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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE, Plaintiff and Respondent, v. MAXIMILIANO AYALA PORCAYO, Defendant and Appellant.	C050770 (Super. Ct. No. CRF040156)

A jury convicted defendant Maximiliano Ayala Porcayo of failure to register as a sex offender. (Pen. Code, § 290, subd. (g)(2).)[1] In a bifurcated proceeding, the jury found true a strike allegation. (§§ 667, subds. (b)-(i), 1170.12.) The court sentenced defendant to the upper term of three years doubled for the strike for a total state prison term of six years.

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[1] Hereafter, undesignated statutory references are to the Penal Code.

On appeal, defendant contends the trial court erred prejudicially by (1) failing to instruct the jury sua sponte on the element of knowledge of the duty to register, (2) failing to hold an evidentiary hearing on the issue of juror misconduct, and (3) imposing the upper term of imprisonment based on facts that the jury never found to be true beyond a reasonable doubt. We shall affirm the judgment.

FACTS

In 1990, defendant was convicted of a felony that required him to register for life pursuant to section 290.

Upon his release from prison in the 1990's, defendant was given a form Notice of Registration Requirements (No. SS8047), which advised him of requirements including (1) annual registration within five days of his birthday; (2) updated registration every 90 (later 60) days if he has "no residence address;" (3) new registration within five days of coming into any city, county, or city and county; and (4) upon moving, notification within five days to the jurisdiction with which he had last registered. Defendant registered annually as required from 1995 through 2003.

On June 12, 2003, defendant went to the Yuba City Police Department and completed an annual registration form. He initialed a box on the form advising: "If I have no residence address, in addition to the requirement to register annually within 5 working days of my birthday, I must update my registration information at least once every 60 days and

register a change of location within 5 working days with the law enforcement agency having jurisdiction over my location." The registration form showed defendant's address as an apartment on Franklin Avenue in Yuba City. According to the form, he was residing with Michelle King.

King had been the manager of the apartment complex on Franklin Avenue and had lived in the designated manager's apartment until some time prior to September 1, 2003, when a new manager moved in. By that date, defendant was not living at the manager's apartment or anywhere else in the complex.

In November 2003, Leslie Carbah, a crime analysis clerk for the Yuba City Police Department, began to "have concerns that the defendant might not be at the residence or the address that he last registered." She relayed her concerns to Yuba City Police Detective Dan Garbutt, who went to the Franklin Avenue address on November 13, 2003, to see if defendant was living there. He was not.

Four days later, on November 17, 2003, defendant and King went to the Yuba City Police Department so that defendant could register. Defendant told a detective that it had been "a few months" since he had lived at the Franklin Avenue address. Defendant added that for the last few months he had been "homeless" and had been "living out of a car" on Cypress Road in Dingville, Sutter County. Defendant intended to register with the Yuba City Police Department, but the detective advised him that he had to register with the Sutter County Sheriff's

Department because he was claiming to live outside city limits, in an unincorporated portion of the county.

The detective "assist[ed]" defendant by taking him into custody on an unrelated outstanding misdemeanor warrant and having him transported to the Sutter County jail, which was in the same building as the Sutter County Sheriff's Department. Inmates are not allowed to register until they are released from jail. The present record does not reveal the date of defendant's release.

In January 2004, defendant gave the Department of Motor Vehicles an address on Pease Road in Sutter County. On May 12, 2004, defendant registered with the Sutter County Sheriff pursuant to section 290 using the address on Pease Road.

Defendant did not testify.

The prosecutor argued in summation that, although defendant's crime was complete by mid-November 2003 when he told a detective that he was living out of his car in Sutter County, the crime continued for several months thereafter. The detective told defendant that he needed to go to the Sheriff's Office and update his registration, but defendant did not register for several more months.

DISCUSSION

I

Defendant contends, and the People effectively concede, the trial court erred by failing to instruct the jury sua sponte on the element of actual knowledge of the duty to register.

(*People v. Garcia* (2001) 25 Cal.4th 744, 752 (*Garcia*).) The parties further agree that the *Chapman* standard of prejudice applies, but they disagree as to whether the error is harmless beyond a reasonable doubt. (*Garcia, supra,* at p. 755; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*).) The People have the better argument.

In *Garcia* our Supreme Court held, "In a case like this, involving a *failure* to act, we believe section 290 requires the defendant to actually know of the duty to act. Both today and under the version applicable to defendant, a sex offender is guilty of a felony only if he 'willfully violates' the registration or notification provisions of section 290. (§ 290, former subd. (g)(3), as amended by Stats. 1994, ch. 867, § 2.7, p. 4393; § 290, present subd. (g)(3).) The word 'willfully' implies a 'purpose or willingness' to make the omission. (§ 7.) Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed. As stated in *People v. Honig* (1996) 48 Cal.App.4th 289, 334, 'the term "willfully" . . . imports a requirement that "the person knows what he is doing." [Citation.] Consistent with that requirement, and in appropriate cases, knowledge has been held to be a concomitant of willfulness. [Fn. omitted.]' Accordingly, a violation of section 290 requires actual knowledge of the duty to register. A jury may infer knowledge from notice, but notice alone does not necessarily satisfy the

willfulness requirement." (*Id*. at p. 752, original italics, parallel citation omitted.)

The court in *Garcia* further explained, "This case involves a legally imposed duty to act. Defendant's guilt here turns not on anything he did, but on what he did not do. Moreover, the registration statute establishes a method of providing notice of the registration requirement that can easily be documented, as it was in this case. (§ 290, subd. (b).) *Although notice alone does not satisfy the willfulness requirement, a jury may infer from proof of notice that the defendant did have actual knowledge, which would satisfy the requirement*." (*Garcia, supra*, 25 Cal.4th at p. 752, italics added.)

In this case, the jury was instructed with CALJIC Nos. 1.20[2] and 3.30,[3] and with a special instruction on failure to

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[2] CALJIC No. 1.20 told the jury: "The word 'willfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word 'willfully' does not require any intent to violate the law or to injure anyone or to acquire any advantage."

[3] CALJIC No. 3.30 told the jury: "In the crime charged in Count I, namely, failure to properly registered [*sic*] as a sex offender, there must exist a union or joint operation of act or conduct and general criminal intent. [¶] General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime he is acting with general criminal intent even though he may not know that his act or conduct is unlawful."

register.[4] There is no CALJIC instruction on this crime, although there is a new CALCRIM instruction on failure to register as a sex offender.[5] Unlike that instruction, none of the instructions given in this case required the jury to find that defendant actually knew that he had a duty to register at the place where he resided.

However, the evidence showed that defendant had actual knowledge of the registration requirement. Defendant had successfully registered for a period of several years. Three months before leaving his Yuba City address, defendant initialed an advisement that "If I have no residence address, in addition to the requirement to register annually within 5 working days of my birthday, I must update my registration information at least once every 60 days and register a change of location within 5 working days with the law enforcement agency having jurisdiction

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[4] Plaintiff's Special Instruction No. 1 provided in relevant part: "In order to prove this crime each of the following elements must be proved: One, a person is required to register under Section 290 (a)(2) of the Penal Code. [¶] Two, the requirement to register under Section 290(a)(2) of the Penal Code is based on a felony conviction. [¶] Three, a person willfully violated the requirements of Penal Code Section 290(a)(1) by failing to register with the Police Department or Sheriff's office having jurisdiction over his residence or transient location within 5 working days of changing residence address or becoming transient."

[5] CALCRIM No. 1170 requires as an element: "3. The defendant actually knew (he/she) had a duty to register as a sex offender under Penal Code section 290 [within five working days of his/her) birthday] wherever (he/she) resided."

over my location." The form is evidence of notice, and defendant's initials on the form are circumstantial evidence of his actual knowledge.

Defendant claims this evidence of knowledge is "particularly weak," because he initialed "18 separate provisions" of the form, and jurors could doubt whether he had remembered them all. The evidence is further weakened by the Yuba City Police Department's practice of not giving the registrant a copy of the initialed form unless requested; there is no suggestion that defendant requested or received a copy of the form.

But further evidence of knowledge was presented in the form of the Yuba City Police Detective's November 2003 advisement that defendant needed to register with the Sutter County Sheriff. The detective testified that she referred defendant to the Sheriff's Office to register, and that she "told him he needed to register with them and not the Yuba City Police."

Defendant claims the detective's advisement was "equivocal," in that it merely told him: "*If* you want to register a Sutter County address, you must go to the Sutter County sheriff's department." (Original italics.) But defendant's "if" has no basis in the record; no evidence suggests he went to the Yuba City Police Department for any reason *other than* to register his then-current Sutter County address.

Defendant claims the detective's advisement would not necessarily lead to actual knowledge, because "a defendant may fairly be skeptical of what a police officer tells him." But even a skeptical defendant would have "actual knowledge" that the registration requirement existed, at least according to the officer. Where no steps are taken to confirm or refute the officer's statement, regardless of how dubious it may seem, the defendant has no basis to claim lack of knowledge of the requirement.

Defendant also claims he misunderstood what the detective was telling him. In his declaration in support of a new trial, defendant asserted that if allowed to testify, he would "say that the police in November 2003 turned me away because I was homeless when I tried to register." But the police did not "turn[]" defendant "away;" rather, they took him into custody and transported him to the sheriff's office, thus implying that he needed to register in *some* jurisdiction. At most, defendant could have believed that his homeless status prevented him from registering *in Yuba City.* He could not reasonably have believed that the sheriff would refuse to register him as the city police had done.[6]

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[6] Because the detective's statement *imparted* actual knowledge, it is not necessary to consider defendant's argument that he lacked knowledge of the registration requirement *prior to the detective's advisement*, when he *went to* the Yuba City Police Department.

Lastly, defendant claims the omission of an actual knowledge instruction was prejudicial because it "likely led to [his] decision not to testify." In his new trial motion, defendant claimed his trial counsel had been ineffective for having failed to allow defendant to testify. However, defendant presented no declaration or other evidence suggesting that this was so. Thus, we can only speculate whether defendant would have chosen to testify had the trial court indicated that it would give an actual knowledge instruction.

On this record, any reasonable juror would have concluded that defendant had actual knowledge of the duty to register; thus, the omission of an actual knowledge instruction played no part in the jury verdict and was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24 [17 L.Ed.2d at pp. 710-711].)

II

Defendant contends the trial court erred prejudicially by failing to hold an evidentiary hearing to determine whether a juror committed misconduct when she denied that she was acquainted with him. We are not persuaded.

Background

Juror No. 132978 was among the first 12 veniremen seated for voir dire. After the respective counsel introduced themselves and defense counsel introduced defendant, the trial court asked, "If any of you are acquainted with either of the attorneys or [defendant], please, raise your hand." Juror

No. 132978 remained silent, and the court moved on to other questions.

When the trial court asked if any veniremen, their family members or close friends had been charged with a felony, Juror No. 132978 said that 10 years earlier her sister had been charged and had gone to court.

Later, Juror No. 132978 stated that she was a manager at a Head Start program; her "significant other" was a firefighter; she had no children; and she had been in the county her whole life. Shortly thereafter, the jury was sworn.

Following the verdict, defendant moved for a new trial on the ground, among others, of juror misconduct. In support of his motion he declared: "4. [Juror No. 132978] was a classmate of mine at Yuba City High School between 1980 and 1983. [¶] 5. She was always following me around and smiling at me, trying to get my attention. I found out that she wanted to date me, but I was not interested. She persisted and I agreed to go out with her. I then stood her up for the date and never did go out with her. [¶] 6. I heard from her and others that [the juror] was very angry with me. She called me an 'asshole' and a 'prick' and vowed revenge. [¶] 7. Although all of these acts happened during those high school years, our community is a small one, and I believe [the juror] still harbors ill will toward me."

In opposition, the prosecutor submitted Juror No. 132978's declaration as follows: "1. I attended Yuba City High School as

a student between 1980 and 1983. [¶] 2. When asked during voir dire in the above-entitled case if I was acquainted with [defendant], I recalled hearing his name during the time I attended Yuba City High School as a student. [¶] 3. I have never been acquainted with the defendant, had no personal knowledge of him at the time of voir dire, and did not have any feelings toward him that would have caused me to favor or disfavor one side over the other in this case. [¶] 4. At the time of voir dire, I could not recall any information I might have ever heard about the defendant, aside from hearing his name as stated above. [¶] 5. I have never had, nor have I ever pursued, any kind of dating relationship with the defendant."

At the hearing on the new trial motion, defense counsel argued that the juror in her declaration "admits she recognized [defendant] during voir dire, and she didn't say anything. She didn't acknowledge that she knew him." Defense counsel asserted that the juror "has apparently undergone some cosmetic dental work since the time [defendant] knew her, and he didn't recognize her at first until after voir dire was over."

The trial court interrupted counsel, noting, "That's not what the declaration says. She said I recall hearing his name during the time I was in high school, and then it goes on to say I have never been acquainted with the defendant, have no personal knowledge of him, didn't have any feelings toward him."

Defense counsel continued: "She knew his name. That's something that you think you would mention during voir dire when

you ask if you're acquainted, if you know the defendant or his attorneys. All the jurors are asked that. She didn't say anything . . . she should have let us know. And by not doing that, she deprived us to question her and use a peremptory challenge if we wanted to. [¶] And under the rule the analysis is to determine whether the information in the declaration from [defendant] is admissible. . . . He can give testimony today if necessary and whether the facts he testifies to establish misconduct. . . . He directly contradicts it. I think her facts are self-serving. She is in a little trouble if she -- what [defendant] says is true. She withheld it on voir dire. [¶] And then the third step is to determine whether the misconduct was prejudicial. And if what [defendant] says is true and we believe it is true, it is prejudicial. . . . [¶] I think it would be reasonable for the Court in light of the two opposing declarations to have her subpoenaed and come here for some testimony, and for the defense to have some time to try to find witnesses that can rebut her statement. [¶] So the first position is that, you know, her declaration is self-serving, and [defendant] is here and can give testimony and has given testimony that misconduct has been shown. If the Court feels it is necessary, we would be willing to take some testimony and develop it further."

The court replied, "I see no need for . . . [¶] . . . [¶] [a] hearing involving the juror."

The prosecutor responded, "Starting with juror misconduct, we need to realize that we cannot fault a juror for answering the question that we ask and not the question we wish we had asked. We asked if anyone was acquainted with the defendant, and the juror's declaration makes it very clear she did not consider herself to be acquainted with him. She had never met him. [¶] The only thing she knew was his name from having heard it when she was a student at the high school, and that's -- that's not being acquainted with someone. I've heard of Brad Pitt, but I'm not acquainted with him. . . . So there is no misconduct there, and without any misconduct, there is no need for -- there is no prejudice. There is no need for a new trial. I also frankly find it amusing that defendant's counsel makes the argument that the juror's statement is self-serving but [defendant's] statement would be reliable, when obviously he has even more interest in giving a self-serving statement than the juror does."

The trial court ruled: "On the declarations as they pertain to the allegation of jury misconduct, the Court does find that the declarations are admissible. The Court specifically finds that the declaration of [J]uror [No.] 132978 is credible, and I find the declaration of the defendant not to be credible. The Court finds no juror misconduct."

Analysis

"'[W]hen a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has

discretion to conduct an evidentiary hearing to determine the truth of the allegations. We stress, however, that the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact.' [Citation.] '[A hearing] should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 581-582, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 415.)

In this case, the two declarations were in conflict as to whether a dating relationship had existed between defendant and the juror. The conflict was material because, if the relationship had existed and the juror remembered it during voir dire, then she committed misconduct by failing to disclose the relationship. However, the trial court was able to resolve the conflict by finding the juror's declaration to be credible and defendant's declaration not to be credible. Thus, this was not the sort of conflict that "can only be resolved at" an evidentiary hearing. (*People v. Brown, supra,* 31 Cal.4th at pp. 581-582.) There was no error.

III

Defendant contends the trial court erred by imposing the upper term of imprisonment based on facts that the jury never found to be true beyond a reasonable doubt. He recognizes that his contention was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1244, and that *Black* is binding upon this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). However, he raises the point in order to preserve it for possible federal review, noting that the United States Supreme Court has granted a petition for certiorari raising the issue whether *Black* was correct. (*People v. Cunningham* (2005) 2005 Cal. LEXIS 7128, cert. granted *sub nom. Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47].) For the reasons stated in *Black*, we conclude defendant's contention has no merit.

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P.J.

BUTZ, J.