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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH GONZALES,

Defendant and Appellant.

F063256

(Super. Ct. No. LBF11636)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriwara, Judge.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Kane, J. and Detjen, J.

## INTRODUCTION

On October 30, 2008, appellant, Ralph Gonzales, was found guilty after a five-day jury trial of driving a vehicle under the influence with a prior conviction for vehicular manslaughter while intoxicated (Veh. Code, §§ 23152, subd. (a) & 23550.5, subd. (b), count 1), driving with a suspended or revoked license (Veh. Code, § 14601.2, subd. (a), count 3), and failing to provide proof of financial responsibility (Veh. Code, § 16028, subd. (a), count 5).<sup>1</sup> In a bifurcated proceeding, the jury found true an allegation that appellant had seven prior serious felony convictions within the meaning of the three strikes law (Pen. Code, § 1170.12, subd. (c)(2)(A)). The trial court found that appellant had three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

The trial court sentenced appellant to prison pursuant to the three strikes law for 25 years to life plus three years for the three prior prison term enhancements. On appeal, appellant contends there was juror misconduct by Juror No. Seven (Juror Seven) and that he was deprived of effective assistance of counsel because his trial counsel failed to replace her. We disagree and affirm the judgment.

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<sup>1</sup> The jury was unable to reach a verdict on count 2, an alleged violation of Vehicle Code sections 23152, subdivision (b) and 23550.5, subdivision (b).

We note that the abstract of judgment inaccurately refers to appellant's conviction on count 1 as being to Vehicle Code sections 23152, subdivision (a) and 22350.5. This is a clerical error. Appellant was charged and convicted of Vehicle Code sections 23152, subdivision (a) and 23550.5, subdivision (b) in count 1. Clerical errors may be corrected at any time, and an appellate court can do so on its own motion or the motion of a party. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, we will remand this case for the trial court to amend the abstract of judgment.

## FACTS

### *Current Offense*

At 10:00 p.m. on July 11, 2008, California Highway Patrol Officer Shaun Ranney was driving his patrol car eastbound on Highway 152 when he observed a black Mercedes weaving back and forth in a serpentine manner between the painted lines of the road. The driver of the Mercedes was interfering with the drivers in the other lane of traffic who had to move their cars to the edge of the other lane to avoid being hit. The Mercedes was traveling at 75 miles per hour.

Ranney activated his red lights to pull over the Mercedes, but the driver was slow to react. The driver eventually exited at State Route 33 and continued down the off-ramp, hitting the stop sign in the left lane. The driver made a left turn onto the road and pulled over to the right. Ranney exited his patrol car and learned that appellant was the driver of the Mercedes.

Appellant smelled of a strong odor of alcohol. There were no passengers in the car. Appellant's eyes were bloodshot and watery. As appellant spoke, his speech was slurred. Ranney believed appellant was under the influence of alcohol. Ranney had appellant exit the Mercedes to perform field sobriety tests. When appellant exited the car, he was unsteady on his feet. Appellant performed poorly on the field sobriety tests.

Ranney performed two field breath tests on appellant. The first test indicated a blood alcohol level of .177 percent and the second a blood alcohol level of .187 percent. Ranney described appellant as being "very intoxicated." Appellant admitted drinking some Bud Light that evening. Ranney arrested appellant. Ranney determined that appellant's driver's license had been revoked and had not been reinstated. Appellant did not have proof of insurance or any paperwork for the Mercedes. Once in the highway patrol office, appellant refused to take a breath test.

### ***Traffic Stop of Juror***

Just before the jury began its second day of deliberations, the prosecutor informed the trial court that he had received a phone call from Ranney the night before. During the conversation, Ranney informed the prosecutor that he had stopped a speeding vehicle and recognized the driver as Juror Seven. Juror Seven passed Ranney, who was on patrol and was traveling at 75 miles per hour. Juror Seven told Ranney she was late in picking up her children. Ranney did not cite Juror Seven for speeding and told her to go pick up her children.

The defense attorney stated that he did not know what to make of this situation. Ranney was called to testify as to what happened outside the presence of the jury. Ranney stated that Juror Seven passed him as he was traveling at 75 miles per hour. She was traveling at between 80 and 85 miles per hour and Ranney stopped her. Juror Seven apologized and said she did not realize what she was doing and told Ranney she was returning from jury duty. Ranney recognized Juror Seven and told her to pick up her son. He did not issue a ticket.

Just as Ranney completed his testimony, the bailiff informed the court that Juror Seven wanted to talk to the judge. Defense counsel stated he was not going to make a motion to have Juror Seven dismissed.

The prosecutor made a motion to have Juror Seven testify outside the presence of the other jurors. Juror Seven was brought in to testify outside the presence of the other jurors. Juror Seven stated that she had been pulled over by Ranney. The court asked Juror Seven if there was anything about her contact with Ranney, or what did or did not happen, that would affect her thinking or her service on the jury. Juror Seven replied “no” to the court’s question and added that she had thought about what happened the night before and decided to tell the court what happened. Juror Seven further stated that she “already heard what has happened. You know, I heard from both sides. So it’s not

going to affect my thought of where I was as of yesterday before he [Ranney] pulled me over.”

When asked by the court if what she was saying was that what happened was not going to have any effect on her ability to serve as a juror, Juror Seven replied, “No, I don’t think so.” Juror Seven did not think she was biased either for or against the prosecution or the defense. Juror Seven had not told any other juror about being pulled over. Juror Seven told the court that she had not told the other jurors about her encounter with Ranney. She only told the other jurors that she had to talk to the judge. When the court told Juror Seven it would be best not to disclose anything concerning this incident to the other jurors, Juror Seven replied, “Yeah.” The court told Juror Seven that she could continue with jury deliberations. Neither attorney had any questions to ask Juror Seven.

### **ALLEGED JUROR MISCONDUCT**

Appellant contends the trial court’s failure to relieve Juror Seven violated his state and federal constitutional right to an impartial jury. Appellant argues Juror Seven’s responses to the court regarding her ability to be impartial were equivocal and the trial court’s inquiry into the juror’s impartiality was only perfunctory.<sup>2</sup> We disagree.

A court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. (Pen. Code, § 1089; *People v. Lomax* (2010) 49 Cal.4th 530, 588 (*Lomax*)). Grounds for

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<sup>2</sup> Respondent initially argues that this issue is forfeited because defense counsel failed to move for Juror Seven’s dismissal. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1250.) Although respondent is technically correct, appellant further contends that he was also denied effective assistance of trial counsel for counsel’s failure to seek further investigation into Juror Seven and for not seeking Juror Seven’s dismissal from the jury. Given this additional issue, we proceed to the merits of appellant’s assertion of jury misconduct.

investigation or discharge of a juror may be established by the juror's statements or conduct. This may include events which occur during jury deliberations and are reported by other jurors. (*Lomax, supra*, at p. 588.)

When a court is informed of allegations which, if proven true, would constitute good cause for the removal of a juror, the court must conduct a hearing. (*Lomax, supra*, 49 Cal.4th at p. 588, quoting *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 (*Barnwell*)).) The scope of any investigation is left to the sound discretion of the trial court. (*People v. Bonilla* (2007) 41 Cal.4th 313, 350.) The California Supreme Court has determined that a juror's disqualification must appear on the record as a demonstrable reality. (*Barnwell, supra*, 41 Cal.4th at p. 1052.) Unlike a substantial evidence inquiry in which a court examines the record in the light most favorable to the judgment, the demonstrable reality test entails a more comprehensive and less differential review.

The standard of review on appeal, whether the basis for a juror's discharge appears on the record as a demonstrable reality, is more comprehensive and less deferential than determining whether any substantial evidence in the record supports the court's decision. (*Lomax, supra*, 49 Cal.4th at p. 589, quoting *Barnwell, supra*, 41 Cal.4th at p. 1052.) "It must appear '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.'" (*Lomax, supra*, at p. 589, quoting *Barnwell, supra*, at pp. 1052-1053, italics in original.) The reviewing court does not reweigh the evidence but inquires whether the court's conclusion "'is manifestly supported by evidence on which the court actually relied.'" (*Lomax, supra*, at pp. 589-590, quoting *Barnwell, supra*, at p. 1053.)

We disagree with appellant's characterization of Juror Seven's comments as equivocal and the court's inquiry as perfunctory. Without being prompted by anyone, Juror Seven asked to speak to the court as the court and counsel had just finished the

examination of Officer Ranney. This was evidence in the record that Juror Seven took her obligations seriously and wanted to openly divulge what had happened to the court.

Even if we were to agree with appellant that Juror Seven's statements were equivocal, the evidence on the question of whether she had exhibited a disqualifying bias may be in conflict. In such a case, the trial court must weigh the credibility of those witnesses whose testimony it receives, taking into account the nuances present in live testimony. The court may also draw on observations it has made of jurors during voir dire and the trial itself. We afford deference to the trial court's factual determinations which are based on firsthand observations not available to us on appeal. (*Barnwell, supra*, 41 Cal.4th at p. 1053.)

Appellant bases his challenge to the adequacy of the court's inquiry of Juror Seven chiefly on *People v. McNeal* (1979) 90 Cal.App.3d 830, 835-839 (*McNeal*). There, the jury foreperson sent the court a note indicating that one of the jurors had personal knowledge that would definitely have a bearing on the way she would vote. (*Id.* at p. 835.) The court asked if the juror had discussed what her knowledge was. The foreperson told the court that she mentioned a couple of names. (*Ibid.*) Later the juror mentioned that "she had too much to lose, and it would definitely affect her decision now." (*Id.* at p. 836.)

During discussion with counsel as to how to proceed, the court stated it would not go into the facts. (*McNeal, supra*, 90 Cal.App.3d at p. 836.) The court thereafter questioned the juror in chambers and told her they were not going into factual matters. (*Ibid.*) The court asked the juror if she could be impartial. The juror answered, "Well, after giving it some thought, since yesterday, I still can't find that I can say "guilty" when I can't believe it." (*Ibid.*) The court did not pursue this. Rather, the court questioned the juror further as to whether "she could deliberate fairly and impartially." (*Ibid.*) Upon receiving the juror's assurances, the court instructed the jury to resume deliberations.

The *McNeal* court found that once a court is placed on notice of the possibility that improper or external influences were being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors has been affected. (*McNeal, supra*, 90 Cal.App.3d at p. 839.) The trial court failed to fulfill its duty because the appellate court stated the court's cursory questioning of the juror did not justify its conclusion that she could properly perform her duties as a juror.

The facts of this case are inapposite to those in *McNeal*. Both Officer Ranney and Juror Seven testified as to the events involving their encounter the night before. Their accounts were identical in every material detail. Unlike the trial court in *McNeal*, the court here did not limit any inquiry into the facts and gave both counsel the opportunity to further question the officer and Juror Seven and conducted its own inquiry into the details surrounding Juror Seven's encounter with Ranney.

Juror Seven indicated that she thought she could proceed without having a bias for or against the prosecution or the defense. Juror Seven thought about being pulled over by Ranney the evening before and concluded that she had already heard the evidence in the case and begun deliberations. Juror Seven clearly stated that being pulled over was "not going to affect my thought of where I was as of yesterday before he pulled me over." Juror Seven indicated she had not discussed the facts surrounding her encounter with Ranney with the other jurors and told the court that she would not do so when she returned to deliberations.

We find Juror Seven's statements to be clear assertions concerning her ability to be fair, and not equivocal assertions as appellant has characterized them. In doing so, we defer to the trial court's observations of Juror Seven's demeanor both during the hearing, as well as during voir dire and the trial. We further find that the trial court more than adequately addressed the issue of any potential bias, engaging in an examination of both

the officer and the juror and permitting questioning by both parties. In effect, appellant is asking us to presume that Juror Seven's encounter with Ranney made her biased against appellant without any evidence to support that presumption. We decline appellant's invitation to presume bias.

### **ALLEGED INEFFECTIVENESS OF TRIAL COUNSEL**

Appellant further argues that trial counsel was ineffective for failing to conduct a further inquiry into Juror Seven's encounter with Ranney and for not seeking to have her removed from jury deliberations. We do not find merit to this contention.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

The trial court was not the only observer of Juror Seven. Mr. Hegland, the defense attorney, also observed Juror Seven during voir dire, the trial, and the hearing on Juror Seven's encounter with the officer. Hegland watched Juror Seven's demeanor and was

undoubtedly aware of the alternate juror, or jurors, who would replace Juror Seven. Hegland chose not to make a further inquiry into Juror Seven's contact with the officer after he observed her statements to the trial court and was able to gage her credibility.

Hegland could well have concluded for tactical reasons that Juror Seven was a better choice to serve on the jury than any alternate juror. Hegland could also have concluded that any further inquiry of Juror Seven would not have yielded any more information than the court and the parties already had discerned from the hearing. We reject appellant's assertion that there was no conceivable, reasonable tactical explanation for Hegland's failure to seek a further inquiry or to make a motion to have Juror Seven dismissed.

#### **DISPOSITION**

The case is remanded for the trial court to amend the abstract of judgment to reflect appellant's conviction in count 1 was for a violation of Vehicle Code sections 23152, subdivision (a) and 23550.5, subdivision (b). The court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is affirmed.