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SEE DISSENTING OPINION

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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KERRY PARKER, JR., Defendant and Appellant.	E021559 (Super.Ct.No. ICR22535) **OPINION**

APPEAL from the Superior Court of Riverside County. Thomas N. Douglass, Jr., Judge. (Judge of the former Municipal Court for the Desert Judicial District, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Martin Nebrida Buchanan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia Garcia and Nancy Palmieri, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kerry Parker, Jr., of three counts of murder (Pen. Code, § 187), while he was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)). The jury further

found true the special circumstances of multiple murder and murder during a robbery and a burglary. (Pen. Code, § 190.2, subd. (a)(3) & (17).) He was sentenced to prison for three concurrent life terms without the possibility of parole, plus one year. He appealed, claiming the trial court erred in dismissing one juror and not dismissing another. We rejected his contentions and affirmed. The California Supreme Court directed this court to vacate its decision and reconsider it in light of *People v. Cleveland* (2001) 25 Cal.4th 466. After having done so, we again reject Parker's contentions and affirm.

The facts concerning the crimes are not pertinent to this appeal except to say that during a burglary and robbery inside the home of one of the victim's, he and two of his houseguests were murdered.

ISSUES AND DISCUSSION

1. *Dismissal of Juror No. 1*

During jury deliberations, the foreperson sent the trial court a note that read, "We have reached an impasse and feel that no amount of deliberations will change this position." The jury then sent a second note which was also signed by the foreperson and read, "A juror has made a statement that tends to indicate that he/she . . . is not following jury instructions. We need some direction."

Defense counsel agreed to have the foreperson asked what he meant by the second note and whether the jury would still be at an impasse regardless of the "issue with the juror." The trial court began its examination of the foreperson by saying, ". . . [I]t is not my intent . . . to inquire into the process of your jury deliberations or to invade the province of the jury at all. So to the extent that you can avoid it . . . [¶] . . . I don't want you to tell me

what you folks have been talking about in there." The trial court further instructed the foreperson not to reveal how the jury was numerically divided. The trial court then asked the foreperson to tell "as narrowly as possible" what he meant by what he said in the second note. The foreperson replied, "After the note was sent saying that we were at a deadlock, [J]uror . . . [No. 1] made a statement to the effect of: 'If the crime wasn't first-degree murder, I could vote for guilty.'" The foreperson said that this was "the entirety of what the juror said in that regard." The trial court then asked the question suggested by defense counsel: whether, but for this problem with the juror, the jury would still be divided. The foreperson answered in the negative.[1]

Defense counsel interpreted the foreperson's report of the juror's remark in one manner and the prosecutor in another.[2] The trial court concluded, based on this, that further inquiry needed to be made as to the meaning of Juror No. 1's statement. Defense counsel suggested that the foreperson be asked about the context of the statement. However, after a

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[1] Interestingly enough, during later discussions between counsel and the trial court, defense counsel represented to the latter that there was a second holdout juror, at least until the day before the first deadlock note had been sent to the trial court.

[2] The jury had been given only the options of finding Parker guilty of first degree murder or not guilty. The prosecutor interpreted the remark to mean that the juror was not following instructions, which dictated that if the juror was not satisfied beyond a reasonable doubt that Parker committed first degree murder, the juror was to vote for acquittal. Defense counsel, on the other hand, interpreted the remark to mean that the juror did not believe a first degree murder had been committed, but, some lesser crime had. However, the comment did not show that the juror was not following the instructions. The trial court put a different spin on the prosecutor's interpretation, finding the remark may have suggested that the juror would vote to convict Parker of first degree murder "were not the punishment so great."

lunch break, counsel changed her mind and objected to anything further being done other than directing the jury to resume its deliberations, indicating that Juror No. 1's remark did not justify singling her out[3] and "call[ing her] on the carpet" by questioning her about it. However, counsel suggested that if the court decided to proceed with further inquiry, that it ask each juror if further deliberations would be helpful and if not, why not. She also suggested that the foreperson be asked if Juror No. 1 had been otherwise participating in deliberations and following the law. The trial court commented, "If . . . [J]uror [No. 1] simply believes that first-degree murder has not been committed and that's why she can't vote for it, I don't have a problem with that. I just need to know what she meant."

The foreperson was again brought before the court and was told by the latter that all it wanted to do was to attempt to clear up a possible ambiguity in Juror No. 1's statement. The trial court asked the foreperson what was it about Juror No. 1's statement that made the foreperson believe that she was not following the law. The foreperson reported that it was his feeling, and that of several other jurors, after Juror No. 1 made the statement, that penalty had entered her thought process and she did not "want . . . to put the penalty on [Parker] . . . regardless of the evidence." The trial court asked if another juror had made a comment or asked a question when Juror No. 1 made the statement that would help explain its meaning. The foreperson reported that after Juror No. 1 made the statement, an uproar occurred in the deliberation room, with the majority of jurors saying to the juror

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[3] At the time, her identity was unknown.

"something like, 'You know, we thought so, when that's not what you're supposed to do' . . . ." The foreperson said that Juror No. 1 replied to the others by saying, "[']What I said was I could find him guilty of not having nice friends, falling in bad company . . . -- that type of thing, but I can't find him guilty of first-degree murder.[']" The foreperson went on to say that the other jurors pointed out to Juror No. 1 that that was not what she had said. The foreperson also reported that Juror No. 1 had been participating all along in the deliberations and she made her statement after another juror asked either, "' If this wasn't a death penalty case, would you have voted different[ly]' or 'If this wasn't a first-degree murder case, would you vote different[ly]?'" Finally, the foreperson said that at least twice during deliberations, Juror No. 1 "had asked questions and entered into discussions as to whether or not we could come to a guilty verdict on the burglary charges without a guilty verdict on the murder charges."[4]

The trial court concluded that the foregoing constituted a sufficient basis for examining Juror No. 1 because it interpreted her statement the same way the foreperson did, i.e., that it was possible she was considering penalty or punishment, contrary to instructions she had been given. In response to defense counsel's assertion that Juror No. 1's statement about Parker falling into bad company meant that the case had not been proven beyond a reasonable doubt to her satisfaction, the trial court said, "Unless the

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[4] The trial court viewed this statement as possibly indicating that penalty had entered into Juror No. 1's mind in light of instructions given the jury that if they concluded that a burglary had occurred, and if the killings occurred during the burglary, Parker would be guilty of murder.

statement w[as] made, as the foreperson suggested, to in effect backtrack from what . . . she had already said. . . ."

Before the trial court began questioning Juror No. 1, it informed her that it did not want her to think that she had done anything wrong and it was not its intent to invade the province of the jury or to cause her to change any opinions she had already formed or to draw any she had not yet reached. The trial court explained that a particular statement had been attributed to Juror No. 1, which could be interpreted in a number of ways and it was trying to determine what the juror meant by the statement. Before the trial court told Juror No. 1 what the statement was, she volunteered that it had been misinterpreted. She explained that her interpretation of the question asked of her and other jurors, to which she responded, was whether if Parker had been accused of something lesser, could anyone who didn't vote guilty vote guilty. She said her affirmative reply meant that if Parker had been accused of having unusual friends, difficult relatives to deal with or a difficult life, he was likely to be headed for trouble. She added that the prosecution had failed to prove to her beyond "a shadow of a doubt" that Parker was involved in the crimes. She reported that at that point, pandemonium broke out in the deliberation room, with other jurors saying they would have to report her to the judge. She admitted that she was at that point accused of considering penalty; however, she said that she had been careful not to let that enter her thinking. She added, since she believed the case was over, she had felt free to "'let myself go and . . . think whatever I want[ed].'"

The trial court concluded that there was no objective statement upon which it could draw an inference that Juror No. 1 had not followed instructions or that she had made a

statement that constituted misconduct, despite its "hunch" that she allowed sympathy to interfere with her verdict. Further, the court found insubstantial the juror's reference to proof "beyond a shadow of a doubt[,]" concluding that she may equate that with proof beyond a reasonable doubt.

After an overnight recess, the trial court asked the jurors to briefly resume their deliberations, after which time it would return them to the courtroom to see how things were going. After a little over 30 minutes later, the trial court received another note from the foreperson reporting that they were still deadlocked with no hope of reaching a unanimous verdict. The trial court brought the jurors back into the courtroom and began by asking the foreperson if he agreed with the second note reporting the deadlock and soliciting his opinion that nothing further could be done to create a reasonable possibility of reaching a verdict. Nine other jurors agreed with the foreperson on both matters, including Juror No. 1. Jurors No. 7 and 10, however, stated that doing something in response to the note concerning Juror No. 1 presented the only reasonable possibility of reaching a verdict.

The trial court concluded that it should ask Jurors No. 7 and 10 whether, by their statements, they were alleging that Juror No. 1 had engaged in misconduct. Juror No. 7 reported that he believed there was a possibility Juror No. 1 was not following the instructions. The trial court asked him the basis for his opinion. He said that the question had been asked if the case just involved a burglary, and no one had been killed, what would happen, and Juror No. 1 made the statement that if they weren't considering first degree murder, she could probably vote guilty. He said all the other jurors became upset by her

statement and pointed out to her that she was not supposed to consider penalty and he believed if she had not done so, she would have seen things differently. He reported that, thereafter, Juror No. 1 refused to talk, saying she would speak to the judge, despite pleas from her fellow jurors. He said Juror No. 1 had made a statement about Parker's friends, but it had not been made in the context of this particular discussion. He also said that Juror No. 1 had closed other jurors off from trying to deliberate with her.

Juror No. 10 reported that Juror No. 1 had hinted many times during deliberations that she could not vote guilty because Parker faced a first degree murder conviction or the death penalty but she finally said it explicitly after the first deadlock note had been sent. Juror No. 10 said that after Juror No. 1 made the explicit statement in response to a question by another juror, pandemonium broke out in the deliberation room and "she tried to take it back" in that she became very defensive and accused the other jurors of putting words in her mouth. As to earlier incidents of hinting at her displeasure with having to convict Parker of first degree murder or impose the death penalty, Juror No. 10 reported that Juror No. 1 had asked whether the jury could ask the judge to change the charges against Parker and she had problems with the murder charge. Juror No. 1 had also said that she could probably convict Parker of robbery,[5] but "the murder charge bothered her." Juror No. 10 reported that there were two or three other incidents during which Juror No. 1 made similar comments.

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[5] The prosecutor argued to the jury that Parker was guilty of felony murder, inter alia, if he committed or aided and abetted the robbery.

The trial court concluded that Juror No. 10 had alleged that Juror No. 1 had made a statement that, if made, probably constituted misconduct. The court felt that it had to ask the other jurors about their recollection of the statement.

Juror No. 11 said he agreed with the note reporting that Juror No. 1 had made a statement indicating that she was not following the instructions. Specifically, he said that Juror No. 1 had answered, "[']yes,[']" to the question, "[']If the sentence were not as severe as it could be, could she change her mind about her verdict?[']" At that point, other jurors said, "[']I knew it. I thought that's what the problem was.[']" Juror No. 11 went on to say that, later, Juror No. 1 explained that she had misunderstood the question and this satisfied him.

Juror No. 2 said she agreed with the note and Juror No. 1 had said, "to the effect . . . that . . . [']it has not been proven to me beyond a reasonable doubt and I cannot go ahead with what is going to happen to this young man. You all have not proven this to me in . . . our deliberations, beyond a reasonable doubt.['] [¶] . . . [B]ecause of that she could not put anyone in prison for life or vote for the death penalty. . . . [¶] . . . [S]he could not find someone guilty who is going to be put in jail for the rest of the person's life or possible death." Juror No. 2 said that she and two other jurors asked Juror No. 1 if there was some area that they could discuss, but Juror No. 1 said only that that was the way she felt and she had nothing to say.

Juror No. 3 agreed with the note and said Juror No. 1 had stated that if a murder charge was not involved, she could consider aiding and abetting. When she made that statement, other jurors said, "[']I knew it.[']" Juror No. 1 then claimed that the other jurors

had not given her a chance to explain her statement, but she declined to do so, saying that she thought they were putting words in her mouth. On another occasion, Juror No. 1 had said that she couldn't send Parker to prison or impose the death penalty "[']based on what she had heard[']and she said she couldn't leave her emotions out of it. . . . [O]ther people had said . . . [that ']you can't bring your emotions into it. You're not supposed to feel sorry for him.['] And she said, ['W]ell, that's impossible,['] she did feel sorry for him. She thought in a way he was recruited [to participate in the crimes] the way they tried to recruit [another person who was solicited to participate in the robbery but did not]."

Juror No. 4 said he agreed with the note and reported that Juror No. 1 had said that "[']if it was anything but first degree [murder], then [she] would have voted guilty.[']" He felt this was a reference to penalty based on the fact that during deliberations Juror No. 1 "was concerned about what she perceived as the length of time [Parker] would stay in prison. [¶] [On three occasions, she said s]he felt [Parker] was put into a position by the people that he ran with. [¶] . . . [He] was led by other people older than himself into whatever problem that he got himself into."

Juror No. 5 agreed with the note. She said Juror No. 1 had said, "[']I[f the . . . charges were robbery . . . and /or burglary, I would vote guilty. But not for murder.['] [¶] . . . [Other jurors] tried to explain to her that's what [they] had been talking about, the aiding and abetting, that if she believed the portion about the robbery and burglary, then the aiding and abetting would apply. [¶] [In response,] . . . [s]he said, ['W]ell, I can't vote guilty because of the murder charge.[']" When asked by the trial court if Juror No. 1 explained why she could not join in convicting Parker of murder, Juror No. 5 stated, "She said she was

an emotional person and she didn't believe she could handle it. She could not live with herself."

Juror No. 8 said he agreed with the note. He said Juror No. 1 said "[']if it was not a first-degree murder charge, I could probably consider voting guilty.['] [¶] [She also made] a series of comments that she just couldn't find it in her to find . . . a nice young man guilty and put him away for life and consider him for . . . [the] death penalty."

Juror No. 9 said she agreed with the note. She said that when Juror No. 1 was asked by another juror whether "[']if there was a lesser punishment, would you vote differently?[']" she responded, "[']Yes, I would definitely.[']" When other jurors reacted to this, Juror No. 1 said, "[']. . . I'm a human being and I have to look at those things.[']"

Juror No. 12 said he agreed with the note, and had felt that way for a couple of days. He reported that at various times, "we knew she wasn't following [the instructions]. We would have to throw instructions at her[, saying, 'T]he instruction says this['] and [she] was like ignoring it." He said Juror No. 1 had said, "['I]f it wasn't for the first-degree murder charge, I could probably find him guilty of something.['] [¶] At one time she had said something about a first-degree murder charge carrying a death penalty without even talking about special circumstances. [¶] . . . [E]verybody tried to correct her. [¶] . . . I think she understood at that time." He also said that Juror No. 1 refused to deliberate.

Many times during its examination of these jurors, the trial court took pains to point out to them that it was not interested in their thought processes or subjective interpretation of facts, but only wanted to know what they heard Juror No. 1 say and the context of her statements.

The trial court dismissed Juror No. 1 saying:

"[Although] we got . . . individual . . . or differing responses from each of the 12 jurors . . . , there is . . . a thread running through these . . . remarks to me, and that . . . is[,] with the exception of the one [juror] who did say [Juror No. 1's] explanation was satisfactory to him, that these jurors . . . believed . . . [J]uror [No. 1] engaged in . . . misconduct. [¶] . . . 10 of . . . them . . . have clearly suggested to me that this juror considered penalty and punishment, allowed sympathy to affect her decision, considered matters she was absolutely told not to do. I'm satisfied of the truth of those statements because of some of the statements allegedly made by . . . [J]uror [No. 1] that she was a human being; she couldn't help but consider those things. [¶] I don't think so many jurors would tell me that she made that statement unless she did, and that statement in and of itself tells me a lot. She's telling us 'I am considering sympathy. I can't help it. I'm an emotional person[.]' [¶] I am satisfied . . . that a neutral reading of the entirety of th[e] jurors' comments as to what [Juror No. 1] has said satisfied [me] to the required degree that she did engage in . . . misconduct of such a degree that she is unable to discharge her duty as a juror and will have to be replaced. [¶] . . . [M]ost jurors . . . are loath to accuse another juror of misconduct. [¶] I think while several [jurors] said that there w[ere] other . . . fishy statements made by . . . [J]uror [No. 1] previously, no one had what they believed to be a smoking gun until that statement [she made] after they [sent the first note indicating they were at an] impasse . . . . To apparently all but one of them, [her] statement . . . was so clear and unequivocal a violation of her duty that it prompted . . . a note to be sent to me."

Parker contends that the trial court abused its discretion by inquiring into possible

misconduct by Juror No. 1. We begin by noting what *Cleveland* held and what it did not. Although the California Supreme Court agreed with other decisions commenting or holding that care should be taken in inquiring into possible juror misconduct, it did not reverse Cleveland's conviction because of the inquiry the trial court had taken. Rather, it disagreed with the trial court's conclusions about the results of its inquiry. As to the inquiry, the *Cleveland* court commented, ". . . [W]hen . . . the [trial] court is on notice that there may be grounds to discharge a juror during deliberations, it must conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist. . . . [¶] . . . [¶] . . . [W]e do not adopt the standard promulgated in [*U.S. v.*] *Brown* [(D.C. Cir. 1987) 823 F.2d 591], and refined in [*U.S. v.*] *Thomas* [(2d Cir. 1997) 116 F.3d 606] and [*U.S. v.*] *Symington* [(9th Cir. 1999) 195 F.3d 1080], that restricts a [trial] court's authority to inquire into [possible juror misconduct] whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.' [Citation.]" (*People v. Cleveland, supra*, 25 Cal. 4th at pp. 480, 484.) Finally, none of the published decisions cited by Parker that have followed *Cleveland,* and one which predated it but relied upon the same standard utilized in it, have held that the inquiry conducted by the trial court was improper. (See {*People v. Hightower* (2001) 2001 D.A.R. 13115}; *People v. Elam* (2001) 91 Cal.App.4th 298; *People v. Bowers* (2001) 87 Cal.App.4th 722.) Therefore, we disagree with Parker's contention that any of these cases provide a basis upon which we can conclude that the trial court abused its discretion in undertaking the inquiry that it did. Rather, we conclude that the trial court had good cause to take the steps it did.

The trial court was reasonable in inquiring of the foreperson as to the meaning of the note stating that the juror had made a remark that tended to indicate that she was not following the law. The foreperson's report was that the juror had said, "to the effect of: 'If the crime wasn't first-degree murder, I could vote for guilty.'" This was an equivocal statement, whose meaning the trial court reasonably undertook to determine by questioning the foreperson.[6] (See *People v. Compton* (1971) 6 Cal.3d 55, 59-60.) The trial court was reasonable in questioning Juror No. 1 in light of the foreperson's report that the juror's remark had been made in response to a question which mentioned either the death penalty or first degree murder. The inquiry was further justified by the foreperson's report of Juror No. 1's earlier questions whether she could convict Parker of burglary, but not murder. *Cleveland* reiterated the holding of *People v. Stankewitz* (1985) 40 Cal.3d 391, 398, that statements made by jurors during deliberations are properly considered by the trial court

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[6] Defense counsel below moved to strike a statement made by the foreperson in response to the trial court's inquiry as to what prompted the foreperson to write the note concerning Juror No. 1 or to conclude that she was not following instructions. The foreperson stated, "It was . . . my feeling and I believe the feeling of several others of the jury after [Juror No. 1 made] the statement . . . that . . . penalty had entered into [her] thought process . . . and . . . [she] was considering penalty and [did not] want to put the penalty on [Parker] . . . regardless of the evidence." The trial court refused to strike the statement, saying it wanted as much information as it could get and it was unsure whether it was appropriate to strike a statement made by a juror. Parker now contends that the trial court erred in refusing to strike the statement. However, in light of the fact that when considering the statement, the trial court ruled that misconduct had not been demonstrated and only later, after other jurors testified as to Juror No. 1's actions, the trial court became convinced that she had engaged in misconduct, we cannot agree with Parker that the trial court's consideration of the statement was sufficiently significant to merit our declaration that it was prejudicial error.

when the making of the statement constitutes misconduct. If, by her statement, the juror meant that she was considering penalty, that would constitute misconduct.

After initially having been satisfied that Juror No. 1 did not mean by her equivocal statement that she was considering penalty, the trial court was confronted by the accusations of two other jurors that she, indeed, was. Again, the trial court acted reasonably in questioning these jurors, which then led the court to reasonably question the rest of the panel in its effort to determine whether the juror was, by the statements she made, considering penalty. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 478 ["'Grounds for . . . discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.'"]; *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066.) Contrary to Parker's assertion, the trial court was not asking the jurors what their personal opinions were as to whether Juror No. 1 was considering penalty or for their subjective impressions or thought processes.[7] That was a determination the trial court needed to and did make for itself. Rather, the court was asking for statements made by Juror No. 1 which would indicate that she was considering

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[7] Not only was the trial court careful to tell the jurors from the beginning that it was interested only in their observations, but whenever a juror began to discuss prohibited matters, the trial court endeavored to get him or her back on the right track. We do not agree with Parker that asking the other jurors the basis for their agreement with the note reporting that Juror No. 1 was not following the instructions to be an inquiry into either their or her mental processes. The court was merely asking the jurors to tell them what it was that Juror No. 1 had said or done that led them to conclude that she was not following the instructions.

penalty or sympathy for Parker. The bulk of the other jurors' testimonies concerned such statements.

Parker also contends that the trial court abused its discretion in dismissing Juror No. 1. We disagree and nothing in *Cleveland* or the cases construing it compel a contrary conclusion. If any substantial evidence supports the dismissal, we must uphold it. (*People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Johnson* (1993) 6 Cal.4th 1, 21.) The inability of a juror to perform must be a demonstrable reality. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.) These rules apply even to so-called "holdout" jurors. (See *People* v. *Roberts* (1992) 2 Cal.4th 271, 324-325; *People* v. *Feagin* (1995) 34 Cal.App.4th 1427, 1437; *People* v. *Thomas* (1994) 26 Cal.App.4th 1328, 1333.)

In *People* v. *Feagin*, *supra*, 34 Cal.App.4th 1427, the appellate court upheld the dismissal of a juror despite that juror's assertions that she was "'concerned with the honesty of . . . the witnesses'" and that the other jurors had preconceived notions caused by racial prejudice which compelled them to abandon the reasonable doubt standard. (*Id*. at p. 1435, fn. 3.) Additionally, not all the jurors believed that she had engaged in misconduct. In dismissing her, the trial court said, "'[She] denied the . . . allegations [of misconduct.] But I do not find her denials credible. I think they were self-serving and made simply to put herself in a better light.'" (*Id*. at p. 1437, fn. 6.)

Similarly, in *People* v. *Thomas* (1990) 218 Cal.App.3d 1477, the targeted juror denied the foreperson's accusation that she had said that all Los Angeles police officers lie (at least one testified for the prosecution). Additionally, not all jurors supported the foreperson's accusation. Despite this, the appellate court upheld the trial court's dismissal

of the juror, concluding that there was "substantial evidence to support the [trial] court's finding that [the targeted juror] was not being truthful in [her] . . . disclaim[er of] bias towards police officers. . . ." (*Id.* at p. 1485.)

Here, all the jurors, save the foreperson, reported comments made by Juror No. 1, which clearly demonstrated that she was considering penalty or sympathy. The foreperson reported comments made by Juror No. 1, which, when considered with the instructions given the jury, suggested that she was considering either penalty or sympathy for Parker.[8] Although two jurors mentioned comments made by Juror No. 1 concerning an absence of proof of the charges, these same jurors also reported that she made comments that, without question, showed that she was swayed by sympathy and considerations of the penalty Parker faced. As in *Feagin* and *Thomas*, the trial court here was entitled to disbelieve Juror No. 1's denial that she was considering penalty and her assertion that she was motivated only by her belief that the prosecution had not proved its case "beyond a shadow of a doubt." The fact that some of the jurors may have been frustrated with Juror No. 1 did not detract from the fact that their reports of her comments demonstrating prejudice were strikingly similar. The trial court was entitled to rely on those reports. They provided substantial evidence to support the dismissal.

Parker also here objects to the trial court returning the jury for further brief deliberations after making its initial determination that there was insufficient evidence of misconduct by Juror No. 1. Before so doing, the trial court instructed the jury as follows:

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[8] The foreperson concluded that she was.

"Ladies and gentlemen, in this case you should reach a verdict if you can do so. While each of you must decide the case for yourselves [*sic*] and not merely acquiesce in the conclusion of the fellow jurors, each juror must examine the issues with candor, frankness and a proper regard for the opinions of your fellow jurors. You are obliged after full consideration of the evidence and the law to agree upon a verdict if you can do so without violating your conscience and your individual judgment.

"Of course by pointing out to you the desirability of your reaching a verdict, I am not suggesting to any of you that you surrender your honest belief as to what the evidence in this case has disclosed and of the weight and effect of the evidence in the case.

"So that there is no misunderstanding in this particular case, the Court has not intended by anything that it may have said or done to intimate or suggest to you what you should find to be the fact on any questions submitted to you or what result the Court believes is appropriate in this particular case. If anything I have said or done has seemed to so indicate -- excuse me -- you must disregard it and form your own opinion of the evidence.

"Having shared those thoughts with you, ladies and gentlemen, and now that you have spent an evening away from the case and not dealing with the issues presented herein, I am going to ask you now to return to the jury room and renew your deliberations. After a brief time, I will bring you back into the courtroom to see how those deliberations are going and we'll talk further then about it. For now I would like you to resume your deliberations, and we'll bring you back to the courtroom in a little while."

We disagree with Parker that the trial court's action and instruction were coercive

under the circumstances. (See *People* v. *Pride* (1992) 3 Cal.4th 195, 265-266.) There is nothing unusual or improper in requesting a jury that has reported for the first time that it is deadlocked to resume deliberations briefly. The trial court's remarks did not address any problem in the deliberation room and it reminded each juror that he or she had a right to his or her opinion, whatever the outcome.[9]

2. *The Failure to Dismiss Juror No. 8*

The day after Juror No. 1 was dismissed, defense counsel informed the court that she had had an extensive discussion with former Juror No. 1, who reported to counsel that the jurors who had accused her of misconduct "were giving you answers that were completely out of context, in some cases outright lying. In other cases they were misrepresenting how things were said." Counsel went on to say that former Juror No. 1 had alleged that Juror No. 8 had, each day of deliberations, brought pictures of the victims into the jury room and "talked about how sorry he felt for them." The trial court agreed, over the prosecutor's objection this time, to question the jurors about the allegation.

Juror No. 8 admitted that on one occasion, he had put up the pictures, but he denied saying anything about feeling sorry for them. He admitting saying "that we shouldn't forget them." He denied that any other juror made a statement or indicated in any other way that

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[9] Parker asserts in his reply brief that returning the jury for further brief deliberations was coercive after 10 of the jurors had publicly accused Juror No. 1 of misconduct and disputed the truth of her testimony. However, Parker forgets the sequence of events. The jury was briefly returned for further deliberations long before the 10 were questioned by the trial court.

sympathy for the victims was affecting their decisions. He also said no other juror made any statements expressing sympathy for the victims.

Juror No. 6 reported that once during deliberations, the victims' pictures were put up "and a statement was made something to the effect [that] we owe the victims' families something too." He believed Juror No. 8 made this statement, but was not certain. He did not hear any other juror make a statement or otherwise indicate that sympathy for the victims was affecting their decisions.

Juror No. 11 reported that another juror had put up the victims' pictures and said "[W]e've got to consider what we're here for is these three people. We've got to consider this." He said he heard no other juror say or indicate that sympathy for the victims was affecting their decisions.

Juror No. 2 said that pictures of the victims were put in the center of the table at which the jurors were sitting and Juror No. 10 and a male juror said, each at a different time, "'Actually these are the people that we should be concerned about. I feel so sorry for them. . . .'" The pictures remained on the table for part of the day until someone suggested they be put back with the other exhibits. She said that no other jurors made any statements or otherwise indicated that sympathy for the victims was affecting their decisions.

Juror No. 10 reported that one of the male jurors put the victims' pictures on top of the rest of the exhibits and either he or another juror said, on one or perhaps two occasions, "'This is why we [a]re here.'" She did not hear any other jurors say or otherwise indicate that sympathy for the victims was affecting their decisions.

Juror No. 9 said that the victims' pictures were put up and a juror said, "'We need to

keep in mind also what this trial is about.'" She heard no other juror make a statement or otherwise indicate that sympathy for the victims had affected their decisions.

The trial court concluded that it did not need to examine the remaining five jurors. It ruled, ". . . [T]he[victims'] pictures are evidence. So the fact that they along with other items of evidence were displayed for the jury . . . is not of tremendous . . . significance. Had . . . [they] . . . been . . . posted prominently . . . every day . . . during . . . deliberations, that . . . might have been something different. [¶] . . . [A]gain . . . as with the first time . . . no two jurors agreed exactly on anything [but] I am satisfied the common thread suggests very strongly and I thereupon make the finding that on one or possibly two occasions the pictures were displayed. The first time it was for a relatively lengthy time. And, again, although the . . . memories of the different jurors put different words in the statement, I don't think we've been told here of any more than one or at most two passing references to 'Remember why we're here' or 'These are the people that we need to remember,' something like that. [¶] Even if I find for the purpose of this discussion, that this was inappropriate, I'm very satisfied that it didn't rise to the level of any juror . . . not being able to continue to discharge his or her duties. [¶] So . . . that the record is clear, I do make a finding of no juror misconduct having occurred in this regard."

Where substantial evidence supports the trial court's finding that no misconduct occurred, we need not independently determine whether prejudice arose from the challenged activities and statements. (*People* v. *Nesler*, *supra*, 16 Cal.4th at p. 582 & at fn.

5.) Substantial evidence supports the trial court's finding that no misconduct occurred.[10] As the trial court noted, the displaying of the victims' pictures, which were exhibits, on one or two occasions, was not improper. The statement made, that the jury should not ignore the victims, was not a particular appeal to sympathy, but a statement of truth—the trial was both about the rights of Parker and the jury's duty to determine the truth about how the victims died and if it was at the hand of Parker, to hold him accountable for his actions.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

I concur:

WARD
J.

[10] Having so concluded, the presumption of prejudice does not arise. (See *People* v. *Pierce* (1979) 24 Cal.3d 199, 207.)

I respectfully dissent:

The California Supreme Court directed this court to vacate its prior opinion and to reconsider it in light of *People v. Cleveland*.[1] I dissented in the prior opinion and see nothing in *Cleveland* to change that decision.

Cleveland affirmed a decision of the Second District Court of Appeal that reversed a conviction for robbery. The Supreme Court agreed that the trial court should not have discharged a juror for failing to deliberate and for prejudging the case. In analyzing the standard for discharging a juror, the Supreme Court confirmed the conclusion in *People v. McNeal*[2] that "Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility."[3]

The trial judge in this case satisfied the *McNeal* requirement. When the trial judge received a note from the jury foreman that one of the jurors was not following jury instructions, he spoke to the foreman, to the juror in question, and ultimately to all of the jurors. In that process the judge exercised every effort to avoid an "'". . . intrusive inquiry into the sanctity of jurors' thought processes."'"[4] He spoke separately to each juror, out of

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[1] *People v. Cleveland* (2001) 25 Cal.4th 466.

[2] *People v. McNeal* (1979) 90 Cal.App.3d 830.

[3] *People v. McNeal, supra,* 90 Cal.App.3d at page 838.

[4] *People v. Cleveland, supra,* 25 Cal.4th at page 475.

the presence of the remaining jurors. In each case he informed the jurors that he was not asking for their impressions or their thoughts, merely their recollection of what the juror in question had said.

The *Cleveland* court specified the standard to be satisfied before the court removes a juror: "'a juror's inability to perform as a juror "'must appear in the record as a demonstrable reality.'" [Citation]' (*People v. Marshall* (1996) 13 Cal.4th 799, 843."[5] In her concurring opinion, Justice Werdegar observed that "[s]uch language indicates that a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror. In this context, then, a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate."[6]

Despite the worthy efforts of the trial judge to walk the tight rope of inquiring into the deliberations of the jury without violating the "sanctity" of the deliberative process, I do not believe the evidence showed by a demonstrable reality that the discharged juror had failed to properly deliberate. I base that conclusion upon the inquiries made by the trial court of the discharged juror and her fellow jurors.

First, the jury foreman acknowledged that juror No. 1 had participated in the deliberations. Dismissal for refusal to deliberate would therefore be inappropriate.

The other 11 jurors primarily complained that juror No. 1 had improperly

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[5] *People v. Cleveland*, *supra*, 25 Cal.4th at page 474.

[6] *People v. Cleveland*, *supra*, 25 Cal.4th at page 488.

considered the potential penalty for a first degree murder conviction. She reportedly said "[i]f the crime wasn't first-degree murder, I could vote for guilty." Upon inquiry, juror No. 1 explained that just after the foreman had sent the judge a note disclosing that the jury was hopelessly hung and could not reach a verdict, she offhandedly responded to a question as to whether she could have voted guilty if the charge had been something other than first degree murder. She answered yes. In explaining that answer to the court she said that the prosecution had not proved "to me beyond a shadow of a doubt that . . . [the defendant] was involved in this thing in any way." She added that throughout the deliberations she had been careful not to consider the possible punishment in the event of a conviction.

After interviewing juror No. 1, the trial court concluded there was no basis to dismiss the juror and asked the jury to continue its deliberations. Thirty minutes later the foreman informed the trial court that the jury remained dead locked. After that note the trial court interviewed all of the other jurors.

The other jurors restated the comment made by juror No. 1 regarding her inability to find the defendant guilty of first degree murder. Most jurors interpreted that comment to mean that juror No. 1 had improperly considered the penalty. Some jurors believed that juror No. 1 had satisfactorily explained that her comment did not mean she was considering punishment. Some jurors said that juror No. 1 had tried to explain her comments, but no one was listening. One juror recalled that juror No. 1 had said that the defendant's guilt had not been proven beyond a reasonable doubt; another said that juror No. 1 said she could not send the defendant to prison or a death penalty on what she had heard.

I believe that the trial court in good faith heard the comments of the jurors as to

juror No. 1, but did not apply the standard enumerated in *Cleveland* when it dismissed that juror. The defendant has the right to a unanimous verdict.[7] The comments of juror No. 1 could have been interpreted to mean that she did not believe the prosecution had proved the charge against defendant. The dismissal of a juror because that juror had doubts about the prosecution's evidence violates a defendant's right to a unanimous verdict because the dismissal allows the prosecutor to obtain a conviction without satisfying all 12 jurors of the defendant's guilt.[8] Where there is a possibility that the request to discharge a juror stems from the juror's view of the sufficiency of the prosecution's evidence, the court should deny the request.[9]

I have reviewed *Packer v. Hill*,[10] a Ninth Circuit opinion rendered on January 15, 2002. That case is not directly applicable here because it deals with the Ninth Circuit reversal of a California murder conviction caused by the trial judge's coercion of the jury. The court did consider the fact that, as in this case, the trial judge knew the numerical division of the jury was eleven to one and knew the name of the lone dissenter. That court observed that "[t]he Supreme Court has instructed that, where the jury break down is eleven to one 'the most extreme care and caution [are] necessary in order that the legal rights of

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[7] *Apodaca v. Oregon* (1972) 406 U.S. 404.

[8] *U.S. v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596-597.

[9] *U.S. v. Brown, supra,* 823 F.2d at pages 596-597.

[10] *Packer v. Hill* (9th Cir. 2002) DJDAR 517.

the defendant should be preserved.' *Burton v. United States*, 196 U.S. 283, 307 (1905)."[11]

In this case the trial judge knew the numerical division of the jury and knew that the lone dissenter refused to find the defendant guilty of the murder charge. In order to satisfy its constitutional mandate, the trial court was required to exercise extreme care to preserve the legal rights of the defendant. I believe the exercise of that care required the trial judge to interpret the comments of the "recalcitrant" juror and those of the other jurors as raising an issue of sufficiency of the evidence to convict the defendant and not a failure to deliberate. The court should therefore have retained the "recalcitrant" juror on the jury. It failed to do so.

I believe there was insufficient evidence in the record as a demonstrable reality of juror No. 1's inability to perform her duty.

I would reverse the conviction and remand the case for a new trial.

s/Gaut

J.

[11] *Packer v. Hill, supra,* DJDAR at page 521.