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Opinion following remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCIS MATA,

Defendant and Appellant.

B226256

(Los Angeles County  
Super. Ct. No. BA366071)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Modified and affirmed with directions.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Francis Mata appeals from the judgment entered following a jury trial in which he was convicted of possession of cocaine base and two misdemeanor counts of resisting an officer. Defendant contends the trial court erred by reseating a prospective juror improperly challenged by the prosecution instead of discharging the venire after it granted his motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). We affirm.

### **BACKGROUND**

On the afternoon of December 21, 2009, Los Angeles Police Department narcotics officers conducted surveillance on San Julian Street between 6th and 7th Streets in downtown Los Angeles. Detective James Miller saw defendant walking on the sidewalk with Earl Early, who held cash in his hand. Early and defendant stopped next to Anthony Coleman. Miller testified he saw Coleman spit a plastic-wrapped item into his hand, remove a small white object from it, hand the object to Early, and take Early's cash. Coleman walked away, and Early and defendant crouched near a fence. At Miller's direction, other officers detained the three men. Coleman, who was tried with defendant, had \$5 and six small rocks that together weighed 0.52 grams and contained cocaine base. Defendant had one rock that weighed 0.02 grams and contained cocaine base. Early threw down a glass smoking pipe and one rock that weighed 0.02 grams and contained cocaine base.

At the police station, defendant expressed anger and refused to walk when two officers attempted to escort him to another area. He leaped up and backward, and his body struck one of the officers in the face. He continued to move after the officers tackled him and told them to release his handcuffs so he could fight them with his good hand.

Coleman testified that he purchased the rocks of cocaine base on the afternoon of his arrest for personal use. He was a long-time, heavy user of cocaine base and intended to smoke all of the rocks he had in rapid succession. He did not provide Early or defendant with any cocaine base or take money from Early, but merely lent Early his smoking pipe. Coleman saw police officers knee defendant in the back and drag him at

least 20 feet to the middle of the street. An officer threatened to do the same to Coleman if he did not turn and face the other way.

The jury convicted defendant of possession of cocaine base and two misdemeanor counts of resisting an officer (Pen. Code, § 148, subd. (a)(1)). The court sentenced him to two years in prison.

In our original opinion in this case, filed February 23, 2012, we applied *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*) and reversed the judgment because the trial court reseated a prospective juror improperly challenged by the prosecutor after it granted defendant's *Wheeler* motion without obtaining his consent to doing so or waiver of his right to a mistrial. The California Supreme Court granted review and reversed our decision in *People v. Mata* (2013) 57 Cal.4th 178 (*Mata*).

## DISCUSSION

### 1. Remedy for prosecutor's improper challenge on the basis of group bias

On the fourth day of jury selection, the prosecutor exercised his 11th peremptory challenge against Prospective Juror No. 2473. Counsel for defendant stated, "I ask for a side bar after she leaves." The court directed the prospective juror to remain in her seat, then conducted a conference with counsel outside the presence of the jury. Counsel for defendant explained that he was making a *Wheeler* motion, stating that Prospective Juror No. 2473 was "the second African-American within the last few challenges" by the prosecutor. The court noted that the prospective juror's responses were "very neutral," and asked the prosecutor for his "thoughts." The prosecutor said he had been watching the prospective juror and "didn't find her to be as engaging [*sic*]. I found her to be extremely quiet. . . . I just felt that at times she was just kind of quiet and tuned out. And I wanted somebody who is a little bit more, to me, appear [*sic*] to be a little bit engaging." The court found there was no "justification" for challenging the prospective juror and stated, "I am going to disallow your challenge at this time. And I'd order that the juror remain seated." The court told the prosecutor he could exercise a peremptory challenge against a different prospective juror, "[a]nd we will continue the process."

Counsel for defendant said nothing about the court's remedy, and voir dire continued, with Prospective Juror No. 2473 seated.

A little later, the prosecutor exercised a peremptory challenge against another African-American, Prospective Juror No. 207, who had stated she disliked police because she had been a victim of racial profiling and police mistreatment. Counsel for defendant stated, "Your honor, I'd ask that she remain while we have a side bar." The court asked Prospective Juror No. 207 to remain seated and conducted a conference with counsel outside the presence of the jury. Counsel for defendant made a *Wheeler* motion that the court denied.

Defendant contends that the trial court erred by reseating Prospective Juror No. 2473 instead of dismissing the venire because defendant did not consent to the juror's reseating or waive his right to a mistrial.

In *Wheeler, supra*, 22 Cal.3d at page 282, the California Supreme Court held that if a trial court concludes that one party has impermissibly exercised peremptory challenges on the basis of group bias, the court "must dismiss the jurors thus far selected" and "quash any remaining venire."

In *Willis, supra*, 27 Cal.4th 811, the Supreme Court noted "the need for the availability of some discretionary remedy short of dismissal of the remaining jury venire" and that the remedy prescribed by *Wheeler* is not compelled by the federal Constitution. (*Willis*, at p. 818.) The court concluded, "We think the benefits of discretionary alternatives to mistrial and dismissal of the remaining jury venire outweigh any possible drawbacks. As the present case demonstrates, situations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial. Under such circumstances, and with the assent of the complaining party, the trial court should have the discretion to issue appropriate orders short of outright dismissal of the remaining jury, including assessment of sanctions against counsel whose challenges exhibit group bias and reseating any improperly discharged jurors if they are available to serve. In the event improperly challenged jurors

have been discharged, some cases have suggested that the court might allow the innocent party additional peremptory challenges.” (*Id.* at p. 821.) “We stress that such waiver or consent is a prerequisite to the use of such alternative remedies or sanctions, for *Wheeler* made clear that ‘the complaining party is entitled to a random draw from an entire venire’ and that dismissal of the remaining venire is the appropriate remedy for a violation of that right. [Citation.] Thus, trial courts lack discretion to impose alternative procedures in the absence of consent or waiver by the complaining party. On the other hand, if the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay.” (*Willis*, at pp. 823–824.)

In *Mata, supra*, 57 Cal.4th 178, the Supreme Court held that “the complaining party’s assent to the trial court’s proposed alternative remedy may be found based on the failure to object, unless the trial court’s actions effectively preclude a meaningful opportunity to object. In turn, we conclude that, by impliedly consenting to the alternative remedy, the complaining party waives the right to the default remedy of quashing the jury venire.” (*Id.* at p. 186.) The court inferred defense counsel’s consent to the trial court’s remedy of reseating Prospective Juror No. 2473 from his failure to object to that remedy. (*Id.* at p. 188.)

Accordingly, we necessarily conclude that the trial court did not err by failing to dismiss the entire venire.

## **2. Omitted fines, fees, and assessments**

The Attorney General asks this court to modify the judgment to include six mandatory fines, fees, and penalty assessments that the trial court omitted. Defendant has not opposed this request.

The trial court imposed a criminal laboratory analysis fee of \$50 pursuant to Health and Safety Code section 11372.5, subdivision (a). The court failed to impose other mandatory fees, fines, and assessments, several of which are calculated on the basis

of that laboratory analysis fee. First, the court failed to impose a Penal Code section 1464, subdivision (a), state penalty assessment of \$10 for every \$10 of the laboratory analysis fee, that is, \$50 in this case. Second, the court failed to impose a Government Code section 76000, subdivision (a)(1), county penalty assessment of \$7 for every \$10 of the laboratory analysis fee, that is, \$35 in this case. Third, the court failed to impose a Penal Code section 1465.7, subdivision (a), surcharge of 20 percent of the laboratory analysis fee, which is \$10 here. Fourth, the court failed to impose the applicable Government Code section 70372, subdivision (a)(1), state court construction fee as calculated for Los Angeles County, which is \$3 for every \$10 of the laboratory analysis fee, that is, \$15 in this case. (*People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254.) Fifth, the court failed to impose the Government Code section 70373, subdivision (a)(1), criminal conviction assessment of \$30 for each count, which is \$90 here. Finally, the court imposed the Penal Code section 1465.8, subdivision (a)(1), court security fee—which was \$30 per count at the time of defendant’s offenses—only for one count. An additional \$60 in court security fees must be imposed. The sum of all the fees, fines, and assessments that the trial court failed to impose is \$260, not \$310 as argued by the Attorney General. Accordingly, we modify the judgment to include these additional fees, fines, and assessments and direct the trial court to issue an amended abstract of judgment reflecting them.

### **DISPOSITION**

The judgment is modified to impose the following: a Penal Code section 1464, subdivision (a), state penalty assessment of \$50; a Government Code section 76000, subdivision (a)(1), county penalty assessment of \$35; a Penal Code section 1465.7, subdivision (a), surcharge of \$10; a Government Code section 70372, subdivision (a)(1), state court construction fee of \$15; a Government Code section 70373, subdivision (a)(1), criminal conviction assessment of \$90; and a Penal Code section 1465.8, subdivision (a)(1), court security fee in the amount of \$90, not \$30. As modified, the judgment is affirmed. The trial court is directed to issue an amended abstract of judgment reflecting

the modified fees, fines, and assessments and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.