

Certification of Word Count: 3,320

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Colorado State Judicial Building Two East 14th Avenue Denver, Colorado 80203</p>	<p>2008 APR 25 P 5: 59 CHRISTOPHER T RYAN CLERK COURT OF APPEALS</p>
<p>Adams District Court Honorable C. Vincent Phelps Case Number 05CR3378</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellee</p> <p>v.</p> <p>James M. Petera</p> <p>Defendant-Appellant</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>OPENING BRIEF OF DEFENDANT-APPELLANT</p>	

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THE CONSTITUTION OF THE STATE OF COLORADO
AS AMENDED

INTRODUCTION

Defendant-Appellant, James Petera, was the defendant in the trial court and will be referred to by name or as the Defendant. Plaintiff-Appellee, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal.

STATEMENT OF THE ISSUE PRESENTED

Whether the trial court reversibly erred when it denied the defendant's challenges for cause of two prospective jurors who clearly and repeatedly indicated that they could not afford Mr. Petera the presumption of innocence.

STATEMENT OF THE CASE

On October 25, 2005, the State charged Mr. Petera with assault in the second degree (on October 20, 2005), against his mother, Mary Petera (an at-risk adult by virtue of her being sixty-two years old), a class three felony and crime of violence, pursuant to §18-6.5-102(1), §18-6.5-103(3)(b), and §18-3-203(1)(b), C.R.S. (2005).(v.1, p1-2) Mr. Petera pleaded not guilty, tried his case to a jury, and was found guilty of the charge.(v.1, p45-46)

Mr. Petera was sentenced to ten years in DOC with five years of mandatory parole.(v.13, p10) Subsequently, through counsel, Mr. Petera filed a Notice of

Appeal and a Motion to Accept Notice of Appeal and Designation of Record as Timely Filed, that this Court granted.(See Court of Appeals flat file)

STATEMENT OF THE FACTS

During trial, Mary Petera testified that on the morning of October 20, 2005, James Petera (her son who lived in her basement) requested the use of her vehicle in order to look for a job.(v.11, p22, p27) According to Ms. Petera, her son offered to drive her to work, but she refused, gave the vehicle's keys to him, and left for work on foot.(v.11, p27-31)

As she was walking, Ms. Petera looked over her shoulder and noticed Mr. Petera driving the vehicle very slowly behind her.(v.11, p32) Shortly thereafter, according to Ms. Petera, Mr. Petera drove the car into her, knocking her to the ground¹.(v.11, p33) Ms. Petera quickly got to her feet and continued on her way.(v.11, p36-41)

Later that afternoon (while at work) Ms. Petera began experiencing pain in her neck and called the police to report the incident.(v.11, p36-42) According to Ms. Petra, as a result of being hit, she suffered whiplash and external abdominal bruising.(v.11, p36)

¹ Sharon Griffith, Ms. Petera's neighbor, also testified that she observed a slow moving vehicle strike Ms. Petra, knocking her to the ground.(v.11, p73)

During closing argument, the defense emphasized a number of inconsistencies between Ms. Petera's testimony, her prior statements, and the physical evidence.(v.12, p21-36) Additionally, the defense argued that Mr. Petera did not use the vehicle in a manner that would qualify it as a "deadly weapon," an essential element of the charged crime.(v.12, p32) Essentially, the defense asserted that Mr. Petera was innocent because the prosecution had simply not proven all the elements of the charged offense beyond a reasonable doubt.(v.12, p21-36)

Additional facts, concerning what occurred during *voir dire*, will be provided where appropriate.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error by denying Mr. Petera's for cause challenges to two prospective jurors who clearly and repeatedly indicated that they could not presume Mr. Petera innocent of the charge against him. Furthermore, neither the trial court nor the prosecution sufficiently rehabilitated these prospective jurors in order to ensure that they could be fair and impartial, afford the defendant the presumption of innocence, fairly judge the facts of the case, and follow the court's instructions and the applicable law.

ARGUMENT

BY DENYING THE DEFENDANT'S CHALLENGE FOR CAUSE OF TWO PROSPECTIVE JURORS WHO CLEARLY AND REPEATEDLY INDICATED THAT THEY COULD NOT AFFORD MR. PETERA THE PRESUMPTION OF INNOCENCE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR.

A. Standard of Review

Because criminal defendants have the constitutional right to a fair trial by an impartial jury, a trial court must grant all valid challenges for cause. *See Ma v. People*, 121 P.3d 205, 210 (Colo. 2005); U.S. Const. amend. VI; Colo. Const. art. II, §16. And whether a defendant received a fair trial by an impartial jury is an issue reviewed *de novo*. *U.S. v. Milner*, 962 F.2d 908 (9th Cir. 1992); *see also U.S. v. Nickl*, 427 F.3d 1286 (10th Cir. 2005) (whether defendant's due process rights were violated is reviewed *de novo*); *but see Carillo v. People*, 974 P.2d 478 (Colo. 1999) (trial court's denial of a defendant's challenge for cause is reviewed for an abuse of discretion).

Here, defense counsel appropriately challenged the prospective jurors at issue, for cause, but the trial court denied the challenges.(v.10, p93-100) Subsequently, the defense exercised peremptory challenges against the prospective jurors and exhausted all of its remaining challenges.(v.10, p100-02) Thus, reversal is mandated. *See Wilson v. People*, 114 P.3d 19, 22 (Colo. App. 2004) (a

conviction must be reversed when a trial court erroneously denies a challenge for cause and the defendant exercises all of his allotted peremptory challenges and removes the prospective jurors at issue).

B. Applicable Facts

Prospective Juror Lundeen's Voir Dire Examination

During *voir dire*, the court informed the prospective jury panel that Mr. Petera was charged with assaulting Mary Petera with a deadly weapon and causing bodily injury to her.(v.10, p8-9) Additionally, the prosecutor told the prospective jurors that the “victim in this case is the Defendant’s 62-year-old mother.”(v.10, p33)

Thereafter, prospective juror Ms. Lundeen indicated, to the prosecutor, that she simply could not understand why Mr. Petera would have done such a thing to his mother and specifically stated, “It’s hard when you’re a mom. And if you have a mom, it’s hard to understand why somebody would do that and how it happened.”(v.10, p59) Moreover, during the defendant’s portion of *voir dire*, Ms. Lundeen indicated, “I just can’t imagine somebody doing that is my problem.”(v.10, p61)

Shortly thereafter, the following exchange occurred between Ms. Lundeen and defense counsel:

[Defense Counsel]: ... you'll get the law at the end of the case if you're chosen to be on the jury, and the law instructs you that it's the prosecution's burden to prove everything. The defense doesn't have to prove their innocence. Do you think you can follow that law?

[Ms. Lundeen]: *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.

[Defense Counsel]: Just let me tell you what my only concern might be is that if you go back there to deliberate and you're thinking, you know what, I don't really think the prosecution proved this element of the charge but you know what, I didn't hear from Mr. Petera or didn't hear from Mr. Petera or his defense attorney that he didn't commit the crime, I did hear any evidence of innocence. Are you going to hold that against Mr. Petera? Or can you just base it solely on the prosecution's case?

[Ms. Lundeen]: *I can try* to base it on his case.

[Defense Counsel]: Okay: well, let me put it this way. If you were chosen to be on the jury and you were back there deliberating, would you consider evidence that was not presented by Mr. Petera or the defense as to whether or not he committed the crime?

[Ms. Lundeen]: *Probably not.*

[Defense Counsel]: What I'm saying is if we didn't explain why there was no intent but the prosecution didn't prove intent, are you going to deliberate about what we fail to show you, the defense?

[Ms. Lundeen]: *I would say I would try not to. But whether or not it would, why I'm having a hard time, I don't know.*

[Defense Counsel]: Well, Ms. Lundeen, do you think it's important that a person accused of a crime has a lot of rights? The prosecution has to prove the guilt?

[Ms. Lundeen]: Absolutely.

[Defense Counsel]: And if you were accused of a crime, you would probably want all of those rights also, correct?

[Ms. Lundeen]: Yeah.

[Defense Counsel]: Let me ask you, if you were accused of a crime and you were sitting there and you were looking over at a jury, would you want someone on the jury that had the same mindset that you have? Or would you be real concerned about that person being a juror?

[Court Reporter]: I can't hear.

[The Court]: We can't hear you.

[Ms. Lundeen]: *He might be a little concerned about me being here just from the way he looked at me. I think he thought maybe I wouldn't be fair.*

[Defense Counsel]: Okay. Well, do you think you can follow the rules of law as explained to you?

[Ms. Lundeen]: *I think I can.*

(v.10, p65-67) (emphasis added).

Later in the process, defense counsel posed the following questions to Ms. Lundeen: “So you know what the law is and you understand the law; but as you sit there right now, you think that Mr. Petera must have done something because he’s sitting there. The D.A. wouldn’t have brought him forward if he hadn’t. That’s the way you feel. Does anybody else feel that way? Ms. Johnson, or, no, I’m sorry, Ms. Lundeen, you indicated that you feel that D.A. would not bring a case against somebody that didn’t commit a crime.”(v.10, p90) To that, Ms. Lundeen responded, “I do, yeah. I kind of do.”(*Id.*)

Defense counsel followed up by asking, “So my question then is, are you not able to look over there at Mr. Petera and say, I presume you innocent, no way? You think that he must have done something wrong because he’s sitting there?”(v.10, p90-91) To that very clear and direct question concerning her ability or inability to afford Mr. Petera the presumption of innocence, Ms. Lundeen replied, “I think he must have done something.”(v.10, p91)

Prospective Juror Fitch’s Voir Dire Examination

Additionally and along similar lines, the following exchange occurred between defense counsel and prospective juror Mr. Fitch:

[Defense Counsel]: Mr. Fitch, I just saw that you had your hand up also. With the law requiring you to presume someone accused of a crime innocent, and the prosecution has the burden to prove they’re guilty, can

you look over there and say, you know what right now, looking over there, not guilty, that's what my verdict has to be, not guilty because I presume him innocent? Can you follow that law?

[Mr. Fitch]: I can follow the law, but *we wouldn't be here if he hadn't done something.*

(v.10, p90) (emphasis added).

Shortly thereafter, defense counsel challenged a number of prospective jurors for cause, including Ms. Lundeen and Mr. Fitch.(v.10, p93) Specifically, the defense asserted that these prospective jurors were unable and/or unwilling to follow the law and presume Mr. Petera innocent of the charged offense, unless and until he was proven otherwise by the prosecution.(v.10, p93)

In its attempt to rehabilitate Ms. Lundeen and Mr. Fitch, the trial court engaged in the following dialogue with these prospective jurors:

[The Court]: Mr. Fitch, did you have to take an oath when you took this position² that you have?

[Mr. Fitch]: Yes.

[The Court]: I thought so. I'll bet you take that oath real seriously, too.

[Mr. Fitch]: I do.

² Earlier in the *voir dire* process, Mr. Fitch indicated that he was currently employed as a firefighter and paramedic.(v.10, p59-60)

[The Court]: I thought so, just like I do. My question, Mr. Fitch, is, if you're selected to sit on this jury panel and take that oath to truly try the case according to the law and the evidence, can you follow that oath?

[Mr. Fitch]: I can follow that oath.

[The Court]: I figured you could. Thank you, sir. And Ms. Lundeen, the same question.

[Ms. Lundeen]: Yeah, *I think I can follow the law*, the oath I've taken.

[The 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.

[Ms. Lundeen]: It is.

[The Court]: It is. And all I need to know is whether or not you can follow that oath and follow the law.

[Ms. Lundeen]: *Well, that's kind of hard because – yeah, I can follow it.*

[The Court]: Oh, I'm going to give it to you, I'm going to read it 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. Lundeen. 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. So do you think you can take that oath and follow the law?

[Ms. Lundeen]: *I think I can.*

(v.10, p98-99) (emphasis added).

C. Law and Analysis

The due process clauses of the United States and Colorado constitutions guarantee every criminal defendant the right to a fair trial by an impartial jury. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II §§16, 25; *see also Morrison v. People*, 19 P.3d 668 (Colo. 2000). “[T]he right to challenge a juror for cause is an integral party of a fair trial” (*People v. Wilson*, 114 P.3d 19, 21 (Colo. App. 2004)), and “[a]n impartial jury is a fundamental element of the constitutional right to a fair trial” (*Morrison v. People, supra* at 672). A defendant’s right to an impartial jury is violated if the trial court fails to remove a prospective juror who is biased against the accused. *See Nailor v. People*, 200 Colo. 30, 32, 612 P.2d 79, 80 (1980) (“To insure that [a defendant’s right to an impartial jury] is protected, the trial court must excuse prejudiced or biased persons from the jury.”); *see also Harris v. People*, 888 P.2d 259, 264 (Colo. 1995) (stating that the right to trial by an impartial jury requires a determination of the issues “solely on the basis of the evidence presented at trial rather than on the basis of bias or prejudice for or against a party”).

Accordingly, “[a] trial court must grant a challenge for cause if a prospective juror is unwilling or unable to accept the basic principles of criminal law and to

render a fair and impartial verdict based upon the evidence admitted at trial and the court's instructions." *Morrison v. People, supra*; see also *People v. Blessett*, 155 P.3d 388, 392 (Colo. App. 2006) (finding that the prospective juror's statements concerning the "presumption of innocence were based on a hypothetical assertion ... [and when] that assumption was removed, there was no indication that the juror would be unable to render a fair and impartial verdict or would be unwilling to honor the presumption of innocence").

This requirement is codified in §16-10-103, C.R.S. (2005), which directs:

(1) The court shall sustain a challenge for cause on one or more of the following grounds:

(j) The existence of a state of mind in the juror evincing enmity or bias toward the defendant or the state; however, no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

See also Crim. P.24(b)(1)(X).

Here, prospective jurors Lundeen and Fitch clearly indicated that they were simply unable or unwilling to accept basic principles of criminal law and presume Mr. Petera innocent unless and until he was proven guilty. Indeed, not only was Ms. Lundeen's entire *voir dire* examination fraught with numerous instances of

equivocation and doubt when questioned about her ability to follow the law and the court's instructions (i.e. "I think I can," "I can try," "Probably not," "I would try," "I'm having a hard time, I don't know"), but when asked if she believed that the district attorney's office would not bring charges against a defendant unless he had committed a crime, she answered "I do, yeah. I kind of do." Moreover, when directly questioned about whether she could afford Mr. Petera the presumption of innocence or alternatively, whether she believed he must have done something wrong (committed a crime) because of his status as the defendant, Ms. Lundeed unequivocally stated "I think he must have done something."

Similarly, prospective juror Fitch also clearly expressed his unwillingness to presume Mr. Petera innocent, albeit not as blatantly as Ms. Lundeed had. Specifically, while Mr. Fitch claimed that he could "follow the law," his inability to afford Mr. Petera the presumption of innocence was clearly revealed when he voiced the caveat, "but we wouldn't be here if he hadn't done something."

Furthermore, the trial court's attempt to rehabilitate Ms. Lundeed and Mr. Fitch was wholly inadequate and failed to ensure that either of the prospective jurors could afford Mr. Petera the presumption of innocence, despite their statements to the contrary. As to Mr. Fitch, the court simply asked the prospective juror if he could follow an oath (which had not yet been administered or even read

to the jury) to try the case according to the law and the evidence. However, the court failed to inquire about Mr. Fitch's inability to afford Mr. Petera the presumption of innocence and his statement to that effect: "but we wouldn't be here if [Mr. Petera] hadn't done something."

Similarly, the court failed to inquire into any of Ms. Lundeen's former statements where she repeatedly indicated that she was unable or unwilling to presume Mr. Petera innocent of the crime charged. *See, e.g., People v. Abbott*, 690 P.2d 1263, 1267 (Colo. 1984) (review of a challenge for cause must take into account the entire examination of the prospective juror). Instead, the court simply made reference to an oath, which had not yet been administered and the specifics of which had not yet been made known to the jury. Moreover, instead of answering the court's questions (concerning the "oath" and her ability to apply the law) in definitive terms, Ms. Lundeen continued to express equivocation and doubt replying, "I think I can follow the law," and, "Well, that's kind of hard because – yea, I can follow it," and finally, "I think I can [follow the law]."

In sum, neither Ms. Lundeen nor Mr. Fitch ever voiced "unequivocal statements . . . of [their] commitment to fairness that might support the trial court's conclusion" to deny the defendant's challenges for cause in the case. *People v. Luman*, 994 P.2d 432, 436 (Colo. App. 1999). Thus, where, as here, prospective

jurors express doubt about their ability to honor and apply a basic principle of criminal law, such as the presumption of innocence, the court should sustain a challenge for cause. *See Morrison v. People, supra*. Indeed, the Colorado Supreme Court has held that any doubts about a juror's ability to be impartial must be resolved by sustaining the challenge and dismissing the juror. *See People v. Russo*, 713 P.2d 356, 362 (Colo. 1986).

Because the trial court erroneously denied Mr. Petera's challenges for cause, the defendant was forced to excuse the two prospective jurors with its peremptory challenge. Consequently, the court's error deprived Mr. Petera of his full allotment of peremptory challenges, and, therefore, reversal is mandated. *See U.S. Const. amends. V, XIV; Colo. Const. art. II §§16, 25; Morrison v. People, supra; Wilson v. People, supra*.

CONCLUSION

For the reasons and authorities presented, Mr. Petera respectfully requests this Court to reverse his conviction and remand his case to the district court for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on April 25, 2008, a copy of this Opening Brief of Defendant-Appellant was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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