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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN WOOD, Defendant and Appellant.	B230344 (Los Angeles County Super. Ct. No. LA062723)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed as modified; remanded in part.

Randy S. Kravis, 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, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jonathan Wood was convicted, following a jury trial, of one count of driving a vehicle while being under the influence of an alcoholic beverage in violation of Vehicle Code section 23152, subdivision (a) and one count of driving a vehicle with .08 percent or more, by weight, of alcohol in his blood in violation of Vehicle Code section 23152, subdivision (b). The trial court sentenced appellant to three years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in admitting the evidence of the preliminary alcohol screening (PAS) test, instructing the jury with CALCRIM No. 2130, and failing to conduct an inquiry into potential juror misconduct. Appellant further contends that the trial court erred in denying his post-trial motion to dismiss made pursuant to Penal Code section 1387 and his motion for a new trial, made on the ground that a juror had seen an exhibit showing that appellant had a prior conviction. Appellant also contends that the conviction for violating Vehicle Code section 23152, subdivision (b) must be temporarily stayed until the judgment is final and permanently stayed when service of sentence is complete, and that the abstract of judgment should be corrected to reflect the sentence orally pronounced by the trial court and to show the statutory basis for the fines imposed. We agree that the abstract should be corrected to show that appellant was convicted after a jury trial, not a guilty plea, and to show the statutory basis for all fines and penalty assessments. The matter is remanded with instructions to correct the abstract of judgment and specify the statutory basis of all fines and penalty assessments. The judgment is affirmed in all other respects.

Facts

On July 13, 2008, about 11:50 p.m., Los Angeles Police Department motorcycle Officers Anthony Hotchkiss and David Fatool noticed appellant driving a black Honda Accord east on Sherman Way. Appellant was driving in the number one lane, which is the lane closest to the oncoming traffic lanes. At this location, there was a concrete divider separating the east and west bound traffic. On the east bound side, where appellant was driving, there were three traffic lanes. Appellant was driving 45 miles per

hour. The speed limit is 35 miles per hour. He weaved over the yellow line near the center divider and also over the line separating the number one and number two lanes. The officers observed this happen about 12 times. Appellant almost struck the divider at one point.

Appellant got into the middle lane (the number two lane) and tailgated another car. After appellant had done this for about a third of a mile, the motorcycle officers turned on their police lights. Appellant did not respond. The officers turned on their sirens. Appellant pulled over, narrowly missing a parked truck in the process.

Officer Fatool went to the driver's side of the car and smelled alcohol. Officer Fatool asked appellant for his wallet. Appellant fumbled with it and was unable to hand it to the officer. Appellant was mumbling and slurring his words. Officer Fatool told appellant to put his wallet down, and then told him to get out of the car. Appellant struggled to find the door handle. When he got out of the car, he was off-balance and had an unsteady gait.

Officer Hotchkiss then spoke to appellant. He noticed that appellant's speech was slurred, his eyes were red and his breath smelled of alcohol. Officer Hotchkiss asked appellant if he was sick or had any condition that would interfere with the tests. The officer then conducted the Horizontal and Vertical Nystagmus tests, which indicated that appellant was intoxicated and had high levels of alcohol in his system. Appellant was unable to complete the Romberg Balance test, the Walk-the-Line test, the Leg Lift test or the Finger-to-Nose test.

Officer Hotchkiss formed the opinion that appellant was under the influence of alcohol and unable to operate a motor vehicle. About 12:05 a.m., appellant was arrested.

Officer Hotchkiss asked appellant if he wanted to take a voluntary preliminary alcohol-screening ("PAS") test. This test is performed by a hand-held breath-testing machine. Appellant agreed. Officer Hotchkiss observed appellant for 15 minutes and then turned on the device. Appellant did not blow sufficient air into the device for a full breath sample. He put his tongue in front of the nozzle, which meant that no seal was formed and air was blocked from entering the device. Officer Hotchkiss used the

"manual trap" method to capture whatever air was in the device. The results of the test showed that appellant had a blood alcohol content of .215 percent.

About 12:10 a.m., Sergeant Dawn McCallum arrived and took appellant to the West Valley police station. There, Officer Fatool told appellant that the law required him to take a chemical breathalyzer test and that he did not have the right to speak with an attorney before taking the test. Appellant initially agreed, but then refused until he could speak to a lawyer.

Los Angeles Police Department Criminalist Lisa Smith testified about the physical and mental effects of alcohol on a person's ability to drive. She also testified about field sobriety tests, and the PAS and ECIR devices and tests. She explained that the PAS device will automatically take a sample after the subject has blown 1.5 liters of breath into the device. The device is also designed to take a sample using the manual trap option if less than 1.5 liters of breath has been blown. The PAS device used on appellant was tested on July 10 and July 17, 2008. The accuracy check figure was .098 and the device was in working order.

Based on a hypothetical involving the facts of this case, Criminalist Smith opined that in her expert opinion, the person's ability to drive was impaired and the impairment was due to alcohol consumption. She also opined that a person with a blood alcohol level of .215 percent twenty minutes after driving would have had a blood alcohol level of over .08 percent at the time the person had been driving. A blood alcohol level of .215 percent would require a person to have at least seven drinks.

Appellant's girlfriend, Kristina LaPaglia-Peralez, testified on appellant's behalf at trial. She stated that she was with appellant at a bar between 8:30 p.m. and 11:30 p.m. on July 13, 2008. She saw him drink three beers. She did not see any signs of intoxication. Marissa Bent, a bartender at the bar that night, testified that she served appellant two beers and one mixed drink which contained two shots of alcohol between 8:00 p.m. and 11:30 p.m. She did not see any signs of intoxication.

Leo Summerhays, a former employee of the Los Angeles County Sheriff's Crime Laboratory, testified on appellant's behalf as an expert on driving under the influence.

Summerhays opined that field sobriety tests and PAS tests are investigative tools. Objective symptoms and field sobriety tests do not conclusively determine a person's level of impairment due to alcohol because factors other than alcohol could be involved and could affect a person's performance. In Summerhays's opinion, the .215 percent reading from the PAS test was not scientifically reliable because of the way the test was administered. He also testified that it is not possible to use a PAS reading to determine a person's blood alcohol level at an earlier time. A person's blood alcohol level can go from .07 percent to .215 percent in 15 minutes. If appellant had consumed two beers and two shots of alcohol between 8:15 p.m. and 11:30 p.m., his blood alcohol content would have been between .03 percent and .04 percent. A third beer during that time period would have increased appellant's blood alcohol level to .07 percent.

Discussion

1. Two dismissal rule

Appellant contends that the trial court erred in denying his post-trial motion to dismiss his case for violation of the two dismissal rule of Penal Code section 1387, and that his counsel was ineffective in failing to raise this issue before trial. We see no error. Appellant received effective assistance.

Under Penal Code section 1387, "[m]isdemeanor prosecutions are subject to a one-dismissal rule; one previous dismissal of a charge for the same offense will bar a new misdemeanor charge. Felony prosecutions, in contrast, are subject to a two-dismissal rule; two previous dismissals of charges for the same offense will bar a new felony charge." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019.) The focus is on the nature of the current charge. "Thus, either a misdemeanor or a felony dismissal will bar a subsequent misdemeanor charge while either two felony dismissals or one misdemeanor

and one felony dismissal will bar a subsequent felony charge." (*Id.* at p. 1020.)[1] Not all dismissals of a case are dismissals within the meaning of Penal Code section 1387.

There were two dismissals in this case, one of the misdemeanor complaint in 2009 and one of the felony complaint in 2010.[2] Appellant contends that both dismissals were dismissals within the meaning of Penal Code section 1387, and thus his case could not be prosecuted after the 2010 dismissal.

The misdemeanor complaint was filed by the Los Angeles City Attorney on July 16, 2008. That complaint alleged that on July 14, 2008, appellant had violated Vehicle Code section 23152, subdivisions (a) and (b), by driving under the influence of alcohol and a drug, and had also violated Vehicle Code section 12500, subdivision (a) by driving without a valid driver's license. It was alleged that appellant had suffered two prior convictions for violating Vehicle Code sections 23152 or 23153.

While this misdemeanor case was still pending, appellant was convicted of violating Vehicle Code section 23152 in another case, case number BA342810. The conviction was for an offense committed on June 28, 2008, about two weeks before the offense in this case. The conviction occurred on July 31, 2009.

On August 11, 2009, the District Attorney for the County of Los Angeles filed a complaint charging appellant with committing felony violations of Vehicle Code section 23152, subdivisions (a) and (b) on July 13, 2008.[3] The case number is LA062723. On our own motion, we take judicial notice of the minute order dated August 12, 2009, in the

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[1] Penal Code section 1387, subdivision (a) reads in pertinent part: "An order terminating an action pursuant to this chapter, or Section 859b, 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or if it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859b, 861, 871, or 995, or if it is a misdemeanor not charged together with a felony . . . ."

[2] At appellant's request, we take judicial notice of the misdemeanor complaint and minute order dated August 12, 2009 in case number 8VY03213.

[3] Appellant was stopped by police very late in the evening of July 13 and arrested in the very early morning hours of July 14. There is only one offense, spanning the two dates.

superior court file. A Vehicle Code section 23152 violation may be charged as a felony if the defendant has three or more prior convictions for violating sections 23103, 23152 or 23153. (Veh. Code, § 23550.) The information which was ultimately filed in the case alleged three prior convictions, one of which was the July 31, 2009 conviction in case number BA342810.

On August 12, 2009, the day after the felony complaint was filed, the court in Department 100 in Van Nuys dismissed the misdemeanor complaint in case number 8VY03213. The minute order for that date states: "Refer to case LA062723. Same arrest. This case dismissed pursuant to 1385 P.C." It also gives the disposition for all three counts as "Dismissal in furth of justice per 1385 PC."

The second dismissal, which involved the felony case, came about 10 months later, following a period in which appellant fled from court.[4] After appellant turned himself in and trial preparations re-commenced, the prosecutor told the court that Officer Hotchkiss, an essential witness, was out on medical leave and unavailable for trial within the time limit required by law. The prosecutor asked to dismiss and refile the case pursuant to Penal Code section 1387.2. The court agreed.

There is no dispute that the 2010 dismissal pursuant to Penal Code section 1387.2 is a dismissal within the meaning of section 1387. Section 1387.2 provides that in lieu of issuing an order terminating an action, the court may proceed on the existing accusatory pleading and rearraign the defendant on that pleading. The section expressly states that the action shall be deemed previously terminated for purposes of section 1387. Appellant contends that the 2009 dismissal of the misdemeanor complaint is also a qualifying dismissal under section 1387. We do not agree.

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[4] On March 30, 2010, appellant moved for a continuance to obtain private counsel. The motion was denied. Appellant failed to return to court after the lunch break. The prosecutor requested that the trial proceed in appellant's absence. The prosecutor was concerned that a key witness, Officer Hotchkiss, would be unavailable at a later date, due to work-related injuries. The court denied this request and issued a bench warrant. After appellant turned himself in two months later, the trial court granted appellant's motion to substitute privately retained counsel for the alternate public defender.

Our colleagues in Division Two of this District Court of Appeal were faced with a situation that was very similar to the one in this case. In *People v. Bohlen*, the defendant was arrested for driving a motor vehicle while under the influence of alcohol and committing an unlawful act that resulted in an injury to another. (*People v. Bohlen* (1992) 4 Cal.App.4th 400.) The Long Beach City Attorney filed a misdemeanor complaint for the offense. At some later point, the District Attorney of Los Angeles County filed a felony complaint for the same conduct. "Consequently, the city prosecutor's complaint was dismissed with the specific observation that this was being done due to the filing of the felony complaint. Although this fact was also noted in handwriting on the municipal court's docket, the stamp used by the clerk to record this entry was of the 'interest of justice' variety." (*Id*. at p. 402.) The felony complaint was later dismissed pursuant to Penal Code section 995, and refiled by the People. (*Ibid*.)

Bohlen contended on appeal that the refiled felony complaint was barred by Penal Code section 1387. The Court of Appeal noted that it "frequently [had] rejected such a contention when presented under similar factual circumstances." (*People v. Bohlen*, *supra*, 4 Cal.App.4th at p. 402.) The court found that the dismissal of the redundant misdemeanor complaint did not count as a dismissal for purposes of section 1387. (*Id*. at p. 403.)

The Court explained: "Prompt termination before trial of the lesser of two otherwise identical proceedings will always be 'in the interests of justice.' While there may be a viable method for eliminating superseded complaints filed by two different agencies through 'consolidation' (see Pen. Code, § 954) followed by a dismissal of the lesser count, instead of directly dismissing it under Penal Code section 1385 or the court's inherent housekeeping powers, such semantic procedural distinctions would invoke neither the concepts nor the concerns regarding repeated criminal prosecutions which Penal Code section 1387 is designed to prevent. [¶] In truth, either method is in accord with, and advances, the goals of that section rather than being violative thereof, and in this era of crowded criminal calendars, the avoidance of pointless paper gavottes is to be encouraged." (*People v. Bohlen*, *supra*, 4 Cal.App.4th at p. 403.)

We agree with the Court in *Bohlen* that the dismissal of a redundant misdemeanor complaint does not count as a dismissal for purposes of Penal Code section 1387. Thus, there was only one dismissal within the meaning of section 1387 in this case. The felony complaint deemed filed in June 2010 was not barred by the two dismissal rule.

Appellant argues that *Bohlen* is not applicable to his situation because *Bohlen* involved the dismissal of duplicative charges simultaneously filed by two distinct prosecutorial agencies. He contends that in his case the misdemeanor charges were dismissed based on a tactical decision by the prosecution to re-file them as felonies. He further contends that the misdemeanor charges were dismissed and then "new, more serious" felony charges were filed.

Appellant is mistaken about the chronology and actors in this case. The misdemeanor complaint in this case, like the misdemeanor complaint in *Bohlen*, was filed by the city attorney's office. The felony complaint in this case, like the felony complaint in *Bohlen*, was filed by the district attorney's office. Thus, the two sets of duplicative charges in this case were filed by two distinct prosecutorial agencies. The misdemeanor complaint was filed in 2008. The felony complaint was filed on August 11, 2009. The misdemeanor complaint was dismissed on August 12, 2009. Thus, the two complaints were concurrent at the time of dismissal.[5]

Appellant is also mistaken in characterizing the felony charges as "new" and "more serious" charges. Appellant was charged in both the misdemeanor complaint and the felony complaint with violating Vehicle Code section 23152. As the California Supreme Court has made clear, a misdemeanor complaint for violating section 23152 and a felony complaint for violating section 23152 involve "'the same offense' for purposes of section 1387(a)." (*People v. Traylor* (2009) 46 Cal.4th 1205, 1218.) The Court

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[5] To the extent that appellant is contending that *Bohlen* requires the filing of the two complaints to take place simultaneously, we do not agree. We see nothing in *Bohlen* that requires the "simultaneous" filing of the two complaints, and no reason to create such a rule. In *Bohlen*, the felony complaint was filed before the misdemeanor complaint was dismissed, and thus, the complaints were, for some period of time, concurrent. That was the situation here.

explained that "both complaints alleged the 'identical criminal act' with the 'same elements'—DUI—and that Vehicle Code section 23550, subdivision (a), which allows felony punishment when there are three or more prior DUI convictions, 'define[s] not [additional] elements [of the substantive offense] but conditions for imposition of sentencing enhancements.' [*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1016, fn. 3.]" (*People v. Traylor*, *supra*, 46 Cal.4th at pp. 1218-1219.)

Since there is no merit to appellant's claim that the (second) felony complaint deemed filed in June 2010 was barred by Penal Code section 1387, his trial counsel was not ineffective in failing to raise this issue before trial.

2. PAS test results

Although appellant agreed to take the PAS test, according to Officer Hotchkiss appellant did not cooperate in actually taking the test. The officer had to use the "manual trap" method of obtaining a sample and was able to obtain only one sample with a low volume of air. Appellant contends that the combination of low air volume and one sample rendered the test results unreliable and so the trial court abused its discretion in admitting the results of the PAS test.

Evidence of a PAS test is admissible after "a showing of (1) the reliability of the instrument, (2) the proper administration of the test, and (3) the competence of the operator. [Citation.]" (*People v. Williams* (2002) 28 Cal.4th 408, 414.) To meet these requirements, the proponent of the test must either show compliance with the title 17 regulations or offer independent proof of the three elements. (*Ibid.*) "Compliance with regulations is sufficient to support admission, but not necessary. Noncompliance goes only to the weight of the evidence, not its admissibility. [Citation.]" (*Ibid.*)

A trial court's ruling on the admissibility of a PAS test is reviewed for an abuse of discretion. (*People v. Williams*, *supra*, 28 Cal.4th at p. 417.)

There is no dispute that the officer did not comply with the title 17 regulations when he administered the test. Therefore, the prosecution was required to offer proof of the three elements set out in *Williams*. Appellant does not dispute that Officer Hotchkiss

was generally competent to administer the test and that the instrument used was generally reliable. He contends only that the improper administration of the test resulted in an unreliable test result.

Appellant contends that the law requires "deep lung" air for the sample and that the "manual trap" method used by Officer Hotchkiss did not capture such air. He contends that the low-volume/shallow breath air captured by the manual trap is not adequate to provide an accurate blood alcohol reading. He concludes that when there is only one such air sample, it is so unreliable that it is an abuse of discretion to admit it into evidence.

Appellant is correct that the regulations require deep lung breath samples and two samples which are consistent.

"Regulation 1219.3 . . . requires the breath sample to be 'essentially alveolar in composition,' i.e., it must come from deep within the lungs. (See *People v. French* (1978) 77 Cal.App.3d 511, 521, 143 Cal.Rptr. 782.)" (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1237, fn. 3.)

Regulation 1221.4 requires that a "breath alcohol analysis shall include analysis of 2 separate breath samples which result in determinations of blood alcohol concentrations which do not differ from each other by more than 0.02 grams per 100 milliliters." (Cal. Regs. Code, tit. 17, § 1221.4, subd. (a)(1).)

As the testimony of prosecution expert Criminalist Smith and existing case law both show, samples which deviate from this requirement can be reliable enough for admission.

"A sample which is not entirely deep lung air is diluted by fresh air or mouth air and thus gives an erroneously *low* indication on the intoxilyzer." (*People v. French, supra,* 77 Cal.App.3d at p. 521, italics added.) Further, as Criminalist Smith explained, the deepest part of the lung is closest to the blood stream, and so air from that area will give the reading that is closest to the alcohol content of the blood. Upper lung and throat

air will give a reading which is lower than the subject's blood alcohol level.[6] Thus, a shallow/low-volume breath sample will establish a *minimum* blood alcohol level. If it is offered by the prosecution to show intoxication, it is reliable. If it is offered by defense to show sobriety, it may well be unreliable, because such a sample does not preclude a higher level of blood alcohol.

According to the California Department of Health, the purpose of the two sample requirement is "to ensure that alveolars of 'deep lung' air samples have been obtained." (*People v. French, supra,* 77 Cal.App.3d at p. 521.) Thus, the purpose of the two sample requirement is to ensure that a person who is in fact under the influence of alcohol does not erroneously pass the PAS test by providing samples of air that give inaccurately low readings of blood alcohol content. A single sample will provide a minimum blood alcohol level, and is reliable for that purpose.

Criminalist Smith explained that another purpose of the two sample requirement is to eliminate the possibility of mouth alcohol influencing the test, which could cause the test to show an inaccurately high level of blood alcohol. (See *Manriquez v. Gourley, supra,* 105 Cal.App.4th at p. 1237, fn. 3.) As Smith explained, the same effect can be achieved with the 15 minute observation period. Such a period occurred here, and so that possibility of unreliability was eliminated.

Criminalist Smith opined that a single sample of shallow breath air is scientifically reliable if it is taken following a 15 minute observation period. The trial court properly relied on that opinion. The court did not abuse its discretion in admitting the PAS test results.

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[6] As the prosecution's expert also explained at trial, if mouth alcohol is present, mouth air will elevate the results of any test, deep lung air or not. Alcohol does not remain in the mouth for more than 15 minutes, so if the required 15 minute observation period is carried out by the officer, mouth alcohol will not be present.

3. CALCRIM No. 2130

Appellant contends that the trial court erred in instructing the jury with an unmodified version of CALCRIM No. 2130.

CALCRIM No. 2130 provides: "The law requires that any driver who has been arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence. [¶] If the defendant refused to submit to such a test after a peace officer asked him to do so and explained the test's nature to the defendant, then the defendant's conduct may show that he was aware of his guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to such a test cannot prove guilt by itself."

Appellant contends that the jury might have misunderstood the instruction to include the PAS test, construed his lack of cooperation with the administration of that test as a refusal and inferred a consciousness of guilt from these actions. Consciousness of guilt may not be inferred from a refusal to take a PAS test. (*People v. Jackson* (2010) 189 Cal.App.4th 1461, 1467.)

Appellant did not object to this instruction or request that it be modified or supplemented. His claim is forfeited. (*People v. Adams* (2009) 170 Cal.App.4th 893, 900.) Appellant contends that his substantial rights were adversely affected by the instruction, and requests to review the instruction pursuant to Penal Code section 1259. "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim – at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

We see no reasonable likelihood that the jury misunderstood and misapplied the instruction. (*People v. Avena* (1996) 13 Cal.4th 394, 417 [standard of review].) The instruction clearly refers to the refusal of a chemical test required by law.

At trial, Officer Hotchkiss made it clear that the PAS test was voluntary, and he never used the word "chemical" to refer to the PAS test. Specifically, Officer Hotchkiss

testified that he told appellant that the PAS test was "a voluntary test." He explained to appellant that the test was "voluntary" and so "he can take or not take" it. In contrast, Officer Hotchkiss made it equally clear that there was a required test which would be undertaken at the police station. He told appellant that whether or not he took the PAS test, he would still "have" to provide either a breath or blood sample at the police station. Before transporting appellant from the scene, Officer Hotchkiss told appellant that he would be "required" to provide blood or breath samples at the station.

Officer Fatool made it equally clear that the ECIR testing at the station was mandatory. Officer Fatool testified that he advised appellant at the station that he was required by law to submit to "chemical testing" of either his breath or blood, and that he did not have the right to speak to an attorney before testing. The officer specifically advised appellant that a refusal or willful failure to complete a test could be used against him in court. Officer Fatool testified that appellant repeatedly stated that he did not want to take the test without speaking to his attorney. Officer Fatool then summoned his supervisor, who did "a chemical test refusal admonition." Appellant said that he would not take any tests without his lawyer.

Nothing in the parties' arguments could have caused the confusion suggested by appellant. The prosecutor never suggested that actions during the PAS test constituted a refusal to take the test which could be used against him. Appellant's trial counsel reminded the jury that the PAS test was not a chemical test and was voluntary. Counsel noted that there was no dispute that appellant refused the chemical test at the station.

Further, even assuming that the instruction was erroneous, we see no possible prejudice to appellant. It was essentially undisputed that he refused to take the required

chemical test at the station.[7] There could be no harm to appellant if the jury also believed that he refused the PAS test as well as the ECIR test. Further, as we discuss in section 5, *post*, the evidence against appellant was very strong, even without his refusal to take the test or tests. Thus, there is no probability or possibility that appellant would have received a more favorable verdict in the absence of CALCRIM No. 2130.

4. Juror misconduct

Appellant contends that the trial court erred in failing to conduct an inquiry into juror misconduct after the court was informed that a juror had expressed a fear of convicting appellant. We do not agree.

"'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.]'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing concerning a juror's alleged misconduct "'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. [Citation.]'" (*Ibid.*) "'[A] hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred.'" (*People v. Avila* (2006) 38 Cal.4th 491, 604.) "[N]ot every incident

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[7] A printout from the ECIR machine was introduced at trial. It read: "Time limit exceeded after zero attempts." Sergeant McCallum testified that the ECIR printout showed that someone had attempted to blow into the machine but had not provided enough air, but she had no independent recollection that appellant had tried to blow into the machine. Officer Hotchkiss testified that the printout indicated that no attempts were made to blow into the machine, and that Sergeant McCallum was not correct in stating that the printout showed an attempt. Further, Officer Hotchkiss had an independent recollection that appellant never blew into the machine. Appellant's expert Summerhays also testified that the ECIR printout showed that no one had attempted to blow into the machine and that Sergeant McCallum was not correct in stating that the printout showed an attempt to blow into the machine.

involving a juror's conduct requires or warrants further investigation." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478.)

Here, on the first day of deliberations, after about an hour of deliberations, the jury foreperson sent the following note to the court: "One juror told another juror that she was afraid to convict the defendant because she lives alone."

Appellant contends that this note shows a strong possibility that two jurors were discussing the case outside the jury room and that the juror who expressed fear made comments about appellant based on information from outside the trial court.

The trial court did not understand the note in the manner suggested by appellant. The court stated: "My reading of this note – I'm not talking about any – I don't think it refers to any – [¶] . . . [¶] – any specific conduct in this court. I think it's generalized anxiety of a juror sitting on a criminal case, is my understanding of this note." The court indicated that it thought it would be appropriate to remind the jurors that their personal identifying information would be sealed.[8]

After hearing arguments from counsel, the court declined to conduct an inquiry which would intrude into the privacy of jury deliberations. The court said: "[T]here's nothing from this note that indicates to me that there's been any jury misconduct or any reason to believe there's jury misconduct." The court added: "[I] have no reason to believe that the jurors are not following all the instructions that I gave the – gave them before, during, and after the trial."

We see no abuse of discretion in the trial court's decision. The note came after about an hour of deliberations, and the most reasonable understanding of the note is that the fear was expressed during those deliberations. There is nothing in the note to suggest that the juror made any references to outside information. The court had no obligation to invade the sanctity of jury deliberations based on pure speculation. (See *People v. Davis* (1995) 10 Cal.4th 463, 548 [court has no duty to investigate juror misconduct or bias

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[8] The jury reached a verdict while the court and counsel were still discussing the note, and so the court took no more action on the note.

claim that is based on pure speculation]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [no hearing required absent evidence juror was actually asleep during trial]; *People v. Kaurish* (1990) 52 Cal.3d 648, 694 [no hearing required absent evidence juror's derogatory remark reflected bias against the defense rather than impatience with the proceedings].)

5. Ineffective assistance of counsel

Appellant contends that the trial court abused its discretion when it denied appellant's motion for a new trial based on ineffective assistance of counsel occurring when defense counsel inadvertently showed the jury an exhibit suggesting that appellant had a prior conviction.

The granting of a new trial motion is always reviewed under the abuse of discretion standard, but some authority indicates that denial of such a motion is independently reviewed if the claimed errors are of constitutional magnitude. (*People v. Ault* (2004) 33 Cal.4th 1250, 1260-1261, 1265 [independent review of motion based on juror misconduct]; *People v. Nesler* (1997) 16 Cal.4th 561, 582 [same]; but see *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27 [abuse of discretion review of motion based on *Brady* violation and ineffective assistance of counsel].)

To prevail on a claim of ineffective assistance of counsel, a defendant must show that the performance of his trial counsel was deficient and that he was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Here, during trial, defense counsel showed the jury Defense Exhibit A, which was a booking photo of appellant. Counsel folded the exhibit and apparently believed that nothing was visible to the jury other than the photo.

After trial, defense counsel spoke with one or more of the jurors. Counsel represented to the court that a juror told him that there was writing on the bottom of Defense Exhibit A which was visible to the jury, and that from that writing the jurors were aware that appellant had a prior conviction.

In fact, the writing said, "Charges 23550(A) V C F D.U.I. w/PR SPEC convictions."

The trial court found that appellant was not prejudiced by the information because the evidence against him was overwhelming on both counts. The court also noted that the jurors had been instructed to consider only evidence that had been presented, and that the court had to believe that the jury followed that instruction. Finally, the court said: "I'm making a finding that the defendant was not prejudiced by the fleeting reference that we know may refer to prior convictions but certainly isn't proof of prior convictions since this was a photograph taken only when the defendant was arrested."

We see no abuse of discretion in the trial court's finding that the information did not prejudice appellant. The evidence of appellant's guilt was overwhelming. He drove erratically. When stopped by police, appellant had difficulty retrieving his wallet and finding the handle to open his car door. When he got out of the car, his gait was unsteady, he was off-balance, his speech was slurred, his eyes were red and his breath smelled of alcohol. The Nystagmus tests indicated intoxication. Appellant was unable to complete any of the four sub-tests of the field sobriety test administered by police officers. The results of his PAS test showed a blood alcohol level of .215 percent, a figure that was likely an underestimate. He refused the chemical test required by law, showing consciousness of guilt. There is no probability or possibility that appellant would have received a more favorable verdict in the absence of the notation on the booking photo.

6. Count 2

Appellant's convictions for violating Vehicle Code section 23153, subdivisions (a) and (b), were based on a single act of drunk driving. The trial court stayed sentence on

count 2, which was the subdivision (b) conviction. Appellant contends that the judgment on count 2 should be modified to state that the conviction cannot be used for penal or administrative purposes. We do not agree.

Appellant relied on *People v. Duarte* (1984) 161 Cal.App.3d 438 to support his argument. Like appellant in this case, the defendant in *Duarte* was convicted of violating Vehicle Code section 23153, subdivisions (a) and (b) based on a single act of drunk driving. The trial court stayed the conviction pursuant to section 654. On appeal, the court modified the judgment by ordering that "the use of the [second] conviction . . . as a prior conviction for penal and administrative purposes, be stayed." (*Id.* at p. 448.)

Generally, Penal Code section 654 not only stays the sentence for a conviction but precludes the use of that conviction unless the Legislature provides otherwise. (*People v. Pearson* (1986) 42 Cal.3d 351, 363.) The Legislature may enact legislation after the date of a conviction which permits the use of a conviction for enhancement or other purposes in a subsequent proceeding even if the sentence was stayed in the original proceeding pursuant to section 654. (*People v. Benson* (1998) 18 Cal.4th 24, 29-30.) Thus, the modification that appellant requests is either unnecessary or ineffective, depending on future circumstances.

7. Abstract of judgment correction

Appellant contends that the abstract of judgment must be corrected because it inaccurately reflects that he pled guilty to counts 1 and 2 and also fails to list the statutory basis for the fines and fees imposed. Respondent agrees. We agree as well.

Appellant was tried and convicted by a jury. The abstract of judgment should be corrected to reflect that fact.

At the sentencing hearing, the trial court imposed a $1,000 fine without stating any basis for the fine. The November 22, 2010 minute order for the sentencing hearing and the abstract of judgment reflect a $1,000 fine and $2,400 in penalty assessments, again without providing the basis for the fine.

Statements at the sentencing hearing suggest, but do not definitively show, that the $1,000 fine was imposed pursuant to Vehicle Code section 23550. It is not clear how the trial court arrived at $2,400 in penalty assessments, however. The abstract specifies a $200 restitution fine pursuant to Penal Code section 1202.4, a $80 court security fee pursuant to Penal Code section 1465.8 and a $60 criminal conviction assessment pursuant to Government Code section 70373, for a total of $340. The abstract then separately lists "a fine of $1,000.00 plus penalty assessment in the sum of $2,400.00 for a total of $3,400.00." Accordingly, the matter must be remanded for clarification. On remand, the trial court should specify the statutory basis for all fines and penalty assessments, and make any necessary corrections to the totals.

Disposition

This matter is remanded to the trial court with instructions to specify the statutory basis of all fines and penalty assessments imposed in this case and to amend the abstract of judgment to show that appellant was convicted following a jury trial. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

I concur:

KRIEGLER, J.

Turner, P. J.

I agree with all of my colleagues' analysis except in connection with the Vehicle Code section 23546, subdivision (a) fine and the accompanying penalties and surcharge. Defendant, Jonathan Wood, has been convicted of felony driving under the influence on July 13, 2008, in violation of Vehicle Code section 23546[1], subdivision (a). In my view, there is no uncertainty as to the fine. But as will be noted, the abstract fails to correctly state the amount of penalties and surcharge. I would correct the abstract of judgment.

The trial court orally stated, "He shall pay a fine of, since he's been gainfully employed and seemed to have lots of money at his disposal throughout the prosecution of this case, a $1,000 fine plus the penalty assessment . . . ." The statutory language indicates the felony driving under the influence fine is mandatory. (*People v. Smith* (2001) 24 Cal.4th 849, 851-852 ["shall" language in Pen. Code, § 1202.45 means parole restitution fine must be imposed and stayed]; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084 [same]; see *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153-1154 [language "shall" in Gov. Code, § 76000, subd. (a) and Pen. Code, § 1464, subd. (a) indicates imposition of the penalties is mandatory].) As noted, Vehicle Code section 23546, subdivision (a) provides for a mandatory fine of $390 to $1,000. Trial judges are presumed to understand their sentencing discretion and duties. (*People v. Moran* (1970) 1 Cal.3d 755, 762; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.) Thus, the trial court was obligated to impose a fine of between $390 and $1,000 which it presumably did.

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[1] Vehicle Code section 23546, subdivision (a) states, "If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of two separate violations of Section 23103, as specified in Section 23103.5, 23152, or 23153, or any combination thereof, that resulted in convictions, that person shall be punished by imprisonment in the county jail for not less than 120 days nor more than one year and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000). . . ."

The trial court stated that the $1,000 fine was imposed plus penalty assessments. When a Los Angeles Superior Court judge imposes a fine and states it includes the penalty assessments, that is a shorthand for imposing the mandatory penalties and surcharge. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864 ["In Los Angeles County, trial courts frequently orally impose the penalties and surcharge discussed above by a short-hand reference to 'penalty assessments.' The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. This is an acceptable practice"]; see *People v. Voit* (2011) 200 Cal.App.4th 1353, 1373 ["We conclude that the trial court adequately pronounced judgment by imposing a specific fine and generally referring to the applicable penalty assessments"].) Here, the trial court expressly used the plus "penalty assessments" shorthand we approved in *Sharret*.

The trial court was obligated to impose the mandatory assessments and surcharge on the fine. The fine was subject to the following: a $1,000 state penalty under Penal Code section 1464, subdivision (a)(1); a $700 county penalty pursuant to Government Code section 76000, subdivision (a)(1); a $200 Penal Code section 1465.7, subdivision (a) state surcharge; a $300 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $200 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a $100 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a $100 Government Code section 76104.7, subdivision (a) state-only deoxyribonucleic acid penalty. (*People v. Sharret*, *supra*, 191 Cal.App.4th at p. 864; *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254 [deduction for local court construction fund].) The total penalties and surcharge imposed that must be imposed is thus $2,600. And this is in addition to the expressly orally imposed $1,000 fine.

Notwithstanding the trial court's perfectly legitimate imposition of the maximum fine plus the penalty assessments, the sum appearing on the abstract of judgment is incorrect. The abstract of judgment states that the total penalties and surcharge equals

$2,400. That sum is not the correct amount. The correct total penalties and surcharge is $2,600. This is the problem we adverted to in *Sharret*. A trial court is free to use the shorthand plus "penalty assessments" shorthand when imposing a fine. But the trial court *must* take steps to insure the amount appearing in the minutes and on the abstract of judgment are *entirely* correct. That did not occur here. Thus, I would correct the abstract of judgment to state that a $1,000 fine is imposed plus the aforementioned penalties and surcharge for a total assessment of $3,600.

Finally, the Attorney General argues the abstract of judgment must state the basis of the fine, which in this case is Vehicle Code section 23546, subdivision (a). The abstract of judgment summarizes the trial court's orders. (*People v. Hong, supra*, 64 Cal.App.4th at p. 1083; see *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Although not mandatory, it makes good sense for the abstract to state the basis of the fine or penalty as they may be designed to create revenue streams for various agencies. (See Gov. Code, § 76000.5, subd. (b) [penalty funds emergency medical services]; Pen. Code, § 1202.5, subd. (b) [fine used for local law enforcement training].) In all other respects, I fully concur in my colleagues' analysis.

TURNER, P. J.