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<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>CLERK COURT OF APPEALS</p>
<p>District Court of Adams County Honorable C. Vincent Phelps, Judge Case No. 05CR3378</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellee, v. JAMES M. PETERA, Defendant-Appellant.</p>	<p>▲ COURT USE ONLY ▲ Case No.: 07CA0390</p>
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<p>PEOPLE'S ANSWER BRIEF</p>	

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STATEMENT OF THE CASE

The defendant, James M. Petera, was charged with assault in the second degree against an at-risk adult (v. I, pp. 1-2). The charges in the case arose from the defendant hitting the victim, Mary Lou Petera, with the victim's car on October 20, 2005. The victim is the defendant's mother and, at the time of the assault, was sixty-two (62) years old making her an at-risk adult (v. I, pp. 1-2; v. XI¹, p. 22). On November 9, 2006, the Defendant was convicted of the charge (v. I, pp. 45-46).

On January 16, 2007, the Defendant was sentenced to ten years in the Department of Corrections ("DOC") with a term of five years for parole (v. XIII, p.10).

STATEMENT OF THE FACTS

On October 20, 2005, the victim, Mary Lou Petera ("Ms. Petera"), testified that she woke up around 7:00 in the morning to get ready to go to work (v. XI, p. 24). Ms. Petera wanted to leave her home before her son, the defendant, woke up (v. XI, pp. 24-25). Ms. Petera said that she typically drives her vehicle to work and intended to do so that morning (v. XI, pp. 26-27). She testified that, as she was

¹ Volume XI incorrectly indicates that the proceeding took place on November 8, 2007. Review of the record indicates that the correct date is November 8, 2006.

pulling out of the garage, the defendant opened the door and stated that he wanted to use Ms. Petera's car that morning to look for a job (v. XI, p. 27).

Ms. Petera, eventually, got out of her vehicle and gave the keys to the defendant (v. XI, p.27). She stated that the defendant offered to drive Ms. Petera to work but she refused and told the defendant that she would walk to work (v. XI, pp. 27-28). Ms. Petera began to walk down the street to work which is approximately one mile from her home (v. XI, p. 28).

As Ms. Petera began to walk, she turned and saw the defendant get into the vehicle (v. XI, p. 31). She stated that she saw the defendant driving slowly, and she thought the defendant was following her to work (v. XI, pp. 31-32). Ms. Petera saw the defendant cross the street, in the vehicle, and then she turned around completely because the front of the vehicle was heading towards her (v. XI, pp. 32-33). Ms. Petera looked through the vehicle's windshield, saw the defendant smile at her, and then the defendant "just rammed into [Ms. Petera]" (v. XI, p. 33).

Ms. Petera recalled "scrambling on the ground" and yelling for help (v. XI, p. 33). She stated that the defendant did not exit the vehicle to offer assistance but, instead, simply left the scene (v. XI, p. 34). Ms. Petera sustained injuries, including whiplash and abdominal contusions (v. XI, pp. 34-36). She stated that

she “probably cussed [the defendant] out” when he ran the vehicle into her (v. XI, p. 36).

Ms. Petera testified that, at that time, she did not call the police because “it was [her] son” (v. XI, p. 40). Ms. Petera was “in shock” but she went to work, using an alternate route (v. XI, pp. 40-41). She contacted her husband and, later that morning, met with the police (v. XI, p. 41).

Additional facts, specifically the relevant testimony from *voir dire*, will be provided in the answer brief as necessary.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the defendant’s challenges for cause against prospective jurors, Ms. Lundeen and Mr. Fitch. Both prospective jurors indicated that they were able to apply the law as instructed and to follow the oath as instructed.

ARGUMENT

- I. The trial court did not abuse its discretion in denying the defendant’s challenges for cause against two prospective jurors because both prospective jurors were willing and able to follow the law as instructed.**

The defendant contends that the trial court abused its discretion in denying his challenges for cause against prospective jurors, Ms. L and Mr. F. The

defendant asserts that Ms. L and Mr. F were unable to follow the law and afford the defendant the presumption of innocence. In fact, as shown below, the record indicates that both prospective jurors were willing and able to follow the law as instructed.

A. Standard of Review

A trial court's denial of a challenge for cause is reviewed for an abuse of discretion, "a very high standard...[that] gives deference to the trial court's assessment of the credibility of a prospective juror's responses...recognizes the trial court's unique role and perspective in evaluating the demeanor and body language of live witnesses, and...serves to discourage an appellate court from second-guessing those judgments based on a cold record." Carillo v. People, 974 P.2d 478, 485 (Colo. 1999). "The trial court's decision to deny a challenge for cause in the jury selection process or decision to excuse a juror will not be disturbed absent an abuse of discretion." Medina v. People, 114 P.3d 845, 856 (Colo. 2005). Its ruling on a challenge for cause will only be reversed if there is no evidence in the record to support it. People v. Arko, 159 P.3d 713, 720 (Colo. App. 2006), rev'd on other grounds, 183 P.3d 555 (Colo. 2008); People v. Richardson, 58 P.3d 1039, 1042 (Colo. App. 2002). Accordingly, reversals on juror challenges should be rare. People v. Young, 16 P.3d 821, 825 (Colo. 2001).

However, when a defendant does use a peremptory challenge to excuse the juror challenged for cause and exhausts all of his peremptory challenges, a trial court's erroneous denial of the challenge for cause affects the defendant's substantial rights and cannot be deemed harmless. People v. Harlan, 8 P.3d 448, 460 (Colo. 2000). Here, the defendant used two peremptory challenges against Ms. L and Mr. F and otherwise exhausted all of his peremptory challenges (v. 10, pp. 100-103).

B. Relevant Testimony

1. Prospective Juror Ms. L

Defense counsel asked Ms. L if she would want the defendant to testify during trial (v. X, p. 60). Specifically, the following exchange occurred:

[Defense Counsel]: And Ms. [L], I don't know if you were getting at you want the reason. Do you want to hear the reason from [the defendant] or ---

[Ms. L]: Not necessarily. I would like to know who he is. It's how I am, you know? If it doesn't have to be heard, then it doesn't have to be heard. But I would like to know.

[Defense Counsel]: Okay.

[Ms. L]: I just can't imagine somebody doing that is my problem.

[Defense Counsel]: You understand right now it's just an accusation?

[Ms. L]: It's an accusation, I understand that.

[Defense Counsel]: Do you think people can get accused of crimes they didn't commit?

[Ms. L]: Yeah.

(v. X, pp. 60-61).

Defense counsel continued with questioning regarding the prosecution's burden in proving the defendant committed the crime. Ms. L stated that she "[didn't] have a problem" with the prosecution being required to prove their case, even if defense counsel or the defendant did not state anything during trial. The following exchange took place:

[Defense counsel]: Okay. So when the law – 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. L]: I think I can. Like I said, my problem would be why 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 [the defendant] or didn't hear from [the defendant] or his defense attorney that he didn't commit the crime, I didn't hear any evidence of innocence.

Are you going to hold that against [the defendant]? Or can you just base it solely on the prosecution's case?

[Ms. L]: I can try.

[Defense counsel]: You can try? Well --

[Ms. L]: 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 [the defendant] or the defense as to whether or not he committed the crime?

[Ms. L]: 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. L]: 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. [L], 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. L]: Absolutely.

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

[Ms. L]: 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?

...

[Ms. L]: 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. L]: I think I can.

(v. X, pp. 65-67).

Later in the process, defense counsel returned to Ms. L with the following:

[Defense counsel]: So you know what the law is and you understand the law; but as you sit there right now, you think that [the defendant] 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. [L], you indicated that you feel the D.A. would not bring a case against somebody that didn't commit a crime.

[Ms. L]: I do, yeah. I kind of do.

[Defense counsel]: So my question then is, are you not able to look over there at [the defendant] and say, I presume you innocent, no way? You think that he must have done something wrong because he's sitting there?

[Ms. L]: I think he must have done something.

(v. X, pp.90-91).

Defense counsel then challenged several prospective jurors for cause, including Ms. L (v. X, p. 93). Defense counsel stated that she was concerned that

Ms. L would not be able to follow the law requiring her to presume the defendant's innocence (v. X, pp. 90-91).

Further into the process, however, the court asked Ms. L if she would be able to follow an oath "to try the case according to the law and the evidence." (v. X, p. 98). Ms. L responded, "[y]eah, I think I can follow the law, the oath I've taken." (v. X, p. 98). The court asked some follow-up questions:

[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. 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.

[Ms. 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 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. [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.

So do you think you can take that oath and follow the law?

[Ms. L]: I think I can.

(v. X, pp. 98-99).

2. Prospective Juror Mr. F

The prosecution determined that prospective juror, Mr. F, was employed as a lieutenant firefighter and paramedic (v. X, p. 59). Mr. F then stated that he did not have the authority to arrest nor was he considered a law enforcement officer; making him eligible to potentially serve on the jury (v. X, p. 60). Further on in the process, the following exchange occurred:

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

(v. X, p. 90).

As previously stated, defense counsel then challenged several prospective jurors, including Mr. F (v. X, p. 93). Again, defense counsel stated that she was concerned that Mr. F would not be able to follow the law requiring

him to presume the defendant's innocence (v. X, p. 93). Later, however, the following dialogue occurred:

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

[Mr. F]: Yes.

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

[Mr. F]: I do.

[The Court]: I thought so, just like I do. My question, Mr. [F], 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 evidence, can you follow that oath?

[Mr. F]: I can follow the oath.

[The Court]: I figured you could. Thank you, sir.

(v. X, p. 98).

3. Additional Testimony

At the beginning of *voir dire*, the trial court gave the prospective jurors an overview of general principles of criminal law and what is typically expected from jurors during a criminal trial. Specifically, the court stated:

The Defendant, upon bringing of this charge against him, has entered a plea of not guilty. By pleading not guilty, he is saying that he didn't commit the crime. And I will tell all of you here that the Defendant in this case, as in every criminal case at this stage of the proceeding, is presumed to be innocent or not guilty of that charge.

And that presumption of innocence will remain with this Defendant, as remains with every defendant in a criminal case, until such time as the prosecution has tendered evidence to this jury that shows to the satisfaction of the jury beyond a reasonable doubt that the Defendant indeed committed the act stated on the Information.

(v. X, p. 9).

Later, after describing the case, the court specifically asked the following question:

[Court]: It is, now knowing what this case is about, is there anyone on this panel at this juncture who feels that you just couldn't be fair and impartial in this kind of a case?

(v. X, p. 21). Neither Ms. L nor Mr. F responded affirmatively to this question (v. X, p. 21).

Defense counsel stated that she was concerned about, among others, Ms. L and Mr. F. Specifically, she believed the prospective jurors "should be excused because they can't follow the law requiring them to presume [the defendant] innocent..." (v. X, p. 93). The following dialogue between defense counsel, the prosecution, and the court ensued:

[Defense Counsel]: And I think when I was questioning them, I was wording it as if you can presume them innocent. And most of them were saying that they think because it's this far because he's sitting there, he must have done something wrong.

[Prosecutor]: Well, it's a subtle – it's a very subtle thing, the question asked, which leads to a relatively misleading answer. [Defense counsel] didn't ask him the question whether or not they can presume him innocent of the crime he's charged with. They just said he's here because he did something.

[The Court]: I understand.

[Prosecutor]: And it's a subtle difference, but it's also very important.

(v. X, p. 93).

C. Analysis

An impartial jury is a fundamental part of the constitutional right to a fair trial. People v. Harlan, 8 P.3d 448, 459 (Colo. 2000). The right to challenge a juror for cause is also an essential component of a fair trial. Id. at 460. A defendant's right to an impartial jury is violated if the trial court fails to remove a challenged juror biased against the defendant. Morrison v. People, 19 P.3d 668, 672 (Colo. 2000). However, the simple existence of a preconceived belief or the identification of a possible source of bias does not require exclusion for cause. Medina v. People, 114 P.3d 845, 856 (Colo. 2005); People v. Streaun, 74 P.3d 387, 390 (Colo. App. 2002). A juror shall not be disqualified if the trial court is satisfied that the juror will follow the court's instructions of law and base the verdict upon the evidence presented at trial. § 16-10-103(1)(j); Streaun, 74 P.3d at 390-91.

The court may ask questions specifically designed to rehabilitate the juror. People v. James, 981 P.2d 637, 639-40 (Colo. App. 1998). In the face of what linguistically may appear to be ambiguous or inconsistent responses, only the trial court can fully appraise the true attitudes and state of mind of a potential juror. Carillo v. People, 974 P.2d 478, 487 (Colo. 1999) (citing People v. Sandoval, 733 P.2d 319, 321 (Colo. 1987)). In doing so, courts are entitled to give “considerable weight” to a juror’s assurances of fairness and impartiality. Sandoval, 733 P.2d at 321.

Jurors are often confused or uncertain about the presumption of innocence, for it is a difficult legal concept. People v. Young, 16 P.3d 821, 825 (Colo. 2001). “The mere expression of some concern by a prospective juror regarding a certain aspect or issue of a case should not result in automatic dismissal of that prospective juror for cause.” People v. Arko, 159 P.3d 713, 720 (Colo. App. 2006) (citing cases). “Rather, the decisive question is whether it is possible for the prospective juror to set aside her preconceived notions and decide the case based on the evidence and the court’s instructions.” Id. (citing cases); *see also* People v. Lefebvre, 5 P.3d 295, 301 (Colo. 2000).

There are numerous Colorado cases where the denial of a challenge for cause was determined to be an appropriate exercise of discretion. *See* Young, 16

P.3d at 822-23, 825 (juror commented that criminal charges indicated guilt); People v. Honeysette, 53 P.3d 714, 719-29 (Colo. App. 2002) (juror indicated a desire to hear both sides); People v. Carmichael, 179 P.3d 47, 54 (Colo. App. 2007) (prospective juror stated she could not be a fair and impartial because of her strong feelings against people who commit crimes against children); People v. Morrison, 985 P.2d 1, 2 (Colo. App. 1999) (This Court concluded that “the trial court questioned the juror and satisfied itself that, with an instruction about the presumption of innocence, the juror would be able to determine the case on the evidence submitted.”).

In the present case, Ms. L expressed a desire to hear, if the defendant committed the crime, the reasoning behind such action (v. X, p.65). She repeatedly stated that she would try to apply the law as instructed and would try to not evaluate anything the defense failed to show (v. X, pp. 65-67). When questioned by defense counsel, Ms. L candidly stated that she thought the defendant “must have done something.” (v. X, p. 91). However, when questioned by the court, Ms. L stated that she believed she could abide by an oath to follow the law as instructed and try the case according to the evidence and law (v. X, p. 98). Her statements reflect “an honest effort to express feelings and convictions about matters of importance in an emotionally charged setting.” Sandoval, 733

P.2d at 321. The record supports the trial court's evaluation of Ms. L and the subsequent denial of the defendant's challenge.

Similarly, Mr. F honestly answered that he would be apply the law as instructed, however, he noted his belief that he believed the defendant did "something" (v. X, p.90). Again, these statements are simply an indication of Mr. F's desire to candidly answer the questions about complex and important issues. Sandoval, 733 P.2d at 321. Further, when questioned by the trial court, Mr. F stated that he "can follow the oath" and "truly try the case according to the law and evidence..." (v. X, p. 98). Clearly, the record supports the trial court's determination that Mr. F was willing and able to apply the law as instructed.

Additionally, both prospective jurors answered "No" to the written initial jury question that asked if "there [is] any reason you believe you could not be a fair juror in a criminal case". (Envelope #3, Juror's Questionnaires, Question #16). Also, neither Ms. L nor Mr. F answered affirmatively when the court specifically asked, at the beginning of the proceedings, if any prospective juror believed they could not be a fair or impartial juror. (v. X, p. 21).

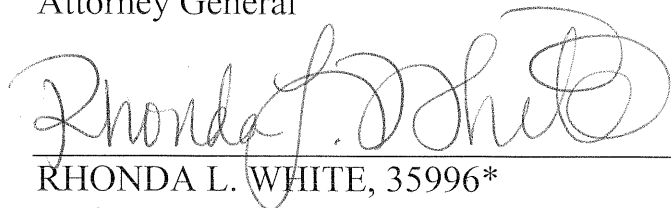
As the record shows and the trial court determined, both Ms. L and Mr. F showed an ability and willingness to follow the law as instructed. The trial court

did not abuse its discretion by denying the defendant's challenges for cause for the prospective jurors.

CONCLUSION

For the foregoing arguments and authorities, the People respectfully request that this Court affirm the defendant's conviction.

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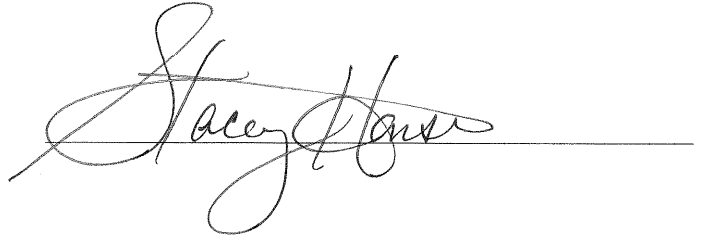
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon
JOSEPH P. HOUGH, Deputy State Public Defender, by delivering copies of same in the
Public Defender's mailbox at the Colorado Court of Appeals office this 11th day of

July 2008.

A handwritten signature in cursive script, appearing to read "Tracy Hauer", is written over a horizontal line.