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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JANET DELONG, Defendant and Appellant.	B152019 (Super. Ct. No. SA040077)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie Sautner, Judge. Affirmed.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, and Marc J. Nolan, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2 and 3 of the Discussion.

INTRODUCTION

In the case of *In re Delong* (2001) 93 Cal.App.4th 562, we addressed the threshold issue of when Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, and Penal Code section 1210.1, subdivision (a),[1] enacted thereunder, first applied in a criminal proceeding.[2] Today, in the published portion of this opinion, we return to Proposition 36 and, in another case of first impression, we decide an issue at the opposite end of the timeline of issues presented in Proposition 36 proceedings. Delong has appealed from the judgment (order granting probation) entered following her conviction by jury of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)). She was placed on probation for three years.

We hold here that although the appellant Janet Delong's conviction for possession was set aside pursuant to Proposition 36, because she successfully completed the prescribed drug treatment program and fulfilled her probation conditions, her appeal was not thereby rendered moot. That is so because she is entitled to an opportunity to clear

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1 Unless otherwise indicated, all statutory references are to the Penal Code.

2 There, we held that a defendant is not "convicted" of a nonviolent drug possession offense within the meaning of section 1210.1, subdivision (a), until the defendant has been adjudged guilty of such an offense *and* judgment has been pronounced thereon. Therefore, we concluded that, in proceedings in which the defendant was adjudged guilty before, but judgment was pronounced after, the effective date of Proposition 36, the trial court erroneously ruled that Proposition 36 was inapplicable because of the circumstance that the defendant was adjudged guilty before the effective date of the proposition. Accordingly, we held that the trial court violated Proposition 36 by imposing incarceration on the defendant as a condition of probation. (*In re Delong*, *supra*, 93 Cal.App.4th at pp. 566-571.)

her name and rid herself of the stigma of criminality. In addition, the conviction still exists for some purposes and has certain prejudicial collateral consequences in spite of the fulfillment of her probation conditions. Moreover, a conclusion that the present appeal is moot would disserve Proposition 36 by penalizing defendants who completed their drug programs while rewarding defendants who did not, since only the latter could maintain such appeals.

In the unpublished portion of this opinion, we reject Delong's contention that the trial court erroneously denied her second *Wheeler*[3] motion, and reject her contention that the trial court erroneously excluded, under Evidence Code section 352, certain hearsay statements allegedly admissible as declarations against interest.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on August 10, 2000, police arrested Delong after they discovered .88 grams of a usable amount of cocaine in her purse in Culver City. At the time, Delong appeared to be under the influence of a central nervous stimulant such as cocaine.

In defense, Delong claimed that, on the above date, she went with Joel Burg to his hotel room. Two other persons were present. Burg gave her drinks and she eventually passed out on a bed. She awoke to see the two persons kissing, and the two moved to the same bed and continued kissing. Burg began touching Delong's hair. Delong entered a

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3 *People v. Wheeler* (1978) 22 Cal.3d 258.

bathroom and locked its door. Burg attempted to persuade Delong to stay but was unsuccessful and called her a bitch. Delong left, but her purse lay unattended at various times before she left. Delong later directed the officers who arrested her to Burg's room, where officers discovered narcotics. On September 8, 2000, Delong's husband accused Burg of planting something on Delong as a "sick joke." Burg replied, "You can't prove it -- so what if I did it. You can't prove it."

In rebuttal, a detective testified that, after Delong's arrest, he asked her if the drugs in her purse were for sale or personal use. Delong replied they were for personal use and she did not often use drugs.

CONTENTIONS

Delong urges that two prejudicial errors justifying reversal were committed by the trial court when it (1) denied her renewed *Wheeler* motion and (2) excluded, pursuant to Evidence Code section 352, defense evidence of a third party's declarations against penal interest. The People dispute these contentions and argue that, in any event, "[t]he appeal should be dismissed as moot." We address this predicate issue first.

DISCUSSION

1. *The Present Appeal Should Not Be Dismissed As Moot.*

The following facts are undisputed. An information filed in November 2000, alleged that, in August 2000, Delong possessed cocaine in violation of Health and Safety Code section 11350, subdivision (a). On May 18, 2001, Delong was convicted by jury of that charge. On July 1, 2001, Proposition 36, the Substance Abuse and Crime Prevention

Act of 2000, and section 1210.1, enacted as part of that proposition, took effect. On July 12, 2001, the sentencing court pronounced judgment, suspending imposition of sentence and ordering Delong placed on formal probation. The court also, over Delong's objection that Proposition 36 applied in the present case and precluded an incarceration order, ordered that, as a condition of probation, Delong be incarcerated in local custody for 150 days.

On July 19, 2001, Delong filed a petition for a writ of habeas corpus directing the lower court to impose probation, but without incarceration, pursuant to Proposition 36. On October 31, 2001, in the case of *In re Delong* (2001) 93 Cal.App.4th 562, (hereafter, *Delong*), we granted the petition.[4]

On February 6, 2002, pursuant to our writ, the trial court ordered that Delong's probation be modified and that she be placed on "formal Proposition 36 probation[.]" (Some capitalization omitted.) All other orders were ordered to remain in effect.[5] At some point prior to March 21, 2002, Delong successfully completed a Proposition 36 drug program (discussed *infra*), therefore, on March 21, 2002, the lower court, pursuant to Proposition 36, set aside Delong's conviction and dismissed the information.

The People argue, "[b]y operation of law, i.e., Proposition 36, there is now no underlying conviction to appeal, or for this Court to affirm or reverse, or for the People to

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4 See fn. 2, *ante*.

5 Except to the extent the People claim the present appeal is moot, there is no dispute that we have appellate jurisdiction in this case.

re-try upon reversal. By completing her drug treatment program, this would-be appellant has 'served' her 'sentence' and then, unlike most persons convicted of crimes, had her conviction set aside. The appeal should therefore be dismissed."

It is settled that "[a]n action that involves only abstract or academic questions of law cannot be maintained. [Citation.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 642, p. 669.) Moreover, "'[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.' (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 642, p. 669.)" (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404.)

The issue of whether events which occur during the pendency of an appeal of a criminal conviction can render the appeal moot is not a novel one. An enlightening annotation canvassing American jurisprudence pertinent to the issue provides perspective. (Annot., When Criminal Case Becomes Moot So As to Preclude Review of or Attack on Conviction or Sentence (1966) 9 A.L.R.3d 462.) That annotation reveals, "The law as to when a criminal case is moot so as to preclude review of or attack on a conviction or sentence is now unsettled, with a noticeable tendency in the more recent cases to relax rules against the review of judgments in criminal cases, in certain circumstances. [Footnote omitted.] The area of greatest disagreement is that in which the accused has satisfied his sentence, as by serving a prison term or paying a fine. In this area, three general rules have emerged: [¶] (1) The traditional rule that the satisfaction of the sentence renders the case moot so as to preclude review of or attack on

the conviction or sentence. [Footnote omitted.] [¶] (2) The liberal view that an accused's interest in *clearing his name* permits review of or attack on the conviction or sentence even after the sentence has been satisfied. [Footnote omitted.] [¶] (3) The federal rule that the satisfaction of a sentence renders the case moot so as to preclude review of or attack on the conviction or sentence unless, as a result of the conviction or sentence, the accused suffers *collateral legal disabilities* apart from the sentence, in which event the accused is held to have a sufficient stake in the conviction or sentence to permit him to obtain review of, or maintain a challenge to, the conviction or sentence. [Footnote omitted.]" (Annot., *supra,* 9 A.L.R.3d at pp. 466-467, italics added.)

California appears to subscribe to the so-called "liberal view," although at least one California case suggests that a mootness inquiry may also include consideration of whether prejudicial consequences or disadvantageous collateral consequences can be ameliorated by a successful appeal. In the case of *In re Byrnes* (1945) 26 Cal.2d 824, in pertinent part, the defendant was tried and convicted in two successive cases. The cases were sentenced consecutively and he appealed both. He later filed a petition for a writ of habeas corpus claiming he did not have the trial transcripts he needed to perfect his appeals. The defendant requested that the petition be granted or that an order be made requiring the appeals to be heard and determined. The petition was answered but, by the time the appellate court considered its merits, the defendant had served his term of imprisonment for the convictions resulting from the first trial. (*In re Byrnes*, *supra*, 26 Cal.2d at p. 825.)

Nonetheless, that fact did not render the petition moot. "Although it is conceded that, as the petitioner has served his full term for the offenses of which he was convicted in the first trial, he cannot obtain relief as to them so far as imprisonment is concerned, the question presented is not moot and he is entitled to an appeal from the judgments in that case *for the purpose of clearing his name*." (*In re Byrnes*, *supra*, 26 Cal.2d at p. 827, italics added.)[6]

In re Dana J. (1972) 26 Cal.App.3d 768 (hereafter, *Dana J.*), is also pertinent. There, a petition alleged a minor came within Welfare and Institutions Code section 602

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6 See also *People v. Succop* (1967) 67 Cal.2d 785 (hereafter, *Succop*), where the Supreme Court relied on *Byrnes* in a case involving mentally disordered sex offender (MDSO) proceedings. In *Succop*, after the defendant was convicted of indecent exposure, but before he was sentenced, the court adjudged the defendant a probable MSDO and ordered him temporarily committed to a state hospital for observation. (*Succop*, *supra*, 67 Cal.2d at p. 788.) The hospital later rejected the defendant on the ground that he was an MDSO who was not amenable to treatment, and he was returned to court for further proceedings. The court then denied the defendant probation and sentenced him to prison. (*Id*. at pp. 788-789.)

The defendant appealed the judgment of conviction (*Succop*, *supra*, 67 Cal.2d at p. 787) and, on appeal, an issue was raised concerning the lawfulness of the temporary commitment order. The Supreme Court concluded the trial court had violated several provisions of the statute governing proceedings pertaining to MDSO commitments, as well as the defendant's right to due process. (*Id.* at p. 789.)

The Attorney General claimed the issue was moot because the defendant had been returned to court and, therefore, was no longer confined in the hospital. The Supreme Court rejected the claim, noting that if the defendant had not been erroneously denied certain statutory rights pertaining to MDSO proceedings, the court might have found that the defendant was not a probable MDSO, and such a finding would have been relevant to the issues of whether probation should have been granted and, if defendant were imprisoned, whether parole later should have been granted. (*Succop*, *supra*, 67 Cal.2d at pp. 789-790.) The Supreme Court then stated, "Furthermore, *defendant is entitled to the opportunity to clear his name* of the adjudication that he is a probable mentally disordered sex offender. [Citations.]" (*Succop, supra,* 67 C.2d at p. 790, italics added.)

because he possessed narcotics. At trial, a referee acquitted the defendant of that charge but, noting the defendant needed probation, and over defendant's objection, amended the petition to add a charge of loitering and convicted him of that charge. (*In re Dana J.*, *supra*, 26 Cal.App.3d at p. 769.) The conviction raised the issue of whether the defendant had been denied a reasonable opportunity to defend against the loitering charge. (*Id.* at p. 771.) Without adjudging or declaring the defendant to be a ward of the court, the court placed the defendant on probation for six months. (*Id.* at p. 770.)

The defendant filed an appeal but, during its pendency, and after the expiration of the six-month probationary period, a superior court judge ordered the case dismissed. (*In re Dana J.*, *supra*, 26 Cal.App.3d at pp. 769-770.) As a result, the People moved to dismiss the appeal as moot. (*Id.* at p. 771.)

The appellate court in *Dana J.* wrote, "We do not believe that the appeal should be dismissed. In the case before us, appellant *was found to have violated a law and was ordered to serve six months on probation*. . . . It is, . . . '[the] purpose of [juvenile court law] to secure for each minor under the jurisdiction of the juvenile court such care and guidance . . . as will serve the . . . welfare of the minor and the best interests of the State; . . . This [law] shall be liberally construed to carry out these purposes.' [Citation.] '[The] rights of the minor remain paramount in view of the serious consequences attending delinquency proceedings.' [Citation.] The juvenile's right of appeal, . . . affords the juvenile the opportunity to rid himself of *'the stigma of criminality'* (*T.N.G.* v. *Superior Court*, 4 Cal.3d 767, 775 . . .) and to *'clear his name'* of a criminal charge [citation]. To deny the juvenile this opportunity would serve neither the interests of the

juvenile nor the interests of the state, and the fact that the juvenile suffered a noncustodial disposition (probation) rather than a custodial disposition (wardship), *is of no more moment to the consideration of a juvenile appeal than it is to the consideration of an adult appeal*. [Citation.] '[*The*] *matter of a besmirched name remains'* [citation], and the appeal is not moot. (See *In re Richard D*., 23 Cal.App.3d 592, 594-595 . . .)" (*Id.* at p. 771, italics added.)

People v. Lindsey (1971) 20 Cal.App.3d 742, (hereafter, *Lindsey*), provides a helpful contrast as to when a criminal appeal should be dismissed as moot. In *Lindsey*, a trial court determined after a hearing that a criminal defendant was insane and ordered him committed to a state hospital; the defendant appealed that order. Later, the defendant was certified as sane and criminal proceedings resumed. (*People v. Lindsey*, *supra*, 20 Cal.App.3d at p. 743.)

Lindsey observed, "The [May 1971] order of commitment . . . is an appealable judgment. [Citation.] Since a person committed under Penal Code section 1370 must be held until he becomes sane, such a commitment may result in a permanent deprivation of liberty. In this case the superintendent's certification of sanity terminates the commitment, *leaving no prejudicial consequences* which could be ameliorated by a successful appeal. This appeal has therefore become moot and must be dismissed." (*People v. Lindsey, supra*, 20 Cal.App.3d at pp. 743-744, italics added.) *Lindsey* later observed, "[t]he certificate of [sanity] . . . attests that defendant is no longer under . . . a [mental] disability. *The law imposes no disadvantageous collateral consequences* upon

one whose trial has had to be postponed by reason of such a temporary disability." (*Id*. at p. 744, italics added.)

Applying the above discussion to the present case, we note that in *Delong*, we observed, "Proposition 36, which was approved by the voters at the November 7, 2000 general election, effected a change in the sentencing law so that a defendant convicted of a nonviolent drug possession offense is generally sentenced to probation, instead of state prison or county jail, with the condition of completion of a drug treatment program. The declared purpose of Proposition 36 is to 'divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses.' (Prop. 36, § 3.)" (*In re Delong*, *supra*, 93 Cal.App.4th at p. 566.)

Section 1210.1, subdivision (d), provides for the "[d]ismissal of charges upon successful completion of drug treatment"[7] and discusses, inter alia, the circumstances in

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[7] Section 1210.1, subdivision (d), provides, "(1) At any time after completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges. If the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted. [¶] (2) Dismissal of an indictment, complaint, or information pursuant to paragraph (1) does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under Section 12021. [¶] (3) Except as provided below, after an indictment, complaint, or information is dismissed pursuant to paragraph (1), the defendant may indicate in response to any question concerning his or her prior criminal

which, as a result of said completion, a conviction for a nonviolent drug possession offense may be "deemed not to have occurred" and a defendant may be released from the disabilities of such a conviction. Under subdivision (d), however, a conviction for a nonviolent drug possession offense is "deemed not to have occurred" for some purposes *but not others*, and a defendant is released from some *but not all* disabilities resulting from the conviction.

Pursuant to subdivision (d)(1), as pertinent here, if a defendant petitions the sentencing court for dismissal of the charges, and the court finds that the defendant successfully completed drug treatment and substantially complied with probation conditions, the conviction on which the probation was based "shall be set aside" and the information against the defendant shall be dismissed. In addition*, except as provided in subdivisions (d)(2) and (3)*, the conviction "shall be deemed never to have occurred" and the defendant shall be released from "all penalties and disabilities" resulting from the offense of which the defendant was convicted.

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record that he or she was not arrested or convicted for the offense. Except as provided below, a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. [¶] Regardless of his or her successful completion of drug treatment, the arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. Dismissal of an information, complaint, or indictment under this section does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer as defined in Section 830, for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury."

Section 1210.1, subdivision (d)(2), provides, in pertinent part, that dismissal of an information pursuant to subdivision (d)(1), does not prevent a person's "conviction under section 12021." We note that a conviction under section 12021, may be based, under section 12021, subdivision (a)(1) or (b), on possession of a firearm by a person who has suffered a *prior felony conviction*.[8] Thus, even if, pursuant to section 1210.1, subdivision (d)(1), a conviction for a nonviolent drug offense has been "set aside" and "deemed never to have occurred," and a defendant has been "released from all penalties and disabilities" resulting from the conviction offense, that fact does not prevent that conviction from later being used as a *prior felony conviction* permitting, under section 1210.1, subdivision (d)(2), a "conviction under section 12021." Moreover, to the extent of that usage, the conviction for the nonviolent drug offense *still exists*.

Section 1210.1, subdivision (d)(3), provides, in pertinent part, that a conviction for a nonviolent drug possession offense *may* be *recorded* by the Department of Justice, *may* be *disclosed* in response to law enforcement inquiry, and *must* be *disclosed* by the

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8 Section 12021, subdivision (a)(1), provides, in pertinent part, "Any person who has been *convicted of a felony* under the laws of the United States, of the State of California, or any other state, government, or country, . . . who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." Section 12021, subdivision (b), provides, "[n]otwithstanding subdivision (a), any person who has been *convicted of a felony* . . . , when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." (Italics added.)

defendant in connection with specified matters.[9] Thus, even if, pursuant to section 1210.1, subdivision (d)(1), a conviction for a nonviolent drug offense has been "set aside" and "deemed never to have occurred," and a defendant has been "released from all penalties and disabilities" resulting from the conviction offense, that fact does not exempt the defendant from the application of *the recording and disclosure provisions* of subdivision (d)(3). Moreover, to the extent of that application, the conviction for the nonviolent drug possession offense *still exists*, and the defendant has *not* been released from "all . . . disabilities."

There is no dispute that Delong's notice of appeal has invested this court with appellate jurisdiction in this case. Moreover, as discussed above, Delong's conviction for a nonviolent drug possession offense, to some extent, still exists. To that extent, Delong continues to suffer a besmirched name and the stigma of criminality. Further, to the extent the conviction continues to exist, Delong continues to suffer disadvantageous and prejudicial collateral consequences therefrom, that is, the above discussed potential use of the conviction as a prior felony conviction permitting a "conviction under Section 12021" pursuant to section 1210.1, subdivision (d)(2), and the "disabilities" of the recording and disclosure provisions of section 1210.1, subdivision (d)(3). These facts militate against a conclusion that the instant appeal is moot. The fact that Delong successfully has

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[9] We note in this regard that one of those matters is "licensure by any state or local agency"; the probation report in this case reflects Delong is employed by the Culver City school system; and it appeared that, at oral argument, the parties conceded she was a teacher.

completed her probationary period and drug treatment program no more compels a contrary conclusion than if she had successfully completed a prison term imposed as a result of the conviction, a consideration which California case law reveals to be irrelevant.

The declared purpose of Proposition 36 is to "'divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses.' (Prop. 36, § 3.)" (*In re Delong*, *supra*, 93 Cal.App.4th at p. 566.) The People's argument that the present appeal is moot would disserve that express legislative declaration. Defendants who successfully completed their programs and fulfilled their probation conditions would have their convictions set aside with the results that the appeals of said defendants would be moot and collateral consequences of convictions would be unavoidable, but convictions of defendants who did not successfully complete their treatment and who fulfilled none of their probation conditions would not be set aside, and such defendants could prosecute their appeals. In light of all of the above, we conclude that Delong, to the extent discussed above, still stands "convicted" of a nonviolent drug possession offense within the meaning of sections 1210 and 1210.1, subdivision (a), and her appeal is not moot. (Cf. *In re Byrnes*, *supra*, 26 Cal.2d at pp. 825, 827; *In re Dana J.*, *supra*, 26 Cal.App.3d at pp. 769-771; see *People v. Succop*, *supra*, 67 Cal.2d at pp. 788-

790; *People v. Lindsey*, *supra*, 20 Cal.App.3d at pp. 743-745.)[10]

2. *The Court Did Not Reversibly Err By Denying Delong's Second Wheeler Motion.*

During voir dire of prospective jurors,[11] juror 5 stated that she lived in Long Beach and was single. She was a project developer for a food company, and her fiancé was a computer engineer. She had no prior jury experience. She would accept the court's instructions concerning the law, even if she did not agree with the law. Concerning narcotics, juror 5 had no strong feelings which would make her unable to be an impartial juror. She had a first cousin who was involved in law enforcement in Virginia, but juror 5 was not close with that cousin, and juror 5 thought she could be an impartial juror in a criminal case.

During Delong's voir dire of jurors, the court intervened and asked further questions of juror 5.[12] During the People's voir dire of jurors, juror 5 indicated as

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10 Although we are not presented with a situation in which we must reverse the judgment on the merits because of Delong's other contentions, we reject the People's suggestion that, were we presented with such a situation, the fact Delong's conviction was set aside would preclude us from reversing the judgment. As discussed previously, the conviction still, to some extent exists. Since Delong already has completed her treatment program, a reversal of the judgment might have to contain directions precluding the trial court from ordering her to complete such a program again in the event that, following remand, she were again convicted of the present offense. However, there is no need for us to further discuss that issue.

11 For the sake of simplicity, we will refer to prospective jurors as jurors.

12 At one point during voir dire, another juror was asked whether that juror would view a priest as more credible than a person who was not a priest. The juror replied in the negative. The court asked juror 5 if she thought a person's occupation should be a factor in determining credibility of witnesses. Juror 5 replied in the negative. The court

follows. Just because a person was a priest did not make the person more credible. Some persons had a greater motive to lie, regardless of their occupations. People lied for gain and to escape apprehension for wrongdoing. Juror 5 would be willing to listen to the opinions of other jurors and to their opinions concerning the facts, and she would be willing to change her mind if she were persuaded that the views of other jurors were correct.

Later, during the exercise of peremptory challenges, the prosecutor, and then Delong, each peremptorily challenged two jurors. The prosecutor then peremptorily challenged another juror. Delong made a *Wheeler* motion, the court denied it, and the validity of that denial is not disputed in this appeal.[13]

Thereafter, Delong and the prosecutor each peremptorily challenged two jurors.[14] Delong subsequently peremptorily challenged three jurors and, each time, the prosecutor

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then asked if juror 5 thought police officers should be viewed as more credible than other witnesses because they were officers. Juror 5 replied in the negative. In response to further court questioning, juror 5 stated that, to a certain extent, it was natural for people to treat police officers as more credible, especially outside a courtroom. However, juror 5 stated that, inside a courtroom, it should be different; just because a person was an officer did not mean that that person's version of events was more accurate; and juror 5 would consider the officer's version as well as another person's version and weigh both.

13 The *Wheeler* motion was made on the ground that the prosecutor improperly challenged two African-Americans and one Hispanic. The court asked the prosecutor if he had race-neutral reasons for exercising those peremptories, the prosecutor proffered reasons, and the court found them to be race-neutral.

14 After the prosecutor and Delong peremptorily challenged the first two in this set, the court asked the jurors if they had ever seen anyone that they thought was under the influence of a narcotic or controlled substance. No one indicated they had. The court asked the same question of juror 5. Juror 5 stated she worked at Terminal Island and was

accepted the panel as then constituted. Later, Delong, and then the prosecutor, each peremptorily challenged a juror. Delong accepted the panel as then constituted.

The jury box contained 18 persons in three rows. The court used a "six-pack" system of jury selection with the result that, each time a person from the first two rows was excused, a person from the third row would move to the vacated seat, starting with the first person in the third row and continuing in sequence to the last person in the third row. When the last person in the third row moved to a vacated seat, a new group of six persons would be seated in the third row. At the time Delong, as previously mentioned, accepted the panel as then constituted, the third row consisted of jurors 13 through 18, inclusive. If the prosecutor were to subsequently exercise a peremptory challenge, juror 13 would move to the vacated seat.

By the time Delong, as previously mentioned, accepted the panel as then constituted, voir dire had been conducted as to jurors 13 through 18.[15] When Delong

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told that a transient there had a problem with alcohol, but juror 5 did not know whether what she was told was true.

15 During voir dire by the court, juror 13 stated that he had "several friends involved in law enforcement with various agencies and friends that are lawyers." He had friends that were former prosecutors. He had also seen a person under the influence of what he believed was a controlled substance. His sister-in-law used morphine for pain relief without a prescription.

During voir dire by the court, juror 14 stated that her father had retired from the Honolulu Police Department. Juror 14's family friends were "with the police department." One of juror 14's best friends was a special agent with the United States Air Force and her cousin was an Oakland city attorney. Juror 14 did not think she would favor the testimony of law enforcement witnesses over citizen witnesses. She stated, "I wouldn't necessarily favor it. I wouldn't disbelieve it though." She would not "discard [testimony] just because it was law enforcement."

accepted said panel, the prosecutor had four remaining peremptory challenges he could exercise, and Delong had two. The prosecutor later peremptorily challenged juror 5.

At sidebar, Delong stated he was "going [to] renew the *Wheeler* motion . . . , with respect to the excusing of juror No. 5, . . ." After Delong proffered a prima facie showing of group bias, the court found that such a showing had been made and asked the prosecutor "your basis for excusing [juror No. 5]." The prosecutor proffered justifications and the court initially indicated doubts as to whether the prosecutor had offered a race-neutral justification for peremptorily challenging juror 5. However, after hearing the entirety of the prosecutor's proffer, the court stated, "I do believe that this was not racially motivated. I'm going to deny your *Wheeler* motion." We will recite below additional facts where pertinent.

During voir dire by the court, juror 15 stated that his wife was an attorney who began her legal career as a prosecutor in the Los Angeles City Attorney's Office, and had remained there for four years. She then went into civil private practice and was currently practicing criminal defense and personal injury and employment law. The court stated that the court knew juror 15's wife and used to work with her in the same office, and juror 15 acknowledged that he knew that. Juror 15 had been a victim of burglaries committed by juveniles, and he testified in juvenile court concerning the offenses. During his testimony in the juvenile proceeding, juror 15 had difficulty "remembering all the details." He understood that sometimes a witness who did not remember was not lying. Juror 15 had experience with a person who used or abused controlled substances. His brother-in-law possessed marijuana and cocaine, and pled guilty in those cases. Juror 15 denied that he might tend to believe professionals more than civilians. Asked if he thought police officers had a greater or lesser motive to lie than the average citizen, he replied, "I think everybody has a tendency, just what their motive is going to be."

Juror 17 stated that he had served in the military during World War II and the Korean War.

As mentioned, the court denied Delong's first *Wheeler* motion and the validity of that denial is not at issue in this appeal. Delong's sole claim is that the trial court reversibly erred by denying his second *Wheeler* motion, that is, by concluding that the prosecutor had lawfully exercised a peremptory challenge as to juror 5.

Our Supreme Court has observed that "There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner." (*People v. Turner* (1994) 8 Cal.4th 137, 165.) In *People v. Fuentes* (1991) 54 Cal.3d 707, our Supreme Court stated, "This court and the high court have professed confidence in trial judges' ability to determine the sufficiency of the prosecutor's explanations. In *Wheeler*, we said that we will 'rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' (*Wheeler, supra,* 22 Cal.3d at p. 282.) Similarly, the high court stated in *Batson v. Kentucky* [(1986) 476 U.S. 79], that 'the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility,' and for that reason 'a reviewing court ordinarily should give those findings great deference.'. . ." (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.)

Moreover, jurors "may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*People v. Turner, supra*, 8 Cal.4th at p. 165.) If substantial evidence supports the

trial court's findings, we may affirm them. (*People v. Williams* (1997) 16 Cal.4th 635, 666.)[16]

The prosecutor proffered essentially four justifications for peremptorily challenging juror 5. The first was that there were "other jurors that we would like on the jury," and the prosecutor wanted to "get to the other jurors to put on my jury panel." In *People v. Johnson* (1989) 47 Cal.3d 1194, our Supreme Court observed, "as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse *a previously passed* juror *hoping to draw an even better* juror from the remaining panel." (*People v. Johnson, supra,* 47 Cal.3d at pp. 1220-1221, italics added.)

The prosecutor reasonably could have believed that jurors 13 through 18 (especially juror 13, who would be the next juror to fill a vacant seat) would be more favorable to the prosecution than any of the jurors in the first two rows. If the prosecutor wanted to get to jurors 13 through 18, someone in the first two rows had to go. Nothing precluded the prosecutor from arbitrarily choosing to peremptorily challenge juror 5 in order to get to jurors 13 through 18.

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16 Because we address the merits, we need not decide whether Delong failed to raise below the issue of whether the prosecutor's exercise of a peremptory challenge as to juror 5 violated equal protection principles articulated in *Batson v. Kentucky, supra,* 476 U.S. 79, with the result that Delong waived the issue. (See *People v. Garceau* (1993) 6 Cal.4th 140, 173, fn. 10; *People v. Turner, supra,* 8 Cal.4th at pp. 164, 171-172; *People v. Ashmus* (1991) 54 Cal.3d 932, 987, fn. 16; *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; *In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1344.)

The prosecutor later explained that he "like[d] other jurors better than [juror 5][]" because "there is a lot of jurors now who have had experiences with people with narcotics addictions; who would be able to know symptoms; would be able to recognize the way people act when they're necessarily under the influence of narcotics. There are several people with experience with prosecutors; who have police backgrounds; who would recognize that police do not necessarily have a motive to lie; that they're not always lying and entrapping people, . . ." The prosecutor's explanation is supported by the statements of jurors 13, 14, and 15 given in voir dire. (See fn. 17, *ante*.)

The prosecutor proffered as a second justification that juror 5 might be a hold-out juror and she gave a "long, drawn-out explanation of why she necessarily wouldn't [change her opinion]." During the prosecutor's voir dire of juror 5, the prosecutor asked, "And if you were convinced when you begin -- at the time when you give your opinion about what your position is and you are convinced that that's the correct opinion, but after you listen to your fellow jurors you are convinced the other way, would you unhesitatingly change your opinion to the opinion that you think is correct?"

The carefully phrased question by the prosecutor reasonably could have been answered only in the affirmative, and reasonably could have been answered simply "Yes." Instead, juror 5 rephrased the question and expressed that if she became convinced that others were right she would change her opinion. She then gratuitously added she would not change her opinion simply because others felt differently. The prosecutor reasonably could have considered that gratuitous addition to be a "long, drawn-out explanation of why she necessarily wouldn't [change her opinion]." In fact,

her answer caused the prosecutor to ask an additional question designed to focus her attention, not on when she would not change her opinion, but on when she would.[17] Even the court later acknowledged that juror 5 "might necessarily be a hold-out[.]"

The prosecutor proffered the third justification that there was a "different panel" and "different jurors." *People v. Johnson, supra*, observed that there are a "variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. . . . the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the

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17 The fact that the prosecutor later may have mistakenly characterized his previous voir dire question(s) as questions posed by Delong during her voir dire is irrelevant. Language in *People v. Williams* (1997) 16 Cal.4th 153, is instructive: "First, a 'mistake' is, at the very least, a 'reason,' that is, a coherent explanation for the peremptory challenge. It is self-evidently possible for counsel to err when exercising peremptory challenges. Second, a genuine 'mistake' is a race-neutral reason. Faulty memory, clerical errors, and similar conditions that might engender a 'mistake' of the type the prosecutor proffered to explain his peremptory challenge are not necessarily associated with impermissible reliance on presumed group bias. [Citation.] Third, a 'mistake' may be a reason based on 'specific bias' (*People* v. *Wheeler, supra*, 22 Cal.3d at p. 277) where, as appears to have been the case here, the prosecutor's error is one of erroneously *believing*, ... Finally, a 'mistake' is a reason 'related to the particular case to be tried' (*Batson* v. *Kentucky, supra,* 476 U.S. at p. 98) to the extent the *possibility* that genuine errors of this sort will be made exists in every case." (Cf. *People v. Williams, supra,* 16 Cal.4th at pp. 188-189.)

supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (*People v. Johnson, supra,* 47 Cal.3d at p. 1220.)

The prosecutor proffered the fourth justification for peremptorily challenging juror 5 that the prosecutor used a strategy of waiting until defendants used their peremptory challenges before the prosecutor used his. As *People v. Johnson, supra,* observed, "It is . . . common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge *and the number of challenges remaining with the other side*." (*People v. Johnson, supra,* italics added.) The prosecutor reasonably could have believed that Delong might wish to peremptorily challenge certain jurors,[18] and reasonably could have waited until Delong did so, reducing Delong's remaining available peremptory challenges. The court expressly stated it understood the prosecutor's strategy.[19]

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18 For example, Delong's last peremptory challenge was used to excuse a juror who previously had served on a federal grand jury.

19 We also note that, after the prosecutor represented that he was a member of a racial minority and expressed personal offense at the suggestion that he would exercise a race-based peremptory challenge, the court observed that the prosecutor was a "fairly new lawyer." Moreover, it was in the context of that observation that the court indicated

After finding that Delong made a prima facie showing of impermissible group bias, the trial court found to be legitimate the prosecutor's peremptory challenge of juror 5. There was substantial evidence supporting that finding, and it is a credibility determination to which we defer. The court's comments do not reflect any failure to understand its duties with respect to Delong's second *Wheeler* motion. We conclude no *Wheeler* or *Batson* error occurred, and the trial court properly denied Delong's *Wheeler* motion. (Cf. *People v. Williams, supra,* 16 Cal.4th 635 at pp. 664, 666; *People v. Fuentes, supra,* 54 Cal.3d at pp. 714-715; *People v. Turner*, *supra*, 8 Cal.4th at p. 168; *People v. Rodriguez* (1999) 76 Cal.App.4th 1093, 1112-1115.)[20]

3. *The Trial Court Did Not Err By Excluding Evidence Under Evidence Code Section 352.*

During an admissibility hearing on May 7, 2001, the prosecutor sought exclusion of certain statements. The prosecutor sought exclusion of anticipated testimony from

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it understood the prosecutor's strategy and denied the second *Wheeler* motion. As *People v. Johnson, supra,* has observed, "trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges." (*People v. Johnson, supra,* 47 Cal.3d at p. 1219, fn. 6.) We also note the prosecutor stated, ". . . I kept African Americans" and the court stated "[w]e have minorities on the panel still"; this is an indication of the People's good faith in exercising peremptories. (*People v. Turner, supra,* 8 Cal.4th at p. 168.)

20 Delong suggests that we should consider the alleged fact that the People did not excuse one or more prospective jurors who were similarly situated with respect to juror 5, who was excused. Even if the alleged fact were true, the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal, and our Supreme Court has concluded that, in such circumstances, defendants are not entitled to what Delong seeks--a comparative analysis of excused and unexcused jurors. (*People v. Ayala* (2000) 24 Cal.4th 243, 270; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Landry* (1996) 49 Cal.App.4th 785, 791.)

Delong's husband concerning a statement Burg allegedly made to Delong's husband, Alan Hart, during a telephone call on August 10, 2000. The alleged statement by Burg was, "'I got Janet good and if I were you I'd play by my rules. I got two people to sign a sworn affidavit that Janet did all this and not me. If I were you, Alan, I'd watch your business, 'cause I can destroy you too.'"

The prosecutor also sought exclusion of a statement by Burg allegedly left on Hart's answering machine on August 15, 2000. The statement by Burg was, "'Yes, I hear you won't be working at Culver City High School, now or ever. I buried you there and that's only the beginning.'"

The court acknowledged that Burg had invoked his Fifth Amendment rights and was, therefore, unavailable. Delong urged the statements were relevant to show that Burg, and not Delong, put the cocaine in her purse, and Burg's threats were designed to dissuade Delong from presenting that defense.

The court observed that the statements could be construed as inculpating Delong, on the ground that they reflected that Burg was getting even with Delong for her crime because she had led police to discover Burg's crime.

On May 8, 2001, the court found that the statements (and others not at issue here) would have "little probative value and only would serve to confuse the jury under 352 with the exception of . . . [Burg's September 8, 2000 reply to Hart, reflected in our factual summary *ante*.]" The court later observed, "All these other messages appear to be – they're subject to lots of interpretations, . . . And I think under 352 it would only serve to confuse the jury and have little probative value."

The court observed that the August 10, 2000 statement was "very vague"; Delong and Burg "appear[ed] to have a previous working relationship[]"; Burg could not be cross-examined concerning the statement's meaning; and Hart's interpretation of it was irrelevant. The court commented, "In viewing those statements, I don't think they necessarily deal with third party culpability as to the possession of the drugs in her purse; and I don't think that they show a consciousness of guilt on the part of Mr. Burg with respect to the possession of the alleged drugs or the drugs alleged to be possessed in the purse of your client."

The court stated that Burg's September 8, 2000 reply to Hart "falls squarely within [case law supporting its admissibility], but I don't think the others do. They're so vague that they're open to lots of interpretations about a hostile relationship between two parties. And I don't think that those statements *link* him to the drugs in the purse or *tend* to establish her innocence of the drugs in the purse." (Italics added.)

Delong urged that the August 15, 2000 statement was different. The court stated, "Again, I don't find it to be that kind of a statement that would do anything other than to confuse the jury." The court then, referring to the statements at issue (and others not at issue), stated, "I looked through all of these. I spent time looking through all the statements. There are lots of obnoxious remarks . . . , that could be construed in *any* number of ways. And I think since we don't have Mr. Burg's testimony and he's not available for us to know what these things meant, I think I need to go by the plain words, and I'm not going to allow all these statements, . . ." (Italics added.)

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including rulings concerning the relevance of evidence and whether it should be excluded under Evidence Code section 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 724-725.) We have recited the pertinent facts. We conclude the trial court excluded the statements at issue on the grounds that they were inadmissible as irrelevant, and excludable under Evidence Code section 352.[21] Moreover, we conclude the trial court did not err, constitutionally or otherwise, by excluding the statements on those grounds. (Cf. *People v. Waidla, supra,* 22 Cal.4th at pp. 717-718, 724-725; Evid. Code, §§ 210, 352.) Further, there was strong evidence of Delong's guilt. The jury, having convicted Delong, necessarily rejected the alleged exculpating evidence of Burg's September 8, 2000 reply to Hart, and that statement was arguably more exculpatory than the August 10 and August 15, 2000 statements. There is no evidence that Delong told police that the cocaine was planted. To the extent Delong claims the statements at issue would have bolstered that defense, Delong cites nothing from the record that could support an inference that Burg put cocaine in the purse, knowing she would encounter police shortly thereafter. Any erroneous exclusion of the statements at issue was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

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21 We need not reach the issue of whether the trial court excluded the statements on the ground that they were inadmissible hearsay, whether any such ruling was correct, or whether any such hearsay was admissible under a hearsay exception (such as the declaration against interest exception; Evid. Code, § 1230).

DISPOSITION

The judgment (order granting probation) is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

CROSKEY, J.

We concur:

KLEIN, P.J.

ALDRICH, J.