Filed 6/8/04; pub. order 6/21/04 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LAMAR COTTLE, Defendant and Appellant.	C043594 (Super. Ct. Nos. 02F03971, 99F09935)

Defendant Kevin Lamar Cottle was convicted of four counts of assault with a deadly weapon when he hit four people with his car. Defendant argues the trial court erred in refusing to allow him to reopen jury selection to exercise one of his two remaining peremptory challenges against Juror No. 12 after the original 12 trial jurors were sworn, but before the alternate jurors were sworn. Defendant made his request to reopen after Juror No. 12, on his own initiative, provided new information to the court about his beliefs about his ability to be fair and unbiased. The trial court denied defendant's peremptory challenge because the jury was sworn. Twenty years ago, our Supreme Court concluded that jury selection is not complete

until the alternate jurors have been sworn, and that the improper denial of a request to reopen jury selection to exercise a peremptory challenge before that time is reversible error. (*People v. Armendariz* (1984) 37 Cal.3d 573, 578-584 (*Armendariz*).) We must reverse the jury's verdict and remand this matter for a new trial. We do not address defendant's other contentions on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged and convicted of four counts of assault with a deadly weapon when he hit four people with his car. Defendant got into a fight with a man over the fact defendant was dating the man's girlfriend. After the fight was over, defendant got into his car and while driving away struck several of the other people who got involved in the fight. One witness testified it appeared defendant was trying to leave the scene. Another witness claimed defendant deliberately tried to run over his victims.

Jury selection began in this case on December 16, 2002, and concluded the next day. Juror No. 12 was in the second group of jurors brought into the jury box and briefly questioned by the court and defense counsel. After one juror raised the fact that he might have more sympathy for the victims of the crime, Juror No. 12 did not volunteer his similar feelings. After the court's voir dire and limited voir dire by the parties' attorneys, both sides exercised some of their peremptory challenges.

Eventually, both sides consecutively passed their remaining peremptory challenges. At the trial court's direction, the clerk swore in the 12 trial jurors. At this time, defendant had exercised eight of his 10 peremptory challenges. (Code of Civ. Proc., § 231, subd. (a).) The parties then proceeded to select the alternate jurors.

After the original 12 jurors were sworn, but before the alternate jurors were sworn, Juror No. 12 asked to speak with the court in chambers. The following colloquy occurred:

"THE COURT: Yes sir, [Juror No. 12] why don't you have a seat. There is something you wanted to bring to the attention of the court?

"A. Yes, your Honor. Physically hurting people, anything like injury, right? Kind of mentally fits me. My problem is in effort in civil case, I would be more comfortable. In a criminal case, my feeling is and I would -- justice be served with this jury. I don't want to go with the feeling that, okay, we didn't do the right thing in this court. So that's, that's my mental block. But now I can work around it, I'll do my best. But I just thought I just let you know.

"Q. Right. I am not sure I understand what, what you are telling me. Are you saying that --

"A. Aftermath, my feeling would be just whatever verdict we come with did anything go wrong in this case, right? I am responsible for this. Kind of mental problem.

"Q. Is this some hesitancy you have about, for example, voting guilty because you feel that would be uniquely burdensome for you?

"A. Yeah.

"Q. Well, if the evidence here was sufficient to prove beyond a reasonable doubt that Mr. Cottle engaged in the conduct that is alleged here according to the law, can you vote for a guilty verdict?

"A. Yeah, try to.

"Q. Try to is a difficult word for me.

"A. Again?

"Q. Your obligation as a juror --

"A. Right.

"Q. -- would be to vote for that verdict which you believe is correct consistent with the facts as you determine them and the law and you cannot, for example, let sympathy for Mr. Cottle affect that decision. It has to be based on the evidence and the law and not on some sense of sympathy. All right?

"A. Right.

"Q. Can you do that?

"A. Yeah. But again my mind and I feel more comfortable in a civil case than a criminal case.

"Q. Well, I do both and sometimes I feel more comfortable with civil cases than criminal cases too, but they are there and they need to be tried and there is a right to jury trial.

"A. Right.

"Q. For them.

"Now I want you to just reflect on this a second. Can you truly be fair and impartial in this case both to Mr. Cottle and to the People?

"A. Yeah."

The court then allowed the parties to question Juror No. 12. Defense counsel examined Juror No. 12 as follows:

"Q. [Juror No. 12], is there any religious component to your judging facts and criminal--

"A. Not about hurting people is a bad thing. My mental, anything related to injury, inflicting injury, I don't like it.

"Q. Would you let your opinion be swayed by sympathy for the victims in this case?

"A. Probably, yeah.

"Q. You would?

"A. Yeah.

"Q. Could you -- could you keep an open mind until the end to determine whether or not there is criminal responsibility for the injuries to the victim?

"A. Sure.

"Q. Okay. Do you understand people get hurt all the time in auto accidents. They are not criminally responsible for it, they are just accidents.

"A. Correct.

"Q. Sometimes people aren't responsible for hurting some other people?

"A. Correct.

"Q. It doesn't do to them to put restrictions back again, does it? Do you understand?

"A. Yeah, I got it.

"Q. Do you understand what I am saying? So you can't favor Mr. Cottle or the victim, you have to judge it on the facts, the testimony?

"A. Okay.

"Q. Put that together with the law and come up with a decision, can you do that?

"A. Yeah, I can do that.

"Q. Think so?

"A. Yeah.

"Q. All right. Let me ask you again. Is your, is your vote when you are in the jury room going to be based or could it be influenced by sympathy for the victims who are hurt in this?

"A. Possibility again. Without looking at the data, it is going to be hard. I am not sure.

"But I will do my best to analyze the data."

Juror No. 12 assured the prosecutor that he understood he was not "to consider sympathy, passion, punishment, or any consequences for anyone." Upon further questioning from the court, Juror No. 12 assured the court he understood he had to put aside his feelings of sympathy and that he would do so as a juror in the case.

At that point, defendant moved to dismiss Juror No. 12 for cause. The People took no position on the motion. The trial court denied that motion.

Defendant then moved to reopen jury selection so he could use one of his two remaining peremptory challenges because there was "substantially more evidence" than there was prior to this revelation. (Code Civ. Proc., § 231, subd. (a) (10 peremptory challenges allowed).) The court denied that motion stating, "You can't do that so the jurors have been sworn. You can't do a peremptory." Defendant's counsel responded, "They haven't been sworn," and the court stated, "The twelve in the box have been sworn."

Defendant was convicted on all four counts and appeals.

DISCUSSION

I

Denial Of Reopening Of Peremptory Challenges

Defendant argues the "trial court committed reversible error by refusing to allow [defendant] to reopen his peremptory challenges, when, before the alternate jurors were sworn, new information was developed with respect to one of the twelve originally seated jurors." We agree.

A

People v. Armendariz

In *Armendariz, supra,* after the original 12 trial jurors were selected and sworn, the parties commenced selection of five alternate jurors. (37 Cal.3d at pp. 578-579.) Before the alternate jurors were sworn, two of the original twelve jurors were discharged from the jury. (*Id.* at p. 579.) The defendant moved to reopen jury selection and to be allowed to use his unused peremptory challenges in that process. (*Ibid.*) The

trial court denied this motion. (*Ibid.*) Our Supreme Court reversed. (*Id.* at p. 584.)

The *Armendariz* court started by noting, "The court's ruling made clear that it believed it had no authority to grant any of defense counsel's requests. Unfortunately, the court was apparently unaware that this court had held a year earlier that a trial court *does* have the power to reopen jury selection and authorize the use of unused peremptory challenges before all the alternates are sworn. [Citation.]" (*Armendariz, supra,* 37 Cal.3d at p. 580.) "'The general rule is that where a court has indicated that a trial will be conducted with alternate jurors the impanelment of the jury is not deemed complete until the alternates are selected and sworn.' [Citation.]" (*Ibid.*)

In part, the *Armendariz* court relied on Penal Code section 1089 as authority for its conclusion. That section "'requires that the "alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors[] . . ." [¶] . . . The oath which they must take is the same as that which the regular jurors take, viz., to try the particular case and render a verdict therein. The oath is administered to them at the very outset, and is not postponed until some emergency might call them into the box. But most compelling of all . . . is the statutory requirement that the additional jurors "must attend at all times upon the trial of the cause in company with the other

jurors . . .” This means that not a syllable of testimony can be introduced until the “additional jurors” have been sworn to try the case. *If, therefore, the jury cannot function until the alternates have qualified, the jury cannot be said to be complete or impaneled until that time*.’ [Citations.]” (*Armendariz, supra,* 37 Cal.3d at pp. 580-581.) Thus, the *Armendariz* court held, “Since a jury is not ‘complete or impaneled’ until all the alternates are sworn, a trial court retains the power under section 1068 to allow the exercise of peremptory challenges up until these jurors take their oath.” (*Id.* at p. 581.)

The court noted one of the purposes for the allowance of peremptory challenges is to allow the parties the “‘opportunity for comparison and choice between jurors’” and to assess the makeup of the entire panel. (*Armendariz, supra,* 37 Cal.3d at pp. 581-582.) The discharge of the two jurors prior to the conclusion of the selection of the alternate jurors constituted a change in the composition jury, and thus, satisfied the good cause standard to reopen jury selection. (*Id.* at p. 582.)

The *Armendariz* court concluded by noting, “The right to exercise peremptory challenges ‘has always been held essential to the fairness of trial by jury.’ [Citation.] It ‘is one of the most important of the rights secured to the accused. “The end of challenge,” says Coke, “is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.” . . . Any system for the empanelling of

a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.' [Citations.]" (*Armendariz, supra,* 37 Cal.3d at p. 583.) Thus, the court concluded, "'[T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury . . . .' [Citation.] 'The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside.' [Citation.]" (*Id.* at pp. 583-584.)

Similarly, in *People v. Marks* (1986) 184 Cal.App.3d 458, 462-463, the appellate court held that the trial court's refusal to allow the defendant 26 peremptory challenges and instead provided 10 under former Penal Code section 1070[1] constituted reversible error. Relying on *Armendariz,* the court in *Marks,* concluded this error was reversible per se. (*Marks*, at pp. 462-463.)

B

Denial Of Defendant's Motion To Reopen

Was An Abuse Of Discretion

The People argue that because both sides had passed their peremptory challenges consecutively, the decision to allow

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[1] This rule is now codified in Code of Civil Procedure section 231.

defendant to reopen his peremptory challenges was entirely within the discretion of the trial court and the trial court did not abuse that discretion. We conclude the trial court abused its discretion.

Like the trial court in *Armendariz, supra,* 37 Cal.3d at page 581, the trial court here was under the impression jury selection could not be reopened because the trial jurors had been "sworn." As that case also establishes, the trial court's conclusion here was wrong and cannot be upheld as an informed exercise of its discretion. (*Ibid.*)

The People cite *People v. Niles* (1991) 233 Cal.App.3d 315 to support their argument. It does not help them. There, one of the jurors provided information *during* voir dire relevant to her fitness to serve. (*Id.* at p. 318.) After the parties had passed their peremptory challenges but before the jury was sworn, defense counsel moved to reopen jury selection to use one of his peremptory challenges. (*Id.* at pp. 318-319.) The *Niles* court rejected defendant's argument that he had the absolute right to reopen jury selection. (*Id.* at p. 319.) The appellate court concluded that once the jury is selected, but before it was sworn, counsel must show cause to reopen jury selection. (*Id.* at p. 320.) The appellate court found no abuse of discretion in the trial court's conclusion that defense counsel had not demonstrated good cause because the information he based his challenge on came up during the original voir dire of the jurors. (*Id.* at p. 321.)

Here, we cannot come to that same conclusion. Juror No. 12 expressed no reservations about his ability to serve during voir dire. It was only after he was sworn that Juror No. 12 brought new information to the court and parties. At that time, he claimed he would have a difficult time judging the case and that he would have sympathy for the victims of the crimes that could affect his ability to be a fair and impartial juror. While ultimately, he agreed he could be fair and impartial, the information he brought to the court's attention was material to the intelligent exercise of defendant's peremptory challenges. Nothing in this record demonstrates defense counsel should have anticipated the juror had these feelings.

The People further suggest that *Armendariz* does not apply here because there was "no vacancy" on the jury panel. While the existence of two vacancies on the jury panel constituted good cause to reopen jury selection in *Armendariz, supra,* 37 Cal.3d at pages 580-581, a vacancy on the jury is not a necessary condition precedent for good cause to reopen jury selection.

A peremptory challenge is a substantial right that may not be unreasonably infringed. "[O]ne accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] '"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."' [Citations.]" (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) In analyzing the impact of a juror who is willfully false in the context of voir dire, our

Supreme Court held, "We have recognized that 'the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury.' [Citation.]" (*Id.* at p. 111.) Moreover, the court concluded, "'The denial of the right to reasonably exercise a peremptory challenge, be it by either the trial court *or a juror through concealing material facts,* is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.' [Citations.]" (*Id.* at p. 112.)[2]

To this end, "[t]he law therefore presumes that each party will use his [peremptory] challenges to remove those prospective jurors who appear most likely to be biased against him or in favor of his opponent; by so doing, it is hoped, the extremes of potential prejudice on both sides will be eliminated, leaving a jury as impartial as can be obtained from the available venire." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274.)

Here, defendant was unable to intelligently exercise this right prior to the time that Juror No. 12 came forward and revealed important information about himself that would have

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[2] But see "Peremptory challenges are intended to promote a fair and impartial jury, but they are not a right of direct constitutional magnitude." (*People v. Webster* (1991) 54 Cal.3d 411, 438 [determining that defendant did not have to personally waive right to 26 peremptory challenges].) While the right to peremptory challenges is not so fundamental or critical that it needs to be personally waived, no legitimate argument can be made that this right is a substantial right of the parties to litigation. (*In re Hitchings, supra,* 6 Cal.4th at p. 112.)

informed the parties in their exercise of their peremptory challenges during the initial jury selection. This obviously frustrated the critical purpose underlying the right to the peremptory challenge. These facts give rise to good cause to reopen jury selection. The magnitude of the right to exercise peremptory challenges, the nature of the information provided by Juror No. 12, and the absence of a lack of diligence on defendant's counsel's part, all dictate that good cause existed here. The trial court's refusal to allow defendant to reopen was an abuse of discretion.

II

Reversal Is Required Here

The People also argue we should reject the per se reversal rule dictated by *Armendariz, supra,* 37 Cal.3d 573, in favor of the harmless error rule. We decline to do so.

People v. Bittaker (1989) 48 Cal.3d 1046, 1087, succinctly summarized *Armendariz*, as follows, "The denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried." *Armendariz* remains good law and has not been rejected or criticized by the Supreme Court. Thus, we are compelled to follow its holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454.) Here, defendant unequivocally invoked a peremptory challenge he was entitled to

against Juror No. 12. The trial court denied that challenge. We must, therefore, reverse.[3]

Further, the nature of this right precludes harmless error analysis. *People v. Rodriguez* (1996) 50 Cal.App.4th 1013 is instructive. There, the appellate court came to the conclusion that the refusal of the trial court to excuse the jury panel and start jury selection anew when it denied the prosecutor's peremptory challenge to an alternate juror on the grounds it was racially biased was harmless error. (*Id.* at pp. 1019, 1027-1036.) The court examined whether this error was a structural error requiring reversal or a trial error requiring the application of a harmless error analysis. (*Id.* at pp. 1027-1035.) It concluded the court's error was harmless because the only juror selected during the tainted portions of jury selection -- an alternate juror -- did not serve on the jury panel and thus could not have affected the verdict rendered by the jury. (*Id.* at p. 1035.) In this analysis, the court noted, "Of even more importance is an obvious and critical factual distinction between [*People v. Wheeler, supra,* 22 Cal.3d 258] (as well as the federal and state cases which do not apply a harmless error analysis), and this case. In *Wheeler*, the

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[3] In passing, the People note that the statutory language contained in former Penal Code section 1068 has changed since *Armendariz* was decided. However, they stop short of arguing that the rule announced in that case is no longer good law. Instead, they assume, for purposes of argument, the change in the statutory language did not abrogate *Armendariz*. It is not necessary to decide this issue.

Supreme Court found that peremptory challenges had been improperly exercised during selection of the *12-member jury*. Implicitly, the same result would ensue if the peremptory challenges were improperly exercised during selection of alternates where any one alternate was ultimately seated as a juror. In either situation, the trial court's error would have a direct impact on the jury which decided the defendant's fate. This is a common thread that runs through virtually every case where a court has declined to apply a harmless error analysis to a *Wheeler/Batson* issue. [¶] Underlying this position is a natural reluctance on the part of appellate courts to speculate with respect to what impact, if any, the error had on the fact finder. [¶] 'To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation. In the context of an appeal based on denial of a peremptory challenge, there is inadequate evidence for an appellate court to determine the degree of harm resulting from the seating of a juror [or failure to sit a juror] despite a defendant's attempted peremptory strike.' [Citation.]" (*People v. Rodriguez, supra,* 50 Cal.App.4th at p. 1034.)

Similarly here, we would be engaging in the rankest speculation if we attempted to discern the effect Juror No. 12 had on this jury, its deliberations, and its ultimate verdict. Under the *Rodriguez* court's analysis, harmless error analysis is inapplicable here.

For their part, the People rely on *People v. Coleman* (1988) 46 Cal.3d 749. They contend the denial of the right to exercise a peremptory challenge should be analyzed under the same harmless error standard as we would examine the trial court's denial of a challenge for cause. A key distinction renders the analysis of *Coleman* inapplicable here. In *Coleman,* the defendant was able to exercise one of his peremptory challenges to remove the juror he asserted the trial court should have been removed for cause. (46 Cal.3d at pp. 768-769.) Thus, defendant was not tried by a jury that included the "offensive" juror and thus could not have been harmed by the court's error. (*Id.*)

Here, the juror to whom defendant's peremptory challenge was directed remained on the jury throughout the trial and voted in favor of defendant's guilty verdicts. Defendant tried to exercise his peremptory challenge but the trial court rebuffed his attempt. In this sense, the trial court forced a juror who was unacceptable to the defendant upon him in violation of his right to challenge that juror.

DISPOSITION

The judgment is reversed, and the matter is remanded for a new trial.

ROBIE, J.

We concur:

SCOTLAND, P.J.

HULL, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN LAMAR COTTLE, Defendant and Appellant.	C043594 (Super. Ct. Nos. 02F03971, 99F09935) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion filed on June 8, 2004, which was not certified for publication is now ordered certified for publication.

FOR THE COURT:

SCOTLAND, P.J.

HULL, J.

ROBIE, J.

EDITORIAL LISTING

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd Connelly, Judge. Reversed.

Victor S. Haltom, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Matthew L. Cate, Supervising Deputy Attorney General, Sean M. McCoy, Deputy Attorney General, for Plaintiff and Respondent.