State v. Dotson

Court of Appeal of Louisiana, Fourth Circuit

February 17, 2016, Decided

NO. 2015-KA-0191

Reporter
187 So. 3d 79 *; 2016 La. App. LEXIS 253 **; 2015-0191 (La.App. 4 Cir. 12/17/16);

STATE OF LOUISIANA VERSUS DERRICK A. ***DOTSON***

Subsequent History: Writ granted by ***State*** *v.* ***Dotson****, 216 So. 3d 809, 2017 La. LEXIS 628 (La., Mar. 24, 2017)*

Reversed by, Remanded by ***State*** *v. Derrick, 2017 La. LEXIS 2321 (La., Oct. 18, 2017)*

Prior History: [1]** APPEAL FROM CRIMINAL DISTRICT COURT ORLEANS PARISH. NO. 514-318, SECTION "G". Honorable Julian A. Parker, Judge.

Disposition: REVERSED AND REMANDED.

Overview

HOLDINGS: [1]-In an appeal of defendant's 2014 conviction and sentence for forcible rape, under *La. Const. art. I, § 17*, and *La. Code Crim. Proc. Ann. art. 797*, the trial court's erroneous denial of defendant's challenge for cause required the reversal of defendant's conviction because the prospective juror ***stated*** during voir dire that her mother had been raped and murdered and that the event might have a bearing on her ability to be a fair and impartial juror; defendant's subsequent challenge of the prospective juror for cause was denied, defendant had to use a peremptory challenge to excuse the prospective juror, and he thereafter exhausted his remaining peremptory challenges; and, in reviewing the prospective juror's complete voir dire testimony, bias, prejudice, or the inability to render judgment according to law could be reasonably implied.

Outcome
Judgment reversed and remanded.

Core Terms

trial court, juror, prospective juror, challenge for cause, impartial, rape, aggravated, peremptory challenge, sentence, voir dire, murdered, sexual assault, forcible rape, questioning, kidnapping, replied

Case Summary

LexisNexis® Headnotes

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Entitlement

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

HN1[] **Peremptory Challenges, Entitlement**

La. Const. art. I, § 17 guarantees to a defendant the right to full voir dire examination of prospective jurors and the right to challenge jurors peremptorily.

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Number of Challenges

HN2[] **Peremptory Challenges, Number of Challenges**

In trials of offenses necessarily punishable by imprisonment at hard labor, each defendant shall have 12 peremptory challenges, and the ***State*** shall have 12 for each defendant. La. Code Crim. Proc. Ann. art. 799.

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause

HN3[] **Juries & Jurors, Challenges for Cause**

To ensure a fair and impartial trial, the ***State*** and defendant can challenge a juror for cause. La. Code Crim. Proc. Ann. art. 797.

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Bias & Impartiality

HN4[] **Challenges for Cause, Bias & Impartiality**

See La. Code Crim. Proc. Ann. art. 797.

Criminal Law & Procedure > Appeals > Reversible Error > Juries & Jurors

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Number of Challenges

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN5[] **Reversible Error, Juries & Jurors**

When a defendant uses all 12 of his peremptory challenges, a trial court's erroneous ruling on a defendant's challenge for cause that results in the deprivation of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of his conviction and sentence. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and he has exhausted all of his peremptory challenges. Accordingly, to establish reversible error in the denial of one of his challenges for cause, a defendant must show: (1) that he exhausted all of his peremptory challenges; and (2) that the trial court erred in refusing to grant his challenge for cause.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Judicial Discretion

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

Criminal Law & Procedure > Appeals > Reversible Error > Juries & Jurors

HN6[] **Standards of Review, Abuse of Discretion**

Determinations on excluding a prospective juror for cause are made on a case-by-case basis. A trial court is vested with broad discretion in ruling on challenges for cause, and its ruling will only be reversed when a review of the voir dire as a whole reveals an abuse of discretion.

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Determinations

HN7[] **Challenges for Cause, Determinations**

When a juror expresses a predisposition as to the outcome of a trial, a challenge for cause should be granted. If after subsequent questioning, or rehabilitation, the juror exhibits the ability to disregard previous views and make a decision based on the evidence presented at trial, the challenge is properly denied. When assessing whether a challenge for cause should be granted, the district judge must look at the juror's responses during his or her entire testimony, not just isolated answers.

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Determinations

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > Judicial Discretion

HN8[] **Challenges for Cause, Determinations**

A prospective juror's seemingly prejudicial response is not grounds for an automatic grant of a challenge for cause, and a trial court does not abuse its discretion when denying the challenge, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence.

Counsel: Leon A. Cannizzaro, Jr., District Attorney, Matthew C. Kirkham, Assistant District Attorney, Parish of Orleans, New Orleans, LA, COUNSEL FOR APPELLEE/***STATE*** OF LOUISIANA.

Mary Constance Hanes, LOUISIANA APPELLATE PROJECT, New Orleans, LA, COUNSEL FOR DEFENDANT/APPELLANT.

Judges: (Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano). LOBRANO, J., DISSENTS.

Opinion

[*80] [Pg 1] Defendant Derrick A. ***Dotson*** appeals his 2014 conviction and sentence for forcible rape, for which he was adjudicated a third-felony habitual offender and sentenced to the mandatory term of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. For the reasons that follow we find that the trial court's erroneous denial of the defendant's challenge for cause requires the reversal of the defendant's conviction.

Procedural History

The defendant Derrick A. ***Dotson*** was charged by grand jury indictment in Count 1 with the aggravated rape of K.T.; in Count 2 with the aggravated kidnapping of K.T.; in Count 3 with the aggravated rape of **[**2]** H.B. and in Count 4 with the aggravated kidnapping of H.B.[1]

The defendant was tried as to Count 1 and Count 3. After trial, the twelveperson jury returned a verdict of guilty of forcible rape on Count 3 but was unable to reach a verdict on Count 1, whereupon the trial court declared a mistrial as to that count.[2]

[Pg 2] Subsequently, the trial court denied defendant's motion for a new trial and conducted a habitual offender hearing. Initially, the trial court sentenced him to serve forty years at hard labor. Later, the trial court adjudicated the defendant a third-felony habitual offender, vacated his original sentence, and resentenced him to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.

Facts of the Case

For the purposes of this opinion only a brief synopsis of the underlying facts of the case are necessary.

In January of 1994, K.T. reported to the New Orleans Police Department (NOPD) that she had been sexually assaulted. At that time, she gave a statement to the investigating officer, **[**3]** Detective Debbie Coffee, and underwent a sexual assault exam. K.T. related to the officer the events that transpired. She ***stated*** that while crossing the street in Eastern New Orleans, a man she recognized as someone with whom her mother had worked with at one time summoned her to his vehicle.[3] When she approached she noticed a gun in his lap. He directed her to get into the car and drove to a wooded area. Still in possession of the gun, he forced K.T. to engage in sexual intercourse. He later dropped her off near where he had initiated the encounter. **[*81]** The police investigation did not lead to a suspect.

In February of 1996, H.B. reported to the NOPD that

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[1] The aggravated rape charges are violations of La. R.S. 14:42 and the aggravated kidnapping charges are violations of La. R.S. 14:44.

[2] Ultimately, Counts 1, 2, and 4 were nolle prosequied.

[3] Although, K.T. recognized the defendant she did not know his name.

she had been sexually assaulted. Detective Alan Gressett interviewed H.B. and she was transported to the [Pg 3] hospital where she underwent a sexual assault exam. In her interview with Det. Gressett, H.B. explained that her attacker had appeared at her home earlier in the day. He knocked on the door and asked for H.B.'s brother. Her brother recognized the man as someone who had come to the door previously asking for money.[4] The man claimed that he was there to thank H.B.'s **[**4]** brother for the money. Shortly thereafter her brother left for work. H.B. was home alone and the man returned. This time he claimed to be locked out of his house and asked H.B. to place a call for him. The phone number did not work and she returned to the door to inform the man. At that time, he forced himself into the home and sexually assaulted H.B. Like in K.T.'s case, the investigation did not yield a suspect.

In 2010, NOPD Det. Decynda Barnes was assigned to the NOPD Cold Case Homicide Division. At that time, the division was investigating unsolved rape cases. She ran the DNA collected from the victims' through CODIS and received a DNA letter identifying the DNA match. In both the case involving K.T. and the one involving H.B., the DNA match was to Derrick ***Dotson***. She contacted the victims, generated a police report for the cases, and secured arrest warrants in both cases.

As the procedural history ***states***, the defendant was tried and convicted of the forcible rape of H.B., but the jury was unable to reach a verdict in the forcible rape of K.T. At trial, the defendant testified and maintained that he had been in romantic **[**5]** relationships with both K.T. and H.B. He further ***stated*** that the sexual encounters were consensual.

[Pg 4] ***Assignments of Error***

On appeal, the defendant raises two assignments of error. First, he maintains that the trial court erred in denying his challenge for cause of a prospective juror. Second, the defendant argues that the trial court abused its discretion in refusing to grant defendant's motion for mistrial regarding the ***State***'s DNA expert's testimony.

Assignment of Error Number One

In his first assignment of error, the defendant argues that the trial court erred in denying his challenge for cause of a prospective juror on the grounds that she could not be a fair and impartial juror. More specifically, during *voir dire* it was determined that the prospective juror's mother had been raped and murdered. When asked by the trial court whether the fact that her mother had been raped and murdered would have any bearing on her ability to be a fair and impartial juror in the case, the prospective juror replied: "Yes, it might." No further questioning was conducted of the prospective juror on that issue.

HN1[↑] *Louisiana Constitution article I, § 17* guarantees to a defendant the right to full *voir dire* examination of prospective jurors **[**6]** and the right to challenge jurors peremptorily. ***HN2***[↑] In trials of offenses necessarily punishable by imprisonment at hard labor, such as in the present case, each defendant shall have twelve peremptory challenges, and the ***State*** shall have twelve for each defendant.[5] Additionally, ***HN3***[↑] to ensure a fair **[*82]** and impartial trial, the ***State*** and defendant can challenge a juror for cause.[6]

[Pg 5] ***HN5***[↑] When a defendant uses all twelve of his peremptory challenges, a trial court's erroneous ruling on a defendant's challenge for cause that results in the deprivation of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of his conviction and sentence.[7] Prejudice is presumed when a defendant's **[**7]** challenge for cause is erroneously denied and he has exhausted all of his peremptory challenges.[8] Accordingly, to establish reversible error in

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[4] On that occasion, H.B.'s brother had given the man five dollars.

[5] *La. C.Cr.P. art. 799*.

[6] ***HN4***[↑] *La. C.Cr.P. Art. 797* — Challenge for Cause reads in pertinent part:

The ***state*** or the defendant may challenge a juror for cause on the ground that:

> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence.

[7] ***State v. Juniors, 2003-2425, p. 7-8 (La. 6/29/05), 915 So. 2d 291, 304***; ***State*** *v. Fields, 2013-1493, p. 22 (**La. App. 4 Cir.** 10/8/14), 151 So. 3d 756, 771*.

[8] ***State v. Carmouche, 2001-0405, p. 8 (La. 5/14/02), 872 So. 2d 1020, 1028***; ***State*** *v. Kirk, 2011-1218, p. 10-11 (**La. App. 4 Cir.** 8/8/12), 98 So. 3d 934, 941*.

the denial of one of his challenges for cause, a defendant must show: (1) that he exhausted all of his peremptory challenges; and (2) that the trial court erred in refusing to grant his challenge for cause.[9]

In this case, the defendant exhausted his peremptory challenges, thus the issue is whether the trial court erred when it denied his challenge for cause. ***HN6***[⬆] Determinations on excluding a prospective juror for cause are made on a case-bycase basis.[10] Additionally, this Court recognizes that a trial court is vested with broad discretion in ruling on challenges for cause, and its ruling will only be reversed when a review of the *voir dire* as a whole reveals an abuse of discretion.[11]

[Pg 6] On appeal, the defendant maintains that the prospective juror at issue expressed her inability to be impartial, establishing justification for a challenge for cause in accordance with *La. C.Cr.P. art. 797*. The record is clear that when asked the routine question by the court as to whether she or a close friend or relative had ever been a crime victim, **[**8]** the prospective juror replied that her mother had been raped and murdered. As previously ***stated***, when asked whether that event would have any bearing on her ability to be a fair and impartial juror in the case, she replied: "Yes, it might." Thereafter, neither the trial judge, the ***State***, nor defense counsel questioned the prospective juror any further concerning her answer.[12]

The record further reflects that the defendant subsequently challenged the prospective juror for cause. When the trial court asked the nature of the cause for which he was challenging the prospective juror, the defense counsel ***stated*** "her mother was murdered and raped." The trial court declared that that was not **[*83]** "cause." Defense counsel began to reply, "[s]he said that would --," but before he could finish his statement the trial court cut him off, ***stating***: "No, she didn't." Defense counsel replied: "Yes, she did." Ultimately, the defendant had to use a peremptory challenge to excuse the prospective juror and thereafter exhausted **[**9]** his remaining peremptory challenges.

HN7[⬆] When a juror expresses a predisposition as to the outcome of a trial, a challenge for cause should be granted.[13] If after subsequent questioning, or [Pg 7] rehabilitation, the juror exhibits the ability to disregard previous views and make a decision based on the evidence presented at trial, the challenge is properly denied.[14] When assessing whether a challenge for cause should be granted, the district judge must look at the juror's responses during his or her entire testimony, not just isolated answers.[15]

The ***State*** relies heavily on ***State*** *v. Robinson*, in support of the trial court's denial of the challenge for cause.[16] In *Robinson*, a prospective juror ***stated*** in *voir dire* that she did not know whether she could be impartial in a second degree murder prosecution because three of her children had been victims of crimes. This Court found that a review of the *voir dire* in its entirety "did not reveal facts from which bias, prejudice, or inability to render judgment according to law might be reasonably implied".[17] That is what distinguishes this case from *Robinson*.

The facts of this case are more on point with ***State*** *v. Holmes*.[18] The **[**10]** defendant in *Holmes* was charged with aggravated rape, aggravated kidnapping, and aggravated crime against nature. This Court found that a prospective juror, who could not assure the court that her husband's kidnapping would not affect her judgment in the case, was not "impartial."[19] Likewise, in this case, the prospective juror's past experience

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[9] *Carmouche, supra;* ***Juniors, 2003-2425, p. 8, 915 So. 2d at 305***.

[10] ***State*** *v. Ballard, 98-2198 (La.10/19/99), 747 So.2d 1077, 1080*.

[11] ***State*** *v. Anthony, 98-406, p. 22 (La. 4/11/00), 776 So. 2d 376, 391*; ***State*** *v. Brown, 2012-0626, p. 14 (**La. App. 4 Cir. 4/10/13), 115 So. 3d 564, 574*.

[12] Later, when the *voir dire* panel as a group was asked by the ***State*** why a victim might not come forward in a case such as the present one, the prospective juror volunteered: "There's shame involved."

[13] ***State*** *v. Lindsey, 2006-255, p. 3 (La. 1/17/07), 948 So.2d 105, 107-08*.

[14] *Id.*

[15] *Id.*

[16] ***State*** *v, Robinson, 08-0652 (**La.App. 4 Cir. 5/13/09), 11 So.3d 613* (Belsome, J., concurring).

[17] *Id. at 12-13, 11 So.3d at 621*.

[18] ***State*** *v. Holmes, 619 So.2d 761 (**La.App. 4 Cir. 5/27/93)*.

[19] *Id. at 765*.

impacts her ability to be impartial.

[Pg 8] This Court appreciates that HN8[↑] a prospective juror's seemingly prejudicial response is not grounds for an automatic grant of a challenge for cause, and a trial court does not abuse its discretion when denying the challenge, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence.[20] Unfortunately, we do not have the benefit of further questioning to determine that the potential juror possessed the willingness and ability to decide the case impartially according to the law and evidence. The only indicator we have regarding whether her mother's rape and murder would have an impact on her ability to be impartial in the defendant's prosecution for forcible rape is an affirmative response of "yes, it might." Additionally, **[**11]** when the defendant raised the challenge for cause, the trial court did not allow a full recitation of the prospective juror's response. Moreover, the transcript reflects that the trial court was adamant that the prospective juror did not say anything that would denote her **[*84]** inability to be impartial. In reviewing this prospective juror's complete *voir dire* testimony, bias, prejudice, or the inability to render judgment according to law can be reasonably implied. Thus, we find that the trial court abused its discretion in denying the challenge for cause.

Accordingly, the defendant's conviction is reversed and the case is remanded to the trial court for further proceedings.[21]

REVERSED AND REMANDED

Dissent by: LOBRANO

Dissent

LOBRANO, J., DISSENTS.

I respectfully dissent.

[20] *See* ***State*** *v. Dorsey, 10-0216, pp. 23-24 (La. 9/7/11); 74 So.3d 603, 622-623*.

[21] This Court pretermits any discussion of the defendant's second assignment of error.

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State v. Dotson

Supreme Court of Louisiana

October 18, 2017, Decided

NO. 2016-K-0473

Reporter
234 So. 3d 34 *; 2017 La. LEXIS 2321 **; 16-0473 (La. 10/18/17);; 2017 WL 4681942

STATE OF LOUISIANA VERSUS DERRICK A. ***DOTSON***

Subsequent History: On remand at *State v. Dotson, 2017 La. App. LEXIS 2526 (La.App. 4 Cir., Dec. 18, 2017)*

Prior History: [1]** ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS.

State v. Dotson, 187 So. 3d 79, 2016 La. App. LEXIS 253 (La.App. 4 Cir., Feb. 17, 2016)

Disposition: REVERSED and REMANDED.

Case Summary

Overview

HOLDINGS: [1]-In a trial for aggravated rape, it was not reversible error to deny a challenge for cause under *La. Code Crim. Proc. Ann. art. 797(2)* as to a prospective juror whose mother had been had been raped and murdered and who, when asked by the trial court if the circumstances related to her mother's death had any bearing on her ability to be impartial, ***stated***, "Yes, it might," because no follow-up questions were posed to in fact establish that the prospective juror could not be fair and impartial. The use of the word "might" rendered the response equivocal; thus the need for rehabilitation by the ***state*** was not triggered.

Outcome
Reversed and remanded.

Core Terms

prospective juror, juror, impartial, rape, challenge for cause, trial court, voir dire, questions, trial judge, appellate court, murdered, equivocal, defense counsel, fair and impartial, peremptory challenge, crime victim, responses, aggravated, abused, cases, bias, rehabilitate, voir dire examination, trial court's denial, render a judgment, instant case, sentence, ordeal, reasons

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Juries & Jurors > Peremptory Challenges > Number of

Challenges

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN1 **Criminal Process, Right to Jury Trial**

La. Const. art. I, § 17 guarantees a defendant the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of peremptory challenges granted to a defendant in a trial of an offense punishable necessarily by imprisonment at hard labor, such as the one currently before this court, is fixed by law at twelve. La. Const. art. I, § 17(A); La. La. Code Crim. Proc. Ann. art. 799. When a defendant uses all twelve of his peremptory challenges, an erroneous ruling by a trial court on a challenge for cause that results in depriving the defendant of a peremptory challenge constitutes a substantial violation of the defendant's constitutional and statutory rights, requiring reversal of the conviction and sentence. A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused. Therefore, prejudice is presumed when a challenge for cause has been erroneously denied by a trial court and the defendant exhausts all peremptory challenges statutorily afforded to the defendant. In summary, where all peremptory challenges have been used, as in this case, a defendant need only demonstrate the erroneous denial of a challenge for cause to establish reversible error warranting reversal of a conviction and sentence.

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN2 **Appellate Review, Standards of Review**

If all available peremptory challenges have not been used, a defendant must show some prejudice to overcome the requirements of La. Code Crim. Proc. Ann. art. 921.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

HN3 **Bias & Impartiality, Actual & Implied Bias**

A defendant may challenge a juror for cause if the juror is not impartial, whatever the cause of his partiality. La. Code Crim. Proc. Ann. art. 797(2). Additionally, art. 797(3) provides a defendant may challenge a juror for cause on the ground that the relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict. A juror who will not accept the law as given to him by the court may also be challenged for cause by the defendant. art. 797(4).

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN4 **Voir Dire, Questions to Venire Panel**

Voir dire examination of prospective jurors is designed to discover bases for challenges for cause and to secure information for an intelligent exercise of peremptory challenges. The questions propounded are designed to determine any potential adverse influence on the prospective jurors ability to render an impartial verdict. A prospective juror's responses during voir dire cannot be considered in isolation. A trial judge is vested with broad discretion in ruling on challenges for cause, and such a ruling is subject to reversal only when a review of the entire voir dire reveals the judge abused his discretion. The trial judge's refusal to excuse a prospective juror on the ground he is not impartial is not an abuse of discretion where, after further inquiry or instruction (frequently called rehabilitation), the prospective juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

HN5 **Bias & Impartiality, Actual & Implied Bias**

The fact that a juror may have painful memories associated with the subject of a criminal trial is not listed as a basis for a challenge for cause under La. Code Crim. Proc. Ann. art. 797. That a prospective juror personally has been the victim of a crime will not necessarily preclude that prospective juror from serving

on a jury. A prospective juror's relationship to a person who was the victim of a crime likewise does not disqualify a prospective juror from serving.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

HN6[] **Bias & Impartiality, Actual & Implied Bias**

The law does not require that a jury be composed of individuals who have not personally been a crime victim or who do not have close friends or relatives who have been crime victims. It requires that jurors be fair and unbiased. Therefore, the prospective jurors past experience as, or relationship to, a victim of a crime similar to that for which the defendant is being tried must be examined in conjunction with other evidence in the record of the voir dire proceeding that bears on the prospective jurors ability to be fair and impartial and to apply the law as instructed by the trial court.

Criminal Law & Procedure > Juries & Jurors > Voir Dire

HN7[] **Juries & Jurors, Voir Dire**

"Might," in the context of juror responses to voir dire, may be defined as expressing especially a shade of doubt or a smaller degree of possibility or permission.

Criminal Law & Procedure > ... > Challenges for Cause > Bias & Impartiality > Actual & Implied Bias

Criminal Law & Procedure > ... > Challenges for Cause > Appellate Review > Standards of Review

HN8[] **Bias & Impartiality, Actual & Implied Bias**

La. Code Crim. Proc. Ann. art. 797(2) does not require that a prospective juror ***state*** with absolute certainty that he/she cannot be impartial in order to be removed for cause. However, in the absence of such a statement, the trial court's denial of a challenge for cause will not be reversed if, on review of the entire voir dire examination, the prospective juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. Reversal is appropriate only where it appears, upon review of the voir dire examination as a whole, that the trial judges exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused. This standard of review is utilized because the trial judge has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questions by the parties attorneys. Such expressions and intonations are not readily apparent at the appellate level where review is based on a cold record. An appellate court should accord great deference to the trial court's ruling on a challenge for cause, which is necessarily based, in part, on the court's personal observations during questioning.

Judges: WEIMER, Justice. Hughes, J., dissents for the reasons given by Guidry, J. Guidry, J., dissents and assigns reasons.

Opinion by: WEIMER

Opinion

[*37] [Pg 1] **WEIMER**, Justice.

The ***state***'s writ application was granted to consider whether the court of appeal erred in reversing defendant's conviction, finding that the trial judge abused his discretion in denying a challenge for cause of a prospective juror. During *voir dire*, the prospective juror gave an equivocal answer as to whether she could be impartial after indicating her mother had been the victim of a violent crime. The record of the *voir dire* proceeding is bereft of any information that would clarify the prospective juror's response, and the remainder of her responses during *voir dire* indicate that she would be impartial. As such, deference should have been afforded by the appellate court to the trial court's ruling on the challenge. For the reasons that follow, the decision of the appellate court is reversed, and this matter is remanded to the appellate court for determination of the remaining issue raised on appeal by defendant.

[Pg 2] **FACTUAL AND PROCEDURAL [**2] BACKGROUND**

In 1994, K.T. was crossing the street in eastern New Orleans when a man she recognized as someone who had worked with her mother in the past called her to his car. When she walked over, she saw a gun on his lap. He ordered her to get into the car and then drove to a wooded area where he forced K.T. to engage in sexual intercourse. K.T. reported the incident and underwent a sexual assault exam, but the police investigation did not lead to any suspects.

In 1996, H.B. was at home when a man came to the door and asked to speak to her brother. She recognized the man as someone to whom her brother had previously given money. The man claimed that he wanted to thank H.B.'s brother for the money. Later, when H.B's brother left for work, the man returned and claimed that he was locked out of his house. He asked H.B. to make a telephone call for him, and, when she returned to tell him the number did not work, he forced his way into the house and sexually assaulted her. H.B. reported the crime and underwent a sexual assault examination, but the police investigation did not yield any suspects.

In 2010, while investigating unsolved rape cases, a detective of the police force searched the **[**3]** national DNA data base (CODIS) and discovered that DNA from both cases matched that of Derrick A. ***Dotson*** (defendant). The ***state*** subsequently charged defendant with two counts of aggravated rape. The jury found defendant guilty of the 1996 forcible rape of H.B., but could not reach a verdict as to the charge involving K.T. The court sentenced defendant as a third felony offender to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

The court of appeal majority reversed defendant's conviction, finding the trial court abused its discretion by denying defendant's challenge for cause of a prospective juror after defendant exhausted all of his peremptory challenges. ***Dotson, 15-0191**, p. 8 (**La.App. 4 Cir.** 12/17/16), **187 So.3d 79**, 83-84*. At issue was whether **[*38]** the prospective juror, whose mother had been raped and murdered, could be impartial. When asked by the trial court if the circumstances related to her mother's death had any bearing on her ability to be impartial, she ***stated***, "Yes, it might." No direct follow-up questions were asked by the trial court, the ***state***, or the defense as to this particular response. Although the prospective juror was not asked to, and did not, provide any additional **[**4]** insight to this particular response, the appellate court found that "bias, prejudice, or the inability to render judgment according to law can be reasonably implied" from her initial response. ***Dotson, 15-0191** at 8, 187 So.3d at 84*. Accordingly, the trial court was found to have abused its discretion by denying defendant's challenge for cause.

The ***state***'s writ application was granted to determine if the trial court abused its discretion in finding that defendant failed to prove that the prospective juror was not impartial. ***State** **v.** **Dotson**, 16-0473 (La. 3/24/17), 216 So.3d 809*.

DISCUSSION

HN1[↑] *Louisiana Constitution article I, section 17* guarantees a defendant the "right to full voir dire examination of prospective jurors and to challenge jurors peremptorily." ***State** **v.** **Juniors**, 03-2425, p. 7 (La. 6/29/05), 915 So.2d 291, 304*. The number of peremptory challenges granted to a defendant in a trial of an offense punishable necessarily by imprisonment at hard labor, such as the one currently before this court,[1] is fixed by law at twelve. See *La. Const. art. I, § 17(A)*; *La. C.Cr.P. [Pg 4] art. 799*.[2] When a defendant uses all twelve of his peremptory challenges, an erroneous ruling by a trial court on a challenge for cause that results in depriving the defendant of a peremptory challenge constitutes a substantial violation of the defendant's constitutional and statutory rights, requiring reversal of the conviction **[**5]** and sentence. ***Juniors**, 03-2425 at 7-8, 915 So.2d at 304*; see *La. C.Cr.P. art. 921* ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."). Therefore, prejudice is presumed when a challenge for cause has been erroneously denied by a trial court and the defendant exhausts all peremptory

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[1] See ***La. R.S. 14:42.1(B)*** ("Whoever commits the crime of second degree rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence."); see also ***La. R.S. 14:42.1(C)*** ("For all purposes, "forcible rape" and "second degree rape" mean the offense defined by the provisions of this Section and any reference to the crime of forcible rape is the same as a reference to the crime of second degree rape.").

[2] In pertinent part, *La. C.Cr.P. art. 799* provides: "In trials of offenses punishable by death or necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges, and the ***state*** twelve for each defendant."

challenges statutorily afforded to the defendant.[3] ***Juniors**, 03-2425 at 8, 915 So.2d at 305* (citing ***State v. Robertson**, 92-2660, p. 3 (La. 1/14/94), 630 So.2d 1278, 1280*, and ***State v. Ross**, 623 So.2d 643, 644 (La. 1993)*). In summary, where all peremptory challenges have been used, as in this case, a defendant need only demonstrate the erroneous denial of a challenge for cause to establish reversible error warranting reversal of a conviction and sentence. See ***Juniors**, 03-2425 at 8, 915 So.2d at 305*.

[*39] *HN3*[↑] A defendant may challenge a juror for cause if "[t]he juror is not impartial, whatever the cause of his partiality." *La. C.Cr.P. art. 797(2)*. Additionally, *La. C.Cr.P. art. 797(3)* provides a defendant may challenge a juror for cause on the ground that "[t]he relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the [Pg 5] district attorney, or defense counsel, is such that it is reasonable to conclude **[**6]** that it would influence the juror in arriving at a verdict." A "juror [who] will not accept the law as given to him by the court" may also be challenged for cause by the defendant. See *La. C.Cr.P. art. 797(4)*.

HN4[↑] *Voir dire* examination of prospective jurors is designed to discover bases for challenges for cause and to secure information for an intelligent exercise of peremptory challenges. ***State v. Drew**, 360 So.2d 500, 513 (La. 1978)*. The questions propounded are designed to determine any potential adverse influence on the prospective juror's ability to render an impartial verdict. See ***id.*** A prospective juror's responses during *voir dire* cannot be considered in isolation. See ***State v. Frost**, 97-1771, p. 8 (La. 12/1/98), 727 So.2d 417, 426*.

A trial judge is vested with broad discretion in ruling on challenges for cause, and such a ruling is subject to reversal only when a review of the entire *voir dire* reveals the judge abused his discretion. ***Robertson**, 630 So.2d at 1281*. The trial judge's refusal to excuse a prospective juror on the ground he is not impartial is not an abuse of discretion where, after further inquiry or instruction (frequently called "rehabilitation"), the prospective juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. ***Id.***

During *voir dire*, the trial court was **[**7]** questioning prospective juror number 9 ("K.C."), who indicated she was an attorney, when the following exchange took place:

> [Court:] [K.C.], are you familiar with the people involved in today's case?
> [K.C.:] No, sir.
> [Court:] Anything about the facts of the case?
> [Pg 6] [K.C.:] It may be a case I've been reading about in the paper, but I'm not sure.
> [Court:] Okay. Hold that thought.
> [Court:] Have you served on a jury before?
> [K.C.:] Yes, sir.
> [Court:] What kind of case?
> [K.C.:] A possession of a narcotics case and the defendant took an acquittal.
> [Court:] Was that recently?
> [K.C.:] A few years.
> [Court:] Have you or close friends or relatives ever worked in law enforcement?
> [K.C.:] No, sir.
> [Court:] Have you or a close friend or relative been a crime victim?
> [K.C.:] Yes, sir.
> [Court:] Could you tell us a little bit about that?
> [K.C.:] My mother was raped and murdered.
> [Court:] Would that event have any bearing on your ability to be a fair and impartial juror in today's case?
>
> [K.C.:] **Yes, it might**.
> [Court:] Do you have any questions for me?
> [K.C.:] No.
> [Court:] Thank you very much. [Emphasis added.]

[*40] At this point, the trial court did not ask any follow-up questions of K.C.'s responses.

When K.C. was later questioned **[**8]** in chambers, the following colloquy took place:

> [Pg 7] The Court: .... [K.C.], number 9, said that she saw something in the news.
> [Defense:] That's the one that the mother was raped and killed. The Court: [K.C.], would you have a seat right here and make yourself comfortable. [K.C.], earlier today when I asked you the question do you know anything about the facts of the case, you said I think this is the case I've been reading about in the news. Is that what you said?
> [K.C.]: Correct.
> The Court: Can you expound on that?

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[3] *HN2*[↑] If all available peremptory challenges have not been used, a defendant must show some prejudice to overcome the requirements of *La. C.Cr.P. art. 921* (quoted *supra*). ***State v. Robertson**, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280*.

[K.C.]: I was thinking this man was a New Orleans Police Officer. I've been reading some articles about a police officer being accused of rape. It doesn't sound like it from *voir dire* that it's the same case.
The Court: If it turns out that this is not that case, whatever you've been reading in the news about a police officer, have any bearing on your ability to be a fair and impartial juror?
[K.C.]: No.

The Court: ***State***?

[***State***:] No questions.
The Court: Defense?
[Defense:] None, your Honor.

The trial judge's comment during *voir dire* ("Hold that thought.") and the questions asked by the trial judge of K.C. in chambers indicate that K.C. was taken into chambers for further questioning **[**9]** regarding her knowledge of the case based on media coverage. Aside from recognizing that K.C.'s mother had been raped and murdered, defense counsel did not revisit K.C.'s prior response regarding whether her mother's ordeal would affect K.C.'s ability to be impartial in defendant's cases.

When defense counsel later challenged K.C. for cause, the following exchange took place:
[Pg 8] The Court: .... Panelist Number 9.

[***State***]: Acceptable.
[Defense]: Challenge for cause, Your Honor.
The Court: Cause based on what?
[Defense]: Her mother was murdered and raped.
The Court: That's not cause.
[Defense]: She said that would --
The Court: No, she didn't.
[Defense]: Yes, she did. Also, she said she knows a witness.
The Court: She never said that.
[Defense]: [K.C.] said that -- didn't she --
The Court: What witness did she say she knew?
[Defense]: I don't remember.

[***State***]: Ann Montgomery, but she said she doesn't remember really how she knows her. It would not affect her ability to be fair and impartial.
The Court: Is that going to be D2?
[Defense]: No. Judge, she said —
The Court: Is that going to be D2? The cause is denied.
[Defense]: It's denied.
The Court: Is that going to be D2?
[Defense]: If it has to be.

[10]** [Defense]: D2.
The Court: Well, it doesn't have to be. It can be J3.
[Defense]: She said —
The Court: Look, that's the fifth time you've told me that. ...

[*41] [Pg 9] Defendant's challenge for cause as to K.C. was related to the following facts: (1) K.C.'s mother was raped and murdered; and (2) K.C. testified that her mother's ordeal might affect her impartiality in this case. Because the basis for defendant's challenge does not involve a relationship described in La. C.Cr.P. art. 797(3) (quoted *supra*), the ground at issue in this case is La. C.Cr.P. art. 797(2) (quoted *supra*).[4]

The above-quoted colloquy pertaining to defendant's challenge reveals the trial judge found that K.C.'s "[y]es, it might" response (to the trial judge's question concerning whether her mother's ordeal would have a bearing on her ability to remain impartial) alone was insufficient to establish K.C. could not be impartial so as to constitute cause for excusing her under La. C.Cr.P. art. 797(2). In support of the trial judge's finding, the ***state*** contends K.C.'s response in this regard is equivocal and open to interpretation. Further, the ***state*** urges that defense counsel was given an opportunity to further question the prospective juror as to this response, but did not do so. Lastly, **[**11]** given the totality of the *voir dire*, because the prospective juror never definitively ***stated*** she could not be impartial based on her mother's rape and murder, the ***state*** argues the trial court acted within its discretion by denying defendant's challenge for cause of K.C. On the other hand, defendant maintains K.C.'s response in and of itself demonstrates she could not be impartial, the ***state*** was obligated to rehabilitate K.C. and did not, and the appellate court was correct in finding an abuse of discretion by the trial court.

[Pg 9] Although the trial judge at times cut off defense

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[4] Courts have imposed the test set forth in La. C.Cr.P. art. 797(3) (that is, the relationship is such that one might reasonably conclude that it would influence the juror in arriving at the verdict) in addressing a prospective juror's relationship to others who are not listed in Clause (3). See ***State v Robinson***, 353 So.2d 1001, 1004 (La. 1977) (relationship with people associated with law enforcement duties); ***State v. Calloway***, 343 So.2d 694, 696 (La. 1976) (nephew was a police officer); ***State v. McClure***, 258 La. 999, 249 So.2d 109, 113 (1971) (friendship with the clerk of court).

counsel during the challenge phase, the record of the *voir dire* indicates that defense counsel was in no way deprived of an opportunity to question K.C. about her "[y]es, it might" response regarding her mother's ordeal. While in chambers, the trial judge afforded the parties an opportunity to further question K.C. After reminding the court that K.C. ***stated*** that her mother had been raped and murdered, counsel for defendant declined to further question K.C. in this regard. Furthermore, contrary to defendant's assertion, the record does not indicate that the trial judge did not have any recollection of K.C.'s **[**12]** "[y]es, it might" response to the trial judge's question during *voir dire* about K.C.'s ability to be impartial. During the challenge phase, the trial judge first simply observed that the fact that K.C.'s mother was raped and murdered does not constitute cause.

HN5[] "[T]he fact that a juror may have painful memories associated with the subject of a criminal trial is not listed as a basis for a challenge for cause under La.C.Cr.P. art. 797." ***State v. Magee***, *13-1018, p. 12 (**La.App. 5 Cir. 9/24/14), 150 So.3d 446, 454*, writ denied, *14-2209 (La. 10/2/15), 178 So.3d 581*. That a prospective juror personally has been the victim of a crime will not necessarily preclude that prospective juror from serving on a jury. ***State v. Dorsey***, *10-0216, p. 3 (La. 9/7/11), 74 So.3d 603, 631*. A prospective juror's relationship to a person who was the victim of a crime likewise does not disqualify a prospective juror from serving. See ***id.***; ***State v. Nix***, *327 So.2d 301, 326 (La. 1975)* (a prospective **[*42]** juror's relationship to a murder victim—his brother-in-law—was insufficient to establish cause for excusing the venireman).

HN6[] The law does not require that a jury be composed of individuals who have not personally been a crime victim or who do not have close friends or relatives who have [Pg 11] been crime victims. It requires that jurors be fair and unbiased. ***Juniors***, *03-2425 at 11, 915 So.2d at 306*. Therefore, the prospective juror's past experience as, or relationship **[**13]** to, a victim of a crime similar to that for which the defendant is being tried must be examined in conjunction with other evidence in the record of the *voir dire* proceeding that bears on the prospective juror's ability to be fair and impartial and to apply the law as instructed by the trial court. See ***Dorsey***, *10-0216 at 38-39, 74 So.3d at 631*; ***Nix***, *327 So.2d at 326*. Accordingly, the trial court did not abuse its discretion in refusing to find that K.C.'s relationship with her mother, who was raped and murdered, automatically rendered K.C. unable to be impartial in these cases. Although the record establishes a mother/daughter relationship, and this court is sensitive to the impact of crime on a family member, we are constrained by the record which reflects no follow-up questions were posed to in fact establish this prospective juror could not be fair and impartial in these cases.

Upon the trial judge's recognition that K.C.'s relationship with a rape victim was alone insufficient to disqualify K.C., defense counsel referenced K.C.'s response to the trial judge's question regarding her ability to be impartial due to her mother's ordeal. Defense counsel interpreted K.C.'s response as "yes," that is, K.C. could not be impartial **[**14]** in the instant cases against defendant. However, as the trial judge again correctly observed, K.C. did not declare that her mother's rape and murder would affect her ability to be impartial, as her affirmative response was immediately qualified by an expression of uncertainty—"it might."[5] In this respect, K.C.'s testimony differs from that of prospective juror number 20, who testified that as a victim of molestation she could not be impartial and who was dismissed by the trial [Pg 12] court on a challenge for cause.[6] Based on the qualification of K.C.'s affirmative response, this court cannot say that the trial court erred or abused its discretion in finding that K.C. at no point declared that she could not be impartial in these cases; nor from this

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[5] HN7[] "Might" is defined as "expressing especially a shade of doubt or a smaller degree of possibility or permission." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 932 (College Edition 1964). Such definition confirms the equivocalness of K.C.'s response.

[6] Prospective juror number 20 testified as follows:

> The Court: Have you or any close friends or relatives been a victim of a crime?
>
> Juror [ ]: Yes.
>
> The Court: Can you tell us a little bit about that?
>
> Juror [ ]: My husband was murdered. My house was broken into and I was molested at 12 years old.
>
> The Court: Would those events have --
>
> Juror [ ]: Yes.
>
> The Court: Let me finish the question. Would those events have any bearing on your ability to be a fair and impartial juror?
>
> Juror [ ]: Yes.
>
> The Court: So you could not serve as a fair and impartial juror in this case?
>
> Juror [ ]: That's correct.

lone response can "bias, prejudice, or the inability to render judgment according to law ... be reasonably implied,"[7] as found by the appellate court. **[*43]** Furthermore, K.C.'s conditional response neither required that K.C. be rehabilitated,[8] nor relieved defendant (who sought to exclude K.C. for cause) of his burden of demonstrating, through questioning, that K.C. lacked impartiality. See ***State v. Taylor***, *99-1311, p. 8 (La. 1/17/01), 781 So.2d 1205, 1214* ("The party seeking to [Pg 13] exclude the [prospective] **[**15]** juror has the burden to demonstrate, through questioning, that the [prospective] juror lacks impartiality.").

In ***Nix***, *327 So.2d at 326*, a murder trial, the trial court denied defendant's challenge for cause of a prospective juror who testified that the murder of his brother-in-law might affect his thinking on the case. The equivocalness of that statement, together with the prospective juror's testimony "that he understood the principles of law upon which he was instructed by the trial judge, including the presumption of innocence, and that he could apply those principles in the case at bar" was **[**16]** found by this court to be sufficient to support the trial court's denial of the defendant's challenge for cause. ***Id.***

Other cases involving equivocal responses that were found by this court to be insufficient to obtain reversal of the trial court's denial of a challenge for cause include: ***State v. Robinson***, *353 So.2d 1001, 1004 (La. 1977)* (Where a prospective juror's impartiality was brought into question by her "maybe not" response to whether she would acquit the defendant of one crime even if she thought he was guilty of other misconduct, this court found no abuse of discretion in the trial court's denial of a challenge for cause in light of the prospective juror's subsequent responses which indicated she would be impartial.); ***State v. Passman***, *345 So.2d 874, 879-80 (La. 1977)* (A prospective juror responded that he might be influenced by whether the defendant took the stand on his own behalf, implicating *La. C.Cr.P. art. 797(4)*. Furthermore, when asked if he would have trouble following the trial judge's instruction not to consider whether the defendant testified in weighing the defendant's guilt, the prospective juror in **Passman** indicated that he "may have trouble and [he] may not." However, on further questioning by the trial judge, the prospective juror clarified that he would accept and apply the **[**17]** law in deciding whether [Pg 14] the defendant is guilty. This court found no abuse of discretion in the denial of the defendant's challenge for cause.); ***State v. Frazier***, *283 So.2d 261, 263-64 (La. 1973)* (an equivocal answer given by the prospective juror ("I could try.") to the trial judge's question, "If [defendant] did not take the stand do you feel that you could return a fair and impartial verdict based on the evidence and the testimony that you did hear," did not amount to a refusal to accept the law as charged so as to implicate *La. C.Cr.P. art. 797(4)*.)

Also noteworthy on this point is ***State v. Robinson***, *08-0652 (**La.App**. 4 **Cir**. 5/13/09), 11 So.3d 613*, writ denied, *09-1437 (La. 2/26/10), 28 So.3d 269*. In response to a question by the prosecutor, a prospective juror in **Robinson** "***stated*** during *voir dire* that she did not know whether she could be impartial due to the fact that three of her children had been crime victims." ***Id.***, *08-0652 at 11, 11 So.3d at 620*. In analyzing this equivocal response, the appellate court found that the prospective juror only "***stated*** that she did not know if she could **[*44]** be impartial and did not affirmatively ***state*** she could not be" and observed "that defense counsel never asked [the prospective juror] any questions at all." ***Id***, *08-0652 at 13, 11 So.3d at 621*. The **Robinson** court concluded that the prospective juror's "responses as a whole [did not reveal] facts from which bias, prejudice, or **[**18]** an inability to render judgment according to law might be reasonably implied." ***Id.***

In ***State v. Ruffin***, *11-0135 (**La.App**. 4 **Cir**. 12/21/11), 82 So.3d 497*, writ denied *sub nom.*, ***State ex rel. Ruffin v. State***, *12-0400 (La. 9/12/12), 98 So.3d 813*, a prospective juror responded that "it may" when asked if "her niece's death would affect her ability to sit on the jury." ***Id.*** *11-0135 at 25, 82 So.3d at 514*. Upon further questioning, this prospective juror revealed that serving as a juror would be emotional for her in that it would likely cause her to have flashbacks. She testified that her [Pg 15] niece's killers were still at large, and she had still not gotten over the incident. ***Id.*** Based on this information, the defendant urged that the prospective juror was unable "to be a rational and unbiased juror,"

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[7] *Cf.* ***Juniors, 03-2425 at 9, 915 So.2d at 305*** (a challenge for cause should be granted "if [the prospective juror's] responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied.").

[8] *Cf.* ***State v. Mickelson***, *12-2539, p. 23 (La. 9/3/14), 149 So.3d 178, 193* (which addressed the need "to rehabilitate a prospective juror whose unequivocal statements in *voir dire* evidence an inability to follow the law," implicating *La. C.Cr.P. art. 797(4)*. **Mickelson** does not mandate rehabilitation of a prospective juror whose statements are equivocal and who simply indicated that he or she might not be able to be fair.

citing ***State v. Holmes***, 619 So.2d 761 (**La.App**. 4 **Cir**. 1993), discussed *infra.* **Id.** Relying instead on its decision in **Robinson**, the appellate court found no abuse of discretion in the trial court's denial of the defendant's challenge for cause since the prospective juror "did not say unequivocally that her [great]-niece's death would prevent her from being an impartial juror." ***Id.*** 11-0135 at 26-27, 82 So.3d at 514-15.

In the instant case, in reviewing the trial judge's denial of defendant's challenge, instead of relying on this court's decision in ***Nix***, the facts of which are strikingly similar to those of the instant case, or its decisions in **[**19]** **Robinson** and **Ruffin**, the appellate court relied on its decision in **Holmes**. The defendant in **Holmes** was charged with aggravated rape, aggravated kidnapping, and aggravated crime against nature. On appeal of his conviction for aggravated crime against nature, the defendant argued that the trial court committed reversible error in denying his "challenge for cause to a [prospective] juror whose husband had previously been held hostage and who could not say affirmatively that the experience would not affect her ability to be fair." ***Holmes***, 619 So.2d at 762. When the members of the jury venire were questioned by the ***state*** about why they did not "feel like [they] could sit on this type of case," the prospective juror ***stated*** that her "husband was held hostage." ***Id.*** at 763. When the court asked if the fact that her "husband was a victim of a crime" would cause her to be unfair, she ***stated***, "I think it might. I'm not real sure." ***Id.*** During further questioning by the trial court, the prospective juror explained that her husband's kidnapping had been a very traumatic time for her. ***Id.*** at 764. Defense counsel followed up by asking the prospective juror if she could "assure [him] that [Pg 16] what happened to [her] husband would not affect **[**20]** [her] in judging whether [the defendant] committed a crime or not." ***Id.*** She relied, "I'm not sure." ***Id.*** In reviewing the trial court's denial of the defendant's challenge for cause as to this prospective juror, the appellate court noted that the prospective juror ***stated*** that she could not assure defense counsel "that her husband's kidnapping would not affect her judgment in [the] case" and observed that the ***state*** failed to rehabilitate the prospective juror. ***Id.*** at 764-65. Concluding that "[t]he trial court's finding that the [prospective] juror could be fair is not supported by the voir dire transcript," the appellate court held that "[t]he [prospective] juror was not impartial and the [trial] court abused its discretion by failing to excuse her for cause." ***Id.*** at ***[*45]*** 765. The defendant's conviction was reversed, and a new trial was ordered. ***Id.***

Defendant argues, and the appellate court found, that the facts of the instant case are more akin to those of **Holmes**, while the ***state*** likens the facts of this case more to the facts of **Robinson** and **Ruffin**. Unlike ***Holmes***, the prospective juror in this matter (K.C.) was not questioned further by anyone as to her "[y]es, it might" response. For this reason, the instant **[**21]** case, like ***Robinson*** and ***Ruffin***, is clearly distinguishable from **Holmes**.[9] As in ***Nix***, K.C.'s use of the word "might" relative to the impact that her family member's ordeal as a victim of a similar crime would have on K.C.'s ability to be impartial in the instant cases rendered her response equivocal. Because of the equivocalness of K.C.'s response, the need for rehabilitation of K.C. by the ***state*** had not been triggered in this case. Furthermore, unlike the prospective juror in **Holmes**, K.C. was never asked to assure that she could be impartial to the defendant in these cases.

[Pg 17] Clearly, ***HN8***[⬆] La. C.Cr.P. art. 797(2) does not require that a prospective juror ***state*** with absolute certainty that he/she cannot be impartial in order to be removed for cause. However, in the absence of such a statement, the trial court's denial of a challenge for cause will not be reversed if, on review of the entire *voir dire* examination, the prospective juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. ***Passman***, 345 So.2d at 880. Reversal is appropriate only where it appears, upon review of the *voir dire* examination as a whole, that the trial judge's exercise of that discretion **[**22]** has been arbitrary or unreasonable, resulting in prejudice to the accused. ***Id.***; see ***Dorsey***, 10-0216 at 28, 74 So.3d at 625; ***State v. Lee***, 93-2810, p. 9 (La. 5/23/94), 637 So.2d 102, 108. This standard of review is utilized "because the trial judge has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questions by the parties' attorneys." ***Lee***, 93-2810 at 9, 637 So.2d at 108. "Such expressions and intonations are not readily apparent at the appellate level where review is based on a cold record." ***Id.*** As noted in ***State v. Miller***, 99-0192 (La. 9/6/00), 776 So.2d 396, because of the "complicated and oftentimes daunting" task faced by a trial court in deciding "challenges for cause of prospective jurors who give equivocal ... responses during *voir dire*," "an appellate court should accord great deference to the [trial] court's

[9] Neither party sought writs in this court in **Holmes**. Without a review of the full *voir dire* in **Holmes**, this court expresses no opinion regarding the appellate court's decision therein.

ruling on a challenge for cause, which is necessarily based, in part, on the court's personal observations during questioning." ***Id.***, *99-0192 at 14, 776 So.2d at 405-06*. A review of the entire record of the *voir dire* proceedings in this case does not suggest that the trial court's exercise of the sound discretion afforded in determining K.C.'s competency was arbitrary or unreasonable, to the prejudicial injury of the defendant in obtaining a fair and [Pg 18] impartial **[**23]** trial.[10] Furthermore, the appellate court erred to the extent that it found **[*46]** K.C.'s responses as a whole reveal facts from which "bias, prejudice or inability to render judgment according to law may be reasonably implied." Accordingly, defendant failed to show any abuse of discretion in the trial court's refusal to grant his challenge for cause as to K.C.

DECREE

For these reasons, the decision of the appellate court is reversed. This matter is remanded to the appellate court for determination of the remaining issue raised on appeal by defendant.

REVERSED and REMANDED.

Dissent by: Hughes; Guidry

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[10] Early on in the jury selection process, before *voir dire* of individuals began, the trial judge read aloud to the venire the relevant parts of the indictment, which alleged two counts of aggravated rape. The trial judge then asked generally: "[B]ased on what you've heard, any problems with difficulty in serving on a jury involved in this type of a situation? Anyone?" There was no response from the prospective jurors. Shortly thereafter, upon hearing the definition of aggravated rape and being asked if there were any questions or comments, the prospective jurors again remained silent. Then, just before individual *voir dire* commenced, the trial judge asked the prospective jurors: "Can anybody think of any reasons based on the things we've discussed so far why you couldn't be a fair and impartial juror in this case, anything whatsoever?" Once more, the trial judge was met with no response. Finally, in the middle of the ***state***'s *voir dire*, the trial judge intervened to clarify the ***state***'s burden of proof, asking at the end if everyone followed what the trial judge told them; the response from the venire was "[y]es." Also noteworthy is the fact that K.C. is an attorney, trained in the law and legal concepts applicable in a criminal trial, including the obligation of a juror to be fair and impartial. In fact, K.C. advised she had previously served on a jury in a criminal case in which the defendant was acquitted, a favorable response for a defendant.

Dissent

Hughes, J., dissents for the reasons given by Guidry, J.

Guidry, J., dissents and assigns reasons.

I respectfully dissent from the majority's decision today. In this case, the potential juror expressed during *voir dire* an undoubtedly equivocal response that she "might" be impartial or biased against this defendant, charged with two counts of aggravated rape, because her mother had been raped and murdered. In the face of this clear expression of possible bias, there was no follow-up questioning by the trial court, the ***state***, or the defense as to whether the juror would be willing and able **[**24]** to decide the case impartially according to the law and evidence. The trial court, when the prospective juror was later challenged for cause, did not allow a full discussion of the juror's response regarding her possible bias, and more troublingly, insisted the potential juror had not said anything that would bring into question her inability to be impartial, when in fact she did. *See Anti*, pp. 6 and 8; ***State** v. **Dotson**, **15-0191** p. 8 (**La. App.** 4 **Cir. 2/17/16**), **187 So.3d 79**, 83-84*.

This court will not reverse a trial court's ruling on a challenge for cause unless it appears, upon review of the *voir dire* examination as a whole, that the trial judge's exercise of its discretion has been arbitrary or unreasonable, resulting in prejudice to the accused. *Anti*, p. 17. While deference is certainly owed to the trial court's determination, where due, I find in this case the trial court abused its discretion, because, upon review of the prospective juror's *voir dire* examination as a whole, her bias, prejudice, or the inability to render judgment according to the law may be reasonably implied. Accordingly, I would affirm the appellate court's decision.

End of Document

State v. Dotson

Court of Appeal of Louisiana, Fourth Circuit

December 18, 2017, Decided

NO. 2015-KA-0191

Reporter
2017 La. App. LEXIS 2526 *; 2015-0191 (La.App. 4 Cir. 12/18/17);

Core Terms

mistrial, fingerprint, database, statewide, admonish, chambers, arrest

STATE OF LOUISIANA VERSUS DERRICK A. ***DOTSON***

Notice: THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

Subsequent History: Writ denied by ***State*** *v.* ***Dotson****, 259 So. 3d 340, 2018 La. LEXIS 3450 (La., Dec. 17, 2018)*

Writ denied by ***State*** *v.* ***Dotson****, 2020 La. LEXIS 1046 (La., June 3, 2020)*

Prior History: [*1] APPEAL FROM CRIMINAL DISTRICT COURT ORLEANS PARISH. NO. 514-318, SECTION "G". Honorable Byron C. Williams, Judge.

State *v.* ***Dotson****, 234 So. 3d 34, 2017 La. LEXIS 2321 (La., Oct. 18, 2017)*

Disposition: AFFIRMED.

Case Summary

Overview
HOLDINGS: [1]-The court affirmed defendant's conviction for forcible rape because the trial court did not abuse its discretion in refusing to grant his motion for mistrial after the ***State***'s DNA expert testified that his DNA profile had previously been put into a statewide database where defendant would have needed to testify regardless to support his defense that he had consensual relations with the victims, the extreme remedy of mistrial was not warranted, and the defendant did not request an admonition before or after the trial court denied his motion for a mistrial.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of

Review > Abuse of Discretion > Mistrial

Criminal Law & Procedure > Trials > Motions for Mistrial

HN1[] **Abuse of Discretion, Mistrial**

Mistrial is an extreme remedy and should only be used when substantial prejudice to the defendant is shown. A trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. Further, a trial court's decision concerning whether actual prejudice has occurred and whether a mistrial is warranted will not be overturned on appeal absent an abuse of that discretion.

Counsel: Leon A. Cannizzaro, Jr., District Attorney, Matthew C. Kirkham, Assistant District Attorney, Parish of Orleans, New Orleans, LA, FOR APPELLEE/***STATE*** OF LOUISIANA.

Derrick ***Dotson*** #336610, Louisiana ***State*** Penitentiary, ANGOLA, LA; Mary Constance Hanes, LOUISIANA APPELLATE PROJECT, New Orleans, LA, COUNSEL FOR DEFENDANT/APPELLANT.

Judges: Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano. LOBRANO, J., CONCURS IN THE RESULT.

Opinion by: Roland L. Belsome

Opinion

[Pg 1] The Defendant, Derrick ***Dotson***, was convicted of forcible rape and sentenced to life imprisonment at hard labor as a third-felony habitual offender, without benefit of parole, probation, or suspension of sentence. The defendant appealed his conviction and sentence. In ***State*** *v.* ***Dotson***, this Court found that the trial court abused its discretion in denying defendant's challenge for cause to a prospective juror who indicated that she did not know if she could be impartial.[1] After granting certiorari, the Louisiana Supreme Court, reversed and remanded the matter to this Court for consideration of the **[*2]** Defendant's remaining assignment of error.[2]

In the Defendant's remaining assignment of error, he contends that the trial court abused its discretion in refusing to grant his motion for mistrial after the ***State***'s DNA expert testified that his DNA profile had previously been put into a statewide database.

[Pg 2] The testimony at issue was from Anne Montgomery, the ***State***'s expert in the field of molecular biology and DNA analysis. Ms. Montgomery testified that the Defendant had been identified through a statewide DNA search. The pertinent part of her testimony for this assignment of error is as follows:

> Again, this is another investigative lead letter. It's dated August 5, 2010, and this is now - - we know that the case from 1994 was hitting to the case in 1996. Now, in August of 2010, based on the ***state*** search, not the local search, the ***state*** search, they identified an individual who was matching these two cases and identified him as Derrick ***Dotson*** and submitted that information to the lab, and before they send the letter to the laboratory, the ***state*** police reconfirms that profile in their system; they go back to the original swab, rerun it, make sure it's the same one that was identified **[*3]** as being Derrick ***Dotson***. Once they confirm that in their lab, they send the investigative lead letter to the local jurisdiction. Their policy is such that, if NOPD or whoever the jurisdiction is [sic] wants to pursue the lead, that another specimen must be collected from the individual to confirm the match. This step is required by the federal guidelines that regulate the national DNA database, and so that is what Exhibit 9 is.

At some later time in Ms. Montgomery's testimony, defense counsel ***stated***: "Your Honor, I'd like --." The trial court quickly responded by asking counsel to approach, whereupon an off-the-record bench conference was held. The trial court then (on the record) advised the jury that it had to discuss a matter with the

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[1] ***State*** *v.* ***Dotson, 15-0191 (La.App. 4 Cir. 2/17/16), 187 So. 3d 79*** (Lobrano, J., dissenting).

[2] ***State*** *v.* ***Dotson****, 16-0473 (La. 10/18/17), 234 So. 3d 34, 2017 WL 4681942*.

attorneys in chambers. Once in chambers, the trial court noted that at the time defense counsel began to raise its objection (as quoted above), the court itself had been preparing to call counsel into chambers because it "had some concerns about where the testimony [of Ms. Montgomery] was going." The trial court then addressed the defendant's objection, which the court characterized as being "to the witness reviewing some hearsay material."[3] The trial **[*4]** court addressed that hearsay [Pg 3] objection, finding it had no merit. At that time, defense counsel made no further comments.

The trial court then proceeded to detail the concern that led it to independently decide to bring counsel into chambers, ***stating***:

> I have a problem that, with this testimony, that's a little bit more troublesome than whether it's hearsay, and that is - - I mentioned to the attorneys at the bench, that this testimony regarding the Defendant's DNA being part of a statewide database could, if it goes any further, result in testimony regarding other crimes' evidence that has not been the subject of a Prieur hearing, ..."

Then, the trial court ended the in-chambers conference by telling the ***State***: "I don't want to hear statewide database again, okay?" After conferring with Ms. Montgomery privately, the ***State*** resumed direct examination. Once Ms. Montgomery's testimony was concluded, the ***State*** went on to present a second DNA expert and then rested its case.

Next, defense counsel made an oral motion for a mistrial, ***stating***:

> We move for a mistrial based upon the testimony of Ms. Montgomery indicating she's shift [sic] the burden of proof to my client compelling him to take **[*5]** the stand by indicating that my client's DNA is in the statewide database.

On appeal, the Defendant contends that Ms. Montgomery's reference to a "***state*** police system" implied that he had been convicted of a prior crime, possibly a sex-related offense, compelling him to testify.

When the oral motion for mistrial was asserted, defense counsel did not provide statutory authority for the motion. However, the argument presented on appeal is that the Defendant was entitled to a mistrial under *La. C.Cr. P. art. 771(2)*, which ***states*** in pertinent part:

> In the following cases, upon the request of the defendant or the ***state***, the court shall promptly admonish the jury to disregard a remark or comment [Pg 4] 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:
> * * *
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of *Article 770*.
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied **[*6]** that an admonition is not sufficient to assure the defendant a fair trial. (Footnote supplied).

HN1[↑] Mistrial is an extreme remedy and should only be used when substantial prejudice to the defendant is shown.[4] "[A] trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial."[5] Further, a trial court's decision concerning whether actual prejudice has occurred and whether a mistrial is warranted will not be overturned on appeal absent an abuse of that discretion.[6]

In denying the Defendant's motion for mistrial the trial court noted that it had called the attorneys into chambers to caution the ***State*** against eliciting from Ms. Montgomery references to a "statewide database," and thereafter Ms. Montgomery refrained from referencing the database. Additionally, at no time during her testimony did Ms. Montgomery refer to another crime or bad act committed by the Defendant.

Although it was not an issue regarding DNA testimony, this Court addressed a similar situation involving

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[3] This objection was directed at Ms. Montgomery's testimony regarding a DNA report.

[4] ***State*** *v. Burton, 09-0826, p. 10 (**La. App**. 4 **Cir**. 7/14/10), 43 So. 3d 1073, 1080* (quoting ***State*** *v. Castleberry, 98-1388, p. 22 (La. 4/13/99), 758 So. 2d 749, 768)*.

[5] ***State*** *v. Leonard, 05-1382, p. 11 (La. 6/16/06), 932 So. 2d 660, 667*; ***State*** *v. Greenberry, 14-0335, p. 20 (**La. App**. 4 **Cir**. 11/19/14), 154 So. 3d 700, 712*.

[6] *Greenberry, supra*, citing ***State*** *v. Maxwell, 11-0564, p. 25 (**La. App**. 4 **Cir**. 12/21/11), 83 So. 3d 113, 128*.

fingerprint evidence in ***State*** *v. Smith*.[7] There, the [Pg 5] defendant moved for a mistrial on the ground that the ***State***'s fingerprint expert impermissibly suggested to **[*7]** the jury that the defendant had a prior criminal record when the officer testified that he was able to compare latent fingerprints collected at the crime scene with fingerprints that were "on file" for the defendant.[8] The trial court denied the motion, offering to admonish the jury, but the defendant rejected that offer. The trial court instructed the expert not to testify as to when or how the defendant's fingerprints were obtained. On appeal, this Court found no merit to the defendant's argument that the trial court had erred in denying his motion for mistrial, ***stating*** that because the "file" referenced by the expert could have been made in conjunction with the present case and no mention was made of prior convictions, an admonishment to jury, "if anything," was all that had been necessary.[9]

The defendant in *Smith* also moved for a second mistrial based on an alleged reference to other crimes committed by him when a detective testified that he compiled a six-person photo lineup "based on previous arrest information."[10] This court did find that the detective's explicit reference to "previous arrest information" suggested to the jury that he was referring to a prior arrest other **[*8]** than the one for the offense for which the defendant was being tried. This court noted that, as with the defendant's first motion for mistrial relating to the fingerprint evidence, the trial court had denied the motion for mistrial but offered to admonish the jury, which the defendant declined. This Court ultimately found that the trial court did not err in denying the motion for a mistrial and offering instead to give only an admonishment.

[Pg 6] Finally, in *Smith*, the defendant also argued on appeal that the above references to his criminal history "forced him to make the last-minute decision to testify in his own defense at trial."[11] This claim essentially is the same claim counsel for defendant in the present case cited as the basis of his oral motion for mistrial, as quoted hereinabove. This Court soundly rejected that argument in *Smith*, ***stating***:

> [B]y way of understatement, we find this argument difficult to accept. Without [the defendant's] testimony there would have been no testimony or evidence to support his claims of self-defense and accident. The detective's statement, moreover, was vague, tangential, and, as characterized by defense counsel, unintentional. It is not plausible **[*9]** that [the defendant] would believe he was compelled to take the witness stand and admit that he was convicted in 2003 of possession of marijuana and cocaine (La. C.E. art. 609.1 B) in order to offset that marginal comment by the detective. An admonition to the jury, at most, would have sufficed; no mistrial was necessary or required.[12]

This court's reasoning in *Smith* is applicable in the present case.[13] Ms. Montgomery made a vague reference to defendant's DNA being in a "statewide database" or a "***state*** police system." As with the fingerprint expert's reference to defendant's fingerprints being "on file" in *Smith*. Moreover, as to a detective's subsequent reference in *Smith* to "previous arrest information" in connection with composing a photo lineup with defendant's photo in it, this Court reasoned that even if that comment suggested to the jury that he was referring to a prior arrest other than the one for the offense for which he was being tried, a mistrial was not warranted. Further, like in *Smith*, the Defendant needed to testify to support his [Pg 7] defense that he had consensual relations with the victims. Just as in *Smith*, the extreme remedy of mistrial was not warranted, and the Defendant did **[*10]** not request an admonition before or after the trial court denied his motion for a mistrial.

For the reasons discussed, Derrick ***Dotson***'s conviction and sentence are affirmed.

AFFIRMED

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[7] *11-0664 (**La. App**. 4 **Cir**. 1/30/13), 108 So. 3d 376*.

[8] *Smith, 11-0664, p. 16, 108 So. 3d at 386-387*.

[9] *Smith, 11-0664, p. 16-17, 108 So. 3d at 387*.

[10] *Id.*

[11] *Smith, 11-0664, p. 17-18, 108 So. 3d at 387*.

[12] *Id.*

[13] See also ***State*** *v. Livas, 527 So. 2d 398, 400 (**La. App**. 4 **Cir**. 1988)* (trial court did not err in permitting police officer to refer to the defendant's "B of I" photographs or in denying the defendant's motion for mistrial based on an inadmissible reference to another crime committed by the defendant—"[t]here is a great probability the jurors were not aware that 'B of I' meant the Bureau of Investigation or that the photographs were secured following the defendant's involvement in another criminal act."

LOBRANO, J., CONCURS IN THE RESULT.

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State v. Dotson

Supreme Court of Louisiana

December 17, 2018, Decided

NO. 2018-KO-0177

Reporter
259 So. 3d 340 *; 2018 La. LEXIS 3450 **; 2018-0177 (La. 12/17/18);; 2018 WL 6630254

STATE OF LOUISIANA VS. DERRICK A. DOTSON

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [1]** IN RE: Derrick A. Dotson; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Orleans, Criminal District Court Div. G, No. 514-318; to the Court of Appeal, Fourth Circuit, No. 2015-KA-0191.

State v. Dotson, 2017 La. App. LEXIS 2526 (La.App. 4 Cir., Dec. 18, 2017)

Judges: Marcus R. Clark, Bernette J. Johnson, John L. Weimer, Greg G. Guidry, Jefferson D. Hughes III, Scott J. Crichton, James T. Genovese.

Opinion

[*341] Denied.

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CRIMINAL DISTRICT COURT OF ORLEANS PARISH, LOUISIANA

SECTION "G" Judge: THE HONORABLE DENNIS WALDRON
Minute Clerk: MARCELLE BUTSCHER
Court Reporter: ALLYSON BRAXTON
Assist. D.A.: ERIC CUSIMANO
SARAH DAWKINS

Date: TUESDAY, May 14, 2019
Case Number: 514-318
State of Louisiana
versus
DERRICK A DOTSON

Violation: RS 14 42.1
RS 14 44
RS 15 529.1
RS 14 42

AS TO DEF, DERRICK A DOTSON
FILING(S) IN OPEN COURT

THE COURT RECIEVED AN APPLICATION FOR POST CONVICTION RELIEF. AFTER REVIEW OF THE MOTION AND THE LAW, THE COURT DENIES THE MOTION FOR LACK OF MERIT. A COPY OF THIS MINUTE ENTRY WAS SENT TO THE DEFENDANT.

NO NEW DATE IS SET FOR THIS CASE.

MARCELLE BUTSCHER, Minute Clerk

NO. 2019-K-0651

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

DERRICK A. DOTSON

IN RE: DERRICK A. DOTSON

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE DENNIS J. WALDRON
CRIMINAL DISTRICT COURT ORLEANS PARISH
SECTION "G", 514-318

WRIT DENIED.

Relator, Derrick A. Dotson, seeks supervisory review of the district court's judgment dated May 14, 2019 that denied his application for post-conviction relief. The writ is denied.

New Orleans, Louisiana this 10th day of September, 2019.

JUDGE JOY COSSICH LOBRANO

JUDGE SANDRA CABRINA JENKINS

JUDGE PAULA A. BROWN

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COURT OF APPEAL FOURTH CIRCUIT

Exhibit B

State v. Dotson

Supreme Court of Louisiana

June 3, 2020, Decided

No.2019-KH-01828

Reporter
2020 La. LEXIS 1046 *; 2019-01828 (La. 06/03/20);

STATE OF LOUISIANA VS. ***DERRICK*** A. ***DOTSON***

Notice: THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

Prior History: [*1] IN RE: ***Derrick*** A. ***Dotson*** - Applicant Defendant; Applying For Supervisory Writ, Parish of Orleans Criminal, Criminal District Court Number(s) 514-318, Court of Appeal, Fourth Circuit, Number(s) 2019-K-0651.

*State v. **Dotson**, 2017 La. App. LEXIS 2526 (La.App. 4 Cir., Dec. 18, 2017)*

Core Terms

non-unanimous, retroactive, disproportionately, accuracy, jurors, racist, collateral, watershed, abandon

Judges: Scott J. Crichton, Jefferson D. Hughes, III, James T. Genovese, William J. "Will" Crain, James H. Boddie. Johnson, C.J., would grant and docket and assigns reasons. Weimer, J., would grant and docket.

Opinion

Writ application denied.

Johnson, C.J., would grant and docket and assigns reasons.

Weimer, J., would grant and docket.

[Pg 1] **Johnson, C.J., would grant and docket and assigns reasons**.

I would grant the writ to clarify that the Supreme Court's recent decision in *Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020)* should be applied retroactively to cases on state collateral review. It is time we abandoned our use of *Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)* in favor of a retroactivity test that takes into account the harm done by the past use of non-unanimous jury verdicts in Louisiana courts.

In 1992, we adopted *Teague*'s test for determining whether decisions affecting rights of criminal procedure would be retroactively applied in cases on state collateral review. *State ex rel. Taylor v. Whitley, 606 So. 2d 1292, 1296 (La. 1992)*. *Teague* only requires retroactive application of a new rule if it is a "watershed rul[e] of criminal procedure" that **[*2]** "implicates the fundamental fairness [and accuracy]" of the criminal proceeding. *Teague, 489 U.S. at 311-312*.

In my view, *Ramos* announces a watershed rule implicating fundamental fairness and accuracy. "The *Sixth Amendment* right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the *Fourteenth Amendment*." *Ramos, 140 S. Ct. at 1397* (citing *Duncan v. Louisiana, 391 U.S. 145, 148-50, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)*). The law that Ramos struck came from the post-Reconstruction Louisiana Constitutional Convention of 1898, which sought to "establish the supremacy of the white race." *Id. at 1394*. It "approved non-unanimous juries as one pillar of a comprehensive and brutal

program of racist Jim Crow measures against African-Americans, especially in voting and jury service." [Pg 2] *Id. at 1417* (Kavanaugh, J., concurring in part). The point was to make it easier to convict African American defendants at criminal trials, even when some of the jurors themselves were African American. And it worked. Data contained in the *Ramos* record shows that votes of Black jurors have been disproportionately silenced and that Black defendants have been disproportionately affected by non-unanimous verdicts. Approximately 32% of Louisiana's population is Black, yet 69.9% of prisoners incarcerated for felony convictions are Black. Clearly **[*3]** our longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has affected the fundamental fairness and accuracy of proceedings.

There are some rules of procedure untethered to our history of discrimination against African Americans where the question of retroactive application may carry less weight. But then non-unanimous jury rule was intentionally racist and has disproportionately affected Black Louisiana citizens for 120 years. There is no principled or moral justification for differentiating between the remedy for a prisoner convicted by that law whose case is on direct review and one whose conviction is final. We should abandon our use of the *Teague* test, which—informed by federalism concerns—has never had any logical application in state court anyway, and formulate a new retroactivity test for Louisiana that takes into account the racist origins or disproportionate impact of a stricken law. We should not fear a "crushing" "tsunami" of follow-on litigation." *Ramos, 140 S. Ct. at 1406*. The cost of giving new trials to defendants convicted by non-unanimous juries is much less than the social cost of perpetuating—by **[*4]** our own inaction—a deeply-ingrained distrust of law enforcement, criminal justice, and Louisiana's government institutions.

For these reasons, which I explain further in *State v. Gipson*, 19-KH-1815, regardless of the words or legal grounds a defendant uses to challenge his conviction, I believe *Ramos* should apply to anyone convicted by a non-unanimous jury.

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