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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LACHRIS SHONETEZE BROWN,

Defendant and Appellant.

H039502

(Santa Clara County

Super. Ct. No. C1095000)

A jury convicted defendant Lachris Shoneteze Brown of possession for sale of methamphetamine (Health & Saf. Code, § 11378; count 1), possession for sale of cocaine base (Health & Saf. Code, § 11351.5; count 2), possession for sale of cocaine (Health & Saf. Code, § 11351; count 3), possession for sale of hydrocodone (Health & Saf. Code, § 11351; count 4), possession for sale of oxycodone (Health & Saf. Code, § 11351; count 5), possession for sale of zolpidem (Health & Saf. Code, § 11378; count 6), possession for sale of marijuana (Health & Saf. Code, § 11359; count 7), and destroying evidence (Pen. Code, § 135; count 8). The jury found true allegations that the methamphetamine (count 1) and cocaine (count 3) each weighed 57 grams or more. (Pen. Code, § 1203.073, subds. (b)(1) & (b)(2).) The trial court found true allegations that defendant had three prior narcotics convictions. (Pen. Code, § 1203.07, subd. (a)(11); Health & Saf. Code, §§ 11370, subds. (a) & (c), 11370.2, subd. (c).)

Defendant was sentenced to a 12-year county jail term to be followed by two years on mandatory supervision. (See Pen. Code, § 1170, subd. (h)(5).)

On appeal, defendant contends the trial court erred by: (1) failing to investigate a juror inquiry prior to accepting the verdict; (2) denying defendant's discovery motion for search warrant affidavits in other cases; (3) failing to give a unanimity instruction as to count 7, in which defendant was charged with possessing marijuana for sale; and (4) denying defendant's *Miranda* motion<sup>1</sup> with respect to a statement he made at the time of his arrest. For reasons that we will explain, we will affirm the judgment.

## **BACKGROUND**

### ***A. Defendant's Arrest***

On December 15, 2010, Milpitas police officers conducted surveillance at the Extended Stay Hotel on Hillview Court. When defendant walked out of the hotel, he was arrested and placed in the back of a police vehicle. Detective Fox asked defendant if he "had anything illegal on him." Defendant replied, " 'Yes, I have crystal in my underwear.' "

Defendant was transported to the police station, where he was cooperative while removing his clothing for a search. Then, while naked, he lunged past the searching officer, threw an item into the toilet, and flushed the toilet. The officer glimpsed a clear plastic item but was not able to recover it. Defendant told the officer, " 'Don't be mad. I told you where it was. It[']s] not like you don't got me already. You got my house, and you got my apartment. You can't bury me in prison. I got kids to look out for.' "

### ***B. Search of Defendant's Apartment***

After defendant was taken into custody at the hotel, officers executed a search warrant at defendant's apartment, located on Calle Oriente. In the kitchen, the officers found a small black digital scale and a box of pleated sandwich bags inside a cabinet.

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

There was a cell phone on the microwave and a box of small Ziploc bags in a drawer. Paperwork for defendant's vehicle was also found in the kitchen, although the address on the vehicle registration was for a mailbox store. In the living room, the officers found a small spiral notebook with defendant's writing. In a closet near the bedroom, the officers found a piece of mail addressed to defendant.

In the bedroom closet, which contained both men's and women's clothing, the officers found a gray suitcase. Inside that suitcase, the officers found another digital scale. Also in that closet, the officers found a green safe. A key to the safe was in the drawer of a nightstand in the bedroom. Inside the green safe, the officers found two vacuum-sealed bags of marijuana. The bags weighed 299 grams and 285 grams. The bags were marked "smelly proof."

A second safe was found inside the bedroom closet. The officers pried open the safe and found more packaged marijuana. One bag weighed 100 grams. A second bag contained 14 smaller bags and weighed 58 grams.

Another Ziploc bag of marijuana was found in a small dresser, which contained women's clothing. That bag weighed 28 grams and was also marked "smelly proof." Another 8 grams of marijuana was in a box on top of a nightstand.

Inside a taller dresser in the bedroom, the officers found a banker's bag containing three pill bottles. The pill bottles contained a large number of zolpidem, hydrocodone, and oxycodone tablets. The names on the pill bottle labels were Sheila McDonald, Charles Jackson, and Mary Martinez. There was no indicia for anyone with those names elsewhere in the apartment.

### ***C. Search of the Hotel Room***

Officers obtained a search warrant for and searched room 351 at the Extended Stay Hotel. A photograph of defendant was found on a computer in the hotel room. Inside a closet, the officers found a vacuum-sealing device. Inside a laundry hamper, the

officers found a messenger-style bag containing two banker's bags. One banker's bag was blue; the other was black.

A key from defendant's key ring unlocked the black banker's bag, which contained the following items: (1) a gallon-sized Ziploc bag with 114 grams of methamphetamine; (2) another Ziploc bag with 97 smaller bags of methamphetamine; (3) a third Ziploc bag with smaller baggies of cocaine base, the total weight of which was 78 grams; (4) two scales, one of which was the same model as the scale found in defendant's apartment.

The blue banker's bag contained the following items: (1) a bag of cocaine base; (2) a Ziploc bag with 13 small blue baggies of methamphetamine; (3) a clear bag containing 29 grams of methamphetamine; (4) about 700 small Ziploc bags.

A dresser contained 23 Ziploc bags with the "smell[y] proof" label on them. A black bag contained six bundles of cash totaling \$5,980. An additional \$400 in cash was found in an envelope.

#### ***D. Defense Case***

Defendant's friend Lakresha Nguyen had visited defendant at his apartment in December 2010. According to Nguyen, a woman named Jamila Heshima lived at the apartment at that time, and "a couple people" had keys to the apartment. Nguyen saw Heshima smoke marijuana and use "other things." Nguyen believed the safe containing drugs belonged to Heshima and that Heshima possessed prescription medications. Nguyen had also been to defendant's hotel room. She believed a girl named Sunny lived in the hotel room with defendant.

Nguyen, who had known defendant for six years, had never seen him possess or sell drugs. She herself had a prior criminal history for drug offenses including possession and being under the influence. In addition, she had convictions for vandalism, battery, giving false information to a peace officer, check fraud, petty theft, and false impersonation.

Sangeetha Krishnan (also known as Sunny) had been staying with defendant at the Extended Stay Hotel about five or six days per week for a few months prior to his arrest. Other women stayed there also, including Nguyen, Regina White, and possibly Misha Jones. Krishnan believed that Heshima lived at defendant's apartment, where she had also seen some clothing belonging to White. Krishnan had never seen defendant in possession of illegal drugs, and she had never seen him sell drugs.

Defendant testified he had never seen the narcotics before. He had seen only one of the three banker's bags before; it had been in a drawer at his apartment. Defendant denied that the safes or the marijuana belonged to him; he claimed those items belonged to Heshima, who also lived in the apartment and who had a "cannabis card." He denied that any of the pills belonged to him.

Defendant testified that Nguyen, White, and Jones all would come over to his apartment. Both Jones and White had keys to the apartment. Krishnan stayed at the hotel room with him, and other people visited.

On Thanksgiving in 2010, Heshima had been manicuring marijuana at the apartment. Defendant asked her to go to the hotel room because he was having family over for dinner. When he went to the hotel room the following day, he saw plastic bags and the vacuum sealing device there. He never tried to give the vacuum sealer back to Heshima, and he did not ask her to come get it.

Defendant denied telling Detective Fox that he had " 'crystal in my underwear.' " He claimed that Detective Fox had asked him if he had " 'any drugs or weapons,' " and that he had replied, " 'No.' " Detective Fox had searched defendant's underwear but had not found anything.

Defendant claimed that when he was undergoing the strip search at the police department, a bandage on his leg had come off, so he had dropped it into the toilet and flushed it. He had no drugs hidden on him.

Defendant admitted prior convictions for transportation of a controlled substance, conspiracy to transport a controlled substance, possession for sale of cocaine, possession of a billy club, and unlawful possession of ammunition.

***E. Charges, Verdicts, and Sentence***

Defendant was charged, by information, with possession for sale of methamphetamine (Health & Saf. Code, § 11378; count 1), possession for sale of cocaine base (Health & Saf. Code, § 11351.5; count 2), possession for sale of cocaine (Health & Saf. Code, § 11351; count 3), possession for sale of hydrocodone (Health & Saf. Code, § 11351; count 4), possession for sale of oxycodone (Health & Saf. Code, § 11351; count 5), possession for sale of zolpidem (Health & Saf. Code, § 11378; count 6), possession for sale of marijuana (Health & Saf. Code, § 11359; count 7), and destroying evidence (Pen. Code, § 135; count 8). As to counts 1 and 3, the information alleged that the substances each weighed 57 grams or more. (Pen. Code, § 1203.073, subds. (b)(1) & (b)(2).) The information also alleged that defendant had three prior narcotics convictions. (Pen. Code, § 1203.07, subd. (a)(11); Health & Saf. Code, §§ 11370, subds. (a) & (c), 11370.2, subd. (c).)

The jury found defendant guilty of all eight charged counts, and it found true quantity allegations as to counts 1 and 3. The trial court found true all of the prior narcotics conviction allegations.

The trial court imposed a “blended sentence” consisting of a 12-year county jail term to be followed by two years on mandatory supervision. (See Pen. Code, § 1170, subd. (h)(5).)

**DISCUSSION**

***A. Juror Inquiry***

Defendant contends the trial court erred by failing to investigate a juror inquiry prior to accepting the verdict.

## **1. Proceedings Below – Jury Verdicts**

Jury deliberations began at 11:50 a.m. on January 24, 2013. The jury informed the court that it had reached a verdict that afternoon at 4:25 p.m. The attorneys were called into the courtroom, but defendant did not appear, so the court issued a bench warrant and continued the matter until the following morning.

The verdicts were returned at 9:15 a.m. the next day, January 25, 2013. Defendant was present. Before having the clerk read the verdicts, the trial court asked the jury foreperson if the jury had “arrived at a unanimous verdict as to all eight counts.” The foreperson replied, “Yes, your Honor.”

After the verdicts were read, the trial court asked the jurors “collectively,” “Are these your unanimous verdicts as read by the courtroom clerk? Yes?” The record reflects that “all twelve jurors responded affirmatively.” Defendant declined the court’s invitation to have the jury polled. (See Pen. Code, § 1163.) The jury was then discharged. (See Pen. Code, § 1164.)

On the afternoon of January 25, 2013, the court reconvened “to memorialize the events that transpired” that morning and afternoon. Before the jury entered the courtroom that morning, the clerk had reported that Juror No. 7 had called and asked to speak with the bailiff. The court had advised the bailiff that Juror No. 7 wished to speak with him. The jury was then brought in and the verdicts taken. The court then asked the jurors if “this was indeed their unanimous verdict,” and the jurors had “all nodded affirmatively.” After the jury was discharged, the court reporter had come into chambers and advised the court that “there was something important.” The bailiff had then advised the court that, after the verdicts, Juror No. 7 had “approached him and said that she felt pressured by the other jurors in arriving at the guilty verdict. She felt pressured because they all indicated they wanted to go back to work, and that that would not have been her verdict, or words to that effect.” The trial court had therefore brought both counsel back

into the courtroom, advised them of “what had transpired,” and given them an opportunity to talk to the bailiff.

Trial counsel noted that he had seen Juror No. 7 in the hallway after he had left the courtroom in the morning. He and his assistant had walked down to the elevator with Juror No. 7 and ridden down to the first floor with her. Juror No. 7 “didn’t mention anything to me during that time.”

The prosecutor noted that “the appropriate procedure from here, since we have a verdict that was recorded, is just for [defendant] to pursue this as part of a motion for a new trial.”

## **2. Proceedings Below – Motion for a New Trial**

On February 15, 2013, after the court trial on the prior conviction allegations, defendant informed the trial court that he was going to file a motion for a new trial. The court asked if the motion was “going to be submitted on declarations” or whether defendant would “call in witnesses.” Defendant indicated he hoped to have “declarations from all the involved parties.” The prosecutor indicated he did not anticipate the declarations would warrant a hearing with live witness testimony.

On March 8, 2013, defendant filed a motion for a new trial “on the grounds that the verdict has been decided by a means other than a fair expression of the opinion on the part of all the jurors (Pen. Code § 1181(4)) and on basic principles of the right of trial by jury in the U.S. and California Constitutions.” Defendant argued that the verdict in his case had not been unanimous. Instead, he claimed, Juror No. 7 had opposed the verdict but had been “unable to communicate her disagreement before the verdict was announced.”

A declaration from Juror No. 7 was attached to defendant’s motion. Juror No. 7 declared that she “wanted to vote NOT GUILTY in this case.” She would have “needed more evidence to vote guilty,” and she was specifically concerned about “the lack of DNA and fingerprints.” All of the other jurors wanted to convict, and some of them were

“in a hurry to get home.” Juror No. 7 felt that the other jurors had pressured her to vote guilty. She asserted that in response to the pressure, “I threw up my hands and said ‘OK, if you want to get out of here, I’ll go with guilty’.” That evening, however, she decided she wanted to “vote ‘not guilty’.” She believed the proper protocol was for her to call into the courtroom and ask to speak to the bailiff, so that is what she did. She then waited for the bailiff to approach her, but he did not. She did not hear the judge ask the jury, “ ‘Is this your verdict?’ ” At the time, she “did not have the headphones that the court had provided [her] on earlier occasions.” If she had heard the judge’s question, she would have announced “that this was NOT my verdict.” She later approached the bailiff and told him that “this was not my verdict.”

A declaration from the bailiff was also attached to defendant’s motion. The bailiff stated that on the morning of January 25, 2013, before the jury’s verdicts were read, the clerk had informed him that Juror No. 7 wanted to talk to him. When he escorted the jury back to the jury room, he made sure that he stood near Juror No. 7, so that she would have an opportunity to talk to him. He did not want to initiate the conversation. Juror No. 7 did not say anything to him at that time. However, after the verdicts, Juror No. 7 approached him and told him, “ ‘this was not my verdict’ . . . . [‘]they pressured me into voting guilty’ and ‘I guess it is too late to do anything about it now.’ ” The bailiff then informed the trial court of the conversation.

In his motion for a new trial, defendant explained Juror No. 7’s reference to headphones: “At the start of the trial, [Juror No. 7] indicated that she had hearing problems. Throughout the trial, (although admittedly not every day) [Juror No. 7] used court supplied headphones to hear the proceedings. On some occasions they were necessary and other times they were not. Previously she had managed to communicate to the bailiff whether or not she required headphones and he saw to it that the headphones were available to meet her needs. In the courtroom that Friday morning, [Juror No. 7] did not have headphones, nor did she ask for them.”

The prosecution filed a written response to defendant's motion for a new trial, arguing that the jury had returned a unanimous and complete verdict. The prosecution argued that much of Juror No. 7's declaration was inadmissible under Evidence Code section 1150 because Juror No. 7 was reporting her subjective opinions and thought processes. The prosecution argued that some of the bailiff's declaration was similarly inadmissible.

In his written reply to the prosecution's response, defendant indicated that he had originally agreed to submit the matter based on the declarations, but that he wanted "a full hearing with witnesses" if the trial court was not going to consider portions of the declarations. He argued that Evidence Code section 1150 did not preclude the trial court from considering the declarations.

The motion for a new trial was heard on March 22, 2013. The trial court noted that on January 17, 2013 (a week before the jury's verdicts), the court had asked Juror No. 7 if she needed the assistive hearing device. Juror No. 7 had responded, " 'I'm hearing better today.' "

The trial court ruled that in considering the declarations defendant submitted with his motion, it would consider only "the overt acts that are objectively ascertainable," pursuant to Evidence Code section 1150.<sup>2</sup> Those facts included: (1) Juror No. 7 had initially requested an assistive hearing device but was "hearing better" on January 17, 2013; (2) before the verdict, Juror No. 7 told the clerk that she wanted to speak with the

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<sup>2</sup> Evidence Code section 1150 provides: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him [or her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

bailiff, but “no such conversation took place;” (3) the foreperson had informed the court that the verdict was unanimous and the jurors had “all nodded affirmatively” when the court asked if the verdicts were correct; (4) Juror No. 7 was one of the closest jurors to the bench when the jury was asked if the verdicts were correct.

The court felt “satisfied that the jury returned a verdict that was both complete, as well as unanimous.” The events that had occurred after the verdict was recorded were “really not relevant.” The court therefore denied defendant’s motion for a new trial.

### **3. Analysis**

Defendant contends that the trial court had a duty to inquire into Juror No. 7’s request to speak to the bailiff the morning before the verdicts were read. He contends that the trial court’s error resulted in the denial of his federal and state constitutional rights to a jury trial and due process, and to his state constitutional right to a unanimous 12-person jury. Defendant specifically faults the trial court for not “*ensuring* that the bailiff had, *in fact*, communicated with Juror No. 7” and for failing to inform trial counsel and the prosecutor of Juror No. 7’s request. Defendant also criticizes the bailiff for sending “the implicit message that communication at that time was *inappropriate*” by not “asking Juror No. 7 what it was that she wanted to speak about (or, perhaps, asking her to write her request as a note to the trial court)” while standing directly next to Juror No. 7. Although defendant does not specifically argue that the trial court erred by denying his motion for a new trial, this is in fact the essence of his claim. Thus, we begin our analysis by setting forth the standard of review applicable to a motion for a new trial.

“ ‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140 (*Thompson*)). “And a reviewing court

defers to the factual determinations the trial court makes when assessing the credibility of the jurors.” (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75.)

We next set forth some of the relevant statutes and legal principles concerning the responsibilities of the trial court and the bailiff.

The duties of a bailiff are set forth in Penal Code section 1128, which states that the bailiff has a duty to keep the jury together for deliberations, and “not to permit any person to speak to or communicate with them . . . , nor to do so himself or herself, unless by order of the court, or to ask them whether they have agreed upon a verdict . . . .” Conduct by a bailiff that influences the jury’s deliberation process, such as improper communication with a juror, constitutes misconduct. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 411, 419-420 (*Hedgecock*); *People v. Lee* (1974) 38 Cal.App.3d 749, 751-752; *People v. York* (1969) 272 Cal.App.2d 463, 464.) In light of the potential for bailiff-juror communication to influence the jury, trial courts should “remind their bailiffs of the importance of their role as guardians of the integrity of the jury’s deliberative process and . . . caution them to limit their communications with jurors to the bare essentials and to make no statement that a juror might construe as relating to the merits of the case, the interpretation of legal rules, or the nature of the deliberative process.” (*Hedgecock, supra*, 51 Cal.3d at p. 420.)

Penal Code section 1138 sets forth the trial court’s duties with respect to juror communications during deliberations. The trial court must respond to jury requests for rereading of testimony, and the trial court must instruct the jury on “any point of law arising in the case.” (Pen. Code, § 1138.) “[T]he provisions of section 1138 of the Penal Code . . . do not call for any such action unless there is disagreement among the jurors as to testimony or if they desire to be informed on any point of law.” (*People v. Demes* (1963) 220 Cal.App.2d 423, 440-441, disapproved on other grounds by *People v. Collie* (1981) 30 Cal.3d 43, 64, fn. 19.)

The manner of taking a verdict is set forth in Penal Code section 1149, which provides: “When the jury appear they must be asked by the court, or clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.”

The procedures for polling the jury are set forth in Penal Code section 1163, which provides: “When a verdict is rendered, and before it is recorded, the jury may be polled, at the request of either party, in which case they must be severally asked whether it is their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.”

The procedures for receiving a verdict and discharging the jury are set forth in Penal Code section 1164, which provides: “(a) When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case. [¶] (b) No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.”

Defendant acknowledges there is “no case that is factually square” with his case, but he contends *People v. Bento* (1998) 65 Cal.App.4th 179 (*Bento*) “is instructive.” In *Bento*, there were two codefendants: Johnson and Bento. The jury announced it had reached verdicts on two counts as to Johnson and three counts as to Bento, but that it could not reach verdicts on two of the other counts as to Bento. (*Id.* at p. 187.) After the verdicts were read in open court, the jurors were polled, and they all affirmed that the verdicts were correct. The trial court and counsel then proceeded to discuss the counts as

to which the jury had not reached a verdict. During that discussion, a juror said she was “ ‘not absolutely sure with reasonable doubt’ ” about her verdicts as to Johnson. (*Ibid.*) The trial court declined to reconvene the jury.

On appeal, Johnson claimed the trial court should have reconvened the jury after a juror expressed doubts about the verdict. (*Bento, supra*, 65 Cal.App.4th at p. 186.) The *Bento* court first held that the verdicts against Johnson were “complete within the meaning of Penal Code section 1164 when they were recorded.” (*Id.* at p. 188.) The court reasoned, “Here, the verdicts resolved all requisite matters concerning Johnson, the jurors collectively and individually affirmed the verdicts in open court, and the trial court verified the verdicts and directed the clerk to record them.” (*Id.*, at p. 188.) The *Bento* court next held that the trial court did not err by failing to reconvene the jury. The court explained: “[W]hen, as here, the verdicts have been collectively and individually confirmed in open court pursuant to these sections and are complete in every detail, jurors are no longer empowered to dissent from the verdicts, and the trial court may not reconvene the jury for further deliberations on the basis of such dissent.” (*Id.* at p. 191.)

Defendant points to this observation by the *Bento* court: “Before the verdict is complete within the meaning of [Penal Code sections 1163 and 1164], a juror’s expressions of doubt or confusion mandate further deliberations.” (*Bento, supra*, 65 Cal.App.4th at p. 191; see also *id.* at p. 189.) He argues that if Juror No. 7 had informed the court of her “change of heart” at the time she requested to speak with the bailiff, the trial court would have been required to order additional deliberations.

We agree with defendant that *if* Juror No. 7 had informed the trial court she had changed her mind before the verdicts were read, the trial court would have been required to order additional deliberations. However, the trial court was not so informed. The trial court was informed only that Juror No. 7 wanted to speak with the bailiff. The issue here is thus whether Juror No. 7’s request to speak with the bailiff required the trial court to

investigate why Juror No. 7 wanted to talk to the bailiff and whether the trial court was required to ensure that the communication had taken place.

The Attorney General contends the trial court had no duty to investigate Juror No. 7's request to speak with the bailiff, because nothing indicated that Juror No. 7 had changed her mind and wanted to dissent from the signed verdict forms. The Attorney General points out that the juror may have wished to speak with the bailiff "regarding any number of issues including parking passes, locked bathrooms, and scheduling concerns, to name a few." The Attorney General also points out that the jurors had been instructed they could communicate directly with the court by sending a written note through the bailiff, but that Juror No. 7 did not send a written note.<sup>3</sup>

The trial court did not err in failing to investigate Juror No. 7's request under the circumstances of this case. "[N]ot every incident involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) For instance, even when the trial court is notified of "the possibility of juror bias, incompetence, or misconduct," the decision whether to conduct an investigation "rests within the sound discretion of the trial court," and "a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citation.]' [Citation.]" (*Ibid.*; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [trial court did not abuse its discretion by failing to investigate a juror's derogatory remark about defense counsel].)

Here, the trial court was informed only that Juror No. 7 had asked to speak to the bailiff on the morning after the jury reached its verdicts, before the verdicts were returned. Juror No. 7 did not request that the trial court reread any testimony or provide

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<sup>3</sup> Pursuant to CALCRIM No. 3550, the trial court had instructed the jurors that if they wished to communicate with the court during deliberations, they should "send a note through the bailiff signed by the foreperson or by one or more members of the jury."

further instruction on a point of law. Juror No. 7 did not send a written note to the court as instructed, and she did not dissent when the clerk read the eight verdicts or when the trial court asked the jury, collectively, if the verdicts were correct. Juror No. 7 did not inform the court that she needed an assistive listening device, which she had requested earlier in the trial but had declined on a subsequent occasion. None of these facts, individually or collectively, put the trial court on notice that Juror No. 7's request on January 25, 2013 was related to the verdicts.

Additionally, the bailiff did not err by failing to initiate communication with Juror No. 7 after learning that she wanted to speak to him. As noted above, Penal Code section 1128 prohibits a bailiff from speaking to the jurors "unless by order of the court, or to ask them whether they have agreed upon a verdict . . . ." As bailiffs must be careful not to engage in any conduct that could influence the deliberation process (see *Hedgecock, supra*, 51 Cal.3d at pp. 419-420), the bailiff was not required to do anything more than make himself available to Juror No. 7 upon receiving notice that she wished to communicate with him, which is what the bailiff did.

Finally, the trial court did not err by deciding the motion for a new trial based only on "the overt acts that are objectively ascertainable." Under Evidence Code section 1150, the trial court could consider only " 'overt acts, objectively ascertainable,' " not " 'the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . .' [Citation.] 'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his [or her] own or his [or her] fellow jurors' mental processes or reasons for assent or dissent.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.) The trial court could not, for instance, consider Juror No. 7's statements about voting guilty because she felt pressured to do so by the other jurors. (See *People v. Peavey* (1981) 126 Cal.App.3d 44, 51.) The trial court also could not consider Juror No. 7's statement that she had changed her mind about her vote during the night after the verdict forms were filled out. (See *People v. Romero* (1982) 31 Cal.3d

685, 695 [improper to consider affidavits indicating jurors had mistakenly convicted defendant of one burglary count instead of a second burglary count].) The trial court properly considered the facts it listed when ruling on defendant's motion for a new trial: (1) Juror No. 7 had initially requested an assistive hearing device but was "hearing better" on January 17, 2013; (2) before the verdict, Juror No. 7 told the clerk that she wanted to speak with the bailiff, but "no such conversation took place"; (3) the foreperson had informed the court that the verdict was unanimous and the jurors had "all nodded affirmatively" when the court asked if the verdicts were correct; (4) Juror No. 7 was one of the closest jurors to the bench when the jury was asked if the verdicts were correct.

Ultimately, it was up to Juror No. 7 to make her change of mind known to the court prior to the discharge of the jury. Penal Code sections 1149 and 1164, set forth above, require the jurors to be asked about their verdict and to inform the court if there is any disagreement. Additionally, here the jury was given express instructions on how to communicate with the court—to send a written note. Yet Juror No. 7 sent no written note, did not speak to the bailiff when he made himself available to her, and failed to speak up at the time the verdict was read. The trial court appears to have found Juror No. 7's claim of not being able to hear the question " 'Is this your verdict?' " not credible. That determination is supported by the record, which establishes that Juror No. 7 failed to request an assistive hearing device on the day the verdicts were read, despite requesting one earlier in the trial, and by the trial court's own observation that all of the jurors had nodded affirmatively when asked if the verdicts were correct. Notably, there were eight guilty verdicts read out loud, but Juror No. 7 did not indicate that she no longer agreed with any of them until after the jury was discharged.

On these facts, the trial court properly determined that the verdicts were unanimous and complete under Penal Code section 1164 at the time the jury was discharged. (See *Bento, supra*, 65 Cal.App.4th at p. 191.)

In sum, under the circumstances of this case, the trial court did not err by failing to investigate Juror No. 7's request to speak with the bailiff, and the trial court did not abuse its discretion by denying defendant's motion for a new trial. (See *Thompson, supra*, 49 Cal.4th at p. 140.)

**B. Discovery Motion**

Defendant contends the trial court erred by denying defendant's discovery motion for search warrant affidavits submitted by Detective Fox in other cases.

**1. Proceedings Below**

Before trial, defendant filed a motion to quash and/or traverse the search warrants issued for his person, car, apartment, and hotel room. Defendant also sought disclosure of the sealed portion of the search warrant affidavits. The trial court ordered the "majority" of the affidavits unsealed, but ordered the informant's identity to remain confidential.

Defendant's motion to quash and/or traverse the search warrants was denied at his preliminary hearing, but after the information was filed, he filed a new motion to quash the search warrant for his apartment. The partially unsealed search warrant affidavit was attached to his motion.

The search warrant affidavit had been prepared by Detective Fox and was dated December 10, 2010. Detective Fox related his training, experience, and knowledge about methamphetamine sales and use. He related his opinion about why the informant's identity needed to be kept confidential.

Detective Fox related why he believed the informant, who he referred to as "X," was reliable: "because on at least 5 occasions within the past 6 months X has provided law enforcement with information that has led to the arrest of a suspect and/or critical information in a police investigation." Specifically, "Within the past six months, X told law enforcement that a particular person was selling a particular drug. Based upon this information provided by X, the drugs specified were seized and an arrest was made. All

information proved true in all respects. This information led to a criminal conviction of the suspect in Santa Clara County.” Additionally, “Within the past six months, the X told law enforcement that a particular person with an active bench warrant was present at a particular location. The information provided by X led to the arrest of the particular individual. All information proved true in all respects.” The paragraph about X providing information leading to the arrest of someone with an outstanding bench warrant was repeated three more times.

In a *Hobbs*<sup>4</sup> attachment to the affidavit, Detective Fox stated that, according to X, defendant was selling methamphetamine in Milpitas. X had described defendant, defendant’s vehicle, and the approximate location of defendant’s residence. X had also identified a photograph of defendant. X had then engaged in a “ ‘controlled buy,’ ” using marked police funds to purchase methamphetamine from defendant. Detective Fox explained that he did not want to provide specific details of the buy—such as the location, amount of money, or amount of methamphetamine—because it would tend to reveal X’s identity.

On October 23, 2012, defendant filed a motion to compel discovery and a new motion to quash and/or traverse the search warrant. In the discovery motion, defendant sought “ALL search warrants issued by, written by, or used by [Detective] Fox of the Milpitas Police since October 2010” and all affidavits, *Hobbs* attachments, and docket numbers associated those search warrants. Defendant also sought all other exculpatory evidence, including any evidence of misstatements of fact by Detective Fox.

Defendant provided an affidavit that Detective Fox had submitted in support of a search warrant in a case involving a person named Michael Hutchinson, on July 6, 2011. In the Hutchinson case, the affidavit contained some identical material. In particular, the affidavit in the Hutchinson case described the confidential informant (also called “X”) as

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<sup>4</sup> See *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*).

being reliable “because on at least 5 occasions within the past 6 months X has provided law enforcement with information that has led to the arrest of a suspect and/or critical information in a police investigation.” This paragraph is identical to the paragraph describing X’s reliability in defendant’s case. The affidavit in the Hutchinson case also reported, just as in defendant’s case: “Within the past six months, X told law enforcement that a particular person was selling a particular drug. Based upon this information provided by X, the drugs specified were seized and an arrest was made. All information proved true in all respects. This information led to a criminal conviction of the suspect in Santa Clara County.” Additionally, just as in defendant’s case, the Hutchinson affidavit contained four identical paragraphs stating that within the past six months, X had given the police information leading to the arrest of a person with an active bench warrant. Unlike the affidavit submitted in support of the search warrant for defendant’s apartment, however, the Hutchinson affidavit did not describe a controlled buy.

Defendant pointed out that the Hutchinson affidavit’s description of the confidential informant’s reliability was identical to the information in the affidavit concerning defendant’s apartment. Defendant argued that this showed the affidavit in his case was “demonstrably false.” He argued: “The same informant cannot possibly have been involved in identifying four different persons with warrants ‘within the last six months’ in affidavits submitted seven months apart.”

The prosecution filed written opposition to defendant’s discovery motion, arguing that it was “mere speculation” that Detective Fox had lied in the search warrant affidavit.

At the hearing on defendant’s discovery motion held on December 4, 2012, defendant suggested three alternative explanations for the two “virtually identical” search warrant affidavits filed in separate cases, more than six months apart. The first possibility was that “the [affidavits] are completely and totally made up. There is no X. X doesn’t exist.” The second possibility was that “there are two Xes who have

amazingly similar lives.” The third possibility was that “it’s the same person X, and X really exists,” and X is frequently identifying individuals who are involved in illegal activity. Defendant argued that he was likely to discover more identical search warrant affidavits if his discovery motion was granted.

The prosecutor argued that defendant was engaging in “rampant speculation.” He contended it was not unreasonable to believe there were two informants who had provided similar information in the two cases, or that the informant was in fact the same in both cases. He noted that the repeated information was somewhat “generic.”

The trial court denied defendant’s discovery motion. The court noted that it had to presume the warrant was valid, and it found that the affidavit was sufficient even without the information about X’s reliability because the officer had observed a controlled buy. The court found that defendant’s arguments about the similarities between the two affidavits amounted to “sheer speculation.”

## **2. Analysis**

Defendant contends the trial court erred by denying his request for search warrant affidavits prepared by Detective Fox in other cases. His argument draws primarily on *People v. Luttenberger* (1990) 50 Cal.3d 1 (*Luttenberger*), in which the court discussed the procedures and standards for “discovery of information in police possession regarding a confidential informant, for purposes of challenging the accuracy of statements made in an affidavit in support of a search warrant.” (*Id.* at p. 6.)

In *Luttenberger*, the court held that in order for a criminal defendant to obtain discovery of protected information such as police files, the motion must “ ‘describe the requested information with at least some degree of specificity and must be sustained by plausible justification.’ [Citation.]” (*Luttenberger, supra*, 50 Cal.3d at p. 20.) “[A] defendant must offer evidence casting some reasonable doubt on the veracity of material statements made by the affiant.” (*Id.* at p. 21.) If the defendant makes the required “preliminary showing,” the trial court should conduct an in camera examination of the

specified police records and determine “whether the defendant’s allegations of material misrepresentations or omissions are supported by the requested materials.” (*Id.* at p. 24.) The decision whether to order such discovery is “a matter within the trial court’s discretion. [Citations.]” (*Id.* at p. 21.)

Defendant contends his discovery request was similar to that made in *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118 (*City of Alhambra*). However, that case did not involve discovery of material relevant to the veracity of a search warrant affidavit. In *City of Alhambra*, the defendant sought and obtained discovery relevant to a possible third party culpability defense. (See *id.* at p. 1136.) Moreover, in that case, “the defendant sought a very limited number of specifically described reports which were readily available.” (*Ibid.*) Here, defendant requested an unlimited number of search warrant affidavits in support of a potential attack on the veracity of a search warrant affidavit.

Defendant contends that in his motion, he “cast a ‘reasonable doubt’ on the veracity of [Detective] Fox’s affidavit” and showed that the possible misrepresentations were “‘material to the probable cause determination.’” He contends that by showing there were “uncanny similarities” between the two affidavits, it was reasonable to suspect that Detective Fox had been untruthful in the affidavit submitted in defendant’s case.

The Attorney General acknowledges the two affidavits contained some “identical allegations regarding the activities of a confidential informant over a six month period,” but contends that this fact did not entitle defendant to discovery. The Attorney General points out that “the description of the confidential informant’s activities was very general” and that “it could have reflected the type of ongoing information that one or more confidential informants routinely provide to law enforcement.”

Despite the similarities in the two affidavits, the trial court was not obligated to order the discovery defendant requested. As the trial court found, it was speculative to conclude, based on the repeated allegations in the two search warrant affidavits, that

Detective Fox was lying about the existence of X, the confidential informant. It was not unreasonable for the trial court to find that X was, most likely, a frequent informant who was regularly providing the police with information in narcotics cases. Considering there were some differences between the two affidavits—most significantly, the existence of a “controlled buy” in defendant’s case—the trial court did not abuse its discretion by determining that defendant’s proffered evidence did not cast “reasonable doubt on the veracity of material statements” made by Detective Fox and thus that defendant’s showing failed to meet the “ ‘plausible justification’ ” standard. (*Luttenberger, supra*, 50 Cal.3d at pp. 20-21.) We therefore conclude the trial court did not err by denying defendant’s discovery motion, which requested “ALL search warrants issued by, written by, or used by Officer Fox of the Milpitas Police since October 2010” and all affidavits, *Hobbs* attachments, and docket numbers associated those search warrants.

**C. Unanimity Instruction**

Defendant contends the trial court erred by failing to give a unanimity instruction as to count 7, in which defendant was charged with possessing marijuana for sale, since officers found marijuana in four different places in the bedroom of defendant’s apartment: (1) in the green safe inside the closet, packed in two bags marked “smelly proof”; (2) in a second safe inside the same closet, packed in one 100-gram bag and 14 smaller bags; (3) in a small dresser, packed in a bag marked “smelly proof”; and (4) in a box on top of the bedroom nightstand.

Defendant contends that the prosecutor did not elect among these separate “stash[es] of marijuana,” and thus that the trial court should have given the jury a unanimity instruction, such as CALCRIM No. 3500.<sup>5</sup> Defendant contends that the jurors

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<sup>5</sup> CALCRIM No. 3500 provides: “The defendant is charged with \_\_\_\_\_ <insert description of alleged offense> [in Count \_\_ ] [sometime during the period of \_\_ to \_\_ ]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that

could have made a number of different findings. First, jurors could have found that Heshima had exclusive dominion and control over the two safes, since Nguyen testified that Heshima had opened one of the safes to retrieve marijuana. Second, jurors could have found that Heshima had sole possession of one safe while defendant had sole or constructive possession of the other safe. Third, jurors could have found defendant did not have dominion and control over the marijuana found in the dresser, which contained women's clothing, or that even if defendant possessed the marijuana found in the dresser, he did not intend to sell it. Thus, defendant argues, there was a risk that the jurors did not all agree on the act that constituted possession for sale of marijuana.

The Attorney General contends that no unanimity instruction was necessary because defendant presented the same defense as to all of the marijuana found in his apartment: that none of it belonged to him. The Attorney General also argues that the only marijuana at issue was that found in the safes, because the prosecutor argued that only that marijuana was possessed for sale. As to the marijuana in the two safes, the Attorney General contends that defendant's possession of the safes was "so closely connected in time and place as to form part of one transaction."

The jury verdict in a criminal case must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When a defendant is charged with a single criminal act and the evidence shows more than one such unlawful act, the prosecution must either elect which act to rely upon, or the jurors must be given a unanimity instruction telling them they must agree on which act constituted the crime. (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.)

However, the trial court has no sua sponte duty to instruct on unanimity if the defendant's multiple acts constitute a single continuous course of conduct—that is, if his

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the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

or her acts are “so closely connected in time as to form part of one transaction. [Citations.]” (*People v. Maury* (2003) 30 Cal.4th 342, 423.) “The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Numerous cases have addressed the question of whether a unanimity instruction is required when the defendant is charged with one possession offense that could be based on the defendant’s possession of multiple items. Defendant relies primarily on *People v. Crawford* (1982) 131 Cal.App.3d 591 (*Crawford*) and *People v. King* (1991) 231 Cal.App.3d 493 (*King*).

In *Crawford*, the defendant was convicted of being a felon in possession of a firearm. (*Crawford, supra*, 131 Cal.App.3d at p. 593.) The prosecution had introduced evidence of four different firearms found in Crawford’s home. Two firearms were in his bedroom: one at the foot of the bed; one in a closet. Two more firearms were in an upstairs bedroom, where someone else had been sleeping. (*Id.* at p. 595.) Crawford’s girlfriend testified that the firearm found in the bedroom closet belonged to her and that Crawford had never possessed it. Crawford and his girlfriend both denied ever seeing the firearm found at the foot of the bed. (*Ibid.*)

The *Crawford* court set forth rules for determining whether a unanimity instruction should be given when there are multiple acts of possession that could constitute one charged offense. A unanimity instruction “should be given where the acts of possession were not factually identical.” (*Crawford, supra*, 131 Cal.App.3d at p. 599.) But a unanimity instruction is not required “where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place.” (*Ibid.*) Applying these rules to the facts of the case, the *Crawford* court concluded that the jury should have been given a unanimity instruction. There were “distinctive facts surrounding defendant’s ‘possession’ of each gun.” (*Id.* at pp. 599-

600.) The guns were “located in various portions of the house” and thus Crawford’s possession was “fragmented as to space.” (*Id.* at pp. 598, 599.) The circumstances surrounding the possession of each gun was different: “the evidence showed unique facts surrounding the possessory aspect of each weapon.” (*Id.* at p. 599.)

In *King, supra*, 231 Cal.App.3d 493, the defendant was convicted of a number of crimes, including possession of methamphetamine for sale. (*Id.* at p. 495.)

Methamphetamine had been found in the living room, in a purse that another woman had been using, and more methamphetamine had been found inside a decorative ceramic statue in the kitchen. (*Id.* at p. 497.) At trial, King’s boyfriend testified that the methamphetamine in the statue belonged to him. (*Id.* at p. 498.) On appeal, the *King* court followed *Crawford* and concluded that a unanimity instruction should have been given because “there was a separation of the contraband by space and there was conflicting evidence as to the ownership of the narcotics themselves.” (*Id.* at p. 501.) The court held that if the prosecution has not made an election, a unanimity instruction must be given “in a prosecution for possession of narcotics for sale, where actual or constructive possession is based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant.” (*Ibid.*)

In the instant case, marijuana was found in four separate places in the bedroom at defendant’s apartment. However, the prosecutor made a partial election as to which act of marijuana possession constituted possession for sale, arguing that the marijuana on the nightstand was in a quantity consistent with “personal-use.” The prosecutor also referred to the marijuana found in the dresser as a “smaller quantit[y].” With respect to the possession of marijuana for sale count, the jury was instructed that two or more people can possess something at the same time. (See CALCRIM No. 2352.) In contrast to *Crawford* and *King*, here the marijuana was found in one bedroom in the apartment, not

in separate rooms. Also in contrast to *Crawford* and *King*, here the defense was that one other person (Heshima) possessed all of the marijuana.

Even if we conclude that a unanimity instruction was required because each item was “reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that [each item] was solely possessed by a person or persons other than the defendant” (*King, supra*, 231 Cal.App.3d at p. 501), any error was harmless under the circumstances, whether assessed under the standard for constitutional violations (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)) or the standard for state law error (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)). (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 (*Wolfe*) [noting split in authority].)

“The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119, fn. omitted (*Napoles*)). “[S]uch disagreement is unlikely [when] the true issue in the case was a single credibility dispute.” (*Id.* at p. 120.) Here, defendant “presented a unitary defense” with respect to all of the acts that could have constituted possession of marijuana for sale, and he testified on his own behalf. (See *Wolfe, supra*, 114 Cal.App.4th at p. 188.) As noted above, defendant contended he did not possess any of the marijuana, and although he presented evidence that various people had access to his apartment, his defense hinged on the jury believing that Heshima had exclusive dominion and control over the marijuana. Defendant testified that the safes and marijuana belonged to Heshima, who also lived in the apartment. The true issue here was, therefore, whether or not defendant was credible in denying he possessed any of the marijuana. On this record, there is no reasonable possibility that the jurors partially believed defendant. (See *Napoles, supra*, at p. 121.) Therefore, it is not reasonably probable that a different result would have been reached if the jury had been given a unanimity instruction (*Watson, supra*, 46 Cal.2d at p. 836), and

any error in the trial court's failure to give such an instruction was harmless beyond a reasonable doubt (*Chapman, supra*, 386 U.S. at p. 24).

#### ***D. Miranda Motion***

Defendant contends the trial court erred by denying his *Miranda* motion with respect to a statement he made at the time of his arrest.

##### **1. Proceedings Below**

One of defendant's motions in limine was a motion to suppress statements he made to Detective Fox following his arrest outside of the hotel, on the basis that he had not been advised of his rights under *Miranda*. Defendant specified that he was seeking to suppress his responses to three questions asked at the time of his arrest: (1) whether he had anything illegal hidden on him, (2) whether there was any additional methamphetamine in the hotel room, and (3) what room number he was staying in.

In its trial brief, the prosecution argued that defendant's post-arrest statements were admissible under the public safety exception to *Miranda*, as provided in *New York v. Quarles* (1984) 467 U.S. 649 (*Quarles*) and *People v. Simpson* (1998) 65 Cal.App.4th 854, 861 (*Simpson*).

The trial court held an Evidence Code section 402 hearing to determine the admissibility of defendant's post-arrest statements.

At the hearing, Detective Fox testified that he observed the SWAT team remove defendant from his car, arrest him, and place him in the back of a patrol car. Detective Fox spoke to defendant, asking, "Do you have anything on you?" Detective Fox intended the question to help him determine if defendant had any weapons; Detective Fox was concerned for his safety. Defendant's response was, "I have crystal in my underwear."

Detective Fox then asked defendant if he had anything in his hotel room. Defendant stated that there was "more" in the hotel room. Detective Fox asked defendant which hotel room he was staying in. Defendant told him it was room 351.

The trial court ruled that defendant's response to Detective Fox's first question ("Do you have anything on you?") fell within the public safety exception to *Miranda*, under *Quarles* and *Simpson*. The court excluded defendant's responses to the other two questions.

## 2. Analysis

Our Supreme Court has described the basic rule of *Miranda* as follows: "Before being subjected to 'custodial interrogation,' a suspect 'must be warned that he [or she] has a right to remain silent, that any statement he [or she] does make may be used as evidence against him [or her], and that he [or she] has a right to the presence of an attorney, either retained or appointed.' [Citation.] Statements elicited in violation of this rule are generally inadmissible in a criminal trial." (*People v. Mayfield* (1997) 14 Cal.4th 668, 732.)

The public safety exception to *Miranda* arises from *Quarles*, *supra*, 467 U.S. 649. In that case, the police were approached by a woman who told them that she had just been sexually assaulted. She provided a description of the man and stated that he had just entered a nearby supermarket and that he was carrying a gun. As the police entered the store, they saw Quarles, who matched the description. Apparently seeing the police, Quarles ran toward the rear of the store and disappeared from view for a time. When he was finally apprehended, Quarles was wearing an empty shoulder holster but possessed no gun. An officer asked him where the gun was. Quarles nodded toward some empty cartons and said, " 'the gun is over there.' " (*Id.* at p. 652.) Although no *Miranda* warnings had been given prior to the question, the court found that the statement was admissible. The court noted that the police were facing an immediate necessity of locating a gun that a suspect had most likely just concealed somewhere in the store. "[I]t obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." (*Id.* at p. 657.) The court held that "on these facts there is a 'public safety' exception to the requirement that

*Miranda* warnings be given before a suspect's answers may be admitted into evidence.” (*Id.* at p. 655.) The court concluded that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination. We decline to place officers such as [the arresting officer] in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.” (*Id.* at pp. 657-658, fn. omitted.)

Thus, “*Quarles* teaches that where questions are reasonably directed to defusing a situation which threatens the safety of either police officers or members of the general public, a suspect’s answers are admissible in evidence, even if the questions were not preceded by *Miranda* warnings, and even if they happened to elicit an incriminating response.” (*Simpson, supra*, 65 Cal.App.4th at p. 861, fn. omitted.)

Defendant asserts that the facts here “bear no relationship to those in *Quarles*,” pointing out that he was “not the subject of a hot pursuit,” that he had been securely placed in the back of the police car, and that there was no indication he had a weapon. However, the application of the public safety exception does not depend on whether the defendant poses an “imminent threat to anyone at the moment” he or she is being questioned. (*Simpson, supra*, 65 Cal.App.4th at p. 861.) In *Simpson*, the defendant had been arrested and handcuffed pending the execution of a search warrant at his residence when an officer asked him “ ‘[i]f there were any guns or weapons on the property.’ ” (*Id.* at pp. 857-858.) The public safety exception applied because the questions asked by the officer “were primarily related to an objectively reasonable need to protect police officers or the public from the dangers that would be immediately encountered once the police

attempted to enter Simpson’s residence to execute their warrant” (*id.* at p. 861), since “the safety of police officers who are required to execute [search] warrants is always at serious risk” (*id.* at p. 862).

Thus, in the instant case, although defendant was handcuffed and had not been seen with a weapon, the public safety exception could still apply, particularly since “ ‘guns often accompany drugs.’ ” (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378, quoting *United States v. Sakyi* (4th Cir. 1998) 160 F.3d 164, 169.)

Defendant next argues that the public safety exception is inapplicable because Detective Fox’s question “had nothing [to] do with protecting the public, [Detective] Fox, or any other officer.” Defendant points out that here, Detective Fox did not specify that he was asking about dangerous items when he asked, “Do you have anything on you?” Defendant also points out that in *People v. Cressy* (1996) 47 Cal.App.4th 981 (*Cressy*), the court held that in order to fit within the public safety exception, an officer’s “inquiry must be narrowly tailored to prevent potential harm.” (*Id.* at p. 989.) “Questions about needles or other potentially contaminated sharp objects would be permissible. General questions like ‘What’s in your pockets?’ are overly broad.” (*Ibid.*)

The question here—“Do you have anything on you?”—falls somewhere in between the specific question asked and sanctioned in *Cressy* and the type of question that court criticized as overly broad. Although Detective Fox testified that he intended the question to help him determine if defendant had any weapons, the word “anything” certainly could have been interpreted to include items that are not potentially harmful.

Even assuming that the question asked in this case was so overbroad as to fall outside the public safety exception, any error in admitting defendant’s response (“I have crystal in my underwear”) was harmless. The erroneous admission of statements in violation of *Miranda* does not require reversal if the error is harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; see *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

The evidence against defendant was overwhelming. As to the possession for sale counts, large quantities of narcotics and narcotics packaging material were found in both defendant's apartment and in defendant's hotel room. A significant portion of the narcotics was packaged for sale. A key from defendant's key ring unlocked the black banker's bag that contained some of the narcotics. Defendant's testimony, in which he denied possessing any of the narcotics and claimed all of the drugs were possessed solely by a woman who lived at the apartment with him, was not believable, particularly in light of the evidence connecting defendant to the narcotics in the hotel room and the similarities in the packaging material found in both places (i.e., the banker's bags and "smelly proof" bags). As to the destruction of evidence count, defendant's testimony about flushing a bandage down the toilet in the middle of a strip search was also not believable. On this record, any error in allowing the jury to hear that defendant admitted having "crystal in [his] underwear" was harmless beyond a reasonable doubt.

#### **DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

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GROVER, J.

Márquez, J.—I respectfully dissent.

“Our state Constitution provides that a defendant in a criminal case has a fundamental right to a unanimous jury verdict.” (*People v. Anzalone* (2013) 56 Cal.4th 545, 551, citing Cal. Const., art. 1, § 16.) The trouble with this case is defendant was found guilty and is currently serving a 12-year term in county jail even though Juror No. 7 wanted to vote not guilty. It is true the jury had, at one point, reached a unanimous guilty verdict, but that happened only after Juror No. 7, succumbing to pressure from her fellow jurors, “threw up [her] hands and said ‘OK, if you want to get out of here, I’ll go with guilty.’” Overnight, however, she changed her mind. She requested to speak with the bailiff the next morning, *before* the verdict was taken. But the bailiff—who had been informed by the judge that Juror No. 7 needed to speak with him—did nothing more than stand “near” Juror No. 7 when escorting the jury to the jury room. Shortly thereafter, the jury’s verdict was taken and the jury was discharged. Just *after* the verdict was taken, Juror No. 7 came up to the bailiff and said: “[T]his was not my verdict.”

Defendant moved for a new trial under Penal Code section 1181, subdivision (4), providing for the grant of a new trial when the verdict has been decided by “any means other than a fair expression of opinion on the part of all the jurors.” The majority concludes the trial court did not abuse its discretion by denying that motion. I disagree. In my view, the record shows the jury’s verdict did not reflect a fair expression of Juror No. 7’s opinion. The trial court’s contrary conclusion was based upon a misapplication of the law, which was an abuse of discretion. Accordingly, I would reverse the judgment and remand this matter for a retrial.

#### A. *Procedural Background*

The relevant procedural background concerned a juror identified as Juror No. 7, who had identified herself as hard of hearing and requested an assisted hearing device early in the proceedings. On the afternoon of January 24, 2013, the deliberating jury

indicated to the bailiff that it had reached a verdict, but defendant was unable to return to the courtroom so the matter was continued until the following morning.

The next morning, before the jury was escorted into the jury room, Juror No. 7 called the courtroom, spoke with the clerk, and stated that she needed to speak with the bailiff. The clerk informed the trial judge—the Honorable Andrea Bryan—about the juror’s desire to speak with the bailiff. Either Judge Bryan or the clerk then relayed that information to the bailiff.<sup>1</sup> However, neither the judge nor the bailiff contacted Juror No. 7. Nor did the court inform counsel for either party about the juror’s phone call. After the bailiff escorted the jury into the jury room, the bailiff stood near Juror No. 7, but said nothing to her. Not surprisingly, Juror No. 7, who was surrounded by the same jurors who had pressured her into voting guilty the day before, said nothing to the bailiff.

The bailiff then escorted the jury into the courtroom. The trial court received the jury’s verdicts, which were read by the clerk in open court. After the verdicts were read, the trial court “collectively” asked the jury if the verdicts read by the clerk were the jury’s unanimous verdicts. The transcript of the proceeding states that “all twelve jurors responded affirmatively.” The trial court also found that all twelve jurors nodded affirmatively. But after the jury was discharged, Juror No. 7 approached the bailiff and told him: “[T]his was not my verdict.”

According to the juror’s declaration, she wanted to vote “not guilty” based upon a lack of evidence. Her declaration further stated: “All the other jurors wanted to vote ‘guilty.’ Some of them were in a hurry to get home. Some of them expressed that this case had taken too long and it was costing them money. [¶] The[y] pressured me to vote guilty and in fact at one point I threw up my hands and said ‘OK, if you want to get out of here, I’ll go with guilty.’ [¶] However, once I had the evening to think about my verdict

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<sup>1</sup> Judge Bryan stated on the record that she had informed the bailiff about Juror No. 7’s communication. The bailiff’s declaration, however, stated that the clerk had informed him that Juror No. 7 needed to speak with him.

I decided to vote ‘not guilty.’ ” Thus, she called the courtroom the next morning and asked to speak with the bailiff because she “thought this is what I was supposed to do.” She stated that, having asked to speak with the bailiff, “I assumed that he would approach me. He did not.”

With respect to the collective polling of the jury, Juror No. 7 stated that she did not have her assisted hearing device when the jury was escorted into the courtroom. She stated that, as a result, she did not hear the judge when the jury was polled about the verdicts. She stated that if she had heard the judge polling the jury, “I would have been more than willing to announce that this was NOT my verdict.” The bailiff’s declaration stated that Juror No. 7 approached him after the verdicts had been received and told him “ ‘this was not my verdict,’ . . . ‘they pressured me into voting guilty,’ and ‘I guess it is too late to do anything about it now.’ ”

After Juror No. 7 informed the bailiff of these facts, the bailiff informed Judge Bryan. Judge Bryan then convened the parties in open court and recounted the morning’s events. In response, defense counsel stated that he had been unaware of these events.

Defendant subsequently moved for a new trial under Penal Code section 1181 (section 1181), subdivision (4), on the basis that the verdict had been decided by “means other than a fair expression of opinion on the part of all the jurors.” Defendant argued that the verdict had not been unanimous, thereby violating the California Constitution and section 1181’s requirement that the verdict be an expression of opinion on the part of “all the jurors.” Defendant supported his motion with declarations from Juror No. 7 and the bailiff, as described above.

The trial court denied the motion. In doing so, the court applied Evidence Code section 1150 (section 1150) to the evidence set forth in the declarations supporting the motion. The court ruled that, under section 1150, it would only consider “overt acts that are objectively ascertainable.” The court considered the following facts under this limitation: (1) Juror No. 7 had previously requested an assisted hearing device, but

indicated on January 17 that she did not need the device because she was hearing better that day; (2) before the verdict, Juror No. 7 told the clerk she wanted to speak with the bailiff, but no such conversation took place; (3) the jury foreperson had indicated that the jury's verdict was unanimous; (4) after the verdict was read, the court collectively asked the jury if their verdict was unanimous, and they all nodded affirmatively; and (5) Juror No. 7 was one of the jurors seated closest to the bench. The court then found, based on these facts, that the jury had returned a verdict "that was both complete as well as unanimous," whereupon the court denied the motion for a new trial. The court also stated that "what took place after the verdict was recorded and the jurors were discharged is not really relevant to this analysis."

*B. The Trial Court Erred by Failing to Determine What Juror No. 7 Wished to Communicate*

Defendant's primary claim on appeal is that the trial court erred by failing to investigate Juror No. 7's attempt to communicate with the court. I agree. I would hold that, under the facts here—wherein the juror made a clear, unequivocal statement to the court that she needed to communicate with the bailiff—the court had a duty to address the juror's concern. Indeed, the court had previously instructed the jurors that if they wished to communicate with the court during deliberations, they should "send a note through the bailiff signed by the foreperson or by one or more members of the jury." Upon learning that a juror wished to speak to the bailiff, Judge Bryan could have reinstructed the jury—either directly, or indirectly through the bailiff—to put any communication into a written note, sign it, and give it to the bailiff. Instead, neither the judge nor the bailiff made any effective attempts to determine what the juror wished to communicate.

As the majority acknowledges, trial courts have certain duties with respect to communications from jurors. For example, trial courts have a mandatory duty to answer a jury's question on a point of law. "[Penal Code] Section 1138 provides that when, after

it has begun deliberating, the jury ‘desire[s] to be informed on any point of law arising in the case, . . . the information required must be given . . . .’ [Citation.] This provision imposes on the court the ‘primary duty to help the jury understand the legal principles it is asked to apply.’ ” (*People v. Cleveland* (2004) 32 Cal.4th 704, 755.) Additionally, the trial court has a mandatory duty to respond to jury requests for the rereading of testimony. (*People v. Lucas* (2014) 60 Cal.4th 153, 301.) The obvious corollary to these duties is that when a juror attempts to communicate with the court, the trial court has a duty to receive the juror’s communication. If, instead, the trial court could ignore jurors’ attempts to communicate with it, there would be no way of knowing whether the jury has a question about the law, or whether they wish to hear testimony read back.

Furthermore, both defense counsel and the prosecution have the right to be notified about jurors’ communications. In *People v. Wright*, the California Supreme Court held: “It is well settled that the trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel. [Citation.] ‘This rule is based on the precept that a defendant should be afforded an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant’s case.’ ” (*People v. Wright* (1990) 52 Cal.3d 367, 402, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458–459.) Here, the trial court erred by failing to inform the parties about Juror No. 7’s communication with the clerk. As a consequence, defendant and his counsel never learned about Juror No. 7’s desire to vote not guilty—a fact that, if known, obviously would have prompted counsel to take action, e.g. to request an instruction to the jury to return to deliberations, or to request that jurors be polled individually. It appears reasonably probable that a result more favorable to defendant would have been reached had such an opportunity been afforded to trial counsel. Accordingly, I would find the trial court’s error prejudiced defendant, and that reversal is required under *People v. Watson* (1956) 46 Cal.2d 818, 836.

C. *The Court Misapplied Section 1150 in Denying the Motion for a New Trial*

Regarding the trial court's ruling on the motion for a new trial, the trial court misapplied section 1150 in a manner that improperly restricted the evidence supporting defendant's motion. Under section 1150, "any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) Conversely, "No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Ibid.*) Under this rule, "Evidence of a juror's mental process—how the juror reached a particular verdict, the effect of evidence or argument on the juror's decisionmaking—is inadmissible." (*In re Boyette* (2013) 56 Cal.4th 866, 894.)

Section 1150 did *not* require the exclusion of evidence showing that, after the jury was discharged, Juror No. 7 approached the bailiff to tell him, " 'this was not my verdict.' " It also did not require exclusion of other statements in Juror No. 7's declaration, such as: "All the other jurors wanted to vote 'guilty.' Some of them were in a hurry to get home. Some of them expressed that this case had taken too long and it was costing them money." Nor does section 1150 justify the exclusion of Juror No. 7's statements that she did not hear Judge Bryan poll the jury because the juror was without an assisted hearing device.

The majority states that the trial court appears to have found Juror No. 7's statement "not credible." (Majority Opn. at p. 17.) But the record shows the court made no findings regarding the juror's credibility. Rather, the trial court did not consider evidence of Juror No. 7's hearing problems based on the court's misapplication of section 1150.

Considering all admissible evidence, I would conclude the jury's verdict did not constitute a "fair expression of opinion on the part of all the jurors." (Pen. Code, § 1181, subd. (4).) And because the trial court erred as a matter of law by misapplying section 1150, it abused its discretion in denying the motion for a new trial. Accordingly, I would reverse the trial court's denial of the motion and remand the matter for retrial.

Finally, the majority adopts the position that it was not the court that erred, but the juror because she did not raise her concerns properly. (Majority Opn. at p. 17.) While I disagree regarding the propriety of the court's actions, I would agree that the juror erred as well. In my view, both parties failed to take the proper course of action. But even assuming blame lies solely with the juror, I would conclude that it is a miscarriage of justice to place the consequences of the juror's error on defendant.

*D. Conclusion*

For the reasons above, I respectfully dissent.

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Márquez, J.