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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HENRY HARRIS, Defendant and Appellant.	B232568 (Los Angeles County Super. Ct. No. BA364226)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed as modified.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Henry Harris, appeals his conviction for sale of a controlled substance with prior serious felony conviction, prior prison term and prior drug conviction enhancements. (Health & Saf. Code, §§ 11352, 11370.2; Pen. Code, §§ 667, subds. (b)-(i), 667.5.)[1] He was sentenced to state prison for 15 years.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On November 4, 2009, police officers Edward Kellogg and George Mejia were working an undercover narcotics operation in downtown Los Angeles. Watching from an unmarked patrol car, the officers saw defendant Harris sitting on a folding chair in the middle of the sidewalk. A man with money in his hand walked toward Harris. They spoke and then Harris took two small red balloons from his pocket. Harris showed the balloons to the man. The man handed Harris some currency and Harris gave the man the balloons. The man put the balloons in his pocket and walked down the street.

Los Angeles Police Detective Ronald Kitzmiller detained Harris and found $72 on him, including 22 one-dollar bills. Detective James Miller detained the other man and found the two balloons, which were subsequently determined to contain .25 grams of heroin.

Four years earlier, Harris had been found in possession of 11 balloons of heroin and multiple rocks of cocaine base. At the time, he had been sitting on a crate on the sidewalk about one block from where the 2009 incident occurred.

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

2. *Defense evidence.*

Harris did not testify.

James Brown testified for the defense. In 2007 Brown had been convicted of two felonies involving moral turpitude. Nine months later he had been convicted of selling cocaine. In December 2008, Brown was arrested by Officer Mejia for selling drugs. According to Brown, Mejia lied at the preliminary hearing in that case when he testified he had seen Brown selling drugs.

CONTENTIONS

1. The conviction must be reversed because at least one juror was actually biased against Harris.

2. The trial court miscalculated Harris's presentence custody credits.

DISCUSSION

1. *There was no showing of juror bias.*

Harris contends his conviction must be reversed because the record demonstrates that at least one of the jurors was biased against him. This claim is meritless.

a. *Background.*

At the time of trial, Harris was in a wheelchair. In the middle of the trial, and in the presence of the jury, Harris fell out of the wheelchair and onto the courtroom floor. Paramedics were called and the trial court had the jurors step into the jury room. After examining Harris, the paramedics advised he was complaining of chest pain and had to be taken to the hospital.

The jurors returned and the trial court told them: "Ladies and gentlemen, you saw what occurred here. The defendant fell out of his wheelchair. While you were absent we obtained medical attention for him. The paramedics have arrived and they are taking him to the hospital for treatment of his complaints. I don't know whether or not this is anything that's going to get in the way of trial . . . . [C]ounsel are willing to come back tomorrow and we'll see if the defendant is

sufficiently capable of rejoining us for the closing. With that, I'll ask the jurors . . . to return tomorrow at 11:00 a.m."

The next morning, defense counsel asked for a mistrial, saying a prospective prosecution witness, Officer David Chapman, may have overheard one of the jurors say Harris had faked the wheelchair incident.[2] The trial court said it would review the relevant law. The court then called in the jurors and told them the trial had to be delayed for several days because Harris was receiving medical treatment.

When trial resumed several days later, defense counsel renewed the mistrial motion. The trial court asked Officer Chapman, "[W]hat did you see or hear any of the jurors say?" The following colloquy occurred:

"Officer Chapman: Your Honor, I heard one male – I couldn't tell you specifically who it was – state that quote –

"The Court: Just be honest. Just say it.

"Officer Chapman: 'I call bullshit on that.'

"The Court: Okay.

"Officer Chapman: I don't believe it was a conversation between more than one person, it was just a statement that he made. I couldn't tell you who it was directed to or even exactly who made it.

"The Court: So you don't know who?

"Officer Chapman: I do not.

"The Court: Do you know that it was in fact a member of the jury?

"Officer Chapman: I believe it was.

"The Court: Are you sure?

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[2] Defense counsel told the trial court: "I wanted the court to make an inquiry based on what Officer Chapman heard in the elevator one of the jurors saying that maybe . . . what occurred with Mr. Harris was not real. I wanted that juror to be asked."

"Officer Chapman: Not 100 percent.

"[Defense counsel]: May I just inquire if looking at the jurors would refresh his recollection as to who it was?

"Officer Chapman: I did look as I walked in today. I could not recognize him."

Based on this inquiry, the trial court determined it would raise the incident with the jury: "What I will do is I'll ask of the jurors if anybody blurted anything out. If that juror . . . identifies himself, then I'll take action on that. I'll take him sidebar to determine if he can continue to remain fair." The court added: "[Officer Chapman] thinks it was a juror, can't be sure, doesn't know who. So I'll raise the issue. I also intend on instructing the jury generally with the following admonition. Let me read that into the record . . . ."

When the jurors returned to the courtroom, the trial court said: "Last week after Mr. Harris had his medical episode, I just want to inquire of the jury. You may recall I admonished you earlier not to discuss this case with anyone until everything is completed and you're in the jury room deliberating with the jurors. Did anybody make any statement, volitionally or otherwise, about what happened last week as you were leaving or in the elevator or anything like that? [¶] Okay. I see no hands. [¶] With that, we're going to continue the trial."

The trial court subsequently informed counsel it was denying the mistrial motion. As part of its final instructions to the jury before deliberations began, the trial court said: "Last week Mr. Harris had that medical emergency that we all witnessed here in the courtroom. He's since received treatment and is now able to resume trial. In your deliberations of this case, do not consider any sympathy nor any prejudice towards the defendant[] because of that medical emergency."

b. *Legal principles.*

"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.) "Any presumption of prejudice [arising from juror misconduct] is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*Id.* at p. 296.)

"Section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror is 'found to be unable to perform his or her duty.' A trial court 'has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.' [Citation.] A juror's inability to perform ' "must appear in the record as a 'demonstrable reality' and bias may not be presumed." [Citations.]' [Citation.] We review the trial court's determination for abuse of discretion and uphold its decision if it is supported by substantial evidence. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

" 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct – like the ultimate decision to retain or discharge a juror – rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.' " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1284.)

c. *Discussion*.

Harris contends his conviction must be reversed because the record shows at least one juror was actually biased against him as a result of witnessing the wheelchair incident. This claim is meritless because the alleged bias does not appear in the record as a demonstrable reality, and we cannot say the trial court abused its discretion in failing to investigate further. Indeed, the claim of juror bias appears to be based on nothing more than speculation.

Harris argues there was sufficient evidence of juror bias because Officer Chapman "informed the court that a male juror riding the courthouse elevator with other jurors had accused appellant of staging a medical emergency in the courtroom," the "juror's remark conclusively demonstrated his actual bias against appellant," and his subsequent "refusal to disclose his identity to the court as the juror who spoke in the elevator demonstrated the juror's consciousness of guilt and intent to judge the case based upon impermissible factors."

But, as the Attorney General points out, hardly any of these alleged facts are actually supported by the record. What the record does show is that, apparently in the aftermath of Harris falling from his wheelchair, Officer Chapman overheard a remark which *might have* been made by a juror and which *might have* referred to the wheelchair incident.

Although Chapman thought one of the male jurors had made the remark, he wasn't sure. Looking at the jury subsequently, Chapman could not identify the speaker. Chapman never told the trial court the remark had been made in front of other jurors; Chapman said: "I couldn't tell you who it was directed to or even exactly who made it." There is no way to tell from the record what the remark meant because it had no context; apparently no one said anything in response and the speaker did not say anything else. Chapman did not tell the trial court he believed he knew what the remark signified. Harris's claim about the juror's subsequent act of dishonesty is again based on speculation. If the elevator remark had not been made by a juror, *or* if it had been made by a juror but not in reference

to the wheelchair incident, then the jury's silence when questioned by the trial court did not reveal any misconduct whatsoever.

In response to these problems, Harris argues: "[R]espondent invites this court to presume that some event, other than appellant's medical emergency, inspired someone other than one of appellant's jurors" to make the remark "soon after the judge released appellant's jury from the courtroom due to appellant's medical emergency. But, in place of speculation, this court may rely on the trial court's sound view that a juror had referred to appellant's medical emergency, which it demonstrated by questioning the jury and by admonishing the jury in response to Chapman's report, despite his inability to identify the male juror in question."

This argument is meritless. Contrary to Harris's assertion, the record does not demonstrate the trial court concluded Officer Chapman overheard a juror reacting to Harris falling out of his wheelchair. Rather, given the ambiguity of Chapman's report, it appears the trial court was merely trying to gather more information about what, if anything, had happened. When no juror came forward, the trial court dropped the matter.

Something similar occurred in *In re Hitchings* (1993) 6 Cal.4th 97, where a referee concluded a juror had committed misconduct by lying about her pretrial knowledge of the case, discussing the case with a non-juror, and then denying the discussion took place. The Attorney General argued the presumption of prejudice arising from this juror's misconduct was rebutted by the referee's additional conclusion there was no credible evidence the juror had prejudged the defendant's guilt. *Hitchings* rejected this argument because the rebuttal evidence was "simply too ambiguous to be probative," and therefore did not "constitute substantial

evidence to support the referee's conclusion that [the juror] did not prejudge the case." (*Id*. at p. 122.)[3]

Here, too, for all that the ascertained facts show, the man making the elevator remark might not have been a juror, or he might have been a juror whose statement had nothing whatsoever to do with Harris falling out of his wheelchair. This does not prove by a demonstrable reality that one of Harris's jurors was actually biased against him, and we conclude it was not an abuse of discretion for the trial court to curtail its investigation into the incident when no juror admitted having made the remark. (See *People v. Bennett, supra,* 45 Cal.4th at p. 621 [juror's inability to perform duty under section 1089 must appear as demonstrable reality; bias may not be presumed]; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 295, disapproved on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638 ["The trial court is required to hold [an evidentiary] hearing only when the defense adduces evidence demonstrating a 'strong possibility that prejudicial misconduct has occurred,' and generally a hearing is unnecessary unless there is a material conflict in the evidence presented by the parties."]; *People v. Seaton* (2001) 26 Cal.4th 598, 676 ["The specific procedures to follow

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[3] *Hitchings* explained: "Respondent would have us draw from the fact that Nordstrom [the juror who committed misconduct] was one of the last jurors to vote for guilt the inference that she had not prejudged the case. Even assuming for argument that Nordstrom was one of the last jurors to vote for guilt, that 'fact' is too tenuous a foundation to support respondent's inference. Nordstrom may simply have been the last juror as the foreperson went around the table for votes. Some other order of casting votes may have been used under which Nordstrom was last. She might have asked to vote last to conceal her prejudgment of the issues. There are many possible scenarios that could explain Nordstrom being the last (or one of the last) jurors to vote for guilt. Under the circumstances, we conclude that 'fact' cannot constitute substantial evidence to support the referee's conclusion that Nordstrom did not prejudge the case." (*In re Hitchings, supra,* 6 Cal.4th at p. 122.)

in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion."].)

The trial court did not abuse its discretion by refusing to declare a mistrial based on Harris's claim of juror bias.

2. *Trial court miscalculated Harris's presentence custody credits*

As the Attorney General properly concedes, Harris's presentence custody credits were miscalculated. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]" (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647; see also *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8 ["The failure to award an adequate amount of credits is a jurisdictional error which may be raised at any time."].)

Harris was arrested on November 4, 2009, and sentenced on April 19, 2011. For this period of time, he was entitled to 532 actual days of presentence custody credit, not 531 days. (See *People v. Morgain* (2009) 177 Cal.App.4th 454, 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [day of sentencing counted for presentence custody credits even though it was only partial day].) This would have resulted in a total of 798 days custody credit. We will order the judgment modified to correct this error.[4]

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[4] In his opening brief, Harris also claimed he was entitled to additional days of presentence custody credit because the newest version of section 4019 should have been applied retroactively to his case. However, Harris has conceded in his reply brief that, after the recent decision in *People v. Brown* (2012) 54 Cal.4th 314, this contention is meritless. *Brown* concluded a prior version of section 4019 applied prospectively only and that prospective application did not violate equal protection. (See *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551-1552.)

DISPOSITION

The judgment is affirmed as modified. Harris is entitled to one additional day of actual presentence custody credit for a total of 798 days of presentence custody credit. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.