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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIJERMAINE RAINEY, Defendant and Appellant.	B264934 (Los Angeles County Super. Ct. No. ZM016056)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas Rubinson, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

After trial, a jury found true the allegation that appellant Tijermaine Rainey (Rainey) meets the criteria of a Sexually Violent Predator (SVP). Prior to making that finding, the jury had reported three times that it was deadlocked, but the trial court refused to discharge the jury pursuant to Penal Code section 1140.[1] On appeal, Rainey argues that the trial court abused its discretion by refusing to discharge the jury after the third indication that the jury was deadlocked, and by requiring the jury to submit questions to be addressed by the prosecutor and defense counsel during additional argument. Further, he argues that the combined effect of the foregoing deprived him of his right to due process and an impartial jury.

Upon review, we find no error and affirm.

FACTS

In 2010, the Los Angeles County District Attorney filed a petition under Welfare and Institutions Code sections 6250 and 6600 et seq. alleging that Rainey is a SVP who should be committed to a secure facility for mental health treatment. In May 2015, the matter proceeded to a jury trial. After deliberating, the jury found true the allegation that Rainey was a SVP, and the trial court proceeded to commit Rainey to Coalinga State Hospital for an indeterminate term pursuant to Welfare and Institutions Code section 6604.1.[2]

This appeal followed.

DISCUSSION

I. Legal Principles.

Section 1140 provides that a "jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of

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

[2] The issues in this case are procedural and, as we discuss below, there was no error by the trial court. Because Rainey does not challenge the sufficiency of the evidence, and because we have not engaged in a harmless error analysis, the details of Rainey's crimes and the trial testimony are not relevant.

such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

The Fifth and Fourteenth Amendments grant a defendant the right to due process, a principle that ensures fundamental fairness in criminal proceedings. (*Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 246; *In re Hyde* (2007) 154 Cal.App.4th 1200, 1214; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1250.) The Sixth Amendment grants a criminal defendant the right to an impartial jury. (*People v. Nelson* (2016) 1 Cal.5th 513.) "'Courts must exercise care when intruding into the deliberative process to ensure that . . . the sanctity[] of the deliberative process is maintained.' [Citation.]" (*Id.* at p. 568.)

II. Standard of Review.

"'The determination whether there is a reasonable probability of [juror] agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' [Citation.]" (*People v. Sandoval* 33 (1992) 4 Cal.4th 155, 195–196.) "A trial court abuses its discretion when it '"exceeds the bounds of reason"' after considering all the circumstances before it. [Citation.]" (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 516.)

Our Supreme court has explained that "'[a]ny claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case.' [Citation.]" (*People v. Russell* (2010) 50 Cal.4th 1228, 1252.)

"Constitutional issues are reviewed de novo. [Citation.]" (*In re J.H.* (2007) 158 Cal.App.4th 174, 183.)[3]

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[3] We note that, in the Ninth Circuit, whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact subject to de novo review. (*United States v. Berger* (2007) 473 F.3d 1080, 1089.)

III. Relevant Proceedings.

The jury began deliberating at 2:36 p.m. on May 29, 2015, and they were excused at 4:15 p.m. Deliberations resumed at 9:15 a.m. on June 1, 2015.

At 10:47 a.m. on June 1, 2015, the jury sent the following jury questions to the trial court: "1. If Mr. Rain[e]y is out, will he still be going through outpatient treatment or any other program?

"2. Will he be under any other supervision?

"3. Will he finish his current program at Coalinga before getting out?

"A: Can we have a copy of DSM-5[4], mark the pages about pedofilia.

"B: Can we get the transcript of the interview with the father?"

The trial court read the questions to the prosecutor and defense counsel and said, "All right. I'll hear from counsel if you want to be heard, but my initial reaction to these questions is as follows: [¶] No. 1, wanting to know if Mr. Rainey will still be going through outpatient treatment or any other program if he gets out, I cannot answer that question. They're not supposed to be considering . . . punishment . . . , or what would happen after the case is concluded. . . . [¶] No. 2, 'Will he be under any other supervision,' same response. No response. [¶] 3. 'Will he finish his current program at Coalinga before getting out,' again, not their concern and not relevant to their task. [¶] A. Can we have a copy of DSM-5, marking the pages about pedophilia,' no. It's not in evidence. One page of the DSM-5, which was defense [exhibit] B, was placed into evidence, but that's all."

As to whether the jury could have the transcript of the interview with the father, the trial court said it needed to clarify with the jurors "what it is that they are looking for there."

Defense counsel responded, stating, "In terms of my position on what the [trial] court said, I'm fine with the [trial] court's proposed responses in terms of 'No,' but I do

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[4] The "DSM-5" is the Diagnostic and Statistical Manual (5th ed. 2013) published by the American Psychiatric Association. (*People v. Johnson* (2015) 235 Cal.App.4th 80, 83, fn. 2.)

want to make sure that the [trial] court does say that their job is to see if the elements have been proved."

The trial court replied, "Yes, that is my intention."

The prosecutor had no objection.

Continuing on, the trial court said, "I think I want to tell them, 'Not only can I not answer those questions, but those questions are not your concern. Your concern is to determine if the elements of an SVP as defined in the jury instructions have been satisfied beyond a reasonable doubt, and that is all.'"

The jurors were brought back into the courtroom.

Regarding the juror questions, the trial court stated that it could not answer any questions about what would happen if Rainey was released, and whether he would finish his current program. The trial court explained that it could not give the "DSM-5" to the jury. As for the father's testimony, the trial court said that it would be read back to the jury.

The jury resumed deliberations for 30 minutes, at which point the jury was excused for a lunch break.

Deliberations resumed at 1:35 p.m. Thirty-seven minutes later, the jury submitted a second jury question, as follows: "What do we do if we don't have a unanimous decision?"

The trial court discussed the second jury question with the attorneys, stating, "My basic response is going to 'keep deliberating.' It has been not even a full day on a case that took about a week or so to try, and this type of testimony is very dense and difficult to make your way through, and my feeling about it is that they need to give it more time and attempt to deliberate and reach a verdict. A lot of resources were put into this trial. Ultimately[,] if they can't reach a unanimous verdict, then I'll have to accept that, but I want them to try a little harder."

Defense counsel replied, "I have no problem with that, your Honor, as long as it's made clear to them that they do have that option to not reach a verdict. I just don't want them to think they have to reach a verdict."

The trial court said, "No, no. I'll say it just like I said it."

The prosecutor agreed with the trial court's approach.

After some colloquy about whether the trial court should ask the jurors if they wanted additional testimony, jury instructions or something else, the prosecutor asked the trial court to hold off. Defense counsel, however, stated, "I was thinking maybe we should ask them if more deliberation will assist them, but I know you're probably wanting to wait."

The trial court indicated that it wanted to wait.

Once the jurors returned to the courtroom, the trial court stated, "Here's my response to [the second juror question] at this point: You just received the case on Friday afternoon. These types of cases are difficult for jurors in a number of respects. The testimony in these cases and in this particular case is highly technical. It is dense. It is difficult to wade through oftentimes, and it's not the kind of thing usually that can be gone through quickly and easily. It's hard. It takes a lot of work.

"And considering that you got the case late in the day on Friday, you haven't even had it for a full day, I need you to give it some more time. I need you to keep deliberating. . . ."

Deliberations continued for an hour and 25 minutes, and then the jury was excused until the following day.

The morning of June 2, 2015, the jury deliberated for an hour and a half. In the afternoon, the jury deliberated from 1:40 p.m. to 4:08 p.m., at which point it sent a note to the trial court stating, "We can't agree."

The trial court brought the jury into the courtroom. The foreperson said yes when asked if the "jury is hopelessly deadlocked[.]"

The trial court asked the jurors there was anything it could provide "the jury that would assist the jury in reaching a verdict?" According to the foreperson, the jury had voted four times. The trial court asked for the vote count, and the foreperson replied, "4 to 8."

Some of the jurors said they were hopelessly deadlocked, and other jurors said additional argument or jury instructions, or both, might help.

The trial court noted that 9 of the 12 jurors "are not ready to throw the towel in on this case, which is very encouraging." For the next day, it asked the jury to put together a list of issues they wanted counsel to address in additional argument, and a list of jury instructions they wanted clarified.

On June 3, 2015, the jury deliberated for an hour and 13 minutes without submitting a list of questions. Subsequently, the jury sent a note, stating, "We are deadlocked [¶] same 4:8 [¶] No additional instructions or discussion needed (after writing out our questions for the judge and discussing them among ourselves)."

The trial court announced to the attorneys, "So I am going to bring them out and make some general inquiries about that. It seems very unusual that the jurors would have thought that something would be helpful, and then all of a sudden none of them do. I can't get too much into the content of the deliberations, and I wouldn't want to, but that seems a little unusual to me."

Defense counsel stated: "I agree with the [trial] court. I just think that an inquiry should be made, but I do know that last time an inquiry was made they did volunteer content in terms of what they were deliberating about, so I think the court, I'm sure, would want to advise them not to do that."

The trial court was amenable to the suggestion.

Addressing the jury, the trial court read the most recent note and said, "All right. This strikes me as a little bit unusual, and here's why: It seemed unusual to me that as of 4:30 yesterday afternoon 9 of you thought that either instructions or argument could help break this deadlock, and now this morning after sitting back there for about an hour and a half all 9 have changed their mind."

Some colloquy between the trial court and the foreperson ensued regarding whether anything could help the jurors, and the foreperson then said, "I had some questions about how people came up with their verdict, and then they clarified it today and they still were pretty set on that, so I don't think—all the questions I had that were

going to be answered today were answered in there, and it didn't seem like it changed anyone's mind, and I think we're at a deadlock."

The trial court polled Juror Nos. 2, 4, 5, 6 and 8, and they indicated that neither more argument nor instructions would help. Juror No. 8 said after the jurors discussed whether further argument would be beneficial, they "came to a unanimous decision that no further actions would help." Juror Nos. 10 and 11 said they felt the same way.

Juror No. 12 opined that "there could be a more compelling argument made" that could change jurors' minds.

At that point, the trial court said, "Okay. Well, . . . there's such a thing as a hung jury. It happens. And I'm not saying I would never accept it. You get to a certain point, I would have to accept it, and that's just life. That's the way it goes sometimes. [¶] But the objective reality is to reach a verdict if at all possible, and if you honestly think that additional argument will help convince some of your fellow jurors to rethink their position in certain respects or in all respects and that could help this jury reach a verdict, I want to give the jury that opportunity." The trial court instructed either the foreperson or Juror No. 12 to write out a question, and then said that "we'll address it from there."

Multiple jurors sent notes requesting argument regarding specific topics, such as the diagnostic criteria for pedophilic disorder, and/or asking specific factual questions about the case. The trial court read them to counsel, indicating that some of the questions would have to be clarified.

The jury was summoned back to the courtroom. The trial court told the jury that Juror No. 12's note was fine, and the attorneys would address it in argument. Next, the trial court said that the other jurors' questions would have to be written on proper forms, and some would have to be clarified.

Subsequently, the jurors submitted clarified questions. Also, Juror No. 12 submitted an additional question.

The case was reargued at 1:56 p.m. on June 3, 2015.

After the jury engaged in another 24 minutes of deliberations, the jury found true the allegation that Rainey was a SVP.

IV. No Abuse of Discretion Under Section 1140.

Rainey argues that the trial court's "refusal to accept the fact the jury was deadlocked on the third occasion was irrational and not grounded in reasoned judgment. Additionally, the fact all jurors, save one, said they were hopelessly deadlocked did not justify the [trial] court's decision to reopen argument by counsel." Based on these arguments, Rainey contends that the trial court abused its discretion. These arguments are two sides of the same coin and, accordingly, we both discuss them together and reject them together.[5]

After the jurors submitted a second note indicating a deadlock, the trial court asked if it could provide anything that would assist the jury in reaching a verdict. A majority of the jurors indicated that additional argument or jury instructions might help. The trial court directed them to put together a list of questions they wanted counsel to address in further argument, and a list of instructions they wanted the trial court to clarify. Thus, at that point, the trial court perceived a reasonable probability that the jury could reach a verdict, and came up with a reasonable plan to aid the jury. This course of action was permitted by the California Rules of Court.

California Rules of Court, rule 2.1036 provides: "(a) . . . After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching

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5 The Attorney General argues that Rainey forfeited these arguments by not lodging objections below. But section 1259 provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant." If the trial court committed the error assigned by Rainey, it would affect his substantial rights. Consequently, section 1259 requires us to determine whether there is merit to Rainey's claims. As a practical matter, this renders the issue of forfeiture superfluous.

a verdict. [¶] (b) . . . If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures."

Rainey acknowledges this rule of court, and does not suggest that the trial court abused its discretion when it formulated its plan after the second jury note indicating that it was deadlocked. Also, Rainey acknowledges that when a trial court is "faced with questions from the jury, including that they have reached an impasse, 'a 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.' [Citation.]" (*People v. Young* (2007) 156 Cal.App.4th 1165, 1171–1172.)

This brings us to the proceedings after the third jury note indicating that it was deadlocked. In our view, it was reasonable for the trial court to conclude that there still remained a probability that the jury could reach a verdict because (1) only the day before, a majority of the jurors said that additional argument and clarification of jury instructions would help, (2) the jury had not yet had the benefit of additional argument, (3) defense counsel did not argue that the jury should be discharged, and (4) Juror No. 12 thought more argument could help.

Next, Rainey argues that the trial court abused its discretion by requiring the jury to submit a question to be addressed by the attorneys in further argument. He maintains it was an abuse of discretion on the theory that it went beyond the bounds outlined by *People v. Salazar* (2014) 227 Cal.App.4th 1078 (*Salazar*), and because it called for the jury to reveal the content of their deliberations.

In *Salazar*, the jury sent a note asking if it could move on to count 2 if it was hung on count 1. (*Salazar*, *supra*, 227 Cal.App.4th at pp. 1083–1084.) The trial court advised the jury of various further actions the trial court could take to assist the jury in reaching a verdict, such as permitting the attorneys to make further closing arguments. After deliberating a little longer, the "the jury sent another note to the trial court that stated, 'We would like to hear the closing [a]rgument again from the [a]ttorneys, with regards to

[b]elievability of a witness, of S. Villatoro.'" (*Salazar*, *supra*, 227 Cal.App.4th at p. 1084.) Over defense objection, the trial court allowed further argument on that single subject. Subsequently, the jury reached a guilty verdict with respect to one of the two defendants. (*Ibid.*) The court held that the procedure employed by the trial court was not an abuse of discretion. (*Id.* at pp. 1088–1089.)

Rainey reads *Salazar* as holding that when faced with a deadlocked jury, a trial court can do no more than inform the jury of the options provided by California Rules of Court, rule 2.1036, and that only if the jury initiates a request for further argument on a specific topic can the trial court permit additional, targeted argument. In other words, Rainey maintains that *Salazar* prohibits a trial court from the procedure followed here: the trial court asked if further argument or clarification of instructions would help, and when a majority of jurors indicated the answer was yes, the trial court asked them to provide a list of questions for the attorneys to address, and a list of instructions that required clarification. But *Salazar* did not contain any language that can be construed as espousing the rule urged by Rainey. Moreover, *Salazar* did not decide the issue presented here, and cases are not authority for issues that they did not decide. (*People v. Martinez* (2000) 22 Cal.4th 106, 118.)

As for the issue presented here, we hold that once jurors indicate that further argument would aid their deliberation but do not volunteer topics that interest them, a trial court has the discretion to ask them to submit questions for the attorneys to address. Without this tool, a trial court and the attorneys would be faced with the following situation. The trial court would know that further argument might help, but it would be unable to give the attorneys focus. The attorneys, not knowing what areas to focus on, would be placed in the position of having to guess, and with the possibility that if they offered argument, they would be wasting some or all of the jurors' time, the trial court's time, and the trial court's resources. And the jurors might be placed in the position of hearing argument on areas on which they have no questions, and no argument on the areas that interest them most. The only reasonable solution in this situation is to allow the procedure employed below.

Now, we turn to the rule that the deliberations of the jury shall remain private and secret. (*United States v. Olano* (1993) 507 U.S. 725, 737 (*Olano*).) "Secrecy affords jurors the freedom to engage in frank discussions, free from fear of exposure to the parties, to other participants in the trial, and to the public. [Citations.] The mental processes of deliberating jurors are protected, because '[j]urors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations.'" (*People v. Engelman* (2002) 28 Cal.4th 436, 442–443.) But the rule of secrecy is not absolute. For instance, secrecy "may give way to reasonable inquiry by the [trial] court when it receives an allegation that a deliberating juror has committed misconduct. [Citation.]" (*Id*. at p. 443.) The Supreme Court has noted its inability to locate any authority suggesting that the federal constitutional right to a trial by jury "constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Ibid*.)

"[O]utside intrusions upon [a] jury [are analyzed] for prejudicial impact. [Citation.]" (*Olano, supra*, 507 U.S. at p. 738.) The principles of due process are violated if an intrusion upon a jury renders it incapable or unwilling to decide a case solely on the evidence before it. (*Ibid*.)

Rainey argues that "[t]he court did indirectly what it was not allowed to do directly in that submitting questions to the jury infringes on the jury's power to arrive at a verdict without having to explain its reasons," and that he "was entitled to a unanimous jury of twelve peers assured of their privacy." Further, he contends that "the very nature of the jury's points for additional argument informed the court of the content of their deliberations, of which appellant's counsel had expressed concern. Each point raised by the jury highlighted the specific problem areas with the facts, the evidence and the law, thereby revealing their thought processes and invading the sanctity of their deliberations."

We conclude that the trial court exercised its discretion within the bounds of reason. While the questions the jury asked revealed topics of discussion, disagreement

and/or confusion, their questions did not reveal their specific debates. Consequently, any intrusion on the secrecy of their deliberations was minimal, and it was designed to facilitate the trial court's duty to give the jury the assistance permitted by California Rules of Court, rule 2.1036. Defense counsel did not object, nor did defense counsel suggest an alternative to juror questions. Further, we easily resolve that the trial court's neutral and content-free request for two lists did not have a prejudicial impact on the jury. Nothing in that request had any tendency to render the jury incapable or unwilling to decide the case on anything but the evidence, i.e., the request did not suggest that the jury should decide the case one way or another. Accordingly, we conclude that the trial court's request cannot be construed as coercive.

VI. Cumulative Effect.

As we have discussed, the trial court's handling of the jury was reasonable, and nothing about it was coercive. Consequently, we conclude that the cumulative impact of the trial court's decision to instruct the jury to continue deliberating after the third note indicating a deadlock and the trial court's decision to request two lists from the jurors did not violate Rainey's due process right to fundamental fairness at trial, nor his Sixth Amendment right to an impartial jury.

VII. Ineffective Assistance of Counsel.

Rainey argues that he received ineffective assistance of counsel when defense counsel did not request a discharge of the jury after the third note indicating a deadlock, and when he did not object to the trial court's request for two lists. The question is whether defense counsel's acts or omissions fell outside the wide range of professionally competent assistance, and whether those acts or omissions were prejudicial. (*Strickland v. Washingto*n (1984) 466 U.S. 668, 691–692.)

We need not determine whether defense counsel's performance was deficient. When the jury submitted the third note indicating a deadlock, the jury still did not have the benefit of additional argument or clarification of instructions, which it had indicated the day before would be beneficial. Thus, as we already discussed, the trial court had ample reason to determine that there was a reasonable possibility that the jury could reach

a verdict. Based on this record, we conclude that even if defense counsel had lodged objections, the trial court would still have required the jury to submit questions and listen to additional argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT