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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JONH DEROY GREEN III, Defendant and Appellant.	B178945 (Los Angeles County Super Ct. No. YA056315)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sandra Thompson, Judge. Affirmed in part, reversed in part, and remanded.

Fay Arfa, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant John Deroy Green III challenges his numerous forgery, grand theft, and obtaining money by false pretenses convictions on the grounds of insufficient evidence, lack of jurisdiction, and asserted trial court error in failing to conduct an adequate hearing regarding jury misconduct, failing to respond to a question from the jury during deliberations, denying a request to appoint substitute counsel, sentencing him on two counts each with respect to victims Headlee and Hestmark, and imposing consecutive sentences based on facts not found by the jury.

We conclude substantial evidence supports appellant's conviction pertaining to victim Hestmark. A juror who read about contracts in the courthouse law library did not commit misconduct. The trial court prejudicially erred by ignoring a question from the jury during deliberations. It acted within its discretion, however, by denying appellant's motion for substitution of appointed counsel. The court permissibly sentenced appellant on multiple counts pertaining to victims Headlee and Hestmark, as the offenses were committed at widely separated times. Substantial evidence supports a finding of jurisdiction over the crimes against Headlee and Hestmark. Appellant's consecutive terms do not violate due process.

BACKGROUND AND PROCEDURAL HISTORY

Over a period of several years, appellant obtained loans of money from numerous "investors" by telling them various record labels were interested in his music and he needed funds to complete his recordings. He showed several "investors" letters he had created that purported to be letters from Dreamworks Records to appellant, discussing a potential or pending purchase of his recordings. Appellant never repaid the loans from any of the "investors." In addition, he asked one "investor" and another individual to cash checks for him drawn on closed accounts or accounts containing insufficient funds. He did not repay any of the funds.

A jury convicted appellant of four counts of obtaining money by false pretenses (Pen. Code, § 532, subd. (a)), four counts of grand theft, three counts of forgery, and one count of making, drawing, uttering or delivering a check knowing his account held insufficient funds (Pen. Code, § 476a, subd. (a)). The jury acquitted him of one additional count of forgery and returned a true finding on an allegation that all of the offenses involved fraud or embezzlement and a pattern of related felony conduct, and the taking exceeded $150,000. The court sentenced appellant to prison for eight years eight months.

DISCUSSION

1. Sufficient evidence supports appellant's convictions in counts 8, 9 and 10.

Appellant contends the evidence was insufficient to support his convictions for obtaining money from Thomas Hestmark by false pretenses, grand theft and forgery. He argues he did not make any false representations or fraudulent promises to Hestmark, he did not send the fabricated Dreamworks Records letter to Hestmark, and Hestmark saw that letter after he had finished investing money with appellant.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

Hestmark testified he was the owner of an independent record label in Portland, Oregon. Appellant telephoned him and said "he needed a little bit of money to finish his album . . . it was almost done." Appellant told him he "had to go back in the studio and finish mixing down some music and then get it mastered." He said he was "shopping" the album around, and several record labels, including Dreamworks and Sony, were interested in the album. He asked Hestmark to invest money for 90 days, after which he would "have [his] money back and then some." Hestmark and his partner Shawn Headlee agreed to pay appellant $12,500 apiece. Appellant sent them an "Investment Sponsor Agreement" dated March 21, 2000. (People's Exhibit 15.) Hestmark wired

$12,500 into appellant's bank account. In entering into the contract, Hestmark relied upon appellant's representations that he needed only a small amount of money to complete his album, was in the mixing and mastering phase, and would repay the funds to Hestmark within 90 days.

However, appellant did not repay Hestmark. When Hestmark contacted appellant "countless" times regarding repayment of his investment, appellant told him he had not yet signed "his deal" with Dreamworks or Sony because he had not been able to complete the album due to lack of funds for additional studio time. On November 26, 2001, Hestmark entered into a second sponsorship agreement with appellant (People's Exhibit 20) and paid him an additional $5,700 in order to recoup his original investment by assisting in the completion of the album. That investment was due to be repaid on January 31, 2002. Appellant did not repay Hestmark on that date and, when Hestmark inquired about his money, appellant said the album was still not completed and required more studio time to finish the master recording, did not yet have a record deal, and could not repay Hestmark. In January 2002, Headlee faxed Hestmark a letter (People's Exhibit 21) he had received from appellant in response to the inquiries Headlee and Hestmark made about repayment of their money. The letter was dated January 17, 2002, appeared to be on Dreamworks Records letterhead stationery, and was purportedly signed by Beth Halper for Dreamworks. The letter states Dreamworks had received appellant's "final album masters" on January 14, 2002, would purchase the masters for $1,200,000, pay appellant within three days after he signed the recording contract drafted by Dreamworks's legal department, and pay appellant other advances. Hestmark believed the letter actually came from Dreamworks. After appellant sent the letter, he asked Hestmark for additional money, but Hestmark made no additional "investments."

Headlee testified that at some point when appellant sought more money from Hestmark and himself, they asked for proof of progress on the album. Appellant faxed them a letter dated September 28, 2001 (People's Exhibit 19), purportedly sent to him by Jerry Spielberg of Dreamworks Records. The letter appeared to be on Dreamworks

Records letterhead stationery and stated, "[W]e are very pleased with the progress of your album production. However, we do require that you provide the edited pre-masters for final negotiations." The letter further stated that appellant would not be paid any portion of his "album production budget" until six weeks after delivery of the edited pre-masters.

Beth Halper testified she worked at Dreamworks from 1996 through early 2004, but did not write or sign the letter introduced as People's Exhibit 21 or authorize anyone else to do so. She testified the letterhead was an imperfect imitation, as the address line appeared at the bottom of the page, not under the logo. She stated she did not know appellant.

Richard Silverstein, who owned a "radio promotion marketing consulting company," testified that in April or May 2000, he met with appellant regarding music he had recorded. Appellant sought Silverstein's assistance in "spreading that music to record labels" to "get [the] music noticed." Silverstein listened to music appellant had recorded on CDs and cassette tapes. Because he felt the music had some potential, Silverstein entered into a three-month agreement to represent appellant. Appellant paid him $12,000. Silverstein took appellant's music to senior officers of MCA Records, Miramax Pictures and others, but the consensus was that the music was "very average, nothing compelling." Although Silverstein's business with appellant concluded at the end of that three-month period, appellant came to Silverstein's office on many occasions over the next 12 to 18 months. During those visits, Silverstein listened to appellant's music, but did not "take this music out" because he had no "deal" with appellant during that time. He urged appellant to work on his songs a bit more.

a. Count 8: obtaining money by false pretenses (Pen. Code, § 532).

Penal Code section 532, subdivision (a), provides, in pertinent part, "Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money . . . and thereby fraudulently gets possession of money . . . is punishable in the same manner and to the same extent as for larceny of the

money or property so obtained."

The prosecution must prove the defendant made a false pretense or representation with the intent to defraud the victim of his property, and the false pretense or representations materially influenced the victim to part with his or her property. (*People v. Ashley* (1954) 42 Cal.2d 246, 259.) A promise made without intention to perform it is a sufficient false representation to support a conviction. (*Id.* at pp. 262-263.)

Substantial evidence supported appellant's conviction for a violation of Penal Code section 532. Hestmark testified that appellant told him that because several record companies, including Dreamworks and Sony, were interested in his music, he would be able to repay Hestmark "and then some" within 90 days. This representation was made before the March 21, 2000 written agreement. At that time, appellant had not yet hired Silverstein to take his recordings to record companies to develop interest in them. The jury could reasonably infer that if any record companies had been interested in his music when appellant made the representation to Hestmark, he would not have subsequently paid Silverstein $12,000 to take his recordings to record companies. No need would have existed to do so, and appellant seemingly needed the money for other purposes. Accordingly, even if the representations that he was in the mixing and mastering phase and simply needed more money to complete the album were true, appellant misrepresented both his ability to repay Hestmark within 90 days and the reason for his ability to repay Hestmark. Hestmark relied upon these representations by sending appellant $12,500.

Appellant's intent to defraud Hestmark may be inferred from the totality of the circumstances, including the necessary inference that no record companies were interested in his music, and his subsequent conduct with respect to Hestmark and other "investors" from whom he obtained but never repaid money. When Headlee and Hestmark questioned appellant about the status of his album, appellant fabricated the September 28, 2001 letter from Dreamworks (People's Exhibit 19) and sent it to them. This letter falsely represented the existence of a contract with Dreamworks and

Dreamworks' intention to pay appellant a substantial amount of money. Appellant subsequently fabricated the January 17, 2002 Dreamworks letter (People's Exhibit 21) and sent that letter to Headlee and Hestmark. After sending the second fabricated letter, appellant asked Hestmark for more money. He also falsely told Headlee he co-owned a condominium, and included a paragraph in one of the sponsorship agreements purporting to grant Headlee title to that property as security for Headlee's "investment." In fact, appellant had no ownership interest in the condominium.

In March or April 2002, appellant made essentially the same representations to Yosuke Chikamoto about needing money to finish his album. This followed appellant's representation to Headlee and Hestmark in January 2002, through means of the January 17, 2002 Dreamworks letter (People's Exhibit 21), that his album was complete, as Dreamworks had already received his "final album masters." In addition, appellant told Chikamoto he had a contract with Dreamworks. After Chikamoto demanded proof, appellant fabricated another letter from Dreamworks and showed it to Chikamoto. This letter (People's Exhibit 4), dated March 17, 2002, stated that Dreamworks "look[ed] forward to receiving your final album masters." Although the letter was purportedly signed by Beth Halper, she denied writing it, signing it, or authorizing anyone else to do so.

Appellant's repeated use of the same story to obtain money from the victims, the false claims that he either had a contract or the potential for a contract with Dreamworks or another record company, the fabrication of the several Dreamworks letters, and the inherent contradictions in the stories told in the fabricated letters regarding the status of his recordings reveal appellant's intent to defraud.

Appellant's conviction of obtaining money from Hestmark by false pretenses is supported by ample evidence.

b. Count 9: grand theft.

To convict appellant of grand theft on a false pretenses theory, the prosecutor was required to prove he made a false representation or pretense to the owner of property with

the intent to defraud, the owner of the property transferred it to appellant in reliance upon the representation, and the property was worth more than $400. (Pen. Code, § 487, subd. (a); *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842.)

As it is undisputed the amount of money appellant took from Hestmark exceeded $400, and the remaining elements of theft by false pretenses are identical to those of obtaining money by false pretenses, the conviction in count 9 is sufficiently supported by the same evidence as the conviction in count 8.

c. Count 10: forgery.

"Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741.) Penal Code section 470 provides, in pertinent part, that a person who, with the intent to defraud, engages in any of the following acts is guilty of forgery: (1) signs the name of another person or a fictitious person knowing he or she lacks authority to do so; (2) forges the handwriting or seal of another; (3) alters, corrupts or falsifies particular types of documents including wills and conveyances; (4) falsely makes, alters, forges, counterfeits, utters, publishes, passes, or attempts or offers to pass any of many enumerated types of documents.

The false writing must have the effect of defrauding one who acts upon it as if it were genuine. (*People v. Gaul-Alexander*, *supra*, 32 Cal.App.4th at p. 742.) It need not create a valid, legally enforceable obligation. (*In re Parker* (1943) 57 Cal.App.2d 388, 391.) However, "[u]nless the consequential harm of the fabrication is a loss, damage, or prejudice of a legal right, generally a pecuniary or property right, there is no harm of the kind to which the statute is directed and hence no forgery." (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 383-384.)

Count 10 was based upon the January 17, 2002 Dreamworks letter (People's Exhibit 21). Appellant argues he never sent the letter to Hestmark, as opposed to Headlee; Hestmark did not "invest" any more money after seeing the letter, and the letter did not affect Hestmark's legal rights because the investment sponsorship contracts were

already signed.

The crime of forgery is complete upon the fabrication of a false writing with the requisite intent. (*Lewis v. Superior Court*, *supra*, 217 Cal.App.3d at p. 393.) Accordingly, it was of no consequence that Hestmark did not succumb to appellant's scheme by providing any more money to appellant. Appellant's intent to defraud is shown by the evidence discussed with respect to count 8. In particular, he requested more money from Hestmark after sending the letter in People's Exhibit 21, and subsequently maintained his ongoing scheme with Chikamoto.

Although appellant sent the letter to Headlee, not directly to Hestmark, Headlee and Hestmark were business partners and had "invested" in appellant together. The first fabricated Dreamworks letter (People's Exhibit 19) was also sent directly to Headlee after appellant had asked both Headlee and Hestmark for more money. They inquired about the status of appellant's album, and he responded by sending Headlee the letter. After he sent the second fabricated Dreamworks letter (People's Exhibit 21), appellant asked Hestmark for more money. The jury could reasonably infer from this pattern of conduct that appellant fully expected that Headlee would provide Hestmark with such an apparently important piece of information about the status of appellant's album which, if true, directly reflected upon appellant's ability to repay them and the timing of the potential repayment. Therefore, the fact the letter was faxed only to Headlee was inconsequential.

The Dreamworks letter (People's Exhibit 21) falsely informed anyone who read it that appellant had completed his final album master recordings, provided them to Dreamworks Records, and Dreamworks intended to purchase them for a substantial amount of money. Hestmark believed the letter was genuine and, had he acted upon it as such by providing appellant with the additional money he requested, the effect of the letter would have been to defraud Hestmark of additional money. Accordingly, the letter was the type of document that could support a forgery conviction.

2. The record does not support appellant's claim of juror misconduct.

On the final day of deliberations, the court clerk reported to the judge that she saw one of the jurors on the case in the courthouse law library. The court consulted with counsel, and then conducted an ex parte interview with the juror in chambers. The record reflects the following:

> Court: "Ms. 1135, I just wanted to find out what you were doing in the law library this noon."
>
> Juror No. 1135: "I was just reading about contracts."
>
> Court: "Okay. You weren't reading about something to do with this trial?"
>
> Juror No. 1135: "Oh, no."
>
> Court: "Okay. You understand that you are not allowed to do any reading about law and relay it to the panel members?"
>
> Juror No. 1135: "I was not aware of that, but I was not in there for that specific thing."
>
> Court: "Okay. There's an instruction, and it's in your packet, that talks about your inability to have any independent investigation--"
>
> Juror No. 1135: "Yeah. Okay."
>
> Court: "--go to any reference works or any other persons and that's what we are talking about. You can't go to a dictionary; you can't look up anything. I just wanted to make sure that you weren't doing that in the law library today."
>
> Juror No. 1135: 'No, I was not."
>
> Court: "Okay. Well, then, you are welcome to use the law library for information as long as it's not related to this case. Okay?"
>
> Juror No. 1135: "Yeah."

The jury resumed its deliberations, and the court placed the following on the record: "I wanted to put on the record the discussion that we had via telephone conference with regards to Juror No. 1135, Juror No. 5, who was observed by Mrs.

Axtman in the law library on the first floor of the building. [¶] So we brought her into chambers while Mr. Curtis was on the telephone and Miss Paccione was in chambers to discuss how we would proceed. The court brought her into chambers and she indicated that, while she was reviewing something to do with contracts, she was not looking at anything to do with this case. And I asked her if she could remember the admonition that a juror is not to conduct any research or investigation and inform other panel members of same, and she indicated that she had forgotten that, but that she would honor that instruction. [¶] At that point, there was no further inquiry, and I advised both counsel that we had had this discussion and I just wanted to make sure that this was on the record."

Appellant contends Juror No. 1135's actions constituted misconduct, and the court deprived him of his right to a jury trial by failing to conduct a "meaningful hearing" in the presence of counsel and himself and admonish the jury to disregard information from outside sources.

Not every incident involving potential juror misconduct requires or warrants further investigation. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) The decisions whether to investigate and whether to discharge a juror are entrusted to the trial court's discretion. (*Ibid.*) In determining whether misconduct occurred, we accept the court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Majors* (1998) 18 Cal.4th 385, 417.)

Although it is misconduct for a juror to receive extraneous information about a party, the case, or the principles of law applicable to the case (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Marshall* (1990) 50 Cal.3d 907, 950), nothing in the record demonstrates misconduct. Juror No. 1135 stated she was simply reading about contracts, and repeatedly denied that she was looking at anything related to appellant's trial. The court found her credible, and we must accept that determination. Despite appellant's argument to the contrary, contract law was completely irrelevant to his case. The only relevance of the written contracts to the charges against appellant was as proof of his

false promises and false pretenses upon which the victims relied when they handed over their money. This criminal action did not raise any issues regarding the formation, interpretation, modification or enforceability of contracts. Accordingly, Juror No. 1135's conduct in "reading about contracts" was not misconduct and could not possibly have prejudiced appellant. No violation of appellant's right to a jury trial occurred.

Nor did the court abuse its discretion by failing to conduct a further investigation or a hearing in the presence of appellant and counsel. The record indicates the court discussed with counsel the issue of how to proceed before speaking to Juror No. 1135, and afterward advised them of the results of the inquiry. Similarly, because no misconduct occurred, the court did not abuse its discretion by subsequently failing to admonish the jury.

Appellant argues that his trial attorney rendered ineffective assistance by failing to request a hearing into the juror misconduct in the presence of appellant and counsel, arguing for the removal of the juror, or conducting posttrial interviews with jurors regarding the incident.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Because the record does not support appellant's claim that Juror No. 1135 or any other juror engaged in misconduct, appellant can show neither objectively unreasonable performance by counsel nor prejudice.

3. The trial court prejudicially erred by ignoring a question from the jury during deliberations.

The jury began deliberating on the afternoon of September 17, 2004.[1] At the end of the day, proceedings were adjourned and jurors were instructed to return at 9:30 a.m.

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[1] All dates used in the discussion of this issue refer to 2004.

on September 20. On September 20, the case was called at 9:39 a.m. Juror No. 3835 suffered a death in the family and was replaced by an alternate juror. The court read CALJIC No. 17.51 to the panel. This instruction included a direction to "set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place." The jury began deliberating at 9:48 a.m.

At some point during September 20, the jury sent the court a note stating the following: "Count #13 – we have some people that would like to change their vote. What is the process for doing this?" The court's minutes do not reflect receipt of this note or notification of counsel, who were not present in court. Because the record did not reflect the court's response, if any, to this note, we ordered the trial court to conduct a hearing to settle the record on this point. The court responded to the first order with previously filed pages of the report's transcript regarding the replacement of Juror No. 3835 and the reading of CALJIC No. 17.51. We then issued a second order to the court to conduct a hearing to settle the record regarding the jury's note. Although both orders expressly informed the court that it must conduct a hearing at which the district attorney, trial counsel, and appellate counsel were present, the court again apparently dealt with the issue in an ex parte manner. This time, the court issued an order stating, "As the jurors were instructed to begin their deliberations anew, no response was given to their inquiry about changing votes taken during their initial deliberations."

Appellant contends the trial court violated his right to due process by failing to respond to the note. He argues the record contradicts the court's "settled statement," as the jury's note necessarily followed the replacement of a juror.

The jury's note is dated September 20. The minute order for that day's proceedings and the reporter's transcript reveal that the juror was replaced at the start of the day, as soon as the case was called. At that time, and apparently only at that time, the court instructed the jury to begin its deliberations anew. The note about changing votes was necessarily sent later in the day. Accordingly, the trial court's response to this

court's order to settle the record is plainly incorrect to the extent it attempts to explain the failure to respond to the jury's note.[2] Although the court seemingly admonished the jury at every break it took during the remainder of September 20, its minute order reveals it merely told the jury "not to express or form any opinions as to defendant's guilt or innocence." Nothing indicates the court again told the jury to begin deliberations anew, as respondent seemingly argues.

When a deliberating jury desires information on any point of law arising in the case, the jury must return to the courtroom and the requested information must be given. (Pen. Code, § 1138.) A judge's primary function in a jury trial is to explain the applicable legal principles. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) Instruction on the rules by which the jury must abide and the procedures the jury must follow is no less important a trial court function. Where the original instructions are themselves full and complete, the court has discretion to determine what additional explanations are needed. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) But the court "must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." (*Ibid*.) Nor can the court simply ignore a question from the jury.

The jury's question strongly indicates the jury had reached a verdict on count 13 and filled out the verdict form, as directed by CALJIC No. 17.50. It is unlikely the jury would find it necessary to inquire about a "process" for changing votes if they had not reached a verdict on that count and filled out the verdict form. CALJIC No. 17.40 informed the jurors that they should not hesitate to change an opinion if convinced it was wrong, and CALJIC No. 17.50 told them all 12 jurors must agree upon a verdict. Therefore, jurors received guidance about changing their votes before a verdict was reached. However, none of the original instructions addressed the circumstance of jurors

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[2] If the trial court had followed this court's order and conducted a hearing in the presence of counsel, perhaps counsel would have brought the court's error to its

changing their minds after a verdict was recorded.

The court erred by ignoring the jury's question. It did not matter that the jury had recommenced their deliberations that morning with a replacement juror. The question clearly indicated the jury faced a serious procedural problem directly affecting the verdict on count 13. The court could not simply ignore the problem and hope it went away. Nor could the court deem the verdict on count 13 beyond reconsideration after the verdict form was signed. The court had a duty to respond to the question and return the verdict forms to the jury if they had already handed them over to the clerk, as directed by CALJIC No. 17.50. By ignoring the questions, the court breached this duty.

A violation of Penal Code section 1138 does not warrant reversal unless appellant shows prejudice. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.) The content of the question clearly indicates that the inquiry directly affected the verdict on count 13, which was guilty. Some jurors wanted to change their votes, which would have resulted in a hung jury on that count. The court's failure to respond to the jury's question prevented those jurors from changing their votes and undoing the guilty verdict. The court's error was therefore necessarily prejudicial, even under the more lenient standard generally applied to violations of Penal Code section 1138. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) Appellant's conviction on count 13 must therefore be reversed.

Respondent argues the jury's failure to reask the question and jurors' agreement with the verdict when polled demonstrate an absence of prejudice. This argument ignores the coercive effect of the court's failure to respond. The court's silence in response to the inquiry would naturally tend to persuade jurors that once a verdict was reached, it could not be changed. If the jury had already handed the verdict form over to the court clerk, it could not revoke the verdict without the court's cooperation. Faced with the court's silence, those jurors who wanted to change their vote may have surrendered their doubts and independent judgment and concluded that a signed verdict

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attention.

form constituted an irrevocable rendering of a verdict. Moreover, when the court polled the jury, it did not ask the jury about individual counts. Even jurors who wanted to change their votes on count 13 may have understood the court's question "Is this your verdict?" to be an inquiry whether they reached one or all of the verdicts, not whether they still agreed with the verdict on every count. Accordingly, the jury's failure to reask the question and jurors' positive response when polled do not negate the prejudice created when the court simply ignored the jury's question about count 13.

4. The trial court did not abuse its discretion by refusing to replace defense counsel during trial.

At or near the conclusion of jury selection, appellant moved for a substitution of counsel. Outside of the presence of the jury and prosecutor, appellant told the court he could not telephone counsel because he had not been given a cell phone and could only purchase a few phone cards per week, which he needed to maintain contact with his family; counsel refused to visit appellant when asked; appellant did not know counsel's theory of defense; appellant had written "booklets" listing witnesses and evidence he wanted to present and had given the booklets to counsel, but counsel said he had not gone over the booklets; he had asked counsel to contact particular witnesses, and obtain particular items of evidence from witnesses, friends and appellant's father, but counsel failed or refused to do so; counsel did not listen to appellant; counsel was not interested in the case; for two weeks, counsel had tried to convince appellant to "take a deal"; counsel told appellant's father the trial was not "The Deroy Show"; because counsel had not shown him a videotape of his police interrogation, he was mistaken during a pretrial hearing about the time of day the interrogation occurred; counsel had not shown appellant the police report or the evidence that would be used against him; counsel's conduct prevented appellant "from obtaining all this information and evidence and witnesses that [he] normally would"; and appellant did not feel prepared for trial.

Defense counsel responded that he had visited appellant "no less than three times in jail" and gone over the evidence with appellant. He had attempted to have "realistic

discussions" with appellant. Counsel did not believe he "would be any better prepared with any more time with" appellant.

Appellant contends the trial court violated his right to counsel by failing to replace his attorney.

When a defendant claims that appointed counsel is inadequately representing him and asks the court to appoint another attorney, the court must allow the defendant to explain the basis of his request and state specific instances of allegedly poor representation. (*People v. Marsden* (1970) 2 Cal.3d 118, 124.) The court then has discretion in deciding whether to replace counsel. The defendant must show either that counsel is inadequately representing him or that an irreconcilable conflict is likely to result in ineffective representation. (*People v. Hines* (1997) 15 Cal.4th 997, 1025.) The defendant's dissatisfaction with the number of times the attorney has visited or contacted him or her provides an insufficient basis for replacement. (*People v. Silva* (1988) 45 Cal.3d 604, 622.) Similarly, differing views about trial and pretrial strategy are an insufficient basis for replacement. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729.)

The trial court was extremely patient with appellant. It gave him ample time and a full opportunity to air his complaints about counsel. It asked him to take another look at his notes to determine if he had failed to state any of the grounds for his motion, and later asked again if he wanted to say anything else about counsel. The court even permitted appellant to read a lengthy list of tangible evidence and describe the items he believed would assist in his defense.

None of appellant's complaints, singly or collectively, amounted to inadequate representation or an irreconcilable conflict. Most of appellant's complaints stemmed from disagreements about trial strategy. "[C]omplaints regarding [counsel's] purported inadequate investigation, trial preparation, and trial strategy were essentially tactical disagreements, which do not by themselves constitute an 'irreconcilable conflict.' "

(*People v. Cole* (2004) 33 Cal.4th 1158, 1192.) Appellant had no right to force his attorney to present a particular theory of defense, call particular witnesses, or introduce particular evidence. By refusing to replace counsel, the trial court did not abuse its discretion

5. The trial court permissibly sentenced appellant on multiple counts pertaining to Headlee and Hestmark.

With respect to the counts in which Hestmark was the named victim, the court imposed consecutive eight month sentences for count 8 (obtaining money by false pretenses) and count 10 (forgery), and stayed the sentence on count 9 (grand theft) under Penal Code section 654. Similarly, for the counts in which Headlee was the victim, the court imposed consecutive eight-month sentences for counts 11 and 12 (forgery and obtaining money by false pretenses, respectively), and stayed the sentence on count 13 (grand theft).

Appellant contends that, with respect to Headlee and Hestmark, the court erred by sentencing on both the forgery and obtaining money by false pretenses counts. He argues that, with respect to each victim, since both the forgery and false pretenses convictions were based upon the forged Dreamworks letter, he did not have separate objectives in committing these offenses.

Penal Code section 654 prohibits the imposition of punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid*.) If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Penal Code section 654 applies only to "a course of conduct deemed to be indivisible in time." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) If the course of

conduct is "divisible in time," section 654 is inapplicable. (*Id.* at p. 639, fn. 11.) Thus, even if offenses were committed with a single intent and objective, they may be punished separately if committed on different occasions. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) A factor often considered in determining the temporal divisibility of offenses is whether the defendant had an opportunity to reflect upon and renew his or her intent before committing the next offense. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok, supra*, 63 Cal.App.4th at p. 1255.)

As addressed in the context of the sufficiency of evidence issue, Hestmark gave money to appellant in early 2000 and late 2001, based upon appellant's verbal and written representations and promise to repay the money "and then some" by a specific date. Appellant did not send Hestmark and Headlee the forged Dreamworks letter (People's Exhibit 21) until early in 2002, when he was attempting to persuade Hestmark to provide additional money. The false pretenses conviction (count 8) was based upon appellant's conduct in obtaining money from Hestmark in 2000 and 2001. The forgery conviction was based upon the letter forged in 2002. The offenses were therefore divisible in time, and the trial court permissibly imposed a sentence for each.

Similarly, appellant's false pretenses conviction with respect to Headlee (count 12) was based upon his conduct in inducing Headlee to pay him money in the spring and summer of 2000, whereas the forgery conviction (count 11) was based upon the first forged Dreamworks letter (People's Exhibit 19) appellant sent him later when he was seeking additional money. The offenses were therefore divisible in time, and the trial court permissibly imposed a sentence for each.

6. Substantial evidence supports a finding of jurisdiction over the crimes against Headlee and Hestmark.

Headlee and Hestmark testified they were residents of Oregon when they dealt with appellant. Neither man ever personally met appellant. They communicated with him by telephone and fax.

Appellant contends the prosecution failed to establish that California had

jurisdiction over the offenses pertaining to Hestmark and Headlee. He argues that appellant's phone calls could have been made from anywhere and the sponsorship agreements provided they were to be interpreted according to Oregon law.

Penal Code section 27, subdivision (a)(1) provides California courts with jurisdiction over crimes committed "in whole or in part" within California. Penal Code section 778a, subdivision (a) provides as follows: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state."

Jurisdiction is a factual issue and need only be proven by a preponderance of the evidence. (*People v. Cavanaugh* (1955) 44 Cal.2d 252, 262.) We must defer to the trial court's jurisdictional finding if supported by substantial evidence. (*People v. Tabucchi* (1976) 64 Cal.App.3d 133, 141, overruled on another ground in *People v. Barella* (1999) 20 Cal.4th 261.)

Headlee and Hestmark each testified appellant telephoned them and said he was calling from Los Angeles. This constitutes an admission by appellant. The sponsorship agreements (People's Exhibits 15, 16, 18, and 20) appellant sent to Headlee and Hestmark stated appellant's address was 256 South Robertson Boulevard, Beverly Hills, California. Each representation regarding appellant's address also constituted an admission by appellant that he resided in California. Appellant had three of these agreements notarized by California notaries. The first two agreements with Headlee and Hestmark were notarized by the same Los Angeles County notary on the same date. The second agreement with Hestmark was notarized by a different notary, whose acknowledgement stated that appellant appeared before her in Los Angeles County. The forged Dreamworks letters sent to Headlee and Hestmark (People's Exhibits 19 and 21) reflect the same Beverly Hills address and 310 as the area code of the fax machines. A reasonable trier of fact could reasonably infer from this evidence that appellant was

physically present in California at the time he made false verbal and written representations and promises to Headlee and Hestmark. Moreover, nothing in the record suggested appellant left California during any part of the time period during which the offenses against Headlee and Hestmark were committed. Accordingly, substantial evidence supports a finding that the court had jurisdiction over the offenses against Headlee and Hestmark.

The provision in the agreements requiring interpretation of the agreements according to Oregon law is irrelevant to the jurisdiction issue. The charges against appellant did not present any issue of interpretation of the agreements, and the jurisdictional statutes do not contain an exception based upon agreement by the parties.

7. Appellant's consecutive terms do not violate due process.

The trial court chose to make all of appellant's unstayed sentences run consecutively. Citing *Cunningham v. California* (2007) ___ S.Ct. ___ [127 S.Ct. 856] (*Cunningham*), appellant contends this violated due process because the jury did not make the findings upon which consecutive sentences were based.

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*), essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) *Cunningham* held that California's Determinate Sentencing Law violates *Apprendi* to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt. *Cunningham* did not address consecutive sentencing. The California Supreme Court previously held that the imposition of consecutive terms did not violate *Apprendi*. (*People v. Black* (2005) 35 Cal.4th 1238, 1262 (*Black*).) This remains the law.

Moreover, appellant forfeited his claim by failing to raise it in the trial court. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) Appellant was sentenced on October 13, 2004. Sentencing occurred after issuance of *Apprendi* and *Blakely v. Washington* (2004) 542 U.S. 296, which explained the scope of *Apprendi*. Accordingly,

the issue was known and could have been raised. It would not have been futile to assert it, as *Black* was not decided until the following year.

DISPOSITION

The judgment on count 13 is reversed and the cause remanded for further proceedings. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORT

BOLAND, J.

We concur:

COOPER, P. J.

FLIER, J.