

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LUIS RUBIO,

Defendant and Appellant.

H028213

(Santa Cruz County

Super. Ct. No. F04263)

Following a jury trial, defendant Joe Luis Rubio was convicted of two counts of felony sexual battery (Pen. Code, § 243.4, subd. (a)), one count of unlawful possession of testosterone (Health & Safety Code, § 11377, subd. (a)), and one misdemeanor count of indecent exposure (Penal Code, § 314, subd. (1)). Defendant brought a motion for a new trial on the ground that he was denied his right to a fair trial and a unanimous jury verdict by 12 competent jurors because one of the jurors was hearing impaired and failed to disclose her inability to hear testimony during trial and discussions during deliberations to the court. The trial court denied the motion, and defendant now appeals.

Defendant also claims on appeal that there was insufficient evidence to support the convictions for sexual battery, and that he was denied effective assistance of counsel because his trial counsel failed to elicit evidence that defendant was a victim of molestation as child.

In addition, defendant brings a petition for habeas corpus based on ineffective assistance of counsel that we ordered considered with the appeal, and dispose of by separate order.

STATEMENT OF THE FACTS AND CASE

This case arises out of defendant's job as a massage therapist. While massaging one of his long-time clients, defendant exposed himself, and placed his client's hands on his penis while moving her hand back and forth. Defendant then got on top of his client, who was lying on her stomach, pulled her underpants and a sheet down and straddled her. Defendant's client thought defendant pulled his penis out and was rubbing it on her buttocks, and she could feel wetness smeared on her. After this, defendant got off of her, and the session ended.

As a result of this incident, defendant was charged with two felony counts of sexual battery (Pen. Code, § 243.4, subd. (a)),¹ one misdemeanor count of indecent exposure (§ 314, subd. (1)), and one felony count of unlawful possession of testosterone, a controlled substance (Health & Safety Code, § 11377, subd. (a)).

Defendant pleaded not guilty and the matter proceeded to trial. During in limine motions, the court granted defendant's request to sever count 4, unlawful possession of testosterone. The jury found defendant guilty of all counts. Defendant waived jury on count 4, and the court found defendant guilty of that charge as well.

Defendant brought a motion for a new trial that the court denied. The court sentenced defendant to five years in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

In this appeal, defendant asserts the trial court erred in failing to grant his motion for a new trial based on a claim his constitutional rights were violated by a juror's

¹ All further unspecified statutory references are to the Penal Code.

inability to hear portions of the trial proceedings. In addition, defendant asserts there was insufficient evidence to support the convictions for sexual battery, and he was denied effective assistance of counsel for failure to introduce evidence of defendant's prior molestations.

Motion for a New Trial: Factual Background

Defendant filed a motion for a new trial based on the following grounds: (1) he was denied his right to a fair trial and unanimous verdict by 12 competent jurors in violation of the Sixth and Fourteenth Amendment of the United States Constitution and article I, section 16 of the California Constitution; (2) Juror No. 11 committed misconduct by failing to follow the court's order to disclose her inability to hear testimony during the trial and/or discussions during deliberations due to her hearing impairment; and (3) the verdict was not decided by a fair expression of opinion of the jurors.

It is important to note that prior to the presentation of evidence during voir dire, one of the jurors, identified as Juror No. 1 during voir dire, but after being sworn was identified as Juror No. 11, notified the court that she was having difficulty hearing the proceedings. Specifically, the colloquy among the court, the attorneys and Juror No. 11 was as follows:

“THE COURT: [Juror No. 11], the Deputy mentioned to me that you had some concerns about being able to hear the proceedings. Tell us what that is.

“JUROR NO. [11]: Well, I wasn't able to hear the District Attorney several times, and um, I'm—I guess I'm a little hesitant to say, you know, “What was that?”

“THE COURT: Did you have one of those hearing devices that we had?

“JUROR NO. [11]: He gave me one toward the last, but it was not very satisfactory.

[¶] . . . [¶]

“THE COURT: Do you have any sort of hearing device of your own?

“JUROR NO. [11]: I have a hearing aid, but it didn’t—did not do the trick.

“THE COURT: And how much of the proceedings are you missing? All of what she says, once in a while, a lot?

“JUROR NO. [11]: Um, once in a while, I would say.

“THE COURT: Okay, Well, we will have to try to use the hearing device. Turn it up. If I let you stay on the jury, you would have to agree that every single time you can’t hear something, you have the right to raise you hand, and then the reporter would either read it back, or we’d have people speak up. [¶] It’s very hard to hear in this courtroom, and I’m constantly asking people to speak up and try to understand what they’re saying. [¶] Other questions or other comments at this point?

“[THE DISTRICT ATTORNEY]: Judge, would it be helpful to sit in a different spot, do you think?

“JUROR NO. [11]: I can’t hear you. What?

“[THE DISTRICT ATTORNEY]: Would it maybe helpful to sit in a different spot?

“JUROR NO. 11: Well, I was sitting in the front row.

“THE DISTRICT ATTORNEY: And you have some difficulty hearing now?

“JUROR NO. [11]: Uh-huh.

“[THE DISTRICT ATTORNEY]: How is that now?

“JUROR NO. [11]: Well, now I can hear you fairly well.

“[THE DISTRICT ATTORNEY]: Okay.

“JUROR NO. [11]: You raised your voice a little.

“[THE DISTRICT ATTORNEY]: I’ll try to—

[¶] . . . [¶]

“JUROR NO. [11]: Pardon me?

“THE COURT: How many hearing devices do we have, Deputy Alcantar? So, we have one or [*sic*] the other juror, and then we can—let’s go ahead and hook up that one right now. Let’s have her use it and be sure I [*sic*] working first of all.

“[THE DISTRICT ATTORNEY]: [Juror No. 11], how would you feel about raising your hand without having to say, “What?” I mean, would that be more comfortable to you perhaps?

“JUROR NO. [11]: Probably.

“THE COURT: Why don’t we go ahead and have her put that on. Let’s try that again and have a dialogue.

“[THE DISTRICT ATTORNEY]: Are you able to hear me any better or about the “same?

“JUROR NO. [11]: About the same.

“[THE DISTRICT ATTORNEY]: Uh-huh.

“JUROR NO. [11]: It makes clicking noises, too. It’s not a very good machine.

“THE COURT: At this time, is it turned up all the way now?

“JUROR NO. [11]: Yeah.

“[THE DISTRICT ATTORNEY]: Do you think it’s possible that you may be able to hear with that one if you took your hearing aid out? Maybe they’re not interrelating well.

“JUROR NO. [11]: Well, the last time I used this, I didn’t have my hearing aid. On [*sic*] the batteries had gone bad.

“THE COURT: So, how are you hearing right now? Are you still having a hard time hearing [the district attorney]?

“JUROR NO. [11]: Talk.

“[THE DISTRICT ATTORNEY]: I would definitely do my best to keep my voice up. You’re not the first person who, on occasion, has had difficulty hearing me

because sometimes I speak more softly when I stand too far away. So, I do have to keep my voice up a little more, but there may be occasions when I approach, say, for some purpose. For example, if I were approaching a witness, and I was asking questions from here, how is that? Can you hear that okay?

“JUROR NO. [11]: Uh-huh.

“THE COURT: If I’m turned this way, if I were to be showing somebody something and talking to them that way, how is that?

“JUROR NO. [11]: It’s all right.

“THE COURT: [Defense counsel], other input or questions?

“[DEFENSE COUNSEL]: Just a question, too [Juror No. 11] when the people are talking into the microphone. Can you hear that clearly when the microphones are on?

“JUROR NO. [11]: Yes.

“[DEFENSE COUNSEL]: That is really the best way for you to actually hear everything.

“JUROR NO. [11]: I’m sorry, would you say that again?

“[DEFENSE COUNSEL]: You bet. Is that probably the best way to hear everything, if we use the microphones?

“JUROR NO. [11]: I’m not sure. I don’t know.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: Well, we could have you both doing your questioning—come up to the lectern and use the microphone and try that and move around with some flexibility, but the most part of your questions, perhaps you could use the lectern. [¶] Is that going to be a problem for anybody?

“[THE DISTRICT ATTORNEY]: I’ve only used the lectern infrequently.

“THE COURT: What we’ll do is try and if it’s not working, we’ll check with you at the break again and see how things are going, but I need to be very clear, every time you can’t hear anything, get my attention and raise your hand, all right, and if it’s not working, then we’ll deal with that. I don’t want to give up on you yet.

You [have] been through a lot here, and you're important. We want to be sure if we can keep you as part of the jury—are you comfortable with that?

“JUROR NO. [11]: Okay.”

Juror No. 11 continued to serve, and raised her hand once during trial to indicate she could not hear the proceedings.

After the verdict, but prior to sentencing, Juror No. 11 returned a voluntary questionnaire regarding jury service. In the questionnaire response, Juror No. 11 stated: “The acoustics were very poor in the court and both the attorneys and the judge talked fast and not very clearly—I had asked to be released because of poor hearing, I still couldn't hear well with the little gadget you gave me and I know I missed a lot of the testimony & also comments in the jury room. I should have been released.” (Exhibit A to motion for new trial, underlining in original.)

In addition, Juror No. 11's response to the question, “[w]hat did you dislike about our experience?” was “[h]aving to strain to hear and *not hearing everything*.” (Exhibit A to motion for new trial, italics added.)

At the hearing on the motion in June 2004, the court determined that Juror No. 11 needed to be questioned regarding her ability to hear the trial proceedings and deliberations. In July 2004, Juror No. 11 was questioned in camera by the trial judge; defense counsel and the district attorney were also present.

During the in camera discussion, Juror No. 11 told the court that the hearing device she was given was “almost useless,” and that she could not hear the proceedings “maybe once or twice during the day, maybe three times during the day.” Juror No. 11 also said the periods of time she could not hear lasted “a short time.” The court asked her if she remembered anything she specifically could not hear during the trial, and she responded:

“[JUROR NO. 11]: I didn't always hear the defense attorney.

“[THE COURT]: [The defense attorney]?”

“[JUROR NO. 11]: Uh-huh. I think you dropped your voice maybe or something or maybe you were facing the wrong way and it just—

“[THE COURT]: He was hard to hear sometimes?”

“[JUROR NO. 11]: He was hard to hear, uh-huh. I always heard you.

“THE COURT: Was there any reason why you didn’t bring this to my attention, anything that you can think of that—

“[JUROR NO. 11]: Yeah, it’s embarrassing.

Following the in camera discussion with Juror No. 11, the motion for a new trial was heard again on August 4, 2004. At the request of the district attorney, the court made factual findings based on Juror No. 11’s in camera statements. The court found: “based on what I heard, I don’t find that she was missing a significant portions of the trial. Like any other trial, all of us are going to speak in good tones that are easily heard and [sic] voices are going to drop at times, and we’re going to mumble and turn to the side and not face people when they are speaking, and anyone is going to miss some portions of any particular trial.”²

The court finally determined that defendant’s rights were not violated by Juror No. 11’s inability to hear portions of the trial and denied defendant’s motion for a new trial.

Motion for a New Trial: Legal Analysis

Defendant based his motion for a new trial on the assertion that he was deprived of his due process rights, as well as his right to an impartial and competent jury and the assistance of counsel as a result of Juror No. 11’s inability to hear portions of the trial and deliberations. Embedded within defendant’s claim of constitutional violations is his

² In the initial Reporter’s Transcript filed with the appeal, the statement by the court read: “based on what I heard, I find she was missing a” However, in a corrected transcript filed with this court October 5, 2005, the statement reads: “based on what I heard, I *don’t* find that she was missing a” (Italics added)

argument that Juror No. 11 committed misconduct by failing to notify the court during the times she was unable to hear. Defendant asserts that given Juror No. 11's inability to hear and failure to notify the court when hearing lapses occurred, he was denied his constitutional rights, and the trial court erred in denying his motion for a new trial.

Standard of Review

The California Supreme Court has definitively stated that in cases in which the trial court *grants* a new trial order, the standard of review is abuse of discretion. (*People v. Ault* (2004) 33 Cal.4th 1250.) However, in cases such as this, where the trial court denied the motion for a new trial, the authorities are not clear regarding the standard of review. (*Id.* at p. 1262, fn. 7 [noting the lack of uniformity in the standard of review].) For example, in *People v. Nesler* (1997) 16 Cal.4th 561, 582 (*Nesler*), the California Supreme Court stated: “[w]hether prejudice arose from juror misconduct . . . is a mixed question of law and fact and subject to an appellate court’s independent determination.” Yet in *People v. Williams*, the court provided little explanation for its decision to apply an abuse of discretion standard, stating simply: “ ‘[t]he determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’ ” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318(*Williams*).)

While *Williams* contains little discussion of the standard of review for denials of new trial motions, the *Nesler* court provides extensive analysis. In *Nesler*, the criminal defendant moved for a new trial on grounds of juror misconduct. The trial court denied the defendant’s motion, and the Court of Appeal affirmed. Our Supreme Court reversed, holding that the trial court erred in concluding there was no substantial likelihood the juror’s misconduct demonstrated her “actual bias.” The court stated the standard of review of the ruling on the motion for new trial as follows: “We accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court’s independent

determination. [Citations.]” (*Nesler, supra*, 16 Cal.4th 561, 582 fn. omitted (lead opn. of George, C. J.).)

In a footnote further explaining the standard of the review, the *Nesler* court stated: “appellate courts . . . conduct an independent review of whether a defendant was prejudiced by juror misconduct.” (*Nesler, supra*, 16 Cal.4th 561, 582, fn. 5. (lead opn. of George, C. J.).) The court further opined “that in reviewing an order denying a motion for new trial based upon jury misconduct, the reviewing court has a constitutional obligation to determine *independently* whether the misconduct prevented the complaining party from having a fair trial. [Citation.]” (*Nesler, supra*, at p. 582, fn. 5 (lead opn. of George, C. J.).)

Of particular importance to the *Nesler* court in evaluating the standard of review for the denial of a new trial motion in a juror misconduct case was the fact that the question presented implicated the constitutional rights of the defendant.

We believe the *Nesler* court’s rationale for applying independent review when a question implicates a significant constitutional issue is inherently sound. Because the present case falls squarely within the purview of *Nesler*, in that it implicates defendant’s right to a unanimous verdict of an impartial jury, we will apply the de novo standard of review.

Juror Misconduct

Proof of jury misconduct has two fundamental elements. The first is an adequate factual showing to establish the misconduct. The second is a showing of prejudice; that is, the claimed misconduct must have materially affected the party’s substantial rights. (See *People v. Nesler, supra*, 16 Cal.4th at p. 580.)

As a general rule, adequate proof of jury misconduct raises a presumption of prejudice. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) That presumption may be rebutted, however, by evidence that no prejudice exists. (*Id.* at p. 119.) The presumption also may be overcome by a determination on appeal that the misconduct resulted in no reasonable probability of actual harm. (*Ibid.*) “The test is whether or not the misconduct

has prejudiced the defendant to the extent that he has not received a fair trial.” (*United States v. Klee* (9th Cir. 1974) 494 F.2d 394, 396.)

Here, there is no question that juror misconduct occurred. The record demonstrates that during voir dire, the court instructed Juror No. 11 to notify it and the parties when she could not hear any part of the proceedings. The court directly stated to Juror No. 11, “but I need to be very clear, every time you can’t hear anything, get my attention and raise your hand, all right, and if it’s not working, then we’ll deal with that.” However, Juror No. 11 admitted during her in camera examination at the motion for a new trial that she did not notify the court when she could not hear during the trial because it was “embarrassing.” Such an admission demonstrates clearly that Juror No. 11 failed to follow the court’s specific instructions and therefore, committed misconduct. (See, e.g., *People v. Engleman* (2002) 28 Cal.4th 436, 444 [failure to follow the court’s instructions constitutes juror misconduct].)

The question before us is whether Juror No. 11’s misconduct in failing to inform the court when she could not hear the proceedings prejudiced defendant to the extent that he did not receive a fair trial.

The single California case that deals with a juror committing misconduct by concealing his hearing impairment from the court is *People v. Neely* (1979) 95 Cal.App.3d 1011, in which the First Appellate District affirmed the trial court’s denial of the defendant’s motion for a new trial. The *Neely* court observed that the juror had no difficulty hearing and responding to questions from the trial court regarding the impairment, and deduced from this that any impairment that existed during the trial was not sufficient to have impeded the juror’s competence to serve. (*Id.* at p. 1019.) The court did not consider whether the juror’s misconduct affected the defendant’s constitutional rights.

Here, however, the trial court’s observations of Juror No. 11 are markedly different than those in *Neely*. During voir dire in the present case, Juror No. 11 specifically informed the court and the parties she was having difficulty hearing the proceedings. Unlike *Neely*, in which the court observed that the juror was able to hear

every question posed by the court, here, during the discussion with the court and counsel at the commencement of the trial regarding her hearing impairment, Juror No. 11 was unable to hear *four* separate times. When the district attorney asked her “[and] you hav[ing] some difficulty hearing now?” Juror No. 11 responded: “Uh-huh.” On three other occasions, Juror No. 11 interrupted the proceedings by saying “[p]ardon me,” and “I’m sorry, would you say that again?” and “I can’t hear you. What?”

Moreover, although the court specifically stated he did not find Juror No. 11 “was missing significant portions of the trial,” and that her hearing impairment was not problematic because “anyone is going to miss some portions of any particular trial,” this finding is contradictory to the record before us. Juror No. 11 stated that she could not hear the defense attorney during the trial from one to three times a day, and that she missed “a lot of testimony.”

In addition, unlike the juror in *Neely*, Juror No. 11 demonstrated repeatedly throughout her voir dire that she could not hear the proceedings, indicating her hearing difficulty *four* separate times during that examination alone. We note that although we find there were problems with Juror No. 11’s service because of her hearing impairment, we commend the trial court for attempting to accommodate her disability.

Juror No. 11’s demonstrated hearing impairment, coupled with her statement that she could not hear defense counsel at times during the trial, and missed “a lot of testimony,” indicates that she did in fact miss parts of the trial. The question before us is how the trial court determined that Juror No. 11 did not miss “significant portions of the trial,” when it is not at all clear what testimony and statements by defense counsel she actually missed (because she missed them.)

Defendant is entitled to a fair trial before an impartial and *competent* jury. (*Tanner v. United States* (1987) 483 U.S. 107, 126.) This right is guaranteed by Sixth Amendment of the United States Constitution, and is applied to the states through the Due Process Clause of the Fourteenth Amendment. (*Ibid.*) Moreover, under the California Constitution, defendant is entitled to a unanimous verdict of 12 impartial jurors. (*People v. Nesler, supra*, 16 Cal.4th at p. 578.)

Inherent in the right to a fair and impartial jury is the necessity that each juror be competent and able to understand the facts and issues presented in the trial. (*Jordon v. Massachusetts* (1912) 225 U.S. 167, 176.) Here, we have no question that Juror No. 11's hearing impairment impacted her ability to serve as an impartial and competent juror. Indeed, how could she possibly deliberate on evidence she did not hear, much less fully participate in a unanimous verdict of guilt?

We do not mean to say that a hearing impaired individual will always be incompetent to serve as a juror. But where as here, a juror has a known hearing impairment that is not being helped by the court-provided listening device, and the juror is ordered to inform the court and counsel when she cannot hear and she fails to do so, she is incompetent to serve as a juror.

Given Juror No. 11's proven hearing impairment, coupled with her statement that she could not hear the defense attorney numerous times during the trial and missed "a lot of testimony," she did not serve as a competent juror in defendant's trial. In addition, Juror No. 11's misconduct in failing to notify the court when she could not hear, materially affected defendant's substantial rights. (See *People v. Nesler, supra*, 16 Cal.4th at p. 580.) Because defendant was denied his right to a fair trial, and the judgment must be reversed.

Insufficient Evidence and Ineffective Assistance of Counsel

Because we reverse the judgment on the ground that defendant was denied his constitutional rights to a fair trial based on Juror No. 11's inability to hear portions of the proceedings, we do not address defendant's additional claims of insufficient evidence and ineffective assistance of counsel because they are moot.

DISPOSITION

The judgment is reversed. The matter is remanded for a new trial.

RUSHING, P.J.

WE CONCUR:

MIHARA, J.

McADAMS, J.

Trial Court:

Santa Cruz Superior Court
Superior Court No.: F04263

Trial Judge:

The Honorable John S. Salazar

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