Filed 2/6/13 P. v. Candler CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>REGINALD MARK CANDLER,<br><br>Defendant and Appellant. | B235849<br><br>(Los Angeles County<br>Super. Ct. No. MA052393) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

---

## INTRODUCTION

Reginald Mark Candler appeals from a judgment entered following a jury verdict finding him guilty of possessing ammunition and being a felon in possession of a firearm. He contends the judgment should be vacated because the trial court erred in declaring a mistrial after excusing two jurors for cause, and the retrial violated the double jeopardy provisions of the federal and California constitutions. He also contends the judgment should be reversed because the court erred in denying his *Batson*/*Wheeler* motion,[1] brought after the prosecutor used peremptory challenges to excuse three prospective African-American jurors. Finding no error, we affirm.

## STATEMENT OF THE CASE[2]

After appellant was charged in a three-count information with various firearm offenses, a jury trial commenced June 23, 2011. On July 5, 2011, while the jury was deliberating, the trial court granted a defense motion for mistrial over appellant's objection. The retrial commenced August 30, 2011. The jury found appellant guilty of possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)) and of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). It acquitted him of the remaining count (discharge of a firearm with gross negligence). In a bifurcated trial, appellant admitted three prison prior convictions. He was sentenced to state prison for a total of six years, and assessed various fines and fees. He timely appealed.

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79, 85 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 168.

[2] Because the facts of appellant's crimes are not relevant on appeal, we omit a Statement of the Facts.

## DISCUSSION

Appellant contends his retrial was barred by the double jeopardy provisions of the federal and California constitutions. He also contends the judgment should be reversed because the trial court erred in denying his *Batson*/*Wheeler* motion.

A. *Double Jeopardy*

1. *Relevant Proceedings*

During jury deliberations in the first trial, the court was informed that one juror had looked up the definition of two words in a dictionary and that another juror had used the internet to research juror responsibilities. In response, the judge sent a written instruction, admonishing the jurors that they "'must not independently investigate the facts or the law'" and that they were "not to discuss any information obtained in the dictionary or the internet." The judge also indicated to the parties that he would conduct a further inquiry into the misconduct.

Defense counsel agreed that further inquiry was needed. She also stated that the court's instruction would not cure the jurors' misconduct and that she would be requesting a mistrial.

After the judge conducted the inquiry by questioning the two jurors, the judge asked defense counsel whether she "still ha[d] [her] motion for mistrial based on jury misconduct." Defense counsel responded in the affirmative. The judge then asked appellant whether he understood that there would be "no double jeopardy when I grant a defense mistrial." Appellant responded, "Right." The judge asked defense counsel whether she agreed, but defense counsel and appellant conferred before counsel could answer. After this conference ended, the judge asked counsel whether she was still bringing the motion. She answered, "I'm still bringing it." Appellant requested more explanation about double jeopardy, and defense counsel again conferred with him. After this discussion, appellant stated

he did not understand the double jeopardy issue. After further discussion with defense counsel, appellant stated that he objected to his counsel's motion for mistrial. The trial court granted the defense motion for mistrial over appellant's objection.

2. *Applicable Law*

The Double Jeopardy Clause of the Fifth Amendment of the federal constitution provides that no person shall "be subject to the same offense to be twice put in jeopardy of life or limb." Article I, section 15 of the California Constitution similarly provides that "Persons may not twice be put in jeopardy for the same offense . . . ." Thus, "once a criminal defendant is placed on trial and the jury is duly impaneled and sworn, a discharge of the jury without a verdict is equivalent to an acquittal and bars retrial unless (1) the defendant consents to the discharge or (2) legal necessity requires it." (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329, citing *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712-713.) A defendant consents to discharge of a jury and retrial if, inter alia, he moves for a mistrial or states that he has no objection to a mistrial. (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175 (*Brandon*).) Moreover, as a matter of trial tactics, defense counsel may move for a mistrial over the defendant's objection. (*Ibid*. [defendant had no meritorious double jeopardy defense to retrial where trial counsel moved for mistrial over defendant's objection], citing *People v. Moore* (1983) 140 Cal.App.3d 508, 512-515 [mistrial granted at request of defendant's counsel authorized retrial]; accord, *People v. Hambrick* (2012) 96 A.D.3d 972 973 [947 N.Y.S.2d 139] [although defendant personally disagreed with request for a mistrial, "defendant's personal consent to a mistrial was not necessary, and his counsel's decision to move for a mistrial was binding on the defendant"].) Finally, a claim that a prosecution violated a defendant's constitutional rights against

double jeopardy is not cognizable on appeal unless the defendant has entered a plea of once in jeopardy, or the claim is part of one alleging ineffective assistance of counsel. (*People v. Scott* (1997) 15 Cal.4th 1188, 1201.)

3. *Analysis*

The resolution of the double jeopardy claim is controlled by our prior decision in *Brandon*. It is undisputed that appellant's counsel moved repeatedly for a mistrial. As this court explained in *Brandon*, the law does not require that the right to proceed to a conclusion with the same jury be personally waived by an accused: "trial counsel [has] the right to make that decision as a matter of trial tactics . . . even over [the defendant's] objection." (*Brandon*, *supra*, 40 Cal.App.4th at p. 1175.) Defense counsel's request for a mistrial is deemed to be the defendant's consent. Although appellant objected below to the motion for mistrial, his counsel's request is thus "deemed to be appellant's consent." (*Ibid*.) Because appellant is deemed to have consented to the discharge of the first jury, the retrial was not barred by the double jeopardy provisions of the federal and California constitutions. Similarly, as appellant had no meritorious double jeopardy defense to the second trial, his counsel was not ineffective for failing to enter a plea of once in jeopardy. In short, the trial court did not err in granting the defense motion for mistrial, and the second trial was not barred by appellant's constitutional right against double jeopardy.[3]

B. *Batson/Wheeler Motion*

1. *Relevant Proceedings*

During the retrial, after the prosecutor used his peremptory challenges to excuse three prospective African-American jurors, defense counsel made a

---

[3] Because we conclude that appellant consented to a mistrial, we decline to address respondent's argument that there was a legal necessity to grant a mistrial.

*Batson*/*Wheeler* motion. The trial court determined that the defense had made a prima facie case that the jurors had been excused because they belonged to an identifiable group. The court asked the prosecutor to explain why he excused the three prospective jurors, identified as Juror Nos. 6333, 2334, and 8237.

The prosecutor explained that Juror No. 6333 had a nephew who had been convicted of a crime. The juror believed that his nephew had been "railroaded," that his conviction was racially-based, and that the punishment he received was unfair.

As for Juror No. 2334, the prosecutor explained that the juror was a counselor who worked with parolees. The prosecutor believed the juror might be sympathetic to appellant because she worked with people in situations "where the defendant could be . . . in the future." The prosecutor also noted that the juror stated her sister had been a defendant in a criminal case.

Finally, as to Juror No. 8237, the prosecutor noted that the juror had said her husband's cousin had been convicted of a crime involving a shooting and was currently in prison. The prosecutor was concerned that she would sympathize with appellant.

The trial court gave defense counsel the opportunity to comment on each of the prosecutor's proffered reasons for excusing the jurors. Counsel declined to do so. The court then denied the defense's motion, stating:

> "The court has heard the explanations by the prosecutor. . . . [T]he explanations are consistent with the court's notes, and as to each of the three, the court does believe those are neutral explanations for the challenges."

2. *Applicable Law*

"The purpose of peremptory challenges is to allow a party to exclude prospective jurors who[m] the party believes may be consciously or unconsciously biased against him or her. [Citation.] However, the use of peremptory challenges

to remove prospective jurors from the panel solely on the basis of group bias violates the right of the defendant to a jury drawn from a representative cross-section of the community. [Citations.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17-18, italics & fn. omitted.) "[A] peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality[,] . . . rang[ing] from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative." (*Wheeler, supra*, 22 Cal.3d at p. 275; accord, *People v. King* (1987) 195 Cal.App.3d 923, 933.)

Trial courts engage in a three-step process to resolve claims that a prosecutor used peremptory challenges to strike prospective jurors on the basis of group bias -- that is, bias against "'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds.'" (*People v. Avila* (2006) 38 Cal.4th 491, 541.) "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California, supra*, 545 U.S. at p. 168, fn. omitted.) The appellate court reviews the trial court's ruling on the question of purposeful racial discrimination for substantial evidence, presumes that the prosecutor used peremptory challenges in a constitutional manner, and gives deference to the trial court's conclusions, as long as the "court makes 'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*People v. Avila*, *supra*, 38 Cal.4th at p. 541, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

C. *Analysis*

After examining the record, we conclude that the trial court made "a sincere and reasoned effort" to evaluate the prosecutor's proffered reasons for excusing the three African-American jurors. Here, "[t]he prosecutor's stated reasons for exercising each peremptory challenge [was] neither contradicted by the record nor inherently implausible." (*People v. Ward* (2005) 36 Cal.4th 186, 205.) Juror No. 6333's belief that his nephew was "railroaded" by the criminal justice system was a sufficient race-neutral reason for the prosecution to excuse him. (See, e.g., *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690 ["use of peremptory challenges to exclude prospective jurors whose relative and/or family members have had negative experiences with the criminal justice system is not unconstitutional"].) The prosecutor's excusal of Juror No. 2334 because she was a counselor who worked with parolees was also legitimate. (See, e.g., *People v. Trevino* (1997) 55 Cal.App.4th 396, 411-412 [occupation can be a permissible, nondiscriminatory reason for exercising a challenge].) Finally, as to Juror No. 8237, the prosecutor had a valid race-neutral reason for excusing her -- the fact that she had a family member in prison for a crime involving a shooting. (See, e.g., *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1052-1053 [prosecutor properly challenged juror whose uncle had been convicted of murder].) In addition, there was no evidence suggesting the prosecutor's proffered reasons were pretextual. In short, the trial court did not err in denying the *Batson*/*Wheeler* motion.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.