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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOSE M. MENDEZ-GONZALEZ,** **Defendant and Appellant.**	**A124916** **(Sonoma County Super. Ct. No. SCR514067)**

Jose M. Mendez-Gonzalez appeals from a judgment entered after a jury found him guilty of first degree murder. (Pen. Code, § 187.) He contends the court erred in discharging a sworn juror during the trial, before deliberations began, upon a finding that the juror's anxiety and distraction in missing work would substantially impair his ability to deliberate. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An amended information charged appellant with murder (Pen. Code, § 187, subd. (a)) and alleged he personally discharged a firearm resulting in death or great bodily injury (Pen. Code, § 12022.53, subds. (b), (c), and (d)). The matter proceeded to trial.[1]

[1] Although the facts of the case are not directly relevant to the issue on appeal, we include a brief summary for background purposes. Facts relating to the removal of the juror are set forth *post*.

A. Prosecution

Appellant and his cousin, victim Pedro Gonzalez-Ruiz (Ruiz), worked together at a market. In June 2007, they were no longer on speaking terms.

On June 13 or 14, 2007, appellant told his friend Jaime (Ruiz's brother) that he was thinking about killing Ruiz because Ruiz was "hitting on his girlfriend." Appellant informed Jaime that he had a .22-caliber gun and had "everything set up," but he had relented up to that point due to the effect Ruiz's death would have on his family. Jaime asked him to consider the consequences.

On the evening of June 15, 2007, appellant picked up another cousin, Miguel Guzman, in his car, and the two later picked up Ruiz.[2] Appellant drove them to a location on an unpaved road and stopped the car. There, appellant and Ruiz got out of the car, and Guzman heard two or three (or three or four) gunshots. Appellant quickly returned to the car alone and entered on the passenger side. Guzman drove off with him, stopping briefly at appellant's request, at which point appellant got out of the car (according to the prosecution, to discard the murder weapon) and got back in. They continued on to Guzman's house.

Later that evening, Jaime saw appellant. Appellant seemed nervous, and his eyes were a little watery. Appellant told Jaime: "It happened." On cross-examination, Jaime testified that appellant told him "they shot him" and mentioned someone named "Wicker."

On June 17, 2007, Ruiz's dead body was found in a brushy area down an embankment, about 30 feet from a gravel road. Drag marks led from the road to the bottom of the embankment near Ruiz's body. There was a bloodstain in the road where the drag marks began. Two spent .22-caliber casings and an unspent .22-caliber round were found in the middle of the road, and another spent .22-caliber casing was located near Ruiz's body. Ruiz had three gunshot wounds to the head and one to the chest. The wounds were consistent with a .22-caliber handgun.

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[2] Guzman testified under a grant of immunity from further prosecution after pleading guilty to being an accessory to the killing of Ruiz.

Police questioned appellant. He claimed that he picked up Wicker and later Ruiz in his car. They stopped on a small dirt road, and they all got out of the vehicle. Wicker test-fired a handgun to see if it worked, and then asked Ruiz and appellant if they wanted to fire it, too. After they declined, Wicker pointed the gun to appellant's head and told him to "bounce;" appellant got in his car and left. He looked back after hearing a gunshot and saw Wicker standing over Ruiz's body.

Detectives assisted in a search of appellant's residence, while appellant remained outside. There, appellant spontaneously told Detective Vivian: " '*I* did it. *I* killed him. *I* killed him. You know, he treated me like shit . . . and said we weren't family.' " (Italics added.) Appellant cried and repeated that Ruiz kept "fucking with him at work" and was "always putting him down" and saying they were not family. Officer O'Leary also heard appellant say that he shot Ruiz. Detective Wallahan heard someone say, "I can't believe I did it fool."

Appellant agreed to show the detectives where he killed Ruiz. Weeping and seemingly remorseful, he led them to a point on the road where power lines cross away from the road and said, "I was on the passenger side of the car and I threw the gun in the air and it hit utility wires." He looked up at the utility wires and identified the location where he threw the gun, which he identified as a silver .22-caliber semiautomatic. Appellant pointed further up the road and said Ruiz's body was "up there." He also admitted to detectives that he shot Ruiz in the back of the head, shot him in the chest after he fell to the ground, dragged his body off the road, and then shot him a third time in the head. As he spoke, appellant looked in the exact location where the deputies had found Ruiz's body.

Deputies located a .22-caliber semiautomatic handgun about 70 feet from the road. Forensic analysis showed that the casings found at the scene were fired from the .22-caliber semiautomatic. Deputies found a black t-shirt and a pair of gloves off the roadway. DNA testing matched the t-shirt and gloves to appellant and his cousin, Guzman. Appellant's shoes, shirt, and pants tested positive for gunshot residue.

Appellant was taken to the sheriff's department and interviewed further. Appellant explained that Ruiz had been disrespectful and flirted with his girlfriend Dolce. Appellant therefore decided to shoot Ruiz, noting "it felt so simple" and would allow him to "get rid of the stress."

Appellant proceeded to describe the killing in detail, including that he shot Ruiz twice in the head and once in the chest, since Ruiz kept making noises after being shot the first time. Specifically, he drove Wicker and Ruiz to the dirt road, and he put on a long-sleeve t-shirt and gloves to avoid getting gunpowder on him. Appellant got out of the car with the gun and approached Ruiz from behind. Appellant held the gun up at an angle behind Ruiz's ear and shot him. Ruiz dropped to the ground, gagging and wheezing for air. Appellant looked away and fired a second shot into Ruiz's chest. Appellant dragged Ruiz off the road by the feet. Finding Ruiz still alive, appellant shot him in the head again. Appellant returned to the car and drove away with Wicker.

B. Defense

Appellant testified essentially that "Wicker" was really his cousin Guzman, and it was Guzman, who had obtained prosecutorial immunity, who really murdered Ruiz.

According to appellant at trial, he, Ruiz, and Guzman drove to the dirt road at Guzman's direction. Guzman had a gun that he was going to sell to Ruiz. Guzman told appellant where to stop, and all three men got out. Guzman offered to let them fire the gun, but they declined; Guzman tried to fire it, but it jammed. Then appellant heard a gunshot; he "started freaking out" and went to the driver's side of the car; he looked back and saw Ruiz on the ground. Guzman went back to Ruiz, and appellant heard more gunshots. He saw Guzman dragging Ruiz to the side of the road and then heard another shot. He and Guzman drove off.

Appellant claimed he did not have any problems with Ruiz on June 15, the day of the murder. Ruiz was flirting with Dolce about a year earlier, but that was before appellant started to date her. (Dolce *was* appellant's girlfriend as of June 15, however, and his wife at the time of trial.) Appellant claimed he made up the story about

"Wicker," and then confessed to killing Ruiz himself, because he was afraid of Guzman and did not want to snitch on him.

Appellant did not recall telling the detectives, outside his home, that he killed Ruiz. Nor did he remember describing the details of the shooting to detectives at the murder scene.

C. Jury Verdict and Sentence

The jury convicted appellant of first degree murder and found the enhancement allegations true.

The court sentenced appellant to an aggregate term of 50 years to life in state prison, comprised of 25 years to life on the murder count and a consecutive 25 years to life for the enhancement under Penal Code section 12022.53, subd. (d).

This appeal followed.

II. DISCUSSION

The sole issue in this appeal is whether the court erred in discharging Juror 623 shortly after trial began. He contends the court violated Penal Code section 1089 and his rights under the federal and state constitutions.

A. Factual Background

Juror 623 worked as a supervising officer at the North County Detention Facility for the Sonoma County Sheriff's Department.

On Friday, January 30, 2009, after he was empaneled and sworn as a juror, Juror 623 contacted the court. In a reported conference with counsel present, he asserted that his lieutenant, upon learning of Juror 623's selection on the jury, wanted the court to know that Juror 623 was assigned to work in the detention facility for 11 shifts "next month" (February 2009). Juror 623 explained that, as a supervisor, he was required to read "briefing notes" and thought he might read something about the accused or come in contact with him. Juror 623 believed he could still give his 100 percent as a juror and focus on the case, and he wanted to be fair. The court issued an order to Juror 623's supervisor, Captain Walker, to arrange affairs at the detention facility so that Juror 623

had no contact with or information about appellant. Both the prosecution and defense passed Juror 623 for cause.

That same day, the court informed Juror 623 of its order. Juror 623 said that the order's interference with his job would not affect his ability to be a fair and impartial juror.

Later that day, opening statements took place and the prosecutor began to present testimony.

On that same Friday, Sonoma County Counsel Anne Keck appeared for the Sheriff's Department to request that Juror 623 be removed because he was a supervising correctional officer and relief sergeant at the detention facility. County counsel asserted that Juror 623 was a peace officer ineligible for jury service (Code Civ. Proc., § 219, subd. (b)(1)), and the infirmity could not be waived. The matter was continued to the following court day.

On Monday, February 2, 2009, county counsel reiterated her position and added that the sheriff's office could not comply with the court's order due to the nature of Juror 623's job. At this point, both the prosecution and the defense expressed their desire that Juror 623 remain on the jury, and they each waived any infirmity with respect to Code of Civil Procedure section 219. The court determined that, although Juror 623 was ineligible for jury service, the matter was waived. While the court appreciated the inconvenience caused to the sheriff's department, it ruled that Juror 623 would remain on the jury. Trial testimony resumed.

On Monday afternoon, Juror 623 again asked to speak to the judge. He informed the court that his service on the jury "ha[d] become a bigger issue than [he] thought it would be." This time, he expressly requested to be excused from jury service, explaining that he was anxious about missing work and the pressure his jury service was putting on his fellow custodial officers who were having to cover 11 shifts for him. Juror 623 asserted that his inability to work at his job was "a problem for me personally because I feel like all of a sudden I can't do my job that I am being paid to do." He assured the court that his request to be removed was his own choice.

The court asked Juror 623 if he could still be fair and impartial to both sides. The juror replied that he is a "fair person." When asked if the situation would cause anxiety or pressure affecting his service as a juror, he explained that his conscience was bothered because his colleagues would have to do his work.

The prosecutor, defense counsel, and the court proceeded to inquire further of Juror 623. Asked whether his concerns would affect his ability to serve, Juror 623 stated: "I've been thinking about it all these days since Friday and it really – it makes it *hard for me to be a hundred percent partial – excuse me – to be fair to both sides*." (Italics added.) He explained: "*At times my mind wanders off* to some other place besides here because I'm thinking who's going to cover for me, who's going to be working for me on this day and that day, that is the only thing." (Italics added.)

Asked whether the burden on his coworkers would affect his ability to deliberate, he stated, "probably very minimal." When pressed for a "yes" or "no" answer, Juror 623 stated he was "not sure." He said he would "still be fair" and would "pay attention," adding: "I think I'm giving a hundred percent to the trial." On the other hand, he acknowledged it would be difficult for him to set his work situation aside when serving as a juror. The prosecutor asked, "so leaving you on there is a distraction according to what you just said, is that correct, for you?" Juror 623 replied, "I think at this time *it is*." (Italics added.) The fact that, due to the court's order, he could not do his job, affected him personally. When asked if he would be able to concentrate on the evidence being presented even with this concern about work, Juror 623 replied: "I can concentrate." He elaborated that he did not think the situation would affect his ability to deliberate, but it *would distract him* from being 100 percent focused during the trial.

The court commented, "right now it sounds to me that would affect his ability to be a juror and to deliberate. . . . [R]ight now that is what I'm hearing. You are still asking to be excused as a juror, correct?" Juror 623 replied, "It would probably be best." When asked for a more definitive statement, the juror asserted: "I would like to request to be excused." He explained: "Because it has become an emotional thing for me, and nothing

to do with the case, just to do with my situation." Juror 623 confirmed that the impact his jury service would have on his coworkers was causing him "a little bit of anxiety."

The court found good cause to excuse (discharge) Juror 623, because he would be distracted from giving his full attention as a juror. "It is not just being fair and impartial. . . . Is he going to have anxiety and could it distract him? He said he is distracted. He said a little bit, but to him I mean from the court *looking at his body English and listening to him* would he be distracted? The answer in the court's mind is yes. That's what we've got right now." (Italics added.)

The prosecutor agreed with the court that Juror 623 was clearly requesting to be excused and indicating that he was not going to concentrate 100 percent, and that there was good cause to remove Juror 623 from the jury.

Defense counsel objected to removing Juror 623, claiming he could compartmentalize matters and leave his work situation behind. The trial court disagreed: "He didn't put it into much of a compartment. He just took it out and said [']it was bothering me. I may have been in a compartment up until this afternoon, but it is out.' " The court concluded that Juror 623's anxiety from missing work would substantially impair his ability to deliberate and discharged him for cause. An alternate juror was chosen, without further objection, and the trial proceeded.

B. Analysis

Penal Code section 1089 provides in part: "If at any time, whether before or after the final submission of the case to the jury, . . . a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box . . . ." Good cause may arise when a juror becomes physically or emotionally unable to continue to serve. (See *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) Anxiety resulting from missing work may constitute good cause to remove the juror. (*People v. Earp* (1999) 20 Cal.4th 826, 892-893 [financial hardship in remaining on jury might exert pressure to bring trial to a close]; *People v. Lucas* (1995) 12 Cal.4th 415, 488-489 [distress over missing a scheduled vacation constituted good cause for discharge]; *People v. Fudge* (1994) 7

Cal.4th 1075, 1098-1100 [juror's anxiety over need to complete paperwork required for her new job would affect her ability to deliberate].)

Although a decision to discharge a juror is within the trial court's discretion, the basis for the discharge must appear on the record as a "demonstrable reality." (*People v. Lomax* (2010) 49 Cal.4th 530, 589.) "The inquiry is whether 'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' " (*Id*. at p. 590.)

The evidence on which the court relied, in this case, manifestly supported the conclusion that there was good cause to discharge Juror 623, in that his anxiety over his work situation was distracting him and would substantially impair his ability to serve. Juror 623 stated that his inability to work (and his resulting concern for his colleagues) was causing him "anxiety," it made it hard for him to be 100 percent fair to both sides, at times his mind "wander[ed] off," he was distracted, there would be some effect on his ability to deliberate, and it would be difficult for him to set his work situation aside to focus on the case. Furthermore, it was not just what Juror 623 said, but how he said it and how he looked when he was speaking: the court noted, without contradiction, that Juror 623's body language and speech showed he was distracted. (See *Lucas, supra*, 12 Cal.4th at p. 489 [although juror denied that cancellation of her vacation would affect her ability to perform her duties as a juror, her demeanor suggested otherwise in bringing the matter to the court's attention and exhibiting concern and agitation].)

Appellant argues that we should reverse the court's ruling and overturn his conviction because, in addition to all that Juror 623 said as noted above, he also said he could "concentrate," be "fair and impartial," and would suffer only "a little bit of anxiety." Appellant's argument is unpersuasive. While the "demonstrable reality" standard is something more than the abuse of discretion standard, it does *not* permit us to reweigh the evidence. (*Lomax, supra*, 49 Cal.4th at p. 589.) The evidence provided to the trial court – both what Juror 623 said and how he appeared – established a demonstrable reality of circumstances that provided good cause to discharge Juror 623.

In essence, the trial court was confronted with a juror who was asking to be removed because he was suffering some degree of anxiety and distraction that would

keep him from focusing totally on his task in a murder trial. The underlying circumstances were confirmed by county counsel and Captain Walker. While the juror did not overplay the extent of his anxiety and distraction, he certainly stated they existed. While he not surprisingly added that he thought he could be fair and impartial, he also expressed doubt that he could be 100 percent fair. Moreover, a desire to be fair and impartial does not carry the day if the juror is unable to give his full attention to what is happening during the trial. In any event, any uncertainty or inconsistency in Juror 623's words had to be evaluated by the judge in light of the juror's demeanor, which the court found to point decidedly toward a level of distraction that warranted discharge from the jury. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 348; *Lucas, supra*, 12 Cal.4th at p. 489.)

Appellant argues that the court's reference to Juror 623's "body English" and "listening to him" is not as good as the statement by the trial court in *Zamudio* that a juror was "obviously visibly concerned" (*Zamudio, supra,* 43 Cal.4th at p. 348) or the court's conclusion in *Lucas* that a juror repeatedly exhibited "agitation" (*Lucas, supra*, 12 Cal.4th at p. 489). We disagree. To the contrary, the court's finding in this case is more precise and elaborative than the findings in *Zamudio* and *Lucas*, since the court not only stated its conclusion that Juror 623's appearance showed he would be distracted, but also explained a *basis* for that conclusion ("body English [language] and listening to him").

Appellant further argues that the court's decision was wrong because Juror 623's situation was less severe than the circumstances facing jurors in *Earp, Fudge* and *Lucas*. None of those cases, however, held that jurors could never be discharged unless confronted with pressures that were identical to the ones afflicting the jurors in those cases. The critical point is simply whether there was sufficient evidence for the court in this case to conclude there was good cause to excuse Juror 623; for the foregoing reasons, there was.

Lastly, appellant's reliance on *People v. Wilson* (2008) 44 Cal.4th 758 is misplaced. There, the trial court removed a hold-out juror during deliberations in the penalty phase of a capital case, based in part on statements of other jurors that the hold-

out juror would not put aside racial bias. (*Id*. at pp. 814-815.) The hold-out juror claimed that his decision against the imposition of the death penalty was based on his view of the mitigating evidence. (*Id*. at p. 814.) Our Supreme Court held that the juror was improperly discharged, because his reliance on his own life experience did not render him unable to serve under Penal Code section 1089. (*Id*. at pp. 831, 840-841.)

Wilson is plainly distinguishable from the matter at hand. While the juror in *Wilson* was removed *involuntarily* because of the *manner* in which he was deliberating in the penalty phase of a death penalty case, Juror 623 was removed at his *own request* because of his anxiety over missing work, which affected his *ability* to focus on his task as a juror. Moreover, while the juror in *Wilson* was a lone hold-out juror removed during deliberations in favor of a juror who ultimately voted that the defendant be put to death (*Wilson, supra,* 44 Cal.4th at p. 814), Juror 623 was removed after just one day of trial and replaced by an alternate juror acceptable to the defense. The context of the two cases are vastly different, and *Wilson* is unhelpful to our analysis on this point.

Appellant has failed to establish that Juror 623 was discharged in violation of Penal Code section 1089 or his constitutional rights. (See *Wilson, supra*, 44 Cal.4th at p. 821 [discharge of juror for good cause pursuant to Pen. Code, § 1089 is not unconstitutional].)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.