

# **Petition Appendix**

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

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**2017 CO 89**

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**Supreme Court Case No. 14SC49**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 11CA1460

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**Petitioner:**

The People of the State of Colorado,

v.

**Respondent:**

Bradley Raymond Clemens.

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**Judgment Reversed**

*en banc*

September 11, 2017

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**JUSTICE BOATRIGHT** delivered the Opinion of the Court.

**JUSTICE HOOD** dissents, and **JUSTICE MÁRQUEZ** and **JUSTICE GABRIEL** join in the dissent.

¶1 We granted certiorari to consider whether the trial court abused its discretion when it relied on three prospective jurors' silence in response to questions asked of the entire venire to conclude that those jurors had been rehabilitated after they had previously expressed a preconceived opinion about the defendant's right to remain silent.<sup>1</sup>

¶2 We hold that a prospective juror's silence in response to rehabilitative questioning constitutes evidence sufficient to support a trial court's conclusion that the juror has been rehabilitated when, in light of the totality of the circumstances, the context of that silence indicates that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial. We conclude that the context surrounding the challenged prospective jurors' silence in this case supported the trial court's conclusion that they had been rehabilitated, meaning that the trial court did not abuse its discretion in denying defense counsel's challenges for cause.<sup>2</sup> Accordingly, we reverse the judgment of the court of appeals.

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<sup>1</sup> We granted certiorari to review the following issues:

1. Whether a prospective juror who has indicated a preconceived opinion can be rehabilitated by silence following a question or questions made to the entire venire.
2. Whether, even assuming that the trial court erred in depriving the challenges for cause, any error was harmless because the prospective jurors did not sit on the jury.

<sup>2</sup> Because we conclude that the trial court did not err in denying Clemens's challenges for cause, we need not consider the second issue on certiorari of whether any error was nonetheless harmless.

## **I. Facts and Procedural History**

¶3 Defendant Bradley Raymond Clemens chased his girlfriend out of their home and attacked her with a golf club on the street. He also attacked a bystander who attempted to intervene and stop the assault. The People charged Clemens with second-degree assault, felony menacing, and third-degree assault. Clemens pleaded not guilty, and the matter proceeded to a jury trial.

¶4 The trial court judge began jury selection for Clemens's trial by addressing all of the prospective jurors. She first summarized the main principles of criminal law, including that "[t]he defendant is never compelled to testify, and the fact that he does not cannot be used against him or as an inference of guilt and should not prejudice him in any way." The judge also told the jurors that she would ask them open-ended questions and that they should raise their hands if they had an answer. Later, she reminded the jurors that if anyone had answers to questions asked of the whole venire, "[P]lease just raise your hand." Consequently, prospective jurors actively volunteered answers throughout her and the attorneys' questioning.

¶5 During Clemens's portion of voir dire, defense counsel questioned the venire members, asking for their thoughts on relevant legal principles. Jurors 7, 10, and 12 all responded to various questions throughout defense counsel's voir dire. At one point, defense counsel asked the venire members questions about their ability to fairly assess the credibility of witnesses. After concluding that discussion, defense counsel pointed out to Juror 25 that he had commented that he would want to "hear both sides of what happened." Juror 25 confirmed that he felt that way, and defense counsel explained

that Clemens has a constitutional right not to testify. Juror 25 commented that there are “always two sides to the story” and that he would need to hear both sides before making a judgment call. Defense counsel followed up by asking, “if you don’t hear from [Clemens] you have some real concerns as to whether or not you can find him not guilty?” Juror 25 said that was correct.

¶6 Defense counsel then asked the entire venire whether anyone else felt the same way that Juror 25 did, and Juror 12 volunteered that when one of her children will not tell their side of the story, she becomes immediately suspicious. Defense counsel asked her whether she would have a hard time finding Clemens “not guilty if [she didn’t] hear from him and hear an explanation out of his mouth.” Juror 12 responded, “[P]robably.” Juror 10 followed with an opinion that if someone does not tell their side of the story, they have “something to hide.” Defense counsel responded by asking, “Even though the Judge may instruct you that you can’t use [his silence] as inference of guilt, you have real concerns you would use that as an inference of guilt?” and Juror 10 responded, “[Y]es.” Juror 9 and Juror 7 each said that they agreed with those same sentiments. When defense counsel followed up and asked Juror 7 if she would “have trouble following the Judge’s instruction that you may not use Clemens’s exercising of the right to remain silent, that you would use that against him,” she responded, “[Y]es.” Defense counsel then shifted her line of questioning and asked the panel for reasons a defendant may choose not to testify. Juror 8 said that a defendant may not want to testify because then the prosecution can ask him questions about his past offenses.

¶7 At that point the judge interjected. In so doing, the judge addressed the entire venire and explained that “[a] very important part of our judicial system is that the defendant never has to present any evidence or testify themselves [sic]. And you cannot use the fact that a defendant does not take the stand as evidence one way or the other.” She further advised the jury that if a defendant does not take the stand, “the jury is instructed that [it] cannot guess [what] the reason is.” The judge also explained that if the prosecution does not prove its case beyond a reasonable doubt as to each element of the offense, then the jury must find Clemens not guilty even if he puts on no evidence in his defense. At the conclusion of her explanation, the judge asked the venire, “[If] the prosecution[] failed to present enough evidence, would the fact that the defendant may not testify make you change your mind and say now I’m going to find him guilty because he didn’t testify even though there wasn’t enough evidence to prove the case; anyone who would do that?” Juror 25 said that he would—that if the defendant did not testify, then he must have something to hide and be guilty. No other juror responded to the court’s question.

¶8 Defense counsel then resumed her voir dire and asked whether anyone else who had previously indicated that they would want to hear the defendant testify “still feels that if you don’t hear from Mr. Clemens that would be a problem for you reaching a verdict of not guilty in this case?” At this point, Juror 47 answered that he could not find Clemens not guilty if he did not hear Clemens’s side of the story; Juror 48 agreed with Juror 47. Defense counsel then asked whether “anybody else ha[d] anything more to say?” Juror 11 said that he was glad to have the additional information from the

judge. Jurors 7, 10, and 12 did not respond. No other prospective jurors commented further on the issue, and defense counsel moved on to questioning the panel about domestic violence.

¶9 After defense counsel finished questioning the prospective jurors, she asked the court to excuse nine jurors for cause, including Jurors 7, 9, 10, 12, 25, 47, and 48. In support of her request, defense counsel argued that Jurors 7, 9, 10, and 12 had all indicated before the court's admonition that they would want to hear Clemens testify. The judge responded that, after she had clarified the law, Jurors 7, 9, 10, and 12 had not indicated that they could not follow the law when she called for a response, while Juror 25 had so indicated. Accordingly, the trial judge excused Jurors 25, 47, and 48 but denied defense counsel's request as to Jurors 7, 9, 10, and 12.

¶10 During peremptory challenges, the prosecution excused Juror 9. Defense counsel used peremptory challenges to excuse Jurors 7, 10, and 12. The jury was then sworn in, and the jurors took an oath to follow the law as instructed by the court. The matter proceeded to trial, and Clemens elected not to testify. Before deliberations, the judge instructed the jury that "[t]he defendant is never compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."

¶11 The jury ultimately found Clemens guilty of second- and third-degree assault but acquitted him of felony menacing. Clemens appealed his convictions, arguing, as relevant here, that the trial court erred in denying his request to excuse Jurors 7, 10, and 12 because they were not rehabilitated after they indicated that they could not follow

the law. In a split decision, a division of the court of appeals agreed with Clemens and held that silence does not constitute sufficient evidence that a prospective juror who had previously taken a position justifying a challenge for cause has been rehabilitated. People v. Clemens, 2013 COA 162, ¶ 25, \_\_\_ P.3d \_\_\_. The division thus reversed Clemens’s convictions and remanded his case for a new trial. Id. at ¶ 30. Judge Bernard concurred in part and dissented in part, concluding that the challenged jurors’ silence “in response to the court’s and defense counsel’s questions was an assurance that they would follow the court’s instructions.” Id. at ¶ 67. He reasoned that “reasonable jurors in these circumstances would only have answered these questions verbally if they still harbored concerns about the prospect that [Clemens] might not testify.” Id. at ¶ 58.

¶12 We granted certiorari to determine whether a juror’s silence in response to questions posed to the venire can be sufficient evidence of rehabilitation after that juror has indicated a preconceived notion. We hold that it can, and we conclude that the trial court did not abuse its discretion in denying Clemens’s challenges for cause because, in light of the totality of the circumstances evinced in the voir dire record, Jurors 7, 10, and 12’s silence constituted sufficient evidence supporting the trial court’s conclusion that they had been rehabilitated.

## **II. Standard of Review**

¶13 We review a trial court’s ruling on a challenge for cause to prospective jurors for an abuse of discretion. Carrillo v. People, 974 P.2d 478, 485 (Colo. 1999). This standard gives deference to the trial court’s assessment of the credibility of prospective jurors’ responses, recognizes the trial court’s unique role and perspective in evaluating the



demeanor and body language of prospective jurors, and serves to discourage reviewing courts from second-guessing the trial court based on a cold record. Id. at 486. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. People v. Stewart, 55 P.3d 107, 122 (Colo. 2002).

### **III. Applicable Law and Analysis**

¶14 To determine whether the trial court abused its discretion in finding that Jurors 7, 10, and 12 were rehabilitated, we first review the law applicable to the right to be tried by a jury and to jury selection; then, we explain the principles of juror rehabilitation and apply them to the case at hand.

#### **A. Silence as Evidence of Rehabilitation**

¶15 Both the United States and Colorado Constitutions guarantee criminal defendants the right to a trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. To protect this right, a trial court must excuse prejudiced or biased persons from the jury. Nailor v. People, 612 P.2d 79, 80 (Colo. 1980). Colorado law thus provides that the trial court shall sustain a challenge for cause when a prospective juror has indicated “enmity or bias toward the defendant or the state.” § 16-10-103(1)(j), C.R.S. (2016). However, such a juror will not be excused for cause if, after further examination, the court believes that the juror will follow the law and can be impartial:

[N]o person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial[.]

Id. Thus, if a court is satisfied that a challenged juror will render a fair and impartial verdict according to the law and the evidence presented at trial, then the court should not dismiss that juror for cause. People v. Young, 16 P.3d 821, 824 (Colo. 2001); see People v. Drake, 748 P.2d 1237, 1243 (Colo. 1988) (“A prospective juror’s expression of concern or indication of the presence of some preconceived belief as to some facet of the case does not automatically mandate exclusion of such person for cause.”).

¶16 The purpose of challenges for cause, as relevant here, is to remove jurors who have shown bias or enmity toward one of the parties, not jurors who simply enter the courtroom with a misunderstanding of the law. See § 16-10-103(1). Those jurors who initially misunderstand the law should not be removed for cause if, after explanation and rehabilitative efforts, the court believes that they can render a fair and impartial verdict based on the instructions given by the judge and the evidence presented at trial. The court makes this determination of whether a juror should be removed at the conclusion of voir dire, considering evidence such as the prospective juror’s response to the counsels’ questioning, the court’s own questioning, and the demeanor and body language of the juror in the context of the entire voir dire. See Carrillo, 974 P.2d at 486–87.

¶17 It is normal for jurors to arrive for jury duty without knowing the relevant law. In particular, a potential juror’s desire to “hear both sides” is reasonable considering that he knows that he will be called upon to decide the defendant’s guilt. For this reason, trial judges explain the correct legal principles to jurors during voir dire. If, after such explanation, jurors no longer hold tight to their preconceived expectations

and instead are willing to apply the law as instructed by the court, then the jurors are rehabilitated.

¶18 We considered whether a juror with a preconceived notion had been rehabilitated in Young. In that case, a prospective juror said that he believed that the defendant must be guilty because he was charged with the crime and “if a person weren’t guilty, he wouldn’t be [at trial].” Young, 16 P.3d at 822. In response to subsequent questioning, the prospective juror said that his perspective was a general personal judgment and he would not let it cloud his assessment of the facts presented at trial. Id. at 823. We concluded that the trial court did not abuse its discretion in denying the defendant’s challenge for cause because the juror had been rehabilitated. Id. at 825–26. We noted that it is not unusual for jurors to be confused or uncertain about difficult legal concepts, and we reasoned that the record as a whole supported the trial court’s decision. Id. at 825. Specifically, we relied on two facts: (1) that upon further questioning, the juror said that he would judge the case on the facts; and (2) that when defense counsel said, “[w]e’ve already talked about the presumption of innocence and I take it no one disagrees with that,” the juror did not voice disagreement. Id. Thus, that the juror did not vocalize disagreement with defense counsel’s correct statement of the law constituted evidence supporting the trial court’s finding that the juror had been rehabilitated. Id.

¶19 We agree with the reasoning in Young and extend its rationale to hold that a prospective juror’s silence in response to rehabilitative questioning constitutes evidence that the juror has been rehabilitated when the context of that silence indicates that the

juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.<sup>3</sup> On the other hand, a juror's silence in response to group questioning could reflect reluctance to disagree with the court; in that case, such silence would not be indicative of the silent juror's mindset. As such, examination of the entire voir dire record is necessary to provide context.

## **B. Application**

¶20 We now apply these principles to the question at hand: whether Jurors 7, 10, and 12 were rehabilitated such that the trial court properly denied Clemens's challenges for cause. To do so, we must examine the jurors' statements or silence in light of the totality of the circumstances.

¶21 Initially, each of the challenged jurors indicated that they would like to hear from the defendant to get both sides of the story. Again, this is not an abnormal expectation. When a person normally makes an important decision, they like to receive all pertinent information or hear both sides of an argument. A juror's inability to follow the court's instructions, however, is grounds for their disqualification from jury service. Thus,

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<sup>3</sup> We note that other jurisdictions have held that a prospective juror's silence can constitute evidence that the juror has been rehabilitated. See United States v. Martinez-Martinez, 369 F.3d 1076, 1082–83 (9th Cir. 2004) (construing a juror's failure to respond to a question framed in the negative as a commitment by that juror to follow the law, thus rehabilitating him); State v. Garrison, 276 S.W.3d 372, 377 (Mo. Ct. App. 2009) ("A venireperson's silence may constitute an unequivocal assurance of impartiality sufficient for the purpose of rehabilitation."). But see Doret v. United States, 765 A.2d 47, 56 (D.C. 2000), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36 (2004) (holding that jurors' silence in response to group questioning was insufficient to rehabilitate them when they had close or familial relationships with persons in law enforcement); People v. Arnold, 753 N.E.2d 846, 851–52 (N.Y. 2001) (holding a juror's participation in a group answer to questions posed to the entire venire to be insufficient to rehabilitate her).

when the jurors at issue here answered “yes” to defense counsel’s question of whether they would have difficulty following the court’s instruction to the contrary, they required rehabilitation in order to serve on the jury.

¶22 And, under the totality of the circumstances, we conclude that Jurors 7, 10, and 12 were rehabilitated, meaning the trial court did not abuse its discretion in declining to dismiss them for cause. The trial court observed these jurors throughout voir dire and reasonably concluded that their silence in response to the court’s and defense counsel’s questions confirmed that they would obey the instructions regarding Clemens’s right not to testify. In particular, we note that the venire was highly responsive to group questioning throughout voir dire. Many jurors, including Jurors 7, 10, and 12, volunteered answers to questions posed to the entire panel. Jurors 7, 10, and 12 were not hesitant to express their opinions even when they disagreed with the attorneys or the judge. Thus, the trial court fairly attributed their silence to their willingness to follow the law as instructed by the court as opposed to a fear of speaking up.

¶23 Based on the prospective jurors’ conduct throughout voir dire, the trial court reasonably distinguished Jurors 7, 10, and 12 from other jurors who reiterated that they would struggle to follow the court’s instruction regarding the right not to testify. Specifically, when the court asked the panel whether “anyone” would find Clemens guilty because he did not testify, even if the prosecution did not present enough evidence to prove its case, Juror 25 repeated his belief that the defendant had something to hide and must be guilty if he did not testify. This demonstrates that Juror 25 felt free to continue to disagree with the law, whereas Jurors 7, 10, and 12 did not express

hesitation to follow it. Furthermore, after defense counsel followed up—asking, “[B]ased on [the court’s explanation], is there anybody back here, some hands were raised before, who nevertheless you’ve been hearing what the Judge had to say, still feels that if you don’t hear from Mr. Clemens that would be a problem for you reaching a verdict of not guilty in this case?”—Jurors 47 and 48 volunteered that they would be unable to acquit a defendant who did not testify; conversely, Jurors 7, 10, and 12 did not respond to defense counsel’s inquiry. Indeed, defense counsel specifically called on the jurors who had previously said that they would have difficulty following this aspect of the law to answer; still, Jurors 7, 10, and 12 remained silent and, significantly, did not follow the lead of Jurors 47 and 48. Because the voir dire record demonstrates that Jurors 7, 10, and 12 responded affirmatively to questions when applicable to them, their silence is reasonably construed as a willingness to follow the court’s instructions.

¶24 In sum, Jurors 7, 10, and 12 actively expressed their opinions and participated with the court and counsel during the entire voir dire, yet they remained silent when the court and defense counsel both asked questions that called for a response only if a juror still felt that he could not follow the law honoring a defendant’s right not to testify. Thus, when viewed in context, their silence was the appropriate response to indicate that they no longer held that opinion. Accordingly, in light of the totality of the circumstances, the record supports the trial court’s conclusion that the challenged jurors were rehabilitated by the court’s and counsel’s legal explanations and further questioning. The judge, who was in a superior position to make this judgment, was within her discretion in concluding as much. See People v. Vecchiarelli-McLaughlin,

984 P.2d 72, 76 (Colo. 1999) (emphasizing the trial court's role in making rehabilitation determinations).

#### **IV. Conclusion**

¶25 We hold that a prospective juror's silence in response to rehabilitative questioning constitutes evidence sufficient to support a trial court's conclusion that the juror has been rehabilitated when, in light of the totality of the circumstances, the context of that silence indicates that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial. We conclude that the context surrounding the challenged prospective jurors' silence in this case supported the trial court's conclusion that they had been rehabilitated, meaning that the trial court did not abuse its discretion in denying Clemens's challenges for cause. Accordingly, we reverse the judgment of the court of appeals.

**JUSTICE HOOD** dissents, and **JUSTICE MÁRQUEZ** and **JUSTICE GABRIEL** join in the dissent.

JUSTICE HOOD, dissenting.

¶26 Jurors 7, 10, and 12 all indicated reluctance to apply the law protecting a defendant's constitutional right to remain silent at trial, even after the trial court had instructed them about how they must apply that right.

¶27 In the absence of effective rehabilitation, then, these jurors should have been disqualified. The majority does not seem to disagree. See maj. op. ¶ 21 ("Thus, when the jurors at issue here answered 'yes' to defense counsel's question of whether they would have difficulty following the court's instruction to the contrary, they required rehabilitation in order to serve on the jury.").

¶28 So, the question becomes whether these jurors' silence alone constitutes evidence of effective rehabilitation. Put differently: Should we allow trial courts to keep such jurors based on questionable inferences about what their silence means? Or should we simply require trial courts to ask each reluctant juror after further admonition whether the juror can apply the law as that juror has been instructed?

¶29 I vote for the latter. While the majority's approach arguably has the virtue of greater efficiency, that efficiency in my estimation comes at too high a cost, particularly when a constitutional right is at stake and there is a safer approach that requires so little more. Because I believe a defendant's right to an impartial jury is too fundamental to our criminal-justice system to be left to guesswork about the meaning of a juror's silence, I would affirm the division's judgment and require the trial court to find that a juror who has taken a disqualifying position has affirmatively retreated from that position. Because there was no such affirmative retreat here, I respectfully dissent.



## I. Analysis

¶30 The majority's reliance on People v. Young, 16 P.3d 821 (Colo. 2001) seems misplaced. Young is not a pure silence case. On the contrary, the juror at issue there amended his views during the very kind of follow-up questioning I advocate here. Id. at 825. While the court referenced the juror's failure to disagree with the statement of law at issue, that reference came after our emphasis of a much more revealing colloquy with the juror. In other words, there was silence plus specific discussion. Therefore, the majority today takes us well beyond Young.

¶31 Regardless, there are at least three reasons courts should not rely solely on jurors' silence for rehabilitation, which Judge Webb articulated well in the opinion below. I turn to those now.

¶32 First and foremost, as I've already mentioned, the right to an impartial jury is too fundamental to leave to speculation. Both the United States Constitution and the Colorado Constitution guarantee the right to an impartial jury. U.S. Const. amend. VI; Colo. Const. art. II, § 16. In order for a jury to be impartial, it must demonstrate a willingness to follow the law – including, above all, the law concerning the defendant's core constitutional protections. See Young, 16 P.3d at 824. The Supreme Court has explained that the Fifth Amendment's privilege against self-incrimination “reflects many of our fundamental values and most noble aspirations.” Carter v. Kentucky, 450 U.S. 288, 299 (1981) (citation omitted); see U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”). When jurors have expressed an inability to afford the defendant such a bedrock

constitutional safeguard, “[m]ere silence does not sufficiently protect” the right to an impartial jury. People v. Clemens, 2013 COA 162, ¶ 26, \_\_\_ P.3d \_\_\_.

¶33 Second, “silence in the face of group questions does not force jurors to engage in [the] type of critical self-reflection” necessary to confront their predispositions. Id. at ¶ 28; see People v. Arnold, 753 N.E.2d 846, 852 (N.Y. 2001). Keep in mind, we’re not discussing jurors who think criminal law works one way (i.e., we should hear “both sides”) and merely need to be instructed that it actually works a different way. See maj. op. ¶¶ 16–17. In individual exchanges with each of these three jurors, defense counsel correctly reiterated how the law works—echoing the court’s initial admonition that they could not use the defendant’s refusal to testify as an inference of guilt—and immediately afterwards asked if the juror would have concerns about following that law. Each juror answered in the affirmative. Group admonition is no solution to this problem, because these jurors may not even know themselves whether they can properly apply the law without first going through the exercise of talking about it. At the very least, such jurors should be politely confronted and asked to confirm that they can apply the law, or they should be excused.

¶34 Third, jurors’ silence gives too little for a trial court to assess and for an appellate court to review. See Clemens, ¶ 29. I agree with the majority that the trial court is in a superior position to gauge jurors’ demeanor and tone, maj. op. ¶ 24, but when jurors sit silently in response to group questions, what is there to gauge? Were this a case where the trial court noted that these jurors nodded their heads, or even stared pensively, we

might have a more meaningful conversation about whether these jurors had embraced the court's mandate. But here we do not even have that.

¶35 Instead, we are left to surmise what these jurors may have been thinking based on interactions during other parts of voir dire. I fear this exercise is too speculative for a trial judge sitting in the room, let alone a reviewing court with a cold record. Indeed, the record before us highlights the problem. Each of the three jurors' problematic statements was made in response to a group question by defense counsel. But beyond that question, Juror 10 never responded to any other group question. Juror 7 responded to only one other group question during the entire voir dire, and that question was purely factual (Have you ever been involved in a court case?). From this, the majority finds that the three jurors "actively expressed their opinions and participated with the court and counsel during the entire voir dire." Maj. op. ¶ 24. I would categorize their participation differently. And this is the source of my concern—it seems that a juror's likeliness to respond to challenging group questions is largely in the eye of the beholder.

¶36 Finally, I think the majority overestimates the willingness of jurors to share information. After all, how much forthrightness can we really expect after jurors have been admonished in front of a group of strangers? Even if the lawyers and the judge succeed in quickly cultivating an environment in which jurors feel more at ease in expressing their views, most will remain intimidated. See United States v. Hill, 552 F.3d 541, 548 (7th Cir. 2008). Common experience teaches us that most people fear public speaking. Most have little or no experience in a courtroom. Most know little

about the law, other than the need to show deference to the person wearing the robe. See Starr v. United States, 153 U.S. 614, 626 (1894) (“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.”). If the robed authority figure interjects and lectures the entire venire, does common sense suggest that most people listening would be eager to throw up a hand and persist in disqualifying views? Probably not (unless that person is seeking to avoid jury service altogether). In point of fact, after the judge here lectured about the Fifth Amendment and asked if anyone would still have difficulty abiding it, two jurors—numbers 47 and 48—who would later admit such difficulty (to defense counsel), remained silent.

¶37 At the very least, then, it seems trial courts should individually question jurors like Jurors 7, 10, and 12 about their disqualifying statements and require an affirmative retreat from those statements. Clemens, ¶ 27; see also Arnold, 753 N.E.2d at 852 (“[N]othing less than a personal, unequivocal assurance of impartiality can cure a juror’s prior indication that she is predisposed against a particular defendant or particular type of case.”).

## II. Conclusion

¶38 Because these jurors did not affirmatively retreat from a disqualifying position, I would hold that the trial court erred, which takes us to the other question on certiorari: whether such an error is reversible. Like the majority, I will not reach that question.

While it certainly warrants discussion, it warrants a full-court discussion. That will have to wait for another day.

¶39 For the foregoing reasons, I respectfully dissent.

I am authorized to state that JUSTICE MÁRQUEZ and JUSTICE GABRIEL join in this dissent.

Court of Appeals No. 11CA1460  
Arapahoe County District Court No. 10CR1316  
Honorable Elizabeth Beebe Volz, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Bradley Raymond Clemens,

Defendant-Appellant.

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JUDGMENT REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division IV  
Opinion by JUDGE WEBB  
Dunn, J., concurs  
Bernard, J., concurs in part and dissents in part

Announced December 5, 2013

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Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Jon W. Grevillius, Deputy  
State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Based on an altercation with the female victim and a male bystander who intervened, defendant, Bradley Raymond Clemens, was convicted of assault in the second degree (female victim) and assault in the third degree (bystander). He appeals on four grounds: (1) the trial court abused its discretion in denying three of his challenges for cause; (2) the trial court erred in referring to the prospective jurors only by number; (3) the trial court erred in denying his motion to suppress because the police entered his home without a warrant and arrested him; and (4) the trial court abused its discretion in admitting evidence of the female victim's statements that Clemens had threatened to rape her and of Clemens' question to the booking officer whether she had accused him of rape.

¶ 2 We agree with Clemens' first contention, which raises an unresolved question of law in Colorado, reverse the judgment, and remand the case for a new trial.

I. The Trial Court Abused its Discretion in Denying Clemens' Challenges for Cause to Prospective Jurors 7, 10, and 12

¶ 3 During voir dire, a prospective juror, who was later dismissed for cause, raised concerns about his ability to return a not-guilty

verdict if Clemens declined to testify. Defense counsel then asked the entire venire if others felt similarly. In response, prospective jurors 7, 10, and 12 each expressed similar concerns as to their ability to fairly weigh the evidence presented without hearing from Clemens.

Prospective juror 12 was the first to suggest “real concerns.”

[Defense Counsel]: . . . The question is the Judge says to you that the law does not require Mr. Clemens to testify. [A]re you going to find it hard to find him not guilty if you don’t hear from him and hear an explanation out of his mouth?

Prospective Juror [12]: Probably.

[Defense Counsel]: Okay. You have some real concerns about that?

Prospective Juror [12]: Uh-huh.

¶ 4 Defense counsel asked the venire if anyone else agreed.

Prospective juror 10 replied, “Yes, I just agree with them, too. I feel if you’re not going to tell your side, you have something to hide.”

Counsel asked, “Even though the Judge may instruct you that you can’t use that as [an] inference of guilt, you have real concerns you would use that as an inference of guilt?” Prospective juror 10 again answered, “Yes.”



¶ 5 Next, defense counsel asked prospective juror 7, “You have concerns that if Mr. Clemens doesn’t testify as is his right, that you would have trouble following the Judge’s instruction that you may not use his exercising of the right to remain silent, that you would use that against him?” Prospective juror 7 also replied, “Yes.”

¶ 6 Following these exchanges, the trial court explained three bedrock principles of criminal law to the entire venire: the prosecution bears the burden of proof; the defendant is not required to testify; and if the defendant chooses not to testify, that fact cannot be used in jury deliberations.<sup>1</sup> In response, another juror

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<sup>1</sup> “As I instructed you earlier, in our system of justice, it is the prosecution’s burden in every case to present the evidence to prove the case. If the prosecution fails to present sufficient evidence, then you must find the defendant not guilty.

“Another very important part of our judicial system is that the defendant never has to present any evidence or testify themselves. And you cannot use th[e] fact that a defendant does not take the stand as any evidence one way or the other. [I]t’s just not a factor to be taken into consideration. . . .

“The only evidence that matters is the evidence that comes from the witness stand. And a defendant for whatever reason they want to can choose not to take the stand. . . . Anyone here who cannot follow that instruction, that if the prosecution fails to present enough evidence to prove beyond a reasonable doubt every element of the offense, is there anyone here who could not find the defendant not guilty? And if the prosecution[] failed to present

expressed reluctance to apply the law, saying that he would hold Clemens' decision not to testify against him. This juror was also dismissed for cause.

¶ 7 Defense counsel then resumed voir dire and asked the venire whether “anybody . . . still feels that if you don’t hear from Mr. Clemens that would be a problem for you reaching a verdict of not guilty in this case.” Two other jurors, who also were both dismissed for cause later, expressed concerns about their ability to fairly weigh the evidence without hearing from Clemens. Again, defense counsel turned to the venire and asked if “anybody else ha[d] anything more to say” on the matter. But this time, the venire was silent.

¶ 8 At the conclusion of voir dire, defense counsel challenged prospective jurors 7, 10, and 12 for cause based on their earlier statements. The court denied each challenge. As to prospective juror 12, the court explained:

I think 12 didn’t—I did not see after my admonition to the jury about the question regarding the defendant not

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enough evidence, would the fact that the defendant may not testify make you change your mind and say now I’m going to find him guilty even though there wasn’t evidence to prove the case; anyone who would do that?”

having to testify. I don't think that 12 gave this strong indication . . . that she could not follow the instructions [of] the court, unlike [the other prospective jurors who were dismissed for cause], continued to maintain that position even after my admonition.

As to prospective jurors 7 and 10, the trial court added:

My recollection is that after I gave the instruction about not speculating and how that is an important part of our judicial system, one juror particularly noted that that helped explain it. And when I asked the rest of the panel if any of them could not follow that, there were no others that indicated [they could not] except for [a prospective juror dismissed for cause].

Defense counsel removed prospective jurors 7, 10, and 12 with peremptory challenges and exhausted all of his remaining challenges.

#### A. Standard of Review

¶ 9 Because of the trial court's superior position to assess a prospective juror's demeanor and credibility, *People v. Young*, 16 P.3d 821, 824 (Colo. 2001), challenges for cause are reviewed for abuse of discretion, *Medina v. People*, 114 P.3d 845, 856 (Colo. 2005). This standard is highly deferential. *Carrillo v. People*, 974 P.2d 478, 485-86 (Colo. 1999).

¶ 10 But appellate courts must not "abdicate their responsibility to ensure that the requirements of fairness are fulfilled." *Morgan v.*

*People*, 624 P.2d 1331, 1332 (Colo. 1981). Thus, although we must affirm if “the record contains a general statement by a juror that, despite any preconceived bias, he or she could follow the law and rely on the evidence at trial,” *People v. Phillips*, 219 P.3d 798, 802 (Colo. App. 2009), we will reverse if a prospective juror’s statements “compel the inference that he or she cannot decide crucial issues fairly and there is no rehabilitative questioning or other counterbalancing information,” *People v. LePage*, \_\_\_ P.3d \_\_\_, \_\_\_, 2011 WL 544019 (Colo. App. No. 09CA0676, Feb. 17, 2011) (internal quotation marks omitted), *cert. granted on other grounds*, No. 11SC235, 2011 WL 4015578 (Colo. Sept. 12, 2011).

## B. Law

¶ 11 Many Colorado cases have addressed challenges for cause to prospective jurors who, as here, expressed a need to hear “both sides” before rendering a verdict. *See, e.g., Morgan*, 624 P.2d at 1332 (holding that trial court erred in denying challenge for cause to juror who, following the court’s attempt to rehabilitate him, stated that he “could go along with it” but would “find it hard not hearing both sides of it” and he could not “picture one side of a trial”); *LePage*, \_\_\_ P.3d at \_\_\_ (holding that trial court did not err in

denying challenge for cause when the juror, who previously indicated a need to hear from the defendant, was rehabilitated); *People v. Blackmer*, 888 P.2d 343, 344-45 (Colo. App. 1994) (holding that when jurors communicate “difficulty applying the principles of law unless [they] hear[] the defendant testify at trial,” they should be dismissed for cause absent rehabilitation).

### C. Application

¶ 12 The initial statements by prospective jurors 7, 10, and 12 established sufficient grounds to challenge them for cause. Unless they were rehabilitated, the trial court abused its discretion in denying the challenges for cause.

¶ 13 In *People v. Hancock*, 220 P.3d 1015, 1019 (Colo. App. 2009), the division held that the trial court had abused its discretion in denying a challenge for cause to a juror who had made a disqualifying statement because the record showed neither successful rehabilitative questioning nor counter-balancing information. The division explained that a trial court should do one of three things when faced with a juror who indicates an unwillingness to apply the law: (1) dismiss the juror for cause; (2) follow-up with “effective rehabilitative questioning prior to denying

the challenge for cause”; or (3) make a credibility finding sufficient to explain why the “statements of doubt in [the juror’s] willingness or ability to follow the law should be disregarded.” *Id.* at 1019-20.

¶ 14 Here, the trial court attempted to satisfy the second requirement by responding to the jurors’ statements with a lengthy admonishment and then asking the venire whether it could apply the law as explained. Clemens does not dispute the adequacy of the admonition, nor does the record afford any basis for doing so.

¶ 15 But this leaves unanswered the question whether these prospective jurors’ silence, despite repeated questions to the venire, constituted sufficient rehabilitation. Because no Colorado case has addressed whether such silence is sufficient rehabilitation, we consider evidentiary principles, cases from other jurisdictions dealing with rehabilitation based on silence, and Colorado cases on rehabilitation of prospective jurors. We conclude that, where a prospective juror has taken a position supporting a challenge for cause, that juror’s silence following a question or questions to the entire panel does not constitute sufficient rehabilitation.

¶ 16 In certain circumstances, silence may be evidence of an affirmative response.<sup>2</sup> But the silence of a prospective juror who has made a problematic statement raises two concerns.

¶ 17 First, “[s]ome prospective jurors undoubtedly find voir dire intimidating,” *United States v. Hill*, 552 F.3d 541, 548 (7th Cir. 2008), and thus, they may be more reluctant to volunteer a response when questions have been posed to the venire than when questioned individually. Second, a prospective juror’s silence affords the trial court very little, if any, basis on which to make a credibility determination between the juror’s earlier statement and later lack of response to a rehabilitative question. *See, e.g., People*

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<sup>2</sup> For instance, while

silence generally is thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others[,] [i]n some situations, . . . where the normal reaction is to speak out in response to a statement, silence may have some probative value.

*People v. Quintana*, 665 P.2d 605, 610 (Colo. 1983) (citation and internal quotation marks omitted). For that reason, courts allow evidence of defendants’ failure to deny accusations made against them when they can hear them and could deny them without emotional or physical impediment. *Id.* And they allow evidence of victims’ failure to timely report an alleged sexual assault in certain circumstances. *Id.* at 610 n.6.

*v. Banks*, 2012 COA 157, ¶ 110 (holding trial court within its discretion to determine “the juror’s [verbal] assurance of fairness outweighed his statements of previous doubt[s].”); *People v. Richardson*, 58 P.3d 1039, 1042 (Colo. App. 2002) (in resolving challenges for cause, trial courts must “assess . . . the sincerity of potential juror’s responses, including statements that linguistically may appear to be inconsistent”).

¶ 18 For these reasons, we turn to the few other jurisdictions that have decided the question. But their answers to the question are split.

1. Yes, Silence Can Rehabilitate A Prospective Juror Who Previously Indicated an Unwillingness to Follow the Law

¶ 19 A panel of the Ninth Circuit has held that even if a juror had previously indicated an unwillingness to follow the law, “[i]n the context of the voir dire, [that juror’s] failure to respond [to a question posed to the entire venire] can be construed as a commitment by [the juror] to follow the law.” *United States v. Martinez-Martinez*, 369 F.3d 1076, 1082 (9th Cir. 2004). The court explained that the highly deferential standard of review applied to challenge for cause rulings on appeal requires appellate courts to



afford “great weight” to a trial court’s assessment of a juror’s silent response to a question posed to the venire. *Id.*

¶ 20 Similarly, the Missouri Court of Appeals has repeatedly held that “[a] venireperson’s silence may constitute an unequivocal assurance of impartiality sufficient for the purpose of rehabilitation.” *State v. Garrison*, 276 S.W.3d 372, 377 (Mo. Ct. App. 2009); *see also Edgar v. State*, 145 S.W.3d 458 (Mo. Ct. App. 2004); *State v. Clark*, 55 S.W.3d 398 (Mo. Ct. App. 2001); *State v. Bebermeyer*, 743 S.W.2d 516 (Mo. Ct. App. 1987). As the panel in *Bebermeyer* explained,

[i]f the jurors had been asked individually the questions the court asked them as a group and the jurors individually had given the same answers that the entire panel made, we would not have found an abuse of discretion in the court’s failure to sustain defendant’s objections for cause. Having made that determination, what is the effect of the manner in which the court asked the questions and received the responses?

743 S.W.2d at 520.<sup>3</sup>

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<sup>3</sup> Other courts have also considered jurors’ silence, as a negative response, but only where failure to disclose information would have suggested bias after the panel was asked questions “reasonably calculated” to reveal such bias. *E.g.*, *State v. Akins*, 867 S.W.2d 350, 355-56 (Tenn. Crim. App. 1993).

## 2. No, Silence Cannot Rehabilitate A Prospective Juror Who Previously Indicated an Unwillingness to Follow the Law

¶ 21 The District of Columbia, Florida, New York, and Texas have each concluded that jurors' silence in the face of a question posed to the venire is insufficient to rehabilitate previous problematic statements.

¶ 22 The D.C. Court of Appeals held that when prospective jurors indicated their potential bias, their silence in response to questions posed to the venire was insufficient to rehabilitate them. *Doret v. United States*, 765 A.2d 47, 56 (D.C. 2000). While recognizing that “trial judges often operate under enormous pressures to cope with very substantial caseloads, frequently finding themselves on ‘circuit overload,’ and thus, pressed to move trials along,” the court concluded that such considerations do not overcome a defendant’s Sixth Amendment right to an impartial jury and fair trial. *Id.* To safeguard this right when faced with prospective juror bias, “the trial judge has an obligation to probe further, and to elicit more than a nod of the head or a simple ‘yes’ or ‘no’ response, to ensure their impartiality and fairness as jurors.” *Id.*

¶ 23 Arriving at the same conclusion, the Louisiana Court of Appeals held that posing five questions to prospective jurors regarding their impartiality and inviting them to raise their hands to indicate an inability to apply the law as given are insufficient as “a method of rehabilitation . . . to rebut a juror’s unambiguous expression of partiality resulting from an individual questioning.” *State v. Lewis*, 724 So. 2d 830, 834 (La. Ct. App. 1998). Instead, when a defendant identifies any partiality of prospective jurors, including “statements that they could not accept the law as given if the defendant failed to take the stand on his behalf,” *id.* at 833, rehabilitation must occur “by obtaining [the prospective jurors] unequivocal and affirmative expressions that they could overcome their initial feelings such as to apply the law and evidence,” *id.* at 834.

¶ 24 Likewise, New York’s highest court held that “the collective acknowledgment by the entire jury panel that they would follow the Judge’s instructions . . . was insufficient to constitute an unequivocal declaration of impartiality from [the prospective juror].” *People v. Arnold*, 753 N.E.2d 846, 851-52 (N.Y. 2001). Rather, “nothing less than a personal, unequivocal assurance of impartiality

can cure a juror's prior indication that she is predisposed against a particular defendant or particular type of case.” *Id.* at 852.

¶ 25 For the following four reasons, the latter approach is both better reasoned and more consistent with Colorado law.

¶ 26 First, “trial by jury in criminal cases is fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). And as “a basic requirement of due process,” “the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 551 (1976) (internal quotation marks omitted); see also *People v. Rodriguez*, 914 P.2d 230, 260 (Colo. 1996) (“A criminal defendant has a fundamental right to trial before an impartial jury.”). But without a guaranty of impartiality, a defendant is deprived of this fundamental right, in violation of both the United States and the Colorado Constitutions. See, e.g., *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000) (“A defendant has a constitutional right to a fair and impartial jury.” (citing U.S. Const. amend. VI; Colo. Const. art. II, § 16)). Mere silence does not sufficiently protect such a right.

¶ 27 Second, in *People v. Sandoval*, 706 P.2d 802, 804 (Colo. App. 1985), the division held that rehabilitation requires nothing less than a “clear[] retreat” from previous statements indicating bias or an unwillingness to apply the law. And in *People v. Wilson*, 114 P.3d 19, 23 (Colo. App. 2004), the division required “a statement from the prospective juror that he could render or would try to render an impartial verdict according to the law and evidence, that he would apply the facts to the law and follow the instructions of the court, or that he would presume defendant innocent until proved guilty.” But silence does not constitute either a “clear retreat” or “a statement” indicating a willingness to follow the law.

¶ 28 Third, as explained by the New York Court of Appeals, adequate rehabilitation requires prospective jurors to “address [their] personal attitudes” and “to confront the crucial question whether [they] could be fair to [the] defendant in light of [their] expressed predisposition[s].” *Arnold*, 753 N.E.2d at 852. But silence in the face of group questions does not force prospective jurors to engage in this type of critical self-reflection.

¶ 29 Fourth, a categorical rule requiring an affirmative response from prospective jurors who have made problematic statements

recognizes the trial courts' unique opportunity to assess juror demeanor. *See, e.g., Young*, 16 P.3d at 825-26 (“[O]nly the trial court can assess accurately the juror’s intent from the juror’s tone of voice, facial expressions, and general demeanor.”). But absent individual questioning of prospective jurors who have made disqualifying statements, for a trial court to make the credibility findings that are crucial to appellate review on the prospective jurors’ silence alone would be, at best, very difficult. *See Hancock*, 220 P.3d at 1016 (“[D]enials of challenges for cause have been reversed where prospective jurors have made statements demonstrating bias and there are no other statements in the record that would permit the reviewing court to affirm based on deference to the trial court’s assessment of unclear or ambiguous responses.”).

¶ 30 Accordingly, because the statements of prospective jurors 7, 10, and 12 indicating unwillingness to follow the law were not overcome by their responses to individual questioning, we conclude that the trial court abused its discretion in denying Clemens’

challenges for cause. Therefore, the judgment must be reversed and the case is remanded for a new trial.<sup>4</sup>

¶ 31 In so holding, we do not diminish the value of questions posed to the entire venire, where no prospective juror has already indicated unwillingness or inability to return an impartial verdict. See *People v. Pena-Rodriguez*, 2012 COA 193, ¶¶ 17-18 (“[N]o venire member responded when asked about having feelings ‘for or against the defendant.’”), *cert. granted*, No.13SC9 (Colo. Aug. 19, 2013); see also *Bryant v. Brady*, 427 S.W.2d 179, 180 (Ark. 1968) (“[W]here other jurors understood the questions and responded [disclosing their relationship with the party], we must accept the jurors’ silence as a responsive answer to the court’s questions.”).<sup>5</sup>

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<sup>4</sup> This result is dictated by *People v. Macrander*, 828 P.2d 234 (Colo. 1992), which the supreme court is revisiting. See *People v. Novotny*, 2011 WL 484366 (Colo. No. 10SC377, Jan. 31, 2011). We decline to address Clemens’ contention that the trial court erred in referring to the prospective jurors only by number because it is unlikely to recur on retrial. See *Perez v. People*, 2013 CO 22.

<sup>5</sup> Courts’ analyses of questions posed to the entire venire regarding pretrial publicity illustrate the utility and limitations of such questions. In cases involving extensive pretrial publicity, “a general question [whether they have been biased by the media] directed to the entire group of prospective jurors is inadequate.” *United States v. Giese*, 597 F.2d 1170, 1183 (9th Cir. 1979). But “in cases of less publicity . . . [s]everal general questions addressed to the entire

II. The Warrantless Entry into Clemens' House Was Lawful,  
Because the Police Officers Reasonably Believed that the  
Female Victim Had Apparent Authority to Consent

¶ 32 Although we reverse the judgment on challenge for cause grounds, we address Clemens' contention that the trial court erred in denying his motion to suppress because the suppression ruling could affect the retrial.

¶ 33 When the police arrived at the scene, they found three male bystanders and the female victim, bloodied around the mouth and appearing intoxicated. One of the bystanders had attempted to intervene when he saw a male holding a woman down, striking her with what he said looked like a broken golf club. When he sought to intervene, the perpetrator struck him with the golf club. One of the other bystanders kicked the perpetrator in the head, and the man ran off. The third male bystander heard the shouts for help and called 911.

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panel of jurors, followed by individual questioning of jurors who respond affirmatively to the initial inquiries, may be sufficient if it becomes clear that few jurors have any knowledge of the case.” *Id.* A juror’s previous indication of an unwillingness to follow the law is like the probable bias arising from exposure to extensive pretrial publicity. In such circumstances, individualized questioning “may be the only means of assuring a defendant his right to an impartial jury.” *United States v. Dankser*, 537 F.2d 40, 56 (3d Cir. 1976).



¶ 34 While the eyewitnesses told the responding officers that the perpetrator fled the scene into one house, the female victim told them that she lived with Clemens at a different address in the same block. The officers did not obtain a warrant, but immediately and forcefully entered Clemens' house, which the female victim had correctly identified, and arrested him.

#### A. Standard of Review

¶ 35 “A ruling on a motion to suppress requires the trial court to make findings of historical fact and apply controlling legal standards to the established facts.” *People v. Nelson*, 2012 COA 37, ¶ 14. “In reviewing a trial court’s denial of a motion to suppress, we defer to that court’s factual findings and reverse only where its conclusions are unsupported by its evidentiary findings or where it applied an erroneous legal standard.” *People v. Trusty*, 53 P.3d 668, 672 (Colo. App. 2001). We review the trial court’s ultimate legal conclusions de novo. *People v. Prescott*, 205 P.3d 416, 419 (Colo. App. 2008).

#### B. Law

¶ 36 A warrantless entry into a home is presumptively unconstitutional unless an exception to the warrant requirement

applies. *People v. Strimple*, 2012 CO 1, ¶ 20. One such exception is when officers receive valid consent to enter by one with “common authority” over the premises. *People v. Sanders*, 904 P.2d 1311, 1313 (Colo. 1995). But absent actual common authority, a warrantless entry may be constitutional if the person who gave consent reasonably appeared to have such authority. *Petersen v. People*, 939 P.2d 824, 830 (Colo. 1997).

¶ 37 When applying the apparent authority doctrine, the key question is “whether a police officer’s belief that a third party had the authority to consent to a search is objectively reasonable.” *People v. McKinstrey*, 852 P.2d 467, 472 (Colo. 1993). In ambiguous circumstances, police officers must make “reasonable inquiries” into the third party’s authority. *Id.* at 473.

### C. Application

¶ 38 The following evidence admitted at the suppression hearing supports the trial court’s finding that the officers reasonably believed the female victim had authority to consent to the entry:

- She was found unclothed in the street in front of the house, in the middle of the night, suggesting a connection with the house;

- She explained that her keys, an indicator of common authority, were inside the house, along with her clothing;
- She told the officers that she lived in the house with Clemens; and
- She granted them permission to forcibly enter the house, if necessary, which would be unlikely from a person without any authority over the premises.

¶ 39 In Clemens’ view, however, this evidence presented “at best, ambiguous circumstances.” He argues that the officers should have made additional inquiries into her authority because they received inconsistent statements about Clemens’ address. But under the circumstances of an active crime scene involving multiple assaults and victims, this inconsistency does not create sufficient ambiguity to hold that the trial court abused its discretion in finding the officers’ belief to have been reasonable.

¶ 40 Accordingly, we conclude that under the apparent authority doctrine, the officers properly entered Clemens’ house without a warrant.<sup>6</sup>

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<sup>6</sup> Because of this conclusion, we need not address the exigent circumstances exceptions to the warrant requirement.

### III. Remaining Evidentiary Contentions

¶ 41 We decline to address Clemens' evidentiary contentions because how they may arise on retrial is indeterminable.

### IV. Conclusion

¶ 42 The judgment of conviction is reversed and the case is remanded for a new trial consistent with this opinion.

JUDGE DUNN concurs.

JUDGE BERNARD concurs in part and dissents in part.

JUDGE BERNARD concurring in part and dissenting in part.

¶ 43 I respectfully dissent from the majority’s conclusion in section I. I concur with the rest of the opinion.

¶ 44 During its introductory remarks, the trial court stated, as is pertinent here, that “the defendant is never compelled to testify, and the fact that he does not cannot be used against him or as an inference of guilt and should not prejudice him in any way.”

¶ 45 During her voir dire, defense counsel asked the prospective jurors whether, despite this instruction, they would have “real concerns as to whether . . . you can find [defendant] not guilty” if he did not testify. Jurors 7, 10, and 12 all responded indicating that they harbored such concerns.

¶ 46 The responses of these three jurors obviously raised the question whether they would follow the pertinent law during the trial and during their deliberations. But I would conclude, for the following reasons, that the trial court did not abuse its discretion when it denied defendant’s challenges for cause concerning them. *See People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007) (“[W]hen, as here, a potential juror’s statements compel the inference that he or she cannot decide crucial issues fairly, a challenge for cause

must be granted in the absence of rehabilitative questioning or other counter-balancing information.”).

I. The Court Instructed All Jurors to Volunteer Relevant Information During Voir Dire, and the Jurors in This Case Did So Repeatedly

¶ 47 The trial court told the jurors in its opening remarks that “it is very important that you listen to the questions asked and that you answer them to the best of your ability.” The court added that, when it asked questions, “I may ask a very general open-ended question and ask all those that it applies [to] to raise their hand[s]. And then you may . . . answer it.”

¶ 48 The court repeated this direction a short time later when it stated, “I’m going to ask some questions . . . of you as a whole. And if . . . you have an answer to . . . these questions, please just raise your hand.”

¶ 49 By my count, the prospective jurors, some of them more than once, followed this procedure almost seventy times during the court’s initial questioning *before* the attorneys began their own inquiries. As a result, I would conclude that each prospective juror clearly understood, from the beginning of voir dire, that he or she

should volunteer a response when the court asked a pertinent question.

¶ 50 The pattern of jurors volunteering information continued during defense counsel's questions. She ultimately questioned fifteen prospective jurors about whether they had "concerns" if defendant did not testify. Although the record is not entirely clear because it does not indicate all the jurors who may have raised their hands in response to defense counsel's questions, many jurors volunteered their responses. It appears to me that jurors 7, 10, and 12 were among these volunteers.

II. After Jurors 7, 10, and 12, Among Others, Expressed Their Concerns, the Trial Court Instructed the Prospective Jurors That They Could Not Use Defendant's Failure to Testify Against Him

¶ 51 After the first twelve jurors spoke with defense counsel about this issue, including jurors 7, 10, and 12, the court instructed the jury that a "very important part of our judicial system is that the [defendants] never ha[ve] to present any evidence or testify themselves. And you cannot use th[e] fact that a defendant does not take the stand as any evidence one way or the other." The court added:

- "The only evidence that matters is the evidence that comes

from the witness stand”;

- “[A] defendant for whatever reason . . . can choose not to take the stand”;
- “If a defendant does not take the stand, that is the defendant’s decision”; and
- “[T]he jury is instructed that [it] cannot guess [what] that reason is.”

### III. The Court and Defense Counsel Asked Narrow and Focused Questions That Would Prompt Reasonable Jurors to Volunteer a Response If They Still Had Concerns About Finding Defendant Not Guilty If He Did Not Testify

¶ 52 After instructing the jury about the pertinent law, the court asked the jurors two questions. Was there “anyone” who would convict defendant despite the court’s instruction that, if the jury found that the prosecution did not prove all the elements of the offense beyond a reasonable doubt, then the jury was required to acquit him? Was there “anyone” who would find defendant guilty “because he didn’t testify even though there wasn’t evidence to prove the case?”

¶ 53 One juror, number 25, volunteered a response to these questions. He stated that, if defendant did not testify, then



defendant must have “something to hide . . . [a]nd to me that’s guilty.” The court excused this juror for cause.

¶ 54 Defense counsel then asked the prospective jurors a similarly focused question. “[I]s there anyone back here, some hands were raised before, who [has heard] . . . what the [j]udge had to say, [and who] *still feels* that if you don’t hear from [defendant] that would be a problem for you reaching a verdict of not guilty in this case?” (Emphasis added.)

¶ 55 Three jurors responded. One stated that if “I don’t hear [defendant’s] story, I could not” acquit him. A second agreed with that statement. But a third replied, “I was glad to have the added information about how to approach it.” Jurors 7, 10, and 12 did *not* respond.

¶ 56 Jurors 7, 10, and 12 were obviously included in the word “anyone,” which was contained in the court’s and defense counsel’s questions. And defense counsel’s question further inquired whether, *after* listening to the court’s instruction, any juror *still* felt that the juror’s ability to acquit defendant would be impaired if he did not testify.

¶ 57 I would conclude that the direct and focused phrasing of the court's and defense counsel's questions indicates that the prospective jurors would only have responded affirmatively if they would not follow the court's instructions. In this context, silence means to me that jurors 7, 10, and 12, would have followed the court's instructions.

¶ 58 Their silence in the face of the court's and defense counsel's questions further convinces me that jurors 7, 10, and 12 were following the rules of voir dire that the court had laid out in its opening remarks, and which had been followed repeatedly during voir dire. We know that other jurors volunteered answers to the court's and defense counsel's questions, and the record does not suggest that Jurors 7, 10, and 12 had difficulty speaking up.

¶ 59 In my view, reasonable jurors in these circumstances would only have answered these questions verbally if they still harbored concerns about the prospect that defendant might not testify. See *State v. Akins*, 867 S.W.2d 350, 355-56 and n.13 (Tenn. Crim. App. 1993) ("Silence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer. . . . The test is whether a reasonable, impartial

person would have believed the question, as asked, called for a juror response under the circumstances.”).

#### IV. Opinions from Other Jurisdictions That Engage in Similar Analysis Support the Conclusion that I Would Reach

¶ 60 The facts of this case are much like those in *United States v. Martinez-Martinez*, 369 F.3d 1076, 1082-83 (9th Cir. 2004). There, a juror raised his hand to express discomfort with a legal provision that an attorney had explained. But the Court of Appeals concluded that he had been rehabilitated, even though he was silent when the prosecutor asked the jurors the following question: Was there “anybody in here who would not be able to put aside [his or her] daily experiences . . . and apply the facts that you will hear from the witnesses . . . to the law that [the trial judge] will provide to you at the end of this trial?”

¶ 61 Similarly, *State v. Garrison*, 276 S.W. 3d 372, 377 (Mo. Ct. App. 2009), held that “[a] venireperson’s silence may constitute an unequivocal assurance of impartiality sufficient for the purpose of rehabilitation.” Defense counsel there asked the prospective jurors whether they would be “concerned” if defendant did not appear at his trial. Several answered that they might be concerned.

¶ 62 The prosecutor in *Garrison* asked the jury a series of questions about a defendant’s right not to be present in court. These questions included vocabulary that was similar to the words the trial court and defense counsel used here. There were inquires such as: (1) “does everyone . . . understand” that the defendant could choose to exercise his right not to attend the trial; (2) “do you understand” that his presence or absence was not evidence; (3) “is there anyone here” who did not understand that concept; and (4) “is there anyone here” who could not put aside the defendant’s potential absence in evaluating the testimony and evidence that would be submitted? There was no response to any of these questions, and the prosecutor noted that he saw “no hands.”

#### V. Colorado Law Supports the Conclusion That I Would Reach

¶ 63 It is fair to say in this case that jurors 7, 10, and 12 “displayed a preconceived opinion that defendants in general should testify in their own defense.” *People v. Vechiarelli-McLaughlin*, 984 P.2d 72, 76 (Colo. 1999). But a juror’s “equivocation and ambivalence” about that issue do not necessarily support a challenge for cause. *Id.*

¶ 64 It is one thing if a juror “display[s] persistent doubts” about whether the juror can be “fair in the absence of testimony from the defendant.” *Id.* It is another thing if the “examination” of jurors or “other evidence” satisfies the trial court that the juror will “render an impartial verdict according to the law and the evidence submitted to the jury at trial.” *Id.* at 75 (quoting § 16-10-103(j), C.R.S. 2013).

¶ 65 We do not have the trial court’s perspective on prospective jurors. We do not know whether jurors 7, 10, and 12 were hesitant or emphatic when they expressed their concerns. Unlike the trial court, we do not know what the demeanor of jurors 7, 10, and 12 was when they expressed those concerns, or when the court instructed them, or when the court and defense counsel asked them the three questions, or when the other jurors supplied answers to those questions. *See Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999) (The abuse of discretion standard “recognizes the trial court’s unique role and perspective in evaluating the demeanor and body language of live witnesses, and it serves to discourage an appellate court from second-guessing those judgments based on a cold record.”).

¶ 66 The expression of the “preconceived opinion” by Jurors 7, 10, and 12 that defendant should testify was comparatively brief. I would not characterize their statements as “persistent.” See *Vechiarelli-McLaughlin*, 984 P.2d at 76. And there is no indication in the record that they “persisted” in their preconceived opinions “despite efforts by the court to rehabilitate them.” See *id.*

¶ 67 I would conclude, under the circumstances here, that the silence of jurors 7, 10, and 12 in response to the court’s and defense counsel’s questions was an assurance that they would follow the court’s instructions. See *People v. Drake*, 748 P.2d 1237, 1243 (Colo. 1988) (A trial court may consider “a prospective juror’s assurance that he or she can fairly and impartially serve on the case.”). I would not, as a result, “overturn the trial court’s resolution of [the] challenge[s] for cause” in this case because I would conclude that the record contains a “basis for supporting” the trial court’s decisions. *People v. Harlan*, 8 P.3d 448, 462 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Court address: Arapahoe District Court  
Division 309  
7325 South Potomac Street  
Centennial, Colorado 80112

COURT USE ONLY

THE PEOPLE OF THE STATE OF COLORADO,

v.

BRADLEY RAYMOND CLEMENS,

Defendant.

Case No: 10CR1316

Division: 309

COURT REPORTER'S TRANSCRIPT

The hearing in this matter commenced on Monday,  
March 14, 2011, before the HONORABLE ELIZABETH BEEBE VOLZ,  
Judge of the District Court.

A P P E A R A N C E S

FOR THE PEOPLE:

SAMUEL EVIG, ESQ.  
Registration No: 36550

FOR THE DEFENDANT:

EVAN ZUCKERMAN, ESQ.  
Registration No: 11608

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1 instructed that you cannot guess as to why that reason is.

2 PROSPECTIVE JUROR: I understand.

3 MS. ZUCKERMAN: Based on all that, is there anybody  
4 back here, some hands were raised before, who nevertheless  
5 you've been hearing what the Judge had to say, still feels  
6 that if you don't hear from Mr. Clemens that would be a  
7 problem for you reaching a verdict of not guilty in this case?

8 PROSPECTIVE JUROR: I don't hear the other person's  
9 story, I could not.

10 MS. ZUCKERMAN: And your Juror Number?

11 PROSPECTIVE JUROR: 47.

12 MS. ZUCKERMAN: 47, okay. And, 48, you agree?

13 PROSPECTIVE JUROR: I agree.

14 MS. ZUCKERMAN: That you could not find not guilty  
15 or make a decision if you don't hear from the jury -- I mean  
16 from Mr. Clemens?

17 PROSPECTIVE JUROR: I would assume he had something  
18 to hide.

19 MS. ZUCKERMAN: You would assume he had something to  
20 hide and that's Juror Number 48?

21 PROSPECTIVE JUROR: Yes.

22 MS. ZUCKERMAN: Anybody else have anything more to  
23 say because I don't have much more time and there are a bunch  
24 of questions. Juror Number 11, I kind of saw you nodding your  
25 head as -- when the Judge was talking about I think if you

1 don't hear from Mr. Clemens?

2 PROSPECTIVE JUROR: Oh, I was glad to have the added  
3 information about how to approach it.

4 MS. ZUCKERMAN: Okay.

5 PROSPECTIVE JUROR: You know, it was more like,  
6 okay, it gave a little more precise information, don't  
7 speculate on it, and I was listening.

8 MS. ZUCKERMAN: All right. Here's a broad question:  
9 You've heard there was discussion when Mr. Evig was  
10 questioning you regarding domestic violence. And I'm asking  
11 the group and I'm going to start here, is there anything about  
12 the charges or case involving -- that is alleging to involve  
13 domestic violence that sort of gives you that visceral  
14 reaction or makes you feel like I don't want to touch it?  
15 Anybody in the back row that feels that way either because you  
16 know someone who has been involved or from your own personal  
17 experience which I'm not asking you to disclose but anything  
18 about a domestic violence case that makes you uncomfortable?  
19 Juror Number 12, you're nodding?

20 PROSPECTIVE JUROR: Yes.

21 MS. ZUCKERMAN: Is it something that makes you feel  
22 that it would be difficult for you to sit as a juror in a case  
23 involving allegations of domestic violence?

24 PROSPECTIVE JUROR: It would be difficult --

25 MS. ZUCKERMAN: Okay.

1 PROSPECTIVE JUROR: -- for me.

2 MS. ZUCKERMAN: It would be difficult?

3 PROSPECTIVE JUROR: Uh-huh.

4 MS. ZUCKERMAN: You have concerns that it would be  
5 hard to sit here and listen to a case like that?

6 PROSPECTIVE JUROR: Uh-huh.

7 MS. ZUCKERMAN: Anybody in this front group? Juror  
8 Number 16?

9 PROSPECTIVE JUROR: I agree with her. If it were  
10 shoplifting, it would be easy. But domestic violence.

11 MS. ZUCKERMAN: You have some real serious concerns  
12 that you could sit here and listen to the evidence fairly in a  
13 case like that?

14 PROSPECTIVE JUROR: I do.

15 MS. ZUCKERMAN: Anybody else in this front group?  
16 In the back, anybody feel that -- okay, that's fine. Juror  
17 Number --

18 PROSPECTIVE JUROR: 36.

19 MS. ZUCKERMAN: 30 what?

20 PROSPECTIVE JUROR: 36.

21 MS. ZUCKERMAN: 36, oh, okay. I guess I don't want  
22 to get personal. There's something about the nature of the  
23 domestic violence case.

24 PROSPECTIVE JUROR: Visceral, talked about before.

25 MS. ZUCKERMAN: Absolutely. So it would be

1 difficult for you to sit here and listen to accusations and  
2 evidence that goes to that issue?

3 PROSPECTIVE JUROR: Yes.

4 MS. ZUCKERMAN: You have concerns that you could sit  
5 here and judge fairly as a juror because of that?

6 PROSPECTIVE JUROR: I think I could judge fairly.  
7 I'm concerned my mind would go somewhere else. That's what it  
8 is.

9 MS. ZUCKERMAN: Okay, thank you. Anybody else on  
10 the issue of domestic violence?

11 PROSPECTIVE JUROR: I would not be objective.

12 MS. ZUCKERMAN: You could not be objective and  
13 that's Juror Number 48. Thank you. Anybody else feel that  
14 way?

15 Before I leave this, can anyone say that you have  
16 any kind of bias against a guy accused of getting physical  
17 with a woman? Anybody feel that that's an issue, an issue of  
18 credibility perhaps? Juror Number 4?

19 PROSPECTIVE JUROR: I wouldn't have a problem.

20 MS. ZUCKERMAN: No, okay. I want to talk a little  
21 bit about credibility. I spoke with Juror 21 earlier about  
22 credibility and how given his personal knowledge and  
23 information and wife that he has some information that some  
24 other people might not have, domestic violence issue. Does  
25 anybody feel that pretty much if a woman accuses a man of

1 hurting her, she must be telling the truth? Anybody believe  
2 that as a general rule? Anybody back there? Anyone disagree  
3 that sometimes a woman -- could be a man or woman, might make  
4 accusations of being hurt or something happening out of anger?  
5 Everyone agree with that, sometimes that can happen, out of  
6 jealousy, out of hurt? Everyone agrees; no one disagrees?  
7 Does anybody think that being under the influence of whether  
8 it's drugs or alcohol will affect a person's ability to  
9 perceive reality, what's really going on?

10 PROSPECTIVE JUROR: Agree or disagree?

11 MS. ZUCKERMAN: That was Number 23. Disagree.  
12 Anyone disagree with that? Does anyone feel that if there are  
13 injuries involved, that it would be Mr. Clemens' burden to  
14 show you how those injuries occurred? Juror Number 17,  
15 somebody says they got hurt, accuse someone of hurting them,  
16 whose burden is it to show you where those injuries came from?

17 PROSPECTIVE JUROR: I'm not sure.

18 MS. ZUCKERMAN: You don't know?

19 PROSPECTIVE JUROR: No.

20 MS. ZUCKERMAN: If the Judge tells you that any --  
21 it is the prosecution's burden to prove beyond a reasonable  
22 doubt every element, injury being one of them, of a crime, do  
23 you have a problem with that? Do you understand what I'm  
24 asking you?

25 PROSPECTIVE JUROR: Not precisely.

1 MS. ZUCKERMAN: Okay. One of the elements of one of  
2 the charges is that bodily pain resulted. Whose burden is it  
3 in a case like this to prove whether there was bodily pain or  
4 any kind of associated injury with that?

5 PROSPECTIVE JUROR: Depends on the circumstance, I  
6 think.

7 MS. ZUCKERMAN: It would depend on the circumstance?

8 PROSPECTIVE JUROR: Yes.

9 MS. ZUCKERMAN: The Judge tells you that it's the  
10 government's burden, prosecutor's job to prove to you every  
11 element of an offense beyond a reasonable doubt. Whose burden  
12 is it then, Number 1?

13 PROSPECTIVE JUROR: Prosecution.

14 MS. ZUCKERMAN: And do you think that then  
15 Mr. Clemens as the defendant in this case would have to  
16 disprove anything? In other words, show no -- that's not how  
17 it happened?

18 PROSPECTIVE JUROR: If he chooses to.

19 MS. ZUCKERMAN: Do you feel that he has a burden to  
20 do that; would you look to him to do that?

21 PROSPECTIVE JUROR: I would think he would.

22 MS. ZUCKERMAN: What if he doesn't present any  
23 evidence, then what?

24 PROSPECTIVE JUROR: Depends on the first evidence.  
25 I'm not sure.

1 THE CLERK: Juror 21, now you can fill the seat.

2 MR. EVIG: Your Honor, may we approach? I  
3 apologize.

4 (Whereupon, a bench conference was held and the  
5 following proceedings were had:)

6 MR. EVIG: The person sitting in seat 14 should be  
7 brought up there now, otherwise never make it on the jury.

8 THE COURT: Right.

9 MR. EVIG: Because we skipped her.

10 THE COURT: Well, now you seat 14.

11 MS. ZUCKERMAN: Right.

12 MR. EVIG: Right.

13 (Whereupon, the bench conference was concluded.)

14 THE COURT: Sorry.

15 THE CLERK: We'll get it right eventually, I  
16 promise.

17 MS. ZUCKERMAN: We would thank and excuse Juror  
18 Number 20.

19 THE COURT: Thank you, you're excused.

20 THE CLERK: Which, I guess, means -- right?

21 PROSPECTIVE JUROR: Now I go.

22 MR. EVIG: Your Honor, the People thank and excuse  
23 Juror 1.

24 THE COURT: Juror 1, you're excused. Thank you.

25 THE CLERK: Juror 22, that's you, go ahead and sit

1 in that seat.

2 MS. ZUCKERMAN: The defense would thank and excuse  
3 Juror Number 10.

4 THE COURT: Juror Number 10, thank you.

5 THE CLERK: Juror 23, go ahead and fill the seat.

6 MR. EVIG: Your Honor, the People thank and excuse  
7 Juror Number 6.

8 THE COURT: Juror Number 6, thank you very much.

9 THE CLERK: Juror 24.

10 MS. ZUCKERMAN: The defense thank and excuse Juror  
11 Number 7.

12 THE COURT: Juror Number 7, thank you very much.

13 THE CLERK: So that gets us to Juror 27, sit in the  
14 back row.

15 MR. EVIG: Your Honor, the People thank and excuse  
16 Juror Number 24.

17 THE COURT: Thank you.

18 THE CLERK: Juror 28.

19 MS. ZUCKERMAN: The defense would thank and excuse  
20 Juror Number 12.

21 THE COURT: Juror Number 12, thank you very much.

22 THE CLERK: Juror 29.

23 MR. EVIG: Your Honor, at this time the People would  
24 reserve.

25 THE COURT: All right.



1 MS. ZUCKERMAN: The defense thanks and excuses Juror  
2 29.

3 THE COURT: Juror 29, thank you very much.

4 MR. EVIG: The People would reserve.

5 THE CLERK: Juror 24.

6 MR. EVIG: Your Honor, the People would again accept  
7 the panel.

8 THE COURT: All right.

9 (Whereupon, there was a pause in the proceedings.)

10 MS. ZUCKERMAN: Your Honor, the defense would thank  
11 and excuse Juror Number 34.

12 THE COURT: Thank you, ma'am.

13 THE CLERK: Juror 36.

14 MR. EVIG: Your Honor, the People would accept the  
15 panel.

16 MS. ZUCKERMAN: Judge, may we approach?

17 THE COURT: Yes.

18 (Whereupon, a bench conference was held and the  
19 following proceedings were had:)

20 MS. ZUCKERMAN: Judge, I didn't raise this before,  
21 and I didn't realize until she just walked up. I recall Juror  
22 Number 36 saying she'd have real trouble sitting in DV case  
23 and her color seemed to change when I questioned her. I don't  
24 know if anyone else noticed. I only raised it because I  
25 didn't raise it earlier. I can't tell if she looks upset or

1 not just by the nature of the offense.

2 MR. EVIG: Your Honor, I do recall seeing here. It  
3 would be difficult for her to sit on the case. But I went  
4 through and questioned a number of jurors about whether they  
5 would apply the reasonable doubt standard and find somebody  
6 guilty if they are charged with DV. All of those, including  
7 36, said no.

8 MS. ZUCKERMAN: I was just worried because I missed  
9 it before.

10 (Whereupon, the bench conference was concluded.)

11 THE COURT: Looks like we have the jury so I will  
12 excuse the rest of the panel. If you are not seated up here  
13 in the jury box, then you will be excused from this case. You  
14 need to go downstairs. If there's any other instructions,  
15 Anna, let me know, but turn in badges and you'll get a form.  
16 And I'm going to have you do your oath and take a quick break  
17 and come back and do opening statements, all right.

18 (Whereupon, the remainder of the jury panel left the  
19 courtroom.)

20 THE COURT: All right. If the members sitting in  
21 the jury panel box, raise your right hands, please.

22 (Whereupon, the jury was duly sworn by the Court.)

23 THE COURT: All right. I'm going to have you go  
24 back into the jury room. Anna will take you back there.  
25 There's some notebooks back there. She has some other

1 instructions. Take a 15-minute break. We'll come back and  
2 begin with opening statements. But I do want to remind you  
3 that even though you have now been selected to sit on this  
4 jury and even though you've all taken an oath, this case is  
5 far from beginning. You should not go back there and discuss  
6 the case or give any opinions about anything that you have  
7 about the case. You'll hear the opening statements. You'll  
8 hear instructions. We'll begin to take evidence and you're  
9 far from really starting this case. But thank you. You are  
10 allowed to use cell phones until deliberations.

11 Deliberations, we will take the cell phones from you. So,  
12 yes, this would be a good time to contact family or friends or  
13 co-workers or whatever you need to do to let them know what's  
14 happening and that you're now on the jury.

15 (Whereupon, the jury panel left the courtroom.)

16 MS. ZUCKERMAN: Judge, I wanted to make a record.  
17 Now or later?

18 THE COURT: No, go right ahead.

19 MS. ZUCKERMAN: I wanted to supplement my record  
20 regarding the challenges for cause that I asked, that I had --  
21 people I asked to be excused.

22 With respect to Juror Number 7, all of these jurors  
23 expressed an inability to be fair if Mr. Clemens did not  
24 testify. Juror Number 7 said it would probably be a problem  
25 to testify. She gave the example of the kids, if something is

1 wrong, you need to tell. Juror Number 12, looking at my  
2 notes.

3 THE COURT: When you're saying Juror Number 7 and  
4 Juror Number 12, you mean their original numbers or person  
5 sitting in that seat now?

6 MS. ZUCKERMAN: I'm talking about the original  
7 numbered jurors. I don't know who is sitting where.

8 THE COURT: Juror Number 7, all right. I  
9 understand. Go ahead.

10 MS. ZUCKERMAN: These are that I believe should have  
11 been excused for cause.

12 THE COURT: Uh-huh. Uh-huh.

13 MR. EVIG: Juror Number 12 similarly said there  
14 would be a problem if he didn't testify, if there's something  
15 wrong, you want to say it, uncomfortable -- no, that was about  
16 DV-type charges. Okay. Juror Number 10 said if the defendant  
17 was silent, you must have something to hide. That was Juror  
18 Number 10. Juror Number 11 nodded head and said understood,  
19 couldn't speculate, but wanted to hear from Mr. Clemens.  
20 Juror number 7, I think I said 7 again but then further notes  
21 Number 7 didn't testify, yes, I would use it against him.  
22 Juror Number 9 said even with an instruction -- even  
23 instructed by the Judge, if you have an opportunity to tell  
24 your story, you should, I would hold it against him. That's  
25 all, Judge.