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LUU, J.

SUPREME COURT
FILED

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IN THE SUPREME COURT OF CALIFORNIA

Frank A. McGuire Clerk

PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
)
 v.)
)
 CHARLES ALEX BLACK,)
 Defendant)
 Petitioner/Appellant.)
)
)
)

Case No. Deputy
 Court of Appeal
 Case No. A131693
 Alameda County
 Superior Court
 No. C163496

PETITION FOR REVIEW

After Decision by the Court of Appeal
First Appellate District, Division One
Filed October 25, 2012

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by appointment of the Court of
Appeal under the First District
Appellate Project

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CHARLES ALEX BLACK,)	
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PETITION FOR REVIEW

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE
AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF
CALIFORNIA:

Petitioner Charles Alex Black petitions this Court to review the decision of the Court of Appeal, First Appellate District, Division One filed on October 25, 2012. The Court of Appeal affirmed the judgment in its entirety. Petitioner did not petition the Court of Appeal for a rehearing. A copy of the Court of Appeal's unpublished opinion is attached as Exhibit A.

QUESTION PRESENTED FOR REVIEW

1. In those instances where defense counsel exercises peremptory challenges to remove prospective jurors following the erroneous denials of his challenges for cause, does prejudice result when, after the exhaustion of defense counsel's peremptory challenges, he unsuccessfully challenges a sitting juror for cause, expresses dissatisfaction with the composition of the jury, and learns that the trial court will not grant his request for an additional peremptory challenge?

NECESSITY FOR REVIEW

This case highlights the uncertainty in the law as to exactly when the erroneous denial of one or more challenges for cause results in prejudice. In this case, petitioner alleged that the trial court wrongfully denied two of defense counsel's challenges for cause. Respondent did not counter by saying that no error occurred. Instead, respondent contended that since no "incompetent juror" was forced upon petitioner after he exhausted his peremptory challenges, any error was harmless. Respondent characterized an "incompetent juror" as one who should have been excused for cause. (See Exhibit A; Slip Opn., p. 4; RB 25.) Petitioner, on the other hand, characterized an "incompetent juror" as one that he would have excused with a peremptory challenge had he not been forced to exhaust his supply in response to an erroneous denial of a challenge for cause. (See Exhibit A: Slip Opn., pp. 5-7; AOB 27-28.) As a result, petitioner argued that an "incompetent juror" was indeed foisted upon him, and thus the trial court's erroneous denials cannot be labeled as harmless.

The Court of Appeal properly recognized that “[t]he issue before us is therefore not the propriety of the trial court’s conduct but the nature of defendant’s burden in demonstrating a violation of his right to a fair and impartial jury.” (Exhibit A; Slip Opn., p. 5.) The Court of Appeal devoted a significant portion of its opinion tracing the jurisprudential history of this question and noted that since 1989, appellate courts have issued conflicting decisions on the issue – some in support of petitioner’s position and some against. (Exhibit A; Slip Opn., pp. 5-7.) The Court of Appeal did not choose one line of cases over another, but instead relied on a parallel line of authority to reject petitioner’s argument. (Exhibit A; Slip Opn., pp. 8-10.)

Review is essential in this case because there is exists a split of authority as to the “nature of [a] defendant’s burden in demonstrating a violation of his right to a fair and impartial jury” after he suffers the erroneous denial of one or more challenges for cause. This case presents a perfect vehicle by which this Court can clarify the aforementioned burden and establish once and for all which line of cases correctly states the law. (Cal. Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE

Petitioner adopts the statement of the case in the opinion of the Court of Appeal. (Exhibit A; Slip Opn., pp. 1, 4.)

STATEMENT OF THE FACTS

Except as otherwise noted, petitioner adopts the statement of the facts in the opinion of the Court of Appeal. (Exhibit A; Slip Opn., pp. 1-4.)

ARGUMENT

I. PETITIONER CONTENDS THAT WHEN A TRIAL COURT ERRONEOUSLY DENIES ONE OR MORE CHALLENGES FOR CAUSE, PREJUDICE RESULTS WHEN DEFENSE COUNSEL LOSES THE USE OF A PEREMPTORY CHALLENGE TO REMOVE A SITTING JUROR WHO SURVIVES A CHALLENGE FOR CAUSE

A. INTRODUCTION

Petitioner contends that when a trial court erroneously denies one or more of his counsel's challenges for cause and compels him to exhaust his supply of peremptory challenges, the error is prejudicial when the ruling prevents counsel from resorting to a peremptory challenge that he would have used to remove a sitting juror following an unsuccessful attempt to remove that same juror for cause. With that said, petitioner acknowledges that the law is unclear as to the nature of the burden that a defendant must show in order to establish that the trial court's error impinged upon his right to a fair and impartial jury.

B. THE LAW IS MURKY AS TO WHEN A DEFENDANT HAS SUFFERED PREJUDICE FOLLOWING THE ERRONEOUS DENIAL OF ONE OR MORE OF HIS CHALLENGES FOR CAUSE

At present, the law is unclear as to what constitutes prejudice in the context of an erroneous challenge for cause. Older cases indicate that a “defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation omitted] or can justify his failure to do so [citation omitted], and that he was dissatisfied with the jury as selected. But if he can actually show that his right to an impartial jury was affected because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different.” (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088.)

As the Court of Appeal noted in its opinion, this Court later took a different tack and held that a defendant’s exercise of a peremptory challenge following the erroneous denial of a challenge for cause only results in prejudice “if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*” (*People v. Yeoman* (2003) 31 Cal.4th 93, 114, internal quotations omitted; Exhibit A, Slip Opn., pp. 5-6.) *Yeoman* did not actually define what constitutes “an incompetent juror,” but found no prejudice because the defendant failed to challenge a sitting juror, and thus “[n]o incompetent juror was forced upon him.” (*People v. Yeoman, supra*, 31 Cal.4th at p. 114; Exhibit A; Slip Opn., p.

6.) Relying on *People v. Bonilla* (2007) 41 Cal.4th 313, 340 and *Wainwright v. Witt* (1985) 469 U.S. 412, 430, the Court of Appeal construed an incompetent juror in this context as one “properly excused for cause.” (Exhibit A; Slip Opn., p. 6.)

The Court of Appeal then noted a seeming retreat by this Court from its position in *Yeoman*. (*People v. Blair* (2005) 36 Cal.4th 686, 742.) In *Blair*, this Court held that “[t]o establish that the erroneous *inclusion* of a juror violated a defendant's right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence, or that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case.” (*Id.* at p. 742.) This Court found the error harmless because the defendant used his peremptory challenges to remove those jurors he had challenged for cause and could not identify a juror whom he would have excused had he not exhausted his peremptory challenges. (*Ibid.*) *Blair* cited *Bittaker* and *Yeoman* but “did not acknowledge the apparent disagreement between them.” (Exhibit A; Slip Opn., p. 7.)

The Court of Appeal then looked to *People v. Baldwin* (2010) 189 Cal.App.4th 991 for guidance. Failing to cite *Blair*, *Baldwin* found *Yeoman* to be more persuasive than *Bittaker*. (*Id.* at pp. 999-1001.) *Baldwin* held that the erroneous denial of for cause challenges only leads to a deprivation of the right to an impartial jury if “the trial court erroneously denied a challenge for cause to a

sitting juror.” (*People v. Baldwin, supra*, 189 Cal.App.4th at p. 1001.) The Court of Appeal partially assessed the state of the law as follows: “we are [therefore] faced with a 2003 Supreme Court decision apparently rejecting [petitioner’s] position, a more recent Supreme Court decision from 2005 accepting it, and a 2010 Court of Appeal decision definitively rejecting it, without discussing the conflicting 2005 Supreme Court decision.” (Exhibit A; Slip Opn., p. 7.)

Review is essential because, as the Court of Appeal properly noted in its opinion, there presently exists profound uncertainty in the law regarding the nature of the burden a defendant must demonstrate in establishing prejudice when he suffers the erroneous denial of one or more challenges for cause. Petitioner further submits that the error has a federal constitutional dimension, because it infringes on the right to a trial by an impartial jury as guaranteed under the Sixth and Fourteenth Amendments. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156; *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 751-752 [Sixth Amendment right to an impartial jury is violated if any juror is biased against the defendant].) Given the importance of this issue, petitioner urges this Court to grant this petition.

C. THE COURT OF APPEAL’S RELIANCE ON *PEOPLE V. GORDON* TO REJECT PETITIONER’S ARGUMENT IS MISPLACED

Faced with abovementioned conflicting authority, the Court of Appeal ultimately relied on *People v. Gordon* (1990) 50 Cal.3d 1223, disapproved on

another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835 to reject petitioner's argument. *Gordon* does not settle the issue because petitioner's case is distinguishable from it. (Exhibit A; Slip Opn., pp. 8-10.)

In *Gordon*, the defendant challenged three prospective jurors for bias. (*People v. Gordon, supra*, 50 Cal.3d at p. 1246.) The exercise of peremptory challenges removed two of the three jurors, and the third "was never drawn into the box." (*Ibid.*) "When the jurors were sworn, defendant did not indicate any dissatisfaction with the panel and in fact had a peremptory challenge remaining." (*Ibid.*)

This Court in *Gordon* assumed that the trial court erred in denying the challenges for cause, but found no prejudice because "[n]one of the prospective jurors whom defendant found objectionable actually sat on his jury. Hence, none could have tainted the panel's members with his alleged bias. Accordingly, none could have affected the process or result of the deliberations to defendant's detriment." (*Id.* at p. 1247.)

The facts of petitioner's case contrasts sharply with *Gordon*. Not only did he exercise a peremptory challenge to a sitting juror, he also expressed dissatisfaction with the jury as a whole. (AOB 21.) Thus, the very taint that this Court found impossible in *Gordon* was very possible here given that defense counsel feared that the juror in question, though admittedly not subject to a challenge for cause, might adversely infect the jury with his linkage of appellant to guns, violence, and drugs. (AOB 28.)

The Court of Appeal nonetheless found petitioner's argument indistinguishable from *Gordon*, because "[i]n the absence of a demonstration that Juror No. 8 should have been removed for cause, this argument is no different from the general claim made in *Gordon* of prejudice from the unnecessary use of peremptory challenges." (Exhibit A; Slip Opn., p. 9.) This contention is puzzling because it ignores cases that predate and postdate *Gordon* – namely *Bittaker* and *Blair* – which affirm that prejudice emerges when the error has the effect of denying a defendant a peremptory challenge that his counsel would have otherwise exercised to remove the objectionable juror – the exact situation in petitioner's case. (*People v. Bittaker, supra*, 48 Cal.3d at pp. 1087-1088; *People v. Blair, supra*, 36 Cal.4th at p. 742.)

Petitioner respectfully submits that the Court of Appeal's reliance on *Gordon* fails to reconcile the split of authority noted in the unpublished opinion and, if anything, highlights the need for this Court to secure some uniformity of decision in this area of the law. (Cal. Rules of Court, rule 8.500(b)(1).) With the law in this area in such a flux, review by this Court is critical.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant review on the issue presented in this brief and reverse the judgment of the Court of Appeal accordingly.

Dated: November 26, 2012

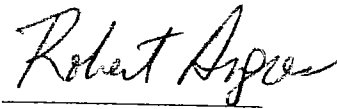
Respectfully submitted,



ROBERT L.S. ANGRES
Attorney for Petitioner

CERTIFICATE OF LENGTH

I, Robert L.S. Angres, counsel for petitioner Charles Alex Black, certify pursuant to the California Rules of Court, that the word count for this document is 2,057 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(1). This document was prepared in Microsoft Word, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Fresno, California on November 26, 2012.



Robert L.S. Angres
Attorney for Petitioner

Filed 10/25/12

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
FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT

OCT 25 2012

DIANA HERBERT, CLERK
BY _____ DEPUTY CLERK

THE PEOPLE,
Plaintiff and Respondent,
v.
CHARLES BLACK,
Defendant and Appellant.

A131693

(Alameda County
Super. Ct. No. 163496)

Defendant was convicted of two counts of animal cruelty after he was twice videotaped while beating his dog. Defendant contends the trial court deprived him of the right to a fair and impartial jury by denying his requests to excuse two jurors for cause and erred by failing to instruct the jury on the lesser included offense of attempted animal cruelty with respect to one of the charges. We affirm.

I. BACKGROUND

Defendant was charged in an information, filed April 22, 2010, with two counts of animal cruelty. (Pen. Code, § 597, subd. (a).) Separate incidents of abuse were alleged to have occurred on June 30, 2009 and February 19, 2010. The information also alleged defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subd. (e)(1), 1170.12, subd. (c)(1)) and one prior prison conviction (Pen. Code, § 667.5, subd. (b)).

A. Denial of "For Cause" Challenges

During jury selection, two prospective jurors expressed concern about their respective abilities to serve impartially. The first, M.P., characterized herself as "a very devout Hindu" who was "taught to not harm any animals whatsoever." Although M.P.

said she would “try” to put aside her beliefs, when asked whether she could be “completely impartial, unbiased,” she responded, “Probably not for this particular case.” The second prospective juror, A.D., had been abused as a child, raising concerns in his mind about his ability to act impartially. Further, he told the court in chambers he “already sided with the [district attorney], because of what happened today in the morning and at lunch.” Asked to explain, A.D. said he felt defendant’s conduct in the courtroom was disrespectful, since he arrived late and was “singing and stomping his feet” as he entered. When the court denied defendant’s “for cause” challenges to the two prospective jurors, he used peremptory challenges to remove them.

A third prospective juror, eventually seated as Juror No. 8, also expressed concern in a note to the court. In chambers, he explained he was a process server who had been sent earlier that year to serve an unlawful detainer summons on a “Charles Black” at an Oakland Housing Authority building. Because this Charles Black was never at home when Juror No. 8 attempted to serve him, the juror did not know whether defendant was the same person as the subject of the summons. Although he had served residents of the Housing Authority “[o]ver 100 times,” this attempt at service stood out in Juror No. 8’s memory because he received a police escort, which only occurred if “guns and/or drugs were involved in the reason for the eviction.” The juror said he would “try” not to let the incident affect his consideration of the case and promised he would not disclose it to other jurors. Defense counsel requested Juror No. 8 be excused for cause “in an abundance of caution.” The court declined the request, concluding the juror was conscientious and noting there was no evidence of a gun in this case.

After exhausting his peremptory challenges, defendant sought additional peremptory challenges from the court in order to remove Juror No. 8 and another unspecified juror. The request was denied.

B. Evidence of the June 30 Incident

The primary witnesses at trial were defendant’s neighbors. One neighbor in particular, whose home had a view of the rear balcony of defendant’s apartment, witnessed several incidents of abuse. On these occasions, defendant would typically take

the dog onto the balcony, reprimand it, and kick it “pretty hard” or hit it with a mop handle. The dog would yelp and cower. The neighbor found defendant’s conduct so “appalling” that he decided to videotape it.

On June 30, 2009, the neighbor was in his bedroom when he heard defendant’s voice and a dog yelping. The neighbor grabbed his camera and went to a sliding glass door from which he could view defendant’s balcony. As he was filming, the neighbor saw defendant raise the mop over his head, using both hands, and bring it down on the dog. He swung at the dog “no more than three times,” each time striking the dog “across the back anywhere from the back of the neck to all the way down to the rear.” The dog was yelping as defendant reprimanded it.

The resulting video of the events was of poor quality. Only a portion of defendant’s balcony was visible; the remainder was obscured by vegetation.¹ Bright sunlight from the left bleached out details. Although defendant was visible throughout most of the video, the dog was not. Early in the video, the dog was twice heard yelping suddenly and there was shouting, but at those times defendant’s body was largely obscured, and the dog could not be seen. At the critical point on which the neighbor focused his testimony, slightly more than one minute into the video, defendant was visible walking around the balcony carrying the mop or broom with the head down. At certain points he made sudden movements, appearing to thrust the mop or broom downward one time and to swing it another time, and an unseen dog was heard crying out loudly at least five separate times. It was not possible to determine from the video, however, that defendant’s movements caused the dog’s cries.

In his own testimony about the June 30 incident, defendant said he went to the balcony where the dog had been put after he noticed it had chewed an electrical cord. When the dog growled at him, defendant picked up the mop “to signify that his defiance wouldn’t be tolerated.” Defendant acknowledged he used the mop to “make contact”

¹ The neighbor testified he had a much better view of the events on the balcony than is suggested by the video.

with the dog, but he denied raising the mop over his head and bringing it down forcefully. Instead, he used it to “push or . . . touch” the dog twice. He then reentered his apartment.

The neighbor had also recorded the February 2010 incident underlying the second count. This video was of far better quality, unmistakably showing defendant swinging a steel axe over his head and bringing it down on the cowering dog, striking the animal repeatedly. Defendant shouted angrily at the animal as it squealed in pain, in a manner identical to the cries heard on the June 30 video. A veterinarian’s subsequent examination confirmed the dog was wounded by the strikes.

Defendant was convicted on both counts and sentenced to a four-year prison term.

II. DISCUSSION

Defendant contends (1) his right to a fair and impartial jury was violated when the court refused to excuse Prospective Jurors M.P. and A.D. for cause, leaving him without sufficient peremptory challenges to remove Juror No. 8; and (2) the trial court erred by failing to instruct the jury on the lesser included offense of attempted animal cruelty with respect to the June 30 incident.

A. *Right to an Impartial Jury*

Defendant contends the trial court erred in refusing to excuse for cause M.P. and A.D., which required him to exercise peremptory challenges to prevent these prospective jurors from being seated. Although defendant does not contend the trial court erred in refusing to excuse Juror No. 8 for cause, he argues his right to a fair and impartial jury was violated because the unwarranted use of two peremptory challenges to remove the other prospective jurors left him unable to use a peremptory challenge to remove Juror No. 8.

The Attorney General does not defend the trial court’s decisions not to excuse M.P. and A.D. Instead, she contends defendant’s right to a fair and impartial jury was violated only if his use of peremptory challenges to remove these two jurors left him unable to prevent the seating of an “incompetent” juror, which she defines as a prospective juror who should have been excused for cause. Because defendant does not contend Juror No. 8 should have been excused for cause, it is argued, he has failed to

demonstrate he was deprived of a fair and impartial jury. The issue before us is therefore not the propriety of the trial court's conduct but the nature of defendant's burden in demonstrating a violation of his right to a fair and impartial jury.

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) “To find actual bias on the part of an individual juror, the court must find “the existence of a state of mind” with reference to the case or the parties that would prevent the prospective juror “from acting with entire impartiality and without prejudice to the substantial rights of either party.” ” (*People v. Horning* (2004) 34 Cal.4th 871, 896.)

In its decisions addressing the specific issue raised by defendant, our Supreme Court has been of two minds. In *People v. Bittaker* (1989) 48 Cal.3d 1046 (*Bittaker*), the defendant claimed he was deprived of his right to a fair and impartial jury because he had been required to use peremptory challenges to remove five prospective jurors who should have been excused for cause and was granted only two compensatory peremptory challenges by the court. (*Id.* at p. 1087.) Responding to the argument, the court held “defendant must show that he used a peremptory challenge to remove the juror in question, that he exhausted his peremptory challenges [citation] or can justify his failure to do so [citation], and that he was dissatisfied with the jury as selected. But if he can actually show that his right to an impartial jury was affected *because he was deprived of a peremptory challenge which he would have used to excuse a juror who sat on his case*, he is entitled to reversal; he does not have to show that the outcome of the case itself would have been different.” (*Id.* at pp. 1087–1088, italics added.) Accordingly, the court held the defendant was required to show the trial court erred in denying at least three challenges for cause to gain a reversal, since the court provided two additional peremptory challenges. (*Id.* at p. 1088.) Because the court found only two of the denials erroneous, it did not reverse. (*Id.* at pp. 1088–1091.) There is no question the highlighted language from *Bittaker* supports defendant's contention.

More recently, in *People v. Yeoman* (2003) 31 Cal.4th 93 (*Yeoman*), the court appeared to change its view, holding a defendant's use of a peremptory challenge to

remove a juror who should have been excused for cause is not prejudicial unless it resulted in the seating of an “incompetent” juror. (*Id.* at p. 114.) The court reasoned, “To prevail on such a claim, defendant must demonstrate that the court’s rulings affected his right to a fair and impartial jury. [Citation.] None of the four prospective jurors [whom the defendant unsuccessfully challenged for cause] could possibly have affected the jury’s fairness because none sat on the jury. [Citations.] The harm to defendant, if any, was in being required to use four peremptory challenges to cure what he perceived as the trial court’s error. Yet peremptory challenges are given to defendants subject to the requirement that they be used for this purpose. [Citation.] While defendant’s compliance with this requirement undoubtedly contributed to the exhaustion of his peremptory challenges, from this alone it does not follow that reversible error occurred. . . . [T]he loss of a peremptory challenge in this manner ‘provides grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*’” [Citations.] Here, defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror. No incompetent juror was forced upon him.” (*Ibid.*, italics added by *Yeoman*.) Although *Yeoman* cited *Bittaker* without acknowledging any disagreement (*Yeoman*, at p. 114), it appears to impose a stricter standard for prejudice than *Bittaker* by requiring the defendant to demonstrate that the exhaustion of his peremptory challenges resulted in the seating of an “incompetent” juror, rather than merely a juror whom the defendant would have preferred to remove. This interpretation is reinforced by *People v. Bonilla* (2007) 41 Cal.4th 313, 340, which construes *Yeoman* as referring to “a juror incompetent under *Wainwright v. Witt* [(1985)] 469 U.S. 412.” While *Wainwright* does not use the term “incompetent,” it discusses jurors “properly excused for cause.” (*Id.* at p. 430.)

The Supreme Court later appeared to retreat from its position in *Yeoman*. In *People v. Blair* (2005) 36 Cal.4th 686 (*Blair*), the court held, “To establish that the erroneous *inclusion* of a juror violated a defendant’s right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence, *or that the defendant was deprived of a peremptory challenge that he or*

she would have used to excuse a juror who in the end participated in deciding the case.” (*Id.* at p. 742, italics added.) The court found no reversible error because the defendant used peremptory challenges to remove the prospective jurors challenged for cause, had not identified any sitting juror whom he challenged for cause, and “fail[ed] to identify any juror whom he would have excused had he not used his peremptory challenges to remove [the jurors challenged for cause].” (*Ibid.*; see also *People v. Alfaro* (2007) 41 Cal.4th 1277, 1314 [“Defendant has not identified any person who sat on her jury panel whom she would have peremptorily challenged but for the circumstance that she had used her final challenge to excuse another prospective juror”].) Although *Blair* cited both *Bittaker* and *Yeoman*, it did not acknowledge the apparent disagreement between them.²

In *People v. Baldwin* (2010) 189 Cal.App.4th 991 (*Baldwin*), the court discussed *Bittaker* and *Yeoman* at length, ultimately concluding *Yeoman* did adopt a stricter standard than *Bittaker*. Under *Yeoman*, the court held, “the defendant cannot show that his right to an impartial jury was affected by the denial of the for-cause challenges, unless the trial court erroneously denied a challenge for cause to a sitting juror.” (*Baldwin*, at pp. 1000–1001.) In so holding, *Baldwin* equated *Yeoman*’s “incompetent juror” with a juror who should have been removed for cause, in the process rejecting an argument identical to that raised by defendant here. (*Baldwin*, at p. 1001.) Although *Blair* had been decided in the interim since *Yeoman*, *Baldwin* did not mention *Blair*. As a result, we are faced with a 2003 Supreme Court decision apparently rejecting defendant’s position, a more recent Supreme Court decision from 2005 accepting it, and a 2010 Court of Appeal decision definitively rejecting it, but without discussing the conflicting 2005 Supreme Court decision.

² An even more recent decision, *People v. Mills* (2010) 48 Cal.4th 158, reaffirms *Yeoman*’s requirement that an “incompetent” juror remain on the jury. (*Mills*, at p. 187; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1096 [“ ‘So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated’ ”].)

We also conclude we must reject defendant's argument, but we rely on a parallel line of Supreme Court authority not mentioned by *Baldwin* or, for that matter, the parties. In *People v. Gordon* (1990) 50 Cal.3d 1223 (*Gordon*), overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835, which was cited by *Yeoman*, the court rejected the argument that the use of a peremptory challenge to remedy a trial court's erroneous denial of a "for cause" challenge results in a constitutional violation. In *Gordon*, the defendant challenged three jurors for cause during voir dire. One of the jurors was never seated, but the defendant was required to use peremptory challenges to remove the other two. (*Id.* at p. 1246.) The court held that a trial court's erroneous failure to excuse jurors challenged for cause "is not automatically reversible but is subject to scrutiny for prejudice under harmless-error analysis." (*Id.* at p. 1247.) Although no challenged juror was actually seated, the defendant contended "he was harmed because he was effectively denied two peremptory challenges when he chose to exercise those challenges to 'cure' the 'error.'" (*Id.* at p. 1248.) The court rejected the claim of prejudice, noting, "A criminal defendant may, and indeed must, exercise the peremptory challenges granted him by law 'to remove prospective jurors who should have been excluded for cause' [citation]—that is to say, to cure the very kind of error claimed here." (*Ibid.*)

In a footnote, *Gordon* rejected the defendant's constitutional claims, explaining the right to a fair and impartial jury was not violated because no juror challenged for cause actually sat on the jury and "the court's refusal to remove the three prospective jurors for cause did not infringe defendant's right to due process by arbitrarily depriving him of his full complement of peremptory challenges. Since peremptory challenges are a creation of state law and not constitutionally required, the right to exercise such challenges would be denied or impaired only if the defendant did not receive what the law provides. Although at the time relevant here state law gave capital defendants 26 peremptory challenges [citation], it did so subject to the requirement that the defendant exercise those challenges to cure erroneous refusals to excuse prospective jurors for cause [citation]." (*Gordon, supra*, 50 Cal.3d at p. 1248, fn. 4.) *Gordon's* holding on this point

has been summarily reaffirmed by the Supreme Court at least twice, most recently last year. (*People v. Clark* (2011) 52 Cal.4th 856, 902 [rejecting under *Gordon* the argument “because the court’s rulings compelled [the defendant] to use his peremptory challenges to excuse jurors who should have been excused for cause, he was deprived of his federal constitutional right to a state-created liberty interest in 20 peremptory challenges”]; *People v. Weaver* (2001) 26 Cal.4th 876, 913.)

Defendant’s argument is legally indistinguishable from the argument rejected in *Gordon*. Defendant’s argument is *not* that his right to a fair and impartial jury was compromised because a juror who should have been excused for cause actually sat on his jury. Rather, he argues he was prejudiced because his need to remedy the trial court’s erroneous failure to excuse two jurors for cause left him unable to remove Juror No. 8, a sitting juror whom he would otherwise have removed using a peremptory challenge. In the absence of a demonstration that Juror No. 8 should have been removed for cause, this argument is no different from the general claim made in *Gordon* of prejudice from the unnecessary use of peremptory challenges. Defendant has merely identified a particular juror whom he would have removed had he not been required to exhaust his peremptory challenges.³

Defendant argues that an incompetent juror should be defined under *Yeoman* as one who drew a “for cause” challenge from defense counsel, without regard to the merits of that challenge, contending “[i]ncompetence in this context is ultimately nothing more than [defense] counsel’s opinion that a prospective juror is not fit to sit on the panel.” We recognize this position is superficially consistent with *Yeoman*’s observation that “defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror. No incompetent juror was forced upon him.” (*Yeoman, supra*, 31 Cal.4th at p. 114.) Read in context, however, *Yeoman*’s observation is not intended to define an incompetent juror as one who has drawn a challenge for

³ Defendant’s reply brief confirms he does not contend the trial court erred in not excusing Juror No. 8 for cause. In any event, having reviewed the record with respect to Juror No. 8, we find no error in the trial court’s denial of defendant’s challenge.

cause. Rather, *Yeoman*'s point is that a challenge for cause is a necessary prerequisite to a defendant's demonstration of prejudice, since if no juror challenged for cause sat on the jury, the defendant is legally precluded from claiming the jury contained an incompetent juror.

Further, under the constitutional analysis of *Gordon*, the right to a fair and impartial jury is not violated unless a juror who should have been removed for cause—that is, a legally biased juror—actually sat on the jury. As *Gordon* explained, the loss of a peremptory challenge used to remove a juror who should have been removed for cause does not alone constitute a constitutional violation because (1) peremptory challenges are not constitutionally required, and (2) they are granted under state law in part for just this purpose—to avoid prejudice as a result of a trial court's erroneous failure to remove a juror for cause. (*Gordon, supra*, 50 Cal.3d at p. 1248, fn. 4.) Because the privilege granted by a peremptory challenge is not constitutionally required, a defendant's loss of the ability to remove a juror who is not biased, but whom counsel believes to be unsuitable, does not rise to the level of a constitutional violation. Further, because peremptory challenges are granted in part to allow the parties to avoid prejudice from a trial court's wrongful denial of a "for cause" challenge, there is no loss of state-granted rights in the use of peremptory challenge for this purpose. Accordingly, as *Gordon* implicitly holds, a defendant must show the use of a peremptory challenge to remove a juror who should have been excused for cause left him or her unable to prevent the seating of another juror who should have been excused for cause before a constitutional violation will be found. Because defendant does not argue Juror No. 8 should have been excused for cause, he has failed to demonstrate a violation of his right to a fair and impartial jury.

B. Lesser Included Offense Instruction

Defendant contends the trial court failed to fulfill its sua sponte duty to instruct the jury on the lesser included offense of attempted animal abuse with respect to the charge based on June 30 incident.

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.’ [Citations.] ‘That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.’ ” (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) In other words, the duty to instruct on lesser included offenses exists only if there is substantial evidence supporting a jury determination that the defendant “was in fact guilty only of the lesser offense.” (*People v. Parson* (2008) 44 Cal.4th 332, 348–349.) “ ‘As our prior decisions explain, the existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.] “Substantial evidence” in this context is “ ‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’ ” that the lesser offense, but not the greater, was committed.’ ” (*People v. Moya* (2009) 47 Cal.4th 537, 553.)

We find no error here because there was no substantial evidence supporting a jury finding that defendant attempted, but failed, to commit animal cruelty. The testifying witnesses presented the jury with two conflicting stories. The neighbor testified defendant struck the dog forcefully with a mop or broom handle. Defendant acknowledged using the mop to “make contact” with dog, but he denied any cruelty, saying he used it merely to “push or . . . touch” the dog twice. The images on the video are not clear enough to determine what defendant was doing, although the auditory evidence, which featured repeated heart-rending cries from the dog, was consistent with a finding of harm. Accordingly, there was evidence to support both conviction and acquittal of the charged crime, depending upon which witness the jury believed. No witness provided evidence to support a finding defendant intended and attempted, but failed, to abuse the dog.

Defendant’s argument is based on the video, which, he contends, shows him “lunging at something near the screen door” but does not show him actually striking the

dog. If the jury believed the video reflected the view available to the neighbor, he argues, the jury could have concluded defendant tried to harm the dog but found insufficient evidence to conclude he actually succeeded. The argument fails for two reasons. First, the evidence of the video is not clear enough even to support a finding defendant *attempted* to strike the dog. At best, it showed defendant moving the mop in a suggestive manner. It provides no reliable evidence, standing alone, that defendant acted in a manner consistent with an intent to harm the dog. If the jury concluded, as defendant argues, that the video accurately reflected what the neighbor saw, it would have acquitted defendant. Second, the argument considers the video in isolation, without taking account of the testimony of the two eyewitnesses to the events. Neither witness testified defendant failed to make contact with the dog. The neighbor said defendant struck the dog violently, as he had done in the past. Defendant acknowledged making contact with the dog, but he denied any attempt to abuse. Accordingly, the eyewitness testimony precluded any interpretation of the video as a failed attempt at abuse, and any such finding by the jury would have been speculation. The trial court was therefore under no duty to instruct on attempt.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.

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CERTIFICATE OF MAILING

I hereby certify that I am a member of the State Bar of California, that my business address is 4781 E. Gettysburg Avenue, Suite 14, Fresno, CA 93726, that I am not a party to this action, and that I mailed a true copy of the foregoing to the following persons at the following addresses on November____, 2012:

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I declare under penalty of perjury of under the laws of the State of California that the foregoing is true and correct. Executed on November____, 2012 at Clovis, California.

ROBERT L.S. ANGRES