

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL MURRIETA OLIVAREZ,

Defendant and Appellant.

E053029

(Super.Ct.No. SWF029549)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Stephen M. Lathrop, 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, James D. Dutton and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Rafael Olivarez, of nine counts of committing lewd and lascivious acts on a minor (Pen. Code, § 288, subd. (a)).¹ The jury also found that defendant's crimes involved more than one victim (§ 667.61, subd. (e)(5)). Defendant was sentenced to prison for two terms of 15 years to life and appeals claiming the trial court improperly excused one of the jurors during deliberations. We reject his contention and affirm.

Defendant molested two of his step-granddaughters while they were staying overnight at the apartment he shared with his wife, their grandmother.

ISSUES AND DISCUSSION

The jury deliberated the first day for 2 hours and 45 minutes. The following day, the jury deliberated for a half hour before sending the trial court the following note, "Juror number 7 is not comfortable making a decision either way, guilty or non guilty." The trial court examined the foreperson, who reported that Juror No. 7 was participating in the discussions, but "it was pretty much it" that he was the one who was not agreeing with the other 11 jurors. Juror No. 7 was examined next and reported that he had been participating in the discussions, that they had been cordial and that neither he nor the other jurors had read the instructions. The trial court then said it was going to read an instruction and would ask Juror No. 7 if he could do what the instruction said or not. The instruction the court read was, "It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must

¹ All further statutory references are to the Penal Code unless otherwise indicated.

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 are 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.” The trial court then asked Juror No. 7 if he had done that. He said he had not. The court then asked Juror No. 7 if he had exchanged his ideas with the other jurors. In response, Juror No. 7 said, “The only thing that I can say . . . is that I don’t feel comfortable in doing this, rendering this kind of decision.” The court said that it did not feel comfortable in doing a lot of things, “nor probably do all the jurors feel comfortable” but Juror No. 7 had to follow the law. Juror No. 7 said he could follow the law and when asked if he could talk to the other jurors about this case, he replied, “Yeah. We talked over there.” Juror No. 7 said he talked, along with the other jurors. He said he had already voted one way, but when pressed by the court, said he had not, but the other jurors had. Juror No. 7 confirmed that when the foreperson took a vote, he had not voted one way or the other and that was because he was not comfortable voting one way or the other. Juror No. 7 said he understood “all the questions and everything that is going on” and he felt he was able to perform his duty as a juror. Defense counsel asked Juror No. 7 if when he is asked to vote and does not “are you uncomfortable making a decision, or [is it] because you don’t think that you could [perform your] duty [as a juror].” Trial court interjected that it did not see the difference between the two. Defense counsel said he did. The trial court retorted, “What is the difference [between] being uncomfortable making a decision and not being able to do his duty? Because his duty is, he has to make a decision one

way or the other. He has to vote one way or the other.” Juror No. 7 said he had not voted and he responded in the affirmative to the trial court’s question, “It’s because of your personal feelings, you can’t vote, is that what you’re telling me?” The trial court then asked Juror No. 7 if “there . . . is . . . anything that I can say or that the lawyers can say, or we can read to you, jury instructions, that would get you to the point where you would be available to vote one way or the other?” Juror No. 7 said no. Defense counsel wanted to know why Juror No. 7 was uncomfortable, but opposed asking him and also opposed excusing him.

The court excused Juror No. 7, saying, “Based upon his answers, and the fact that he says there is nothing that I could say or we could read to him that would allow him to vote one way or the other, and he has not participated in any of the votes so far. And by that, I mean he says he has not voted one way or the other on any of the votes. And he admits he cannot perform his duty, which is to vote one way or the other.”

“[A]n appellate court’s review of the decision to remove a seated juror is . . . conducted under the . . . ‘demonstrable reality’ test. . . . [¶] . . . [¶] ‘The demonstrable reality test . . . requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [the juror’s inability to serve] was established. . . . [A] reviewing court does not *reweigh* the evidence [T]he reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the

record of reasons the court provides.’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 711-712.)

First, defendant points out that Juror No. 7 was not refusing to deliberate. He is correct; however, the trial court did not excuse Juror No. 7 on this basis.

Defendant then attacks the excusal of Juror No. 7 by making an assumption that is not supported by the record, and, more importantly, had nothing to do with the trial court’s ruling. He claims that Juror No. 7 was the sole holdout juror based on the foreperson’s affirmative answer to the court’s leading question about Juror No. 7, “Sounds like he’s the one that’s not agreeing with the other 11, is that pretty much it?” However, whether Juror No. 7 was agreeing or disagreeing with the others, the fact remains that he had not voted (so he can hardly be called “a holdout”) and it was his refusal to vote *one way or the other* that served as the basis for his excusal.

Next, defendant asserts that the trial court’s reason for excusing Juror No. 7 was improper because “a juror does not have a duty to vote either guilty or not guilty; the legal duty is to participate in deliberations in an unbiased manner, not to engage in voting in a particular manner.” In support, he cites *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 and *People v. Alexander* (2010) 49 Cal.4th 846, 926. However, at page 1051, *Barnwell* discussed the difference between a juror’s inability to fairly deliberate because of bias and a juror’s good faith disagreement with other jurors. At page 926, *Alexander* addresses the difference between a juror who expresses a fixed position at the beginning of deliberations, then rebuffs attempts to get engaged in the discussion of other points of view and one who does not deliberate well or uses faulty logic or disagrees with the

majority as to what the evidence shows, how the law should be applied to the facts or the manner in which deliberations should be conducted. None of this, which relates to a failure to deliberate, is at issue here. Defendant's efforts to recast it as such are not supported by the record and are unmeritorious. Juror No. 7 was not excused because he took or argued a particular position or voted a particular way—he was excused because he said his personal beliefs did not allow him to vote one way or the other. The assertion in defendant's opening brief that Juror No. 7's discomfort in making a decision either way "was based on the facts of the instant case" or because he was "not convinced that the prosecution had met its heavy burden of pro[of]" is *completely* unsupported by the record. Defendant's attempt to "read tea leaves" by interpreting every nuance of the exchange between Juror No. 7 and the trial court and the circumstances² is just that—and it does not support his position that Juror No. 7 was excused because he disagreed with the other jurors.

Because the record does not support defendant's assertion that there was a reasonable possibility that Juror No.7 was excused because of his views on the merits of the case, there was no reason to send the jury back to continue to deliberate or declare a mistrial as proscribed in *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087 and *Williams v. Cavazos* (9th Cir. 2011) 646 F.3d 626, or because this was not done, for

² For example, defendant points to the fact that the reconstituted jury was able to reach verdicts in about two hours. However, this was not a complicated or lengthy case. The evidentiary portion took a little over one day. The jurors either believed the two victims and defendant's pretrial statement admitting the crimes or not. Defendant did not testify.

us to declare that defendant's constitutional rights had been violated, requiring reversal *under any standard*. In fact, the trial court here went to some effort to ensure itself that further discussion with or instruction to Juror No. 7 would not get him to a place where he was able to make a decision, one way or the other.

Defendant has not demonstrated that the trial court's excusal of Juror No. 7 was not based on a demonstrable reality that Juror No. 7 could not fulfill his duties as a juror.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.