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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ANTONIO VIRGEN, Defendant and Appellant.	B170110 (Los Angeles County Super. Ct. No. BA167778)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Harris, Judge. Affirmed.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

After a jury convicted defendant and appellant Luis Antonio Virgen of kidnapping for ransom with true findings on various firearm enhancements, the trial court denied defendant's petition for access to jurors' identifying information and sentenced him to life in prison with the possibility of parole plus 10 years. Defendant appealed the order denying his petition, and this court reversed that order. Upon remand, the trial court sent a letter to the former jurors informing them a petition had been made to release their identifying information. Juror No. 11 objected to the release of his information to the defendant's attorney, and the trial court sustained the objection. After receiving identifying information for the nonobjecting jurors, defendant filed a motion for a new trial, which the trial court denied.

This appeal followed that denial. In this appeal, defendant first contends that Code of Civil Procedure section 237, subdivision (d), which provides that a petition for access to jurors' identifying information will not be granted as to a former juror who is unwilling to be contacted, is unconstitutional as applied to him. Defendant's second contention is he was deprived of a fair opportunity to investigate potential jury misconduct. We affirm.

BACKGROUND

I. Defendant files a petition for access to jury information.

Following his conviction for kidnapping for ransom (Pen. Code, § 209, subd. (a)) with true findings on enhancements for personal firearm use (former Pen. Code, § 12022.5, subd. (a)(1), § 12022.53, subd. (b)), a principal armed with a firearm (Pen. Code, § 12022, subd. (a)(1)), and the victim being over 65 years old (Pen. Code, § 667.9, subd. (a)), defendant filed, on April 15, 1999, a petition for access to jury information under Code of Civil Procedure section 237, subdivisions (b), (c), and (d).[1] In support of the petition, defense counsel submitted his declaration in which he stated that Juror No. 6

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

told him the jury had been hung up on whether defendant had the specific intent to commit ransom. A number of jurors "voiced concern" defendant would be released if they acquitted him of kidnap for ransom. Because defendant was charged only with kidnapping for ransom, and not just kidnapping, the jurors decided the best route was to convict defendant.

The trial court denied the petition and sentenced defendant to prison for life with the possibility of parole, plus 10 years.

II. Defendant appeals the order denying his petition, and this court reverses.

Defendant filed an appeal from the judgment, contending the trial court abused its discretion by denying the petition and refusing defense counsel's request for juror identifying information to develop a motion for new trial. This court affirmed the judgment, but we reversed the order denying defendant's petition for access to jury information, remanded the matter, and directed the trial court to reconsider the petition in accordance with the views expressed in our opinion. (*People v. Luis Antonio Virgen* (Jan. 11, 2001, No. B132137).) The remittitur issued on March 20, 2001.

III. Following further proceedings in the trial court, defendant's motion for a new trial is denied.

After the remittitur issued, the trial court, on August 15, 2001, ordered the jury services administrator to send a letter to the jurors advising them defense counsel wished to obtain their names, addresses, and telephone numbers so an investigator could contact them about any jury misconduct that occurred during deliberations.[2] In response, Juror No. 11 informed the court via letter he was unwilling to have the information disclosed to

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[2] The letter the jury commissioner sent to the jurors stated: "As required by section 237 of the Code of Civil Procedure, this is to advise you that a petition has been made to the court to release juror identifying information, and a hearing has been set to appeal the granting of this petition to unseal the juror records. The juror may appear, in person, in writing, by telephone, or through counsel. The hearing has been scheduled for September 24, 2001 . . . ."

the defense attorney. At a hearing on September 24, 2001, defendant argued that jurors do not have a constitutional right of privacy and instead must show sufficient cause to prevent disclosure of juror information. The trial court sustained Juror No. 11's objection, and ordered disclosure of only the nonobjecting jurors' names and addresses. But in part because of the jury commissioner's failure to comply promptly with the order, the court again had to order, on July 22, 2002, the jury commissioner to release all jurors' names and addresses except that of Juror No. 11. Defense counsel received the identifying information by September 6, 2002.[3]

On April 2, 2003, defendant filed a motion for new trial. At the hearing on the motion on September 5, 2003, defense counsel stated that some of the information he received concerning about one-third of the jurors was no longer valid and his investigator could not locate them; about one-third of the jurors claimed to have no recollection of the jury deliberations; and about one-third of the jurors refused to talk to his investigator. He argued that section 237 violated his constitutional rights to a fair trial, due process, and a fair jury. The court denied the motion, and this appeal followed.

DISCUSSION

I. Section 237 is not unconstitutional as applied to defendant.

Defendant's first contention on appeal is section 237, subdivision (d), is unconstitutional as applied to him because it deprived him of a fair opportunity to investigate jury misconduct in violation of his state and federal constitutional due process rights. (Cal. Const., art. I, § 16; U.S. Const., 6th & 14th Amends.) After reviewing the pertinent statutes, we discuss why defendant was not deprived of his constitutional due process rights.

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[3] Although a minute order reflects that defense counsel received the information by that date, he later stated he received it in November 2002.

A. *The pertinent statutes: Sections 206 and 237.*

The California Legislature enacted sections 206 and 237 "to maximize juror privacy and safety, while retaining a criminal defendant's ability to contact jurors after the trial if sufficient need is shown." (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087 (*Townsel*).)[4] Under section 237,[5] jurors' identifying information is sealed upon

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[4] As originally enacted in 1992, section 237, subdivision (b), provided that a trial court may "upon a juror's request, motion of counsel, or on its own motion, order that all or part of the court's record of personal juror identifying information be conditionally sealed upon finding that a compelling governmental interest warrants this action. Prior to discharging the jury from the case, the judge in a criminal action shall notify the jurors of the right of any juror to request sealing of personal juror identifying information pursuant to this section. For purposes of this section, 'compelling governmental interest' includes, but is not limited to, protecting jurors from physical harm or the threat of physical harm."

[5] The current provisions of section 237 applicable to this case provide: "(a)(1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part. [¶] (2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section. [¶] (3) For purposes of this section, 'sealed' or 'sealing' means extracting or otherwise removing the personal juror identifying information from the court record. [¶] (4) This subdivision applies only to cases in which a jury verdict was returned on or after January 1, 1996. [¶] (b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure. [¶] (c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing at least 20 days prior to the date of the hearing to the parties in the criminal action. The court shall provide notice to each affected former juror by

recording of a jury's verdict in a criminal proceeding. (§ 237, subd. (a)(2).) Any person may petition for access to those records, and the court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for release of the information, "but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm." (§ 237, subd. (b).) If a hearing is set, then the trial court shall give the former jurors notice they may appear, for example, in person or in writing, to protest the granting of the petition. (§ 237, subd. (c).) "After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest . . . is sustained. The court shall sustain [a] former juror's [protest] if, in the discretion of the court, the petitioner fails to show good cause, [there is] a compelling interest against disclosure, . . . *or the juror is unwilling to be contacted* . . . ." (§ 237, subd. (d), italics added.)

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personal service or by first-class mail, addressed to the last known address of the former juror as shown in the records of the court. In a capital case, the petitioner shall also serve notice on the Attorney General. Any affected former juror may appear in person, in writing, by telephone, or by counsel to protest the granting of the petition. A former juror who wishes to appear at the hearing to oppose the unsealing of the personal juror identifying information may request the court to close the hearing in order to protect the former juror's anonymity. [¶] (d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner. The court shall set forth reasons and make express findings to support the granting or denying of the petition to disclose. The court may require the person to whom disclosure is made, or his or her agent or employee, to agree not to divulge jurors' identities or identifying information to others; the court may otherwise limit disclosure in any manner it deems appropriate."

Section 206,[6] subdivision (a), similarly provides that after the jury is discharged, the judge shall inform the jurors they have an "absolute right to discuss or not to discuss the deliberation or verdict with anyone." A defendant may, however, petition the court for access to jurors' identifying information as provided in section 237.

B. *Defendant does not have a posttrial constitutional right of access to jurors' identifying information.*

At issue in this appeal are two interests: Defendant's constitutional right to a unanimous verdict untainted by prejudicial juror misconduct on the one hand (*People v.*

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[6] The pertinent provisions of section 206 provide: "(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (d), and (e). [¶] (b) Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place. [¶] (c) If a discussion of the jury deliberation or verdict with a member of the jury pursuant to subdivision (b) occurs at any time more than 24 hours after the verdict, prior to discussing the jury deliberation or verdict with a member of a jury pursuant to subdivision (b), the defendant or his or her attorney or representative, or the prosecutor or his or her representative, shall inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court. [¶] (d) Any unreasonable contact with a juror by the defendant, or his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge. [¶] (e) Any violation of this section shall be considered a violation of a lawful court order and shall be subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure. [¶] . . . [¶] (g) Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237."

Atkins (1988) 203 Cal.App.3d 15, 27), and strong public policies providing for juror safety and juror privacy on the other (*Townsel, supra,* 20 Cal.4th at pp. 1091-1092). When the California Legislature amended section 237 in 1995 to add, among other things, subdivision (d), it sought to balance these interests. It declared, " 'The Legislature finds and declares that jurors who have served on a criminal case to its conclusion have dutifully completed their civic duty. It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system.' " (Stats. 1995, ch. 964, § 1, quoted in Historical and Statutory Notes, 13 West's Ann. Code Civ. Proc. (2004 pocket supp.) foll. § 206, p. 234.)

After balancing jurors' interests in privacy and safety and the interest in providing access to jurors' personal information for a lawful purpose, such as a motion for a new trial, our Legislature concluded a juror has the absolute right not to discuss deliberations or the verdict with anyone. (§§ 206, subd. (a), 237, subd. (d).) Defendant thus complains that section 237, subdivision (d), gives jurors the absolute veto power over a party's request for juror information, even where there is good cause for the disclosure and no compelling interest against disclosure has been demonstrated, i.e., defendant here had no prior record or gang affiliation, this was not a gang case, and none of the jurors were in danger of contact from anyone. Section 237, subdivision (d), is, according to defendant, therefore unconstitutional as applied to him.

Defendant is correct that section 237, subdivision (d), gives a juror the right to refuse a party's request for his or her identifying information. Defendant is incorrect that this right infringes on his constitutional rights. Rather, the California Supreme Court, albeit in authority that predates the enactment of section 237, has consistently held that a defendant has no posttrial right of access to jurors. (See, e.g., *People v. Cox* (1991) 53 Cal.3d 618.) In *People v. Cox*, the trial court received information that some jurors were

anxious about having been contacted by defense investigators. The court therefore prohibited defendant's investigator from contacting jurors and ordered all further contact with jurors to occur through the court clerk. In affirming the trial court's order, the California Supreme Court stated, "A criminal defendant has neither a guaranty of posttrial access to jurors nor a right to question them about their guilt or penalty verdict. . . . That decision [whether to speak with counsel] rests with the individual juror according to his or her inclination, which the defendant may not attempt to qualify." (*Id.* at pp. 698-699; see also *People v. Atkins, supra,* 203 Cal.App.3d at p. 27 [jurors "retain a clear right to refuse to talk to counsel"], cited with approval in *People v. Cox, supra,* at p. 699; *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552, fn. 6 [same], superseded by statute.)

The California Supreme Court more recently reaffirmed a juror's absolute right not to discuss deliberations or the verdict with anyone in *Townsel, supra,* 20 Cal.4th 1084. In *Townsel,* the trial court entered an order prohibiting defendant's counsel from contacting trial jurors without first obtaining the court's approval. (*Id.* at p. 1087.) The court held that a trial court has inherent authority to protect jurors. In so holding, the court noted that under section 206, subdivisions (a)-(d), "jurors are free to speak with counsel or their representatives, if they wish, but they also can protect themselves from invasions of their privacy (or threats of retaliation from the losing side of a lawsuit) by withholding their consent to discuss the case and, if appropriate, by registering a complaint with the trial court." (*Id.* at p. 1095.) And although the court in *Townsel* did not discuss section 237 subdivision (d),[7] the court went on to state that "[i]f any juror refuses to consent [to an interview], that is the end of the matter." (*Id.* at p. 1097; see also *In re Hamilton* (1999) 20 Cal.4th 273, 303, fn. 23 ["strong public policies protect discharged jurors from improperly intrusive conduct in all cases, and [] jurors in criminal

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[7] Section 237 applies to cases in which the jury verdict was rendered on or after January 1, 1996. The verdict in *Townsel* was rendered in 1991.

cases, in particular, have 'an absolute right' not to discuss their verdict or deliberations with anyone"].) Importantly, the court in *Townsel* also stated that if a juror refuses to consent to posttrial contact with attorneys or their representatives, counsel has no legitimate claim under section 206 that his or her ability to investigate potential claims for habeas corpus were undermined. (*Townsel, supra,* at p. 1096.)

We see no reason why counsel would have such a claim under section 237 where the California Supreme Court has held there is none under section 206. Section 206 provides that a juror has an absolute right not to discuss deliberations or verdict with anyone. Section 237, subdivision (d), similarly provides that upon the making of a properly supported petition, jurors' identifying information shall be made available "unless a former juror's protest . . . is sustained." A juror's protest shall be sustained if "the juror is unwilling to be contacted by the petitioner." (§ 237, subd. (d).) The California Supreme Court has confirmed, both before the enactment of sections 206 and 237 (see, e.g., *People v. Cox, supra,* 53 Cal.3d at pp. 698-699) and after (see, e.g., *Townsel, supra,* 20 Cal.4th 1084), that a defendant has no right to question jurors about their verdict. Rather, sections 206 and 237 "describe a posttrial procedural right under state law," not a constitutional one. (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1323.) Defendant therefore had no constitutional right to have Juror No. 11's identifying information to prepare his motion for a new trial.

Nor do the cases defendant cites to support his contention that his constitutional right to a jury verdict untainted by juror misconduct renders section 237, subdivision (d), unconstitutional. (See, e.g., *Press-Enterprise Co. v. Superior Court of California, Riverside County* (1984) 464 U.S. 501 [trial court could not constitutionally exclude public from voir dire to protect jurors' privacy rights without considering alternatives to closure]; *Lesher Communications, Inc. v. Superior Court* (1990) 224 Cal.App.3d 774 [media is entitled to see juror questionnaires that are a part of voir dire process but only after appropriate precautions are taken to protect legitimate privacy concerns of potential jurors]; accord, *Copley Press, Inc. v. Superior Court* (1991) 228 Cal.App.3d 77; *Contra*

Costa Newspapers, Inc. v. Superior Court (1998) 61 Cal.App.4th 862 [trial court's blanket order prohibiting the "press" from contacting former jurors was without jurisdiction and impermissibly overbroad].) Although those cases discuss when a juror's privacy rights must give way to countervailing interests, they do not address the precise issue before us—whether a juror has the right to refuse to give his or her identifying information to a party. Indeed, in *Contra Costa Newspaper*, at page 867, the court noted that a trial court may broadly proscribe contact between former jurors and parties and parties' representatives as opposed to contact by news media.[8]

We also do not find apt defendant's characterization of the situation before us as different from a situation in which a juror does not initially object to a release of his or her identifying information but thereafter asserts his or her right not to talk to a defense investigator. Defendant argues that Juror No. 11's unwillingness to release his identifying information to defense counsel does not signal Juror No. 11's unwillingness to talk to defense counsel. We disagree. By stating in response to the trial court's letter he did not "wish to give out my name, address, or phone number to the defense attorney,"

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[8] In dicta, the court in *Contra Costa,* at page 868, stated, "This record does not disclose the statements of the jurors to the trial judge but rather implies consent to the order by asking the jurors to 'raise their hands' if they wished to speak; even if such consent were affirmatively expressed, it could not, in any event, establish jurisdiction over strangers to the action. Moreover, issuance of any such order without the further showing of a compelling need impinges upon constitutional rights, including not only the defendant's right to move for a new trial, but also the rights of jurors and the media. In this case the order was not directed at anyone in particular, it was not based on any showing of unreasonable behavior by anyone, and it was not carefully crafted to restrain conduct while preserving the constitutional rights of those interested in the trial." Defendant quotes this language as support for his argument that an order prohibiting contact between a former juror and a defendant or his representatives violates a defendant's right to move for a new trial. It does not support that argument. Rather, the court was merely noting that had the trial court broadly prohibited contact between jurors and parties or their representatives such a broad order would violate defendant's rights (as well as section 237), as the jurors had not said they did not wish to be contacted by the parties or their representatives. They had only indicated they did not want to be contacted by the press.

Juror No. 11 clearly elected not to talk to defendant's representatives. Juror No. 11 stands in no different a position than the one-third of jurors who did not object to a release of their information, and yet still refused to talk to defendant's investigator. Defendant, however, makes no contention the trial court should have engaged in further proceedings with respect to those jurors or otherwise challenges their refusal to speak with his representative.[9] Defendant was not entitled to have Juror No. 11's identifying information once he objected in order to confirm what defendant had already been told—Juror No. 11 did not want to be contacted by defendant's representative. Defendant does not get a second bite at the apple to get Juror No. 11 to speak when Juror No. 11 unequivocally expressed his desire to remain silent. Under section 237, subdivision (d), Juror No. 11 had the right to refuse to have his identifying information given to defendant, and that right does not infringe on defendant's constitutional right to an impartial jury.

II. <u>Defendant was not deprived of a fair opportunity to prepare his motion for a new trial</u>.

The trial court denied defendant's petition for access to jurors' identifying information in April 1999. About three years passed before defense counsel obtained 11 of the 12 jurors' identifying information and was able to initiate his investigation into potential juror misconduct.[10] By that time, according to defense counsel, he was unable

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[9] Defendant does not raise, and therefore we do not address, whether sections 206 and 237 would permit the court, as opposed to a party, to subpoena jurors who do not want their identifying information released or who refuse to speak with a party to testify at a hearing concerning potential juror misconduct. Defendant only contends the trial court erred in refusing to release Juror No. 11's identifying information to his counsel or investigator.

[10] The delay in getting the nonobjecting jurors' identifying information to defendant can be attributed to the jury commissioner's failure to release the information promptly, as well as to the parties. For example, on February 7, 2002, the trial court directed defense counsel to prepare a letter for the jury commissioner to send to jurors. Defense counsel had not complied by April 5, but said he would have the letter done on April 12.

to locate about one-third of the jurors, one-third of them could not recall deliberations, and one-third of jurors refused to speak to his investigator. Based on this passage of time, defendant contends he was deprived of a fair opportunity to investigate jury misconduct based on the trial court's error.

Notwithstanding the delay between the time defendant requested jurors' identifying information and when he received it, any resulting prejudice to defendant must be weighed against justification for the delay. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505 [10-year delay between time crime was committed and before a formal complaint was filed or defendant was arrested was not unjustified].) Nothing the trial court did here was "unjustified." A trial court's erroneous ruling is not an "unjustified" ruling. Indeed, in our opinion reversing the order, we noted that defense counsel's declaration in support of the petition for access to juror information contained four relevant sentences, three of which were excludable under Evidence Code section 1150, subdivision (a), and therefore did not support the petition. The one sentence that we found supported granting the petition ("That during deliberations a number of jurors voiced concern that defendant would be released if they would acquit him of kidnap for ransom") we nonetheless noted to be a sentence fragment. Hence, it was unclear that Juror No. 6, who informed defense counsel of potential jury misconduct, in fact told defense counsel that there had been this concern voiced.

Notwithstanding the erroneous nature of trial court's ruling on the petition, nothing the court did was "misleading," as was the case in *People v. Sarazzawski* (1945) 27 Cal.2d 7, upon which defendant relies. In *People v. Sarazzawski*, the trial court misled defense counsel as to what date she would be required to argue her motion for new trial and then refused to grant her a continuance to prepare. Noting that refusing to permit

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But by May 17, 2002 the letter still had not been prepared and defense counsel failed to appear at a hearing on that date. The trial court therefore again had to direct defense counsel to prepare the letter.

counsel a reasonable opportunity to prepare and present a motion for a new trial is, under certain circumstances, a deprivation of a substantial statutory right, the California Supreme Court reversed an order denying defendant's motion for a new trial and remanded for a new trial.[11] *People v. Sarazzawski* is inapplicable here, first and foremost because it has been overruled. (*People v. Braxton* (2004) 34 Cal.4th 798.)[12] Second, the court in *People v. Sarazzawski* misled counsel. But a trial court's ruling, erroneous though it may be, is not tantamount to "misleading" counsel.

Nor is this case like those defendant cites involving *Wheeler*[13] error. (See, e.g., *People v. Robinson* (2004) 116 Cal.App.4th 1302, rev. granted June 9, 2004, S123938; *People v. Garcia* (2000) 77 Cal.App.4th 1269.) In those cases, the courts held that when a *Wheeler* motion has been erroneously denied and the Court of Appeal remands for the prosecutor to state neutral reasons for a suspect challenge, a retrial is the proper remedy if, due to the passage of time, the prosecutor is unable to recall the neutral reason for the challenge. Unlike here, the defendant in the *Wheeler* cases established a prima facie case for error. Although defendant in this case did make a showing of good cause entitling him to jurors' identifying information, that is not the same as showing there was juror misconduct.

Moreover, although defendant contends he was prevented unfairly from making such a showing, nothing on this record bears out that contention. Rather, defendant ultimately did receive identifying information for 11 of 12 jurors. Defense counsel said

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[11] The court also based its ruling on an erroneous jury instruction that was prejudicial per se. (*People v. Sarazzawski, supra,* 27 Cal.2d at pp. 18-19.)

[12] The court in *Braxton* held, among other things, that a trial court's refusal to hear a motion for a new trial does not result in a miscarriage of justice if the appellate record allows the reviewing court to determine, as a matter of law, that the new trial motion lacked merit or that the trial court would have properly exercised its discretion to deny the motion.

[13] *People v. Wheeler* (1978) 22 Cal.3d 258.

he located two-thirds of the jurors, but one-third of them could not recall deliberations and one-third of them refused to speak to his investigator. Defense counsel also said he could provide the trial court with specific information about the jurors' responses upon request, but he did not submit any such information in support of his motion for new trial. Therefore, on this record, we do not know what efforts he undertook to locate the missing jurors or precisely what the jurors who claimed to have no recollection of deliberations said, for example, whether they could not recall deliberations at all or whether they could not recall anyone voicing a concern defendant would be released if they acquitted him of kidnapping for ransom. Also, as to the one-third of jurors who refused to speak to defendant's investigator there is no showing that their memories had faded due to the passage of time. Rather, they simply refused to speak to defendant's investigator, as they had the right to do. We therefore conclude that defendant has not shown that the passage of time or dimming of memories prevented him unfairly from investigating grounds for a new trial motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, ACTING P. J.

KITCHING, J.