

929; U.S. Const. 6th and 14th Amendments, Cal.Const., art I, section 16.)

In People v. Diaz (1984) 152 Cal.App.3d 926, a juror concealed during voir dire that she had been the victim of a crime similar to that with which the defendant was charged. The court found this misconduct from which a rebuttable presumption of prejudice arose, noted that it had prevented defense counsel from fairly evaluating whether to use his one remaining peremptory challenge to remove her from the panel and stated that:

" The probability of bias is substantial when a juror has been victimized by the same type of crime. As a result of such a similar experience, bias may be conscious and the juror may attempt to persuade the other jurors defendant is guilty regardless of the evidence. More likely, however, the prior experience may cause unconscious bias. Only individuals of strong character would not be affected in some way by their previous identical experience. Subconsciously, the juror may tend to favor the prosecution because of emotional and psychological bonds perceived to exist with the defendant's victim. Indeed the juror may sincerely try to be impartial, and yet be unable to do so. (Citation omitted.)" (Id., at p. 939.)

The First Appellate District cited People v. Diaz with approval in Blackwell, supra at 929-930. As in Diaz, the defendant in Blackwell obtained a reversal because of the concealment by a juror that she had been involved in a domestic violence situation similar to that of the defendant, who was on trial for killing her husband. Notably, more recently, the Ninth Circuit in Dyer, supra, held that the presence of a biased juror cannot be harmless error, but rather the error is structural requiring per se reversal. (Dyer, supra, 151 F.3d at p. 973, fn. 2, citing Arizona v. Fulminante (1991) 499 U.S. 279, 307-310.)

A prospective jurors who has been the victim of a traumatic crime

cannot be impartial when he or she later discusses such crimes, let alone while deliberating at a trial involving a similar alleged victim. This is common sense, mixed with elementary psychology. Involuntary mental processes such as transference, identification, revenge, and sympathy are bound to occur in the minds of past victims, without overt manifestation.

The crime charged in this case, that of sexually molesting _____, obviously qualifies as a "traumatic" event in the opinion of most citizens. Therefore, anyone who has been a prior victim of similar conduct can be assumed to have been traumatized by such occurrence. Society validates this assumption by routinely recommending emotional therapy for molest victims. It is not a great mental leap to infer that such victims often develop negative feelings toward any person alleged to have committed lewd and lascivious conduct against a child.

Defendant's "Peremptory Challenge" Right to Probe for Bias:

The right to exercise peremptory challenges is central to safeguarding a defendant's right to a fair trial. Unless counsel is permitted during voir dire to assist the court in probing for bias, an impartial jury may not be selected and an innocent person may end up being convicted.

[T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury"
People v. Williams (1981) 29 Cal.3d 392, 405 [174 Cal.Rptr. 317, 628 P.2d 869].

Likewise, the improper refusal by the trial court to allow counsel to pose questions reasonably designed to assist in intelligently exercising peremptory challenges may constitute reversible error. See People v. Williams, supra, 29 Cal.3d 392, 407-408, 410, 412. People v. Diaz, supra at 932.

Remedies for Juror Concealment of Bias:

Better to probe for concealment of bias and challenge the juror than to let him or her sneak into the jury box. If a venire person's concealment of bias is discovered after impanelment but before the verdict, he or she should be replaced by the court. If such concealment goes undiscovered until after the verdict is rendered, a new trial must be ordered unless the presumption of prejudice is rebutted.

A juror's misconduct is good cause which, under the provisions of either section 1089 or 1123, may permit the court to replace him or her with an alternate, or if there is no alternate, discharge the jury, impanel a new one, and retry the cause. People v. Guzman (1997) 66 Cal.App.3d 549, 559, Diaz, supra, at p. 934.)

B. WITNESS BIAS

When percipient or expert witnesses are probed and found to possess bias for or against the defendant, they are not treated in the same fashion as a prospective juror. They cannot be banned from the trial or prevented from testifying.

A witness's biased testimony is admissible, but the weight accorded to such testimony is to be discounted by the trier of fact. A criminal defendant has a 6th Amendment confrontation right to cross-examine a witness to expose their biases. (Davis v. Alaska (1974) 415 U.S. 308, 317-318.) A criminal defendant must be afforded wide latitude in cross-examining an adverse witness in order to bring such information out in the open. (People v. Belmontes (1988) 45 Cal.3d 744, 780.)

By analogy, the same presumption of bias spoken of in the Diaz case with regard to prospective jurors who have been the victim of the same or similar crime as that charged in the case on which they are

asked to serve as jurors can be applied to a percipient or expert witness. Any witness (no matter how prestigious or educated) who attempts to testify in a criminal trial should be presumed to be biased against the defendant, where such witness has been victimized in a similar fashion to that alleged by the current victim. The remedy is to allow the juror's to learn of this bias and evaluate it in determining credibility. Thus, in keeping with his 6th Amendment constitutional right of confrontation, defendant requests that he be afforded wide latitude in cross-examining _____ to expose his or her bias.

V. CONCLUSION

Based on the foregoing discussion, the court should fashion remedies appropriate to this case based on the exposure of bias that has occurred.

If the bias has been discovered in a prospective juror, the remedy could involve removal or a new trial. If the bias is discovered in a witness, the jury should be informed of the bias by cross examination or other forms of evidence.

Dated:

Respectfully submitted,

Attorney for Defendant