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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DALE BROWN,

Defendant and Appellant.

F066189

(Super. Ct. No. 1441557)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Stanislaus County. John D. Freeland, Judge.

Peter J. Boldin, 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, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, A.P.J., Gomes, J. and Kane, J.

Defendant Anthony Dale Brown was convicted by jury trial of possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The trial court found true allegations of a prior conviction and a prior prison term, and sentenced him to three years eight months in prison.

On appeal, defendant contends the trial court violated his right to be personally present when the court addressed the jury regarding its inability to reach a verdict. We will affirm.

### **FACTS**

On February 3, 2012, at about 7:10 p.m., Officer Vera conducted a traffic stop on a pickup truck driven by defendant. His girlfriend, Sandra, was the passenger. Officer Vera illuminated the interior of the truck with his lights. As Officer Vera exited his marked patrol vehicle, he observed defendant lean to his left while moving his right arm away from his body and looking down to his right. Officer Vera believed defendant was trying to hide something. Officer Vera did not see Sandra make any movements inside the truck. He approached the truck and asked defendant to get out.

Officer Vera privately asked defendant if there was anything illegal inside the truck. Defendant said there were 50 Vicodin pills<sup>1</sup> in a plastic bag inside Sandra's purse. They had been in his pocket and he put them in her purse when he was pulled over. He did not have a prescription for the pills; he got them from someone and took them for his leg pain. He said he did not want Sandra blamed for the pills. He admitted they were his. Officer Vera placed defendant in back of the patrol vehicle.

Officer Vera then returned to the truck and asked Sandra if there was anything illegal inside of her purse and if he could look inside it. She said there was nothing illegal in it and he could look. Officer Vera had noticed that the open purse, sitting on the bench seat, was closer to the driver's side of the truck. It had been about six inches from

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<sup>1</sup> The pills were actually oxycodone.

defendant. Inside the purse, Officer Vera found the plastic bag of 50 pills in the side pocket where defendant said it would be. Sandra did not deny that the purse was hers, but she did not admit knowing the pills were in her purse. She did not appear to be under the influence of drugs, but she seemed oblivious to things because she just stared straight ahead. Officer Vera thought she might be “a little mentally retarded.” Another officer gave her a ride home because she did not want to drive defendant’s truck.

### ***Defense Evidence***

Defendant testified that after Officer Vera started following him, Sandra, who used various drugs, told him she had Vicodin in her purse. He told her they should eat them, but she said there were 50 pills. Since there were too many pills to eat, defendant tried to find them in Sandra’s purse because he did not want her to get caught with them. Then he lied to Officer Vera that the pills were his because Sandra was mentally ill and he thought he could handle the system better than she. He believed he would be granted a drug program if he were arrested.

## **DISCUSSION**

### **I. Background**

Defendant was present in court when the jury retired to deliberate around 11:37 a.m. The court recessed for a lunch break and the jurors resumed deliberations at about 1:03 p.m. At about 2:00 p.m., in the presence of both counsel but not defendant, the jury submitted three questions and a request for readback of certain testimony. At about 2:30 p.m., the court responded, asking for clarification. At 3:00 p.m., the jurors requested Officer Vera’s testimony regarding his conversation with Sandra. At 3:30 p.m., the jury submitted a note that it was unable to reach a verdict. The court brought the jury back to the courtroom and the following occurred:

“THE COURT: On the record in the case of People versus Brown. We have the 12 jurors and both counsel present. The defendant is not

present. [¶] Ladies and gentlemen, [defendant] is en route. He may walk in the door any second. But, in any event, I have a note here from [Juror No. 7] that you're unable to reach a verdict. [¶] So, [Juror No. 7], first, let me ask you, has there been a vote—don't tell me what the vote is—just, have you had a vote?

“JUROR NUMBER 7: Yes, sir.

“THE COURT: Okay. At about 2:00 you sent me a note asking for readback. And we sent a note back to you asking for clarification as to readback for items 3 and 4, and we haven't heard back from you on that. [¶] We are prepared to have the court reporter go ahead and read [the requested testimony]. [¶] So I guess the question is, you know, do you think that since there are people on the panel that apparently have asked for some readback, do you think that readback would—might be helpful in terms of your deliberation?

“JUROR NUMBER 7: I presented that to the jurors, and it was the feeling that more likely it would not change the way that each juror saw the case.

“THE COURT: Okay. So I'm going to ask a few other people. I don't want to get into your deliberations, but, for instance, [Juror No. 3], do you agree with what [Juror No. 7] said, that further—or readback probably won't help you in terms of reaching a verdict?

“JUROR NUMBER 3: Help me personally, or the group?

“THE COURT: Well, maybe we better keep it to just you personally, I think, because I don't want to get into your deliberations, so—

“JUROR NUMBER 3: Reading it back will not change what I feel.

“THE COURT: Okay. Not to put you all on the spot, but is there anybody who thinks that maybe some readback might be helpful to them in terms of coming to a verdict in this case? [¶] Anybody want to volunteer—[Juror No. 9]?

“JUROR NUMBER 9: Yeah. I think [readback] might be more helpful than—than—I think it could help everyone if they are open to it.

“THE COURT: Okay.

“JUROR NUMBER 9: If they listen.

“THE COURT: Does anybody else feel that way? [¶] You folks have invested three days of your life into this case. It has been a very short trial. The attorneys estimated their time well, and they got the case to you even quicker than they had anticipated. [¶] I have found in the past that sometimes a good night’s sleep, coming back fresh the next day helps the jury reach a verdict. I have found also that sometimes it doesn’t and they’re still not able to reach a verdict. [¶] But I think that, Number 1, if there is anyone on the panel who wants readback, you should consider making that request to the Court. [¶] And, Number 2, I would like for you to give it a night’s rest and come back tomorrow and see how you do. [¶] So, with that, we can do one of two things. I can excuse you now to come back tomorrow, or you can go in and decide whether you want readback, what specifically you want read back of, and then [the reporter] can come in and do that this afternoon. [¶] [Juror No. 7]?”

“JUROR NUMBER 7: Sir, if I may say, if we can listen to Officer Vera’s testimony when he spoke to [Sandra], it will help. And that will help a couple of us to make a decision.

“THE COURT: Okay. That’s fine. And [the reporter] will do that.... [¶] So with that, I will excuse you to go back to the jury deliberation room. [The reporter] will go with you and provide that testimony. In the meantime, if you come up with other readback that you want, if you would let us know. [¶] ... [¶] So I want to wish you a good evening....”

At this point, around 3:50 p.m., the reporter provided readback of testimony for the jury. Then the jury recessed for the evening.

The next day, the jury reconvened to deliberate at 9:05 a.m. At about 9:53 a.m., the jury returned to the courtroom with a guilty verdict.

## **II. Analysis**

“A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth

Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code.” (*People v. Waidla* (2000) 22 Cal.4th 690, 741 (*Waidla*).

However, “under the Fourteenth Amendment’s due process clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a ‘stage ... that is critical to [the] outcome’ and ‘his presence would contribute to the fairness of the procedure.’ [Citation.]” (*Waidla, supra*, 22 Cal.4th at p. 742.) Similarly, under section 15 of article I of the California Constitution and sections 977 and 1043 of the Penal Code, a defendant is not entitled to be personally present during proceedings which bears no reasonable, substantial relation to his or her opportunity to defend the charges against him. (*Waidla*, at p. 742; see *People v. Ervin* (2000) 22 Cal.4th 48, 74.)

The burden is on the defendant to demonstrate that his absence from the proceeding prejudiced the case or denied him a fair and impartial trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [“The reading back of testimony ordinarily is not an event that bears a substantial relation to the defendant’s opportunity to defend ... and nothing in the present record indicates that defendant’s personal presence would have assisted the defense in any way”].) When “[t]he only possible basis for a conclusion favorable to [the defendant] in this regard would be speculation[, s]uch a basis ... is inadequate. [Citation.]” (*Waidla, supra*, 22 Cal.4th at p. 742.)

Defendant states that “[a] hearing in which the jury declares it is deadlocked and seeks further guidance from the court is extremely critical to the outcome of the trial.” He argues that his absence “came at a highly critical stage as the jury could have reasonably interpreted his absence in a negative light that may have been the tipping point for the jurors who had doubts as to his guilt at this time. The fact that the jury returned a unanimous verdict less than an hour after further deliberations supports that

conclusion.” He explains that the critical nature of the hearing in his case “is evidenced by the fact that the jury returned with a different decision than it had before the hearing.” He explains that the inability of the jury to reach a verdict demonstrated that at least one juror had expressed a doubt as to his guilt, and the request for readback of Officer Vera’s testimony regarding his interaction with Sandra reflected that some jurors wanted to further assess defendant’s credibility. This issue went directly to the core of defendant’s guilt or innocence. He says his presence was essential to the jurors’ assessment of his credibility; his presence would have contributed to the fairness of the procedure because “[f]airness requires that the person on trial whose credibility the jury sought to further assess be present when the court inquires about a jury’s ability to come to a unanimous decision as to his guilt or innocence.”

We agree with defendant that the in-court discussion between the court and the jury was a “critical stage” of the proceedings and the trial court erred in proceeding in defendant’s absence. We also conclude that the court and both counsel were remiss in not making a better record—for example, inquiring on the record whether defense counsel agreed to proceed with the hearing in defendant’s absence, and stating on the record post-hearing that defendant formally waived his presence at the earlier hearing, if he did.

As for prejudice, defendant contends he was prejudiced because the case was close and his absence cast him in a bad light. He says the court’s “indication on the record that [defendant] was en route, but late, could have prejudiced the jury by negatively reflecting a carefree, indifferent attitude upon the [defendant] when the court asked the jury to keep deliberating and emphasized that each juror had ‘invested three days of [their] life into this case.’” This mischaracterizes the record. As our excerpt of the record demonstrates, the court did not say defendant was late, which according to defendant might have

suggested an indifferent attitude, but only that he was “en route” and “may walk in the door any second.”

On this record, we cannot find that defendant’s absence or the trial court’s comment prejudiced defendant in any way. Indeed, defendant’s theory is mere speculation. The court in *People v. Gonzales* (2012) 54 Cal.4th 1234 explained: “[Defendant’s] only claim of prejudice is that the prospective jurors may have gotten the impression that he, charged with a horrible crime, ‘callously did not bother to show up at his own ... trial.’ Such a speculative and peripheral consideration is insufficient to establish a reasonable probability (*People v. Watson* (1956) 46 Cal.2d 818, 836) or a reasonable doubt as to the eventuality of a result more favorable to defendant had he been present (*Chapman v. California* (1967) 386 U.S. 18; *People v. Gonzales* [(2011)] 51 Cal.4th [894,] 953).” (*Id.* at p. 1254; see *People v. Castaneda* (2011) 51 Cal.4th 1292, 1318 [defendant’s “theory is speculation, and therefore is inadequate to establish that the conference was ‘critical’ or that his presence would have ‘contributed to the fairness’ of the procedure.”]; *People v. Horton, supra*, 11 Cal.4th at p. 1121 [defendant’s “suggestion that the jury might have been favorably influenced by defendant’s reactions to the reading back of the testimony is entirely speculative”].) Based on these considerations, on this record we conclude defendant has failed to carry his burden to show his absence prejudiced his case or denied him a fair and impartial trial.

### **DISPOSITION**

The judgment is affirmed.