

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL OLMOS,

Defendant and Appellant.

B226709

(Los Angeles County
Super. Ct. No. TA110287)

APPEAL from a judgment of the Superior Court for Los Angeles County, John T. Doyle, Judge. Reversed.

Marilee Marshall & Associates, Inc. and Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Daniel Olmos guilty of carjacking (Pen. Code, § 215, subd. (a))¹ and unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)). He appeals from the judgment, arguing that (1) he was deprived of his

¹ Further undesignated statutory references are to the Penal Code.

constitutional right to a unanimous jury when the trial court failed to declare a mistrial after the jury indicated it was at an impasse, and dismissed a holdout juror during deliberations; (2) the trial court erred by refusing to instruct the jury on a claim of right defense; (3) the trial court erred by giving a special jury instruction on carjacking, requested by the prosecutor, that he contends lessened the prosecution's burden of proof; (4) the trial court erred by admitting evidence that defendant previously had been convicted of misdemeanor domestic violence; and (5) cumulative error requires reversal. We conclude the trial court abused its discretion by dismissing the holdout juror, thus depriving defendant of his constitutional right to a unanimous jury. Accordingly, we reverse the judgment.

BACKGROUND

On December 31, 2009, Rogelio Hernandez drove his 1997 Cadillac to a gas station in Lynwood. He had bought the car from a friend's uncle less than two weeks before that date. He got out of the car, leaving his keys in the ignition and the doors unlocked. As he stood in line to pay to pump gas, he saw two Hispanic men, one in a red shirt and the other in a gray sweater or sweatshirt, walking toward him. Hernandez started backing up because the men had their hands by their pockets as though they had weapons and the man in the red shirt was "banging on" him, saying "Compton" something and asking him where he was from. Hernandez told the man that he was from CFM -- which stands for "Criminal Family," a party crew that he was in while in high school, before the crew died out -- but that he did not do that anymore.

The man in the red shirt kept walking toward Hernandez as he was backing up, but the man in the gray sweater walked over to Hernandez's car and stood there. When Hernandez was almost at the street, the man in the red shirt stopped and said, "This what happened [*sic*] when you get caught slippin'" (which

Hernandez understood to mean “they gonna get you when you less expect it”).² At that point, the man in the red shirt started backing off while the man in the gray sweater got in Hernandez’s car and drove off. He did not see where the man in the red shirt went.

Hernandez did not know the car’s license plate number, so he had to go see the person who sold him the car. Once he got the plate number, he contacted the police to report that his car had been stolen. A few days later, he talked to Detective Oscar Veloz of the Los Angeles County Sheriff’s Department. He told the detective that a gang from Compton was involved in the incident, possibly Largo or T Flats.

In the early morning hours of January 7, 2010, Deputy Sheriff Cesar Landeros was on patrol when he saw a 1997 Cadillac parked in a high crime area in Paramount, with two people who appeared to be sleeping in it. A young woman was in the driver’s seat, and defendant was in the passenger’s seat. When the deputy approached, the woman opened the car door, and he smelled burnt marijuana. He detained both individuals pending a narcotics investigation. When he ran the car’s license plate number, it came back as stolen. After reading defendant his *Miranda*³ rights, Deputy Landeros asked him about the stolen car. Defendant told him that his girlfriend, the driver, had purchased the car from some guy on Alameda and Firestone in Los Angeles. When asked about the pink slip, defendant said he saw that it had the name Roberto Hernandez on it. When one of the assisting units arrived at the scene, Deputy Landeros learned that the report on

² Although Hernandez testified at trial that the man in the red shirt made this statement, the detective who interviewed him shortly after the incident testified that Hernandez told him that the man in the gray sweatshirt made the statement.

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

the stolen car indicated that the men who took the car had yelled “Compton,” so the deputy checked defendant for tattoos. He saw that defendant had a Compton tattoo on his upper back.

Detective Veloz interviewed defendant later that day. Defendant told him that he was at a gas station with his brother Antonio and Antonio’s girlfriend when they saw Hernandez (whom they knew as “Red”⁴) waiting in line. Defendant and Antonio confronted Red because Red owed him money for a quad (a four-wheel dirt bike). Antonio told defendant to take the car, so he got in the car and drove off. Detective Veloz asked defendant to write down what he told him.

Defendant’s written statement was consistent with what defendant told the detective, except it did not state that Antonio told defendant to take the car. During the interview, the detective also asked defendant if he belonged to a gang; defendant said that he belongs to the Compton T Flats gang, with the moniker “Fat Boy.”⁵

After interviewing defendant, Detective Veloz compiled two photo lineups -- one that included defendant’s photo and another that included Antonio’s photo -- and showed them to Hernandez. According to the detective, Hernandez looked at the photos, gave him a startled look and immediately handed them back to him.⁶ The detective asked Hernandez to look at them again, but Hernandez declined, saying that he did not want to point anyone out, and he just wanted to get his car back.

⁴ Hernandez testified that everyone called him “Rojo,” which is short for Rogelio, or “Red”; rojo is the Spanish word for red.

⁵ Detective Veloz also interviewed defendant’s brother Antonio, who told him that he belongs to Compton T Flats, with the monikers “Vago” and “Scrappy.”

⁶ At trial, Hernandez testified that he looked at the photos for four or five minutes and told the detective he did not recognize anyone.

Defendant was charged by information with one count of carjacking (§ 215, subd. (a)), with a gang allegation under section 186.22, subdivision (b)(4), and one count of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), with a gang allegation under section 186.22, subdivision (b)(1)(a).

At trial, the jury was shown video clips of the incident, and Hernandez described what happened. Hernandez was asked if the man in the gray sweatshirt was in the courtroom, and he said he did not see him. The prosecutor pointed to defendant and asked Hernandez if he knew him; Hernandez said he did not, and that he had never seen him before. Hernandez also testified that he did not give anyone permission to take his car, he did not owe money to anyone for a quad, and he has never owned a quad.

In addition to Hernandez, the prosecution presented the testimony of Deputy Landeros, who described the circumstances of defendant's arrest, a fingerprint technician who lifted fingerprints from the Cadillac, an identification deputy who determined those fingerprints belonged to defendant, and Detective Veloz, who testified about his interviews with defendant and Hernandez and provided expert gang testimony.

Defendant testified on his own behalf. He said that he knows Hernandez because they went to school together, and that he introduced Hernandez to his cousin in February 2009 because Hernandez wanted to buy his cousin's quad. Hernandez agreed to buy the quad for \$4,500. Hernandez paid the cousin \$500 at that first meeting, and agreed to pay \$250 every two weeks. In late April, defendant's cousin, who no longer lived in Los Angeles, told defendant that Hernandez had not paid him for the quad, and asked defendant to get the money Hernandez owed him. Defendant called Hernandez in May 2009 to ask him about the money. Hernandez told him that he had it and was going to give it to defendant's cousin. In December 2009, defendant's cousin told defendant that he

had not received any money from Hernandez other than the money he paid at their first meeting.

Defendant testified that he spoke to Hernandez again on December 9, and told him that his cousin agreed that Hernandez should give the money to defendant. Hernandez told defendant that he did not have the money at the moment, and that he was trying to sell his car. Hernandez said that he would call defendant back on December 14. Hernandez did not call defendant back. Defendant saw Hernandez at a barbeque/dog show on December 19, and told him he would call him about the money.⁷ Defendant called Hernandez on December 31. Hernandez told defendant that he had not yet sold his car, and asked defendant to meet him at the gas station, so Hernandez could turn the car over to defendant to hold it until either Hernandez or defendant found someone to buy the car. Defendant went to the gas station with his brother in their mother's car; he asked his brother to come with him so his brother could drive their mother's car home.

During his testimony, defendant admitted that he had not told Detective Veloz the same story he told the jury, and denied telling the detective that he belonged to the Compton T Flats gang. He also denied telling Deputy Landeros that his girlfriend bought the car from a guy at Firestone and Alameda; he testified that his girlfriend said that to the deputy, and that he just told him that he had seen the pink slip.

⁷ Defendant did not mention this meeting during his initial testimony. The morning after the defense rested, defendant's sister told defense counsel that she had a CD with pictures taken at a dog show on December 19, 2009, showing that defendant and Hernandez were at the same event. Counsel moved to reopen defendant's case to present this evidence, and the trial court granted the motion. Defendant testified about the event (he said there were around 30 people there), and offered three photographs into evidence. One of the photographs showed defendant, and another showed Hernandez.

The case was submitted to the jury. After a few hours of deliberation, the jury asked to review the video of the incident. After viewing the video, the jury deliberated for a couple more hours, then sent a note to the court stating that, after four votes, the jury was undecided. Five minutes later, while the trial court was addressing counsel about the jury's note, the jury buzzed the courtroom indicating it had a verdict. Ten minutes later, the jury sent out a note stating that it was hung on both counts. The jury was called into the courtroom, and the foreperson was asked if there was a verdict. The foreperson said there was not. When asked by the court about the votes the jury had taken, the foreperson indicated that, in the first vote, the jury split eight-four on the first count and eleven-one on the second count. On the second vote, the split was ten-two on the first count and eleven-one on the second count. On the third and fourth votes, the split was eleven-one on both counts. The court asked the jury to continue its deliberations, noting that the jury had not had a lot of deliberation time, and that it appeared that progress was being made. The jury returned to the jury room and deliberated for just over an hour before adjourning for the day.

The next morning, the jury sent another note to the court stating: "We have discussed the case over and over and our one juror is solid with their stance. No matter how long we deliberate their mind will not change. That is what was stated by the juror." The court was not able to bring the jury out when it received the note because it was engaged in another jury trial. Half an hour later, before the court was able to meet with counsel and the jury, the jury sent another note, stating: "We have one hostile juror who is not willing to follow the law and agree to deliberate based on fact and evidence that has been presented by other jurors. She also admitted to taking notes home to look over them and to help her make her decision. I respectfully request to excuse this juror due to her bias and her unwillingness to review evidence presented."

After taking a recess in its ongoing trial, the trial court brought the jury out and questioned each of the jurors separately. The dissenting juror, Juror No. 1, said that all of the jurors were deliberating, and that she was engaging in conversation and discussing the case. She admitted that she had taken her notes home, and said she did not know she was not allowed to do so until someone said something to her that morning. The remaining jurors gave different accounts to the court. Some of the jurors said that Juror No. 1 refused to deliberate from the beginning, others said she deliberated at the beginning and then refused to participate, and others said she continued to deliberate. One of the jurors (the foreperson) also told the court that Juror No. 1 told the jurors she felt strongly about her decision on the verdict because Hernandez did not want to point out defendant; Juror No. 1 said that when she got robbed by someone in her neighborhood, she called the police and pointed out the perpetrator.⁸

During a break in the trial court's inquiry of the jurors, defense counsel asked the court to declare a mistrial based on juror misconduct. Counsel said she sought a mistrial, rather than having the court dismiss the juror and replace her with an alternate, because she was concerned that the remaining jurors would convince the alternate to go along with them so they would not have to return to court the following week (the questioning of the jurors was taking place mid-day on a Friday). Counsel stated: "I think there's a legitimate basis now to declare mistrial for this reason as opposed to hung jury mistrial. . . . In other words [mistrial] based on juror misconduct rather than based on hung jury." When the

⁸ Defense counsel expressed concern about this because she could not recall Juror No. 1 revealing during voir dire that she had been the victim of a robbery (in fact, the juror had disclosed it). Counsel stated that "she's letting a previous experience influence her decision making on this case. And even though it inures to the benefit of my client, it's clearly improper."

court indicated that, while it understood counsel's concern, the appropriate thing to do would be to bring in the alternate and instruct the jury to start over, defense counsel asked the court to declare a mistrial based upon a hung jury. Counsel noted that the jury had indicated several times that it was hung and, had the court brought the jurors out when it received the first note that morning (it could not do so because of an ongoing jury trial), the court probably would have declared a mistrial. The court, however, observed that there were other issues, i.e., that Juror No. 1 took her notes home. Counsel responded, "That's why I'm saying there's obviously juror misconduct."

After questioning the remaining jurors and hearing the arguments of counsel, the trial court found that Juror No. 1 could not perform her duties because she refused to listen or give a reason for her position, and she had committed willful misconduct by taking her notes home and bringing her prior experience as a robbery victim into the jury room and using it as an example of how it should affect the jury's decision making. The court removed Juror No. 1 and replaced her with an alternate, and instructed the jury to disregard all past deliberations and begin deliberating as if those earlier deliberations had not taken place. Less than an hour later, the jury reached its verdict.

The jury found defendant guilty on both counts, but found the gang allegations were not true. The court sentenced defendant to the midterm of five years on the first count (carjacking); a two-year sentence on the second count was stayed under section 654. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. Deprivation of Constitutional Right to a Unanimous Jury

Defendant argues he was denied his right to be free from conviction absent a unanimous verdict, as guaranteed by the California Constitution and, through the due process clause, by the United States Constitution. His argument is based on the following contentions: (1) the trial court should have declared a mistrial after the jury indicated that it was deadlocked, before the jury disclosed possible misconduct by Juror No. 1; (2) the trial court's determination that Juror No. 1 refused to deliberate was not established "as a demonstrable reality" by the record (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*)); (3) Juror No. 1's conduct in taking her notes home and bringing up her experience as a robbery victim did not amount to misconduct warranting dismissal from the jury; and (4) the trial court should have discharged the entire jury rather than replacing Juror No. 1 with an alternate juror. Although we disagree with defendant's first contention, we agree the record does not establish as a demonstrable reality that Juror No. 1 refused to deliberate or that her conduct warranted dismissal from the jury.

1. *Failure to Declare a Mistrial Based Upon Hung Jury*

Defendant first contends he was deprived of his right to a unanimous jury when the trial court failed to declare a mistrial when the jury had indicated it was hung, because the court improperly based its decision to order the jury to keep deliberating solely on the amount of time the jury had been deliberating, and ignored the foreperson's statement that the holdout juror "was solid" in her vote. The record, however, does not support his contention. Instead, the record shows there was a certain amount of confusion initially regarding whether the jury had reached a verdict or was hung, and that the trial court based its decision upon its reasonable belief (based upon the votes the jury had taken) that progress was being made by the jury.

“[T]he question whether to declare a hung jury or order further deliberations rests . . . in the trial court’s sound discretion. [Citations.] ‘Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived “as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.”’ [Citation.]” (*People v. Bell* (2007) 40 Cal.4th 582, 616; see also § 1140 [“Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree”].)

In the present case, after less than four hours of deliberation, the trial court received a note from the jury indicating that it was unable to reach a verdict after four votes. But five minutes later, the court received notification that the jury had reached a verdict, followed ten minutes later by a note stating that the jury was hung. In questioning the foreperson, the court learned the vote-splits as to one of the counts had moved from eight-four on the first vote, to ten-two on the second vote, to eleven-one on the third and fourth votes. Noting the progress that had been made over the several votes, but acknowledging the foreperson’s statement that the one juror “was solid,” the court asked the jurors to continue to deliberate and see if they could reach a verdict. In doing so, the court emphasized that it did not intend to force any juror to change his or her mind, telling the jury: “It is only my intent to see if you can arrive at a consensus and unanimous decision if you can. If you can’t, then you can’t.” In light of this record, we conclude the trial

court reasonably could have believed that further deliberations might lead to a unanimous verdict, and therefore it did not abuse its discretion by directing the jury, in a non-coercive manner, to continue its deliberations. (*People v. Bell*, *supra*, 40 Cal.4th at p. 617.)

2. *Good Cause to Discharge Juror No. 1*

Defendant's second and third contentions in support of his assertion that he was denied his constitutional rights challenge the trial court's findings that Juror No. 1 was unable to perform her duties as a juror because she refused to deliberate and engaged in willful misconduct. The court made these findings after it received a note from the jury stating that the dissenting juror was refusing to deliberate and had admitted to taking her notes home to help her come to her decision. Having been informed of possible misconduct by the dissenting juror, the trial court was required to, and did, conduct a hearing to determine whether the juror should be removed under section 1089. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 (*Barnwell*)). That section provides in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (§ 1089.)

Refusing to deliberate or engaging in willful misconduct by failing to follow the court's instructions may constitute good cause for removal. (See, e.g., *Cleveland*, *supra*, 25 Cal.4th at p. 475 [refusing to deliberate is ground for removal under § 1089]; *People v. Daniels* (1991) 52 Cal.3d 815, 864 [serious and willful misconduct constitutes good cause for removal].) The Supreme Court has

cautioned, however, that great care must be taken by the trial court when removing a juror for cause, to protect both the sanctity of jury deliberations and the defendant's fundamental rights to due process and to a fair trial. (*Cleveland, supra*, 25 Cal.4th at p. 475; *People v. Wilson* (2008) 44 Cal.4th 758, 821.)

For that same reason, the Supreme Court has instructed that on review we must apply the "demonstrable reality test," which "entails a more comprehensive and less deferential review" than the substantial evidence standard: "It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause] was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be that the trial court's conclusion is manifestly supported by evidence on which the court actually confident relied." (*Barnwell, supra*, 41 Cal.4th at pp. 1052-1053.) The Supreme Court noted that, because the reviewing court must consider both the evidence on which the trial court relied and the record of reasons the court provided, the trial court should "set[] out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath." (*Id.* at p. 1053.)

In the present case, the trial court gave three reasons for its conclusion that Juror No. 1 was failing to follow the oath: she refused to deliberate, she took her notes home to help her make her decision, and she took her prior experience as a robbery victim into the jury room and was "comparing her prior experience . . . and using that as an example how it should affect their decision making."

Unfortunately, the record is somewhat unclear with regard to the court's explanation of the first reason. The trial court appears to have based its conclusion that Juror No. 1 refused to deliberate on statements by various jurors that Juror No. 1 told them she "didn't want to look at anything else" and did not have to give a

reason for the way she felt about the case. We have reviewed the examinations of the individual jurors. We note that several jurors told the court that Juror No. 1 engaged in deliberations for at least part of the time -- for example, the foreperson estimated that Juror No. 1 participated in about 40 percent of the deliberation process before she shut down -- which would preclude a finding of refusal to deliberate. (See *Cleveland, supra*, 25 Cal.4th at p. 485 [“A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views”].) But in making its ruling, the court did not address the statements of those jurors, nor did the court discuss why it may have discredited those statements.

And even though most of the jurors did indicate, as the trial court noted, that Juror No. 1 was firm in her decision and did not provide much (if any) explanation for her opinion, we conclude their statements do not show that she refused to deliberate. When the jurors who told the court that Juror No. 1 was not deliberating were questioned about the basis for their assertion, they gave responses that reveal that Juror No. 1 simply viewed the evidence differently than the other jurors.

For example, when asked whether Juror No. 1 would explain her reasoning to her fellow jurors, Juror No. 2 told the court that Juror No. 1 would just say, “This is my opinion and this is the way I see it, and the others of you see it different than I see it.” Juror No. 6 said that Juror No. 1 would only say “Well, I see it differently than all eleven of you, and that’s my opinion,” or “I feel the way I feel.” And Juror No. 7 explained that Juror No. 1 was “saying that basically [she is] looking at the same thing that we are and [she] see[s] something completely different than we do.” Juror No. 4’s response to the court’s questioning was even more direct, saying that Juror No. 1 told them that she did not want to listen to their

opinions because she already told them what she believes is true, that the person (i.e., the victim, Hernandez) told defendant to take the car. In other words, it appears that Juror No. 1 found defendant's testimony to be more credible than the prosecution's evidence, and having come to this conclusion, she refused to change her mind. That does not amount to a refusal to deliberate. (See, e.g., *People v. Bowers* (2001) 87 Cal.App.4th 722, 734 ["It is not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors"]; see also *id.* at p. 735 ["It cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote"].) In light of the record, we cannot say we are "confident that the trial court's conclusion [that Juror No. 1 refused to deliberate] is manifestly supported by" the record. (*Barnwell, supra*, 41 Cal.4th at p. 1053.)

The other two reasons the trial court gave for its conclusion that Juror No. 1 was failing to follow the oath -- she took her notes home and she discussed with the other jurors her experience as a robbery victim -- also are insufficient to justify her removal from the jury. Although the Supreme Court has held that "a court may exercise its discretion to remove a juror for serious and willful misconduct, such as . . . repeated violation of the court's instructions" (*People v. Daniels, supra*, 52 Cal.3d at pp. 863-864), the record here does not show that Juror No. 1's actions constituted "serious and willful misconduct."

With regard to the trial court's finding that Juror No. 1 "created willful misconduct by taking [her] notes home and . . . making a decision at home," we note that, once the case has been submitted to the jury, it is not misconduct for a juror to think and form an opinion about a case while at home. (*People v. Collins*

(2010) 49 Cal.4th 175, 253.) To the extent the trial court’s finding was based upon its conclusion that Juror No. 1 willfully violated the court’s instructions to the jurors not to remove their notes from the courthouse, we conclude that Juror No. 1’s single violation does not rise to the level of “serious and willful misconduct” warranting her removal.⁹

With regard to the last reason the court articulated in support of its ruling, the court appears to find that Juror No. 1 committed misconduct because she told the jurors they should decide the case based her prior experience as a robbery victim. But the record of Juror No. 1’s statement regarding that incident (which was recounted by the foreperson) suggests that Juror No. 1 was simply telling the other jurors why she did not credit Hernandez’s testimony about the alleged carjacking. In any event, Juror No. 1’s discussion of her experience as a robbery victim does not constitute misconduct. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 162 [holding it was not misconduct for jurors to recount their own experiences with drugs when evaluating defendant’s claim that his conduct was related to his drug use]; see also *People v. Collins, supra*, 49 Cal.4th at p. 252, fn. 34 [“Jurors’ views of the evidence are necessarily informed by their life experiences”].)

In light of our conclusion that the record does not support, under the demonstrable reality standard, the trial court’s finding that Juror No. 1 could not perform her duties as a juror, we hold the trial court abused its discretion by removing her, and the judgment must be reversed. (*Cleveland, supra*, 25 Cal.4th at p. 486.)

⁹ We note that the court gave two instructions regarding juror’s notes, one before opening statements and the other after the close of evidence. The initial instruction stated: “You have been given notebooks and may take notes during the trial. Do not remove them from the courtroom.” The later instruction, from CALCRIM No. 202, was phrased as a request rather than an order. It stated: “Please do not remove your notes from the jury room.”

B. *Defendant's Other Contentions*

Although we conclude that the judgment must be reversed based upon the improper removal of the holdout juror, we nevertheless will address defendant's other contentions on appeal regarding jury instructions and impeachment evidence, because the issues are likely to arise on retrial.

1. *Jury Instruction Issues*

Defendant contends the trial court should have instructed the jury on a claim of right defense, and should not have given a special instruction on carjacking that the prosecutor submitted. Based upon the evidence presented at trial, we agree with both contentions.

A claim of right defense negates the element of felonious intent in theft crimes where the defendant has a bona fide belief in his right or claim to the property at issue. (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.) The trial court has a duty to instruct on the defense if it supported by substantial evidence. (*People v. Romo* (1990) 220 Cal.App.3d 514, 517.) In this case, defendant testified that he and Hernandez had agreed that he would take and hold the car until a buyer could be found. Thus, substantial evidence supports a claim of right defense. The Attorney General argues, however, that the claim of right defense is not available to defendant because he tried to conceal the taking when he was arrested, by telling Deputy Landeros that his girlfriend had purchased the car, and failing to tell Detective Veloz about his purported agreement with Hernandez. (Citing *People v. Wooten* (1996) 44 Cal.App.4th 1834, 1849 [claim of right defense unavailable if defendant attempts to conceal the taking, either when it occurs or after it is discovered].) But defendant testified that he did not make that statement to Deputy Landeros, and the statement he made to Detective Veloz, although different than

his testimony at trial, did not conceal his taking of Hernandez's car.¹⁰ Therefore, based upon the evidence presented at trial, the trial court should have instructed the jury on a claim of right defense.

Conversely, the trial court should not have instructed the jury with the special instruction proposed by the prosecutor. The special instruction, which was derived from *People v. O'Neil* (1997) 56 Cal.App.4th 1126, stated: "Carjacking is not limited to cases in which a defendant initially gains possession by dispossessing the victim through the use of force or fear, and does not require that the victim be inside or touching the vehicle at the time of the taking." This instruction, which was given in addition to CALCRIM No. 1650,¹¹ was not applicable to the facts of this case, and was potentially misleading. It refers to

¹⁰ The story defendant told Detective Veloz -- that he took the car as payment on a debt Hernandez owed defendant's cousin -- would not, however, support a claim of right defense. (*People v. Tufunga, supra*, 21 Cal.4th at p. 956 [holding that claim of right defense does not extend to robberies perpetrated to satisfy, settle or otherwise collect on a debt].)

¹¹ CALCRIM No. 1650 provides in relevant part:
"To prove that the defendant is guilty of [carjacking], the People must prove that:
"1. The defendant took a motor vehicle that was not his own;
"2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;
"3. The vehicle was taken against that person's will;
"4. The defendant used force or fear to take the vehicle or to prevent that person from resisting;
"AND
"5. When the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently.
...
"A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person. . . .
"A vehicle is within a person's immediate presence if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear."

situations in which the defendant initially gained possession of the car without use of force or fear, but then resorted to force or fear while driving off, as was the case in *People v. O'Neil*. (*Id.* at p. 1132; see also *id.* at p. 1131 [explaining that “mere vehicle theft becomes carjacking if the perpetrator, having gained possession of the motor vehicle without use of force or fear, resorts to force or fear while driving off with the vehicle”].) There was no evidence of any such situation in this case. Given the danger that the first part of the instruction -- considered in isolation -- could be interpreted to mean that the prosecution was not required to show that the car was taken through force or fear, the instruction should not have been given based on the evidence adduced at trial.

3. *Impeachment Evidence*

Before defendant testified, the prosecutor told the court she had “a certified rap sheet with two convictions that [she would] like to be allowed to use to impeach the defendant.” Defense counsel submitted on one of the convictions, which was for felony vehicle theft, but objected to use of the other, which was a misdemeanor domestic violence conviction. The trial court noted that violation of section 273.5 (i.e., willful infliction of corporal injury) is a crime of moral turpitude, and that, under *People v. Duran* (2002) 97 Cal.App.4th 1448, an official court record of a misdemeanor conviction may be used to prove both the fact of the conviction and the commission of underlying offense.¹² Defense counsel said she intended to ask defendant about the domestic violence during direct examination and did not expect him to deny it, but asked whether the court was going to allow the prosecutor to ask defendant about the conviction as opposed to the underlying conduct. The court stated that the jury would have to hear about the conviction “because [the prosecutor] can’t impeach with underlying events because she doesn’t have that information [about the underlying conduct].”

To the extent the court indicated that the prosecutor was allowed to present evidence of defendant’s misdemeanor conviction even if defendant did not deny on direct examination that he committed domestic violence, the court was mistaken. Misdemeanor convictions are not admissible for impeachment. (*People v. Chatman* (2006) 38 Cal.4th 344, 373.) While conduct that resulted in a misdemeanor conviction of a crime of moral turpitude may be admitted to discredit a witness’ testimony, the conviction itself is hearsay when offered to prove the underlying conduct. (*People v. Wheeler* (1992) 4 Cal.4th 284, 298.) Although there are hearsay exceptions for felony convictions, whether offered through

¹² After a break in the proceedings, the prosecutor told the court she had obtained a certified court docket for the misdemeanor domestic violence case.

testimony or documentation of the conviction (Evid. Code, § 788), and for official court records of misdemeanor convictions (Evid. Code, § 452.5, subd. (b)), there is no hearsay exception for testimonial evidence of a misdemeanor conviction. (See *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1515, fn. 4.) Therefore, if defendant testifies on retrial, evidence of his prior misdemeanor conviction cannot be presented to the jury unless defendant denies committing the underlying offense, at which time a certified record of his conviction may be introduced as impeachment evidence to show that the offense occurred. (*People v. Duran, supra*, 97 Cal.App.4th at p. 1460.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.