

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA1646
Adams County District Court No. 05CR3098
Honorable C. Vincent Phelps, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Gerardo Joel Delacruz,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I

Opinion by: JUDGE ROMÁN

Taubman and Lichtenstein, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: March 19, 2009

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Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

Defendant, Gerardo Joel Delacruz, appeals his judgment of conviction entered on jury verdicts finding him guilty of first degree murder, attempted first degree murder, first degree assault, and prohibited use of a weapon. We reverse and remand for a new trial.

I. Background

According to the People's evidence, in the early morning of September 24, 2005, a fight broke out at the Mexico Lindo bar in Adams County. Defendant was inside the bar at the time the fight broke out. He left the bar, retrieved a gun from his vehicle, and re-entered the bar. Defendant waived the gun, which attracted the attention of a bouncer, who escorted him outside.

Outside, a group of individuals who had been fighting inside the bar yelled and gestured at defendant. Defendant shot at the group, killing one individual and wounding another.

After a trial by jury, defendant was convicted of all counts and sentenced to life in prison for first degree murder, a consecutive thirty-two-year sentence for attempted first degree murder, a concurrent twelve-year sentence for first degree assault, and a concurrent six-month sentence for prohibited use of a weapon.

We conclude the trial court abused its discretion when it did not dismiss for cause several jurors who responded affirmatively to defense counsel's question whether defendant's status as an illegal alien would affect their ability to be fair and impartial jurors. Because the jurors were not questioned further on the subject by either the People or the court, there were insufficient assurances that the jurors would set aside any preconceived notions and make a decision based on the evidence and the court's instructions. Therefore, we reverse the judgment and remand for a new trial.

II. Jury Selection

Defendant contends the trial court abused its discretion when it failed to dismiss Jurors 7, 29, 37, 39, 45, and 30¹ for cause when the jurors responded affirmatively to defense counsel's question about whether defendant's status as an illegal alien would affect their ability to be fair and impartial jurors. We agree.

¹The record regarding defendant's challenge of Juror 30 for cause is unclear. Defendant challenged Juror 30 initially, but Juror 30 was not discussed among the court, the People and defense counsel during defendant's challenges for cause. However, since we determine it was an abuse of discretion for the trial court not to grant defendant's other challenges for cause, we need not reach the merits of this challenge here.

Criminal defendants have a fundamental constitutional right to a fair and impartial jury. *Morrison v. People*, 19 P.3d 668, 673 (Colo. 2000). A biased juror may not serve because he or she could poison the defendant's right to a fair trial. *People v. Lefebvre*, 5 P.3d 295, 299 (Colo. 2000).

A trial court must grant a challenge for cause if a prospective juror is unable or unwilling to accept the basic principles of criminal law and to render a fair and impartial verdict based on the evidence admitted at trial and the court's instructions. *Id.* at 300. A potential juror who makes a statement suggesting bias may nonetheless sit on the jury if he or she agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions. *Id.* at 301.

When a defendant challenges a prospective juror for cause on the basis of actual bias, the defendant bears the burden of demonstrating through questioning that the potential juror lacks impartiality. *People v. Arko*, 159 P.3d 713, 719 (Colo. App. 2006), *rev'd on other grounds*, 183 P.3d 555 (Colo. 2008). A trial court's denial of a defendant's challenge to a prospective juror for cause will only be reversed where the trial court abused its discretion. *Id.*

Stated differently, a trial court's ruling on a challenge for cause will be reversed only if there is no evidence in the record to support it.

People v. Richardson, 58 P.3d 1039, 1042-43 (Colo. App. 2002).

Reversible error occurs when a trial court does not grant a challenge for cause to a prospective juror who expresses doubt as to his or her ability to be impartial and is not rehabilitated by the prosecution or the trial court.

People v. Wilson, 114 P.3d 19, 22 (Colo. App. 2004).

Here, defendant's status as an illegal alien was introduced when a prospective juror asked the People if defendant was a United States citizen. The People explained to the jury that defendant's status was not relevant. However, when defense counsel conducted his voir dire, Jurors 29, 30, 37, 39 and 45 also raised their hands in response to counsel's question about whether defendant's status as an illegal alien would affect their ability to be fair and impartial jurors.

The following lengthy exchange occurred at the beginning of defendant's voir dire:

[Defense Counsel]: . . . If in this case it came up that the Defendant, the person being charged, was illegal, *would that affect your ability to be a fair and impartial juror?*

[Juror 12]: It may.

[Defense Counsel]: Okay. You don't like -- you basically would . . . not let[] people come in unless they had the proper papers and not giving any excuses. So if anyone here[] [is illegal], you're thinking basically they're taking something away from you?

[Juror 12]: I realize every situation is different. But, yes.

.....

[Defense Counsel]: . . . So I can take it as a factor in my deliberations in how I'm going to use my challenges that not one other juror sitting in the box here would be affected if there was a question of legality? Is that correct? . . .

[Juror 27]: I would have a little trouble with it. Since he is not a citizen of the United States, why would you be spending my money?

.....

[Defense Counsel]: Okay. So it's why we're spending our money to prosecute him?

[Juror 27]: Yes.

[Defense Counsel]: Well, legal or illegal, a person could be prosecuted. Would you concede that?

[Juror 27]: Yes, I can concede that.

[Defense Counsel]: But *you think it might affect your opinion on guilt or innocence*. And please, there's nothing wrong with that if that's how you honestly feel.

[Juror 27]: Yes, I believe that.

At that point, defense counsel asked the jurors to pass the microphone around so that he could note other prospective jurors who also believed defendant's status as an illegal alien might affect their opinion on guilt or innocence.

[Juror 29]: Yes.

[Defense Counsel]: I'm sorry, yes.

[Juror 29]: Yes.

[Defense Counsel]: That simplifies life. That's Mr. --

[Juror 29]: [29]

[Defense Counsel]: . . . And next, please.

[Juror 30]: Mr. [30].

[Defense Counsel]: Mr. [30] Anybody else in that area, on this side? Yes, sir, you're number, Mr. [39]?

[Juror 39]: Yes.

[Defense Counsel]: So yours would be a yes, too; is that correct?

[Juror 39]: That's correct.

[Defense Counsel]: All right. Anybody else in this area that would, *their opinion of guilt or innocence would be affected by illegality?* Okay. That's Mrs. [37]? Did I cover it? All right. . .

Let me have a show of hands in this group over here. We could get into this first two rows, I think. The first row, I know

what your answer is, young lady. Let me just get your number. . . . Your last name, sir, is?

[Juror 45]: [45].

[Defense Counsel]: Okay. Got it. All right. Thank you much.

(Emphasis added.)

Later in voir dire, defense counsel asked Juror 7 whether she would pick herself as a juror if she were defense counsel. She replied, “I don’t think I would pick me if I [were] you. . . . Just being here illegally is, really bothers me.”

Although the court dismissed Jurors 12 and 27 for cause, the trial court denied defense counsel’s additional challenges for cause to Jurors 7, 29, 37, 39, and 45. Our review of the record, however, shows that those jurors were not rehabilitated by the People or the court.

The Court: And Mr. [29].

[The People]: I didn’t know the reason for that. I don’t know if defense counsel can elaborate.

[Defense Counsel]: He went along with that same theory about illegals and he couldn’t be fair with illegals. . . .

[The People]: I don’t recall him going into that.

The Court: I don’t think so, either

The trial court went through similar exchanges with counsel for Jurors 37, 39, and 45, stating it could not remember their “going into” the issue of defendant’s citizenship.

Regarding Juror 7, the People argued, “She waived on a couple answers; but ultimately, I think she did say she could be a fair and impartial juror.”

Without further questioning or attempting to rehabilitate them, the trial court denied defendant’s challenges to these prospective jurors. Defendant then exhausted all of his peremptory challenges.

While a potential juror who makes a statement suggesting bias may nonetheless sit on the jury, he or she must agree to set aside any preconceived notions and make a decision based on the evidence and the court’s instructions. *Lefebre*, 5 P.3d at 301. A court must be “satisfied that the juror will render an impartial verdict based solely upon the evidence and the instructions of the court.” Crim. P. 24(b)(1)(X); accord § 16-10-103(1)(j), C.R.S. 2008; see also *People v. Shover*, ___ P.3d ___, ___ (Colo. App. No. 07CA0187, Feb. 19, 2009).

Here, since no further examination or rehabilitation of the jurors regarding bias against defendant's illegal alien status occurred, we cannot conclude the trial court could have been adequately satisfied with the responses of the challenged jurors. See Crim. P. 24(b)(1)(X). Once the jurors responded that defendant's status as an illegal alien could affect their ability to be fair and impartial, the court had the responsibility to question the jurors to make sure they could set aside any bias or excuse the challenged jurors for cause.

Similar to the juror challenged in *People v. Wilson*, the jurors challenged by defendant here expressed an actual bias and

neither the court nor the prosecution elicited a statement from the prospective juror[s] that [they] could render or would try to render an impartial verdict according to the law and evidence, that [they] would apply the facts to the law and follow the instructions of the court, or that [they] would presume defendant innocent until proven guilty.

Wilson, 114 P.3d at 23; cf. *Shover*, ___ P.3d at ___ (where trial court inquired of entire panel whether it could separate feelings and experiences from the facts of the case and give defendant a fair trial after bias was expressed during defense counsel's voir dire, no abuse of discretion to deny challenges for cause); *People v. Valdez*,

183 P.3d 720, 725 (Colo. App. 2008) (no abuse of discretion to deny challenges for cause where jurors specifically stated they would try to do what the court instructed and if selected would follow jury instructions and apply them to the facts of the case); *People v. Simon*, 100 P.3d 487, 491-95 (Colo. App. 2004) (no abuse of discretion to deny challenges for cause where jurors stated that despite their biases they would base their decisions on the evidence presented and be able to find defendant not guilty if prosecution failed to meet its burden). Since there was no effort to rehabilitate the jurors on their acknowledged bias, we conclude the trial court abused its discretion by not dismissing them for cause.

The People argue that the challenged jurors' act of raising their hands in response to defense counsel's question does not rise to the level of bias that would place the burden on the trial court or the People to rehabilitate. In support of this position, the People cite *People v. Asberry*, 172 P.3d 927, 930 (Colo. App. 2007), for the proposition that a challenge for cause is waived if defense counsel does not use reasonable diligence to determine whether grounds for a challenge exists. Here, we find that defense counsel's question was meant to, and did, bring out bias from jurors. The affirmative

act of raising one's hand is enough to place the People and the court on notice of the jurors' bias against defendant. Once the bias was made known, the burden was on the People or the court to further examine those jurors to ensure they could set aside their bias and follow the instructions of the court.

Defendant exhausted all of his peremptory challenges, using peremptory challenges to dismiss Jurors 7, 29, 37, and 45.² Therefore defendant established prejudice when the trial court denied his challenges for cause. *See Morrison*, 19 P.3d at 671 (prejudice can be shown when a defendant's substantial right to use peremptory challenges is affected due to a trial court's improper denial of a challenge for cause or when a juror challenged for cause serves on the jury and the challenge for cause was improperly denied); *People v. Prator*, 833 P.2d 819, 821 (Colo. App. 1992) (prejudice is shown if defendant exhausts all of his or her

² While defendant challenged Juror 39 for cause, he did not exercise a peremptory challenge on Juror 39. However, as stated in *Morrison v. People*, "[r]egardless of whether the defendant chose to use a peremptory challenge on the allegedly objectionable juror, because he challenged [the juror] for cause and she served on the jury, his right to an impartial jury was violated if his challenge for cause was improperly denied." 19 P.3d at 671. Here, Juror 39 served on defendant's jury.

peremptory challenges and one of those challenges is expended on a juror who should have been removed for cause), *aff'd*, 856 P.2d 837 (Colo. 1993).

III. Other Contentions

Because of our disposition, we do not address defendant's other contentions.

Accordingly, the judgment is vacated, and the case is remanded for a new trial.

JUDGE TAUBMAN and JUDGE LICHTENSTEIN concur.