Filed 6/14/07 P. v. McNeely CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DONALD RICHARD MCNEELY, Defendant and Appellant.	D048692 (Super. Ct. No. SCD194654)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge. Judgment vacated and remanded with directions.

A jury convicted Donald Richard McNeely with residential burglary (Pen. Code, § 459, 460;[1] count 1), grand theft (§ 487, subd. (a); count 2), and receiving stolen property (§ 496, subd. (a); count 5). McNeely admitted allegations that he suffered 11 no-probation prior convictions (§ 1203, subd. (e)(4)), 11 prior prison term convictions (§ 667.5, subd. (b), 668), two serious felony convictions (§ 667, subd. (a)), and 11 prior

strike convictions under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, 668). The court sentenced McNeely to a state prison term of 38 years and eight months consisting of an indeterminate 25-year-to-life term under the Three Strikes law for the burglary count, a consecutive 3-year upper term for the grand theft count, a consecutive 8-month term for the receiving stolen property count, and two consecutive 5-year serious felony enhancements. On appeal, McNeely contends his convictions must be reversed because (1) the trial court denied him his state and federal constitutional right to self-representation; (2) the court's decision to remove him from the courtroom deprived him of his constitutional and statutory right to be present at his trial; (3) the trial court erred by denying his request for a new trial based on juror misconduct, and further erred by denying him access to juror information; and (4) he was deprived of his federal constitutional rights to a jury trial and due process when the trial court imposed the upper term on his grand theft count and mandatory consecutive sentences under the Three Strikes law based on factual findings not made by a jury or beyond a reasonable doubt.

As we explain, we agree that under the circumstances of this case, McNeely established good cause for a hearing under Code of Civil Procedure section 237 for release of personal juror identifying information, which is necessary to assess whether Juror No. 8's misconduct improperly influenced the jury's deliberations. We further conclude that absent the juror identifying information, the trial court could not adequately

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1 All statutory references are to the Penal Code unless otherwise indicated.

assess whether the People rebutted the presumption of prejudice. We vacate the judgment and remand with directions set forth below.

FACTS

McNeely does not challenge the sufficiency of the evidence of his convictions and thus we need not provide a detailed summary of the underlying facts of his offenses. McNeely does not dispute that in October 2005, he went to two La Jolla hotels and took property belonging to others, including credit cards, laptop computers, and digital cameras, by entering hotel rooms and taking a bag from a display table. At a nearby mall, McNeely used one credit card to charge about $1,200 in purchases, and attempted to use another before a salesperson notified a loss prevention officer. Police detained and arrested McNeely after he took one of the laptop computers to have its security password erased. Upon searching his car, police found the remaining property and a parking pass from one of the La Jolla hotels.

DISCUSSION

I. *Jury Misconduct/Disclosure of Juror Information*

McNeely contends the trial court erred in denying his new trial motion based on misconduct of the jury foreman, who did not disclose during voir dire that he was a licensed California lawyer and who wrote about the case on his Internet website while the case was pending. McNeely separately contends the trial court erred by denying him access to juror information, asserting the court's ruling cut off his investigation into the misconduct. On this latter contention, McNeely points out the trial court found actual

juror misconduct had occurred, and he asks that we declare a bright line rule that "when actual juror misconduct has been established and a defendant moves for discovery of juror information to complete juror interviews and ascertain the scope of the misconduct and degree of resulting taint, the juror information must be disclosed "as a matter of right."

A. *Background*

During voir dire, the court initially posed questions to the jury panel, asking each juror to give their occupation and the occupations of all adults living in their households, and also whether they had friends or relatives who were prosecutors, defense counsel or were in law enforcement. Juror No. 8, who ultimately became the jury foreman, advised the court he was a project manager for a technology company. He did not mention that he was a licensed California attorney who had practiced immigration law out of a separate office listed with the California State Bar, and who, at the time of trial, was still using that office and spending approximately five percent of his time counseling an attorney colleague on some "lingering cases" Juror No. 8 had handled. Nor did Juror No. 8 disclose that he had held his present position for only two months, and was formerly one of the company's attorneys. At an evidentiary hearing, Juror No. 8 testified that in his current employment he acted as a liaison between his employer and its outside counsel; was involved in reviewing, drafting and editing contracts for the company; dealt with outside attorneys and investment bankers as a "special assistant" to the company's board of directors; filed trademark applications; and spent 10 percent of his time "in an in-house counsel role" representing foreign employees of the company in immigration

matters. He also testified that he spent about 20 percent of his time involved with legal documents, explaining, "I'm a lawyer who got thrown into an engineering business at the invitation of the president of the company." None of these facts had been disclosed during voir dire.

The jury reached guilty verdicts on one count of residential burglary (count 1), one count of grand theft (count 2) and one count of receiving stolen property (count 5). The jury was unable to reach a verdict on another count of grand theft (count 3), and the court declared a mistrial on that count. The minute order shows the jury commenced deliberations at about 1:59 p.m. on Friday, March 3, 2006, and they submitted verdict forms to the court at 4:36 p.m. The court addressed the verdict forms with the jury and sent them back to the jury room at 4:48 p.m., it addressed the jury again at 4:59 p.m., and it read the jury's verdicts at 5:06 p.m.

At some point after the verdict, McNeely's counsel learned that Juror No. 8 had written on an Internet journal, or "blog" (see Merriam-Webster's Collegiate Dictionary (11th ed. 2006), p. 133; *In re Stevens* (2004) 119 Cal.App.4th 1228, 1236, fn. 3) about the case while the case was pending,[2] and applied for an order disclosing juror names and

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[2] Juror No. 8's writings were posted on March 2, 5 and 6, 2006. Trial commenced in the afternoon of February 28, 2006, and continued through March 1, 2 and 3, 2006. The jury retired for deliberations at approximately 2:00 p.m. on March 3, 2006. Juror No. 8's first entry on March 2, 2006, mostly was commentary about the scene within the criminal courthouse and general observations about the process of voir dire; however, he did note that the case was a felony theft and burglary trial in Department 37. On that day, he wrote, "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry, will do.)"

information. McNeely argued good cause existed for release of juror addresses and telephone numbers to assist him in moving for a new trial, in part because the statements indicated the juror had lied during voir dire, and also revealed the jury reached its verdicts through a compromise and not through a unanimous decision on the evidence and merits of the case. On March 6, 2006, Juror No. 8 wrote about how he offered to be the foreperson and was quickly chosen, writing, "In fact I planned for that occurrence."[3] He also purported to chronicle the jurors' deliberations that day, which we set out at some length, as follows:

> "The effort to piece the evidence together began. The bailiff deposited the trial exhibits, including blown up photographs, a mug shot of Donald the Duck [defendant], and one Hyatt parking paystub in the center of the table.
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> "I quickly shot out, 'I recommend we take a quick poll to see where we stand.'
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> "A woman interjected, 'No, let's wait. I don't feel comfortable doing that so early.' I had hoped popular sentiment would lead us to decide this thing quickly, but underestimated the apparent sympathies among some of the jurors. I decided it best to let others speak. They were wanting to speak, so I let them speak.
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> "At once, the anxious jurors launched into a re-cap of the evidence in the trial. A sudden burst of conversation enveloped the room. I listened and watched. It was if a pressure valve had been released, since during the entire trial we were repeatedly admonished by the judge to not talk to *anyone* about the case.
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[3] He wrote further about voir dire at that point: "I had sat bulkhead, in the first row on the aisle of the back courtroom benches, during all of voire dire [*sic*], not saying a word except for when the microphone was handed over, when I quickly iterated my occupation (project manager for technology company, which is more neutral than lawyer, don't ya think?) and connections thru myself or acquaintances to criminal experiences."

"The women in the room (there were four) tended not to speak out of turn except for Emily, the pretty teacher to my left, who spoke up first about the weakness of evidence in one of the charges.

" 'How do they know he took that computer at the Marriott, when there's no one who saw him, and no photos or other proof? Anything could have happened.' She spoke softly but passionately, igniting a fire in a few others who wanted a chance to consider carefully whether Donald the Duck was innocent, now that the scary-looking prosecutor was no longer present to intimidate our senses.

. . .

"After ten minutes of unscripted back and forth by everyone, I turned to the shy, young girl across the table, Amanda, who had yet to speak, and asked her what she thought. Her response got the ball of conviction rolling.

" 'Well, I don't see how he *didn't* do it. I mean, he had the stuff when the police caught him.'

"The tide thus turned, and for the next hour-and-a-half, the jury in the People v. Donald the Duck slowly congealed into a rational, investigative body of folks who ultimately realized that stealing was wrong, and that we ought to act responsibly. All, that is, except for Brad, the confident, muscular skinhead character with a carefully shaven goatee sitting directly at the head of the table, to my right. This cocky young fellow I had unease about since seeing him lope down the hallway on day one. He had stared at me for just a second or two too long when he first saw me, expecting some sort of acknowledgment to his presence from another white guy. I averted my eyes then and every other chance since during the trial. Now he was sitting next to me.

"I continued to ignore him. As the foreman, I began suggesting steps to achieving a consensus on all counts. 'Does anyone want to be an advocate for not guilty on count one?' No one spoke. 'Count two?' No one spoke. 'Count three?' A few hands raised.

" 'Gene,' I called.

" 'I don't see it. I mean, we can't have reasonable doubt, right? I don't know, I just don't think the prosecutor laid it out.'

"Emily chimed in. 'I'm voting not guilty.' Bonnie stated the same. Gil said, 'You just never know, I mean I've seen some strange things.'

"I took a quick poll around the room on count three, grand theft of the notebook at the Marriott on day three in the timeline, two days and two notebooks after the Hyatt spree began (you see, he had to switch hotels). We split six to six on that charge. It was 4:00 [p.m.] We had half an hour left before the bailiff would come in and send us home for the weekend. I decided that justice in this case must prevail speedily. It was late Friday afternoon, and none of us were too interested in returning to this small, dank room on Monday morning to stare at each other again.

" 'OK, I suggest a compromise. We find him guilty on counts one, two and five, as an alternative to one, two and three.' Count five was receipt of stolen property, which certainly seemed proven beyond a reasonable doubt for the notebook computer that no one saw him steal, yet somehow mysteriously ended up in the back of his minivan next to the two other hot ones.

"At this point, the deliberations took a turn for the unexpected. The stiff man to my right, Brad, Mr. Tough Guy, blurted out, 'I can't believe you people. You're spineless! Can't you see this guy did it?! I know about justice, man, I have a friend in jail for attempted murder. Until you lose something yourself, you never know! I know, man! Come on!' His voice rose as he got excited that he finally had the attention of everyone in the room (another of the high maintenance types).

"Gil spoke up. 'Who are you calling spineless?' Brad continued unrepentant. 'I mean, this is wrong. We got to put this guy away. Why do you think we're here? You don't know, man! I know! Unbelievable that we're gonna let this guy walk! Not me!

"To convict, the vote must be unanimous – all twelve jurors must agree. By threatening to vote not guilty on count five, since he so strongly believed that Donald the Duck was guilty of count three, that he stole the computer, therefore how could he become in receipt of it, skinhead Brad threatened to torpedo two of the counts – three and five – in his quest for tyrannical jurisprudence.

"I decided to shut him up. 'We're all bringing experiences to the table, and I'm making the count now. This is not a perfect process. Don't let the perfect be the enemy of the good.' Suddenly my wisdom bell was ringing like a church bell at a wedding. I said rather sternly, 'Give me a "guilty" or "not guilty," no commentary[.]' Around the room, I polled everyone individually. Each voted guilty on count five. I signed the jury forms then asked Bonnie, closest to the door, to buzz [t]he bailiff."

Attaching a copy of the juror's writings, the People opposed the motion on grounds there was no evidence to indicate the foreperson was biased or deliberately misled or lied to counsel during voir dire, there was no evidence anyone read the entry that was posted during the trial's pendency, and under Evidence Code section 1150, subdivision (a), an inquiry into the issue of whether the jurors reached their verdict by compromise would impermissibly seek information about juror mental and subjective reasoning processes. The trial court stated it had analyzed Juror No. 8's writings word for word, and concluded there was nothing to indicate any misconduct occurring in the jury room or that Juror No. 8 had done anything wrong inside the jury room. It ruled the defense had not made a prima facie case to justify contacting the jurors. However, it ruled McNeely's showing justified an evidentiary hearing to call the juror in question and question him about his employment, but not about what occurred during jury deliberations.

Following the evidentiary hearing, McNeely moved for a new trial motion in part raising Juror No. 8's misconduct in providing the court with false information, or otherwise knowingly concealing facts during the voir dire process. He argued he was prejudiced because Juror No. 8's writings revealed that the jury reached its verdict as the result of an improper compromise at that juror's direction.

Describing Juror No. 8 as a "manipulator," the court found he deliberately hid information during voir dire that the lawyers would have wanted to know, and also "deliberately trie[d] to relied to subvert the process by hanging on a technicality" to justify writing about the trial. As for the juror's statement about his occupation, the court stated: "He was within the technicality, okay, by saying that he was a project manager –

he is a special projects manager for this high tech company – but when we at the hearing got deeper, it was clear to me that he is only in that position because he has served – had served that company in the past as a lawyer and continues to serve them with his skills as a lawyer. He wouldn't be there without that. That's definitely what I took from the evidentiary hearing that we had. [¶] As of the time that he answered the question, he had already received $2,000 in payment for legal work. He continues to do about 5 percent of his time consulting as a lawyer. He handles four of the engineering employees at his company and their legal work for their visas. He consults with the board of directors. He does liaison work between the company and the outside counsel. He applies for trademark applications. He writes up the stock option program for the employees. This man is a lawyer, and he knew when he answered that question that he would mislead the lawyers here. And he not only did it in apparent attempt to get on a jury, but then he blogged about it gleefully. [¶] And when members of the public wrote in, responding to this blog, saying[,] 'What on earth are you doing?' in essence, he was cavalier in his response to them because he has no respect for the system. He didn't respect anything we did here. He didn't respect the other jurors. He didn't respect the lawyers. He didn't respect the judge. He didn't respect the process. He didn't respect the defendant. He respected nothing." The court concluded it was "not a question" whether McNeely had shown misconduct and also that it was "not a question" that a presumption of prejudice arose.[4]

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4 The court said: "On the other hand, the question then is you've shown misconduct,

Turning to the question of prejudice, the court nevertheless concluded it could not find McNeely was actually prejudiced or did not get a fair trial because of Juror No. 8's actions. It pointed out that the case was an "overpoweringly strong case against the defendant," and that it could not say the defense would have removed Juror No. 8 had he disclosed he was a lawyer. Further, pointing to the jury's long discussion about the case and clashes of opinion, the court concluded it could not say that anything Juror No. 8 did within the jury room was likely to influence anyone badly; that "nothing went wrong in that jury room." It denied McNeely's motion for a new trial.

B. *Disclosure of Juror Information*

We begin with the question of whether the trial court erred in its ruling pertaining to disclosure of juror identifying information because our conclusion bears on our analysis of the ruling on McNeely's new trial motion based on jury misconduct.

1. *Legal Standards*

Code of Civil Procedure sections 206 and 237 are designed to maximize the safety and privacy of trial jurors after they have served as jurors, while retaining the defendant's ability to contact jurors after trial if he or she shows sufficient need for such information. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087, 1096; *People v. Granish*

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not a question. There is a presumption that it did prejudice the defendant, not a question. Then I have to step back and clear-eyedly look at the whole record and everything about this whole record and say is there substantial likelihood that at the end of the day there was a substantial likelihood of prejudice or did it actually prejudice the defendant? The last portion is the way is should be said. Was any juror, including this one, actually improperly influenced by his behavior and did it then prejudice the defendant in his right to a fair trial? And I cannot get to that point because the case was so strong."

(1996) 41 Cal.App.4th 1117, 1124; *Jones v. Superior Court* (1994) 26 Cal.App.4th 1202, 1208-1209 [addressing version of Code of Civil Procedure sections 206 and 237 before 1995 amendments].) Code of Civil Procedure section 206 authorizes a criminal defendant to petition for access to personal juror identifying information – their names, addresses and telephone numbers – when the sealed information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).) The petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the information. (Code Civ. Proc., § 237, subd. (b).) If the court determines the petition and supporting declaration establish a prima facie showing of good cause for release of the juror information, the court must set a hearing, unless the record establishes a compelling interest against disclosure. (*Ibid*.) If the court sets a hearing, Code of Civil Procedure section 237 allows jurors to protest the petition's granting, and "[a]fter the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court . . . the juror is unwilling to be contacted by the petitioner." (Code Civ. Proc., § 237, subds. (c), (d).)

To demonstrate good cause, a defendant must make a sufficient showing " 'to support a reasonable belief that jury misconduct occurred.' " (*People v. Jones* (1998) 17 Cal.4th 279, 317.) The alleged misconduct must be " 'of such a character as is likely to

have influenced the verdict improperly.' " (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) In addition, a trial court can properly consider the extent to which the evidence proffered in support of the petition would be excludable under Evidence Code section 1150, subdivision (a),[5] because it reflects the jurors' thought processes. (*Jefflo*, *supra*, at p. 1322.) A trial court order denying a request for personal juror identifying information is reviewed for abuse of discretion. (*Jones*, 17 Cal.4th at p. 317.)

2. *Analysis*

Applying these standards to the circumstances presented by McNeely's request compels us to conclude that the court should have allowed McNeely to more fully explore his claim relating to the possible compromise or coerced verdict. The trial court concluded that McNeely had made enough of a showing to justify release of information relating to Juror No. 8 given the possibility that the juror had failed to truthfully answer voir dire questions, but it would not permit McNeely to inquire about the deliberations. Relying upon Juror No. 8's writings, the court found it could not say anything went wrong in the jury room.

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[5] Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

We conclude McNeely made the required prima facie showing of good cause justifying disclosure of personal juror identifying information for the remaining jurors.[6] Assuming Juror No. 8 was reasonably accurate in his recitation of what went on in the jury room, it appears he pressured or at least encouraged the jury to reach its verdict through "compromise or concession to expediency" (*People v. Carter* (1968) 68 Cal.2d 810, 816, abrogated on other grounds by *People v. Gainer* (1977) 19 Cal.3d 835, 851-852), rather than through the jury's "independent judgment" (*Carter*, at p. 817), as Juror No. 8 described the deliberations. The inference of coercion is strengthened by the fact that the jury reached its verdict on Friday afternoon after 4:30 p.m., which was consistent with Juror No. 8's writing (assuming its accuracy) reflecting he had "decided that justice must prevail speedily" and ordered each juror to render its vote on count 5 with "no commentary" so they would not have to return the following Monday. The probable effect of Juror No. 8's actions and comments was to improperly "harry the[] [jury's] deliberations" or " 'hasten them in arriving at a verdict' " that day. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594, 595 (*Cook*) [finding the coercive effect of the trial court's comments was "indicated by the dispatch with which the[ ] [jurors] arrived at their

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6 We decline to set out a bright line rule as McNeely requests. It is sufficient to say that under the present circumstances described above, he has made a nonspeculative, prima facie case that Juror No. 8's misconduct may have impacted the verdict.

verdict"].)[7] McNeely's counsel raised the coercion issue both in McNeely's petition for disclosure, and at argument before the trial court on the matter.

Having said this, we note that Juror No. 8's writings cannot be treated as a transcript or a sworn declaration recounting what transpired in the jury room. There is no assurance that Juror No. 8 accurately or completely wrote about his own conduct, or that of the other jurors in the room. However, Juror No. 8's manipulative behavior as evidenced by the trial court's observation that he deliberately tried to subvert the process, combined with the fact he acted as the foreperson of the jury that reached its verdict late on a Friday afternoon, in our view raises sufficient cause to justify further inquiry with the remaining jurors to assess whether and to what extent Juror No. 8's manipulation and misconduct extended to the verdict's outcome. Although Juror No. 8's misrepresentations to the court during voir dire do not conclusively show misconduct in the jury room, one can reasonably infer that misconduct or manipulation in hurrying the jury's deliberations by Juror No. 8, the jury's foreperson, would have a significant impact on the verdict. McNeely should be given a reasonable opportunity to contact the jurors and ascertain whether, in fact, Juror No. 8 forced the jury to reach its verdict to avoid returning for

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7 *Cook* sets out principles governing a trial court's interactions with a deliberating jury, stating that the trial judge "may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks. . . . 'The statement of a trial judge to a disagreeing jury that they must arrive at a verdict, or language from which such peremptory order is logically inferred, is plain coercion and an invasion by the court of the province of the jury.' " (*Cook, supra*, 13 Cal.2d at p. 594.) We see no reason why *Cook*'s rationale cannot apply to the unique circumstances presented here, where Juror No. 8, the foreperson and a practicing attorney, was potentially the coercive force behind the jury's verdict.

further deliberations, prevented full and frank discussion on all counts, or exerted any other improper influence on the jury's deliberations.

We conclude the circumstances raise objective questions about the integrity of the deliberative process, such that inquiry into the overt events and circumstances of the proceedings in the jury room, including Juror No. 8's statements and statements by other jurors in the jury room, would be proper. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) An inquiry into these matters would not violate Evidence Code section 1150, subdivision (a) because it would not require investigation into the subjective reasoning processes of the individual jurors. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418.) The court should have given McNeely the opportunity to more fully assess the totality of the circumstances to ascertain whether, as a result of the Juror No. 8's comments and actions, the jury surrendered its "independent judgment . . . in favor of considerations of compromise and expediency." (*People v. Carter*, *supra*, 68 Cal.2d at p. 817.)

Accordingly, it was an abuse of the trial court's discretion not to conduct a hearing under Code of Civil Procedure section 237. The requisite prima facie showing of good cause for disclosure of the sealed juror information had been established. Further, there was nothing on the record to establish a compelling interest against disclosure; the trial court found during sentencing that McNeely did not use violence in committing his crimes and he never in his career actually personally immediately endangered anyone. The fact a hearing is held, of course, does not necessarily result in the release of the juror personal identifying information. Affected former jurors are to be given notice of the

hearing and an opportunity to oppose the unsealing of the information. (Code Civ. Proc., § 237, subds. (c), (d).)

C. *New Trial for Juror Misconduct*

Our conclusion that the trial court should have granted a hearing under Code of Civil Procedure section 237 impacts our review of the order denying McNeely's new trial motion.

1. *Standard of Review*

In reviewing the trial court's ruling on McNeely's new trial motion based on juror misconduct, we accept the court's credibility determinations and findings of fact if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 294; *People v. Nesler* (1997) 16 Cal.4th 561, 582.) Whether prejudice arose from juror misconduct is a mixed question of fact and law that we review independently. (*People v. Nesler*, at p. 582.)

2. *Misconduct by Intentionally Failing to Truthfully Answer Voir Dire Questions*

We focus first on the question of whether juror misconduct occurred, a matter that the People contest despite the trial court's unambiguous finding on McNeely's new trial motion. The People assert, "[McNeely] failed to establish the factual predicate of this claim [of misconduct] because he failed to establish the jury foreman concealed relevant facts or gave false answers during voir dire." We disagree.

In ruling on the motion, the trial court found Juror No. 8 "knew at the time that he answered the question about his occupation that he was hiding something deliberately that the lawyers would want to know about." It expressly found his nondisclosure to be

plain misconduct, but turned to the question of whether the prosecution had rebutted the presumption of prejudice arising from that misconduct. The court did not err in reaching this conclusion.

"Intentional concealment of relevant facts or the giving of false answers by a juror during the voir dire examination constitutes misconduct [citations], and the occurrence of such misconduct raises a rebuttable presumption of prejudice. [Citations.] Prejudicial jury misconduct constitutes grounds for a new trial." (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929, cited favorably in *In re Hitchings* (1993) 6 Cal.4th 97, 119 (*Hitchings*); see also *People v. Carter* (2005) 36 Cal.4th 1114, 1208 [" 'juror misconduct involving the concealment of material information on voir dire raises the presumption of prejudice' "]; *In re Hamilton*, *supra*, 20 Cal.4th at p. 294.) *Hitchings* emphasizes the importance of voir dire in assuring the fair trial rights of a criminal defendant: " '*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. . . . ' [Citation.] [¶] . . . Of course, the efficacy of voir dire is dependent on prospective jurors answering truthfully when questioned. . . . '*Voir dire* examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for

cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.' " (*Hitchings, supra*, 6 Cal.4th at pp. 110-111.)

Deferring as we must to the trial court's observations and credibility determinations on the question of whether misconduct occurred (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 294; *People v. Pride* (1992) 3 Cal.4th 195, 260), we conclude its finding that Juror No. 8 committed misconduct in misleadingly if not falsely answering voir dire questions is amply supported by substantial evidence. The questions as to occupation were relevant and unambiguous, the trial court found Juror No. 8 substantially knew the purpose was to elicit information about his status as a practicing attorney, even if that were in the context of working for a technology company. (See *People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 930.) Juror No. 8's testimony at the evidentiary hearing disclosing the nature of his occupation and status as a practicing attorney, as well as his writings suggesting he purposefully omitted the latter fact from his answers (see footnote 4, *ante*), constitute ample evidence supporting the trial court's findings. The trial court reasonably concluded Juror No. 8 intentionally misled the court and attorneys when he gave his answer about his occupation, and that this fact was something that the attorneys would have wanted to know for purposes of full and fair opportunity to explore its impact on the juror's attitude about the case. Based on this misconduct, the court correctly concluded that a presumption of prejudice arose. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1208; *Hitchings*, *supra*, 6 Cal.4th at p. 119.)

D. *Presumption of Prejudice*

The critical inquiry on reviewing McNeely's claim of juror misconduct is whether the People sufficiently demonstrated that the presumption of prejudice arising from Juror No. 8's misconduct was rebutted. "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].' " ' " (*People v. Carter*, *supra*, 36 Cal.4th at p. 1208; *Hitchings*, *supra*, 6 Cal.4th at p. 118 [juror misconduct " 'raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted' "].) As stated, whether prejudice arose is a mixed question of law and fact subject to our independent determination. (*People v. Majors* (1998) 18 Cal.4th 385, 417; *People v. Nesler*, *supra*, 16 Cal.4th at p. 582.)

Here, it is premature to assess whether the presumption of prejudice was rebutted without considering information elicited from Juror No. 8 and the remaining jurors, should they elect to discuss the matter. This is a situation where a manipulative person, who unbeknownst to other jurors and the trial court was also a practicing attorney, deliberately maneuvered himself into the position of foreperson and potentially hastened the jurors to a verdict. The trial court based its denial of McNeely's new trial motion largely on its review of Juror No. 8's writings, taking them as true.[8] However, in our

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8 In denying the new trial motion, the trial court noted the strength of the People's case and as to the potential for prejudice reasoned: "I can't say that anything that [Juror No. 8] did was likely to influence anyone badly. In fact, it went the other way, because

view, the record is not complete on the question of prejudice without input from Juror No. 8 or from other jurors about what transpired in the jury room, should they decide to discuss the matter.

We therefore vacate the judgment and remand with directions that the trial court set a hearing under Code of Civil Procedure section 237 to determine whether the personal juror identifying information should be disclosed to McNeely in conformance with the provisions of Code of Civil Procedure 237, subdivisions (c) and (d). If the information is not disclosed after the hearing, the judgment shall be reinstated. If the information is disclosed to McNeely after the hearing, the trial court shall set a briefing schedule for a renewed new trial motion on the question of whether the People have

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by the time you read his whole blog – which I've done three times line by line by line, looked at it – and say did he do something inside that jury room that led this jury astray or led to a compromise? I can't find it. [¶] This jury actually had a long discussion. [Juror No. 8] described how they described their experiences, how they clashed in their opinions. How ultimately they split 6-6 on one of their counts. When you see it at the end of the day, you have to say nothing went wrong in that jury room. [¶] As much as you dislike [Juror No. 8], nothing went wrong in that room, and I can't say that the defendant was prejudiced. I can't say that he got a not fair trial because of what this juror did. It's a very odd kind of combination. [¶] Unless I were to reach the position where I said he is so distasteful we just have to turn it over into a new trial – which you are tempted to want to do – I can't get there. And I can't say in a legal analysis that he improperly influenced any juror, that his own decision was made up based on prejudice or bias. He did have reason to think that the defendant was a chronic liar. There were those seeds throughout this that led to that conclusion. [¶] . . . [¶] So at the end of the day, I have to say that after the presumption of prejudice that the defense has raised, the careful review of the entire record and the entire blog leads me to believe that, nevertheless, this misconduct did not lead to an unfair trial or prejudice the defendant at the end of the day. I also think [Juror No. 8] should be turned in to the [S]tate [B]ar, and I intend to do so. So I will deny the defense motion for new trial."

rebutted the presumption of prejudice and then decide the new trial motion on its merits on that point. If the renewed new trial motion is denied, the judgment shall be reinstated.

II. *McNeely's Remaining Contentions*

We address and reject McNeely's other appellate contentions in the event the trial court later reinstates the judgment.

A. *Denial of McNeely's Request for Self-Representation*

On February 28, 2006, the day trial was set to commence, McNeely moved under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to substitute his appointed counsel, contending he had a "working conflict" with her; that his counsel had failed to adequately investigate, refused to subpoena or call his defense witnesses, refused to allow him to participate in his defense, refused to let him see the prosecution's videotapes of his activity, and belittled and demeaned him. McNeely's counsel explained to the court she had provided McNeely with a complete copy of all the discovery, contacted him on a weekly basis, and urged him to participate in his defense. She denied that she had expressed any hostility toward him, and stated he had been fully apprised of the charges, the possibilities for plea negotiations and his exposure. The court denied the *Marsden* motion, finding no evidence of inadequate or improper representation, conflict of interest, or conflict of personalities.

The proceedings continued, during which McNeely sought to address the trial court several times, at first claiming that he had witnesses or evidence to present, then repeating his claims about a lack of working relationship with his appointed counsel and her failure to locate and subpoena witnesses in his favor. At the court's request,

McNeely's counsel arranged for her investigator to appear at the end of the day for further questioning on that point. After further proceedings, McNeely again unsuccessfully sought to address the court, who advised him he had no right to speak other than testify at trial, and urged him to talk to his counsel. Thereafter, the following exchange occurred:

"The Court: What you should do is talk to your counsel and –

"[McNeely]: I'm going to proceed –

"The Court: I'm going to leave the bench, and you proceed to talk to your counsel. I don't think you are ready to proceed, are you?

"[McNeely]: Well, I would like to have a say in my own defense, and at the moment I don't have that. And I don't have counsel that I can trust and feel comfortable with. I have no working relationship with this counsel. They've lied to me numerous times in the past –

"The Court: Okay. I don't want to hear any more statements about your counsel.

"[McNeely]: I would like to proceed in pro per.

"The Court: The jury is on its way up. They've been prescreened this morning, so this case is ready to proceed now. [¶] Are you ready to proceed to represent yourself without your counsel? Understand, if the Court were to grant that – and I'm not deciding that – if they were to walk out this door, you have a jury walking down the hallway, ready to proceed – are you ready to proceed to defend yourself today?

"[McNeely]: What I would like to do, then, is ask that this be sent back to Judge Fraser, that I could get a continuance for a day or two so that I would be prepared to meet with the jury and go from there."

After eliciting argument from the prosecutor, the court ruled McNeely's motion was untimely, and would cause hardship to the People if trial were continued. It denied McNeely's motion for self-representation. That day, a panel of prospective jurors was sworn. The People called their first witness on May 2, 2006.

McNeely contends that by denying his request, the court violated his state and federal constitutional rights to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), mandating automatic reversal of his convictions. He maintains he met all of the requirements for a valid request because he made a knowing and intelligent request, his request was unequivocal, and his request was made within a reasonable period of time before trial. We disagree.

A court must grant a defendant's request for self-representation if it concludes the defendant is mentally competent, he makes a knowing, intelligent and unequivocal request, and he makes his request "within a reasonable time before trial." (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932; *Faretta*, *supra*, 422 U.S. at pp. 835-836; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087; *People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Marshall* (1997) 15 Cal.4th 1, 20-21; *People v. Windham* (1977) 19 Cal.3d 121, 128.) When an unequivocal motion for self-representation is timely made, the trial court must permit the defendant to represent himself after ascertaining he has voluntarily and intelligently elected to do so, irrespective of how unwise the choice appears to be. (*Windham*, citing *Faretta*, at p. 836; *Marshall*, *supra*, 15 Cal.4th at pp. 20-27.) Alternatively, when a *Faretta* motion is found to be untimely, the trial court may, in its discretion, grant or deny it after inquiring into such matters as " ' "the quality of

counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion." ' " (See *People v. Jenkins* (2000) 22 Cal.4th 900, 959; *People v. Clark* (1992) 3 Cal.4th 41, 98-99; *People v. Marshall* (1996) 13 Cal.4th 799, 827; *Windham*, at p. 128.)

McNeely's day-of-trial request to represent himself, combined with his statement that he "needed his witnesses" in order to do so, plainly indicated he was not prepared to proceed as his own counsel on that day. Under the circumstances, his request was not made within a reasonable time prior to the commencement of trial and was therefore committed to the sound discretion of the trial court. (See *People v. Clark, supra*, 3 Cal.4th at pp. 98, 99-100 ["eve of trial" self-representation request was under the court's discretion to grant or deny]; *People v. Valdez* (2004) 32 Cal.4th 73, 102-103 [defendant "asserted his right to self-representation moments before jury selection was set to begin" and thus trial court "acted within its discretion in concluding that defendant could represent himself only if he was ready to proceed to trial without delay"]); *People v. Burton* (1989) 48 Cal.3d 843, 852-853 [*Faretta* request made after the case had been called for trial and transferred to trial department, both counsel had answered ready, and defendant asserted he needed unspecified period for preparation, was clearly directed to the trial court's discretion]; *People v. Moore* (1988) 47 Cal.3d 63, 79-81 [*Faretta* motion made on the day trial was set to begin would have been well within the court's discretion to deny]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205 [*Faretta* motions made "just prior to the start of trial" are untimely], citing *People v. Hill* (1983) 148 Cal.App.3d 744,

757 [*Faretta* motion made five days before trial was untimely and within trial court's discretion to deny] & *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [*Faretta* motion made six days before trial was untimely]; *People v. Perez* (1992) 4 Cal.App.4th 893, 901-903 [*Faretta* request made on day of trial, just before jury selection and day after unsuccessful *Marsden* motion where defendant required a continuance held untimely].) We reject McNeely's argument that his motion was timely because it was brought before the jury was impaneled. (See, e.g., *Savage v. Estelle* (9th Cir. 1990) 924 F.2d 1459, 1463, fn. 7.) Such a rigid rule is not the law in California. (*Clark*, 3 Cal.4th at p. 99.)

We further conclude that in the context of the proceedings, McNeely's motion was also equivocal, an independent basis for us to uphold the court's exercise of discretion. In *People v. Marshall*, *supra*, 15 Cal.4th 1, the court explained that circumstances apart from the defendant's own words may be indicative of an equivocal, and therefore invalid, *Faretta* request: "The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Marshall*, at p. 23; see also *People v. Stanley*, *supra*, 39 Cal.4th at p. 932 [*Faretta* motion made out of temporary whim or annoyance or frustration is not unequivocal even if the defendant has said he or

she seeks self-representation; " 'Equivocation, which sometimes refers only to speech, is broader in the context of the Sixth Amendment, and takes into account conduct as well as other expressions of intent' "]; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1087.)

Here, McNeely's *Faretta* request was made during the course of his continuing arguments on his unsuccessful *Marsden* motion. It appears to us that McNeely's mention of self-representation is the sort of " 'impulsive response' " to the court's denial of his *Marsden* motion that has been rejected as an equivocal request to act as his own attorney. (See *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1087-1088; *People v. Hines* (1997) 15 Cal.4th 997, 1028.) On this record, the court did not abuse its discretion in denying his motion.

B. *Right to Be Present at Trial*

McNeely contends his removal from the courtroom for disruptive behavior deprived him of his constitutional and statutory rights to be present at his trial. Although he admits interrupting the proceedings and making inappropriate statements in front of the jurors, he maintains his conduct did not warrant removal because he was not violent or abusive and he did not use vulgar language. He further argues reversal is appropriate because the trial court did not consider alternatives to ejection such as physical restraints or criminal contempt sanctions, and it did not give him any opportunity to return after a " 'cooling off' " period.

McNeely had a constitutional right to be present at his trial (U.S. Const., 6th & 14th Amends.; Cal. Const., art 1, § 15), as well as a right to be present conferred by sections 977 and 1043 of the Penal Code. (*People v. Hines*, *supra*, 15 Cal.4th at pp.

1038-1039.) However, those rights can be waived by the defendant's disruptions if, after he has been warned by the judge that he will be removed if he continues that disruptive behavior, he "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful to the court that his trial cannot be carried on with him in the courtroom.' " (*People v. Carson* (2005) 35 Cal.4th 1, 8-9.) "[A] defendant may waive his right to be present at his trial by being disruptive at the trial, and appellate courts must give considerable deference to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated." (*People v. Welch* (1999) 20 Cal.4th 701, 773, overruled in part on another ground in *People v. Blakely* (2000) 23 Cal.4th 82, 89.)

As McNeely himself summarizes it, the record reveals he repeatedly disrupted the proceedings in front of the jury after the trial court denied his requests for new counsel and self-representation. During jury selection, he asked questions of the trial court that communicated to the jurors he was being prevented from presenting "his witnesses" or evidence of his innocence, and after the court was forced to call a recess, it twice warned him not to speak up or "you will be taken out . . . and we will continue on with the trial without you." After further discussion, the court told McNeely: "If you think you can behave and not talk, we'll go forward and try it unless and until you interrupt." The next day, after McNeely unsuccessfully sought to communicate with the court, he slumped over in his chair, causing the trial court to call paramedics who removed McNeely from the courtroom and requiring it to release the jury for that day. In addition to delaying the start of trial, the prosecutor lost an out-of-state witness that required him to dismiss a burglary charge. Based on its discussion with the bailiff and the prosecutor's

representations about his conversation with McNeely's treating physician, the trial court found McNeely was attempting to feign a seizure. It advised McNeely at that time that if he were to engage in any further outbursts or games, the court would remove him from the trial.

McNeely caused another disruption after the prosecutor's opening statement, when he interjected, "I object. That's a lie. Your honor, I think the jury should be aware –" until the court interrupted him and asked the jury to leave the courtroom. While they were exiting, McNeely continued to shout: "– for misconduct, and I my rights have been violated. I haven't been able to bring my witnesses in or my evidence afforded to me under the law. My 6th and 14th Amendment rights have been violated. My attorney has been fired. I have been forced upon this attorney." The court removed McNeely from the courtroom after again advising him he had been warned, and finding McNeely was intentionally so disruptive that the trial could no longer proceed in an orderly fashion. After his removal, the court also found McNeely was deliberately shouting to ensure the jurors heard him even as they were leaving the courtroom, further justifying its express finding under Penal Code section 1043, subdivision (b)(1). It observed that normally it would give defendants a chance every day to behave and indicate they would like to be present, but in the present case, having given the defendant three opportunities with repeated warnings, the court found he would continue to disrupt the proceedings to his disadvantage before the jury. The court made an exception to its ruling in the event McNeely elected to testify.

Giving considerable deference to the trial court's judgment as we must (*People v. Welch*, *supra*, 20 Cal.4th at p. 773), we fail to see any error or constitutional deprivation in its decision to remove McNeely from the courtroom. Ample evidence in the record supports the trial court's conclusion that McNeely "insisted on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that the trial cannot be carried on with him in the courtroom." The court gave McNeely several opportunities to behave and was fully within its broad discretion to excuse him from the courtroom, permitting him to return upon his decision to testify. (E.g., *People v. Medina* (1995) 11 Cal.4th 694, 738-740 [defendant's continuous pattern of disruptive behavior in disregard of court's instructions warranted his exclusion from trial].)

We need not further address McNeely's more specific contentions challenging his removal, because turning directly to the question of prejudice, we conclude McNeely cannot show any error requires reversal under either the harmless beyond a reasonable doubt prejudice standard of *Chapman v. California* (1967) 386 U.S. 18, or the state law standard, requiring reversal only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Davis* (2005) 36 Cal.4th 510, 532-533; *People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) McNeely asserts the People cannot prove beyond a reasonable doubt that his improper exclusion was not prejudicial because one of the witnesses had to identify him from a "mugshot," and the jury's inability to reach a verdict on one of the theft counts (count 3) demonstrated the case was not overwhelming. Setting aside the fact that the record does not indicate the picture of McNeely was a mugshot, McNeely does not explain how or

whether the witness would have made any different identification had he been present in the courtroom. Nor does McNeely explain how his attendance would have altered the outcome of the trial in his favor. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1358.) The fact the jury failed to reach a verdict on one of the counts does not establish it would have reached any more favorable result had McNeely been present during trial.

C. *Sentencing Issues*

McNeely contends that by imposing the upper term on count 2, the grand theft count, and imposing mandatory consecutive sentences under the Three Strikes law, the court violated his federal constitutional right to a jury trial and due process under *United States v. Booker* (2005) 543 U.S. 220 (*Booker*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), because in imposing the sentence the court relied on aggravating factors not found true by a jury or beyond a reasonable doubt. In response, the People maintain only that McNeely's sentence was proper under *People v. Black* (2005) 35 Cal.4th 1238, 1244. *Black*, however, was overruled in *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 859. McNeely's sentence nevertheless survives his jury trial and due process challenges.

1. *Background*

After the jury was excused for deliberations, McNeely admitted allegations that he had suffered 11 prior convictions for residential burglary under Penal Code section 459: eight counts in September 1989 and three counts in July 1992. He also admitted that he

had suffered another conviction within five years of being released from prison on the 1989 offenses.

Following his convictions, the trial court sentenced McNeely to 38 years, 8 months to life in prison, consisting of (1) an indeterminate 25-years-to-life term under the Three Strikes law for the count 1 burglary; (2) a consecutive 3-year upper term for the count 2 grand theft; and (3) a consecutive 8-month term (one-third the mid-term) for receiving stolen property (count 5), and two consecutive 5-year serious felony enhancements. The court granted McNeely's motion to strike all of his prior strikes with respect to the count 2 grand theft, however, it stated that it would impose the upper term on that count "because of [McNeely's] significant and lengthy history of crime."

2. *Upper Term*

In *Cunningham*, the United States Supreme Court held that to the extent California's determinate sentencing law (DSL) (§ 1170 et seq.) permits a judge to impose an upper term sentence based on facts not determined by a jury or admitted by the defendant, the "DSL violates *Apprendi's* bright line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Cunningham*, 549 U.S. at p. ___ [127 S.Ct. at p. 868], citing *Apprendi*, *supra*, 530 U.S. at p. 490.) Under *Cunningham*, the middle term prescribed under the former DSL,[9] not the upper term, is

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9 Effective March 30, 2007 (stats. 2007, ch. 3, § 2), the Legislature amended section 1170 so that the trial court now has discretion to determine which term to impose without any presumption that the middle term is the appropriate term. (§ 1170, subd. (b).)

the relevant statutory maximum. (*Cunningham*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].)

The U.S. Supreme Court in *Cunningham* plainly recognized the validity of imposing aggravated terms based on the fact of a prior conviction. (*Cunningham*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 868].) Here, the trial court relied solely on McNeely's history of prior convictions to impose the upper term sentence, and we are convinced that under *Cunningham*, *Apprendi*, *Blakely* and *Booker*, the court was not required to submit the issue to the jury for its determination. All of these cases recognize the fact of a prior conviction need not be pleaded or proven to a jury. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 542 U.S. at p. 301; *Booker*, *supra*, 543 U.S. at p. 231 (opn. of Stevens, J.); see also *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 257.)

3. *Mandatory Consecutive Sentences Under Three Strikes Law*

We likewise reject McNeely's contention that the consecutive sentences imposed by the court also violated *Blakely*. In *People v. Black*, the court held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*People v. Black*, *supra*, 35 Cal.4th at p. 1262.) The court reasoned that a judge's imposition of consecutive sentencing does not run afoul of Blakely because it does not implicate "the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense." (*People v. Black*, at p. 1264.) That aspect of *Black* was not overturned by *Cunningham*, which did not address the issue of imposition of consecutive sentences for separate crimes. Our Supreme Court's holding is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is vacated and the case is remanded to the trial court to set a hearing under Code of Civil Procedure section 237, subdivisions (c) and (d), to determine whether the jurors' addresses and telephone numbers should be released to McNeely's counsel. If, after the hearing, the information is not disclosed, the judgment shall be reinstated. If the information is disclosed to McNeely's counsel, the trial court shall set a briefing schedule for a renewed new trial motion and then decide the new trial motion on its merits. If the renewed new trial motion is denied, the judgment shall be reinstated.[10]

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.

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10 The abstract of judgment improperly identifies the sentence on count 5 as having been imposed as one-third of the upper term, when in fact the court imposed a term of 8 months, one-third the mid-term. At the conclusion of the above proceedings, including a new trial if one is ordered, the trial court shall amend the abstract of judgment to correct that error and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.