19CA0176 Peo v Bonner 12-02-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA0176
El Paso County District Court No. 18CR2614
Honorable Robin L. Chittum, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Brendan Patrick-Harold Bonner,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE NAVARRO
Grove and Pawar, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 2, 2021

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Megan A. Ring, Colorado State Public Defender, Sarah Rowlands, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Brendan Patrick-Harold Bonner, appeals the judgment of conviction entered on jury verdicts finding him guilty of first degree trespass and obstructing a police officer. We reverse and remand for a new trial.

I. Challenge for Cause

¶ 2 Bonner contends that the trial court erred by denying his challenge for cause to Juror G after she explained that, if Bonner did not testify, his silence would bear on her consideration of whether the prosecution proved the allegations beyond a reasonable doubt. We agree.

A. Pertinent Facts

¶ 3 Early in voir dire, the trial court advised the venire that it was the court's job to give the jury the law to apply in this case, and it would be the jury's job to follow that law. The court stressed that "jurors don't get to pick the law, and jurors have to follow the law even if they don't agree with it." The court informed the potential jurors about such "general areas of the law" as the presumption of innocence, the prosecution's burden of proof, and the defendant's right to remain silent. In particular, the court said, "The decision not to testify cannot be used as an inference of guilt and cannot

prejudice the defendant in any way. It is not evidence, does not prove anything, and you must not consider it for any purpose."

¶ 4 Afterwards, defense counsel addressed the prospective jurors about "something that the Judge kind of touched on" — Bonner's right not to testify. Framing her upcoming questioning, counsel explained that she wanted to know whether, if Bonner chose not to testify, "if you get back the jury room, would that kind of be a strike against Mr. Bonner?"

¶ 5 Defense counsel started with Juror B, who said that Bonner's not testifying "would count against him" because "[i]f you're trying to defend yourself, then you should defend yourself. Give everything you got." Counsel then asked whether anyone else agreed with Juror B. Juror Z ultimately spoke up and explained that "in a world of reasonable doubt if you're looking at somebody that chooses not to defend themselves, is that reasonable doubt?" Juror Z continued, "So while I can't say it would prejudice me, I can definitely say that it would give me pause, I think, as to why they choose not to speak."

¶ 6 Following these interactions, defense counsel reminded the prospective jurors of the court's earlier instruction, saying that

whether or not the defendant chooses to testify may not factor into the reasonable doubt consideration. Counsel asked, "Is that something that you think that you could, you know, follow?"

¶ 7 Juror Z and other prospective jurors replied that, despite their personal views, they could follow the law and would not consider the defendant's decision not to testify when deliberating in this case. Defense counsel then asked some jurors in the back rows, "[I]s there anyone that it would honestly be a strike against him?" Juror G, the subject of Bonner's appellate argument, spoke next.

¶ 8 Juror G said, "I think that it would be in your mind if the evidence is, let's say dam[n]ing, that if the defendant is innocent that they would want to get up there and say that they were innocent and make their side of the case." Juror G continued, "So I do think that that would bear in terms of reasonable doubt." In response to defense counsel's follow-up question, Juror G confirmed that the defendant's failure to testify would bear on reasonable doubt for her.

¶ 9 Defense counsel then asked Juror G whether her viewpoint came from her experiences. The juror explained that "[i]t's just experience day-to-day. If I'm being accused of something that I

didn't do, I'm going to say I didn't do it." She confirmed that this was "personally, what [she] would feel." Neither the parties nor the court questioned Juror G any further.

¶ 10 Defense counsel later challenged Juror G for cause based on "the constitutional right not to testify." The prosecutor responded that, according to her "recollection," Juror G said that "she felt comfortable that she could follow the law." Defense counsel pointed out that Juror G said that "if the evidence is damning, if I was innocent, I would get it up there and say it."

¶ 11 The trial court denied the challenge, reasoning as follows:

> [Juror G] expressed her personal opinions about people who don't testify. She never said that she wouldn't follow the law, which really is the burden here. And she never really had the chance because the whole you don't like it but can you follow the law didn't come up until the next person that you were talking to.[1] She just talked about how she didn't much like it. So it would be in her mind. She didn't say I couldn't follow the law.

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[1] Although the record is not entirely clear, the trial court was apparently referring to Juror B, who was questioned again after Juror G. Juror B said he could follow the law even though it did not "square with [his] moral viewpoints." No such follow-up questions were asked of Juror G.

¶ 12 The defense exhausted all its peremptory challenges on other prospective jurors, and Juror G served on the jury. Bonner did not testify at trial and was convicted as charged.

B. Applicable Law

¶ 13 We review a trial court's ruling on a challenge for cause for an abuse of discretion. *People v. Oliver*, 2020 COA 97, ¶ 7. A court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misconstrues or misapplies the law. *Id.*; *see Vigil v. People*, 2019 CO 105, ¶ 14.

¶ 14 Both the United States and Colorado Constitutions guarantee a defendant the right to a trial by an impartial jury. *People v. Clemens*, 2017 CO 89, ¶ 15; U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. To protect this right, a trial court must excuse prejudiced or biased persons from the jury. *Clemens*, ¶ 15. In particular, Colorado law provides that the trial court shall sustain a challenge for cause when a prospective juror has indicated "enmity or bias toward the defendant or the state." *Id.* (quoting § 16-10-103(1)(j), C.R.S. 2021); *People v. Blassingame*, 2021 COA 11, ¶ 11. But such a juror need not be excused for cause if, after further examination, the court believes the juror will follow the law and be

impartial. *Clemens*, ¶ 15. Hence, if a court is satisfied that a challenged juror will render a fair and impartial verdict according to the law and the evidence presented at trial, the court should not dismiss the juror for cause. *Id.*; *see People v. Young*, 16 P.3d 821, 824 (Colo. 2001).

¶ 15 In other words, the purpose of challenges for cause is not to remove jurors who simply enter the courtroom with a misunderstanding of the law. *Clemens*, ¶ 16; *see* § 16-10-103(1). Those jurors who initially misunderstand the law should not be removed for cause if, after explanation and rehabilitative efforts, the trial court believes they can render a fair and impartial verdict based on the instructions given by the judge and the evidence presented at trial. *Clemens*, ¶ 16; *Blassingame*, ¶ 12.

¶ 16 So if, after the court explains the correct legal principles, the juror no longer adheres to their preconceived expectations and instead is willing to apply the law as the court instructs, the juror is rehabilitated. *Clemens,* ¶ 17. Stated differently, if a juror indicates that they would have difficulty following the court's instructions, the juror "require[s] rehabilitation in order to serve on the jury." *Id.* at ¶ 21; *see Blassingame*, ¶ 21. Absent such rehabilitation, the

juror must be excused for cause. *See Clemens*, ¶ 21 ("A juror's inability to follow the court's instructions, however, is grounds for their disqualification from jury service."); *People v. Merrow*, 181 P.3d 319, 321 (Colo. App. 2007) (Where "a potential juror's statements compel the inference that he or she cannot decide crucial issues fairly, a challenge for cause must be granted in the absence of rehabilitative questioning or other counter-balancing information.").

C. Analysis

¶ 17 Bonner contends that Juror G voiced impermissible bias against him as it relates to his decision not to testify and that no rehabilitation nor additional context allowed the trial court to be satisfied that Juror G would follow the law. The People acknowledge that Juror G expressed "some misgivings about an innocent person not testifying at trial." But the People argue that, because the juror "never indicated that she would [be] unwilling or unable to follow the trial court's instructions," denying the challenge was within the court's discretion.

¶ 18 Reviewing Juror G's comments "in the context of the entire voir dire," *Clemens*, ¶ 16, we agree with Bonner. Considered in

context, Juror G's statements indicated an unwillingness or an inability to disregard Bonner's decision not to testify — even after the juror was repeatedly made aware that the court's instructions required her to disregard that decision when determining whether Bonner was guilty beyond a reasonable doubt.

¶ 19 As discussed, the following took place before Juror G gave the problematic comments at issue:

- The trial court advised the venire that jurors must follow the law as instructed by the court "even if they don't agree with it."
- The court instructed the prospective jurors that a defendant's decision not to testify "cannot be used as an inference of guilt" and "cannot prejudice the defendant in any way" and, thus, "you must not consider it for any purpose."
- After Jurors B and Z indicated that Bonner's not testifying would count him against him in their analysis, defense counsel reminded the venire of the court's instruction that a defendant's decision not to testify may not play any role in the reasonable doubt consideration. Counsel asked the prospective jurors whether they could follow that law.

- Multiple jurors explained that, regardless of whether they agreed with the law, they could follow it and would not consider a defendant's decision not to testify in this case.
- Defense counsel then asked other jurors, "is there anyone that it would honestly be a strike against [Bonner]?"

¶ 20 In response to defense counsel's last question, Juror G made clear that a defendant's not testifying would be a strike against the defendant in her mind. The juror opined that, if the evidence were damning and the defendant were innocent, "they would want to get up there and say that they were innocent and make their side of the case." As a result, Juror G said the defendant's silence "would bear in terms of reasonable doubt" in her analysis. Explaining that her position was based on her experience, Juror G declared, "If I'm being accused of something that I didn't do, I'm going to say I didn't do it."

¶ 21 While we recognize that it is normal for jurors to arrive for jury duty without knowing the relevant law, we cannot conclude on this record that Juror G made these statements while unaware or misinformed of what the law required. The juror's statements came after the trial court instructed the venire that a defendant's decision

not to testify may not be considered for any purpose, after defense counsel reminded multiple jurors of the court's instruction, and after other jurors said they could follow that instruction.[2]

¶ 22 Given these circumstances, her colloquy with defense counsel indicated that Juror G remained steadfast in her belief that Bonner's failure to testify would influence her assessment of whether the prosecution had proved its case beyond a reasonable doubt. In other words, Juror G indicated an unwillingness or inability to follow the law as instructed by the court. *Cf. Clemens*, ¶ 23 (approving the grant of a challenge for cause to Juror 25 because "when the court asked the panel whether 'anyone' would find Clemens guilty because he did not testify, even if the prosecution did not present enough evidence to prove its case, Juror 25 repeated his belief that the defendant had something to hide and must be guilty if he did not testify").

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[2] The trial court was mistaken that "the whole you don't like it but can you follow the law didn't come up until" after Juror G's statements. Shortly before Juror G spoke, Juror Z said that she could follow the law requiring her to disregard the defendant's decision not to testify despite her personal opinion to the contrary. After this, Juror G said the defendant's decision not to testify *would* bear on her assessment of reasonable doubt.

¶ 23 Arguing otherwise, the People say Juror G's comments were made "in the context of how she reacts in her daily life." True, the juror said her view that an innocent person would deny a false accusation came from her "experience day-to-day." She made clear, however, that she would apply her experience and view when deciding the defendant's guilt beyond reasonable doubt — i.e., the defendant's silence "would bear in terms of reasonable doubt."

¶ 24 Juror G was not rehabilitated. Unlike with other jurors, neither the parties nor the court asked Juror G any follow-up questions. And while we recognize that a trial court is in a "preferred position" in "evaluating a prospective juror's credibility, demeanor, and sincerity in explaining [her] mental state," *Vigil*, ¶ 14 (citation omitted), we also recognize that, where a juror indicates that she cannot decide issues fairly, "a challenge for cause must be granted in the absence of rehabilitative questioning or other counter-balancing information." *Merrow*, 181 P.3d at 321; *see also Clemens*, ¶ 21; *Blassingame*, ¶¶ 21, 27. Therefore, we conclude that the trial court erred by denying Bonner's challenge for cause to Juror G. *See Blassingame*, ¶ 28.

¶ 25 Because Juror G ultimately served on the jury, and Bonner exhausted all his peremptory challenges, the error was not harmless. *See Vigil*, ¶ 15 ("[T]he defendant's right to an impartial jury can be adversely affected by an erroneous denial of his challenge for cause only if that juror is not otherwise removed . . . ."); *People v. Maestas*, 2014 COA 139M, ¶ 20. Accordingly, we reverse the convictions.

II. Prosecutor's Statements During Closing Argument

¶ 26 Bonner contends that the prosecutor in closing and rebuttal argument misstated the law, denigrated defense counsel, and injected irrelevant issues and evidence while appealing to the jurors' emotions. Some of Bonner's claims were raised below and others were not.

¶ 27 Because we reverse Bonner's convictions due to the erroneous denial of the challenge for cause, we do not address his unpreserved claims about the closing arguments. Those issues are unlikely to arise on retrial in the same circumstances presented here because, if the prosecutor makes the arguments again, presumably the defense will object and the trial court will make a ruling, which may obviate the need for appellate review. We do,

however, address Bonner's preserved challenge to the prosecutor's rebuttal argument. We review the trial court's ruling for an abuse of discretion. *People v. Sauser*, 2020 COA 174, ¶ 78.

¶ 28 Bonner was charged with first degree trespass (based on his entering someone's home without permission) and obstructing a police officer. Bonner presented a mistake-of-fact defense asserting that he had mistakenly entered the wrong home because he was new in town. *See* § 18-1-504(1)(a), C.R.S. 2021; *People v. Lesslie*, 24 P.3d 22, 25 (Colo. App. 2000). The evidence permitted the jury to find that he was voluntarily intoxicated. Voluntary intoxication is not a defense to general intent crimes, such as those at issue here. *See* § 18-1-804(1), C.R.S. 2021; *People v. Vigil*, 127 P.3d 916, 930-31 (Colo. 2006).

¶ 29 The prosecutor argued the following in rebuttal:

> The question is, would he have done this if he was sober? Would he have been confused about the houses and about the dogs? Would he have done it if he was sober? The answer is no, ladies and gentlemen.
>
> The issue with this case is I have to prove to you beyond a reasonable doubt that this wasn't a mistake, and I cannot do that. It probably was a mistake. He probably thought he was walking into the right place. But the

> problem is, it doesn't matter because he was drunk.
>
> In the jury instruction packet that you have, you have a defense, and it talks all about mistake of fact. And then right behind it, it says that voluntary intoxication is not a defense. So if you find that he got drunk and got confused and didn't know where he was going, then that's not a defense, and he's guilty.

¶ 30 After the prosecutor concluded, defense counsel expressed concern that the prosecutor had misstated the law and left the jury with the impression that mistake of fact was not a defense. Defense counsel asked the court to clarify to the jury that mistake of fact was a defense. The court agreed to do so.

¶ 31 The court then reminded the jury that, while voluntary intoxication was not a defense to Bonner's charges, a mistake of fact was a defense to the trespass charge. Defense counsel did not ask for additional relief.

¶ 32 Because the court granted Bonner the relief he requested and he did not ask for further relief, we do not discern an abuse of discretion. *See People v. Alemayehu*, 2021 COA 69, ¶ 101 (concluding that, because the trial court effectively sustained the objection to the prosecutor's argument and the defendant requested

no additional relief, “we will not consider this alleged error further”); *People v. Douglas*, 2012 COA 57, ¶ 65 (same).

III. Conclusion

¶ 33 The judgment is reversed, and the case is remanded for a new trial.

JUDGE GROVE and JUDGE PAWAR concur.