People v. Petera, J

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA0390
Adams County District Court No. 05CR3378
Honorable C. Vincent Phelps, Judge
Honorable Emily E. Anderson, Judge
Honorable Robert S. Doyle, Judge
Honorable Katherine R. Delgado, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

James Michael Petera,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division A
Opinion by: JUDGE ROMÁN
Davidson, C.J., and Russel, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: November 6, 2008

John W. Suthers, Attorney General, Rhonda L. White, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Joseph P. Hough, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, James Michael Petera, appeals the judgment of conviction entered on a jury verdict finding him guilty of second degree assault against an at-risk adult (his sixty-three-year-old mother). We affirm.

Defendant contends the trial court committed reversible error by denying his challenges for cause to two prospective jurors because the jurors "clearly indicated" they were "unable or unwilling to accept basic principles of criminal law and presume [defendant] innocent." We disagree.

"The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials. It may also serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial." *People v. Young*, 16 P.3d 821, 825 (Colo. 2001) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)).

A trial court must sustain a challenge for cause if a prospective juror's state of mind manifests a bias for or against

either side, unless the court is satisfied that the juror will render an impartial verdict based solely upon the evidence and instructions of the court. § 16-10-103(1)(j), C.R.S. 2008, Crim. P. 24(b)(1)(X); *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000).

Rulings on challenges for cause are reviewed for an abuse of discretion, giving deference to the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses. *Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999). If a prospective juror's recorded responses are unclear, only the trial court can assess accurately the juror's intent from his or her tone of voice, facial expressions, and general demeanor. *Young*, 16 P.3d at 825-26; *see also Carrillo*, 974 P.2d at 487 (appellate court's deference to a trial court's rulings on challenges for cause extends to statements that "may appear inconsistent or self-contradictory"). Thus, reversals of such rulings "should be rare." *Young*, 16 P.3d at 825.

Here, during the prosecution's voir dire, prospective juror L expressed a desire to know how and why someone could do what defendant had been accused of doing.

During the defense's voir dire, prospective juror L acknowledged that the charge against defendant was only an "accusation," and that people could be accused of crimes they did not commit. When asked whether she would "have a problem if someone didn't testify or say what happened if they were accused of the crime," prospective juror L answered, "I don't think I would have a problem with it." Nor did she "think" she would hold it against defendant if defense counsel failed to make an opening statement, failed to question any of the prosecution's witnesses, and simply argued during closing argument that the prosecution "didn't prove it."

Furthermore, when defense counsel asked prospective juror L whether she could follow the law requiring the prosecution "to prove everything," and not requiring the defense "to prove their innocence," she responded:

> I think I can. Like I said, my problem would be why would he, if he did do it, why did he do it. I would still want to know that. And if it's not told to us, then that's fine. But I think I would want to know that.

In addition, prospective juror L stated that she would "try" to base

her decision solely on the prosecution's case; she would "probably not" consider whether the defense had not presented any evidence; and, if the prosecution failed to prove the elements of the crime, she would "try not to" deliberate about what the defense had failed to explain.

Prospective juror L also agreed that it was "absolutely" important that a criminal defendant have the right to require the prosecution to prove his or her guilt and acknowledged that, if she were accused of committing a crime, she would want the same right. Then, when counsel asked whether she could "follow the rules of law as explained" to her, she answered, "I think I can."

Later, defense counsel asked all prospective jurors whether any of them felt that, because defendant was "sitting there," "[h]e must have done something wrong." Apparently, both prospective jurors L and F raised their hands. When defense counsel asked prospective juror F whether he could follow the law concerning the presumption of innocence, he answered, "I can follow the law, but we wouldn't be here if he hadn't done something." Counsel did not ask the prospective juror any further questions.

Similarly, when defense counsel asked prospective juror L whether she thought defendant "must have done something wrong because he's sitting there," she answered, "I think he must have done something." Again, counsel did not ask this prospective juror any further questions.

Defense counsel then challenged both prospective jurors on the ground that they could not "follow the law requiring them to presume [defendant] innocent." The trial court rejected counsel's argument and denied both challenges after conducting its own voir dire. The court asked each prospective juror whether they could follow the oath to "truly try the case according to the law and the evidence." Prospective juror F answered, unequivocally, "I can follow the oath." Prospective juror L answered as follows:

> [Prospective Juror L]: Yeah, I think I can follow the law, the oath I've taken.
>
> [Court]: Because you're swearing to all of us here present today that that's what you're going to do, you see? That's really important. That's a huge undertaking and obligation, it is.
>
> [Prospective Juror L]: It is.
>
> [Court]: It is. And all I need to know is whether or not you can follow that oath and

> follow the law.
>
> [Prospective Juror L]: Well, that's kind of hard because -- yeah, I can follow it.
>
> [Court]: Oh, I'm going to give it to you, I'm going to read [the law] to you; and then I'm going to give you a copy of it. If you're on this jury, believe me, you're not going to go back there empty handed, Ms. [L].
>
> You're going to have those papers right in front of you. And if you have any questions about them, any of you, you can ask the questions in writing and we can refer you to, if we can refer you to the answer, we're going to do that, too.
>
> [Prospective Juror L]: I think I can.

Defendant used two peremptory challenges to excuse the challenged jurors and exhausted his remaining peremptory challenges.

Considering these juror's statements as a whole, we perceive no abuse of the trial court's discretion. *See Young*, 16 P.3d at 824 (in reviewing a trial court's ruling on challenges for cause, an appellate court must review the entire voir dire at issue).

First, we reject defendant's argument that prospective juror F "clearly revealed" his "inability to afford [defendant] the presumption of innocence" when he stated that "we wouldn't be here if [defendant] hadn't done something." One such remark is not

enough to warrant reversal of the denial of a challenge for cause. *See People v. Griffin*, 985 P.2d 15, 20 (Colo. App. 1998) (a prospective juror's expression of concern about his or her ability to set aside a prejudice or preconceived belief about some facet of the case does not automatically warrant exclusion for cause). In our view, prospective juror F's assurance to the trial court that he could "try the case according to the law and the evidence" adequately revealed his ability to assess the case on its facts and follow the law, including the law concerning the presumption of innocence. *See People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987) (it is the trial court's prerogative to give considerable weight to the person's statement that he or she can fairly and impartially serve on the case).

We also reject defendant's argument that prospective juror L's responses required her removal for cause. While her assurances about her ability to follow the law and presume defendant innocent were somewhat equivocal, the record does not contain "firm and clear evidence" that she could not do so. *See, e.g., People v. Lefebre*, 5 P.3d 295, 302 (Colo. 2000) (concluding that trial court abused its

discretion in removing prospective jurors for cause where record did not contain "firm and clear evidence" that removed jurors held actual biases that they could not set aside). Considering her responses as a whole, and the trial court's ability to observe her demeanor and gauge the credibility of her responses, we cannot conclude that the court abused its discretion in denying this challenge for cause either. *See People v. Valdez*, 183 P.3d 720, 725 (Colo. App. 2008) (rejecting defendant's contention that prospective juror's use of the words "try" and "feel" was insufficiently definite to show the prospective juror would set aside any preconceived notions about the defense and decide the case on the evidence and the court's instructions).

Accordingly, the judgment is affirmed.

CHIEF JUDGE DAVIDSON and JUDGE RUSSEL concur.