

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY HADDIX,

Defendant and Appellant.

A101622

(Del Norte County  
Super. Ct. Nos. 00-5002, 02-5127)

Defendant, an inmate in Pelican Bay State Prison, appeals his jury convictions for burglary, assault and possession of a weapon by a prisoner. We conclude the trial court abused its discretion in failing to adequately investigate the prejudicial impact of extraneous information received by jurors. The judgment is reversed.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendant's appeal originally concerned two separate matters. In Case No. 00-5002, the jury hung on an attempted murder charge and convicted him of a lesser count. That case was tried before the matter at issue here, Case No. 02-5127. Defendant's appeal in the earlier case concerns only sentencing. While this appeal was pending, defendant was retried on the attempted murder charge, convicted and resentenced. As a result, he has abandoned his claim related to the earlier case.

On July 10, 2002, defendant evaded the supervision of Officer Rowland Anthony and ran into the cell of inmate Eric Johnson. Officer Anthony heard defendant yell, "You mother fucking nigger." Johnson ran from the cell, chased by defendant. Defendant was

significantly larger than Johnson and swung at him with a “slashing motion.” Defendant refused commands to lie down on the floor and was eventually subdued.

Sergeant Mike Campbell recovered an item from near where defendant had hidden before rushing into Johnson’s cell. Campbell described the item as the “ handle of some type of knife or sharp instrument.” Officer Anthony had seen a “sheath” in the same area. Campbell heard defendant tell another officer that he hid and “got at Johnson” because he exposes himself to female employees.

Eric Johnson testified that defendant ran into his cell even though Officer Anthony tried to close the door. Defendant lunged at Johnson and made a slicing gesture, but Johnson dodged and defendant made only superficial contact. Johnson described the wound as barely a scratch, although it drew blood. When Johnson fled, defendant gave chase and continued to slice at him, but again made only slight contact. Johnson did not see a weapon. Finally, Johnson tripped over defendant’s foot and was nicked in the back before Officer Anthony intervened.

Two officers saw defendant punch Johnson. One of the officers described a hard blow to Johnson’s back that “would have hurt.” The other testified that he got blood on his hands when assisting Johnson.

Johnson received medical treatment for injury to his abdomen, nipple, back and wrist. Defendant told the medical assistant, “[T]hat dude had it coming. He exposes himself and jacks off at the women. I just socked him up.” Defendant admitted that he hid in the shower and later ran into Johnson’s cell and started punching him. When Johnson fled, defendant chased him. Two inmates testified on defendant’s behalf. One said defendant hit Johnson only once on the top of the head; the other said that defendant grabbed Johnson’s boxer shorts which caused him to fall against the shower door.

In a separate incident, defendant refused to leave the shower. He broke off the top of a disposable razor, held the blade and told responding officers, “Now you’re going to have to extract me.” Officers sprayed the shower with pepper spray and defendant turned over the razor blade.

As to the assault on Johnson, the jury convicted defendant of first degree burglary, but did not find that he used a weapon during that offense. The jury also convicted defendant of assault on an inmate with a deadly weapon or by means of force likely to cause great bodily injury. Because the jury rejected the use allegation in connection with the burglary, the prosecutor stipulated that the assault was committed by means of force only, rather than with a weapon. In connection with the razor incident, defendant was convicted of possessing a weapon. Defendant was also charged with offenses on other dates. He was acquitted of possessing a weapon on April 2, 2002. The jury was unable to reach a verdict on charges of threats and a battery of a non-inmate occurring on April 12, 2002.

In a sentencing hearing consolidated with Case No. 00-5002, the court imposed a prison term of 21 years, 8 months. Defendant was alleged to have suffered three prior prison terms. The Attorney General concedes that the trial court failed to make findings on those allegations.

## **DISCUSSION**

Defendant contends the trial court abused its discretion in failing to act upon information that the jury had been tainted by outside sources. He argues that the court should either have granted a mistrial or reopened jury selection to permit the exercise of his remaining peremptory challenges.<sup>1</sup> At oral argument, appellate counsel additionally asserted the court could have replaced jurors with alternates pursuant to Penal Code section 1089.<sup>2</sup> Because the court's inquiry was exceptionally meager, we are compelled to reverse.

---

<sup>1</sup> Defendant cites no authority permitting the trial court to reopen voir dire once the jury and alternates were selected and sworn. At such point, jeopardy had attached under both the federal and state constitution. (*People v. Griffin* (2004) 33 Cal.4th 536, 565.) Peremptory challenges may only be made before the jury is sworn. (Code Civ. Proc., § 226, subd. (a).)

<sup>2</sup> Penal Code section 1089 states in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged and [replaced by] an alternate [juror]."

The jurors and alternates were selected about four months after defendant's attempted murder trial. The morning after the jury was empaneled, juror number 76185 informed the court and counsel, "[S]omething I didn't realize yesterday. I read in the morning paper this is a retrial, that you had previously tried to convict [defendant] of attempted murder. And my wife was on that jury."<sup>3</sup> The juror said he and his wife "talked a lot about it after it was over." Although the jury had been sworn the previous day, the court did not give the admonitions as required by Penal Code section 1122, subdivision (a), which includes a direction not to read any newspaper accounts or discussions of the case.

The court advised the juror that the newspaper article was incorrect and asked whether he could set aside his wife's comments and decide the case on the evidence. The juror replied, "I think so, yes." The court asked, "[W]hat we need from you is your independent decision based on the evidence that's presented here. Do you believe you can do that?" The juror replied yes. Without further inquiry or any participation by counsel, the court ordered that the rest of the jury be brought into the courtroom. Defense counsel asked if he could inquire further. The court initially stated, "I think I've covered it. We'll proceed with the jury." It subsequently permitted defense counsel to "ask a couple of questions." In the course of this truncated inquiry, juror number 76185 said that his wife talked about a videotape and a weapon made in prison. She was shocked at the depiction of prison life, and told him "the jury was ten to two." Defense counsel

---

<sup>3</sup> The November 5, 2002 article appeared on the last page of the Daily Triplicate and stated in full: "The second trial for a Pelican Bay State Prison inmate began yesterday after an earlier jury deadlocked on an attempted murder conviction. [¶] During the previous trial, defense attorney Paul Gallegos allowed [defendant], 28, to take the stand in his own defense. That jury convicted [defendant] of possessing a deadly weapon while in prison but could not come to a decision on the more serious charge. [¶] During pretrial testimony, witnesses claimed [defendant] attacked another inmate from behind with a knife in the B-Yard of the prison on Oct. 17, 1999. Another inmate, Kevin Iloff, was accused of joining in the attack. [¶] Prison medical staff said the victim, John Hancock, suffered nine stab wounds in the incident. Hancock has since been released from Pelican Bay. [¶] Senior Deputy District Attorney Jim Fallman said after the deadlock in July that he would definitely retry Haddix on the attempted murder charge. '... this office considers this to be too important to let go,' Fallman said."

asked to use a peremptory challenge to excuse the juror, advising the court he would have challenged the juror if he had learned of the information during voir dire. The court denied the request.

The court then spoke to all the jurors telling them they must decide the case based only on evidence presented at trial. At this point four additional jurors reported that they had seen the newspaper article. The court explained that the article was factually incorrect and the current case was not a retrial. The court said, “[Defendant] has had a prior trial. But that is not the case you’re going to hear. And so I certainly am going to instruct you not to consider any of the matters that you may have seen in that newspaper article in arriving at a decision here.” When asked if they could set aside the information from the article, one juror stated, “I don’t usually believe what I read in the newspaper anyway,” and another stated, “There is a lot of bias in the paper anyway.” The other two jurors stated they had seen only the article’s headline. At no time did the court inquire whether any of the jurors discussed the article among themselves or with anyone else.

Defense counsel moved for a mistrial, arguing that the newspaper article would prejudice those jurors. Alternatively, he asked to reopen voir dire so that he could use peremptory challenges against the jurors who had seen the article or at least those who read it. Counsel stated, “And I think my biggest concern with [juror number] 76185 is that he’s going to communicate with some of the other jurors about the information he has.” The court denied the motions, finding that all the jurors who had seen the article indicated an ability and willingness to decide the case on the evidence.

“Even if inadvertent, it is misconduct for a sitting juror to read a newspaper article relating to the trial.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1331.) “In the context of a claim of juror misconduct we have held that the court must conduct ‘an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror must exist.’ [Citations.] In those cases placing ultimate responsibility upon the *court* to make such inquiry, the trial court had been alerted to facts suggestive of potential misconduct, and hence had proceeded to voir dire the jurors or other relevant witnesses to determine the extent, if any, of prejudice. [Citations.]” (*People v. Adcox*

(1988) 47 Cal.3d 207, 253.) The trial court's obligation following a motion for a mistrial is identical. Only after an adequate voir dire can trial judges " 'weigh the danger of prejudice to the defense against the practicability of reducing or eliminating the danger by choosing a new jury.' " (*People v. Andrews* (1983) 149 Cal.App.3d 358, 366.)

The record here reveals no attempt by the trial court to undertake adequate voir dire. The newspaper article was highly prejudicial. It provided details of defendant's charged conduct in the earlier case, stated that he had been convicted of possessing a deadly weapon, and recounted the prosecutor's vow to retry defendant on the attempted murder charge because " 'this office considers this to be too important to let go.' " Nevertheless, the court made no inquiry as to what the jurors remembered about the article or any impressions or opinions they formed as a result. The court simply asked whether each of those jurors could set aside information from the article.

Of even greater concern is the court's lack of response to juror number 76185's statement that his wife sat on the earlier jury. This juror and his wife had discussed the case "a lot" after the trial was completed. The court asked only whether the juror could set aside his wife's comments and decide the case based on the evidence. It asked no questions regarding the nature of the conversations or their frequency. It did not inquire what, if any impact the discussions had on the juror's views, whether he had any reservations about his ability to follow the court's instructions, or whether juror number 76185 had shared any facts or opinions with other panel members. The court limited defense counsel's opportunity to question the juror by permitting him to ask only "a couple of questions." The restricted questioning raised more concerns than it answered. The juror told counsel that the earlier verdict was "10 to 2." The court did not ask juror number 76185 if he knew which verdict was favored by the ten jurors or if he knew of his wife's conclusions about the case. The juror was not asked further about his wife's description of events on the videotape or the depiction of prison life, and how those remarks affected him.

The decision whether to investigate the possibility of juror misconduct or bias, like the ultimate decision to retain or discharge a juror, rests within the sound discretion of the

trial court. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) “Unless the facts clearly establish a sufficient basis on which to reach an informed and intelligent decision, the court must conduct an appropriate hearing in the presence of litigants and counsel on the question of the juror’s ability to serve.” (*In re Mendes* (1979) 23 Cal.3d 847, 852.) The court abused its discretion by deciding to go forward without an inquiry and by limiting defense counsel’s efforts to ensure a fair trial.

The error was not harmless. The jury convicted defendant of only three of the six charged counts, and strong evidence supported those convictions. However, even when there “was substantial evidence to uphold the jury’s verdict absent prejudicial error, since a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors, a conviction cannot stand if even a single juror has been influenced improperly.” *People v. Andrews, supra*, 149 Cal.App.3d at p. 366.) We cannot conclude, on this record, that all jurors deliberated free of improper influence.

Based on our conclusion that a new trial is required, we need not address defendant’s other claims related to his burglary conviction. We do note, however, that this trial does not appear to have been managed with sufficient care. In addition to the truncated inquiry regarding jury bias, the trial court failed to properly admonish the jury after it was sworn, failed to provide a verdict form for second degree burglary, and made no finding whether the prior prison terms had been proven true in either Case Number 00-5002 or 02-5127.

### **DISPOSITION**

The judgment is reversed.

Corrigan, Acting P. J.

We concur:

Parrilli, J.

Pollak, J.