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William G. Gilstrap

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Juries—New Trial—Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground For New Trial*

The United States Constitution recognizes the requirement that a jury be impartial in its deliberation.[1] Legislation and courtroom procedure attempt to guarantee that impartiality. *Voir dire* examinations under the direction and authority of the court are calculated to insure that each juror selected shall be qualified to serve on the jury panel. When a prospective juror is disqualified or shown to be biased, a challenge for cause is allowed. Also, if counsel suspects from the disclosures that a juror is prejudiced or unfit, he may challenge peremptorily. In this way most questionable jurors are avoided.

Generally, it is not a ground for new trial that a juror is discovered to be disqualified or incompetent unless the moving party shows prejudice which prevented him from having a fair and impartial trial.[2] In contrast, however, a juror's false answer or concealment on matters that would establish his disqualification or incompetency and would have prompted the party complaining to challenge for cause or peremptorily, is a ground for new trial.[3]

In the recent New Mexico case of *State v. Ortega*,[4] the defendants were convicted of aggravated battery. After the verdict was re-

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* State v. Ortega, 422 P.2d 353 (N.M. 1966).

1. The sixth amendment explicitly guarantees an impartial jury trial in criminal cases; the same is implicit in the seventh amendment for most civil cases. The federal constitutional right does not apply to the states through the due process clause of the fourteenth amendment. Palko v. Connecticut, 302 U.S. 319 (1937). Nevertheless, the right is preserved in state constitutions. *See e.g.*, N.M. Const. art. 2, § 12.

There are sound reasons for impartiality in jury trials:

> The principle exacting and requiring disinterestedness, fairness, and impartiality on the part of the jury is as old as the history of the jury system. . . . It is fundamental, and it is popular knowledge that the inviolability of this principle gives credit, or even toleration, to the verdicts of juries. Caesar demanded that his wife should not only be virtuous, but beyond suspicion, and the law's demand for disinterested jurors whose verdicts affect the property, the honor, and the life of the citizen is no less exacting.

Hess' Adm'r v. Louisville & N. Ry., 249 Ky. 624, 61 S.W.2d 299, 301 (1933).

2. Annot., 91 A.L.R.2d 1120 (1963), and cases cited therein. The rule applies only in cases involving a returned verdict and does not govern when a challenge for cause on voir dire has been overruled by the court.

3. *See e.g.*, Sipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53 (1st. Dist. 1954); Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194 (1947); McHugh v. Jones, 258 App. Div. 11, 16 N.Y.S.2d 332 (Sup. Ct. 1939).

4. 422 P.2d 353 (N.M. 1966).

turned, counsel for the defendants discovered that one of the jurors had been convicted of a felony. In a motion for new trial the defendants contended that because of this conviction the juror was disqualified by statute and had misled the defendants when he stated on the *voir dire* that he knew of no reason why he should not serve on the jury. After hearing arguments, the trial court entered an order denying the motion, finding that the defendants had not been injured by the juror's presence on the panel. On appeal to the New Mexico Supreme Court, *held*, Affirmed.

The defendants urged the court to adopt the rule that presence of an unqualified juror raises a presumption of actual injury to the moving party.[5] The court declined to adopt the rule saying that by statute,[6] "actual injury" must be shown by the moving party before a new trial will be ordered. The court implicitly disposed of the defendants' second argument that a false answer impairs the right to challenge with the same language—that since no "actual injury" was shown, the trial court did not err in denying the motion for new trial.[7]

The purpose of this Comment is to examine the practical consequences of the "actual injury" rule and to explore the possible result had the court discussed the defendants' false answer argument.

Most states have statutory provisions describing juror qualifications. They usually prescribe status requirements such as residence, citizenship, and the power to vote.[8] In addition, the courts have re-

5. *Id.*, at 354.

6. The statutory provisions referred to by the court were N.M. Stat. Ann. § 19-1-1 to -2 (1953). Section 19-1-1 describes qualifications for jury service: that a person be a citizen, over twenty-one years of age, of sound mind, a resident and not convicted of bribery or other infamous crime. Section 19-1-2 provides for exceptions from jury service which a person may voluntarily invoke, and concludes, "The service upon any jury of any person disqualified or exempt from service shall, of itself, not vitiate any indictment found or any verdict rendered by that jury, unless *actual injury* to the person complaining of the same shall be shown. . . ." (emphasis added).

7. State v. Ortega, 422 P.2d 353 (N.M. 1966). The court may have felt that the juror's conviction was remote. Also, since the juror was not specifically questioned regarding a possible conviction the court may have reasoned that the juror had not "concealed" a material fact and therefore the defendents had not suffered an "actual injury."

8. *See e.g.*, Ariz. Rev. Stat. Ann. § 21-201 (1956); Colo. Rev. Stat. Ann. § 78-1-1 (1963); Utah Code Ann. § 78-46-8 (1953). Although jurisdictions may differ in their requirements for jury service, a typical classification may include the following provisions: (1) citizenship and eligibility to vote: (2) residence in the jurisdiction; (3) ownership of property or payment of taxes; (4) minimum and maximum age limits; (5) general health; (6) sex; (7) mental competency; (8) character, morality and criminal record; (9) membership in a specific group or class; and (10) prior jury

quired that jurors be unbiased and not prejudiced; parties may invoke these general requirements by challenge for cause.[9]

In most jurisdictions statutory qualifications are directive rather than mandatory; since the legislature did not intend the provisions to be construed absolutely, a court, in its discretion, may waive the requirement and empanel the juror.[10] Of course a party may object and challenge the juror for cause or peremptorily when this occurs.

In those jurisdictions where disqualifications are not mandatory, such as New Mexico, a party requesting a new trial must show: that he has been injured or prejudiced by the juror's presence on the panel and participation in the verdict;[11] that the injury or prejudice was material,[12] and that failure to know of the juror's disqualification or prejudice was not due to the party's lack of diligence in examination or inquiry.[13] In cases where disqualification because of nonage, lack of citizenship, or non-residence is alleged as a ground for new trial, it seems that courts are justified in concluding that the moving party has not been materially prejudiced or injured.[14] However, in cases where more material grounds of possible prejudice or injury are claimed, courts tend to grant new trials.[15]

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service. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. Rev. 1 (1956.

9. *See e.g.*, Hess' Adm'r v. Louisville & N. Ry., 249 Ky. 624, 61 S.W.2d 299 (1933): Knickerbocker v. Erie R. Co., 286 N.Y.S. 1001 (Sup. Ct. 1936).

10. *See e.g.*, Netter's Adm'r v. Louisville & N. Ry., 134 Ky. 678, 121 S.W. 636 (1909). In Texas, any person who has been convicted of theft or any other felony, is under indictment or other accusation, is mentally incompetent, or has a defect in sight, feeling, hearing or disease to make him unfit, is absolutely disqualified from jury service. These disqualifications apply to civil as well as criminal cases. Tex. Civ. Stat. Ann. § 2133.4 (1964); Tex. Code Crim. Proc. Ann. §§ 35.16 (1966). Since the requirements are mandatory, a new trial will be ordered without a showing of injury or prejudice to the moving party. Ex Parte Bronson, 158 Tex. Crim. 127, 254 S.W.2d 117 (1952).

11. Annot., 91 A.L.R.2d 1120 (1963), and cases cited therein.

12. *Id.*

13. *See e.g.*, Frazier v. United States, 335 U.S. 497 (1949); Netter's Adm'r v. Louisville & N. Ry., 134 Ky. 678, 121 S.W. 636 (1909); Territory v. Anderson, 4 N.M. (4 Gild., E.W.S.ed.) 213, 13 P. 21 (1887).

14. In some cases, the distinction between material injury or prejudice to a party on a collateral matter would be difficult to determine. One court has mentioned a peculiar reason for not holding possible prejudice to be material:

> I know of no rule which disqualifies a juror because of acquaintance, or even professional relationship, with a witness for one of the parties. *Indeed it might well be urged that on the contrary such knowledge would assist* a juror in appraising the credibility of the witness. (emphasis added).

Kelly v. Gulf Oil Corp., 28 F. Supp. 205, 207 (E.D. Penn. 1938).

15. *See e.g.*, McMahon v. Yonkers R.R., 294 N.Y.S. 945 (Sup. Ct. 1937) (juror participated in the first trial of the cause); Lund v. Dist. Ct., 90 Utah 433, 62 P.2d 278 (1936) (juror concealed the fact that he had been convicted of a felony.

In *State v. Ortega* the New Mexico Supreme Court failed to distinguish these non-prejudicial grounds from more material grounds such as felony conviction and mental incompetency. Instead, the court said that "actual injury" must be shown when a statutory disqualification is claimed.[16] Since "actual injury" must also be shown when non-statutory grounds are alleged,[17] the question is presented in all cases: how can a moving party show "actual injury"?

The trial court, in its discretion, must necessarily determine what is "actual injury."[18] To persuade the court of this, a party must either produce evidence that the juror was in fact disqualified or unfit or introduce the jurors' affidavits testifying that the juror in question made prejudicial statements about the party.[19] Since the latter method is prohibited in New Mexico,[20] a party is limited to arguing the merits of his allegation before the court.

In *Ortega* neither the trial judge nor the supreme court was persuaded by counsel's argument that the presence of a convicted person on the jury prejudiced the defendants' possibility of a favorable verdict. The obvious presumption would be that a juror who had been convicted of a crime would be sympathetic to the defendants in a criminal prosecution. Yet, just as easily, the juror could have been influenced by fears of retaliation and harassment or unconsciously motivated to "bend over backwards" to be fair to the prosecution.

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16. State v. Ortega, 422 P.2d 353, 354 (N.M. 1966).

17. State v. Manzanares, 33 N.M. 573, 272 P. 565 (1928). In that case defendant was convicted of assault. Although three of the jurors were cousins of the prosecuting witness, the Supreme Court said that since no "actual injury" was proven regarding possible prejudice, the trial court's order denying the motion for new trial would be affirmed.

18. Emphasizing the trial judge's discretion, one court has said:

> The refusal or denial of a motion for a new trial for alleged misconduct on the part of the jury is, as a general rule, a matter within the discretion of the judge . . . ; and unless it appears that this discretion has been abused, . . . his refusal to grant a new trial will not be disturbed.

Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194, 198 (1947).

19. *See e.g.*, Shipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53 (1st. Dist. 1954); People v. Leonti, 262 N.Y. 256, 186 N.E. 693 (1933).

20. New Mexico has adopted the rule that forbids jurors from impeaching their verdict by affidavits, whether the misconduct inheres in the verdict or not. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966). Although there is disagreement, the general rule seems to be that affidavits will be allowed in support of a motion for new trial to show actual bias disclosed by statements made by the juror. See, Annot., 48 A.L.R.2d 971 (1956), and cases cited therein.

In an earlier New Mexico case, *State v. Eskildson*,[21] the supreme court was faced with an even more questionable juror. In that case the defendant was convicted of murder. There was a conflict of testimony regarding what had occured on the night of the killing. In a motion for new trial, the defendant alleged that one of the jurors was mentally incompetent and presented affidavits of a psychiatrist to support the allegation. Yet the supreme court upheld the trial court's denial of a new trial.[22]

Thus, from *Ortega* and *Eskildson* it appears that the court requires an almost impossible showing of injury and will not allow a new trial where substantial doubt exists as to a juror's competency and impartiality. The problem is especially acute in complex cases like *Eskildson* where one juror's opinion can decide the verdict. Consequently, the court should be liberal in its grant of a motion for new trial when substantial doubt exists as to a juror's impartiality, and also take a more lenient stand regarding its requirements for showing of proof.

If the "actual injury" rule is to prevail, parties must make painstaking inquiries and examinations of each juror to insure that he is not unfit. But should the moving party bear the burden of inquiry into a juror's possible disqualification or prejudice? Many courts deny a new trial reasoning that the moving party was not diligent in discovering the incompetency or prejudice.[23] Others, however, do not seem to place a high premium on diligence.[24] Often expense and lack of time make it impossible for counsel and his aides to thoroughly investigate each potential juror and also prepare an effective case.

In addition to the party's burden of diligence in examination on *voir dire* and discovery of disqualification through investigation, the trial judge has a duty to examine generally on the *voir dire*[25] and

21. 36 N.M. 238, 13 P.2d 417 (1932).

22. *Id.* at 245, 13 P.2d at 421.

23. *See e.g.*, Frazier v. United States, 335 U.S. 497 (1949); Harris v. People, 113 Colo. 511, 160 P.2d 372 (1945): Territory v. Anderson, 4 N.M. (4 Gild., E.W.S.ed.) 213, 13 P. 21 (1887).

24. In Bishop v. Nicholson, 146 S.C. 245, 143 S.E. 802 (1928), the court asked any jurors employed by the defendant to stand up. All who stood were excused except for one who remained on the panel. A new trial was granted on the ground that counsel for the plaintiff did not know of the juror's disqualification. This decision is the extreme example of a court's mitigation of the rule requiring diligence by the moving party. See also note 38 *infra*.

25. N.M. Stat. Ann. § 19-1-35 (1953) requires the trial judge to examine prospective jurors for cause.

the state has the duty of preparing a list of qualified jurors.[26] The juror also has a duty to disclose information that may disqualify him. Those who fail to disclose or give false answers on the *voir dire* could be subjected to sanctions for contempt of court or perjury.[27]

One alternative to requiring a heavy burden of inquiry on the moving party is to shift some of the burden to the state. But as a survey made in 1942[28] concluded, few states effectively accept the task:

> 'It is apparent . . . that, while ostensibly an investigation is made in most states as to the competency of the prospective juror, in only a few has there been any attempt to do this in a scientific or businesslike fashion. For the most part reliance on personal information or inquiry of others is the basis of the determination, and such traditional methods can hardly be considered efficient in these days of increasing congestion and mobility of population.'[29]

Easing the party's burden of inquiry could also be accomplished by requiring the trial judge to examine jurors more fully and caution them about concealment or false reply on the *voir dire*; enforcement of contempt and perjury sanctions against jurors who disregard the court's admonitions would also aid the parties.

Sound policy reasons may exist for limiting the right to a new trial

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26. In New Mexico, jury commissioners prepare a list of jurors from the voting rolls of the county, N.M. Stat. Ann. § 19-1-11 (1953). That provision says in part,

> . . . and said commission shall not knowingly place upon the list selected by them, the name of any person who is not believed . . . to be qualified and liable for jury service, or any person whom they have reason to believe has any interest . . . in any . . . cause of action, criminal or civil, . . . nor shall they select any person through favor or partiality, or for any other reason except to provide a list of suitable persons for jury duty. . . .

Thus it appears that the state has an affirmative duty to provide qualified jurors; wouldn't counsel be justified in relying on the performance of that duty? Requiring that a commission shall not "knowingly" select an unqualified juror would probably diminish the reliance.

27. *See e.g.*, Kerby v. Hiesterman, 162 Kan. 490 (178 P.2d 194 (1947).

28. The Knox report to the 1942 Judicial Conference of Senior Circuit Judges, quoted in Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U.L. Rev. 1 (1956). The report's observations regarding a need for scientific and businesslike procedures of selection would be even more apparent today. California probably has the most extensive system of selecting jurors. Investigations, personal interviews, written examinations, questionaires and intelligence tests are required. *Id.* at 70.

29. *Id.* at 71.

after a verdict has been returned: clogging of the court's docket may increase; in some cases a new trial would be financially prohibitive to one or more parties;[30] in criminal and some civil cases the same verdict, supported by the weight of the evidence, would be reached on new trial;[31] also, a party may risk a favorable verdict despite knowledge of the disqualification or prejudice and if he does not prevail, move for a new trial.[32]

Despite these possible reasons for limited new trial, a party should be given some chance of proving actual injury. This could be accomplished by: (1) shifting more of the burden of inquiry and investigation of jurors to the state; (2) allowing the introduction of jurors' affidavits in some cases;[33] (3) granting a new trial if there is substantial doubt as to a juror's impartiality; and (4) recognizing a presumption of injury in cases where there is a material disqualification or prejudice.

The court in *Ortega* did not specifically discuss the defendants' second argument:[34] when the juror stated he knew no reason why he should not serve, the statement, being false, prevented the defendants from challenging the juror which consequently prevented a fair trial. One can assume that the court dismissed this argument by applying the "actual injury" rule.[35]

When a juror denies or conceals facts which are disqualifications or grounds of challenge for cause and thereby avoids challenge, a new trial is ordinarily granted.[36] The same is true in cases where the

30. In his account of the *Reynolds v. Pegler* libel trial, Louis Nizer observes that a prejudicial or disqualified juror can ruin a well prepared case and also prompt a long and expensive new trial. Nizer, My Life in Court, 75, Pyramid Books Ed. (1966).

31. In *Territory v. Emilio*, 14 N.M. 147, 89 P.239 (1907), the court noted that a new trial is given for the protection of the innocent, not to shield the guilty, especially where the record shows the absolute guilt of the defendant.

32. This reason has been recognized by the New Mexico Supreme Court:

> The rule proceeds upon the ground that a party ought not to be permitted, after discovering an act of misconduct which would enable him to claim a mistrial, to remain silent and take his chances of a favorable verdict, and afterwards, if the verdict is against him, bring it forward as a ground for new trial.

Miller v. Marsh, 53 N.M. 5, 10, 201 P.2d 341, 344 (1948).

33. Perhaps this could be accomplished by adopting the general rule in note 20 *supra*.

34. State v. Ortega, 422 P.2d 353 at 354 (N.M. 1966).

35. *Id.*

36. *See e.g.*, Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194 (1947); People v. Leonti, 262 N.Y. 256, 186 N.E. 693 (1933); Lund v. Dist. Ct., 90 Utah 433, 62 P.2d 278 (1936).

juror would not be subject to disqualification or challenge for cause but may be challenged peremptorily.[37] In some cases a new trial is granted even though a party or counsel had access to information that could disqualify the juror or subject him to challenge for cause.[38] The fundamental reason for granting a new trial in these cases is that the moving party, through no fault of his own, has been misled by the juror and denied the right to challenge either for cause or peremptorily.[39] In other cases involving concealment of a disqualification, not in its nature prejudicial, a new trial is not granted because, it is said, the losing party has shown no injury.[40]

The better reasoned rule is that a party moving for new trial need not show injury or prejudice for the motion to be granted.[41] In a Kansas case,[42] the defendant moved for new trial alleging that the foreman of the jury had given a false answer when questioned about business dealings with the plaintiff's counsel. In reversing and remanding for new trial, the Kansas court held that bias or prejudice did not have to be shown, reasoning that the question is not whether an improperly constituted tribunal acted fairly but whether a proper tribunal was established.[43]

Some courts,[44] in granting the motion for new trial, require the moving party to show that the false answer or concealment was made intentionally by the juror. But if the answers to questions on

37. *See e.g.*, Shipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53 (1st. Dist. 1954) (jurors sympathetic to doctors); McHugh v. Jones, 258 App. Div. 11, 16 N.Y.S. 2d 332 (Sup. Ct. 1939) (juror knew one of the parties); Alexson v. Pierce County, 186 Wash. 88, 57 P.2d 318 (1936) (juror who had knowledge of property in question was disqualified because she concealed this fact on the voir dire even though she did not remember the property until the jury viewed it).

38. *See e.g.*, Piehler v. Kansas City Pub. Serv. Co. 357 Mo. 866, 211 S.W.2d 459 (1948) (juror had a previous claim against the defendant and defendant had a record of the claim); Texas Employer's Ins. Assoc. v. Wade, 197 S.W.2d 203 (Tex. Civ. App. 1946) (plaintiff insurance company had a record of a juror's previous claim against the company).

39. *See e.g.*, Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194 (1947).

40. *See e.g.*, Herrin v. State, 271 S.W. 928 (Tex. Crim. App. 1925) (juror said he was a householder); and this has been extended to cases where there is implied bias, Liberty Cab Co. v. Green, 262 S.W.2d 522 (Tex. Civ. App. 1953) (in a workmen's compensation suit, juror failed to reveal that he had received workmen's compensation payments).

41. See notes 36 and 37 *supra* and accompanying text.

42. Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194 (1947). For a good statement of reasons for the rule see, Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 984 (1933).

43. Kerby v. Hiesterman, 162 Kan. 490, 178 P.2d 194, 199 (1947).

44. *See e.g.*, Springdale Park v. Andriotis, 30 N.J. Super. 257, 104 A.2d 327 (1954); Kelley v. Parks, 275 S.W.2d 707 (Tex. Civ. App. 1955).

voir dire are in fact false or there is a concealment, good faith and honesty of the juror in making them are no less effective than deliberate perjury in avoiding a peremptory challenge. Thus, the juror's mental attitude should not be made material to a right of new trial.[45] One court has said,

> The deprivation of this inalienable part [no prejudiced jurors] of the right to trial by jury without fault of the party prejudiced is independent from the intent of the juror to conceal and the means to show such deprivation should therefore not differ depending on whether the concealment was intentional or not.[46]

In the recent New Mexico case of *State v. Shawan*,[47] the supreme court hinted that it might recognize this view. In *Shawan* the defendant moved for a change of venue alleging that he had been prejudiced by certain jurors who had read newspaper accounts of the incident. The supreme court reversed the lower court's denial of the motion and said, "To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice."[48]

In a case where the issue of false answer or concealment is fully discussed, it seems that supreme court will be forced into the anomalous position of requiring, contrary to the better rule, a showing of "actual injury" and yet not requiring that the denial or concealment be intentionally made. It also seems that the court's failure to distinguish between material and non-material grounds for a new trial will necessitate the same showing for any disqualification or prejudice the moving party may allege. The practical effect of the court's decisions is to place an almost impossible burden of proof and persuasion on the moving party to show "actual injury" whether a disqualification or false answer be in issue.

To avoid the consequences of the "actual injury" rule, practitioners must insure that every juror on the panel is free from defect and will not prejudice his case. The legislature could reduce the

45. The cases recognize this, e.g., Shipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53 (1st. Dist. 1954); Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933).

46. Shipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53, 57 (1st. Dist. 1954).

47. 423 P.2d 39 (N.M. 1967).

48. *Id.*, at 42.

problem by distinguishing between material and non-material disqualifications and by abolishing the "actual injury" rule except for immaterial disqualifications. If the rule is to prevail, the legislature should require a more systematic and scientific screening of potential jurors. In addition the supreme court could abrogate the present rule of showing of proof and substitute a presumption of injury when material grounds are alleged and where substantial doubt is evident from the allegation.

WILLIAM G. GILSTRAP II