

People v. Fleiss

The People, Plaintiff and Respondent,

v.

Heidi Lynne Fleiss, Defendant and Appellant.

Court of Appeal, Second District, California

No. B093373

May 28, 1996.

(Super. Ct. No. BA 083380, Unpublished)

Rehearing Denied June 18, 1996.

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Reversed.

Marks & Brooklier, Anthony P. Brooklier and Donald B. Marks for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, William T. Harter and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

We conclude that jury misconduct requires reversal of the judgment. The dispositive question is whether several members of the jury agreed to barter votes.

BACKGROUND

Defendant Heidi Lynne Fleiss was convicted by a jury of three counts of pandering. The panel was deadlocked on two other pandering counts and acquitted Fleiss of a single count of providing cocaine.

Fleiss brought a motion for a new trial, in support of which five jurors filed declarations dated December 10, 1994. These are similar and deal with discussions about relative penalties, entrapment, stubbornness of some of the jurors, deliberation difficulties, and misunderstanding of the entrapment instructions. Joseph Lechuga says he and several jurors had discussed the case outside the deliberation room with other jurors absent. He did not think Fleiss had a fair trial because two jurors "presumed her guilty before the foreperson was even selected."

Soon thereafter, the Los Angeles Daily Journal published an article saying that the District Attorney's Office was looking into whether the jurors should be held in contempt or be charged with criminal violations. On December 21, 1994, Mitrowski, Alavi, and Gipson filed declarations saying they had read the Daily Journal article, in light of which they were unable to provide the defense further information.

On February 16, 1995, Mitrowski, Gipson, Estrada, and Lechuga testified on their request for immunity, which the trial court granted. The court granted Alavi (shown as Alair on the minute order) immunity on February 21, 1995, after she testified in support of her motion.

Alavi executed a declaration dated February 22, 1995. Shortly after returning from the noon recess on Tuesday, the first day of deliberations, "one juror immediately and spontaneously stated 'Let's just hang the bitch.'" That juror "essentially refused to deliberate with respect to the case. At times he laid on the couch in the jury room." Alavi described two days of deliberations where the panel split into two factions.

On Thursday, Alavi, Mitrowski, Gipson, and Estrada began to speculate about the potential punishment faced by Fleiss. They deduced that pandering convictions would probably lead to probation and that the drug charge was the most serious. They agreed they "must obtain Ms. Fleiss' acquittal on the narcotics charge." On Friday, a juror said he wanted five pandering convictions in exchange for his not guilty vote on the drug charge. Alavi, Mitrowski, Gipson, and Estrada agreed to vote guilty on three pandering counts. Alavi says she would not have voted to convict on any pandering charge "had the other jurors refused to vote not guilty on the narcotics charge." She specifically states that she traded guilty votes for the vote of not guilty on the drug charge.

Mitrowski executed a February 23, 1995, declaration, which generally mirrors Alavi's. On Thursday, Mitrowski and Gipson discussed potential punishment. The same day, the two discussed punishment with Alavi. The three agreed to try to get an acquittal on the drug charge. Some conversation took place later that afternoon between the three and Estrada, but the declaration does not mention any discussion of punishment with Estrada present. The next day, Mitrowski, Alavi, Gipson, and Estrada agreed "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Mitrowski concludes, "I regret that I agreed to and did trade my guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Estrada's February 23, 1995, declaration recounts much the same detail as Alavi's and Mitrowski's. On Thursday, Estrada, Mitrowski, Gipson, "and possibly Joseph Lechuga," speculated on the punishment involved. A discussion later that afternoon involved Estrada, Alavi, Mitrowski, and Gipson, but the declaration does not mention it included any conversation about punishment. Friday, Estrada agreed with the others "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Like Mitrowski, Estrada concludes, "I regret that I agreed to and did trade my guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Gipson executed a declaration February 23, 1995. On Thursday morning, outside the courthouse, he and Mitrowski discussed punishment, concluding that the drug charge carried the more severe penalty. Gipson had Thursday lunch with Alavi and Mitrowski. They discussed punishment and agreed they "must obtain Ms. Fleiss' acquittal on the narcotics charge." Later that afternoon, the three and Estrada had a discussion, but the declaration makes no mention that punishment was brought up at this time. Gipson says he agreed with Alavi, Mitrowski, and Estrada "to vote guilty on three pandering counts in hopes of persuading other jurors to acquit Ms. Fleiss on the narcotics offense." Gipson also regrets that he "agreed to and did trade [his] guilty vote on the pandering counts in exchange for a not guilty vote on the narcotics offense."

Two jurors testified. We set forth pertinent excerpts from and brief summaries of their testimony.

Alavi.

"We decided we were going to stick to our verdicts only if we get the 12 jurors to agree with us, otherwise we are going to go hung."

"This was not a decision I was going to make on my own. It wasn't the way I felt. I wanted to get the six counts --"

"The topic of the conversation was what had happened right before the break. . . . I wanted to know are we all going to go with a guilty verdict on those three counts or are we going to stick to what we believe and vote not guilty on all counts."

". . . It was an unofficial conversation. [']Listen, shall we go ahead with this[']. . . . The three guilty verdicts just to get the narcotic charge not guilty. Shall we stick to this." Alavi went on to say she did not remember if someone actually said that, but it was what she was thinking. In response to the question, "Do you remember Ms. Mitrowski saying let's keep voting guilty on these pandering counts so we can get rid of the narcotics?" Alavi answered, "Maybe," then, "I think so. . . . I think she said that yes, let's do it this way." Alavi then said she didn't remember what words Mitrowski used or if it indeed was Mitrowski.

"I cannot put black and white. We were not like in cahoots. We did not make this big plan. It was a very innocent thing. There was this thing that happened in the jury room. We wanted to see are we going to go along with this or not."

Alavi also testified to "a small discussion" and communication by nods and "body language."

"Q. That is when it was agreed that you would in fact do what you said you would do Thursday afternoon which was to vote guilty on pandering in order to have a not guilty verdict on the narcotics; is that right?

A. That was not Thursday afternoon.

Q. I am talking about Friday morning. Is that correct?

A. Friday morning.

Q. What you did Friday morning was based upon the agreement that you guys had discussed Thursday afternoon?

A. No. Thursday afternoon we had not discussed -- we had no idea they were going to offer something like this to us. All we had done Thursday afternoon was discuss what is more serious. How serious would the pandering charge be but not made any decisions.

We did not think we had to trade. We were going to go Friday morning and discuss narcotics charge."

"Q. [] Now, at some point during the jury deliberations on Friday morning -- now we are getting to Friday morning. One of the jurors stated that in exchange for his not guilty vote on a narcotics charge, he wanted five pandering convictions; is that right?

A. Correct.

Q. That is what one of the jurors actually said in the jury deliberations; is that right?

A. After I mentioned do we want to go out hung and everybody said no, they do not want to go out hung, he brought up this topic.

Q. Is it after he said that, that you and Sheila, Lorraine and Henry Gi[p]son agreed together to vote guilty on the three pandering counts?

A. With the body language discussion in the jury room? Yes. It was unofficial.

Q. Okay. You finally did that in order to persuade the other jurors to acquit Ms. Fleiss on the narcotics; is that right?

A. After the break. The final official verdict."

Mitrowski -- foreman of the jury.

"There was a conversation that one gentleman shouted something out at the time when we were voting when 11 people had voted not guilty. He made a statement in quite a loud voice and he said I am -- let me think now. He said 'I am not going to vote guilty [sic] on this unless we find her guilty on all the other charges.'" Mitrowski testified the others told him that "wasn't an acceptable process." After others managed to calm this juror down, they had a vote on the drug charge. All 12 voted to acquit. After some further discussion, votes were taken on the three pandering counts, but not before Mitrowski, Alavi, Estrada, and Gipson had a separate discussion between them. This conversation was over whether they "should go along with it."

"Q. Did you actually have a conversation at that time during the break where it was said that even though you thought Ms. Fleiss was not guilty on the pandering counts, that because of entrapment, that in fact you were willing to give up your guilty votes because and in part you thought that the penalty for pandering would be not substantial?

A. That's correct. And we thought it was much more important to convince the other jurors to give us a not guilty on the drug charge.

Q. And you used that, you and the other jurors, used that -- you sort of horse traded, right?

A. We didn't horse trade directly with them. We discussed it amongst ourselves in an effort to get their cooperation.

Q. There were actual discussions between you, Zina, Lorraine Estrada and Henry Gi[p]son during the break on Friday before the verdict was returned that you were willing to give up your not guilty votes even though -- pardon me. You were willing to give up your not guilty votes because you thought the penalty was less severe in order to get a not guilty on the drug charge; is that right?

A. Absolutely.

Q. Those are the words actually spoken?

A. Yes."

"A. That gentleman said very definitively and shouted out very loudly that he wasn't going to vote guilty -- pardon me. Not guilty on the drug charge unless we all voted guilty on . . . all the pandering counts.

Q. And then it was after that you had the discussion outside the building or outside the jury deliberation room with Zina Alavi, Lorraine Estrada and Henry Lee Gi[p]son; is that right?

A. Yes.

Q. Was it at that point that again the punishment was actually discussed?

A. Yes.

Q. Was it at that point during the course of that conversation with the four of you said that you were willing to give up your not guilty votes on pandering if you could get the not guilty on the drug charge because of penalty? What you thought the penalties were?

A. That is pretty much exactly how it went.

Q. These are actual words spoken between the four of you?

A. Yes. Yes."

At the end of Mitrowski's testimony, the prosecutor said if the court did not want to hear more testimony, he would be willing to submit on Alavi's and Mitrowski's testimony. The court immediately excused Estrada and Gipson.

Counsel argued the matter. The prosecutor's position was that the declarations and testimony revealed nothing more than jurors who were attempting to improperly impeach a verdict with which they had become disenchanted. He attacked their credibility, arguing that the declarations were obviously all prepared by the same person and suggesting that the information in the declarations had been fed to the jurors. He argued that the evidence did not show an actual agreement to trade votes, but rather showed jurors who engaged in an improper mental process in order to arrive at their votes. Since a juror's mental process is not admissible to impeach the verdict, the argument goes, a juror's subsequent unhappiness with his vote does not call for a new trial.

The trial court denied Fleiss' motion for a new trial. The court concluded there had been misconduct, but that it was not prejudicial. Without further discussion, we agree with the trial court's findings as to the following three allegations of misconduct: A juror committed misconduct by looking up words in a dictionary and reporting to the other jurors. It was misconduct to discuss penalty. Discussion of another narcotic investigation involving Fleiss constituted misconduct but did not cause her prejudice because the jury acquitted on the drug count. This appeal turns on the remaining question of whether certain jurors traded votes on different counts.

DISCUSSION

Respondent's argument on appeal is that the trial court made a finding of credibility as to the jurors' declarations and testimony and "impliedly rejected the allegations that were presented both at the hearing and in the affidavits." We agree with respondent that if the trial court found no bartering took place, that ends the discussion on the point. We are not at liberty to undo a trial court's factual findings based on sufficient evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) However, the trial court made no specific findings on this score, as respondent acknowledges by referring to an implied rejection of misconduct allegations. Thus, we are left to infer from this record just what the trial court concluded as to whether jurors engaged in bartering.

The trial court acknowledged that it "has a duty to assess the credibility of the juror witnesses." During the bartering discussion, the court stated the following: "In assessing the credibility of the juror witnesses, it was apparent to the court that in each opportunity to

describe their acts of misconduct, these acts seemed to grow. A little like Pinocchio's [sic] nose. The court is mindful that when the jurors were polled following the verdicts, each juror, including jurors Mitrowski, Estrada, Gi[p]son, Alavi, all stated unequivocally that those were their verdicts.

Thereafter, the jurors learned about the mandatory sentencing scheme having already become advocates for the defendant, they set about to impeach their own verdict. Motive on the part of these juror witnesses is something that the court has considered."

If we limit ourselves to this, it appears the trial court rejected the jurors' testimony about bartering. However, the trial court, during this discussion on the bartering allegation, finished its comments by saying, "Without minimizing the seriousness of the misconduct here, I find that there is no substantial likelihood that the misconduct prejudiced the defendant and the motion for the new trial is denied." If the court was referring to bartering here, we can only conclude, since it made reference to misconduct, that it had determined bartering occurred. We infer, for a couple of reasons, that the trial court was talking about bartering here. The trial court had already dealt with the other misconduct allegations at the beginning of its comments. It said it was going to "look carefully at each area of misconduct" It then, in three discrete parts of its discussion, disposed of the allegations that jurors used a dictionary to look up terms, improperly learned of a narcotic investigation not part of this case, and discussed penalty. As noted above, the trial court found misconduct in each area, but concluded it was harmless.

The trial court then commenced its discussion of bartering as follows: "On another subject, the suggestion that certain jurors traded their verdict in order to achieve a specific result was of concern because obviously a verdict decided by lot or by any means other than a fair expression of opinion on the part of all the jurors, would be a violation of law." This discussion included the "Pinocchio's nose" comment and ended with the comment about not "minimizing the seriousness of the misconduct here[.]" During the discussion, the court referred to *People v. Blau* (1956) 140 Cal.App.2d 193, and said the case was "still viable and . . . appears to be on point." The trial court read *Blau* as holding "that this type of compromise did not constitute prejudicial misconduct." Both sides agree the trial court erroneously relied on *Blau*.

In *Blau* several defendants were charged with one count of conspiracy to commit theft and falsify corporate records, and two counts of grand theft. Two, Blau and Fisher, were convicted of the conspiracy and two counts of petty theft. "On their motion for a new trial appellants submitted an affidavit of one of the jurors in which she stated that the verdict was the result of a compromise; some of the jurors who were inclined to vote in favor of Mays' guilt voted for his acquittal when other jurors who were in favor of acquittal of the appellants agreed to vote in favor of the guilt of Blau and Fisher of a lesser offense." (*People v. Blau, supra*, 140 Cal.App.2d at p. 217.) The *Blau* trial court denied the motion for new trial and the appellate court affirmed.

In sum, on the question of whether the trial court accepted or rejected that bartering had occurred, we must conclude the former. The sequence of discussion with the court first disposing of other misconduct allegations, followed by "another subject" (bartering), reliance on *Blau* with the comment that "this type of compromise did not constitute prejudicial misconduct," and the comment about not minimizing the seriousness of the misconduct, all lead us to conclude that the trial court made the factual determination that bartering had occurred, but, relying on *Blau*, erroneously concluded it was not prejudicial. Of no small consequence is that the trial court heard from Alavi and Mitrowski, then, based on the prosecutor's willingness to submit without further testimony, deemed it unnecessary to hear from Estrada and Gipson. These jurors, however indirect their declarations might have

been on the bartering question, stated in those declarations that they had traded their not guilty votes for guilty ones. We do not see how the trial court could say no trading had occurred without taking the testimony of two available witnesses who previously said it had. While the evidence presented in this record is subject to varying interpretations, the circumstances shown by the record persuade us that the trial court accepted that interpretation showing bartering had occurred. A finding of bartering necessarily means that not guilty votes were traded for guilty votes.

Of course, all this analysis would have been unnecessary had the trial court simply stated its conclusion one way or the other.

Blau did not hold that bartering votes is not prejudicial misconduct. Without discussion, the appellate panel merely stated the rule then in existence that “[j]urors may not impeach their verdict by affidavit that it was the result of compromise, or for other irregularity other than that it was arrived at by chance. [Citations.]” (*People v. Blau, supra*, 140 Cal.App.2d at p. 217.) In *People v. Hutchinson* (1969) 71 Cal.2d 342, the California Supreme Court discussed Evidence Code section 1150, which became operative in 1967, well after the 1956 *Blau* decision. That section limits “impeachment evidence to proof of overt conduct, conditions, events, and statements This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors’ mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citations.]” (*People v. Hutchinson, supra*, 71 Cal.2d at pp. 349-350.)

Accordingly, in the instant matter, evidence of discussions in response to one juror’s demand for guilty votes in exchange for his not guilty vote was admissible and provides sufficient basis to justify the trial court’s conclusion that some members of this jury traded their votes.

That trading votes constitutes prejudicial misconduct is not reasonably open to debate. (See, e.g., *People v. Guzman* (1977) 66 Cal.App.3d 549.) Such malfeasance strikes at the heart of the justice system. All citizens have two opportunities to participate directly in their representative government -- voting and jury service. Both are to be taken seriously and engaged in responsibly. The involved jurors in this case took their solemn duty to impartially dispense justice and turned it into advocacy for a cause. All parties in the justice system are entitled to know what the rules of engagement are and should be able to count on those rules being followed. This was supposed to be a trial, not an auction. The jurors involved in this misconduct committed a transgression worse than those with which Fleiss was charged. Through no fault of the court, the litigants, or their representatives, those jurors turned this serious proceeding into a farce. This verdict resulted not from the evidence, but from extraneous and improper considerations.

Fleiss was entitled to a trial by a jury of 12 persons. A jury is defined as “[a] certain number of men and women selected according to law and *sworn* [] to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them.” (Black’s Law Dict. (5th ed. 1979) p. 768, col 1.) Certain members of Fleiss’ panel violated their oaths, ignored the evidence, abandoned their duty to seek the truth, and turned deliberations into a bazaar. These jurors did not act as a jury. Fleiss did not truly receive a trial by jury. The guilty verdicts rendered by this panel cannot stand.

DISPOSITION

The judgment is reversed. The matter is remanded for further proceedings.

SPENCER, P.J., and MIRIAM A. VOGEL, J., concur.

In light of our decision, we do not reach Fleiss' claim that a mandatory state prison sentence for pandering is unconstitutional.

Sheila Mitrowski, Lorraine Estrada, Zina Alavi, Henry Gipson, and Joseph Lechuga.

We feel constrained to comment on the poor quality of the reporter's transcript. It is replete with examples showing a lack of proofreading. We detail but a few. For example, juror Gipson's name is routinely misspelled as Gibson. The word "mind" often appears when what was spoken was obviously "mine." "Frolic" is spelled "fraulic." "Replete" is spelled "repleat." We offer here a brief sample from the argument of defense counsel: "Mr. Carter I can force the declaration of Mr. Gibson where he in fact says after page five that we openly discussed the potential punishment faced by this is Fleiss. We speck late that if convicted of pandering she would in all likelihood receive a probationary sentence." We have no idea what "I can force the declaration of Mr. Gibson" means. "[T]his is Fleiss" obviously was spoken as Ms. or Miss Fleiss. "Speck late" would be laughable if this weren't a serious proceeding.