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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEREME MICHAEL GOTT, Defendant and Appellant.	F048866 (Super. Ct. No. F04907237-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Lloyd G. Carter and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Jereme Michael Gott was convicted of rape and forcible oral copulation. (Pen. Code, §§ 261, subd. (a)(2), 288a, subd. (c)(2).)[1] He argues that juror misconduct requires reversal of the judgment and that the trial court erred in imposing consecutive sentences. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Gott and his accuser, 17-year-old S.F., attended the wedding of a mutual friend. The two spoke at various times throughout the evening. Gott asked S.F. several times if she wanted to go for a walk in the woods surrounding the community center where the wedding reception was held. S.F. initially refused but then agreed to accompany Gott as the bride and groom left the reception. While in the woods the two had intercourse. S.F. left after the encounter and drove home, where relatives found her crying hysterically.

S.F. accused Gott of raping her and forcing her to copulate him orally. The sheriff's department was called and S.F. was transported to the hospital for a sexual assault examination. She received an injury to her right eye during the encounter, as well as several suction type injuries to her neck and right breast. Although S.F. consistently claimed she was raped, she initially failed to identify Gott as the perpetrator and misrepresented some of the circumstances.[2] Two days after the encounter, S.F. identified Gott to the police and gave an account of the encounter that essentially was consistent with her trial testimony.

Gott gave a statement to the police claiming the encounter was consensual and he did not know S.F. was only 17. He pointed out that S.F. did not identify him immediately as her assailant and relied on witnesses who saw them together before and

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] For example, S.F. initially claimed she was dragged to the woods by an unknown man, instead of admitting she willingly accompanied Gott to the woods.

after the encounter. Some of these witnesses testified that S.F. looked fine when the two returned to the community center after the encounter.

In addition, the prosecutor introduced evidence pursuant to Evidence Code section 1108 that Gott previously had attempted to sexually assault another woman, but was interrupted when a friend came to the aid of the woman.

Gott was charged with rape by force or fear (§ 261, subd. (a)(2)), oral copulation by force or fear (§ 288a, subd. (c)(2)), dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), and sexual penetration by force or fear (§ 289, subd. (a)(1)). The jury found Gott guilty of rape and forced oral copulation, but found him not guilty of the other two counts.

Gott moved for a new trial alleging juror misconduct. The trial court denied the motion and sentenced Gott to consecutive midterm sentences for a total term of 12 years.

DISCUSSION

I. Juror Misconduct

Gott argues the trial court erred in denying his motion for a new trial based on juror misconduct. He urges us to reverse the judgment and remand the matter for a new trial.

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' " capable and willing to decide the case solely on the evidence before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) The right to an impartial jury means the "defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

Juror misconduct occurs when an event suggests that one or more of the jurors were influenced by improper bias. "When the overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct." (*In re Hamilton, supra,* 20 Cal.4th at p. 294.)

Gott claims two types of misconduct occurred in this case, both involving Juror No. 23. The first claim of misconduct relates to the concealment of information during voir dire. The second claim relates to the sharing of improper information with other jurors.

The facts that form the basis for Gott's claims are not disputed: Juror No. 23 failed to disclose during voir dire that she volunteered for approximately one year as a rape crisis counselor. In her declaration filed in support of the opposition to the motion for new trial, Juror No. 23 stated that in the late 1980's she volunteered for a rape counseling service center in Fresno County. She did not volunteer on a full-time basis, but spoke to alleged sexual assault victims on occasion. She received training to act as a volunteer. She quit volunteering after approximately one year because she did not care for the work. She has not had contact with victims of sexual assault since that time. She did not disclose this service during voir dire because she never was asked about her prior volunteer experience and did not understand questions about past employment to include volunteer service. She denied any bias and claimed she followed the trial court's instructions throughout the trial.

Declarations from other jurors established that Juror No. 23 disclosed her volunteer experience to the jurors both before and during deliberations. Juror No. 23 also stated during deliberations that many rape victims do not know how to act after the rape.

The trial court, after ruling on the admissibility of the declarations submitted on behalf of Gott, found that Juror No. 23 did not intentionally conceal that she had acted as

a volunteer rape counselor in the past and that no misconduct occurred. The trial court found no indication that Juror No. 23 was biased.

In making its ruling, the trial court identified a three-step process that it must follow in reaching a decision. (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.) We will follow the same procedure in reviewing the matter.

A. Admissibility of evidence

The first step in the analysis is to determine the admissibility of the evidence submitted in support of the motion, in this case the declarations of various jurors. Our task is driven by Evidence Code section 1150, which limits the evidence that may be considered in determining whether juror misconduct occurred.

> "Evidence Code section 1150, subdivision (a), provides: '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 to assent or to dissent from the verdict or *concerning the mental processes by which it was determined*.' (Italics added.)
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> "This statute distinguishes 'between proof of overt acts, objectively ascertainable, and proof of 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 own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citations.]
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> "' "[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent." ' [Citations.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261.)

Gott challenges only one evidentiary ruling made by the trial court. The trial court struck from the declaration of Juror No. 5 the following statement: "Also on the first day

of deliberations, Random Juror #23 held up a picture of the 'victim's' neck with the hickeys and said 'Random Juror #3 and #38 think this is normal sex.'" Gott argues this evidence is nothing more than a statement made during deliberations and thus is permitted by Evidence Code section 1150.

We conclude there was no error in the trial court's ruling. While the stricken evidence is a statement made by Juror No. 23, there is no admissible use for the statement. The statement appears to be consistent with the give and take we expect a jury to undertake during jury deliberations. To the extent that Gott claims that this statement shows Juror No. 23's view of the evidence, it is inadmissible under Evidence Code section 1150 because it is an example of the juror's mental processes. The statement does not have any relevance to the question of Juror No. 23's bias. The trial court properly refused to consider the statement.

B. Occurrence of misconduct

1. Failure to disclose

The second step in the analysis is to determine whether the admissible facts establish juror misconduct. To summarize, Juror No. 23 had worked for one year as a volunteer at a rape counseling service center 15 years before the trial. She received training to act as a volunteer, but did not volunteer on a full-time basis. She spoke with several alleged rape victims, but was not required to assess their credibility. Juror No. 23 stopped volunteering after one year, deciding she did not like the work. She did not disclose her volunteer work during voir dire because she did not believe the information was responsive to any question asked of her.

The trial court determined there was not misconduct and, if the information should have been disclosed, the failure to do so was inadvertent.

"'Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the

state of mind of a juror or potential juror on voir dire examination. [Citations.]'" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 644.) Our task, then, is to determine whether the trial court abused its discretion in concluding (1) Juror No. 23 did not conceal information during voir dire, and (2) if Juror No. 23 should have disclosed her prior volunteer service, the failure to disclose was inadvertent. "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 713-714.)

Considering the importance of voir dire, a strong argument could be made that Juror No. 23 should have disclosed her volunteer service when questioned about her prior work history. "Voir dire is the crucial means for discovery of actual or potential juror bias. Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully." (*In re Hamilton, supra,* 20 Cal.4th at p. 295.) Because voir dire is so crucial to the jury selection process, "jurors are required to be cooperative, and should volunteer information about any matter which could be construed as rendering them biased." (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 741-742.) Juror No. 23's failure to disclose information about her volunteer service *could be* construed as a violation of the spirit of cooperation required of jurors.

We need not resolve this issue because substantial evidence supports the trial court's conclusion that Juror No. 23's failure to disclose her volunteer service was inadvertent. It is not outside the bounds of reason to accept Juror No. 23's assertion that she did not believe information about her volunteer service was responsive to any question posed. No juror was asked about his or her volunteer service, or whether he or she had ever worked in a field related to counseling rape victims. Instead, the questions related to witnesses, people in law enforcement, work history, and whether the potential juror was ever a victim of a crime or related to anyone who had been the victim of a crime. On this record, we cannot conclude the trial court abused its discretion in

concluding that there was no misconduct because any failure to disclose was *at most* inadvertent.

2. Injecting personal experience into deliberations

As a second ground of misconduct, Gott argues Juror No. 23 injected her personal experience into deliberations based on the following statement: "[Juror] #23 told us that in her experience as a rape counselor, she had learned that many victims do not know how to act after they have been assaulted."[3]

"It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963.)

The Supreme Court addressed a similar issue in *People v. Steele, supra,* 27 Cal.4th 1230. The defendant argued that jurors with military experience and medical experience offered their expertise during deliberations. While discussing the issue, the Supreme Court made the following pertinent observation:

> "A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that

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[3] Juror No. 5 made a similar claim in his declaration.

attorneys draw, never refer to their background during deliberations. 'Jurors are not automatons. They are imbued with human frailties as well as virtues.' [Citation.]

"A fine line exists between using one's background in analyzing the evidence, which is appropriate, even inevitable, and injecting 'an opinion explicitly based on specialized information obtained from outside sources,' which we have described as misconduct. [Citation.]" (*Id.* at p. 1266.)

The Supreme Court found the trial court did not abuse its discretion in finding no misconduct primarily because the evidence at trial was consistent with the statements alleged to constitute misconduct. Gott finds himself in the same position.

Eric Hickey, Ph.D., testified as an expert on behalf of the prosecution. Hickey explained that it was a popular misconception that if a woman is raped she will report it to the police. He explained that research suggests that approximately 75 percent of rapes are not reported to the police. Included in the many reasons for not reporting a rape are fear of retaliation, embarrassment, fear of being victimized by the court system, and fear of the reaction of friends and family. Whether a woman reports a rape depends on a variety of factors, including coping skills, stress level, family support, community support, education level, and resources. Many victims are confused because it is a unique experience, they feel alone, and they are not certain of what they should do or to whom they can turn.

Juror No. 23's statement that many victims do not know how to act after being raped is nothing more than a summary of Hickey's testimony. That Juror No. 23 prefaced her statement by referring to her experience as a rape crisis counselor did not inject her personal expertise into deliberations. Juror No. 23's statement was a permissible use of one's background to examine the evidence. There was no misconduct and the trial court did not abuse its discretion in so finding.

C. *Prejudice*

"[A]n honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover,

the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias." (*In re Hamilton, supra,* 20 Cal.4th at p. 300.) The Supreme Court has stated on one occasion that the analysis for deciding whether the potential juror was biased is similar to the analysis for deciding whether a juror may be challenged for cause. (*People v. Nesler, supra,* 16 Cal.4th at p. 581.)

We are familiar with the numerous cases that have declared that in a juror misconduct case there is a presumption of prejudice that the prosecution must overcome. (See, e.g., *In re Malone, supra,* 12 Cal.4th at pp. 963-964.) But these cases apply when there has been a finding of juror misconduct. We are bound, however, by the trial court's conclusion that there was no misconduct in this case because the failure to disclose was inadvertent.

Our review of the trial court's conclusion that Juror No. 23 was not biased is again reviewed for an abuse of discretion. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 644.) A review of the entire record in this case convinces us that the trial court did not abuse its discretion.

We, like the trial court, do not rely on Juror No. 23's assertion that she was not biased, as such assertion violates Evidence Code section 1150. Instead, we look at the facts that can be discerned from the admissible portions of the declarations.

Juror No. 23's volunteer service occurred over 15 years before the trial. She volunteered at the rape counseling service for only one year. These facts would not have supported a challenge for cause. Nor do they establish that Juror No. 23 was biased against people accused of rape, or biased against a consent defense to accusations of rape. While perhaps unfortunate that trial counsel was not afforded the opportunity to examine these issues in voir dire or, if deemed necessary, use a peremptory challenge, this record does not support a conclusion that the trial court abused its discretion in concluding that Juror No. 23 was not biased.

II. Imposition of Consecutive Sentences

The trial court imposed consecutive sentences for the two counts for which Gott was convicted. Gott contends that in so doing the trial court violated his Sixth Amendment right to a jury trial as explained in *Blakely v. Washington* (2004) 542 U.S. 296. The California Supreme Court has rejected this challenge. (*People v. Black* (2005) 35 Cal.4th 1238.) We are bound by this precedent (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), even though the issue is currently pending before the United States Supreme Court in *Cunningham v. California* (2006) ___ U.S. ___ [S.Ct. 1329].

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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GOMES J.