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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CEDRIC PITTMAN, Defendant and Appellant.	E052903 (Super.Ct.No. FSB1002633) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Michael M. Dest, and Donna G. Garza, Judges. Affirmed.

Victoria Barana and Beatrice Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, Cedric Pittman, received assistance from the San Bernardino County Human Services Department (the county) in the form of cash aid and food stamps. The amount of assistance he received was based in part on his representation that his daughter, J.P., was living with him in late 2009 and early 2010. Investigators with the county determined such representations were false and that defendant was therefore overpaid.

The San Bernardino County District Attorney charged defendant with receiving over $950 in aid by misrepresentation (count 1; Welf. & Inst. Code, § 10980, subd. (c)(2)) and perjury relating to welfare fraud (count 2; Pen. Code, § 118, subd. (a)). A jury convicted defendant of the second count. When the jury could not reach a verdict on the first count, the court declared a mistrial as to that count. The court sentenced defendant to 258 days in jail and five years' felony probation, and imposed a restitution fine.

On appeal, defendant contends the court erred in denying a defense motion for mistrial after the jury had announced they were deadlocked, and that the court coerced a guilty verdict by ordering jurors to continue deliberating. The People assert the court acted within its discretion by directing further deliberation upon reasonably concluding that doing so would enhance the jury's understanding of the case. The People did not specifically respond to defendant's argument regarding the court's denial of defendant's

mistrial motion.[1] We reject defendant's coercion argument and agree with the People that the court acted within its discretion by directing further jury deliberations. Furthermore, we disagree with defendant that the court abused its discretion in denying defendant's motion for a mistrial. We therefore affirm the judgment.

II. FACTUAL SUMMARY

A. *Trial*

J.P. is the daughter of defendant and Zemina King-Sirfontes. During the relevant time, defendant lived in Fontana, California, and King-Sirfontes lived in Arizona. In November 2009, when J.P. was 15 years old, she telephoned King-Sirfontes and asked to be picked up in California. Although J.P. sometimes visited her mother, her permanent residence was—at least until that time—with defendant. A couple of days later, King-Sirfontes arrived in Victorville, California, and retrieved J.P. from the home of Diana Johnson, a woman with whom defendant had fathered two other children. At some time in December 2009, defendant became aware that J.P. was living with her mother in Arizona.

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[1] Defendant's argument regarding the denial of the motion for mistrial was based on the jurors' announcement that they were deadlocked and the alleged presence of factors warranting mistrial. In their respondent's brief, the People do not specifically address this argument. They do, however, include a section in which they argue that defendant has failed to properly raise or preserve an argument that the trial court erred in denying a *motion for new trial*. On that basis, the People expressly decline to address the argument. The People appear to misunderstand defendant's argument. Defendant does not challenge the court's denial of his motion for new trial; he challenges the court's denial of his *motion for mistrial*, which was raised below and preserved for appeal.

Defendant and King-Sirfontes presented conflicting testimony as to where J.P. thereafter lived. Defendant testified that once he was aware J.P. had been taken to Arizona, he contacted King-Sirfontes and demanded she immediately return J.P. to California. According to defendant, J.P. did return to California in early December 2009. However, King-Sirfontes testified that no agreement was ever made to return J.P. to defendant. King-Sirfontes also testified that J.P. made one "turn around" trip to California but never went back to live with defendant.

Although J.P. attended school in the Fontana Unified School District until May 2009, there is no record she attended any Fontana school during the 2009-2010 academic year. In January 2010, King-Sirfontes enrolled J.P. in a high school in Arizona. Defendant testified that although J.P. attended school in Arizona, she regularly traveled between his home in California and King-Sirfontes's home in Arizona. According to the Arizona school records, J.P. was absent a total of 15 days between January and May 2010. Defendant asserted that J.P. sometimes returned to live with him in Fontana during those 15 days. However, King-Sirfontes testified that J.P. remained in Arizona.

In December 2009 and March 2010, defendant represented to the county that J.P. continued to live with him in Fontana. However, defendant's reports and statements contained several inconsistencies that drew interest from the county and created some suspicion of fraud. In March 2010, the county began an investigation to determine whether defendant fraudulently received aid by misreporting that J.P. lived with him. An investigator for the county concluded that defendant was overpaid $2,465.

During the four-day trial, Johnson, King-Sirfontes, defendant's case worker, several investigators, and defendant testified. The allegedly false reports and investigatory documents were admitted into evidence, along with J.P.'s school records.

B. *Overview of Jury Deliberations*

Following trial, the jury began deliberations. After seven hours over two days of deliberations, the jury informed the court they were unable to reach a decision on either count. One juror explained that the deliberation room's hostile environment was likely the source of disagreement. The comment prompted the court to admonish the jury before calling a recess and ending the evening. The following afternoon, the jurors resumed deliberations and asked for the readback of testimony. The jury returned to deliberate the next day. The jury sent a second note, again stating no verdict could be reached. The court brought in the foreperson and asked if any juror had refused to deliberate or make a decision based on the evidence. In response, the foreperson alleged a particular juror had committed misconduct.

When deliberations resumed the following week, the court addressed the misconduct allegation, found the allegation true, and excused the offending juror. The excused juror was replaced, and the jury was instructed to begin deliberations anew. The next day, the jury informed the court it was deadlocked, and one juror had asked to be removed. The court was prepared to grant a mistrial when one juror said that resolution was still possible. With that, the court ordered the jury back to deliberations. After deliberating the following day, the jury found defendant guilty as charged in count 2, but

could not reach a verdict as to count 1. The court then declared a mistrial as to count 1 and dismissed the jury.

III. ANALYSIS

Defendant contends the court abused its discretion in directing the jury to continue deliberations and twice failing to declare a mistrial. Specifically, defendant argues the trial court coerced the guilty verdict through its repeated interaction with the jury and three orders to continue deliberations. The jury, he asserts, should have been allowed to hang on both counts.

The People contend the court acted within its discretion when ordering further deliberations because at each stage of the proceeding there appeared to be a reasonable probability of agreement. We address the issues chronologically.

A. *Standard of Review*

Penal Code section 1140 states: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Through the trial court's discretion, a deadlocked jury may be ordered into further deliberations if the court concludes there is a reasonable probability of agreement. (See *People v. Harris* (2005) 37 Cal.4th 310, 363-364.) However, ordering further deliberations must be understood as """"enabling the jurors to enhance their understanding of the case rather than as mere

pressure to reach a verdict on the basis of matters already discussed and considered.'"' [Citation.]" (*Id.* at p. 364.) The court must exercise its discretion without coercing the jury, "so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775 (*Rodriguez*).) "'Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case.' [Citation.]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1252 (*Russell*).)

Regarding the denial of a motion for mistrial, the California Supreme Court has stated: "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) We therefore "use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

B. *Applicable Legal Principles*

Because "'[t]he secrecy of deliberations is the cornerstone of the modern Anglo-American jury system[,]'" courts must use care when intruding into the deliberative process. (*Russell*, *supra*, 50 Cal.4th at p. 1251.) Where reasonable probability of agreement exists among a deadlocked jury, the court may ask the jury its numerical division "without seeking to discover how many jurors are for conviction and how many are for acquittal." (*People v. Carter* (1968) 68 Cal.2d 810, 815, fn. omitted (*Carter*), disapproved on another point in *People v. Gainer* (1977) 19 Cal.3d 835, 851-852.) Also,

the court should question the individual jurors as to their perspective on the probability of agreement. (*Carter, supra,* at p. 815.) If the court concludes that reasonable probability exists, it may take measures to encourage agreement. (*Ibid*.) Such measures include "impressing the jury with the solemnity and importance of its task and reminding it that in the event of a mistrial the case will have to be retried, with attendant expenditure of money and time, and decided upon similar if not identical evidence by a jury of persons having qualifications equal to those of the present jury." (*Id*. at pp. 815-816.) The court may also advise the jury "that its members should consider the case dispassionately and should lay aside views held through pride of opinion rather than through conscientious conviction." (*Id*. at p. 816.)

Although the trial court may not express an opinion on a defendant's guilt or innocence at any stage of the trial, "it is not prohibited from appropriate comment *simply because the jury has indicated an initial deadlock in its deliberations*." (*People v. Proctor* (1992) 4 Cal.4th 499, 542.) The court has "broad latitude in fair commentary, so long as it does not effectively control the verdict," and "the court need not confine itself to neutral, bland, and colorless summaries." (*Rodriguez, supra,* 42 Cal.3d at p. 768.)

Additionally, the need to protect jury deliberations "does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*People v. Cleveland* (2001) 25 Cal.4th 466, 476.) When the court "questions whether all of the jurors are participating in deliberations," it may "reinstruct the jurors regarding their duty to deliberate and . . . permit the jury to continue deliberations before making further

inquiries that could intrude upon the sanctity of deliberations." (*Id*. at p. 480.) When the court's reinstruction "does not resolve the problem" and there is notice of possible juror misconduct, the court is required to conduct a reasonable inquiry to determine the existence of any misconduct. (*Ibid*.)

Once a juror has been dismissed and replaced by an alternate, the court must instruct the jury to "'set aside and disregard all past deliberations and begin deliberating anew.'" (*People v. Proctor*, *supra*, 4 Cal.4th at p. 537.) In addition, "'[t]he jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had.' [Citations.]" (*Ibid.*; see also Pen. Code, § 1089.) On this issue, the California Supreme Court has stated it is "'confident that juries made aware of the rights involved will faithfully follow such instructions.' [Citation.]" (*People v. Anderson* (1990) 52 Cal.3d 453, 482-483.)

In regards to a mistrial motion, the United States Supreme Court has held that where a trial judge "discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.'" (*Arizona v. Washington* (1978) 434 U.S. 497, 509.) On the other hand, "if he fails to discharge a jury which is unable to reach a verdict after protracted

and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." (*Ibid.*) Nevertheless, "[a] trial court should grant a mistrial *only* when a party's chances of receiving a fair trial have been irreparably damaged . . . ." (*People v. Bolden*, *supra*, 29 Cal.4th at p. 555, italics added.)

C. *The First Note Regarding a Potential Deadlock (October 19)*

The jury began deliberations on Thursday, October 14,[2] at 10:15 a.m. That afternoon, the jury requested a readback of defendant's testimony and the testimony of defendant's case worker, Sabrina Richardson. However, because the court reporter was unavailable to conduct the readbacks, they were scheduled for the following deliberation session.

Deliberations resumed in the morning of Tuesday, October 19. The court reporter completed the readback of defendant's testimony. However, before receiving the requested readback of Richardson's testimony, the jury informed the court reporter they no longer wanted to hear it.

Around 4:00 p.m., the court addressed a note from the jury, which read: "Your honor, we are unable to come to a decision on either count. The first count we are at 8-4 and count 2 is at 9-3. However, [one] juror in particular has expressed that no matter what evidence/deliberations continue, that he or she will not change his/her mind. With that, it does not appear that it would be likely we would come to any decision."

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[2] All dates concerning the jury's deliberations occurred in 2010.

In response, the prosecutor asked the court to inquire of the jurors whether this note indicated a failure to deliberate. Defense counsel objected to the inquiry, alleging interference with the deliberation process. After expressing confusion over the note's meaning, Judge Brodie decided to question the jury for clarification, and, at defendant's urging, agreed to avoid seemingly accusatory phrases.

Judge Brodie informed the jurors he had received the note but was unsure of what the jury intended to convey. He immediately reminded the jury he did not want to discuss the substance of the deliberations and stated it was not his role to say what the verdict should be. He then addressed the foreperson and asked if hearing Richardson's testimony, as requested earlier, would help the jury make a decision. The foreperson responded that no further evidence would be helpful, because it would make no difference to one particular juror. The foreperson then stated that some jurors had strong feelings for one side. The judge replied that this was "fine" and "part of the process," so long as decisions were based on the evidence. The foreperson also mentioned that the "numbers" had changed since deliberations began but noted that the change was not dramatic. Judge Brodie asked the foreperson if he believed any further deliberation would aid the jury in reaching a decision on either count, and the foreperson responded that he personally did not think so. The judge asked the remaining jurors the same question and noted for the record that the only response was the "[s]haking of heads." The following then transpired:

"[THE COURT:] It's always awkward to put you on the spot because you don't want to—you know, it's like being the guy in class when everyone is ready to go and there's one more question when everyone else is done. Okay? [¶] I am going to excuse you and—[¶] Oh, yes. I'm sorry.

"JUROR NO. 5: I believe that the person would agree to come around to everyone else, but the situation, it got hostile in our environment, so—

"[PROSECUTOR]: I'm sorry?

"THE COURT: She said there might be an agreement, but the situation has gotten hostile."

In response to this comment, Judge Brodie reminded the jury of the difficulty of deliberating: "It's hard. Deliberations is a contact sport. It's difficult. You are making an important decision that has a real impact on real people's lives." He then asked if deliberations had gotten "personal and nasty," and both Juror No. 5 and Juror No. 8 replied that they had. The judge reminded the jury of an earlier instruction, which stated that its only role was to decide the case, not to be an advocate for one side or the other. He told the jurors: "[Y]ou don't have a stake in this case except doing—well, I was going to say doing the right thing, but what I mean by that more specifically is deciding it, following the law that I've given you, looking at those crimes, and deciding what happened."

Judge Brodie reiterated that the jury's sole responsibility was to determine if the People had met their burden of proof. He assured the jurors that he was not patronizing

them, nor was he disregarding their hard work, but only asking that they look at the evidence free of emotional attachment. The judge then added that he was not going to keep the jurors deliberating until they reached a verdict, but that there were unresolved issues to discuss with the attorneys, so he would bring them back the next day. He reminded the jurors that each was entitled to his or her own opinion on the evidence, even if it fundamentally differed from another juror's perspective; and, that "compromising for the sake of compromising" was not what the court was after. As he dismissed them, the judge suggested to the jurors that during the break they consider whether another approach to deliberations could be taken. Defendant objected.

We find no abuse of discretion in the court's handling of the deliberations. Judge Brodie, unsure of whether the note indicated a deadlock warranting a mistrial, reasonably exercised his discretion and brought in the jury for further inquiry. (See *Carter*, *supra*, 68 Cal.2d at p. 815.) The judge was careful to remind the jurors he was not interested in the substance of their deliberations, nor did he favor a particular verdict. (See *Russell*, *supra*, 50 Cal.4th at pp. 1251-1252.) Because he recognized the sanctity of deliberations and respected defendant's concerns with the court's intrusion, Judge Brodie questioned only the foreperson and asked about his *personal* perspective on the jury's ability to reach a decision. (*Ibid*.) As the foreperson indicated, he did not "[p]ersonally" think agreement was possible. To ensure that the rest of the jury agreed with the foreperson, the court properly questioned the 11 other jurors for confirmation. (See *Carter*, *supra*, at p. 815.) When the judge saw only the shaking of heads, he appropriately "dr[e]w on [his]

own experience" and commented on the awkwardness of singling out any person. (See *Rodriguez, supra*, 42 Cal.3d at p. 768.) As the record shows, the judge was about to excuse the jury when Juror No. 5 caught his attention and gave the court reason to believe some agreement could be reached. (See *People v. Harris, supra*, 37 Cal.4th at pp. 363-364.)

Defendant contends Juror No. 5 was coerced into commenting because Judge Brodie referenced the awkwardness and difficulty associated with speaking up. We reject defendant's argument because, in this situation, the court's comment would likely have the opposite effect. The more reasonable interpretation is that Juror No. 5 had an opinion on the possibility of agreement among the jurors but was initially afraid to voice it in a courtroom full of peers. Judge Brodie's comment likely reassured her, and showed that the court was not trying to expedite the process, but only ensure that the indicated deadlock was the true and final position of the entire jury. (See *Rodriguez, supra*, 42 Cal.3d at p. 775.)

Although both the note by the foreperson and the foreperson himself indicated agreement was not "likely," Juror No. 5 made sure to give her different perspective before Judge Brodie actually excused the jury. Coupled with the fact that the jury requested a readback of Richardson's testimony, but never heard it, Juror No. 5's statement was sufficient to indicate the possibility of agreement. In addition, because the number of jurors for or against guilt continued to fluctuate, the court could reasonably conclude the jury had not finished deliberating. (See *People v. Harris, supra*, 37 Cal.4th

at p. 364.) Under these particular circumstances, Judge Brodie could reasonably find there was a probability of agreement among the jurors.

Once the court determined a probability of agreement existed, it was within its discretion to take measures that might encourage agreement. (See *Carter*, *supra*, 68 Cal.2d at p. 815.) Accordingly, Judge Brodie impressed upon the jurors the importance of their hard work and decisionmaking, then reminded them of an earlier-read jury instruction, which stated they were not to be advocates for one side or the other. He also properly advised that disregarding any emotional attachment to the evidence could benefit the deliberating process. (See *id.* at p. 816.) The judge's comments were no more coercive than those deemed acceptable in *Carter*, *supra*, at page 815, where the suggestion to consider the case dispassionately and aside from prideful opinions was given to the jury. Furthermore, the comments were not coercive merely because the judge referred to deliberations as "a contact sport" and shared his experiences with the jury. (See *Rodriguez*, *supra*, 42 Cal.3d at p. 768.) Moreover, nowhere in these comments did Judge Brodie impermissibly express an opinion on defendant's guilt or innocence, nor did he improperly inquire whether the majority favored guilt or acquittal. (See *People v. Proctor*, *supra*, 4 Cal.4th at p. 542.) Although the judge's comments were neither "bland" nor "colorless," they were well within the broad range of his discretion. (See *Rodriguez*, *supra*, at p. 768.)

Defendant also asserts it was coercive to tell the jury their only stake in the case was to do the right thing and decide the case because it suggested a decision must be

made and the jury was not allowed to hang. However, defendant has taken the court's words out of context and failed to address the circumstances as a whole. (See *Russell*, *supra*, 50 Cal.4th at p. 1252.) Here, the court had just received word that the deliberation environment was hostile to the point of affecting agreement. Rather than inquire further and risk intruding on the deliberation process, the court chose to remind the jurors of their role and allow them to self-evaluate. (See *Carter*, *supra*, 68 Cal.2d at pp. 815-816.) Since deliberations had become "personal and nasty," Judge Brodie admonished the jurors and reminded them to do what they had been assigned to do: evaluate the evidence and decide what happened. The judge never stated or implied that the case had to be decided a particular way, but only emphasized the jury's exclusive responsibility to determine if the People had met their burden. (See *ibid.*) As evidenced in his final comments to the jury, Judge Brodie did not encourage a verdict, but rather discouraged any forced compromise. In reminding the jurors that each was entitled to his or her own opinion, the judge subtly addressed the misbehavior of the hostile and aggressive jurors and cautioned them to reconsider their harsh approaches and one-sided expectations. Judge Brodie protected the purpose of deliberations by simply reminding the jurors of their role and reiterating the tasks associated with that position. Taken as a whole, his admonishments were properly given so that fruitful discussions would not be sidelined by personal hostilities. (See, e.g., *People v. Cleveland*, *supra*, 25 Cal.4th at p. 480.)

Defendant argues the court abused its discretion by ordering further deliberations when no additional discussion would have enhanced the jury's understanding of the case.

However, once Judge Brodie found further deliberations could reasonably procure agreement, it was within his discretion to send the jurors back to deliberating *if* doing so would enhance their understanding of the case. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 364.) Here, the jury initially requested a readback of Richardson's testimony, yet they later refused to hear it. The judge could reasonably determine that further evaluating this piece of evidence would help the jury understand some issues that once presented questions. And in light of the recent admonishment, which included a reminder of the jury's role, it was possible that the jurors had enhanced their understanding of the case and deliberations.

Because Judge Brodie's comments were not coercive and every action taken was within the sound discretion of the trial court, ordering further deliberations was appropriate.

D. *The Second Note Regarding a Potential Deadlock, Motions for Mistrial, and Allegations of Juror Misconduct (October 20-October 25)*

When the jury reconvened Wednesday afternoon, October 20, they requested the readback of Richardson's testimony.[3] After the readback was completed, the jury informed the court they were "still deliberating," but some scheduling conflicts had

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[3] The prosecutor stated she wanted to "clarify" that the jurors were not ordered to resume deliberations following the October 19 "potential deadlock," but were only instructed to "come back" on October 20. "You [the court] didn't tell them go back and deliberate. Let's come back, all cool down and address these issues tomorrow." The readback, she explained, was the readback the jurors had previously requested, but had not heard. Defense counsel did not object to this clarification. The court responded, "That's correct. That's fair."

arisen. The foreperson also wrote that he believed the jury was "no closer" to deciding than where they were "yesterday." Because Judge Brodie was engaged in another trial, the court requested the jurors to return on Friday to discuss their concerns. One-half hour after receiving the court's reply, the jurors requested a readback of defendant's cross-examination testimony, and then were released for the day.

On Friday, October 22, the jury received the readback of defendant's cross-examination testimony. One-half hour later, the jury sent the court the following note: "Your Honor, we are unable to come to a decision. We have little change in point of views over reviewing evidence and deliberating over the last few days. We took a vote on Wednesday and today and could not come to an agreement. Count 1 was 10 to 2. Count 2, 11 to 1." In response, Judge Brodie decided to question the foreperson individually to avoid "any sort of group pressure."

After calling the foreperson into the courtroom, Judge Brodie emphasized that he did not care to know the substance of the deliberation discussions. The foreperson indicated he understood. The judge continued by saying it was okay for the jurors to see the evidence differently, so long as they were engaged in deliberating on the evidence. Again, the foreperson indicated understanding. The judge then asked the foreperson if it appeared any juror had disregarded the evidence and immediately determined his or her vote despite the group discussion. The foreperson revealed that one juror (Juror No. 7) raised "several red flags," because during jury voir dire she failed to mention her husband's murder and that she had been wrongfully accused of fraud. The foreperson

also indicated that Juror No. 7's comments were especially concerning because they were made after she stated: "[I]t doesn't matter what evidence or deliberations goes, my mind is made up." The foreperson said the comments were made on Tuesday morning, October 19, but that he did not discuss it with the court earlier because he felt uncomfortable singling out Juror No. 7. According to the foreperson, the jury was engaged in going over the evidence and talking as a group, but Juror No. 7 was unwilling to cooperate. When asked whether Juror No. 7 later participated in deliberations, the foreperson said she had, and he believed she had based her opinion on the evidence.

After the foreperson left, defendant moved for a mistrial, asserting that to send the jury back to deliberations would give the impression they were unable to leave until they reached a verdict. Judge Brodie said he would not grant the motion at that time because further inquiry was needed to determine the possibility of juror misconduct during voir dire. However, he agreed deliberations had been extensive and would warrant a mistrial if the court found no misconduct.

At the start of deliberations on Monday, October 25, defendant again moved for a mistrial and objected to any inquiry of the alleged juror misconduct. Defense counsel argued that such inquiry would further alienate Juror No. 7, who would then feel coerced into agreeing with other jurors. Judge Brodie began by addressing the scheduling conflicts and potential hardships arising with two jurors (Juror No. 1 & Juror No. 7); he then asked Juror No. 7 to remain alone for further inquiry into the alleged misconduct.

After questioning Juror No. 7, the judge concluded Juror No. 7 had committed misconduct, and she was excused from further service on the case.

Defendant contends that when the court received the jury's second note indicating a deadlock, it abused its discretion in refusing to accept the deadlock and ordered further deliberations. However, defendant disregards the importance of the surrounding circumstances and the necessity of the court's involvement. As defendant correctly states, because the court already extended deliberations before the arrival of the second note, it no longer seemed probable that further deliberations would procure agreement among the jurors. Nevertheless, the court was required to protect the rights of both defendant and the People by taking all necessary steps before declaring a mistrial. (See *Arizona v. Washington*, *supra*, 434 U.S. at p. 509.) Yet, to preserve the sanctity and the secrecy of deliberations, Judge Brodie was careful to limit the court's intrusion. (See *Russell*, *supra*, 50 Cal.4th at pp. 1251-1252.)

Rather than bring the entire jury before the court once again and risk the possibility jurors would feel pressured, Judge Brodie called only the foreperson to discuss the latest note. The judge outlined the nature of his inquiry and reminded the foreperson that a hung jury was perfectly acceptable. The foreperson indicated he understood. The judge did not immediately question the foreperson on the contents of the note, but first created a context for the conversation framed by the court's indifference to the *substance* of the deliberations and a concern for the *process* of the deliberations. As a result, the foreperson understood the permissible perimeters of the inquiry and did not divulge more

than was necessary to aid the court's understanding. Judge Brodie's behavior illustrates the court's use of care as he reasonably intruded into the deliberative process to determine the meaning of the jury's note. (See *Russell*, *supra*, 50 Cal.4th at pp. 1251-1252.) Therefore, under these circumstances, when the court then asked the foreperson whether anyone on the jury had ignored instructions and failed to deliberate on the evidence, the question was not suggestive of any outcome, but rather properly focused on the integrity of the deliberative process. Based on the foreperson's response, Judge Brodie was on notice of possible juror misconduct and required to conduct an investigatory inquiry. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 710.)

Defendant makes two assumptions related to Juror No. 7's excusal. First, that Juror No. 7 was a minority juror; and second, that the remaining jurors interpreted Juror No. 7's dismissal as the consequence of failing to agree with the majority. However, defendant neglects to establish these points beyond mere speculation. First, the record does not indicate that Juror No. 7 was a minority juror. Also, any inference that Juror No. 7 was a minority juror on count 1 is insufficient to show Juror No. 7 was a minority juror as to count 2—the only count remaining on appeal. Second, even if Juror No. 7 was a minority juror as to count 2, there is no way of knowing how the remaining jurors interpreted her dismissal. The court did not disclose the reason for Juror No. 7's excusal. Thus, it is possible the remaining jurors believed Juror No. 7 was dismissed because of her scheduling conflict.

Although defendant argues that not informing the remaining jurors of the reason for Juror No. 7's excusal led to the interpretation she was removed for noncompliance, we cannot agree. Aside from the scheduling explanation, the court was not required to discuss Juror No. 7's misconduct investigation with the jury. Furthermore, the jury had just been instructed to begin deliberations anew, and supplying the reason for Juror No. 7's dismissal would have devalued that instruction and tainted new deliberations with opinions, perspectives, and speculations regarding Juror No. 7's misconduct.

Defendant also asserts the court abused its discretion when it twice denied his motion for a mistrial.[4] We reject defendant's assertion on the ground that the trial court acted appropriately to preserve the defendant's "'valued right to have his trial completed by a particular tribunal.'" (*Arizona v. Washington*, *supra*, 434 U.S. at p. 509.) As discussed above, the court properly determined that a reasonable probability of agreement existed among the jurors. Therefore, the court was aware that ordering further deliberations could produce a fair verdict. As a result, if the court had discharged the jury instead of ordering that deliberation, it would have deprived defendant of his valued right. (*Ibid*.)

Although defendant contends a mistrial was warranted by protracted and exhausting deliberations, the jurors made no such claims. While two jurors mentioned scheduling conflicts, their issues were quickly resolved. Additionally, the trial court is

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[4] Defendant presents his argument regarding the denial of his motion for mistrial under a heading separate from his primary argument that the verdict was coerced. Our chronological review of the proceedings incorporates our analysis of the mistrial rulings.

afforded great discretion in denying mistrial motions and should *only* grant such motions when the defendant's chance of receiving a fair trial has been "irreparably damaged." (*People v. Bolden*, *supra*, 29 Cal.4th at p. 555.) In this case, the court did not err in denying the mistrial motion because, as discussed above, the court could reasonably conclude that there remained a reasonable probability that the jury could reach an agreement.

E. *The Newly Constituted Jury and the Third Note Regarding a Potential Deadlock (October 26)*

After Juror No. 7 was excused, Judge Brodie notified the remaining jurors. They were informed that an alternate was on his way and entitled to receive the same deliberation opportunities they had been given. The judge instructed that as "a new group of 12," the jury would need to begin the process anew.

When the alternate arrived, Judge Brodie stated: "The reasons for the substitution don't matter, and I would ask you not to let them play any part in your deliberations." The judge instructed the jury it had to begin "deliberations anew, from the beginning," to guarantee the People's and defendant's rights. He further directed the jury to disregard all past deliberations, as if they had not occurred, and emphasized the importance of starting over with the alternate juror. Once the jury was sent to deliberate, Judge Brodie requested a readback of defendant's cross-examination testimony.

On Tuesday, October 26, the jury received the requested readback of defendant's testimony and continued to deliberate. That afternoon, the jury sent a note, which read:

"Your honor, we are currently . . . at 11-1 at both counts. Juror #5 believes she is singled out and does not want to continue. Could you please advise what steps to do next. (She is requesting to talk to you)[.]" Judge Brodie, who had presided over the case, was temporarily unavailable and was replaced by Judge Dest. After receiving the jury's note, Judge Dest met with the attorneys and opined that considering the events of the jury's deliberations over the past two weeks, he feared any further action of the court would send a message of mandatory compliance. He then added that unless there was an objection, it was his intent to bring in the jury, conduct a quick inquiry, and declare a mistrial, so long as it was "consistent with the letter."

When neither counsel objected, Judge Dest called in the jury and informed them Judge Brodie was unavailable and he was standing in. Judge Dest explained he had received the jury's latest note and, while he did not understand the full extent of the case, it was his impression the jury was "hopelessly deadlocked." As required, Judge Dest then told the jury he was going to ask each juror whether he or she felt "hopelessly deadlocked in this case as to all counts[.]" All jurors, except Juror No. 9, responded that they felt hopelessly deadlocked. Juror No. 9 replied, "No, I feel like we can still work something out." Judge Dest expressed that as long as one juror was willing to continue deliberating, he was willing to give deliberations another day.

As the court discussed scheduling with the foreperson, Juror No. 5 reminded Judge Dest she had asked to speak with him alone and she believed it would "really make a difference as far as deliberating." Once the rest of the jury had exited the courtroom,

Juror No. 5 explained she did not feel as if she could "emotionally go on with [the] case." She said she felt attacked by Juror No. 12, and that Juror No. 12 was attacking other jurors too. Juror No. 5 also expressed that she felt the jury could "have come to the same conclusion," if the environment was not "so hostile." She continued by saying she was not normally emotional, but that she could not go on, and she did not feel it was "fair to the Court or [defendant]." Juror No. 5 then said she felt she should be replaced, and that she was "at the point where emotionally" she could not continue.

The court called a brief bench conference, then asked Juror No. 5 if she was willing to return the following afternoon and "give it one more try[.]" Juror No. 5 replied she "would love to do that," then repeated that Juror No. 12 made the environment hostile and that she did not "want to continue to be attacked." The court expressed it did not want to get into the deliberation process, and that the hostile environment was out of the court's "purview." Judge Dest further explained that Juror No. 5 had indicated she wanted to be removed, but the court wanted to know whether she would be willing to come back one more day, which would "be the end one way or the other." Juror No. 5 responded that she "would be willing."

As Judge Dest prepared to release the jurors for the day, he stated:

"THE COURT: . . . I'm going to let you leave for today now. You will have tomorrow morning off. Have a good lunch, not to[o] big of a lunch that you will get too tired. And we will have you come back tomorrow, and see if you can deliberate and see if you can resolve this case. Not all cases can be resolved. There are some cases which

there are different views by different jurors. And there's some cases that can be resolved and some cases that can't. If you can resolve it, great.

"But we've taken 12 randomly selected people that have been acquired upon [*sic*]. You have been—based on your backgrounds and your education and everything else, you have been qualified for this jury. And all of your inputs are valued. And for everybody else—everybody else is important. Your deliberation is important. And if you can reach a verdict, then we will conclude this case. If not, we will have to do something else with this case. . . ."

After the jury was excused, defendant objected to the court's comment, fearing the jury would believe they could not leave until they reached a verdict.

Defendant asserts that despite the formation of a new jury, we must view all the deliberations in their totality. Although we generally agree with a totality of the circumstances approach, we cannot agree with defendant's application of that concept to the facts of this case. Defendant contends the verdict was coerced after 19 hours of deliberating and three indications of deadlock. However, defendant fails to distinguish between the original jury, which included Juror No. 7, and the new jury, which proceeded without her. A totality of the circumstances approach does not mean both deliberation processes must be considered together. When the new jury was formed, it was properly instructed to begin deliberations anew. (See *People v. Proctor*, *supra*, 4 Cal.4th at p. 537.) As stated in the instruction, the new jury was appropriately forbidden from considering anything discussed in past deliberations. (See Pen. Code, § 1089.)

Essentially, the jurors were to treat the process as if it had just begun. Therefore, accepting defendant's argument to consider both sets of deliberations together would completely undermine the jury's instruction and the law on which it is based.

Defendant also contends that the 11 remaining jurors could not "erase from [their] minds" the judge's refusal to accept a deadlock. However, the court did not refuse to accept a deadlock. When Judge Bodie determined Juror No. 7 had committed misconduct, the misconduct and excusal of that juror rendered the previously asserted deadlock moot; there was thus no deadlock to accept or refuse. In addition, the potential deadlock occurred before the instruction was given to begin deliberations anew, so the new jury, which included the 11 remaining jurors, was directed to ignore the deliberations in which that potential deadlock arose. Courts have consistently held it is confident in jurors' ability to faithfully follow the instructions of the court. (See, e.g., *People v. Anderson*, *supra*, 52 Cal.3d at pp. 482-483.) Accordingly, we presume the 11 remaining jurors were able to follow Judge Brodie's instructions and disregard all that occurred before the order.

Defendant next asserts that the belief by only one juror—Juror No. 9—in the probability of agreement was insufficient to order the jury into further deliberations. However, Juror No. 9's statement indicates that the belief in a deadlock was not shared by all the jurors. Considering Juror No. 9's assertion, the 11 to 1 numerical division on both counts, and the fact that the new jury had only deliberated for a total of five hours,

Judge Dest could reasonably conclude there existed some probability of agreement among the jurors.

In addition, defendant contends that the court coerced Juror No. 5 into agreeing with the majority after she addressed the court on October 26. Defendant predicates his argument on the unfounded fact that Juror No. 5 was the sole holdout juror. Again, defendant fails to acknowledge that the jury was deliberating on two different counts. During the relevant time, both counts were at 11 to 1, yet there was no indication that the minority juror as to count 1 was the same minority juror as to count 2. Thus, even if the court correctly *guessed* Juror No. 5 was a minority juror as to one of the counts, there was no way of knowing she was the minority juror in the only count that matters on appeal.

Moreover, contrary to defendant's contention, Judge Dest's questions and comments were not insistent or intimidating, and only functioned to keep Juror No. 5 from divulging private deliberation details before the court. Additionally, Juror No. 5 demonstrated her independence as she addressed the court on her own and even stated she was willing to continue deliberations. Although she expressed some feeling of being unfair to the court or defendant, defense counsel takes these statements out of context. Right before Juror No. 5 made the claim, she stated she was not normally as emotional as she was on that day. Time and again, she mentioned her discomfort grew from emotional tensions within the deliberating environment, not the case itself. Juror No. 5 never suggested she was unable to deliberate based on the evidence, only that her deliberation experience was being affected by the external influence of a supposedly hostile juror.

Yet, to avoid coercing her back into deliberations, Judge Dest offered Juror No. 5 the chance to discontinue her service. Rather than accept the offer, Juror No. 5 manifested her free will by replying that she would "love" to return and agreeing to a final day of deliberations.

Defendant also asserts Judge Dest was coercive when he indicated to the jury that if a verdict could not be reached, the court would have to do "something else with this case." Defendant contends that this comment implied that the case would have to be retried if the jurors could not reach a verdict, and thereby injected extraneous and improper considerations into the jury's deliberations." Defendant relies on *People v. Gainer, supra,* 19 Cal.3d 835 and *People v. Hinton* (2004) 121 Cal.App.4th 655. In *Gainer*, the trial court told the jurors: "'You should consider that the case must at some time be decided,' with its attendant implication that a mistrial will inevitably result in a retrial . . . ." (*People v. Gainer, supra,* at p. 851.) The Supreme Court held that the court's statement was "legally inaccurate"—"It is simply not true that a criminal case 'must at some time be decided.'" (*Id.* at p. 852, fn. omitted.) Therefore, because the instruction "implies that a hung jury will assuredly result in a retrial misstates the law, the court erred in giving that portion of the charge stating 'the case must at some time be decided.' [Citation.]" (*Ibid.*)[5]

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[5] *Gainer* disapproved of dictum in *Carter, supra,* 68 Cal.2d 810 on this point. In *Carter*, the court suggested that the trial court could remind the jurors "that in the event of a mistrial the case will have to be retried, with attendant expenditure of money and time, and decided upon similar if not identical evidence by a jury of persons having qualifications equal to those of the present jury." (*Id.* at pp. 815-816.)

In *Hinton*, the trial judge made statements indicating "the case would be retried if the jury could not agree. Though the judge said at one point the prosecutor would merely be 'free' to try the case again, the judge implied the case *would* be retried if the jury could not agree. The judge stated the case would at some point be decided by 'another 12 or 15 people' and later reiterated he 'would be hard pressed to find a better twelve people.'" (*People v. Hinton, supra,* 121 Cal.App.4th at p. 660.) In addition, "the judge emphasized the costs of the trial and implied that it would be necessary to expend further costs in a retrial." (*Ibid.*) The Court of Appeal, relying on *Gainer*, held that the "judge's remarks, considered individually and collectively, injected extraneous and improper considerations into the jury's deliberations." (*Ibid.*)

Gainer and *Hinton* are distinguishable. Here, the trial court's statement that the court "will have to do something else with this case" does not imply that the case would be retried and is not legally inaccurate: if the jury hangs, the court will have to do something else with the case. In addition to the possibility of retrial, the court may dismiss the case. (Pen. Code, § 1385.) As the *Gainer* court noted, the People's authority to request dismissal of an action following a hung jury "is frequently exercised." (*People v. Gainer, supra,* 19 Cal.3d at p. 851-852.) There is no reason to believe that the jurors understood "something else" to mean that the case would be retried rather than dismissed.

Accordingly, we conclude the court did not abuse its discretion and coerce a guilty verdict in violation of defendant's constitutional rights.

F. *The Verdict on Count 2 and Mistrial on Count 1 (October 27)*

On Wednesday, October 27, the jury submitted a verdict on count 2, finding defendant guilty of perjury relating to welfare fraud. Judge Brodie was again unavailable. This time, Judge Garza presided over the matter. After receiving the verdict on count 2, Judge Garza clarified that the jury did not reach a verdict on count 1, finding the split at 11 to 1. The foreperson stated the jury was "hopelessly deadlocked" as to count 1, and Judge Garza declared a mistrial on that count. The jury was thanked and excused.

In addition to the arguments addressed above, defendant asks the court to consider that "[c]oercion has been found in cases where, after relatively short trials and the presentation of relatively simple issues, the trial court insists on further deliberations despite a deadlocked jury." In support of this statement, defendant refers us to *People v. Crossland* (1960) 182 Cal.App.2d 117 (*Crossland*) and *People v. Crowley* (1950) 101 Cal.App.2d 71 (*Crowley*). However, looking closely at both cases, we find defendant has misinterpreted their holdings. In *Crossland*, the court found coercion where the trial judge improperly told the jury the case was clear and simple on the law, and then ordered further deliberations. (*Crossland*, *supra*, at p. 119.) Nowhere in its opinion does *Crossland* mention the shortness of the trial or the simplicity of the issues as having any bearing on the court's finding of coercion. Similarly, in *Crowley*, the court found coercion where the trial judge commented that the case was "plain and clear," then ordered further deliberations upon learning the minority favored acquittal. (*Crowley*,

supra, at pp. 75-76.) Like *Crossland*, the court in *Crowley* did not consider the shortness of the trial or the simplicity of the issues as factors in determining the presence of coercion.

In this regard, defendant also mentions *Rodriguez*, *supra*, 42 Cal.3d at page 775, which stated: "In cases such as *Crossland* and *Crowley*, . . . the trials had been relatively short and the issues relatively simple, so that further deliberations seemed unnecessary for purposes of enabling the jury to understand the evidence and could only be deemed intended to coerce the minority into joining the majority jurors' views of the case." However, the court's reasoning in *Rodriguez* does not allude to the consideration of short trials and simple issues as factors in determining coercion. Rather, *Rodriguez*'s reference to the relatively short trials and relatively simple issues presented in *Crossland* and *Crowley* is simply used to juxtapose its own voluminous evidence. In essence, *Rodriguez* states its case is factually distinct from *Crossland* and *Crowley* and must be held to a different standard of scrutiny when ordering the jury into further deliberations. Because the *Rodriguez* trial "had been long, the evidence voluminous, and the issues complex," the court stated that its decision to order further deliberations could not be compared to the improper decisions made by the lower courts in the short and simple trials of *Crossland* and *Crowley*. (*Rodriguez*, *supra*, at p. 775.)

Finally, we note that defendant discusses coercion only within the context of count 2. While the jury produced a verdict as to count 2, defendant fails to acknowledge that it was allowed to hang on count 1. This fact is part of the totality of the facts and

circumstances relevant to evaluating the issue of coercion. If the court's comments and actions had the coercive effect defendant asserts, it would seem more likely that the jury would have returned verdicts on both of the counts previously split at 11 to 1. The fact that the jury returned a verdict on count 2 and persisted in asserting a deadlock on count 1 is some indication that it was not coerced into reaching a verdict on count 2.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.