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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE SHAWN SMITH, Defendant and Appellant.	B133309 (Super. Ct. No. NA034744)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert La Font, Judge. Reversed and ordered dismissed.

Carlton E. Lacy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Clarence Shawn Smith was convicted, following a jury trial, of one count of anal and genital penetration of an unconscious person by a foreign object in violation of Penal Code section 289, subdivision (d).[1] The trial court sentenced appellant to the low term of three years in state prison.

Appellant appealed from the judgment of conviction, contending, inter alia, that the trial court erred in conducting an inquiry after the jury stated that it had reached an apparent deadlock and in discharging a juror for failure to deliberate. We held that the trial court did not err in conducting the inquiry or dismissing the juror and affirmed the judgment of conviction.

Appellant petitioned our Supreme Court for review. The Supreme Court transferred review to this Court, with directions to vacate our earlier decision and to reconsider this cause in light of *People* v. *Cleveland* (2001) 25 Cal.4th 466. We now do so.

Facts

In June 1997, 17-year-old Lizett N. went with appellant and Andre Stewart to Chris Taylor's garage residence. Lizett drank a bottle of Coca-Cola to which some drug had apparently been added and passed out. Appellant carried Lizett into the garage. Appellant was alone with Lizett in the garage for about 15 to 30 minutes. When appellant came out, Taylor entered the garage, saw that Lizett was unconscious and her clothes were in disarray and told appellant to get her out of the garage. Appellant and Stewart carried Lizett to appellant's car, drove Lizett home, walked her to her front porch and left her there.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

The next morning, Lizett could remember nothing, but was in pain. Lizett was examined by a registered nurse, Patricia Potts. Potts observed injuries to Lizett's vagina and anus which were consistent with nonconsensual intercourse.

Discussion

In letter briefs filed after this matter was transferred to us from the Supreme Court, appellant contends that *People* v. *Cleveland*, *supra*, 25 Cal.4th 466, demonstrated that the trial court erred in dismissing Juror No. 11, a hold-out juror. We agree.

1. Facts.

The court's inquiry of selected jury members that ultimately resulted in the dismissal of Juror No. 11 began during the afternoon of June 30, 1998. The jury sent a note to the court requesting "further instructions" on two issues: (1) "What to do with an apparent deadlock?" and (2) Scheduling problems involving three jurors and one alternate juror. The jury also requested a readback of a portion of appellant's testimony.

The court told the jurors that the readback would be available the following morning and resolved the scheduling issues. The court then inquired into the request for guidance concerning an apparent deadlock.

The court first asked the foreperson the following questions:

The Court: "How many ballots have you taken?"

Juror No. 1: "Officially, verbally three."

The Court: "[Y]ou've indicated you feel you're hopelessly deadlocked. Is that correct?"

Juror No. 1: "Yes, sir."

The Court: "Is there anything the court can do to help you arrive at a verdict such as a rereading of the testimony? Now, you say that you wanted to hear the testimony of the defendant?

Juror No. 1: "Explaining that no matter, since I was the foreperson, if any of my fellow jurors request, made a request that we could not provide, I made the request regardless."

The Court: "But I'm asking only you. Do you feel that the rereading of this testimony will be helpful?"

Juror No. 1: "No, I do not feel that it would be helpful."

The Court: "In your personal opinion is there anything that the court could do such as a rereading of instructions, anything of that nature?"

Juror No. 1: "My personal belief is that if there is additional clarification of juror instructions as far as or pertaining to what can be used and what can't be used to influence or to make the decision of the verdict, that may help."

The Court: "That's why I'm asking you this question. If there is anything I can do to help you, I'm going to ask you to resume your deliberations and write it out for me. That's why I asked the question if there is anything I can do to help you. If you need clarification or anything such as rereading of the instructions, I'd be glad to do that."

Juror No. 1: "That was just my personal feeling, and I feel that the probability of that being helpful to come to a verdict is very low."

The Court: "All right. But as long as there is that possibility, then I'm going to ask you to write it out for me."

The jury then went to the jury room, from which the foreman sent a note to the court stating: "The consensus of jurors overwhelmingly feels that any further effort would be fruitless. That opinion that I gave you was in my head, a last ditch."

The court called the jury into the courtroom, and again conducted an inquiry of the foreperson.

The Court: "Just give me two numbers. I don't want to know if it's for or against, 8 to 4, 9 to 3."

Juror No. 1: "On the first charge, 11 to 1, and on the second charge, if I can remember correctly, it's approximately 6 to 6."

The court then asked each juror individually "if they share the opinion of the foreperson, that is, that you are hopelessly deadlocked, there is nothing the court can do to help you arrive at a verdict . . . and it's your personal opinion that further deliberations would not produce a verdict." All jurors agreed that that was their opinion.

The trial court then held a bench conference with counsel. He advised counsel that: "Because of the widespread 6, 6 as to Count 2 and 11 to 1 in Count 1, I intend to declare a mistrial." The prosecutor responded: "I would ask the court to ask just the foreperson alone whether or not a person is not deliberating." Appellant's counsel responded: "I'd object to the court inquiring. I expect that the inquiry if the person was not deliberating, the foreperson would inform the court."

The trial court then conducted the following inquiry of the foreperson, outside the presence of the other jurors:

The Court: "It's important that all jurors deliberate, that they all discuss the case and their opinion and listen to opinions. Is it your opinion that all the jurors are deliberating?"

Juror No. 1: "No, sir."

The Court: "No one refused to deliberate, go off in a corner and not discuss it?"

Juror No. 1: "To my knowledge the action needs to -- he didn't do what you just described. But there were at least an individual that refused to even listen to or participate."

The Court: "All right. I can't hear you."

Juror No. 1: "There was one individual that did not even -- he refused to listen to anything, and he brought in outside prejudices into the process."

The Court: "But did that person discuss the evidence?"

Juror No. 1: "He refused to. Only when he wanted to defend something of his own, instead of doing it structurally, systematically like we had set up there to do it. Sometime we hit a nerve or something like that and he would say something. But it was not constructively toward the goal of bringing out the evidence and the facts in the case."

The Court: "But did he at any time, that juror at any time say I won't listen to what you have to say, I refuse to discuss the case?"

Juror No. 1: "Several times."

The trial court then asked which juror the foreperson was describing, and the foreperson identified Juror No. 11. The trial court then randomly selected Juror No. 8 to question on this issue.

The Court: "I'm going to ask you some questions. At any time during the course of deliberations did you form the opinion that any particular juror absolutely totally refused to deliberate and was so closed that --"

Juror No. 8: "Yes."

The Court: "All right. And can you tell me -- I don't want to know what went on during deliberations --"

Juror No. 8: "Okay."

The Court: "-- I don't want to know what was said --"

Juror No. 8: "Okay."

The Court: " -- But tell me what led you to that opinion."

Juror No. 8: "This person seems totally closed off from listening to anybody else who has any kind of opinion that's different."

The Court: "Did he join in any of the deliberations?"

Juror No. 8: "Not really, no."

The Court: "And did he ever make a statement that he would not deliberate?"

Juror No. 8: "He's never said it in that way in terms of him, 'I'm not going to deliberate.' But he's given the impression that he doesn't, you know, want to be

a part of it. And I just think he is very closed off in terms of what he thinks and that's it. And there is no -- he doesn't seem open at all to me."

The Court: "All right. The test is, did he deliberate? Did he just close off from the very beginning and not discuss the case?"

Juror No. 8: "He hasn't really deliberated because my impression is that he had already formed an opinion before we even started deliberating and he -- and that was it. So it became a matter of no matter what was going on, no matter what was said, you know, he was going to separate himself from that."

The trial court then questioned Juror No. 11.

The Court: "It's important that all jurors deliberate, that they have a discussion of the evidence and give their opinion. But it's just not to close out the opinions of all the other jurors without discussing it with them. [¶] It's been stated that they feel that's what you have been doing, that you refuse to discuss the case. [¶] Do you wish to make a statement?"

Juror No. 11: "Well, like I said, I discuss, you know, as much as I know now. If they don't agree with what I say, I can't do nothing about that. But, you know, like I said, you know, they said some things that I just didn't go with. [¶] You know, they have got a guy --"

The Court: "I don't want to know what was said. The important thing is that you discuss the case with them."

Juror No. 11: "Yes, I did. Yes, I did."

Appellant's counsel then asked Juror No. 11: "[I]n deliberation did you listen to the other jurors and their opinions regarding evidence?"

Juror No. 11 replied: "Yes, yes. I have a point that they didn't believe and they didn't want to talk about it. That's the option."

Appellant's counsel asked: "Now we're talking about facts of the case; is that correct?"

Juror No. 11 replied: "Yes, yes."

The trial court then decided to question another randomly selected juror, Juror No. 3.

The Court: "I don't want to know what went on in the jury room, but I want to know your personal opinion if at any time you feel that a particular juror just refused to deliberate, refused to discuss the case and was not open to a fair discussion and deliberation. Did you form that opinion as to any particular juror?"

Juror No. 3: "Yes."

The Court: "Would you tell me which juror?"

Juror No. 3: "His name was 9493, that's all I know."

The Court: "9493. No. 11. All right. And don't tell me what was said, but what led you to believe that he was closed from the very beginning and would not discuss the case, deliberate?"

Juror No. 3: "He kept on bringing things from his own environment into the conversation, and I think he had prejudices before he came. Before he would even discuss things, he would express his opinion on things and they were prejudiced."

The Court: "And that if someone attempted to discuss evidence with him, he -- would he do that? [¶] Would he discuss the evidence? "

Juror No. 3: "He didn't want to listen."

Appellant's counsel then asked Juror No. 3: "Did he at any time listen to the discussion that was going on?"

Juror No. 3: "He had an opinion. He wasn't going to change it, he said."

Appellant's counsel: "So he did listen to the evidence; is that correct?"

Juror No. 3: "Sometimes he did; sometimes he didn't."

Appellant's counsel: "So sometimes he listened?"

Juror No. 3: "He would just walk away and not listen."

Appellant's counsel: "And what about the opinions that he had, would the other jurors listen to him?"

Juror No. 3: "Yes."

The trial court then ceased its questioning of jurors and the following colloquy took place.

The court: "All right. Here is what I'm willing to do is I'm willing to remove 9493 and install an alternate."

The People: "That sounds very -- that would be the People's -- the People accept that, Your Honor, and that would be our request."

The court: "All right, Mr. Morris?"

Appellant's counsel: "I'd object for the record to the removal of 9493."

The court: "I think it was the consensus of all three jurors -- as 4389 said, he would turn and walk away and wouldn't listen. I think that is not deliberating."

Appellant's counsel: "I understand the court's position, but I also understand that the court -- that the jurors did not come up with that -- the jurors said they were hopelessly deadlocked is what the jurors said. And it was only after the court made inquiry that that occurred. And again for the record, I want to make that clear--"

The court: "I made that inquiry based upon the statement of the foreperson. He said -- first of all, he said there is something the court could do to help, and then he said, 'It was in my head, a last ditch.' [¶] So something was bothering him and I would feel it would be improper to declare a mistrial if any one juror was bothered by the proceedings."

Juror No. 11 [Juror 9493] was then excused and replaced by an alternate juror.

2. Standard of review.

Section 1089 provides in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, . . . the court may order him to be discharged and draw the name of an alternate, who shall take his place in the jury box. . . ." A juror who refuses to

deliberate may be removed on the theory that such a juror is "unable to perform his duty" within the meaning of section 1089. (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 475.)

In *Cleveland*, our Supreme Court stated the standard of review in a juror removal case as follows: "'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, however, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror' "must appear in the record as a demonstrable reality" [Citation.]' (*People* v. *Marshall* (1996) 13 Cal.4th 799, 843, 55 Cal.Rptr.2d 347, 919 P.2d 1280.)" (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 474.) The court also stated: "The trial court may "discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 484.) Thus, our job here is to determine from the record whether there is substantial evidence to establish as a demonstrable reality that Juror No. 11 failed to deliberate.

3. Guidelines to determine whether a juror has refused to deliberate.

Our Supreme Court has warned, "caution must be exercised in determining whether a juror has refused to deliberate. California courts have recognized the need to protect the sanctity of jury deliberations." (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 475.) Indeed, "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." (*Id*. at p. 476.) Thus, "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. *The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations*." (*Id*. at p. 485 [emphasis added].)

"[P]roper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views. (See *People* v. *Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067 [55 Cal.Rptr.2d 151].)" (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

4. The record does not establish as a demonstrable reality that juror No. 11 refused to deliberate.

The court's stated reason for concluding that Juror No. 11 was not deliberating was based on its understanding that the consensus of the three jurors interviewed was that No. 11 "would turn and walk away and wouldn't listen." when approached by a juror. The record establishes, however, that three jurors made also made statements that show that Juror No. 11 did in fact participate in the jury deliberations. To put it another way, the jurors' statements fail to establish as a demonstrable reality that Juror No. 11 refused to deliberate.

Although Juror No.1 said that Juror No. 11 stated several times that he refused to discuss the case or to listen to other jurors, Juror No. 1's comments showed that Juror No. 11 was talking and listening at other times. Juror No. 1 stated that Juror No. 11 would discuss the evidence "when he wanted to defend something of his own, instead of doing it structurally, systematically like we had set up to do." Juror No. 1 also stated, "[s]ometime we would hit a nerve or something like that and he would say something." A juror is deliberating when he defends his own view and speaks up when something said in the deliberations "hit a nerve."

Juror No. 8 offered no facts to support his "impression" that Juror No, 11 formed an opinion before deliberations began. Juror No. 8's statement that Juror No. 11 "seemed totally closed off from listening to anybody else who has any kind of opinion that's different" indicates that Juror No. 11 had communicated his opinion to other jurors and had listened to the other jurors at least some of the time. Juror No. 8 acknowledged that Juror 11 never said, "I'm not going to deliberate," thereby confirming Juror No. 1's statement that no member of the jury "refused to deliberate, go off in a corner and not discuss it."

Juror No. 3 acknowledged that Juror No. 11 would listen sometimes. Juror No. 3 also said that the other jurors would listen to Juror No. 11's opinion. Juror 3's comment indicates that Juror No. 11 and the other jurors were expressing opinions with which the other could not agree. This is jury deliberation.

Juror No. 11 confirmed to the court that he had been deliberating. He told the court that he discussed the case with the other jurors, but "If they don't agree with what I say, I can't do nothing about that. But you know, like I said, you know, they said some things that I just didn't go with."

Appellant's counsel asked "[I]n deliberation did you listen to the other jurors and their opinions regarding evidence?" No. 11 replied: "Yes. Yes." And then stated again: "I have a point that they didn't believe and they didn't want to talk about it. That's the opinion." Appellant's counsel followed up this question

by asking "now we're talking about the facts of the case; is that correct?" No. 11 replied: "Yes. Yes." A juror cannot be removed from the jury because his view of the evidence differs from that held by majority of the jurors. (See *People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 483 [juror may not be discharged because he harbors doubts about the sufficiency of the prosecutor's evidence].)

The facts of the present case are similar in many respects to the facts of *People* v. *Cleveland*, *supra.* In *Cleveland*, several jurors stated that the removed juror, Juror No. 1, would not answer questions, did not participate when other jurors discussed the elements of the offense and refused to answer questions about his views of whether the elements of the offense were shown by the evidence, which was substantial evidence that Juror No. 1 was not deliberating. Other jurors stated that the removed juror "is not following instructions," had absolutely no interest in the law and the instructions, and was not following the law. The trial court removed juror No. 1 because he was "not functionally deliberating." (*Id*. at p. 486.)

The Supreme Court found that "individual questioning of the jurors revealed that it was the conclusion arrived at by Juror No. 1 that was at issue. The jurors complained that Juror No. 1 discussed matters that they considered 'irrelevant' and adopted an 'unreasonable interpretation' based upon 'his personal opinion,' while 'the rest of us have a different interpretation.'" (*People* v. Cleveland, *supra*, 25 Cal.4th at p. 486.) The Supreme Court disagreed with the trial court's conclusion, stating: "It is possible that Juror No. 1 employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. Juror No. 1 participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even less than sympathetically, to the contrary views of his fellow jurors." (*Id*. at p. 485.)

Similarly, here, it was the conclusion arrived at by Juror No. 11 that was at issue. His interpretation of the facts and his personal opinion differed from that of

the rest of the jurors and he was unable to persuade them that he was correct -- "I have a point that they didn't believe and they didn't want to talk about it." Juror No. 11 might not have been the perfect juror and he may have been stubborn and rude, but there is no substantial evidence to establish as a demonstrable reality that Juror No. 11 failed to deliberate.

We find the erroneous dismissal to be prejudicial. The statements of the jurors indicate that Juror No. 11 was a hold-out juror for acquittal on count 1, the count on which appellant was ultimately convicted. Immediately prior to the trial court's inquiry, the jury had indicated that it was deadlocked and that further deliberations (with the then-existing jury) would not result in a verdict. (*People* v. *Cleveland*, *supra*, 25 Cal.4th at p. 486.) The judgment must be reversed.

5. Double Jeopardy

The Court in *Cleveland* did not discuss the issue of whether the defendant in that case could be retried. Subsequently, our colleagues in Division Four of this District Court of Appeal have considered the double jeopardy implications of an erroneous dismissal of a juror for refusing to deliberate, and have concluded that jeopardy bars a retrial. (*People* v. *Hernandez* (2002) 95 Cal.App.4th 1346, 1371.) In letter briefs filed after the publication of *Hernandez*, appellant contends that the doctrine of double jeopardy bars his retrial in this case. We agree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense. (*U.S.* v. *Dinitz* (1976) 424 U.S. 600, 606.) Article I, section 15 of the California Constitution likewise guarantees that "[p]ersons may not twice be put in jeopardy for the same offense."

We agree that "[t]he determination of whether to preclude retrial in any given situation can be made only by focusing on all of the fundamental rights and policies upheld by the prohibition on double jeopardy, including the 'need to protect the interest of an accused in retaining a chosen jury' (*Crist* v. *Bretz*, *supra*,

437 U.S. at p. 35 [98 S.Ct. at p. 2161]), the right to a fair and impartial jury rather than one selected by the prosecution (*People* v. *Young*, *supra*, 100 Cal.App. at p. 23), and the importance of avoiding trials in which undue advantage has been placed in the hands of the prosecution (*Larios* v. *Superior Court*, *supra*, 24 Cal.3d at p. 329; *Downum* v. *United States*, *supra*, 372 U.S. at p. 736 [83 S.Ct. at p. 1034].)." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p.1370.)

In *Hernandez*, the court applied the above-stated policies to the case before it and concluded "that jeopardy bars retrial when, without legal necessity or good cause, the court alters the composition of the jury in the middle of trial in a way that favors the prosecution." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p. 1371.)

We reach the same conclusion here. In the case before us, the jury foreperson sent a note to the court indicating an "apparent deadlock." After a brief discussion with the trial court, the jury then sent out another note stating that it was the "consensus" of the jury that further deliberations would be "fruitless." The court called the jury into the courtroom and asked them how they stood numerically. The foreperson replied that they were at 11 to 1 on the first charge.[2] After the trial court stated its intention to declare a mistrial, the prosecutor asked the court to ask the foreperson if one juror was not deliberating. The trial court complied with the prosecutor's request, and as we discuss, supra, eventually dismissed the hold-out juror for refusing to deliberate. Thus, at the prosecutor's request, the trial court altered the jury in a way that favored the prosecution.

We agree that "were we to conclude that retrial is permitted under these circumstances, the vital and fundamental right of every citizen to trial by a fair and impartial jury would be gravely undermined and the right to be free from double jeopardy would be rendered meaningless." (*People* v. *Hernandez*, *supra*, 95 Cal.App.4th at p. 1371.) "If the result of discharging a juror sympathetic to the defense without good cause was nothing more than a reversal of the conviction

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[2] This is the charge of which appellant was ultimately convicted.

and remand for retrial minus the offending juror, we fear such discharges could become routine. This would do lasting harm to the fundamental rights protected by the right to trial by an impartial jury and the prohibition against double jeopardy." (*Ibid*. [footnote omitted].)

Disposition

The judgment of conviction is reversed and this matter is ordered dismissed.

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ARMSTRONG, J.

I concur:

MOSK, J.

GRIGNON, J., Concurring and dissenting.

I concur in that portion of the majority opinion concluding that Juror No. 11 was improperly removed and replaced by an alternate juror. I also concur in that portion of the majority opinion concluding that the error was prejudicial, requiring reversal of the judgment. As our Supreme Court has noted: "While it has been said repeatedly, in the cases cited above, that a defendant is not entitled to be tried by a jury composed of any particular individuals, but only by a jury composed of qualified and impartial jurors, this does not mean that either side is entitled to have removed from the panel any qualified and acting juror who, by some act or remark made during the trial, has given the impression that he favors one side or the other. It is obvious that it would be error to discharge a juror for such a reason, and that, if the record shows (as it does here), that, based on the evidence, that juror was inclined toward one side, the error in removing such a juror would be prejudicial to that side. If it were not, the court could 'load' the jury one way or the other. That is precisely what occurred here. The juror asked, in good faith and in order to be instructed by the court, questions which indicated that (temporarily at least) she was considering the probability of a life sentence. To dismiss her without proper, or any, cause was tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant." (*People v. Hamilton* (1963) 60 Cal.2d 105, 128.)

I dissent from that portion of the majority opinion concluding that double jeopardy precludes retrial.[3] In this case, the jury was hopelessly deadlocked. After questioning the foreperson and the other jurors, the trial court found the jury to be hopelessly deadlocked and advised the attorneys of its intent to declare a

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[3] A petition for review is pending in *People v. Hernandez* (2002) 95 Cal.App.4th 1346 in which this issue is raised.

mistrial. This is the result to which defendant was entitled. The declaration of a mistrial following a hung jury would have resulted in a new trial unrestricted by double jeopardy principles. (Pen. Code, §§ 1140-1141; *People v. Demes* (1963) 220 Cal.App.2d 423, 433.) The same result should follow if the judgment of conviction is reversed on appeal.

Unfortunately, the trial court did not declare a mistrial. The prosecutor convinced the trial court to question the jurors concerning the possibility of a juror not deliberating, even though there had been, up to this point, no suggestion of juror misconduct. The trial court questioned some of the jurors, concluded Juror No. 11 had not deliberated, and removed Juror No. 11. An alternate juror replaced Juror No. 11. The jury reached a verdict and found defendant guilty of one count. The question is, should this error, following a determination that the jury is hopelessly deadlocked and a mistrial should be declared, result in an unwarranted windfall to defendant, permitting defendant to evade prosecution for a serious offense. I conclude the answer is "no."

The California Supreme Court has never decided this precise issue. (See *People v. Collins* (1976) 17 Cal.3d 687, 696-697.) However, in similar circumstances, it expressly remanded the matter for a new trial. In *People v. Hamilton* (1963) 60 Cal.2d 105, the trial court improperly discharged a juror and substituted an alternate juror. (*Id.* at p. 126.) Since the juror had indicated she was not disposed to impose the death penalty, the error was prejudicial. (*Id.* at p. 128.) The Supreme Court reversed the judgment of death and remanded the cause for a retrial of the penalty phase. (*Id.* at p. 138.) It did not, however, expressly address the double jeopardy issue. The same result should obtain in this case.

A similar issue has been addressed by two court of appeal decisions: *People v. Young* (1929) 100 Cal.App. 18 and *People v. Burgess* (1988) 206 Cal.App.3d 762. The two cases reached opposite results. *Burgess* concluded double jeopardy did not bar a trial following the improper removal of a juror and substitute of an alternate juror. I am persuaded by the reasoning of the *Burgess*

case and would follow it. *Burgess* relied, in part, on the Supreme Court's rationale in *Hamilton*. (*People v. Burgess, supra,* 206 Cal.App.3d at p. 769.)

Finally, "[i]f a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." (Pen. Code, § 1262.) "The granting of a new trial places the parties in the same position as if no trial had been had." (Pen. Code, § 1180.) "It is equally well settled that a trial resulting in conviction, followed by reversal on appeal for errors committed at the trial, does not bar a retrial. 'He [the defendant who has appealed] does not gain immunity, for by successfully attacking the judgment he at least subjects himself to a retrial that may reach the same result.'" (*People v. Lo Cigno* (1965) 237 Cal.App.2d 470, 472.) Defendant was convicted by a jury. He has appealed. This court is reversing the judgment of conviction. Defendant is subject to retrial. This trial court error should be treated no differently than prejudicial instructional error, prosecutorial misconduct, juror misconduct, erroneous admission and exclusion of evidence, and ineffective assistance of counsel. (Cf. *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 71-72.)

I would reverse and remand for a new trial. This will not impact on defendant's double jeopardy right to retain a chosen jury (*Crist v. Bretz* (1977) 437 U.S. 28, 35); defendant's chosen jury could not arrive at a verdict.

NOT TO BE PUBLISHED.

GRIGNON, J.