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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, v. BRENNER CARL AULT, Defendant and Respondent.	D040184 (Super. Ct. No. SCD156220)

APPEAL from an order of the Superior Court of San Diego County, H. Ronald Domnitz, Judge. Affirmed.

Paul J. Pfingst and Bonnie M. Dumanis, District Attorneys, Anthony Lovett, D. Michael Ebert and Christopher F. Lindberg, Deputy District Attorneys, for Plaintiff and Appellant.

Cleary & Sevilla and Charles M. Sevilla for Defendant and Respondent.

This is an appeal by the People from an order granting a new trial on the ground of juror misconduct in favor of a criminal defendant convicted of two counts of child molest

(Pen. Code,[1] § 288, subd. (a)), with a finding of substantial sexual conduct (§ 1203.066, subd. (a)(8)). The People concede juror misconduct occurred but contend the trial court erred in finding the jury misconduct was prejudicial. We affirm the grant of a new trial.

FACTS

Ault was charged with 13 counts of child molestation involving Stephanie C. (Stephanie) and two other girls. Ten of the counts related to Stephanie. The molestations were alleged to have occurred on several different occasions over a period of years. The court acquitted Ault of three of the molest charges. The jury acquitted Ault of eight of the remaining counts. They convicted him only of counts 4 and 5, molestations that occurred shortly before a birthday party for Stephanie's brother on September 14, 2000, when she was 13 years old.

Stephanie thought of Ault as her boyfriend, but she felt embarrassed and guilty about the molests. The molests came to light after Stephanie had a fight with her "grammy" with whom she was staying while her parents were in Europe. Stephanie told a teacher of her problems with her "grammy" which led to Stephanie staying with another teacher and a friend, Kym T. (Kym). Kym asked Stephanie if Ault had kissed her, to which Stephanie said no. Kym told her of her own molestation experience. Stephanie then told Kym about some of the conduct with which Ault was later charged. Stephanie testified that the day before she talked to Kym, she was angry with Ault because she had

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1 Statutory references are to the Penal Code except when otherwise specified.

called him several times after school to give her a ride home and he had not given her a ride.

Kym confronted Ault who neither denied molesting Stephanie nor called her a liar. Kym told Stephanie's mother about the molestations. Stephanie was embarrassed and had difficulty talking about the incidents. Stephanie's mother believed Stephanie was naïve and suffered from low self-esteem because of a learning disability. A speech and language specialist (who was also Stephanie's language therapist) testified Stephanie had an expressive language disorder; it was difficult for Stephanie to translate her thoughts into words.

Stephanie did not mention some of Ault's conduct to anyone until a few days before the preliminary hearing. At the preliminary hearing, she did not mention Ault showing her pornographic pictures on his computer, she remembered it only a few days before her testimony.

Counts 1 and 2

Ault was charged with kissing Stephanie on the lips and touching her over her shorts near her vagina in his apartment before taking her to a baseball game. Stephanie said the baseball game was around the time of her other brother's birthday on February 11. Ault denied any touching occurred and testified the baseball game was in August. The jury acquitted Ault of these charges.

Count 3

Ault was charged with fondling Stephanie's vagina over her clothing at his apartment before taking her out for ice cream. Stephanie felt uncomfortable and

embarrassed. Ault told her "don't tell or I'll be going to jail." The jury acquitted Ault of this count.

Counts 4 and 5 — Ault Found Guilty

On September 14, 2000, the day of her brother's birthday and while Stephanie's parents were in Europe, Ault picked up Stephanie, at a store near her school. He told her he had purchased a gift for her brother so they did not have to shop and they could spend more time together. He took her to his apartment and showed her some paint balls. He kissed Stephanie and touched her between the legs and put his finger inside her. They went into the bedroom where Ault laid on top of her, kissed and touched her and then asked Stephanie to undress. He left the room while she undressed and slipped under the covers. He returned, laid on top her, kissed her and then told her that if she was embarrassed she could put a pillow over her face, which she did. Ault told her he had his finger inside her. He told her not to tell or he would go to jail. He also had her touch his penis. Ault remained clothed.

After Stephanie dressed, Ault had her sit on his lap while he touched her vagina and showed her pornographic pictures on his computer. They then went to her brother's birthday party.

Ault denied molesting Stephanie on September 14, 2000, or any other day. Ault, his mother and his girlfriend testified Stephanie did not act in an unusual manner at the party.

Ault admitted he had pictures of adult nudity on his computer on September 14, 2000, but denied showing the pictures to Stephanie. A computer expert testified he found

no evidence that adult nudity or pornography on Ault's computer had been accessed from 1:00 p.m. to 7:00 p.m. on September 14, 2000.

The jury convicted Ault of these counts, i.e., two counts of violating section 288, subdivision (a) and made a true finding that Ault had substantial sexual conduct with a child under fourteen years of age (§ 1203.066, subd. (a)(8)).

Count 6

Ault was charged with touching the area of Stephanie's vagina while giving piggyback rides in a pool when several other people were present. The trial court granted Ault's section 1118.1 motion for acquittal of this count at the end of the prosecution's case.

Count 7

Ault was charged with kissing Stephanie in her bedroom. The trial court granted Ault's section 1118.1 motion for acquittal of this count at the end of the prosecution's case.

Counts 8 through 10

Ault was charged with fondling Stephanie's vagina and having her twice touch his penis when he took Stephanie and others to the beach. According to Stephanie, Ault fondled her and had her first touch his penis while she, Ault, and Ault's girlfriend were lying under a blanket. Later, Ault took her to a nearby car where she stroked his penis. The jury acquitted Ault of these counts.

Other Counts

Ault was also charged with child molesting (§ 288, subd. (a)), sexual battery (§ 243.4, subd. (d)) and child molesting (§ 647.6, subd. (a)) involving two other girls. The jury acquitted Ault of two of these counts and the court granted Ault's section 1118.1 motion for acquittal on one count.

Jury Misconduct

Ault made a motion for a new trial on four grounds: (1) that the evidence was insufficient to prove molest or the enhancement of substantial sexual activity, (2) that the court erred when it excluded evidence indicating Stephanie had a history of sexual intercourse and oral copulation with her step-brother and step-cousin, (3) the court erred when it refused to allow discovery of Stephanie's psychological evaluation, and (4) jury misconduct. The trial court denied Ault's motion on the first three grounds, but granted a new trial based on prejudicial juror misconduct.

The evidence relating to the jury misconduct claim indicates that sometime during the middle of the trial, the foreperson, Juror No. 2, told her manicurist she was serving on a jury. When the manicurist insisted on knowing what kind of trial it was, Juror No. 2 told her it was a child molest case. The manicurist then told Juror No. 2 that she had known someone who had been molested by her father and that her father had escorted her "down the aisle" at her wedding. During deliberations, one of the jurors was replaced with an alternate juror. The alternate juror told the other members of the panel that he did not believe the victim's testimony. Juror No. 2 stated that the jury had already moved on to other issues. The alternate juror stated he did not believe Stephanie in part because of

her demeanor. At this point, in an attempt to bring the alternate juror "up to speed" and so that they could discuss other issues, Juror No. 2 told the manicurist's story. Juror No. 8 also recalled Juror No. 2 telling the story to the alternate juror when the jury was trying to bring the alternate juror up to speed on their progress after the alternate juror stated he did not believe Stephanie's testimony. Juror No. 8 recalled Juror No. 2 telling the story as if it were Juror No. 2's friend who had been molested. Juror No. 9 also recalled a story being told about a friend who had been molested and who had acted normally.

The trial court found Juror No. 2 had committed misconduct by talking to an outside source (the manicurist) during the trial and by then using this extraneous information to influence the other jurors when they were discussing the victim's credibility.[2] In deciding whether the misconduct was prejudicial, the trial court considered whether the "statements about child molestation, judged objectively, amount[ed] to such inherent prejudice that it would have influenced the jury."

The court noted that, objectively, the statements were intended to influence the other jurors; the statements were made "at a time when the credibility of the witness was being discussed and [the juror] made it for the sole purpose to lend more credibility to the victim's testimony." Therefore, the trial court found, the "statements amount[ed] to substantial prejudice." The court, after noting that it was "aware of the ramifications of

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[2] The court order contains a clerical error referring to Juror No. 8 as the juror making the statements, but it is clear from the record the correct juror is Juror No. 2.

this order on the child and her family," that it was not making the ruling "lightly," concluded that "the Sixth Amendment of the United States Constitution require[d] that the verdict be set aside and the defendant be awarded a new trial."

The People appealed.

DISCUSSION

I

Standard of Review

(A) Recent Supreme Court Announcements on the Standard of Review for Jury Misconduct

"An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 16 . . . .) An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it." ' " (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with [a] crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' " (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Prejudicial jury misconduct undermines the structural integrity of a trial and therefore is not amenable to the ordinary harmless error standard of review. (*People v. Nesler* (1997) 16 Cal.4th 561, 579 ["a biased adjudicator is one of the few structural trial

defects that compel reversal without application of a harmless error standard"]; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.) "Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself. . . . [¶] . . . [T]he innocent and the guilty are entitled to start a trial without any member of the jury convinced of the defendant's guilt." (*Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 755.) "When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties." (*People v. Cooper* (1991) 53 Cal.3d 771, 835-836.)

It is well established that a juror who receives extraneous information commits misconduct and commits further misconduct when he or she shares the extraneous information with other jurors. (*In re Hamilton, supra,* 20 Cal.4th 273, 294.) " 'The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' " (*People v. Nesler, supra,*16 Cal.4th 561, 578.)

It is also well established that juror misconduct raises a presumption of prejudice; the Supreme Court has repeatedly so stated. (See, e.g., *In re Hamilton, supra,* 20 Cal.4th 273, 295; *People v. Nesler, supra,* 16 Cal.4th 561, 578; *In re Carpenter* (1995) 9 Cal.4th 634, 651-652; *People v. Marshall, supra,* 50 Cal.3d 907, 950.) This presumption of

prejudice is, in part, a response to the statutory prohibition against impeaching a verdict with declarations or statements of a juror's subjective mental processes, e.g., with a juror's statement whether he or she was biased against the defendant. (See *In re Hamilton, supra,* at p. 295.) As the court explained in *People v. Holloway, supra,* 50 Cal.3d 1098, at page 1109: " 'The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred" due to " 'the substantial barrier to proof of prejudice which Evidence Code section 1150 erects [barring impeachment of a verdict by evidence of a juror's subjective mental processes].' " The presumption of prejudice " 'seeks to lower that barrier somewhat.' " (*Ibid.*) Additionally, the presumption of prejudice "accommodates the fact that the external circumstances of the incident are often themselves reliable indicators of underlying bias." (*In re Hamilton, supra,* at p. 295.)

The presumption of prejudice may be rebutted. (See, e.g., *In re Hamilton, supra,* 20 Cal.4th 273, 295 and cases cited therein.) Over the years, the Supreme Court has formulated the standard for assessing whether prejudice was rebutted and for reviewing a trial court's determination. As Justice Woods observed in his dissent in *People v. Von Villas* (1995) 36 Cal.App.4th 1425, 1445, the standard is somewhat unclear.

The Supreme Court has stated that the reviewing court must defer to the trial court's resolution of "historical facts" to the extent they are supported by substantial evidence. (*People v. Nesler, supra,* 16 Cal.4th 561, 582.) Thus, for example, the

reviewing court defers to the trial court's finding that a juror was exposed to extraneous information if that finding is supported by substantial evidence. Reviewing courts should also defer to a trial court's credibility-based determination including that a particular juror was actually biased. (See *In re Carpenter, supra,* 9 Cal.4th 634, 656; *People v. Nesler, supra,* 16 Cal.4th 561, 583 [rejecting Attorney General's argument that the reviewing court should defer to the trial court's finding since the trial court did not make any findings as to whether the juror was actually biased].)

A "presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton, supra,* 20 Cal.4th 273, 296.) "When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*People v. Nesler, supra,* 16 Cal.4th 561, 578-579.)

" 'Actual bias' . . . is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from

acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.] A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. [Citation.] '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.' [Citation.] The term 'actual bias' may include a state of mind resulting from a juror's actually being influenced by extraneous information about a party." (*People v. Nesler, supra,* 16 Cal.4th 561, 581.)

Justice Mosk, in his concurring opinion in *People v. Nesler, supra,* 16 Cal.4th 561, 592, explained that "[c]onsidered together with the presumption of prejudice, [the standard] may be understood thus: 'When juror misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record. The verdict will be set aside unless there appears no substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias unless the extraneous material, judged objectively, is not inherently and substantially likely to have influenced the juror. Second, looking to the nature of the misconduct and the surrounding circumstances, we will also find bias unless it is not substantially likely the juror was actually biased against the defendant.' "

The Supreme Court has also stated the presumption of prejudice " ' "may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the

misconduct]. . . ." ' " (*In re Hitchings* (1993) 6 Cal.4th 97, 119, quoted with approval in *In re Carpenter, supra,* 9 Cal.4th 634, 653.) It is not required that the People "present affirmative evidence showing there was no prejudice" since "[t]he presumption of prejudice may be rebutted by . . . 'a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.' " (*In re Carpenter, supra,* at p. 657.)

"In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*In re Carpenter, supra,* 9 Cal.4th 634, 654.)

"Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler, supra,* 16 Cal.4th 561, 582; *In re Hamilton, supra,* 20 Cal.4th 273, 296-297.)

(B) Usual Standard for Reviewing the Grant of a New Trial

Here, we are reviewing an appeal from the *grant* of a new trial, rather than the more typical case involving the denial of a new trial. The standard for reviewing a grant of a new trial, as opposed to the denial of a new trial, has been stated to be abuse of discretion. (See *Bell v. State of California* (1998) 63 Cal.App.4th 919, 930-931; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 748 [A trial court's exercise of discretion " ' "especially . . . when the discretion is used in awarding a new trial [which] . . . does not finally dispose of the matter" ' " will be set aside by the reviewing court " ' "only in

rare instances and on very strong grounds." ' "].) This standard applies to the grant of a new trial based on jury misconduct. (*Bell v. State of California, supra,* at pp. 930-931.)[3] As the court in *Bell v. State of California, supra,* 63 Cal.App.4th 919, 931 noted:

> "Witkin distills the law on the point: 'The trial judge is familiar with the evidence, witnesses and proceedings, and is therefore in the best position to determine whether, in view of all the circumstances, justice demands a retrial. Where error or some other ground is established, his [or her] discretion in granting a new trial is seldom reversed. The presumptions on appeal are in favor of the order, and the appellate court does not independently redetermine the question whether an error was prejudicial, or some other ground was compelling. Review is limited to the inquiry whether there was any support for the trial judge's ruling, and the order will be reversed only on a strong affirmative showing of abuse of discretion.'"

Additionally, we note that the trial court had the opportunity not only to see the individual jurors during the evidentiary hearing on the jury misconduct issue and during the course of the trial, but also had the opportunity to see the witnesses who testified at the trial. Because of these opportunities, the trial court is in a unique position to assess

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3 Recently, the court in *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1126-1127 held that a deferential standard of review does not apply when a new trial was sought on grounds of jury misconduct. The United States Supreme Court, however, has vacated the judgment in *Romo* and remanded the case for reconsideration in light of *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 538 U.S. ___ [123 S.Ct. 1513, 155 L.Ed.2d 585], a case dealing with the proportionality of punitive damages. (*Ford Motor Co. v. Romo* (2003) 123 S.Ct. 2072.) We further note *Romo*'s conclusion that the same standard of review should apply to the either the grant or denial of a new trial on the grounds of jury misconduct relied on Supreme Court cases none of which involved the grant of a new trial and relied on a theory that jury misconduct occurs outside the presence of the trial court. This latter theory ignores, as we point out in the text above, the fact that the trial court nonetheless is in a special position because of its opportunity to view the individual jurors during trial and any evidentiary hearing on the jury misconduct issue and also to observe the witnesses as they testified at trial.

the impact of potential prejudice from the alleged misconduct. A reviewing court should not lightly disregard a trial court's assessment that misconduct was prejudicial.

We further note that independent review is mandated in cases involving an appeal from the denial of a motion for a new trial or of habeas corpus petitions in order to accord the defendant due process; in those situations the courts are facing a situation where deference to the trial court's determination may result in a denial of due process, i.e., that the appellate court would be deferentially affirming a ruling finding the juror misconduct did not result in a trial by an unbiased adjudicator even though the appellate court, had it conducted an independent review, would have concluded otherwise. Protection of the constitutional right to an impartial jury is too important a right not to accord independent review when a defendant's motion for a new trial grounded on juror misconduct has been denied. In contrast, when reviewing an order granting a new trial to the defendant, there has already been a ruling by the trial court who observed both the jurors and the trial that prejudicial misconduct occurred and deference to the trial court results does not threaten the defendant's right to an impartial jury. If anything, such deference, insures the defendant's constitutional right is safeguarded to the utmost degree.

In sum, we conclude that because this appeal involves a grant of a new trial, it is appropriate to accord the trial court a certain deference not only to its factual findings that are supported by substantial evidence but also to its conclusion as to prejudice.

II

Application of the Law to the Facts

Here, there are two clear instances of misconduct: (1) a juror talked about the case with a nonjuror (i.e., talking with the manicurist); (2) the juror interjected extraneous information into the jury deliberations (i.e., the story from the manicurist). The People do not dispute that misconduct occurred. These instances of misconduct, as clearly explained by the Supreme Court, gave rise to a presumption of prejudice. The trial court found the presumption was not rebutted.

Initially, we note that this misconduct consisted of not only a juror improperly discussing the case with a nonjuror during the course of the trial and learning extraneous information about a similar situation involving a reaction to molestation, but also that this juror then proceeded to share this extraneous information with other jurors during the course of the deliberations. We acknowledge that, in some ways, the misconduct does not appear especially serious since the manicurist's story can be viewed as saying only that different people react differently to situations, that is, that molestation victims do not all react the same to being molested. Phrased in such a way, the manicurist's story reflects a commonsense point of view.

However, the misconduct must be viewed in light of all the circumstances. The story was told at the point an alternate juror was placed on the jury and was seeking to deliberate on his concerns about the victim's demeanor and credibility. Prior to the alternate juror being placed on the jury, the other jurors had already discussed the victim's demeanor and "had moved on to other issues." Juror No. 2 stated that she told the

manicurist story "[i]n an effort to bring [the alternate] 'up to speed' " and to convince the alternate "that there were other issues to consider other than 'demeanor.' " Juror No. 8 declared that the jurors appeared to find the story helpful in assessing the victim's credibility. Moreover, since Juror No. 2 was the foreperson, it is likely her statements were accorded extra consideration. An inference may be drawn that the effect of the story was to curtail deliberations by the alternate juror and, as a result, the jury, as a whole, committed misconduct by not beginning deliberations anew upon the impanelment of an alternate juror. This is also serious misconduct leading to a presumption of prejudice.

Furthermore, the misconduct becomes even more apparently prejudicial when viewed in light of the record as a whole. This was a close case. Ault was charged with 13 counts of molestation occurring on several different occasions. The jury acquitted Ault of eight of the counts. The trial court acquitted Ault on three other counts. Stephanie was found to be not worthy of belief as to the majority of the counts; Ault was convicted only of the counts occurring on September 14, 2000, the day of her brother's birthday party. This was the occasion when Stephanie's demeanor was particularly a key issue. Not just one, but several, witnesses observed Stephanie shortly after the molestation and she appeared to be acting normally. Stephanie's demeanor was the issue that the newly impaneled alternate wished to discuss, a discussion and a deliberation that was cut off by the telling of the manicurist's story, a story that informed the alternate and the jury that Stephanie's demeanor was a nonissue.

We also note that the trial court here personally witnessed Stephanie's testimony and therefore was in a far better position than we are to assess the damaging effect of the manicurist's story on the issue of Stephanie's credibility particularly in light of her apparently normal demeanor at the birthday party. Implicit in the trial court's ruling that juror misconduct was prejudicial is its assessment of the circumstances of the trial itself based on its own observations, including how closely balanced was the case in general and the believability of Stephanie's testimony in particular. Such a finding is, at least in part, credibility-based, i.e., based on the trial court's personal observations of demeanor and the evidence. We believe that such a finding is entitled to at least some deference in assessing whether the presumed prejudicial impact of the jury misconduct was rebutted.

We agree with the trial court. After reviewing the entire record in this case, we conclude the misconduct was serious, raised a presumption of prejudice, and that presumption was not rebutted. We cannot say this is a case where there was no substantial likelihood of prejudice to Ault; the record indicates that not only was extraneous information introduced during jury deliberations but also that this information was used and inferably resulted in one of the jurors not deliberating on a key issue involving the key witness's credibility.

DISPOSITION

The order is affirmed.

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McCONNELL, J.

I CONCUR:

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McDONALD, J.

BENKE, J.

I respectfully dissent. The majority concludes prejudicial misconduct occurred when Juror No. 2 had a conversation with her manicurist and then passed extraneous information from this conversation on to jurors. In affirming the granting of a new trial, the majority incorrectly uses a deferential standard of review and incorrectly applies the actual bias standard.

Standard of Review

Relying upon *Bell v. State of California* (1998) 63 Cal.App.4th 919, the majority concludes that in cases such as this, where the trial court has granted a new trial, the appropriate standard of review on appeal is whether the trial court abused its discretion. (Maj. opn., pp. 13-15.) I disagree.

The basis for the majority's holding is that where the trial court has *denied* a motion for a new trial, the defendant's constitutional right to due process might have been violated and therefore we examine the entire record using an independent review standard. Where, however, the trial court has *granted* a defendant's request for a new trial, the majority reasons the defendant's due process rights have not been violated and we therefore use a discretionary standard of review.

The initial difficulty with the majority's holding is that article I, section 29 of the California Constitution clearly states that in criminal cases the People of the State of California have the right to due process. This constitutional right would, by virtue of the majority's own analysis, entitle the People to application of the independent review standard when a new trial has been granted because, again using the logic of the majority,

only with such an examination could we properly determine whether the People's constitutional right to due process has been violated by the trial court's action.

More importantly, however, while I agree that we give great weight to the trial court on its findings of historical fact, I believe case law requires application of the independent review standard whenever the issue before us is a mixed question of law and fact. (*People v. Cromer* (2001) 24 Cal.4th 889, 901; *People v. In re Hamilton* (1999) 20 Cal.4th 273, 296-297; *People v. Nesler* (1997) 16 Cal.4th 561, 582; *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1126-1127.) The holdings rest on the sound principle that where a constitutional issue is involved, the law requires uniformity, clarity of precedent and appellate control of results. (*People v. Cromer, supra*, 24 Cal.4th at p. 901.)

The constitutional question before us is whether juror misconduct resulted in a denial of due process. What constitutes such misconduct and when that prejudice has occurred are matters implicating the constitutional rights of the defendant and the People. The standard for such considerations is one best left to our independent review regardless of whether there has been a grant or denial of a new trial motion by the trial court. Such a standard assures equal treatment for all of the parties.

Test of Prejudice on Appeal

Our Supreme Court has stated that where juror bias exists, a verdict will be set aside only where the reviewing court finds that bias is inherently and substantially likely to have influenced the juror or where the nature of the misconduct and surrounding circumstances determine it is substantially likely the juror was actually biased against the

defendant. The judgment must be set aside if the court finds prejudice under either test. (*In re Carpenter* 9 Cal.4th 634, 653; see also *People v. Nesler, supra,* 16 Cal.4th at pp. 578-579.) The majority concludes actual bias exists in this case. I respectfully disagree.

My first observation is that the trial court correctly articulated the *Nesler* test and then found that because "substantial prejudice arose under the first prong of the *Nesler* test, it need not address the second prong." Thus, the trial court declined to make a finding on whether Juror No. 2 was actually biased. It concluded bias existed because the extraneous material Juror No. 2 brought to the jury room was inherently prejudicial. On this finding I note my colleagues' observation: "We acknowledge that, in some ways, the misconduct does not appear especially serious since the manicurist's story can be viewed as saying only that different people react differently to situations, that is, that molestation victims do not all react the same to being molested. Phrased in such a way, the manicurist's story reflects a commonsense point of view." (Maj. Opn., p. 16.) I agree. On this basis alone we should reverse the lower court, for it reached an erroneous conclusion on the prejudicial nature of the material.

Unable to find bias based on the inherent nature of the material in this case, the majority concludes actual bias existed because of the circumstances surrounding the relatively benign statement. As to this, I have several additional observations. First, my colleagues can reach this conclusion only with an independent review of the record. They must apply an independent review because the trial court never reached the actual bias issue and there is no ruling to review on this issue. Stated more directly, there is no ruling on actual bias on which to base a discretionary review. Thus at the outset my

colleagues create inconsistency in their opinion because they do precisely what they hold they cannot do, i.e., apply an independent review standard in a case involving the granting of a new trial.

With all due respect, equally flawed is the majority's conclusion the circumstances demonstrate actual bias. I do not find the record of this case supportive of any of the conclusions reached by my colleagues. The majority concludes that "since Juror No. 2 was the foreperson, it is likely her statements were accorded extra consideration." (Maj. opn., p. 17.) This is speculation. In fact, the record reflects the opposite is true. Juror No. 2 described her comment as a one-sentence statement that was very brief and was never mentioned again. Juror No. 8 observed that even after it was mentioned, jurors "still had their own opinion."

My colleagues also conclude an inference can be drawn that the effect of the statement was to curtail deliberations by the alternate and thus by the entire jury. They conclude discussion in the jury room was "cut off." There is nothing in the record which supports such a conclusion. As noted, jurors maintained their own opinion. Moreover, the record reflects that when the alternate came into the jury room, the jury was instructed to begin deliberations anew. There is nothing in the record that supports a conclusion they did not do so. In fact, the record indicates the pre-alternate jury quickly reached verdicts on some counts and did so again after the alternate was added.

Finally, my colleagues conclude this was a close case where the credibility of the victim swayed the jury on the allegations. As to this conclusion, I would point out the record contains juror declarations secured by the defense in support of the motion for new

trial. These declarations, of Juror Nos. 6, 8, 9 and 11, were of questionable admissibility. (Evid. Code, § 1150.) Nonetheless, the People and defense agreed to admit them and they were admitted. They were prepared after an investigator for the defense interviewed the jurors on a variety of topics, including the basis for their verdicts, how certain events and evidence affected them, and how they would decide the case based on hypotheticals he gave them. The interviews were incorporated into letters the investigator sent to defense counsel, who then prepared declarations incorporating the letters. The declarations are instructive. They do not support the majority's conclusions.

In the declarations, Juror No. 8 states the incidents forming the basis of the guilty verdict were credible. Juror No. 6 related the victim's credibility was based on the fact she related pornography was on appellant's computer, which was independently verified by another witness. Juror No. 9 agreed, stating the most compelling evidence of guilt was the pornography on appellant's computer. That juror added there was evidence of a pillow which verified the victim's testimony, and there was also a negative impact because appellant testified everyone else was lying. As for the victim acting normally at the birthday party, the juror stated it did not concern him. He remembered someone stating something about "a friend who had been molested and who acted normally" but that he "didn't pay attention to it."

There is no evidence to support a conclusion Juror No. 2 manipulated and controlled the verdict in this case. Applying the independent review standard that we are required to apply, and examining the entire record, the evidence supports the conclusion the statement made by Juror No. 2 was a truism which, although improper, had very little

affect on the jury and no effect on the verdict. Neither the statement itself nor the circumstances surrounding it reflects inherent bias or actual bias on the part of Juror No. 2.

I would reverse the finding of the trial court.

CERTIFIED FOR PUBLICATION

BENKE, Acting P. J.