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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LANE,

Defendant and Appellant.

B276512

(Los Angeles County  
Super. Ct. No. LA079840)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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David Lane appeals his conviction of battery with serious bodily injury (Pen. Code,<sup>1</sup> § 243, subd. (d)), arguing that the trial court made erroneous evidentiary rulings and improperly denied his motion for a new trial based on jury misconduct. We affirm the conviction and remand for resentencing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an altercation between a bicyclist and the driver of a truck. According to Lane, he was loading a motorcycle onto his truck's trailer on the shoulder of Pacific Coast Highway when bicyclist Mark Royan struck him in the arm and shouted an obscenity at him while riding past. Lane drove his truck down Pacific Coast Highway, pulled over after passing Royan, exited the truck, and waited for Royan to approach on his bicycle.

Witnesses saw Lane run out onto the highway and shove Royan as he cycled down the road. By Lane's account, he reached out to grab Royan to stop him because he wanted Royan to explain and apologize for striking him earlier. Royan fell, suffering skull and facial fractures and a serious brain injury.

Lane was convicted of battery with serious bodily injury. The trial court sentenced him to 18 years in state prison, consisting of the upper term of four years for the battery, doubled under the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)), plus two additional 5 year terms under section 667, subdivision (a)(1) for his prior serious felony convictions. Lane appeals.

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

## DISCUSSION

### I. Disclosure to Jury of Victim's Death

Royan died by suicide before trial. Prior to trial, the parties discussed with the court what, if anything, the jury would learn about why Royan did not appear as a witness. The trial court denied the prosecution's request to introduce expert testimony that Royan's suicide was a result of the traumatic brain injury he sustained when Lane pushed him, and stated that it was inclined to permit the jury to learn of Royan's death but not his cause of death. Lane objected, arguing that the jury would likely conclude that Royan's death was caused by his injuries from the incident. The court, expressing its belief that it would be unfair to the defense for the jury to learn that Royan committed suicide and unfair to the prosecution for Royan's absence to go unexplained, ruled the jury could hear evidence that Royan was deceased.

Lane argues on appeal that the trial court abused its discretion and rendered the trial fundamentally unfair when it permitted the jury to learn that Royan had died. He contends this information was irrelevant, highly prejudicial, and with little or no probative value. (Evid. Code, §§ 210, 352.) Lane asserts that the evidence that Royan had died "no doubt caused the jury to pre-judge appellant and assume that the victim died due to his brain injury he received on the day of the incident." He argues that the error was not harmless under state law because "had the jury not heard the evidence of the victim's death it is reasonably probable the jury would have reached a result more favorable" to him (*People v. Watson* (1956) 46 Cal.2d 818, 836), and he also contends that the error constituted a violation of due process that was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

On this record, however, Lane cannot establish any prejudice from the court's ruling. At trial, the parties stipulated that the injuries Royan received in the incident did not cause his death, and when the stipulation was read the court instructed the jury that it must accept this fact as true. The court also instructed the jury at the close of evidence with CALCRIM No. 222, which provides in relevant part, "During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true." Lane has not identified anything in the record to suggest that the jury disregarded the instructions and reached a conclusion that directly contradicted the stipulation. We presume that jurors follow the instructions provided by the court in the absence of a showing to the contrary. (*People v. Daveggio* (2018) 4 Cal.5th 790, 821.) Any error in permitting the jury to learn that Royan had died was therefore harmless under any standard.

## **II. Alleged Jury Misconduct**

Prior to deliberations, the jury was instructed to reach its verdict without any consideration of punishment (CALCRIM No. 3550). After his conviction, Lane moved for a new trial based on jury misconduct, submitting an affidavit in which Juror No. 12 stated that Lane's potential punishment had been discussed during deliberations. The court held a hearing on the new trial motion at which the other 11 jurors testified. None of the other jurors supported Juror No. 12's account: all testified either that discussion of punishment or penalty did not occur during the

jury's deliberations or that they did not recall any such discussion taking place during deliberations.<sup>2</sup>

The trial court said, "[T]he great weight of evidence says that no such discussion even took place," and also that it did not think that a discussion of penalty had occurred during deliberations. Even if the discussion had actually occurred, the court continued, it was clear that the discussion could not possibly have affected the verdict in the case. The court denied Lane's motion for a new trial.

"We review independently the trial court's denial of a new trial motion based on alleged juror misconduct. [Citation.] However, we "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 396.)

On appeal, Lane argues that the court should have granted his motion for a new trial because at least one juror heard other jurors discuss punishment and this discussion was inherently and substantially likely to have influenced a juror. He does not acknowledge that the trial court, after hearing from all 12 jurors, concluded that no improper discussion took place during deliberations and that no misconduct had occurred. Substantial evidence supports this factual finding. Eleven jurors either denied that the possible penalty had been discussed during deliberations or had no recollection of the subject being discussed, and even Juror No. 12 could not recall whether conversation about penalty occurred during deliberations or after the verdict had been returned. As the court's finding that the alleged act of

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<sup>2</sup> One juror did recall penalty being mentioned, but only after the jury had returned its verdict.

misconduct did not occur was supported by substantial evidence, the trial court did not err in denying the motion for a new trial.

### **III. Exclusion of Hearsay Evidence Concerning the Victim's Alcohol Use**

At trial, Lane attempted to question the doctor who testified as to Royan's injuries about this statement contained in Royan's medical record: "Patient reports drinking over two pints of vodka on most days." The prosecutor objected on hearsay grounds, and Lane argued that the statement was admissible because it was contained in a medical record. The court refused to permit the testimony, stating, that the statement "is hearsay. It does not meet any exception to the hearsay rule because it happens to appear in an otherwise-admissible medical record. [¶] The medical record, as to observations, diagnoses made by hospital personnel, would be admissible under the business records exception to the hearsay rule. The fact that a third-party patient makes a statement to the doctor is hearsay, pure and simple, offered for the truth of the matter asserted and is not admissible."

On appeal, Lane argues that "the evidence was admissible under the business records exception to the hearsay rule." "We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) Applying this standard, we conclude that the trial court did not err in excluding this evidence.

Hospital records, if properly authenticated, are admissible under the business records exception to the hearsay rule. (*People v. Landau* (2016) 246 Cal.App.4th 850, 872, fn. 7.) Each hearsay statement contained in the records, however, must come within an exception to the hearsay rule before it may be admitted into evidence for the truth of the matter asserted. (Evid. Code, § 1201; see, e.g., *People v. Reed* (1996) 13 Cal.4th 217, 224-225, 230.) Here, although the medical records may have been admissible as a business record under Evidence Code section 1271, Lane has not identified any exception to the hearsay rule that makes this hearsay statement within the medical record admissible. The trial court did not abuse its discretion in excluding this evidence.

Lane also contends that his inability to question the doctor concerning Royan's alcohol consumption violated his due process rights and his Sixth Amendment right to confrontation, as he "was precluded from presenting information on a relevant issue for the jury to consider." Our review of the record indicates that the court did not preclude the presentation of evidence of Royan's alcohol use. When defense counsel complained that he was being denied the opportunity to "show this victim is a drunk," the court responded, "Bring in a witness who says he's a drunk. I'll allow the jury to hear that witness." Moreover, the jury heard evidence that after the incident, Royan was combative on the way to the hospital, had an elevated alcohol level in his urine, and received treatment for alcohol withdrawal. Both counsel mentioned Royan's intoxication in argument, and Lane's attorney argued that Royan had provoked Lane while under the influence. Lane has not established any violation of his constitutional rights.

#### **IV. Remand for Resentencing**

The court sentenced Lane to two additional five-year terms in prison for his prior serious felony convictions. (§ 667, subd. (a)(1).) At the time, section 1385, subdivision (b), prohibited the court from striking a prior conviction of a serious felony for the purpose of enhancing a sentence under section 667. Senate Bill No. 1393, signed into law on September 30, 2018, amends sections 667 and 1385 to provide the trial court with new discretion to dismiss, in furtherance of justice, five-year enhancements pursuant to section 667, subdivision (a)(1). The new law takes effect on January 1, 2019. We asked the parties to submit supplemental briefing concerning whether to remand this matter to the trial court to permit the court to exercise its discretion with respect to the section 667, subdivision (a)(1) enhancements.

Lane and the Attorney General agree that the law will be applicable to those parties, like Lane, whose appeals will not yet be final on the law's effective date. The Attorney General, however, contends that although the law will apply retroactively to Lane, his claim to be entitled to resentencing is not yet ripe. Moreover, the Attorney General argues that it would be futile to remand to allow the trial court to determine whether to strike the enhancements previously imposed under section 667, subdivision (a)(1) because the court clearly indicated that it would not have dismissed the enhancements even if it had discretion to do so. (See, e.g., *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for trial court to consider new discretion to strike a recidivist allegation].) We disagree. The court's statements at sentencing did not express an intention to impose the maximum possible sentence, nor did the court state it would



not exercise discretion to strike the enhancements even if it had discretion to do so. (Cf. *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 “[t]he petition [for resentencing] may . . . be summarily denied if the record reflects that the sentencing court clearly indicated that it would not have exercised discretion to sentence under [the more lenient statute] even if it had been aware that it had such discretion”).) While the court did articulate a view that the Legislature ought to enact a sentence enhancement for the infliction of traumatic brain injury so severe as to lead to the consequences suffered by the victim here, the court also expressed dissatisfaction with its available sentencing options. The court said, “The law, the way it’s set up with the court’s inability to strike a five-year prior and the strictness of the [T]hree[ S]trikes law, does create a quandary when the results have to be either 35 to life, a sentence that’s ten years longer than first[ ]degree murder, or, as [the prosecutor] says, 18 years. [¶] It’s impossible to impose a legal sentence between those two points, where 25 years to life may be a proper sentence or 25 years without life or 20 years to life. There’s a lot of possible, reasonable, just sentences in this case that are impossible to achieve, given the law, but we have to follow the law even though we may personally disagree with it.”

Moreover, “[d]efendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *id.* at pp. 1391-1392 [remand appropriate

because the record did not clearly indicate the court would have imposed the same sentence had it been aware of the full scope of its discretion after a change in the law].) Before Lane's sentence has become final, Senate Bill No. 1393 will afford trial courts discretion to strike the section 667, subdivision (a)(1) enhancement in the interest of justice. Because the trial court sentenced Lane without the benefit of this discretion, remand for resentencing is appropriate.

Accordingly, we affirm the conviction and remand this matter for the trial court to set a resentencing hearing after January 1, 2019.

#### **DISPOSITION**

The conviction is affirmed and the matter is remanded for resentencing.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.