

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIA CECILIA SILVERIO,

Defendant and Appellant.

E054278

(Super.Ct.No. RIF150099)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed.

Law Firm of Harold Greenberg, Harold Greenberg and Mark E. Beallo for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and James H.
Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant Maria Cecilia Silverio instructed two minor girls, her daughter and foster daughter, to plant drugs in defendant's ex-boyfriend's vehicles. A jury convicted defendant of three crimes: furnishing a minor with a controlled substance (§ 11380), possession of a controlled substance (§ 11366, subd. (a)), and transportation or furnishing of a controlled substance (§ 11379, subd. (a)). The court suspended imposition of sentence and ordered defendant to complete 36 months of probation and 360 days of local custody.

On appeal, defendant makes two arguments. Although defendant acquiesced in the trial court reopening voir dire, defendant argues the trial court erred in violation of the Trial Jury Selection and Management Act, Code of Civil Procedure section 190 et seq., as well as defendant's federal and state constitutional rights against double jeopardy. She also contends the trial court erred by giving CALCRIM No. 371 because it was only relevant to counts 4 and 5, involving false testimony, which were dismissed before trial. We reject defendant's claims of error and affirm the judgment.

II

FACTUAL BACKGROUND

The facts, as recited in respondent's brief, are not disputed.

¹ All statutory references are to the Health and Safety Code unless stated otherwise.

On July 25, 2008, an anonymous caller reported to the Fontana Police Department that Thomas Perez was selling drugs from his vehicle located in a grocery store parking lot. The caller told police exactly where the drugs were located in the car under a seat. Officer Christopher Tusan responded and, after an hour of observation, Tusan and several other officers initiated a traffic stop with their guns drawn. Perez obeyed their order to exit the car and seemed “shocked and confused.”

Perez denied he was selling drugs and he invited the officers to search his car. When a police dog alerted to the presence of drugs, Perez repeated, “[p]lease check my car.” Officer Tusan found marijuana and a quantity of Ecstasy, packaged in Ziploc bags and foil, under the seat as described by the 911 caller. Perez told Tusan he had found a similar package in his car earlier in the day and given the package to defendant, his live-in fiancée. He thought the drugs had been left in the car by some teenage passengers who worked for him selling newspaper subscriptions.

Defendant arrived at the scene and told Tusan that Perez was a drug dealer. She said Perez also stashed drugs in another vehicle. Defendant explained she and Perez were “getting a divorce” and Perez had a new girlfriend, Miss Rodriguez, who was also involved. Officer Tusan made contact with Miss Rodriguez and found drugs located in the second vehicle and packaged in the same way. Perez was shocked to learn of the discovery.

Perez spent five weeks in jail. During that time, defendant supported him, hired a lawyer, and posted his bail. Perez and defendant reconciled and began living together

again. When Perez was preparing for his trial on drug charges, he heard the 911 call for the first time and recognized defendant's voice as the caller.

Defendant's foster daughter, Jennifer, also identified defendant's voice in the 911 call. Jennifer admitted that she had planted the drugs in one of Perez's vehicles because defendant threatened to throw her out of the house. According to Jennifer, defendant was angry at Perez and defendant instructed Jennifer to obtain the drugs from J.J., a friend of defendant's daughter, Chelsey. Defendant also threatened to blame Jennifer if she ever told anyone.

Ultimately, defendant, working with J.J., spent several hundred dollars to buy the drugs. Defendant told J.J. that Perez had cheated on her and "was about to get off probation." J.J. watched as Chelsey, age 15, wore gloves and a hoodie to put the drugs, packaged in plastic bags and foil, in Perez's van. J.J. refused to make the phony 911 call, so defendant placed the call herself.

III

JURY SELECTION

At trial, defendant agreed the trial court could reopen jury selection after the regular jurors, but not the alternate jurors, were sworn. On appeal, defendant contends the trial court violated the Trial Jury Selection and Management Act, Code of Civil Procedure section 190 et seq., as well as defendant's federal and state constitutional rights against double jeopardy.

A. Reopening Jury Selection

After defense counsel had used all his peremptory challenges and the prosecution had one remaining peremptory challenge, the prosecutor accepted the 12-member jury panel. The panel included J.V., a registered nurse, and J.H., who was hearing-impaired. The court swore in the jury and began to pick the alternate jurors. After the court asked the potential alternates if they had friends or family in law enforcement, J.V. voiced doubts about his ability to serve on the jury because he and defendant were both Filipino.

The court proposed excusing J.V. for cause, reopening the preemptory challenges, giving defendant another peremptory challenge, and moving one of the prospective alternates into J.V.'s position. The prosecutor then asked whether she would be permitted an additional peremptory challenge because she regretted not challenging J.H. and she was concerned he might not be able to hear defendant's voice on the 911 tape. Defense counsel said he did not object to removing J.H. The court agreed that, rather than choose an alternate to replace J.V., it would excuse J.V. for cause and reopen jury selection, allowing each party one additional peremptory. Neither counsel objected. With the parties' agreement, the court dismissed J.V. for cause.

The voir dire continued using the panel of jurors that had previously been considered as alternates. After some jurors were released for cause and for hardship, the prosecutor exercised a peremptory challenge of J.H. and the defense exercised its last peremptory. The prosecution accepted the panel with one peremptory remaining. The court swore in the jury. Three alternate jurors were also chosen.

At one point in the proceedings the trial court observed: “I’ve done a little research on it. Because we have not picked our alternates, what we would do is just go back into the jury-picking mode. We wouldn’t continue to pick alternates, then move an alternate in. We just go back right into jury-picking mode.”

It is undisputed that 12 jurors were sworn in this case. Under *People v. Cottle* (2006) 39 Cal.4th 246, once the jurors were sworn, the trial court lacked authority to reopen jury selection as to those trial jurors. The *Cottle* court did not indicate that there were any exceptions to this rule. That the trial court thereafter excused J.V. for cause did nothing to affect the application of *Cottle*. As the court in *Cottle* observed, “[t]his conclusion [that the trial court lacks authority to reopen jury selection once the 12 trial jurors are sworn] does not leave the court without recourse should a juror become unable to serve. Code of Civil Procedure sections 223 and 234 and Penal Code section 1089 provide for the removal of a juror upon a showing of good cause.” (*Id.* at p. 259.)

The trial court only had the discretion to reopen the selection of the regular jurors if the panel was not yet sworn: “The phrase ““the jury is sworn”” refers to the trial jury, not the alternates. (*People v. Cottle*[, *supra*, 39 Cal.4th at p. 255].) If a party were allowed to use peremptory challenges to members of the jury after the jury was sworn, but before the alternates were selected, gamesmanship would be encouraged. (*Id.* at p. 257.) ‘For example, if a favorable juror was selected as an alternate, a party would then try to challenge a member of the jury so that the alternate could replace the juror. Nothing in the legislative history suggests an intention to create such a scheme.’ (*Ibid.*)” (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 503.)

Instead, the court should not have reopened jury selection after the jury was sworn. (*People v. Cottle, supra*, 39 Cal.4th 246.) In *Cottle*, “both sides consecutively passed their peremptory challenges, and the jury was sworn.” (*Id.* at p. 255.) During selection of the alternates, a previously sworn trial juror asked to address the trial court about “some reservations” he had about serving as a juror. (*Id.* at p. 250.) After questioning by the trial court and counsel for both parties, the trial court denied a defense motion to dismiss the trial juror for cause. (*Id.* at p. 253.) The defendant then moved to reopen jury selection to exercise an unused peremptory challenge as to the trial juror. (*Ibid.*) The trial court denied the motion to reopen jury selection on the grounds that 12 jurors had been sworn. (*Ibid.*)

The Court of Appeal reversed based on *People v. Armendariz* (1984) 37 Cal.3d 573, concluding that the trial court should have reopened jury selection. (*People v. Cottle, supra*, 39 Cal.4th at p. 253.) The Supreme Court disagreed with the Court of Appeal’s analysis, and in particular with its reliance on *Armendariz*, because *Armendariz* was based on former section 1068, which provision had been repealed in 1988. (*Cottle*, at p. 253.) After conducting an analysis of the statutes that replaced section 1068, the court in *Cottle* concluded that the “Legislature has eliminated the language upon which *Armendariz, supra*, 37 Cal.3d 573, was based [that allowed peremptory challenges until the alternates were sworn], thus superseding its precedential authority.” (*Id.* at p. 255.) It therefore held that “under the [Trial Jury Selection and Management] Act, the Legislature intended that a trial jury be comprised of 12 jurors sworn by the court ‘to try and determine by verdict . . . question[s] of fact’ (§ 194, subd. (o)), regardless of whether

alternate jurors are to be called, selected, and sworn. Once a jury has been sworn, the court lacks authority to reopen jury selection proceedings. (§ 226, subd. (a).)” (*Id.* at p. 258.)

B. Waiver or Forfeiture

In contrast, defendant’s constitutional double jeopardy claims are not sustainable because double jeopardy does not attach until the 12 regular jurors and any alternate jurors have been selected and sworn. (*People v. Griffin* (2004) 33 Cal.4th 536, 565-566, overturned on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758.) What is still necessary for us to decide is whether defendant’s statutory rights under the Trial Jury Selection and Management Act, Code of Civil Procedure section 190 et seq., were waived by defendant. (*People v. McDermott* (2002) 28 Cal.4th 946, 985, fn. 2.) We disagree that defendant had to consent personally to waiving or forfeiting a violation of his statutory, non-constitutional, rights. For the reasons expressed below, we conclude defendant forfeited any objection because his counsel expressly agreed to the procedure followed by the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-591.)

It is unfair to the trial judge and to the prosecution to allow defendant to take advantage on appeal of an error that could have been corrected easily at trial. (*People v. Saunders, supra*, 5 Cal.4th at p. 590.) Here defendant’s counsel acquiesced fully in the procedure followed by the trial court and the prosecutor’s exercise of her peremptory challenge against J.H. because of his hearing impairment. Defendant’s belated objections to any statutory violations of the jury selection process were waived or forfeited at trial.

IV

CALCRIM NO. 371

Defendant maintains it was error to give an instruction based on CALCRIM No. 371, concerning consciousness of guilt, because the two charges involving false testimony were dismissed. We reject this assertion because the instruction was relevant to defendant's threat to blame Jennifer. Defendant's threat demonstrated that defendant knew her conduct was wrong and would have consequences. Where substantial evidence demonstrates defendant tried to hide evidence, an instruction on consciousness of guilt is proper. (*People v. Hart* (1999) 20 Cal.4th 546, 620.)

V

DISPOSITION

Defendant waived any error in jury selection. The trial court did not err in giving CALCRIM No. 371. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.