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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FERMIN VILLA,

Plaintiff and Appellant,

v.

CITY OF LONG BEACH,

Defendant and Appellant.

B268270

(Los Angeles County
Super. Ct. No. BC518613)

APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.

Charles Parkin, City Attorney, and Monte H. Machit, Assistant City Attorney for Defendant and Appellant City of Long Beach.

Balaban & Spielberger, Daniel Balaban, Andrew J. Spielberger, Paymon A. Khatibi; Esner, Chang & Boyer, Holly N. Boyer, and Shea S. Murphy for Plaintiff and Appellant Fermin Villa.

Plaintiff Fermin Villa was injured when a car in which he was traveling struck a decorative boulder in the median of a public road located in Long Beach, California. Villa sued the defendant City of Long Beach for dangerous condition of public property, and the case was tried to a jury. On the second day of jury deliberations, an alternate juror submitted a note to the trial court in which she reported that the jurors were discussing their life experiences, such as their professional experience as an engineer, and asked that the jurors be redirected to focus on the evidence. While the court was considering the note, the jury reached a verdict, finding by a vote of nine to three that the property was not in a dangerous condition. The court took the verdict and discharged the jury without investigating the note or disclosing its existence to counsel. After Villa's counsel learned of the note, he filed a motion for a new trial pursuant to Code of Civil Procedure section 657.¹ The court granted the motion on the ground that its failure to disclose the note prior to taking the verdict was an irregularity in the proceedings that deprived Villa of a fair trial. The City appeals the new trial order. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Evidence At Trial

Villa filed a civil action against the City for negligence and dangerous condition of public property. The trial court granted the City's motion to bifurcate the issues of liability and damages at trial. The evidence discussed below was presented to the jury

¹ All further statutory references are to the Code of Civil Procedure.

over a six-day period starting on June 3, 2015.

On the night of August 23, 2012, Villa was the passenger in a car driven by Carlos Arrieta when the car was involved in a single-vehicle accident. At the time of the accident, Arrieta had a learner's permit and had been driving for four months. Arrieta had consumed multiple beers earlier that day, and shortly before the accident, he was seen drinking from a bottle of liquor while stopped at a gas station. About 10 minutes before the accident, Arrieta also was observed driving his car in a reckless manner, doing "donuts" on a street and hitting the curb with his car.

Arrieta and Villa were headed to the beach that night, and they were being followed in a separate car by two of their friends, Gregorio Aguilera and Adrian Rayon. Arrieta drove his car onto a circular on-ramp connecting Appian Way and 2nd Street in Long Beach. Although the on-ramp had a posted safe speed of 15 miles per hour, Arrieta was driving at least 40 miles per hour. While driving on the on-ramp, Arrieta lost control of the car. His car went over the left curb, struck a 300-pound boulder in the median of the on-ramp, and then rolled over multiple times before landing upside down on 2nd Street.²

At trial, Villa's accident reconstruction expert testified that the front left part of Arrieta's car struck the boulder, which caused the car to roll over passenger side first. Villa's expert also opined that the car would not have rolled over if the boulder had not been in the median. The City's accident reconstruction expert testified that Arrieta's car was already traveling in the wrong

² Rayon, who was a passenger in the car following Arrieta and Villa, videotaped a portion of the accident with his cell phone, and that video was played for the jury at trial.

direction on the on-ramp when it struck the boulder and that the boulder actually caused the car to slow down before it rolled over and landed on its roof. The City's expert opined that Arrieta was not operating the car in a safe manner when it went over the curb and struck the boulder.

Each party had a traffic engineering expert testify about the design and condition of the on-ramp where the accident occurred. According to Villa's traffic engineering expert, the on-ramp was in a dangerous condition because: it had a sharp radius and a steep grade near the top of the ramp where a vehicle was likely to accelerate; it did not have a clear recovery zone that would allow a driver to safely maneuver to the side of the road without hitting the curb; and it had three boulders in the median of the on-ramp that a vehicle foreseeably could strike if it veered left while negotiating the sharp turn. Villa's expert also opined that the City had notice of the dangerous condition because its engineers had conducted traffic studies of the on-ramp in the past, and that it could have mitigated the danger at minimal cost by removing the boulders. According to the City's traffic engineering expert, the on-ramp was not in a dangerous condition because: there was no history of similar car accidents at that location; the posted safe speed of 15 miles per hour was appropriate; the radius of the on-ramp was within acceptable limits according to state guidelines and standards; the three boulders in the median were not fixed objects; and even if the boulders were fixed, they were located a minimally safe distance from the curb. The City's expert admitted, however, that he was not aware of any other on-ramps in California with a similar radius that had boulders in the median.

II. The Jury Deliberations and Verdict

The case was submitted to the jury on June 10, 2015. The alternate jurors were allowed to be present in the jury room, but were instructed by the trial court not to speak or otherwise participate in the deliberations. The jury began its deliberations at 3:00 p.m. and was dismissed for the day at 4:30 p.m. At the end of the first day of deliberations, Alternate Juror Hellen Zuniga approached the court clerk, stated that she was frustrated with how the deliberations were being conducted, and asked what she should do. The clerk advised Zuniga to address her concerns to the court in writing. The clerk then informed the court of the conversation with Zuniga.

The following morning, on June 11, 2015, Zuniga submitted a handwritten note to the clerk, which stated as follows: “Asking for jurys [sic] to be redirect [sic] on facts not on life experience & on there [sic] feeling[.] To view facts on case and come to decision on that. [¶] [E]x. jurys [sic] talking about what they know as engineer.”

The jury resumed its deliberations at 9:15 a.m. Shortly thereafter, the court read the note from Zuniga and began to research various courses of action in response to the note, but did not disclose the note to counsel at that time. At 11:43 a.m., while the court was still considering potential responses to the note, the jury reached a verdict. The court put aside the note and took the jury’s verdict. In response to the first question on the special verdict form, the jury found by a nine to three vote that the property was not in a dangerous condition at the time of the accident. After polling the jury, the court thanked the jurors for their service and discharged them. The court never disclosed the

existence of the note to counsel prior to taking the verdict and discharging the jury.

Following the verdict, Zuniga informed Villa's counsel that the jury foreperson had relied on his personal experience as an engineer in reaching a verdict and that Zuniga had submitted a note to the clerk about the matter before the verdict was reached. Villa's counsel immediately notified the court of the information provided by Zuniga, and then moved for a mistrial at a hearing held later that day. The City's counsel opposed the motion, arguing that a mistrial could not be granted once the jury had been discharged and that the proper remedy for alleged juror misconduct was a motion for a new trial. After ordering briefing on the matter, the trial court denied the motion for a mistrial.

III. Villa's Motion for a New Trial

On July 27, 2015, the trial court entered a judgment in favor of the City. Villa thereafter filed a motion for a new trial on various grounds under section 657, including juror misconduct and an irregularity in the proceedings due to the court's failure to disclose Zuniga's note prior to the verdict being reached. Villa's motion was supported by declarations from Zuniga and three members of the jury.

According to the declarations, the jury foreperson, Mark Kimball, made specific comments throughout the deliberations about his experience as an engineer. Kimball told the jurors that, based on his experience as an engineer, the property was not in a dangerous condition. Kimball also stated that Villa was trying to blame the engineers who designed the area, and that "as an engineer, I have to defend them" because "it was not their fault." In addition, Kimball stated that "[i]t was a one in a million

accident,” and that “in my experience there’s no problem with the design.”³

The declarations submitted by Villa also described other instances of alleged juror misconduct. Specifically, several jurors questioned why Villa had not sued the driver and speculated that he was pursuing a claim against the City because he “was just trying to go after the ‘deep pockets.’” Two of the jurors further speculated that the driver probably did not have insurance because he was young. One juror discussed her experience of having a family member killed by a drunk driver even though she never disclosed that fact during voir dire. Although Zuniga was an alternate juror, she also participated in the deliberations and shared her view of the evidence. On the second day of deliberations, the jury initially voted eight to four that the property was not in a dangerous condition. Later that morning, one of the four jurors who initially had voted in favor of Villa on the dangerous condition question changed his vote, and stated that he was doing so because he intended to vote in favor of the City on a subsequent question in the verdict form. Following that juror’s vote change, the final vote was nine to three that the condition was not dangerous.

³ During voir dire, Kimball disclosed that he was an engineer and had been employed as a technology executive for the Walt Disney Company, working primarily “on the movie side” and “mostly animations.” When asked if he could set aside his professional experience as an engineer in reaching a verdict, Kimball answered that he “absolutely” could let the evidence speak through the experts and rely on the testimony provided at trial.

In its opposition to Villa's motion for a new trial, the City submitted declarations from three members of the jury, including Kimball. According to the declarations, none of the jurors stated that the verdict should be in favor of the City because Villa was looking for a "deep pocket," or that they were changing their vote to expedite the process. While Kimball told the other jurors that he was an engineer, he "did not spend a great deal of time talking about [his] former occupation as an engineer," and "did not attempt to refute the testimony of any expert or witness based on [his] own personal experience." These jurors also confirmed that Zuniga had participated in the deliberations and voiced her dissatisfaction with the verdict.

On October 21, 2015, the trial court granted Villa's motion for a new trial pursuant to section 657, subdivision (1). In its written statement of decision, the court concluded that its failure to disclose Zuniga's note to counsel prior to taking the verdict and discharging the jury constituted an "[i]rregularity in the proceedings of the court by which [Villa] was prevented from having a fair trial."

On November 12, 2015, the City filed a notice of appeal from the trial court's order granting a new trial. Villa thereafter filed a protective cross-appeal, contending that the juror misconduct in the case provided an independent basis for reversing the judgment and ordering a new trial.

DISCUSSION

In its appeal, the City argues that the trial court abused its discretion when it granted Villa's motion for a new trial. The City specifically contends that the court's failure to disclose the note from Alternate Juror Zuniga and to investigate its contents

prior to taking the jury's verdict did not constitute an irregularity in the proceedings. The City also asserts that, even if the court erred in failing to disclose or investigate the note, any error was harmless because the record does not establish that there was actual juror misconduct that deprived Villa of a fair trial.

I. Standard of Review

In granting a motion for a new trial, the court must “specify the ground or grounds upon which it is granted and the court’s reason or reasons for granting the new trial upon each ground stated.” (§ 657.) “When the trial court provides a statement of reasons as required by section 657, the appropriate standard of judicial review is one that defers to the trial court’s resolution of conflicts in the evidence and inquires only whether the court’s decision was an abuse of discretion. [Citations.]” (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636.) “The 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. This is particularly true when the discretion is exercised in favor of awarding a new trial. . . . So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside.” (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387; see *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 [“an order granting a new trial . . . ‘must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court’s] theory”].) Accordingly, “the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a

presumption in favor of the [new trial] order.’ [Citation.]” (*Lane v. Hughes Aircraft Co.*, *supra*, 22 Cal.4th at p. 412.)

II. Relevant Law

Section 657 authorizes a court to grant a new trial based on an “[i]rregularity in the proceedings of the court, jury or adverse party . . . by which either party was prevented from having a fair trial.” (§ 657, subd. (1).) “An ‘irregularity in the proceedings’ is a catch-all phrase referring to any act that (1) violates the right of a party to a fair trial and (2) which a party ‘cannot fully present by exceptions taken during the progress of the trial, and which must therefore appear by affidavits.’ [Citations.]” (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1229-1230.) “No accurate classification of such irregularities can be made, but it is said that an overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct, may be regarded as an irregularity.” (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182.) “The language of the statute is sufficiently broad to include any departure by the court from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected.” (*Gay v. Torrance* (1904) 145 Cal. 144, 149.)

In a civil trial, “[i]f, before the jury has returned its verdict to the court, a juror . . . , upon . . . good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged.” (§ 233.) For instance, if a juror commits misconduct that is discovered before a verdict is returned, the court has the authority to “discharge the offending juror and replace the juror with an alternate.” (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 613; see also *Garden Grove School*

Dist. v. Hendler (1965) 63 Cal.2d 141, 145 [where juror misconduct was discovered during the trial, the court “erred in not granting defendants’ motion to excuse the juror and replace him with an alternate”].) Alternatively, if the court finds that the misconduct has prejudiced a party’s right to a fair trial, the court may order a mistrial on the motion of either party. (*Rufo v. Simpson, supra*, at p. 613.) However, “the remedy of mistrial is for those rare cases where the trial court in its discretion concludes the misconduct of the juror has already caused such irreparable harm that only a new trial can secure for the complaining party a fair trial.” (*Ibid.*)

Generally, “[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court’s duty “to make whatever inquiry is reasonably necessary” to determine whether the juror should be discharged. . . .’ [Citation.]” (*People v. Williams* (2013) 58 Cal.4th 197, 289; see also *People v. Virgil* (2011) 51 Cal.4th 1210, 1284 [“[w]hen a trial court is aware of possible juror misconduct, the court ‘must “make whatever inquiry is reasonably necessary”’ to resolve the matter”].) “Although courts should promptly investigate allegations of juror misconduct ‘to nip the problem in the bud’ [citation], they have considerable discretion in determining how to conduct the investigation.’ [Citation.]” (*People v. Virgil, supra*, at p. 1284.) “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.] . . . [¶] . . . [A] hearing is required only where the court possesses information which, if proven to be true, would constitute “good cause” to doubt a juror’s ability to perform his duties and would justify his removal from

the case. [Citations.]’ [Citation.]” (*People v. Manibusan* (2013) 58 Cal.4th 40, 53.)

III. The Trial Court Did Not Abuse Its Discretion in Granting Villa’s Motion for a New Trial

In granting Villa’s motion for a new trial, the trial court concluded that its failure to disclose Alternate Juror Zuniga’s note to counsel prior to taking the verdict and discharging the jury constituted an irregularity in the proceedings that deprived Villa of a fair trial. The court acknowledged that it had intended to discuss the note with counsel while the jury was deliberating, and after consulting with counsel, to take appropriate action to address the allegation of juror misconduct raised by the note. The court could not recall at the hearing on the motion why it had failed to disclose the note prior to taking the verdict, but admitted that its failure to do so was a “mistake” by the court. After discharging the jury, the court “subsequently realized that the information in the note may have materially affected the [j]ury’s decision.” The court thus concluded that its failure to disclose the note and to conduct an appropriate inquiry into the alleged juror misconduct prejudiced Villa’s right to a fair trial. On this record, we conclude the trial court did not abuse its discretion in granting a new trial to Villa.

The City argues that the trial court’s failure to disclose and investigate Zuniga’s note prior to taking the verdict was not an irregularity in the proceedings because the note only vaguely alluded to potential misconduct by the jury in relying on matters outside the record. The City asserts that there is no requirement that a court share a juror’s note with counsel regardless of its content or conduct an investigation into a vague allegation of

potential juror misconduct. As discussed, however, once a trial court is made aware of ““possible juror misconduct,”” the court must make whatever inquiry is reasonably necessary to determine whether the juror should be discharged. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1284; see also *People v. Williams*, *supra*, 58 Cal.4th at p. 289.) While a court has broad discretion in determining how to conduct its inquiry, a hearing may be required ““where the court possesses information which, if proven to be true, would constitute “good cause”” to discharge the juror. (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 53.) Indeed, once a juror’s ability to perform his or her duty “is called into question, a hearing to determine the facts is clearly contemplated,” and the “[f]ailure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion.” (*People v. Burgener* (1986) 41 Cal.3d 505, 519, 520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

In this case, the trial court did not decide that an inquiry into Zuniga’s note was unnecessary because the note failed to allege potential juror misconduct or was too vague to warrant further investigation. Nor did the court decide that it had no duty to disclose the note to counsel based on its content. To the contrary, the court made clear in its statement of decision that, upon reviewing Zuniga’s note, its “plan was to consider the content carefully, formulate possible next steps, and then review the note and the options with [c]ounsel.” The court also stated that, while it was still “considering potential responses and actions, and before [it] had shared the note with any [c]ounsel, the jury announced it had reached a verdict.” Rather than disclose the note to counsel at that time and discuss the options for proceeding, the court put aside the note, took the verdict, and

then discharged the jury. Given that the trial court found that Zuniga's note, on its face, was sufficiently concerning to warrant further investigation, the court reasonably could have concluded that its failure to disclose the note to counsel and to conduct an inquiry into the allegation of juror misconduct constituted an irregularity in the proceedings.

The City nevertheless contends that any error in failing to either disclose or investigate the note could not have prejudiced Villa's right to a fair trial because the trial court subsequently found that there was no juror misconduct in ruling on Villa's motion for a new trial. In support of this claim, the City points to the following statement made by the trial court at the hearing on the motion: "I don't know whether Kimball [committed] misconduct, and the reason I don't know is that it was my fault for not discussing the note that I received before the verdict so that we could have made an intelligent factually based decision on that very subject." The City also asserts that, by the time the trial court ruled on the motion, it had the benefit of at least six juror declarations that had been submitted by the parties, and that after reviewing those declarations, the court still found that no juror misconduct had occurred. The City's argument, however, is not supported by the record.

Specifically, the record does not establish that, in ruling on the motion for a new trial, the trial court ever made a finding that there was no juror misconduct. At the hearing on the motion, and in direct response to the City's argument that "there was, in fact, no misconduct by Kimball," the trial court remarked that it did not know whether Kimball had committed misconduct because it had failed to conduct a proper inquiry prior to taking the verdict and discharging the jury. In response to the City's

assertion that the court could make such a determination after the trial based on the juror declarations submitted by the parties, the court briefly summarized Kimball's alleged misconduct as set forth in those declarations, and then explained that the court's own failure to "explore a complaint of that very conduct, before the jury came in with their verdict, . . . [was] my mistake, the act that prejudiced Mr. Villa's rights." In its statement of decision, the court ruled that its failure to disclose and investigate Zuniga's note was an irregularity in the proceedings that prevented Villa from having a fair trial. Because the court granted Villa's motion for a new trial on that specific statutory ground, it did not rule on the alternative ground raised by Villa that a new trial was warranted due to juror misconduct. The court did, however, state that, based on Zuniga's note and Kimball's own statements during voir dire, it believed Kimball would have been discharged from the jury had a proper inquiry into the note been made prior to taking the verdict. Contrary to the City's contention, the trial court never made a finding, either at the hearing on the motion or in its statement of decision, that no juror misconduct had occurred.

The City also asserts that the order granting Villa's motion for a new trial was an abuse of discretion because the trial court's stated rationale for its decision "was based on faulty reasoning, speculation, and incorrect factual assumptions." In particular, the City argues that the court erroneously assumed in its statement of decision that, if Zuniga's note had been disclosed to counsel and investigated by the court prior to taking the verdict, there would have been a different outcome at trial. While it is true that the statement of decision includes some speculative reasoning on how a different result may have been reached, we

reject the City's contention that the order granting a new trial constituted such a manifest abuse of discretion by the trial court that reversal is required. Rather, based on the totality of the record before it, the trial court reasonably could have concluded that Villa's right to a fair trial was prejudiced by its failure to properly disclose and investigate Zuniga's note.

The record reflects that, during the presentation of the evidence at trial, there was competing testimony from the parties' respective traffic engineering experts about whether the design of the on-ramp where the accident occurred created a dangerous condition. While Zuniga's note to the trial court did not go into specific detail, it alleged that, during the deliberations, certain unidentified jurors were improperly relying on their personal experiences, including one juror's professional experience as an engineer, rather than the evidence. The juror declarations later submitted by Villa in support of his new trial motion revealed that the juror who allegedly relied on his engineering experience was the jury foreperson, Kimball. According to three of those declarations, Kimball repeatedly referenced his own professional experience as an engineer during the deliberations, and told the other jurors that, based on such experience, the engineers who designed the on-ramp "did a good design" and "there was no dangerous condition." Moreover, the polling of the jury taken immediately after the verdict revealed that the vote was nine to three on the dispositive question of whether the property was in a dangerous condition, with Kimball voting with the nine-person majority that the condition was not dangerous.

Therefore, based on the juror declarations submitted by Villa, Kimball's alleged misconduct went beyond a failure to abide by the court's instruction not to consider matters outside

the record. The alleged misconduct, if found to be true, went to the dispositive issue of whether or not the City's design of the property constituted a dangerous condition. Given that the verdict in favor of the City was very close, the trial court reasonably could have found that the removal of Kimball for misconduct could have resulted in a different outcome at trial. While the trial court ultimately did not grant Villa a new trial on the ground of juror misconduct, it did conclude that, if Zuniga's note had been disclosed and investigated by the court prior to taking the verdict, Kimball would have been discharged from the jury. The court also concluded that, if either party had moved for a mistrial based on juror misconduct following a timely disclosure and investigation of the note, it likely would have granted such motion. Because of the court's error, however, no such remedial measures were ever discussed with counsel prior to the jury being discharged. On this record, the trial court reasonably could conclude that its failure to disclose Zuniga's note to counsel and to conduct a proper inquiry into the note's allegation of juror misconduct constituted an irregularity in the proceedings that was prejudicial to Villa. The trial court accordingly did not abuse its discretion in granting Villa's motion for a new trial.⁴

⁴ In light of our affirmance of the order granting Villa's motion for a new trial, Villa's protective cross-appeal is dismissed as moot. (*Grobesson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 798-799.)

DISPOSITION

The order granting Villa's motion for a new trial is affirmed. Villa's cross-appeal is dismissed as moot. Villa shall recover his costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.