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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.

MARVELL S. POWERS,

Defendant and Appellant.

E055134

(Super.Ct.No. FVI1101923)

OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull,
Judge. Affirmed.

Ava R. Stralla, 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, Senior Assistant Attorney General, and Charles C. Ragland and
Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

While jury deliberations were ongoing, Juror No. 5 remarked to the defendant's family, "You will thank me some day." When the trial court questioned him, he falsely denied making this remark. The trial court therefore discharged him.

After just two hours of deliberation, the reconstituted jury found the defendant, Marvell S. Powers, guilty on one count of driving under the influence and causing bodily injury (Veh. Code, § 23153, subd. (a)) and one count of driving with a blood alcohol level of 0.08 percent or more and causing bodily injury (Veh. Code, § 23153, subd. (b)). On each count, six enhancements for causing bodily injury to additional victims (Veh. Code, § 23558) were found true. Defendant was sentenced to a total of five years in prison, plus the usual fines and fees.

Defendant now contends that the trial court erred by discharging Juror No. 5. Not so. Juror No. 5 committed serious and intentional misconduct by violating the trial court's instructions not to talk to anyone about the case. He additionally committed serious and intentional misconduct by lying to the trial court. Hence, we will affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Jury Indicates It Is Split 11-1.*

On Friday, October 28, 2011, at 9:30 a.m., the jurors began deliberating.

Around 2:20 p.m., they sent out a note stating, "The vote is 11 to 1."

The trial court discussed the matter with the jurors. Juror No. 7 reported that another juror had stated “that that juror is no longer at this time even willing to entertain further questions or discussion.”

The lead juror said, “I think a little bit of clarification would help. . . . Having to make a decision is definitely difficult. But just opting out and saying I’m done talking, . . . I just don’t want to hear any other points about it, I don’t want to hear any more of the law about it [¶] . . . [¶] So . . . if you could clarify.”

After discussing the matter with counsel, the trial court reread some of the instructions. Around 3:15 p.m., it had the jury continue to deliberate.

Defendant does not raise any issue regarding the trial court’s response to the jury’s note.

B. Juror No. 7 Is Discharged.

Around 4:00 p.m., the jury returned to the courtroom. Juror No. 7 asked to be discharged, because his employer paid for only three days of jury service. The trial court discharged him. The trial court then sent the jury home for the day.

Defendant does not raise any issue about the discharge of Juror No. 7.

C. Juror No. 5 Is Discharged.

The bailiff then advised the court that there was “another issue with one of the other jurors.”

Juror No. 2 came back in and told the court:

“JUROR NO. 2: Sir, as we were walking in just now, Juror No. 6 said to the family over here, ‘You will thank me some day.’

“THE COURT: Said to [defendant’s] family?

“JUROR NO. 2: I was right in front of him. I couldn’t say. It wasn’t to me.”

The trial court then recessed for the day.

The following Monday, October 31, 2011, the trial court questioned Juror No. 2 further. He repeated, “[A]s we walked in, Juror N[o.] 6 talked to the family and said, ‘You will thank me some day.’ . . . I think he’s Juror N[o.] 6. I’m not sure about the number.” Juror No. 2 identified the other juror by name. The trial court said, “For the record, that would be Juror N[o.] 5.”

Juror No. 2 then explained that, as the jurors were reentering the courtroom, he (Juror No. 2) was next to last, Juror No. 5 was “a step and a half” behind him, and the bailiff was behind them both. Defendant’s family would have been about a foot away. Juror No. 2 did not turn around; thus, he did not see Juror No. 5 make the remark, and he did not see whether defendant’s family reacted.

He did not think any of the other jurors heard; “[i]t wasn’t that loud.” “I thought he was talking to me and then realized that makes absolutely no sense to me.” Juror No. 2 said he had “typed it into my phone so I wouldn’t forget the exact words”

Next, the trial court questioned each of the other jurors, one by one. None of them had heard any remark.

When it was Juror No. 5’s turn, there was this exchange:

“THE COURT: . . . When the jury was brought back into the courtroom late Friday afternoon, before you were excused for the weekend, it’s been reported that you may have said something to people seated in the audience section of the courtroom, which I believe is part of defendant’s family. Did you make a remark to them?

“JUROR N[O.] 5: No, sir.

“THE COURT: Not at all?

“JUROR N[O.] 5: No, sir. [¶] . . . [¶]

“THE COURT: [So] definitely you did not say anything to — I’m assuming they are members of defendant’s family. Did you not say anything to those people there?

“JUROR N[O.] 5: No, sir, I didn’t say anything. [¶] . . . [¶]

“[DEFENSE COUNSEL]: . . . [D]o you remember something to the effect of ‘Some day you’ll thank me,’ saying something like that maybe to yourself or muttering it?

“JUROR N[O.] 5: No, sir.

“THE COURT: Do you remember hearing anyone else say that?

“JUROR N[O.] 5: No, sir.”

The People asked the trial court to discharge Juror No. 5. Defense counsel responded that, at that point, there was no evidence that any juror could not be fair and impartial. He argued that, before discharging Juror No. 5, the trial court should question defendant’s family. However, he represented to the court that they had not heard anything.

The trial court commented: “And I am going to assume . . . that they heard nothing. And to me it’s irrelevant. The most important thing is how it reflects on Juror N[o.] 5[’s] . . . state of mind and his commitment to obey the rules [I]f he had come in here an[d] said, Yeah, I said it, . . . my next question would have been, Well, what did you mean. And without the benefit of an answer then I think you can look at it two ways. Number one is that he meant to inform the family that even though I had to vote guilty, . . . your relative . . . has to be held accountable and he has to learn from his mistakes and society has to be protected On the other hand, . . . it might have meant basically I’m hanging this trial for you or . . . I’m finding him not guilty and you will thank me later. . . . [B]ut the fact that he lied about it — and . . . there appears to be no reasonable explanation why . . . Juror N[o.] 2 would misreport. . . . [T]hose two things are what disturb me.”

Defense counsel argued further against discharging Juror No. 5. At the request of the bailiff, there was a discussion off the record. After going back on the record, the trial court said: “. . . I need to state this for the record, . . . and that is the bailiff reported that he has some previous knowledge of [Juror No. 5], and . . . there was no detail given, but I got the distinct impression that it was not probably going to be a favorable opinion about [Juror No. 5].” The bailiff confirmed this. The trial court continued, “Okay. I’m not considering it.”

The trial court then discharged Juror No. 5. It replaced both Juror No. 5 and Juror No. 7 with alternates. After about two more hours of deliberations, the jury reached its verdict.

II

THE TRIAL COURT PROPERLY DISCHARGED JUROR NO. 5

“A juror may be discharged if, at any time before or after final submission of the case, the court upon good cause finds the juror ‘unable to perform his or her duty.’ ([Pen. Code,] § 1089.) . . . [I]f a juror is discharged, his or her inability to perform as a juror ‘must “appear in the record as a demonstrable reality.”’ [Citation.]’ [Citation.]” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1242.)

“[T]he 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 bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence [H]owever, the reviewing court must be confident that the trial court’s conclusion is manifestly supported by evidence on which the court actually relied. . . .’ [Citation.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 712.)

We accept, as we must, the trial court’s credibility determination — that Juror No. 2 was telling the truth, and Juror No. 5 was not. “[I]ntentional concealment of material information by a . . . juror may constitute implied bias justifying his or her disqualification or removal [citations]” (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) Thus, the trial court could properly discharge Juror No. 5 for this reason alone.

Separately and additionally, it could also discharge Juror No. 5 for violating its instructions not to speak to anyone about the case. It had repeatedly instructed the jurors, at every recess, “Do not discuss the case among yourselves or any other person.” In its final instructions, it had stated, “[D]o not talk about the case . . . or any subject involved in it with anyone You must discuss the case only in the jury room and only when all jurors are present.”

“‘[A] juror’s serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty.’ [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 732.) “‘[I]n appropriate circumstances a trial judge may conclude, based on a juror’s willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror.’ [Citation.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 834-835; see also *People v. Williams* (2001) 25 Cal.4th 441, 448.)

Defendant argues that Juror No. 5’s misconduct was “trivial” and “technical” rather than serious and willful. He likens this case to *People v. Wilson, supra*, 44 Cal.4th 758. There, during a break in guilt phase testimony, one juror said to another, “[T]his is what happens when you have no authority figure.” (*Id.* at p. 836.) Later, during penalty phase deliberations, when the trial court questioned him, he agreed that he “may have” made such a statement. (*Id.* at p. 837.) The trial court discharged the offending juror, in part because it found that he had “prejudg[ed] the appropriate penalty” during the guilt phase. (*Id.* at p. 820.)

The Supreme Court held that this was error. It explained: “Trivial violations *that do not prejudice the parties* do not require removal of a sitting juror.” (*Id.* at p. 839, italics added.) Although it agreed that the juror had violated the trial court’s instructions not to discuss the case, it found no evidence that he had prejudged the issue of penalty; to the contrary, he had been one of nine jurors who had preliminarily voted to impose the death penalty. (*Id.* at pp. 840-841.)

The Supreme Court also noted, however, that “discussing the case with a *nonjuror*[] is serious misconduct. [Citation.]” (*People v. Wilson, supra*, 44 Cal.4th at p. 838, italics in original.) Here, Juror No. 5’s remark was directed at nonjurors. It was a serious violation of the sanctity of jury deliberations because it revealed (albeit ambiguously) how Juror No. 5 intended to vote. Moreover, here, there was no evidence to rebut a presumption of prejudice. Significantly, when questioned, just three days later, Juror No. 5 flatly denied making the remark. Lying to the trial court was, all by itself, serious misconduct. In addition, it demonstrated that the original remark was willful, and it showed a pattern of disregard for the obligations of a sitting juror. This was ample evidence that Juror No. 5 was unable to perform his duty.

Defendant also complains that the trial court did not question defendant’s family members. According to defense counsel, however, they would have said that they did not hear anything. The trial court could properly accept this representation. “Statements of a responsible officer of the court are tantamount to sworn testimony. [Citation.]” (*People v. Wolozon* (1982) 138 Cal.App.3d 456, 460, fn. 4.)

In any event, as the trial court observed, whether they heard anything or not was irrelevant. Juror No. 5’s misconduct consisted of attempting to talk to defendant’s family, regardless of whether they actually heard him. There was ample evidence that he was addressing them. When he made the remark, he was only a foot away from them. Although Juror No. 2 briefly thought that Juror No. 5 was talking to him, he concluded that that “ma[de] absolutely no sense” The very content of the remark indicated that it was addressed to defendant’s family.

“Because the trial court’s finding of good cause to dismiss [the juror] is supported to a demonstrable reality, there was no violation of defendant’s statutory or constitutional rights. [Citation.]” (*People v. Fuiava, supra*, 53 Cal.4th at p. 716.)

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.