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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER BURLEW,

Defendant and Appellant.

C064269

(Super. Ct. No.
08F02694)

Defendant was convicted by a jury of seven counts of lewd and lascivious conduct with a child under the age of 14 years (Pen. Code, § 288, subd. (a); further undesignated section references are to the Penal Code), six counts of sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b)), and one count of sexual intercourse with a child 10 years of age or younger (§ 288.7, subd. (a)). The jury also found true special allegations that defendant engaged in substantial sexual contact with respect to each of the lewd and

lascivious act charges. Defendant was sentenced to an aggregate determinate term of 18 years plus an indeterminate term of 115 years to life.

Defendant appeals, contending: (1) the trial court erred in permitting the prosecution to amend the information late in the proceedings to expand the time frame for the various offenses; (2) the trial court erred in permitting the prosecution to amend the information during jury deliberations to conform the section 288.7 charges to the wording of the statute; (3) the section 288.7 convictions violate ex post facto principles, because that section went into effect during the time frame of the alleged offenses and it cannot be determined if the jury concluded the offenses were committed before or after the effective date; and (4) the trial court improperly coerced a holdout juror.

We disagree on all points and affirm the judgment.

FACTS AND PROCEEDINGS

The offenses in this matter occurred sometime between September 1, 2006 and September 7, 2007, when defendant was at least 20 years old and the victim was under 10. During this period, defendant was living in the home of his aunt, T.O., and uncle, who had two children, H.O. and C.O. H.O., the victim in this matter, had her ninth birthday in November 2006, and attended the third grade between September 2006 and May 2007.

At approximately 8:00 p.m. on September 7, 2007, T.O. walked to the doorway of C.O.'s bedroom and saw C.O. sitting on

the floor playing a video game and defendant and H.O. sitting on a bed. Defendant had his arm around H.O. and his hand on her chest. T.O. immediately backed away and called for the children to go to the bathroom to brush their teeth and get ready for bed. She also asked defendant to drive to Blockbuster Video to rent a movie.

As soon as defendant departed, T.O. asked H.O. what was going on. H.O. answered, "With what?" T.O. asked if defendant was touching H.O., and H.O. put her head down and began crying. T.O. insisted that H.O. tell her what was going on, and H.O. acknowledged defendant was touching her. When T.O. asked where defendant had been touching her, H.O. grabbed her mother's hand and put it on her chest and her "private" area. H.O. also indicated the touching was under her clothes. T.O. asked if defendant had ever put anything inside her, and H.O. "was crying and crying and said, 'Yes.'" When asked what defendant put inside her, H.O. said, "His wee wee." T.O. then asked where and how this happened. H.O. went to her bedroom and, after a minute, got on her hands and knees on top of the bed. H.O. said defendant "put his wee wee inside of her and went back and forth." H.O. indicated this happened more than once.

T.O. woke her husband, who worked at night and slept during the day, and they took H.O. to the U.C. Davis Medical Center. However, an examination of H.O. was indeterminate for sexual penetration.

On September 18, 2007, H.O. was taken to the Sacramento "S.A.F.E. Center" for a one-on-one forensic interview. However, H.O. refused to discuss the molestations during the interview.

On October 3, 2007, H.O. began attending weekly counseling with a child and family therapist. For many months, H.O. would not discuss the molestations.

On January 31, 2008, T.O. made a pretext call to defendant. During the call, defendant admitted molesting H.O. but indicated the molestations did not occur over a very long period. He also admitted placing his penis close to H.O., touching her "private" with it, and masturbating H.O. However, he denied ever penetrating H.O. or having intercourse with her.

On March 3, 2008, during a counseling session, H.O. finally told the therapist that defendant had touched her "privates" and would have her get on her hands and knees.

Three days later, H.O. was again taken to the S.A.F.E. Center for an interview. During that interview, H.O. discussed the molestations and indicated they occurred when she was nine years old. She also said they occurred during the day while her mother was gone and her father was asleep. H.O. indicated defendant touched her "private" but nowhere else. She also indicated defendant touched her with his fingers and then his "private." H.O. asserted defendant touched her with his fingers perhaps six times and with his "private" four to five times. She also said defendant touched her private with his private both outside and inside and, when his private was inside her, defendant moved around a minute or so and pulled her to him.

H.O. also indicated defendant was in front and facing her at the time.

On August 21, 2008, defendant was charged with four counts of lewd and lascivious conduct (§ 288, subd. (a)) and one count of sexual intercourse with a child 10 years of age or younger (§ 288.7, subd. (a)), all occurring between January 1 and September 7, 2007. Approximately 11 months later, on July 29, 2009, the People amended the information to add three more counts of lewd and lascivious conduct and six counts of sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b)).

Trial commenced five days later. At trial, H.O. testified defendant touched her "private" with his finger and with his "private" while she was in the third grade. She also indicated defendant touched her inside her "private" about five times. H.O. testified defendant touched the inside of her "private" with his "private" approximately three times while in front of her. She denied that defendant ever had her get on her hands and knees.

In addition to testimony from H.O.'s mother, H.O.'s therapist, the physician's assistant who examined H.O. at U.C. Davis, and the investigating officer, the jury heard both the second S.A.F.E. interview and the pretext call.

The defense consisted of expert testimony that H.O.'s medical examination showed there had been no penetration. Defendant did not testify. In argument to the jury, defense

counsel did not contest that defendant had touched H.O. inappropriately.

During trial, the People were granted leave to amend the information to expand the time frame of the offenses backward to September 1, 2006.

During jury deliberations, the People were granted further leave to amend the information to substitute penetration of the victim's "genitalia" for penetration of the victim's "vagina" on the section 288.7 charges.

Defendant was convicted on all charges and all special allegations were found true. He was sentenced on one section 288 charge to the middle term of six years and on each of the other section 288 charges to two years (one-third the middle term), to run consecutively. On each of the section 288.7, subdivision (b) charges, defendant received consecutive indeterminate terms of 15 years to life. Finally, defendant received a consecutive indeterminate term of 25 years to life on the section 288.7, subdivision (a) charge.

DISCUSSION

I

Amendment to Expand Time Frame

The information originally alleged all crimes occurred between January 1, 2007 and September 7, 2007. Less than a week before trial, the People were given leave to amend the information to add new charges. During trial, the prosecution moved to amend the information further to expand the time frame

of the offenses backward to September 1, 2006. After the parties rested, the court granted the motion.

Section 1009 authorizes the trial court to permit an amendment to the information "at any stage of the proceedings." (§ 1009.) The defendant is required to plead to the amended pleading "unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted." (*Ibid.*) Section 1009 is designed to protect a defendant's right to due process by requiring adequate notice of the charges against him. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903-904.)

Defendant contends the trial court erred in granting the prosecution's mid-trial motion to amend the information to expand the time frame of the offenses by four months. He argues such amendment prejudiced him in two ways. First, defendant points out that in the pretext call he admitted inappropriately touching H.O. but denied penetrating her. He also asserted the time frame for these acts "wasn't long at all." Defendant argues the jury would be less likely to believe his denial of penetration if it disbelieved his claim that the offenses occurred over a period that "wasn't long at all." Defendant further argues that, by permitting an increase in the time frame of the offenses, the court made it less likely the jury would believe his assertion that the offenses occurred over a period of time that was not long and, hence, less likely the jury would

believe his other assertion that he did not penetrate the victim.

Second, defendant asserts his defense that there had been no penetration was partially based on the fact there was no physical evidence of penetration. Expert testimony established the physical examination of H.O. was either "normal" or "indeterminate." However, the experts also opined a molest victim could have a normal examination because either the penetration was slight, the genital area of the victim was sufficiently elastic to prevent injury, or the examination occurred a sufficient time after the molest to permit any injury to heal. Defendant argues expansion of the time frame for the offenses, thereby permitting the jury to conclude the offenses began four months earlier, meant the jury could also find the victim had four more months to heal, which would negate the significance of the "normal" examination.

Even ignoring the fact defendant failed to raise either of these arguments in opposition to the People's motion to amend, his arguments are not well taken. The fact the time frame of the offenses was expanded did not negate that the offenses could have occurred over a relatively short period. The overall time frame of the offenses signifies only that the offenses occurred sometime during that period. However, all of the offenses could have occurred at the beginning of that period, at the end, or sometime in the middle. They need not have occurred throughout. Thus, the addition of four months did not necessarily mean the offenses spanned a longer period. It merely allowed for a

finding that the span of the offenses, however long or short, may have begun earlier than originally thought. Furthermore, the basic premise of defendant's argument--that a reasonable jury could find a span of eight months not to be a long period but could not so find for a span of 12 months--is not sound.

As for any increase in the healing period, since defendant did not raise this issue below, there is nothing in the record to support his basic premise that any finding by the jury that the molestations may have commenced earlier than January 1, 2007, would have impacted the results of the physical examination. Furthermore, there is nothing in this record to suggest defendant's defense would have been any different had he been given notice of the expanded time frame from the start. Nor does defendant argue on appeal that early notice would have changed the defense strategy. As noted above, section 1009 is intended to protect the defendant's right to due process. Due process requires adequate notice, so that a defendant may prepare for trial. Because there is nothing in this record to suggest the defense strategy would have been any different had defendant received earlier notice of the expanded time frame for the offenses, defendant was not prejudiced by the last-minute amendment.

II

Amendment to Substitute "Genitalia" for "Vagina"

During deliberations, the jury sent out the following question: "What exactly constitutes penetration?" The court

provided the following response: "The definition of penetration is provided in the instructions for Penal Code section 288.7(a) and Penal Code section 288.7(b). If you have a more specific question, please submit it." The jury then sent the following request: "Clarification between wording of Counts 2, 4, 6, 8, 10, 12, & 14 and Penal Code Section 288.7(a) [.] [¶] *Defendant inserted his finger into the victim[']s vagina) [¶] * Sexual intercourse means any penetration, however slight, of the genitalia by the penis (or foreign object)."

The latter question by the jury highlighted a discrepancy between the charging document and the applicable Penal Code section. Section 288.7, subdivision (b), prohibits sexual penetration as defined in section 289. Section 289 defines sexual penetration as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." However, at the beginning of trial, the amended information alleged for each violation of section 288.7, subdivision (b), that "the defendant inserted his finger into the victim's vagina."

The prosecution proposed that the verdict forms be amended for each of the section 288.7 charges to substitute the word "genitalia" for "vagina." The defense objected that this amendment would reduce the prosecution's burden of proof,

inasmuch as penetration need not be as deep to penetrate the genitalia as to penetrate the vagina. After further back and forth with the jury, the court eventually gave the prosecution leave to amend the information to substitute "genitalia" for "vagina," and the verdict forms were amended accordingly. This amendment was consistent with the instructions given to the jury, which tracked the statutory language. Defendant immediately moved for a mistrial, but the motion was denied. The court then instructed the jury that penetration means "penetration, however slight, of the labia majora of the child for the purpose of sexual arousal or gratification."

Defendant contends the trial court erred in permitting the foregoing amendment. He argues he prepared for trial based on the allegations in the charging document and, because there was no preliminary hearing, he had no advance notice of the revised allegations. As a result, he argues, his right to a fair trial and to present a defense was violated.

Defendant acknowledges that notice of the particulars of the charges is often provided both from the charging document and from the preliminary hearing testimony. He further acknowledges that his waiver of a preliminary hearing in this matter was pursuant to a stipulation that the information could be amended to include any charges supported by the pretrial discovery. But, defendant argues, "[h]e did not agree that the pretrial discovery provided him with notice of the **facts** underlying any new charges."

Defendant cites *People v. Winters* (1990) 221 Cal.App.3d 997 (*Winters*) where, notwithstanding that the facts supporting a drug transportation charge could be found in the defendant's own pretrial statements, the court concluded the prosecution could not amend the information to add a transportation charge. (*Id.* at p. 1007.) In that case, there had been no preliminary hearing and the court concluded that, under such circumstances, the complaint could not be amended to add a new charge, regardless of the defendant's knowledge of the operative facts. (*Id.* at pp. 1007-1008.)

Defendant also cites *People v. Peyton* (2009) 176 Cal.App.4th 642 (*Peyton*), another case where the preliminary hearing was waived and the court declined to adopt a rule whereby information available to the defendant through other means could provide the requisite notice to permit an amendment of the charging document. The court stated: "Preliminary hearing transcripts have long been considered the 'touchstone of due process notice' to the defendant. [Citation.] And when, as here, a defendant waives his right to a preliminary hearing and no preliminary hearing is held, substituting the preliminary hearing transcript with potentially vague indications that the defendant was on notice of the facts underlying a proffered additional charge would risk depriving the defendant of his due process right to notice of *all* of the charges against him. The contents of police reports and other 'discovery' or information available to the defendant would be a

poor and potentially dangerous substitute for the 'touchstone' of the preliminary hearing transcript." (*Id.* at p. 656.)

Defendant contends the present matter falls within the ambit of *Gray v. Raines* (9th Cir. 1981) 662 F.2d 569 (*Gray*), where the defendant was charged with forcible rape, he put on a defense of consent, and the prosecution thereafter amended the complaint to allege statutory rape. (*Id.* at pp. 570-571.) The Ninth Circuit concluded that, under those circumstances and despite the fact there had been a preliminary hearing in which the victim's age of 17 was revealed, the defendant was denied his right to be informed of the charges against him. (*Id.* at pp. 571, 573-574.) The court concluded the offense of statutory rape is a separate offense and not just a type of the more general offense of rape. (*Id.* at p. 572.) Hence, the prosecution had been permitted to charge a new offense after the defense presented its case.

In each of the foregoing cases, the question presented was whether the prosecution could amend the information to allege a new offense. It was not, as here, whether the information could be amended to clarify the circumstances of an existing charge. In addition, unlike *Winters* and *Peyton*, defendant here assented to future amendments of the information as part of his waiver of the preliminary hearing, so long as any such amendment is based on information revealed in discovery. Thus, defendant was on notice that the nature of the charges against him could change, at least as to facts revealed in discovery. And to the extent defendant was aware he was charged with penetration of the

vagina, he was obviously also aware he was charged with penetration of the genitalia.

What defendant really complains about here is that he was deprived of a windfall that occurred when the prosecution ill-advisedly chose to charge him with penetration of the vagina rather than penetration of the genitalia. The applicable code section does not require penetration of the vagina. The defense consisted of defendant's denial in the pretext call of any penetration whatsoever along with the medical testimony that the victim's examination was normal, i.e., consistent with no sexual penetration.

Defendant asserts the prosecution made an *election* to charge him with penetration of the vagina and so must live with that election. However, what the prosecution did was not make an election but mistakenly charge more than was necessary for a conviction. It would be as if the prosecution brought a charge of battery and alleged in the charging document that the defendant shot and killed the victim. The fact the evidence later showed the victim did not die from the gunshot wound would not exonerate the defendant of the battery charge.

To sustain a conviction under section 288.7, subdivision (b), the prosecution was required to prove penetration only of the genitalia. The fact the information alleged the defendant went even further and penetrated all the way to the victim's vagina does not mean he can be acquitted of the charge if it is later proven defendant penetrated the victim's genitalia but did not reach her vagina.

Defendant's only possible due process argument here would not be based on the late change in the allegations but the fact the prosecution originally charged penetration of the vagina. Conceivably, defendant's due process rights might have been violated if the overcharge kept him from presenting a more effective defense to the ultimate charge. However, defendant presents no argument as to how his defense would have been different had the information charged penetration of the genitalia from the beginning. Thus, his challenge to the amendment fails.

III

Ex Post Facto Challenge

As ultimately amended, the information charged six violations of section 288.7, subdivision (b), and one violation of section 288.7, subdivision (a), each occurring sometime between September 1, 2006 and September 7, 2007. However, section 288.7 did not become effective until September 20, 2006, 19 days after the start of the alleged time frame for the offenses. (See Stats. 2006, ch. 337, §§ 9, 62, pp. 2590-2591, 2668.)

Defendant contends it cannot be determined on this record whether one or more of the section 288.7 offenses occurred before the effective date of that provision. Thus, defendant argues, the prosecution failed to prove beyond a reasonable doubt that the offenses occurred after the effective date and, hence, those convictions violate ex post facto principles.

“ “[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.” (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.3d 30, 39].) In *People v. Hiscox* (2006) 136 Cal.App.4th 253 (*Hiscox*), the defendant was convicted of 11 counts of lewd and lascivious conduct with a child occurring between 1992 and 1996 and was sentenced to 11 consecutive terms of 15 years to life under section 667.61. However, that section did not go into effect until November 30, 1994. (*Hiscox*, at pp. 256-257.) The Court of Appeal concluded the sentence violated ex post facto principles, because it could not be determined on the record whether the offenses occurred before or after the effective date of section 667.61. (*Id.* at pp. 259, 261.) The court remanded for resentencing under prior law. (*Id.* at p. 262.)

The court in *Hiscox* explained that, where generic evidence is relied upon to prove multiple acts of molestation, the prosecutor “must establish a time frame for the offenses sufficient to bring them within the scope of any statutory or constitutional limitation on punishment.” (*Hiscox, supra*, 136 Cal.App.4th at p. 260.) In that case, “neither the prosecution, the defense, nor the court realized that the effective date of section 667.61 presented a problem of proof regarding when the charged offenses were committed. The prosecutor did not ask the

victims to identify when they were molested with any specificity. The evidence did not reliably connect the various charges to any time frame other than the period between 1992 and 1996. The court did not instruct the jury that its findings under section 667.61 were restricted to offenses committed on or after November 30, 1994, and defense counsel raised no ex post facto objection." (*Id.* at p. 258.)

In *Hiscox*, the court indicated an ambiguity in the charging document and the verdict forms will not necessarily implicate ex post facto principles if "the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after" the effective date of the applicable statute. (*Hiscox, supra*, 136 Cal.App.4th at p. 261.) As we shall explain, that is the case here.

It is clear on this record that neither the prosecution, the defense, nor the trial court was aware of an ex post facto issue in the application of section 288.7 to this case. The prosecution, with the trial court's acquiescence, actually amended the information late in the proceedings to expand the time frame of the offenses, thereby creating the present ex post facto issue. The jury was not asked to decide whether the offenses occurred after the effective date of section 288.7, and no such finding was made.

H.O. testified at trial that defendant touched her "private" during her third grade school year. T.O. testified the school year ran from September 2006 to May 2007. During the second S.A.F.E. interview, H.O. indicated all of the offenses

occurred while she was nine years old. H.O. testified she turned nine on November 14, 2006. But when asked in the interview when the first touching occurred, H.O. answered: "I don't know. Um, I know it was during summer. But it was like summer was just ending." As for the last touching, H.O. stated in the interview that it occurred approximately 10 months before the interview. Since the S.A.F.E. interview occurred in early March 2008, this would place the last touching in early May 2007.

The People argue the victim's statement during the second S.A.F.E. interview that the first offense occurred when she was nine years old, coupled with testimony that she did not turn nine until November 14, 2006, resolves the present issue. However, this conveniently ignores the victim's interview statements that the first offense occurred when summer was just ending and the last occurred 10 months before March 2008, thus suggesting the first offense occurred near the end of summer 2006. It cannot reasonably be argued November 14 is near the end of summer.

It is clear from the totality of the victim's testimony and interview statements that she was somewhat confused about when the offenses occurred. The first offense could not have occurred near the end of summer 2006 and also after H.O. turned nine. Thus, the jury could reasonably have discounted the victim's testimony in this regard. However, there is other evidence in this record that leaves no reasonable doubt the offenses were committed after September 20, 2006.

First, we have the fact T.O. caught defendant touching her daughter's chest on September 7, 2007. Thus, it may reasonably be inferred the molestations were still ongoing at that time. Second, defendant assured T.O. in the January 2008 pretext call that the molestations had not been occurring for very long, which would suggest they began well after September 20, 2006. Finally, and more importantly, we have the following colloquy in the pretext call between defendant and the victim's mother:

"[T.O.]: . . . I want to know what happened, Chris. And if it didn't happen for long, then--then when did it start?

"[Defendant]: I can't--I don't know when it started, [T.] I don't--

"[T.O.]: [H.O.] said it was during swim lessons. So to me that's, like, this summer.

"[Defendant]: That'd be probably about right.

"[T.O.]: That's right?

"[Defendant]: That's probably--yeah, that's probably about right."

Thus, defendant himself admitted the molestations began during the summer of 2007. This is within the time frame of the jury's verdicts. And because section 288.7 went into effect prior to 2007, there is no ex post facto violation.

IV

Juror Coercion

The jury was instructed with CALCRIM No. 3550. In relevant part, the jury was told:

"Ladies and gentlemen, when you go to the jury deliberation room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

"It is your duty in the jury deliberation room to talk with one another and to deliberate. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors.

"Do not hesitate to change your mind if you become convinced that you were wrong, but do not change your mind just because other jurors disagree with you. Keep an open mind and openly exchange your thoughts and ideas about this case.

"Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other. [¶] . . . [¶]

"Your verdict must be unanimous. This means that to return a verdict, all of you must agree to it. Do not reach a decision by the flip of a coin or by any similar act."

On the third day of jury deliberations, the court received the following note from the jury foreman: "A juror is unwilling to deliberate and discuss all evidence. Unwilling to budge one way or another. [¶] Stated twice mind is made up."

The court announced to counsel its recommendation that the jury be provided a copy of CALCRIM No. 3550, be directed to read it, and be told: "If a juror is unwilling to deliberate, please notify us in writing, and then we will address it as the case law requires us to." Defense counsel suggested that the court first bring in the jury foreman for questioning as "a better use of time." The prosecutor agreed.

The jury foreperson, juror No. 9, was then questioned. Juror No. 9 indicated the juror unwilling to further deliberate, juror No. 8, had announced that morning and the prior afternoon that her mind was made up and nothing was going to change it. Juror No. 9 also indicated juror No. 8 had been listening to the others but had not contributed anything to the discussion. Juror No. 9 stated juror No. 8 had said she thought she was following the court's directive that if a juror has an opinion on the matter she should not let the others change her opinion.

After juror No. 9 was excused, the parties agreed the court should bring in juror No. 8 and question her. Juror No. 8 entered and acknowledged that she had announced her mind was made up. When asked if she was unwilling to discuss the evidence, juror No. 8 responded: "No. That's not what--my understanding, and correct me if I'm wrong. When you--after everybody was released from the jury, that you gave us the instruction and you said that--I'm not going to quote you correctly, probably, but you said when you make up your mind, you can stick with that decision. And that's what I meant." She also indicated she now felt like she was experiencing

animosity from the other jurors. The court explained it is the obligation of each juror to continue discussing and sharing with one another and asked if the juror could do that at this point in the process. Juror No. 8 responded: "I think what I was trying to express was that I was listening to everything and everything that was in discussion, and, you know, I felt like I was listening just like everybody else, so I'm not sure, because I'm feeling very--I'm just telling you honestly, I'm feeling kind of hostility a little bit. Not from this courtroom. I just want you to consider that because I don't want to be unfair. I was listening to you and I tried to do the best I could, but I think they feel that I'm just not. So you know--" When asked if she was willing to listen to the other jurors, to talk to them, and to discuss the evidence, juror No. 8 answered, "yes." She further indicated she was open to changing her position. At that point, juror No. 8 was excused.

The trial court reiterated its intent to have the jurors read CALCRIM No. 3550. The prosecutor responded that the court should also follow its original intention to tell the jurors that if anyone is not deliberating, this should be brought to the court's attention. Defense counsel disagreed, asserting nothing more should be done to single out juror No. 8, since "she already feels ostracized." The court suggested adding instead, "if there are any further issues, including anyone's failure to comply with instruction 3550, please notify us in writing." Both counsel agreed, and the jury was so instructed.

Defendant contends the trial court erred in sending juror No. 8 back for further deliberations "with a proviso (over the defense's objection), that all jurors read the pattern CALCRIM on the duty to deliberate." Defendant argues that, "until the court intervened, this juror had a reasonable doubt as to [defendant]'s guilt (which fellow jurors misconstrued as an unwillingness to deliberate further)." Thus, defendant argues, the record reflects that the verdicts reached were compromises resulting from coercion by the trial court.

Defendant misreads the record. First, as support for his assertion that, before the court intervened, juror No. 8 had a reasonable doubt as to defendant's guilt, defendant cites pages 521 and 525 of the Clerk's Transcript. However, the Clerk's Transcript ends on page 504. There is, in fact, nothing in this record to indicate the position juror No. 8 had taken before the court intervened. The concern expressed to the court was simply that juror No. 8 had announced she had made up her mind and refused to deliberate further.

Defendant argues jury coercion in this case is evident from the fact the jury had good reason to doubt his guilt, the court failed to question the entire jury panel before allowing them to resume deliberations, and "after only four days of actual testimony the jury spent over nine hours deliberating this case [citation], before announcing it was hung because of a holdout juror."

There is nothing in this record to suggest the jury was ever hung during deliberations. The fact one juror was refusing

to deliberate further does not mean there was any deadlock. The court was simply being told one juror was not following the court's instructions.

Furthermore, defendant's claim here is that the court erred in directing the jury to reread CALCRIM No. 3550 and to continue deliberating. However, defendant himself agreed to this procedure. Although defendant asserts on appeal that he objected to the court's action, he did not. Defendant objected only to the court including in its directive to the jury its original proposal that if a juror is unwilling to deliberate, the court should be notified. Defendant expressed concern that this would single out juror No. 8, and the court did not include that directive.

At any rate, there is nothing in the court's actions to suggest the jury was coerced into reaching a verdict. After obtaining the relevant information from juror No. 8 and juror No. 9, the court asked juror No. 8 if she was willing to resume deliberations, to discuss the evidence, to listen to the others, and to change her position if appropriate. Juror No. 8 indicated she was willing to do so. There was no indication at that point of a hung jury and no suggestion as to what position juror No. 8 had taken on the evidence. Thus, defendant's claim that juror No. 8 was coerced into finding him guilty is pure speculation.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ RAYE _____, P. J.

_____ MAURO _____, J.