

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0954

STATE OF LOUISIANA

VERSUS

BEN RESTER

WPR
WPR
DATE OF JUDGMENT: 'MAR 23 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 07-CR3-97178, DIV. A, PARISH OF WASHINGTON
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

Walter P. Reed, DA
Lewis v. Murray, III, ADA
Franklinton, Louisiana

Counsel for Appellee
State of Louisiana

Kathryn Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Frank Sloan
Mandeville, Louisiana

Counsel for Defendant-Appellant
Ben Rester

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

Guidry, P. concurs.

KUHN, J.

Defendant, Ben Rester, was charged by bill of information with one count of cruelty to juveniles (count one), a violation of La. R.S. 14:93, and one count of indecent behavior with a juvenile (count two), a violation of La. R.S. 14:81. He pled not guilty on both counts. (R. 1, 16). Following a jury trial, he was found guilty on count one of the responsive offense of attempted cruelty to juveniles, a violation of La. R.S. 14:27 and La. R.S. 14:93, and guilty as charged on count two. The trial court sentenced defendant on count one to five years at hard labor, suspended, and five years probation; on count two defendant was sentenced to five years at hard labor, suspended, and five years probation, subject to general and special terms and conditions, and a fine of \$1,000.00.¹ The sentences were made concurrent. Defendant now appeals, contending the trial court erred in denying a defense challenge for cause. For the following reasons, we affirm the convictions and sentences.

FACTS

The victim of count one is J.A., whose date of birth is October 12, 1995.² When J.A. was approximately seven years old, defendant choked him with both hands for putting a fish net on the rearview mirror of defendant's truck. At the time, defendant was the boyfriend of J.A.'s biological mother. Defendant released his hold on J.A.'s throat only when J.A.'s biological father intervened and struck defendant. K.A, whose date of birth is March 23, 1999, is the victim of count two. When she was four or five years old, she moved into defendant's camper trailer, along with her mother and her biological brother, J.A. On the night of her birthday

¹ Although the trial court did not specifically state that the sentences were to be served at hard labor, since the court did state that the sentences were to be served with the Department of Corrections, the sentences necessarily must be served at hard labor. See La. R.S. 15:824C.

² In order to protect the identity of the minor victims, we will refer to them herein only by their initials. See La. R.S. 46:1844(W).

in either 2004, 2005 or 2006, defendant approached her bunk bed while she was sleeping. (R. 251, 253). She woke up when he began touching her vagina through her clothing. (R. 251-52). Defendant threatened her, "If you tell anybody [,] I'll kill you." (R. 252). According to K.A., she reported the incident to her mother the next day, but her mother did not believe her. (R. 252).

CHALLENGE FOR CAUSE

In his sole assignment of error, defendant argues the trial court erred by misapplying the law in denying a defense challenge for cause properly asserted against a prospective juror.

Under La. C.Cr.P. art 797(2), the State or the defendant may challenge a juror for cause on the ground that "[t]he juror is not impartial, whatever the cause of his partiality." The State or the defendant may also challenge a juror for cause on the ground that the juror will not accept the law as given to him by the court. La. C.Cr.P. art. 797(4). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. However, a trial court's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. *State v. Taylor*, 03-1834 (La. 5/25/04), 875 So.2d 58, 62-63. Further, a trial court is vested with broad discretion in ruling on a challenge for cause, and its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Henderson*, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 754, *writ denied*, 00-2223 (La. 6/15/01), 793 So.2d 1235.

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he is required to show the following: (1) an erroneous denial of a challenge for cause; and (2) the exhaustion of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.³ An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **Taylor**, 875 So.2d at 62.

In the instant case, the defense used all six of its peremptory challenges during voir dire. Defendant claims the trial court erred in denying his challenge for cause against prospective juror Miller, by relying entirely on Miller's statement that he could be fair, while ignoring his strong emotional reaction to questions related to his own abuse as a baby and his ambivalent initial responses to questions about his ability to be fair. (Defense brief, p. 4).

During voir dire, Miller indicated that, although he had a family member who was involved in federal government security, that employment would not cause him to give greater credibility to an officer who testified. (R. 84). When asked if he could be fair and impartial to both sides, he responded, "I think so." (R. 84). Further, in response to questioning by the trial court, no member of the prospective juror panel, including Miller, indicated that they could not be fair and impartial to either the State or defendant.

Subsequently, Miller volunteered the information that he was an orphan who had been abused as a baby, indicating that he thought that fact should be disclosed. (R. 107). In response to questioning by the State, he agreed that his own life experiences were completely separate and distinct from the trial of defendant.

³ We note that the rule is now different at the federal level. See *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

Further, Miller answered affirmatively when asked if he agreed that defendant was legally innocent at that point and was presumed innocent. (R. 107-08). He answered without reservation that he would give the defendant a fair trial and hold the State to its burden of proof. (R. 108).

Thereafter, defense counsel questioned Miller as follows:

[Defense Counsel]:

Mr. Miller, you were very candid with us. I really appreciate you letting us know about your childhood and we're very sympathetic.

My question to you, though, is:

Would that experience make you more inclined - -

Prospective Juror Miller:

Well, I don't have any recognition of the experience. This happened as a baby.

And then, my Grandy had took me and she raised me.

[Defense Counsel]:

Okay. So you have no recollection?

Prospective Juror Miller:

No.

[Defense Counsel]:

It's just what somebody told you?

Prospective Juror Miller:

No. No. No. Other than being - -

[Defense Counsel]:

It seems to make you very emotional, though?

Prospective Juror Miller:

Yes.

[Defense Counsel]:

Are you going to be able to put those emotions on the side and be fair with this Defendant?

Prospective Juror Miller:

I'm going to try.

[Defense Counsel]:

Is that a yes or a maybe?

Prospective Juror Miller:

Yes. Yes.

The defense challenged Miller for cause, stating "Although he doesn't remember [the abuse], he turns red and starts crying, so." The trial court denied the challenge stating, "Well, he indicated that he could be fair. And you know, we have to take him at his word."

Based on our review, we conclude that the trial court did not abuse its broad discretion in denying the challenge for cause against Miller. This prospective juror demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and his responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.