliberations with an open mind and was not willing to listen to the other jurors' opinions.

Immediately following this examination, defense counsel asked the court to replace Juror No. 8. The trial court, however, was not convinced it had enough evidence to justify removing her, and it decided to conduct further investigation.

The court and attorneys next examined the jury foreperson. The foreperson agreed that Juror No. 8 had used the hypothetical involving the jurors' own dogs, engaged in speculation, discussed whether the dogs, if returned to defendant, would end up alive or dead, and implied that other dogs that had previously been in defendant's care had also died. He said he had to refocus everyone to the facts which were given in the case. The foreperson also believed Juror No. 8 was not approaching deliberations with an open mind.

The court and attorneys then examined Juror No. 8. The court informed Juror No. 8 of the accusations against her. She admitted she had asked the jurors what would happen to their dogs or defendant's dogs if they were returned to him. She said she had forgotten the rule prohibiting jurors from discussing the possible consequences to defendant from this action, and she apologized.

When asked if she was approaching deliberations with a determination already made, Juror No. 8 said she thought she was allowed to do that once the trial was finished and they began deliberating, realizing that deliberations could change that determination. She stated it would not be honest to state at this point she had an "open, open, open, mind." After being told by the court she was "not to form or express any final opinions or conclusions until you've had the opportunity to . . . deliberate" with the other jurors, she said she understood and would have an open mind "[i]f someone can show me where what my opinion now is incorrect." Juror No. 8 denied she persisted in discussing impermissible material after saying she knew the judge said not to discuss it, as had been reported by Juror No. 3 and the foreperson.

Following these examinations, the court stated it was not making a factual determination regarding the issues raised by the jurors or whether Juror No. 8 was biased or engaged in misconduct. Instead, it ordered all of the jurors to continue deliberations and reminded them to be courteous, to keep an open

mind, and not to consider future consequences to defendant or his dogs.

Defendant claims the trial court erred by not removing Juror No. 8, despite the court reconvening and admonishing the entire jury.

B. *Analysis*

Section 1089 vests in trial courts the discretion to discharge a juror. The statute provides in part: "If at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged"

The decision to retain or discharge a juror rests within the sound discretion of the trial court. (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) ""Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence."" [Citations.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 943.) If the court retains a juror, there is no abuse of discretion if the record does not show as a demonstrable reality that the juror was unable to fulfill her functions. (*People v. Jablonski* (2006) 37 Cal.4th 774, 807.)

Under the demonstrable reality test, when reviewing a trial court's *removal* of a juror, we look to determine whether the trial court's conclusion that the juror was unable to perform a juror's functions "is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.) When reviewing a trial court's decision *not* to remove a juror, as is the case here, we first determine whether the juror's inability to perform a juror's functions was in fact shown by the record to be a demonstrable reality. (*People v. Martinez, supra*, 47 Cal.4th at p. 943.)

Based on the record before us, we conclude the trial court did not abuse its discretion when it retained Juror No. 8. The record does not show as a demonstrable reality that she was unable to fulfill her functions as a juror, and substantial evidence supports the court's decision to retain her.

The strongest complaint against Juror No. 8 was that she was considering possible consequences to the dogs if defendant was acquitted. She admitted this had happened, apologized for it, and agreed not to do it again. She would decide the case without considering consequences. Thereafter, the court reconvened and reminded the jury that the issue of consequences to the dogs or defendant was "not a proper consideration on the issue of innocence or guilt." While this evidence demonstrated Juror No. 8 had not complied with instructions, it did not necessarily show as a demonstrable reality she *could not* comply with instructions. There is no evidence in the record indicating Juror No. 8 was unable to follow, or did not follow,

this instruction from the point the jury was reconvened and admonished.

Moreover, Juror No. 8's initial misconduct by considering possible consequences to defendant or the dogs did not prejudice the jury. "Although misconduct raises the presumption of prejudice, 'the presumption of prejudice may be rebutted, *inter alia*, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.' (*People v. Hardy* (1992) 2 Cal.4th 86, 174.)" (*People v. Hord* (1993) 15 Cal.App.4th 711, 725.)

"Transitory comments of wonderment and curiosity, although misconduct, are normally innocuous, particularly when a comment stands alone without any further discussion. . . . [¶] When comments go beyond natural curiosity and their content suggests inferences from forbidden areas, the chance of prejudice increases. For example, if a juror were to say, 'The defendant didn't testify so he is guilty,' or 'we will have to find the defendant guilty of the greatest charges to ensure he will be adequately punished,' the comments go beyond mere curiosity and lean more toward a juror's drawing inappropriate inferences from areas which are off limits. Such comments are more likely to influence that juror and other jurors." (*People v. Hord, supra*, 15 Cal.App.4th at pp. 727-728.)

Although Juror No. 8's comment regarding consequences to defendant or the dogs carried a greater potential for prejudice, the record does not disclose a substantial likelihood that any

prejudice to defendant occurred. While the comment was heard by at least two jurors, it does not appear there was any deliberation by the jury on Juror No. 8's comment. In addition, the foreperson refocused the discussion back to the facts, and the court reconvened and admonished the jury not to consider consequences. Under these circumstances, there is no substantial likelihood defendant suffered any harm due to Juror No. 8's comments.

As to the allegations Juror No. 8 was not deliberating with an open mind, substantial evidence supports the court's decision that she was able to deliberate with an open mind. Juror No. 8 stated she had formed a strong opinion after hearing the evidence but was willing to change her mind if someone could show her where she was wrong. The court informed her she was not to form or express any *final conclusions* until after deliberating, and she said she understood that. This was sufficient evidence on which the court could conclude Juror No. 8 would be able to deliberate.

Under all of these circumstances, we conclude the trial court did not abuse its discretion by retaining Juror No. 8.

IV

Denial of New Trial Sought for Juror Misconduct

After the verdict but before sentencing, defendant moved for a new trial, claiming Juror No. 8 had failed to disclose during voir dire she supports organizations dedicated to preventing cruelty to animals. The trial court denied the motion, ruling no material concealment had occurred. Defendant

argues the trial court erred. He asserts Juror No. 8's concealment was material and prejudicial. We disagree.

A. *Additional background information*

Juror No. 8 was not among the first 18 jurors seated, but she was present in the court when the court instructed all potential jurors to listen to its questions and the attorneys' questions in case they were called to sit in the box. Regarding support of animal rights organizations, the court stated: "[W]hat I'm really trying to explore is whether there's any strong feelings or bias or prejudice one way or another on particular issues. [¶] And this question has to do with whether anybody is actively engaged and a member of either the Humane Society or similar, or some animal rights types of organizations. Anybody out there that is very actively involved in that kind of thing? [¶] . . . [A]nybody that's in charge of the local chapter of the Humane Society or volunteers there on a daily basis, anything like that? I don't see any hands. [¶] Conversely, on the other side of that, and I'm not sure what the organization would be, but maybe it's the beef industry or something. I'm not sure. But anybody that has opposite feelings, that have problems with the concept and the law, that the law provides protection for animals? Does anybody feel very strongly that they have a problem with that concept? [¶] Again, I don't see any hands. And I really am looking for extreme views one way or the other. And this is the time to be candid about it if you have feelings one way or the other."

Defense counsel asked a similar question: "Anyone here a member of PETA, People for the Ethical Treatment of Animals, or any similar organizations? Anyone have sympathies with those organizations?"

He went on to explain: "I'll tell you what I'm looking for, and I'm just going to bring it right out in the open. I'm concerned about jurors who feel so strongly about animals that they're going to have such an emotional reaction to this case that they're not going to be able to apply the law in a detached, unemotional and unbiased manner."

Juror No. 8 was seated in the box in the next group of jurors called. She initially responded to the court's general background questions: "I live about one-half mile east of Alturas. I am a retired teacher. My husband is an active real estate broker. We have no children. I've been on a jury three times. All three were criminal. In one case there was a hung jury and we reached a verdict in the other two." She also disclosed she knew defense counsel as a parent of a former student of hers.

The court reminded the new jurors of the questions it had asked the original jurors and summarized them. About its earlier question on support of animal rights organizations, the court stated: "Question generally about organizations, either organizations where you're sympathetic to animal rights or -- not that I'm particularly aware of any -- but ones that might be to the contrary, that take the position that the animals should have no rights. Actively involved in groups one way or the

other that have feelings on that subject? I don't see any hands."

The court then asked the new jurors if there was anything else that they could think of which it had not asked at that point: "But again anything I haven't covered that you need to know in terms of your ability to be fair and impartial in this case? Again, I see no hands."

Defense counsel asked Juror No. 8 a question to help her understand the concept of criminal negligence. He asked if she could accept that the law may not require a dog owner to take as good of care of his dogs as Juror No. 8 took care of her dogs, and that a level of care less than she provided did not, in and of itself, establish criminal negligence. She answered, "Right."

The court and counsel asked no further questions.

At the motion for new trial, the prosecution submitted into evidence a declaration by Juror No. 8 in which she explained her association with animal rights groups and why she did not disclose this information during voir dire. About a year prior to the trial, Juror No. 8 made a small financial donation to the ASPCA and mistakenly committed to do so by means of a monthly automatic withdrawal. When she realized the mistake, she decided to allow the withdrawals to continue more from inertia than from any passion on her part. She does not open letters from the ASPCA.

Juror No. 8 had contacts with the local humane society, the High Plateau Humane Society (HPHS). She had twice purchased

dinner tickets from the HPHS. She acquired a cat from the HPHS and paid it an adoption fee. She also donated to HPHS in 2005 and in the month after this trial in 2009. A few years earlier, she designed a new Web site for HPHS and managed it for a year, all pro bono. She also collected HPHS's data for a national dog/cat adoption service. She resigned from the project after about one year when the president did not seem happy with her work. She attended one HPHS meeting when she began the project, but has attended none since.

Juror No. 8 takes no active part in the HPHS but does sympathize with its work. To her knowledge, she is not a member of any humane society. She does not attend meetings, take part in their activities, or devote time to them.

She did not disclose this information during voir dire because she believed it was not within the scope of the questions the court and counsel asked. She remembered the question directed to her as asking whether she was an active member of a humane society and attended its meetings. She did not raise her hand because she takes no active part in any organization, and definitely not with the HPHS.

Juror No. 8 and her husband donate thousands of dollars annually to charitable causes, "including medical/health, political, social, local scholarships, philanthropic, educational, animal, and some local organizations." (Original underscoring.) They try to donate monthly and usually rotate donations. In her opinion, given the variety and extent of her donations, "[i]t is only natural that a couple of these

charities be animal oriented." However, it is not her intent to be placed on these organizations' membership lists. In fact, she usually throws away letters she receives from them unopened.

After considering this evidence, the trial court denied defendant's motion for a new trial. It concluded Juror No. 8's voir dire responses did not rise to the level of a material nondisclosure. The court acknowledged "maybe there should have been some more specific questions on voir dire, but generally speaking I think that the categories were fairly well vetted. And based on a review of the transcript and [Juror No. 8's] declaration, I don't find a threshold of material non disclosure being established." The court stated that donating to a national organization did not rise to the level of material nondisclosure.

The court also determined Juror No. 8 was not biased against defendant. The evidence did not establish she went into this case with a preconceived notion of its outcome or with some kind of agenda.

B. *Analysis*

"[D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be fair. Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully. 'A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the

jury selection process and commits misconduct. [Citations.]' [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 295.)

"'[J]uror misconduct involving the concealment of material information on voir dire raises the presumption of prejudice,' and . . . '[t]his presumption of prejudice "'may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . .'" [Citations.]' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1208.) "'The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'" (*Id.* at p. 1208, quoting *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, fn. 2.)

"Still, whether an individual verdict must be overturned for jury misconduct or irregularity "'is resolved by reference to the substantial likelihood test, an objective standard.'" [Citations.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*People v. Hamilton, supra*, 20 Cal.4th at p. 296, original italics.)

“Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. “[T]he proper test to be applied to unintentional ‘concealment’ is whether the juror is sufficiently biased to constitute good cause for the court to find under Penal Code sections 1089 and [former] 1123 that he is unable to perform his duty.” [Citations.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 823.)

We have reviewed the entire record and conclude there is no reasonable possibility of actual harm to defendant from Juror No. 8’s omissions. The record fails to disclose Juror No. 8 intentionally concealed her contributions to the ASPCA and her past involvement with the HPHS. Instead, the general voir dire questions asked of her did not solicit that information. The trial court asked the jurors if they were “actively engaged” in or a “member” of a humane society of similar animal rights group, or were “very actively involved in” that type of an organization. The court was “really” looking for persons “with extreme views” on the subject. Juror No. 8 declared she did not fall within any of those groups, and thus did not mention her contributions to the ASPCA or her past volunteer work with the HPHS.

Defense counsel’s general, related questions were not much different from the trial court’s questions. He asked if the jurors were members of PETA or any similar organizations, or if

they had sympathies with such organizations. Then he clarified that he was looking for jurors who felt so strongly about animals that they could not decide this case in an unemotional and unbiased manner. Again, Juror No. 8 declared she was not a member of an animal rights organization. She threw away any letters she received from such organizations without opening them. Despite having positive feelings towards animals, she believed she could serve on this jury in an unbiased manner.

Thus, Juror No. 8's nondisclosure of her contributions to the ASPCA and her prior volunteer work for the HPHS was inadvertent on her part. It occurred because the questions did not inquire about those activities. There was no misconduct. Under such circumstances, we apply the test for removing a seated juror under section 1089 for bias, the demonstrable reality test, to determine if Juror No. 8's omissions were prejudicial. (*People v. Wilson, supra*, 44 Cal.4th at pp. 823, 824.) They were not. Any alleged bias on her part was not shown by the record to be a demonstrable reality.

V

CALCRIM No. 361

Defendant asserts the trial court erred by instructing the jury with CALCRIM No. 361, an instruction allowing the jury to consider, as part of determining defendant's guilt, his failure when testifying to deny or explain any evidence against him.

The instruction, as given by the trial court read:

"If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be

expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.”

Defendant claims the court erroneously gave this instruction because he in fact explained or denied every aspect of the evidence that had been presented against him, and thus the condition precedent for giving the instruction was not present. He argues the error was prejudicial because the instruction singled out his testimony for special scrutiny, and invited the jurors not to trust his testimony if there was a conflict in the evidence. This, he argues, undermined the principle that jurors must not automatically reject testimony just because of inconsistencies or conflicts, as provided in another instruction given to the jury, CALCRIM No. 105.

We agree the court erred in giving the instruction. There were no facts or evidence in the prosecution’s case that defendant failed to explain or deny. However, the error was harmless.

Initially, the parties disagree over whether the error should be reviewed for prejudice under the constitutional error standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705], or under the less rigorous standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Courts applied the *Watson* standard when determining whether the erroneous giving of CALCRIM No.

361's predecessor, CALJIC No. 2.62, was prejudicial. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) We do the same here, as the error, contrary to defendant's argument, did not implicate defendant's constitutional rights to testify, provide a defense, or be proven guilty beyond a reasonable doubt.

Applying the *Watson* standard, we conclude it is not reasonably probable defendant would have received a more favorable result had CALCRIM No. 361 not been given to the jury. The evidence against defendant was overwhelming. The deputies at the scene testified to the dogs' poor conditions and their lack of food and water. Dr. Catania testified the dogs suffered from malnutrition which, if not corrected, could lead to their death.

Moreover, CALCRIM No. 361, by its own language, protected defendant's interest and obviated any possible harm. The instruction stated any failure on his part to explain evidence against him was not enough by itself to prove guilt. The prosecution still was required to prove each element of the crime beyond a reasonable doubt.

More to the point, the court instructed the jurors to disregard any instructions that, based upon their conclusions of fact, would not apply. (CALCRIM No. 200.) We presume the jurors followed that instruction (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), and thus did not apply CALCRIM No. 361 because its predicate was never satisfied. Under these circumstances, the court's use of CALCRIM No. 361 was harmless.

VI

Cumulative Error

Finally, defendant asserts the errors he has raised constitute cumulative error requiring reversal. We disagree. We have found only two errors, both of which were harmless. Defendant received a fair trial, and thus there is no cumulative error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.