NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

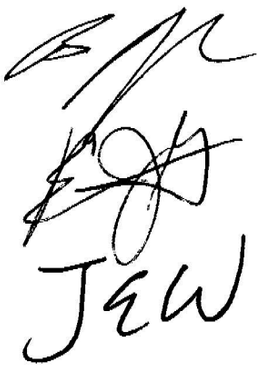
FIRST CIRCUIT

NO. 2010 KA 1683

STATE OF LOUISIANA

VERSUS

RICHARD W. OWENS



Judgment Rendered: May 6, 2011.

* * * * *

On Appeal from the
16TH Judicial District Court,
In and for the Parish of St. Mary,
State of Louisiana
Trial Court No. 175943

The Honorable John E. Conery, Judge Presiding

* * * * *

Susan K. Jones
Franklin, La.

Attorney for Defendant/Appellant,
Richard W. Owens

J. Phil Haney
District Attorney
Jeffrey J. Trosclair
Assistant District Attorney
Franklin, La.

Attorney for Appellee
State of Louisiana

* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C.J.

Defendant, Richard W. Owens, was charged by amended bill of information with one count of armed robbery (count 1), a violation of La. Rev. Stat. Ann. § 14:64; one count of armed robbery, use of firearm, additional penalty (count 2), a violation of La. Rev. Stat. Ann. § 14:64.3; and one count of attempted first degree murder (count 3), a violation of La. Rev. Stat. Ann. § 14:27 and La. Rev. Stat. Ann. § 14:30. He pled not guilty and not guilty by reason of insanity on all counts. Following a jury trial, he was found guilty as charged on counts 1 and 2, and guilty of the responsive offense of attempted manslaughter, a violation of La. Rev. Stat. Ann. § 14:27 and La. Rev. Stat. Ann. § 14:31, on count 3. On count 1, he was sentenced to twelve years at hard labor without benefit of probation, parole, or suspension of sentence. On count 2, he was sentenced to five years at hard labor without benefit of probation, parole, or suspension of sentence, to run consecutively to the sentence imposed on count 1. On count 3, he was sentenced to two years at hard labor to run consecutively to the sentence imposed on count 1. The defendant moved for reconsideration of sentence, and the motion was denied as to counts 1 and 2, but granted as to count 3, with the court ordering the sentence on count 3 to run concurrently with the sentence on counts 1 and 2.

The defendant now appeals, designating the following assignments of error: (1) the trial court erred in failing to grant a mistrial based on the improper interjection of the trial court into the trial; (2) the trial court erred in failing to grant a mistrial based on the improper and prejudicial argument by the State; (3) the trial court erred in limiting the defendant's examination of defense witnesses as to the actions of the defendant's gambling addiction; (4) the trial court erred in failing to

grant a mistrial based on juror misconduct; (5) the trial court erred in denying the defendant's challenges for cause.

For the following reasons, we affirm the convictions and sentences on all counts.

FACTS AND PROCEDURAL HISTORY

On February 12, 2008, Elizabeth Yoder was employed as a cage cashier by Cypress Bayou Casino in Charenton, St. Mary Parish. The cage was the area where the casino stored cash for cashing out customer tickets or chips and for change. At approximately 5:00 a.m., a man wearing a black mask and a camouflage jacket, holding a bag and a gun, jumped through the window of the cage. The robber waved the gun and told Yoder to give him all of the hundred dollar bills. Yoder grabbed the money from her cash drawer and other cash drawers and put it into the robber's bag. The robber then grabbed some more money from Yoder's cash drawer and jumped out of the cage after a casino employee outside the cage began yelling, "They're being robbed." On his way out of the casino, the robber threw $2,500 into the crowd. Yoder got down on her knees and cried because she thought they were all going to die. Darnita Jackson and Chelsea Kreamer were also working in the cage area during the robbery.

Iberia Parish Detective Luke St. Blanc drove toward the casino after being alerted of an armed robbery in progress there. When he passed the casino, security officers pointed toward Indian Road, and he received radio messages that the robber had entered the wooded area near Indian Road. Detective St. Blanc drove to Flattown Road, which he knew formed a T-intersection with Indian Road. He did not see any foot or vehicle traffic, so he turned onto Indian Road and drove back toward the casino. He saw a slow-moving pickup truck and then saw

someone wearing dark clothing and carrying a bag exit the woods and enter the passenger side of the truck. Detective St. Blanc activated his emergency lights and siren and initiated a pursuit. Randy Giroir stopped the truck, exited from the driver's side, and surrendered. Detective St. Blanc began shouting to the defendant to get out and show his hands, but the defendant drove off. Approximately forty yards away, however, the truck stopped. Detective St. Blanc exited his vehicle with his weapon drawn and approached the truck, shouting commands. The truck was then put into reverse, and its tires began to squeal. Detective St. Blanc fired two shots at the truck as he retreated to his police car and took cover behind the unit. The truck stopped almost even with the unit. As Detective St. Leblanc looked into the cab, he saw the defendant brandishing a gun, and then the truck pulled forward. Detective St. Blanc did not know if the vehicle was preparing to ram him or if he would "take fire," so he fired two more shots at the vehicle. The truck then drove up approximately one hundred yards and stopped again. Thereafter, Louisiana State Trooper Cy Landry arrived at the scene and ordered the defendant out of the truck. The defendant was wearing a gun belt with a holster and a magazine for a .45 caliber handgun. Subsequently, a Colt .45 handgun, a camouflage jacket, and a bag containing $103,275 were recovered from the truck, and a mask was recovered from the defendant's pocket. After being advised of his *Miranda*[1] rights, the defendant confessed to the armed robbery.

The defense claimed the defendant was not guilty by reason of insanity in regard to the armed robbery and lacked the specific intent required for the attempted first degree murder.

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The defense presented testimony at trial from Dr. Mark L. Zimmerman, and the court accepted him as an expert in forensic psychology. Dr. Zimmerman conducted a clinical interview with the defendant and performed a mental status examination of him. He concluded the defendant had a depersonalization disorder, which he defined as functioning and behaving as if he were in two places at once, "kind of like you are watching yourself doing something and it limits the amount of control you have over yourself." Dr. Zimmerman also diagnosed the defendant as suffering from pathological gambling. He indicated the defendant was preoccupied with gambling; needed to gamble with increasing amounts of money in order to achieve the desired excitement; had repeated, unsuccessful efforts to control, cutback, or stop gambling; was restless or irritable when attempting to cut down or stop gambling; gambled as a way of escaping from problems or relieving a dysphoric mood, i.e., feelings of helplessness, guilt, anxiety, or depression; often, after losing money, would return to gambling on another date to get even; lied to family members, therapists, or others to conceal the extent of involvement with gambling; had committed illegal acts to finance gambling; and had jeopardized or lost a significant relationship, job, or education or career opportunity because of gambling. Dr. Zimmerman was unable, however, to determine whether the defendant was irrational at the time of the offenses and could not say whether the defendant was legally insane at that time.

The State presented testimony at trial from Dr. Mark S. Warner, and the court accepted him as an expert in clinical psychology and neuropsychology. Following a sanity commission examination of the defendant, Dr. Warner concluded the defendant knew right from wrong on February 12, 2008. Dr. Warner found that the defendant was aware of the illegality of his actions; had a

very clear outcome for his actions, i.e., he wanted to die or he wanted to end his money problems; talked to people at the casino prior to the robbery and tried to find weaknesses in the casino's security system; recruited a friend to drive the getaway vehicle; and planned a diversion after the robbery. Dr. Warner's diagnosis of the defendant was that he was suffering from major depressive disorder, single episode, severe, without psychotic features. Dr. Warner explained that the "single episode" was precipitated by cancer suffered by the defendant's wife and never stopped.

DISCUSSION

Prosecutorial and Trial Misconduct

The defendant combines assignments of error numbers 1 and 2. He argues the jury was prejudiced against him due to "piling on" by the prosecutor and the trial judge against him. He relies on comments by the trial court during *voir dire* and in connection with a motion for mistrial and comments by the State during closing argument.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. Code Crim. Proc. Ann. arts. 770 or 771. La. Code Crim. Proc. Ann. art. 775. The determination as to whether a mistrial should be granted under La. Code Crim. Proc. Ann. art. 775 is within the sound discretion of the trial court, and a denial of a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. *State v. Young*, 569 So.2d 570, 583 (La. App. 1st Cir. 1990), *writ denied*, 575 So.2d 386 (La. 1991).

Louisiana Code of Criminal Procedure Annotated article 770 provides:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, ... during the trial or in argument, refers directly or indirectly to:
>
> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> (3) The failure of the defendant to testify in his own defense; or
>
> (4) The refusal of the judge to direct a verdict.
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Louisiana Code of Criminal Procedure Annotated article 771, in pertinent part, provides:

> In the following cases, upon the request of the defendant ... the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
>
> (1) When the remark or comment is made by the judge, the district attorney, ... and the remark is not within the scope of Article 770; or
>
> . . .
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

The trial court has discretion over the scope of *voir dire* examination. *State v. Lewis*, 08-1381 (La. App. 1st Cir. 2/13/09), 7 So.3d 782, 785, *writ denied*, 09-0531 (La. 11/20/09), 25 So.3d 787.

Louisiana Code of Criminal Procedure Annotated article 774, in pertinent part, provides:

> The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The state's rebuttal shall be confined to answering the argument of the defendant.

During *voir dire*, prospective juror Dean Connor indicated that during the 1970s, he had served as an auxiliary police officer in Morgan City for six years. He stated that his service would not interfere with his ability to be fair and impartial. When asked if working as an auxiliary officer would cause him to give more credibility to testimony of police, he responded, "[r]iding in a police car sometimes makes you a little callous but I think I could be fair." Thereafter, defense counsel asked Connor, "But by making you callous, does it make you – and by being an auxiliary police office[r] do you feel it made you more where you see – we all think highly of police officers. I [mean] that's how I was raised. My father was a World War II veteran and of course, I was taught to respect the law and to respect police officers. But if it gets to the point where sometimes because of close association that it brings us to a higher level where we think so highly of police officers that it's difficult to, when they get up on the police [sic], when [they] get up on the witness stand, you have to judge your [sic] credibility. Now you don't know me, right?" Defense counsel then questioned Connor concerning how he would judge the credibility of defense counsel and Connor's wife. The court interrupted defense counsel, stating, "Ms. Jones, I, I really don't mean to interrupt you and I hate to do that but we're belaboring a point. You just simply wanted to ask him whether he put

more credibility on the testimony of police [than] a lay witness, I think that's the point you were leading to." When asked if he would put more credibility on testimony of police than lay witnesses, Connor responded that he would not. The court advised defense counsel to move on, and she objected. The court overruled her objection. The following exchange then occurred:

> [Defense counsel]: So because – and the reason I'm asking you this is because you rode with police officers, you were a police officer?
>
> [Connor]: Yes ma'am.
>
> [Defense counsel]: So because if we work with people also we tend to give them a little higher or a little more credibility?
>
> [Connor]: Right.
>
> [Defense counsel]: So that's my question 'cause in this case it comes right to the heart of it. It is a police officer who's going to get up and testify and who is accusing [the defendant] with attempting to kill him. So I'm wondering because you said that you were made callous that might affect –
>
> [Connor]: Well, let me –
>
> [Defense counsel]: – your ability to judge a fellow police officer.
>
> [Connor]: When I first started riding the auxiliary, you know, you have a soft spot in your heart, you say, ah man, they're innocent, and then when you see what they actually do, your opinion change [sic]. And, and especially when you're out there on the street. I think this situation is much different. You know. I don't know any of the people involved. I don't know the police officers and I wouldn't give a police officer any more credibility than I would one of the witnesses here. Unless the police officer told a blatant lie that, I mean three people get on the witness stand and say one thing and the police officer says another thing I might not give him very much leverage.
>
> [Defense counsel]: Okay. But –
>
> [Connor]: You know, but straight up, everybody's going to get the same consideration.
>
> [Court]: All right. Let's move on, Ms. Jones. We've, we've beat this horse to death. Let's move on.

[Defense counsel]: Objection, Your Honor.

[Court]: Overruled.

[Defense counsel]: We move for a mistrial.

[Court]: Overruled.

The trial court did not abuse its discretion or prejudice the jury against the defendant in denying the motion for mistrial based on the court asking defense counsel to "move on." Defense counsel fully explored Connor's answer that he might be a little callous due to having been an auxiliary police officer, and Connor repeatedly indicated he would not automatically find the testimony of a police officer more credible than that of another witness. Counsel's continued examination of Connor would have established nothing new, unduly delayed *voir dire*, and wasted time.

Outside the presence of the prospective jurors, defense counsel also moved for a mistrial during *voir dire* following the denial of her challenges for cause[2] against juror Danny Burgess and prospective juror Elton Mier. Defense counsel argued that she believed the testimony of Rhonda Porrier (the defendant's sister),[3] believed the jury was tainted, and the defendant would be unable to obtain a fair trial because of what had been said and because it indicated the feelings and thoughts of the jurors. After the State responded to the motion, the court ruled as follows:

> All right. The court denies the motion for mistrial finding it has no substance and this makes the second motion for mistrial that appears, at least to the Court, to be frivolous and have no basis whatsoever. I don't know if [defense counsel] is playing to the audience or thinking

---

[2] The defendant challenges the rulings on these challenges for cause in assignments of error numbers 4 and 5, which we discuss *infra*.

[3] Outside the presence of the prospective jurors, Porrier testified she heard Burgess tell Mier, "Hun, this needs to hurry up and get over with[,]" and "Everybody knows what the verdict is going to be."

> that she's doing her best as an advocate. I'm not at the point now where I can make that judgment, but certainly a mistrial is a serious, serious remedy and it has to be based on extremely serious grounds and strong proof, none of which is forthcoming based on these two objections. I articulated one of the reasons for denying the challenges for cause and we'll use those same reasons in denying the motion for mistrial plus the additional reason that there has been no evidence whatsoever that the jury panel has been tainted in any way. We're talking about three prospective jurors, here not the jury panel. We're talking about Mr. Burgess, Mr. Mier and Ms. Arceneaux[4] and I've already made my rulings as to those three jurors. There's been no evidence whatsoever that any other jurors heard, said or did anything whatsoever that would rise to the level of even approaching a mistrial.

Initially, we note the motion for mistrial for denial of challenges for cause was made and disposed of outside the presence of the prospective jurors, and thus, the defendant's claim that the trial court's comments in connection therewith prejudiced the jury against him is without basis in the record. Moreover, the trial court did not abuse its discretion in denying this motion for mistrial. The motion was based on nothing more than counsel's belief that Porrier's testimony was more credible than the testimony of Burgess, Mire, and Arceneaux.

During closing, the defense argued:

> I would submit that, after listening to the testimony of Dr. Zimmerman who got up here and was honest and told you everything, and who used the most recent testing materials, that you can reject the opinion of Dr. Warner in its entirety and find that, from the evidence presented and from the evidence adduced from Dr. Zimmerman, that we have proven by a preponderance of the evidence, more likely than not, that [the defendant] is not guilty by reason of insanity. Because you will recall when he was talking about he had a "plan" and they keep talking about the "plan", and Dr. Zimmerman talked about, "Was it rational? Was it rational?" He ([the defendant]) said, "Oh yeah, I knew they [had] cameras all the way around." Was it rational? Dr. Zimmerman talked about the state you get in where it is almost like a dream-like state where you see yourself doing it; but it is not you – that it is like a separate personality. And all of everything that happened says that. It says that it was irrational and that he didn't know right from wrong, and that the gambling – that he had the gambling, that he

[4] Outside the presence of the prospective jurors, Burgess testified prospective juror Ellen Arceneaux had been present during his conversation with Mier.

was a pathological gambling [sic], that he had the mental disease or defect.

On rebuttal closing, the State noted defense counsel had mentioned something about the defendant being in a dream and argued, "That was a dream theory. It was ludicrous. It wasn't supported by any evidence what she talked about – her interpretation of what was presented here. I mean it is ludicrous, absolutely non-responsive to anything that came from the witness stand." The State reminded the jury it had a duty to base its decision on what came from the witness stand, and advised it that what the State and defense counsel said was not evidence; only what came from the witness stand was evidence. The State argued, "Let's talk about credible arguments instead of this dream theory that was just proposed to you." The State noted the defense theory was that the defendant was not guilty of armed robbery by reason of insanity, but defense counsel questioned whether the defendant had a gun. The State argued, "It is ludicrous, ludicrous. And it is frustrating to have to sit here and listen..." Defense counsel objected, and the court instructed the State to, "Lower it just one decibel." The State argued that the case was about consequences of someone's actions and that the defense had distorted the evidence to the point where it was frustrating. Defense counsel objected, and the court sustained the objection.

Initially, we note the defendant failed to move for a mistrial on the basis of the State's comments. Accordingly, he may not now fault the trial court for refusing to grant a motion he did not make. *See* La. Code Crim. Proc. Ann. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."). Moreover, the comments by the State did not provide a basis for a mandatory mistrial under La. Code Crim. Proc. Ann. art. 770. At most, the

comments implicated the discretionary mistrial provisions of La. Code Crim. Proc. Ann. art. 771(1) as "irrelevant or immaterial and of such a nature that [they] might create prejudice against the defendant... in the mind of the jury[.]" The defense also failed to ask the trial court to admonish the jury to disregard the references. La. Code Crim. Proc. Ann. art. 771 mandates a request for an admonishment. *State v. Jack*, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), *writ denied*, 560 So.2d 20 (La. 1990).

In any event, the State's comments did not provide a basis for a mistrial. The State had the right to answer the argument of the defendant. *See* La. Code Crim. Proc. Ann. art. 774 ("The argument shall be confined ... to the lack of evidence[.] ... The state's rebuttal shall be confined to answering the argument of the defendant."). Further, even when the prosecutor's statements and actions in closing argument are excessive and improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments. *State v. Bridgewater*, 00-1529 (La. 1/15/02), 823 So.2d 877, 902, *cert. denied*, 537 U.S. 1227 (2003).

These assignments of error are without merit.

Right to Present a Defense

In assignment of error number 3, the defendant argues the trial court erred in limiting the examination of three family members of the defendant concerning the defendant's gambling addiction. The only limitation of examination he specifically references, however, was during the testimony of Rita Broussard.

Under compelling circumstances, formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. For example, normally inadmissible hearsay may be admitted if it is reliable, trustworthy, and relevant, and if to exclude it would compromise the

defendant's right to present a defense. *See* U.S. Const. amend. VI; La. Const. art. I, §16; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *State v. Van Winkle*, 94-0947 (La. 6/30/95), 658 So.2d 198, 201-02; *State v. Gremillion*, 542 So.2d 1074, 1078-79 (La. 1989); *see also State v. Juniors*, 03-2425 (La. 6/29/05), 915 So.2d 291, 325-26, *cert. denied*, 547 U.S. 1115 (2006).

The defense presented testimony at trial from the defendant's sister, Rita Broussard. Broussard testified that when the defendant's wife, Patricia, had cancer, the defendant was "at wit's end" trying to find ways to cure her because she refused chemotherapy and radiation treatments. Outside of the hearing of the jury, the State indicated the defense was free to make the point that the defendant's wife died of cancer, but that was all. The court advised the defense to ask Broussard questions, instead of a narrative, and to "get to the bottom line." The defense asked Broussard to tell the jury how the defendant's wife's death affected him. The State objected. The court advised the defense that Broussard could state her personal knowledge, but not her opinion. The court found Broussard's testimony was based on her own conclusions, rather than what she saw and heard. The defense told Broussard the jury needed to know what she saw in defendant's actions, not what she thought. Broussard stated, "I saw [the defendant] avoiding ...," and the State objected. The court sustained the objection, and the defense asked Broussard if she had seen the defendant crying or engaging in anything that showed his grief. Broussard stated she never saw the defendant cry after his wife died because he kept everything in.

The defense then questioned Broussard about her knowledge of whether the defendant gambled. Broussard testified that before the defendant's wife became

ill, the defendant was the role model for Broussard and his other siblings, but after the illness, the defendant's life was changing and he did not know how to handle it. The State objected, but the court ruled it would allow the testimony, "just frankly so that we can move to what [Broussard] actually saw and heard." Thereafter, in response to defense questioning, Broussard indicated the defendant was financially and emotionally stable before his wife's illness, but after the illness he borrowed money from her; the defendant lived with her, and she started finding straps from money in his room. Broussard indicated when she woke up for work, the defendant would be returning from the casino, and when she arrived home after work, he would go back to the casino after sleeping only a few hours.

Initially, we note the defense failed to object to the limitation of Broussard's testimony. Accordingly, error, if any, in the court's ruling was not preserved for review. *See* La. Code Evid. Ann. art. 103(A)(2) ("Error may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, and ... the substance of the evidence was made known to the court by counsel."); La. Code Crim. Proc. Ann. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.").

Moreover, any error that occurred was harmless. La. Code Crim. Proc. Ann. art. 921. The proper inquiry for determining harmless error "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The verdicts returned in this case were surely unattributable to the error, if any, in limiting Broussard's testimony concerning how the death of the defendant's wife affected him. Broussard subsequently gave detailed testimony concerning how the

defendant became addicted to gambling following the death of his wife. Additionally, the defense presented expert testimony concerning the defendant's gambling addiction.

This assignment of error is without merit.

Challenges for Cause

The defendant combines assignments of error numbers 4 and 5. He argues the trial court erred in failing to grant his motion for mistrial based on juror misconduct and in denying his challenges for cause against juror Burgess and prospective jurors Mier and Falgout.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality; or on the ground that the juror will not accept the law as given to him by the court. La. Code Crim. Proc. Ann. art. 797(2) & (4).

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. *State v. Taylor*, 03-1834 (La. 5/25/04), 875 So.2d 58, 62. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[5] *Id.* An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *Id.* The defense exhausted its peremptory challenges in this case. *See* La. Code Crim. Proc. Ann. art. 799.

---

[5] "The rule is now different at the federal level. *See United States v. Martinez-Salazar*, 528 U.S. 304 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge)." *Taylor*, 875 So. 2d at 62 n2.

A trial judge'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. *Taylor*, 875 So.2d at 63.

Danny Burgess and Elton Mier

The defendant argues, "[t]he fact that discussions were engaged in by the jurors and including juror Burgess and not admitted to by juror Mier shows that the testimony of defendant's sister... is the more credible and the challenge for cause should have been granted as it shows the juror's inability to remain partial as he had already made a decision as to the defendant's guilt."

During *voir dire*, outside of the presence of the prospective jurors, the defense asked prospective juror Mier if he had any discussions with Danny Burgess at the Coke machine. Mier indicated he had no idea who defense counsel was talking about. He denied anyone said, "We need to get this over as quickly as possible."

Thereafter, outside the presence of the prospective jurors, the defense called Rhonda Porrier, the defendant's sister, to testify. Porrier claimed she had overheard a conversation at the Coke machine between Burgess and Mier, and heard Burgess tell Mier, "Hun, this needs to hurry up and get over with" and "[e]verybody knows what the verdict is going to be."

Outside of the presence of the prospective jurors, Danny Burgess testified his conversation at the Coke machine with Mier was about someone's comment that it was fortunate to be chosen as a juror because then he would not have to wait around to get chosen for one of the other panels. Burgess denied stating, "we need to hurry

up and get this over with 'cause we already know what the verdict's going to be." He indicated Ellen Arceneaux was also present at the Coke machine.

Outside of the presence of the prospective jurors, Arceneaux indicated she went to get a candy bar and was present by the Coke machine when Burgess and Mier were there. Arceneaux indicated that nothing of importance was said by Burgess or Mier and they did not discuss the trial.

The defense challenged Burgess and Mier for cause, arguing Mier basically denied having a conversation with Burgess, but Burgess conceded he spoke to Mier, and Porrier swore under oath that the conversation occurred and, in counsel's opinion, her testimony was honest and forthright.

The State argued the testimony of Burgess and Mier indicated they had not discussed anything of any substance about the case, and Burgess and Mier had both indicated they could be fair and impartial. The court denied the challenges for cause against Burgess and Mier, finding Porrier's testimony was contradicted by the testimony of Burgess and Mier and it easily could have been the case that Porrier was mistaken. The court recognized it was possible Burgess and Mier were lying about the conversation, but did not think that was the case, finding the demeanor of both men to be acceptable and credible. The defense objected to the court's ruling and moved for a mistrial.[6]

The trial court did not abuse its broad discretion in denying the challenges for cause against Burgess and Mier. Both men demonstrated a willingness and ability to decide the case impartially according to the law and the evidence, and their 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. A trial court's

---

6 *See* discussion of assignments of error numbers 1 and 2, *supra*.

ruling on a motion to strike jurors for cause is afforded broad discretion because of the court's ability to get a first-person impression of prospective jurors during *voir dire*. *State v. Brown*, 05-1676 (La. App. 1st Cir. 5/5/06), 935 So.2d 211, 214, *writ denied*, 06-1586 (La. 1/8/07), 948 So.2d 121.

John Falgout

The defendant argues the trial court erred in denying the defense challenge for cause against John Falgout because the totality of his responses indicated he would think the defendant was probably guilty if he did not testify.

Falgout was on the first panel of prospective jurors. The trial court instructed Panel I that the defendant was presumed innocent and did not have to prove his innocence. The court asked the members of the panel if they could accord to the defendant his constitutional presumption of innocence throughout the entire trial, until convinced by competent evidence that the State had proven guilt beyond a reasonable doubt, and all members of the panel answered affirmatively. The court further instructed Panel I, that even after the State presented all of its evidence against the defendant, he did not have to testify, did not have to say anything, did not have to do anything, and did not have to present any witnesses. The court asked the members of the panel, if the defendant chose not to testify, would they accord him the presumption of innocence, and all members of the panel answered affirmatively.

Defense counsel asked Falgout if he could find the defendant not guilty if the defendant did not take the stand. Falgout replied that he would rather the defendant take the stand, but he could still come up with a verdict. Defense counsel then asked Falgout, "Do you think that you would think that he is probably guilty if I decided for him not to testify? That if he was innocent, he would get up there and take that witness stand?" Falgout answered, "I pretty much feel that way." Defense counsel

asked Falgout if it would be difficult for him to sit on the case if he felt that way, and he indicated that it probably would. Thereafter, the following colloquy occurred:

> [Court]: The question isn't: "Do you want to hear both sides of the story?" The question is: "Can you follow the law?"
>
> The law is that a person is presumed innocent and it is the State's burden to prove him guilty. It is not his burden to prove himself innocent. His choice of whether or not to testify is his and his lawyer's alone. If he makes that choice, can you judge the case based on the evidence that you have heard and put aside your feeling that you would rather see and hear both sides of the case? That you would prefer to hear from the [d]efendant; but, if he chooses not to, can you still judge the case based on the evidence that you have heard? Has the State presented enough evidence to convince you beyond a reasonable doubt that the [d]efendant is guilty, regardless of what the defendant chooses to do or not to do? That is the position the case will be in at that juncture.
>
> I had covered that fairly extensively before the lawyers started questioning all of you, and all of you told me that you can. That doesn't mean you can't change your mind after giving it further thought.
>
> [Falgout]: That is why I was telling [defense counsel] that. I mean ever since you said it earlier, I have been thinking and ...
>
> [Court]: Right. You can change your mind and tell me now whether or not you think you can follow the law and accord the [d]efendant the presumption of innocence regardless of whether he chooses to testify.
>
> [Falgout]: Yes, I could.

The defense challenged Falgout for cause, arguing the totality of his testimony was that he would think the defendant was probably guilty if he did not take the stand. The court found, in spite of the fact that at one point during questioning, Falgout had indicated, if the defendant did not take the stand, he would hold it against him, on further questioning by the court, he had reassessed that position. The court noted that it had clarified what the juror's responsibilities were in accepting the law, and had given Falgout a clear opportunity to come back to the court and say that he understood those responsibilities, but could not follow them. The court then noted

that, to the contrary, Falgout indicated he understood the responsibilities and could follow them. The court denied the challenge for cause.

The trial court did not abuse its broad discretion in denying the challenge for cause against Falgout. Falgout 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.

These assignments of error are without merit.

CONVICTIONS AND SENTENCES AFFIRMED.