Maine Supreme Judicial Court
Sitting as the Law Court

Docket No. Aro-23-450

State of Maine,

Appellee,

v.

Pedro J. Rosario,

Appellant.

On Appeal from the
Maine Superior Court, Aroostook County

Appellant's Brief

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Statement of the Case

In May 2021, Pedro Rosario was facing an upcoming jury trial in Aroostook County, Maine for Aggravated Trafficking in Scheduled Drugs (Class A). (A. 16, 21.) On May 13, 2021, the court conducted jury selection. (A. 16-17.) During jury selection, Rosario's counsel stated that he wished to voir dire Juror 23. (A. 17, 22; Ex. 1 at 32:6-20.) But due to an oversight, Juror 23 was not brought forward. (A. 17 at n.1; Ex. 1 at 39:10-44:11.) Juror 23 therefore remained in the pool for the random selection process and was ultimately called as a potential alternate. (Ex. 1 at 58:25-59:13, 171:22-173:9.) After each side exercised one peremptory challenge, Jurors 23 and 258 were selected as the two alternates. (A. 17; Ex. 1 at 173:3-16, 175:6; Ex. 4.)

Trial was held in early June 2021. (A. 17.) Just before the jury began deliberations, the trial court intended to discharge the alternates but mistakenly released Juror 172 instead of Juror 23. (A. 17.) The jury, including Juror 23, returned a guilty verdict on June 3, 2021, and judgment was entered on August 27, 2021. (A. 17.) Following the appeal, final judgment was entered August 25, 2022. Rosario was sentenced to 25 years, with all but 15 years suspended and 4 years of probation. (A. 13.)

Rosario's counsel attended jury selection in two unrelated cases, Brad Plourde and Dale Morin, on June 14, 2021. (A. 17; Ex. 3.) Juror 23 was again in the

jury pool, and it was discovered that Juror 23 had gone to school with Aroostook County District Attorney Collins. (A. 17.) During voir dire in the Plourde case, Juror 23 stated, "I also know Mr. Collins. We went to school together. Don't socialize very much since school, but I do know him also." (Ex. 3 at 36:24-37:1.) The court granted an unopposed motion to strike Juror 23 in the Plourde case, and excused Juror 23 by agreement in the Morin case. (A.17-18.)

Rosario moved for a new trial on April 21, 2023. (A. 22.) The motion argued that the discovery of Juror 23's acquaintance with District Attorney Collins was newly discovered evidence and noted that Juror 23 participated in the deliberations and in rendering the guilty verdict because the trial court mistakenly released Juror 172 as an alternate. (A. 23.) The trial court denied the motion on October 24, 2023, and this appeal followed. (A. 16-20.)

Issues Presented

Pedro Rosario was convicted of Aggravated Trafficking in Scheduled Drugs after a jury trial. Later, Rosario's counsel discovered that the trial court mistakenly discharged one of the regular jurors rather than an alternate, Juror 23. Juror 23 therefore participated in the deliberations and the return of the verdict. In a later jury selection in unrelated cases, it was discovered that Juror 23 knew Aroostook County District Attorney Todd Collins, whose office prosecuted Rosario. Rosario's counsel wished voir dire Juror 23 at Rosario's jury selection, but Juror 23 was not brought forward for questioning.

The question presented is whether Mr. Rosario is entitled to a new trial under M.R.U. Crim. P. 33.

Argument

I. Mr. Rosario is Entitled to A New Trial.

Rule 33 of the Maine Rules of Unified Criminal Procedure provides that the court "on motion of the defendant may grant a new trial to the defendant if required in the interest of justice. If the trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct entry of a new judgment." M.R.U. Crim. P. 33. This Court reviews factual findings on a motion for new trial for clear error, and whether Rule 33 has been satisfied for abuse of discretion. *State v. Williams*, 2022 ME 24, ¶ 8, 272 A.3d 304.

A. The Motion for a New Trial Was Treated as Timely Below.

As a preliminary matter, Rosario's motion for a new trial was treated as timely below. Normally, a motion for a new trial based on any ground other than new evidence must be filed within 14 days after the verdict or finding of guilt. M.R.U. Crim. P. 33. If premised on new evidence, a motion may be made up to two years after entry of judgment. *Id.* Although the juror-related issues raised in Rosario's motion are not "new evidence," under Rule 33, *State v. Gatcomb*, 478 A.2d 1129 (1980), this Court's precedents have recognized that Rule 33 retains flexibility to serve the interest of justice. In *Petgrave v. State*, for example, this

Court cited the "principles underlying Rule 33" to create a process for claiming ineffective assistance of counsel in a probation revocation hearing, even though that process is not textually authorized in Rule 33. 2019 ME 72, ¶ 14-15, 208 A.3d 371. Likewise, in *State v. Rankin*, this Court found that a motion for a new trial filed more than 14 days after the judgment was still "timely filed" because of a late discovery disclosure, again, without any textual basis in Rule 33. 666 A.2d 123, 126 n.2 (Me. 1995). The same holds true here, because the trial court evidently felt the circumstances warranted reaching the merits, even though the motion was filed more than 14 days after verdict (but less than two years after judgment). Thus, consistent with the trial court's determination, the Court here should treat the motion as timely filed.

B. Mistakenly Discharging a Regular Juror and Replacing Them with an Alternate Juror Violated Rosario's Rights.

Title 15 authorizes a court to empanel alternate jurors to sit with the regular jurors, and that "[s]uch alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, *become unable or disqualified to perform their duties.*" 15 M.R.S. § 1258 (emphasis added). See also M.R.U. Crim. P. 24(d) (authorizing the use of alternate jurors "as provided by law"). There was no evidence that Juror 172, who was excused in favor of Juror 23, was "unable or unqualified to perform their duties" as required by the

statute or, in turn, by Rule 24. Thus, when mistakenly allowed to enter the deliberation room, Juror 23 was considered an alternate juror under Section 1258 and Rule 24.

This mistake doubly impacted Rosario's substantial rights. First, Rosario had the right to a unanimous verdict by 12 jurors who were properly qualified to deliberate under Maine law. Instead, he finds himself imprisoned for 15 years because of a guilty verdict returned by only 11 properly qualified jurors. This alone is a structural error that mandated a new trial.

Second, those 11 jurors deliberated with Juror 23 in the room. "An alternate juror has been likened to a stranger to the proceedings." *Stokes v. State*, 843 A.2d 64, 73 (Md. 2004) (citing *Commonwealth v. Smith,* 531 N.E.2d 556, 559 (Mass. 1988) and *State v. Menuey*, 476 N.W.2d 846, 851 (Neb. 1991). Although they may not literally be "strangers," alternate jurors "clearly are *different* than regular jurors . . . and in a sense, their status is that of a third party." *Id.* (quoting *Smith,* 531 N.E.2d at 559). "Although almost every court that has considered the issue of the presence of an alternate juror during deliberations has found it to be error," with the only question being whether "prejudice is presumed, whether the error is *per se* reversible or whether harmless error concepts apply." *Id.* at 73 (collecting

cases).[1] Of these approaches, the per se approach makes the most sense because (i) the Maine Rules of Evidence restricts the parties' ability to effectively litigate prejudice, M.R. Evid. 606(b)(1); (ii) the underlying right at issue protects the fundamental legal interest, the effects of a violation are hard to measure, and the error undermines the fundamental fairness of the proceeding, *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017); and (iii) finally, as a policy matter, the per se approach avoids the undesirable practice of courts prying into the private discussions of the jurors.

Thus, as an alternate, Juror 23's prohibited participation in the deliberations was another error in the underlying trial. Even under a rebuttable presumption analysis, Rosario's substantial rights were still violated because he was deprived of

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[1] As *Stokes* explained:

> Some courts have chosen a presumption of prejudice approach, *see, e.g.*, *United States v. Watson*, 669 F.2d 1374, 1392 (11th Cir. 1982); *People v. Boulies*, 690 P.2d 1253, 1255-56 (Colo. 1984); *Johnson v. State*, 220 S.E.2d 448, 454 (Ga. 1975); *State v. Crandall*, 452 N.W.2d 708, 711 (Minn. Ct. App. 1990); *State v. Scrivner*, 676 S.W.2d 12, 14 (Mo. Ct. App. 1984); *State v. Coulter*, 652 P.2d 1219, 1221 (N.M. Ct. App. 1982); *Yancey v. State*, 640 P.2d 970, 971 (Okla. Crim. App. 1982); *State v. Cuzick*, 530 P.2d 146, 290 (Wash. 1975); other courts have chosen an automatic reversal requirement, *see*, *e.g.*, *United States v. Beasley*, 464 F.2d 468, 470 (10th Cir. 1972); *Bouey v. State*, 762 So. 2d 537, 540 (Fla. Dist. Ct. App. 2000); *Commonwealth v. Smith,* 531 N.E.2d 556, 561 (Mass. 1988); *State v. Bindyke*, 220 S.E.2d 521, 533 (N.C. 1975); *Brigman v. State*, 350 P.2d 321, 322-23 (Okla. Crim. App. 1960); *Commonwealth v. Krick*, 67 A.2d 746, 749 (Pa. Super Ct. 1949). At least two courts have required the defendant to establish prejudice. *See Potter v. Perini*, 545 F.2d 1048, 1050 (6th Cir. 1976); *State v. Grovenstein*, 517 S.E.2d 216, 218 (S.C. 1999).

843 A.2d 64, 73-74 (cleaned up).

his right to have his fate decided by 12 properly seated regular jurors, free from influence of outsiders such as the alternate juror here. The trial court should have granted Rosario a new trial.

C. Newly Discovered Information About Juror 23's Potential Bias Warrants a New Trial.

Juror 23's potential bias, which went undiscovered until after the verdict, is another reason to grant a new trial. *Rankin*, 666 A.2d at 126 (stating that courts have "appropriately considered . . . potential juror bias as the basis of a motion for a new trial"). Criminal defendants have a constitutional right to a fair and impartial jury. U.S. CONST. amend IV; ME. CONST. art. I, § 6; *State v. Thibeault*, 390 A.2d 1095, 1098 (Me. 1978). As this Court has held, "[t]he purpose of the voir dire examination is to detect bias and prejudice in prospective jurors, thus ensuring that a defendant will be tried by as fair and impartial a jury as possible." *State v. Lowry*, 2003 ME 38, ¶ 7, 819 A.2d 331 (quoting *State v. Lovely*, 451 A.2d 900, 901 (Me. 1982)). Simply "[a]sking prospective jurors to evaluate their own ability to be impartial is not always adequate, particularly if there is significant potential for juror bias." *Id.*

The record shows that Juror 23 had a potential bias that, unfortunately, went unexplored. Had Juror 23's connection to District Attorney Collins been known, Rosario could have either moved to strike Juror 23 or exercised a peremptory

challenge to remove him from the jury. Juror 23's responses in the Plourde matter suggested that he does socialize with District Attorney Collins, though "not very much since school." (Ex. 3 at 36:24-37:1.) What does "not very much" mean? Especially when considering the cumulative effect of Juror 23's unexplored potential bias and the impropriety of allowing him to deliberate as a regular juror, the interest of justice supports affording Mr. Rosario a new trial—one that can be impartially decided by 12 properly seated jurors.

Conclusion

Far from his home in Rhode Island, and speaking limited English, Pedro Rosario faced a jury trial in Aroostook County, Maine on a Class A offense. Today he sits in prison serving a 15-year sentence, knowing (1) that the trial court improperly allowed an alternate juror to deliberate with the regular jurors deciding his fate, and (2) that the alternate juror is a personal acquaintance of the lead law enforcement official for Aroostook County. The Court should reverse the Superior Court's denial of Rosario's motion for a new trial.

Respectfully submitted,

Dated: February 14, 2024

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Certificate of Service

I hereby certify that on the date stated below I caused two copies of this document to be served on the following counsel of record via regular U.S. Mail and one electronic copy via email:

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