73297-8

NO. 73297-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FRANK BORDERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUES

1. Broad discretion is afforded to the trial court in conducting *voir dire*, and a juror will be excused for cause only when actual bias on the part of the juror is shown. Here, juror 31 did not make an express statement of actual bias, but rather expressed concern and uncertainty because she was a victim of past sexual assault or misconduct. She also clearly stated that she would be disinclined to believe the testimony of drug addicts. Both charged victims were drug addicts who were using crack cocaine at the time of the offenses. Borders' attorney did not make a for-cause or peremptory challenge against juror 31. Has Borders failed to show that the trial court abused its discretion by not *sua sponte* excusing juror 31 for cause?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Frank Borders was charged with second degree rape of S.C. and J.P. for separate incidents occurring in 2007. CP 4-5. Borders' first trial ended with a hung jury and the court declared a mistrial. CP 390. At a second trial the jury convicted him as charged. CP 6. Borders was sentenced to life in prison without the possibility of parole as a persistent offender under "two strikes" and "three strikes" provisions. CP 6-16; former RCW 9.94A.030(33) (2006); RCW 9.94A.570.

Borders' convictions were reversed on appeal in Court of Appeals No. 66214-7-I. CP 20-25. He was retried in January, 2015. The jury was unable to reach a unanimous verdict as to count 2, relating to J.P., and a mistrial was declared as to that count. 9RP 631-35. The jury convicted Borders of count 1, relating to S.C., and the court again sentenced him to life without the possibility of parole, this time under the two strikes provision of the Sentencing Reform Act. CP 559-60.

2. SUBSTANTIVE FACTS[1]

Rape of J.P.

In the summer of 2007, J.P. was homeless and spent time at Angeline's Center for Homeless Women. One evening, J.P. went to a wooded area along Interstate 5 to meet some friends and smoke crack cocaine. When she arrived, Frank Ricardo Borders approached J.P. and invited her to smoke crack cocaine with him. J.P. did not know Borders but accepted his offer and followed him up a trail. Borders stopped at a clearing and told J.P. to take off her clothes. When J .P. refused, Borders grabbed her by the throat and began choking her with both hands. J.P. said that she told Borders she would do whatever he wanted so he would

[1] The "Substantive Facts" section is taken verbatim from this Court's opinion in State v. Borders, No. 66214-7-I. CP 20-25. Although this appeal involves a single issue relating only to *voir dire*, these facts are included because, as argued below, the facts that both victims were addicted to crack cocaine and were using that drug at the time of the offenses were highly significant to the *voir dire* questioning.

stop choking her. Borders unzipped his pants and told J.P. to give him a "blow job." When Borders was unable to achieve an erection, J.P. pleaded with him to leave. Borders then zipped up his pants and walked away.

Rape of S.C.

In 2007, S.C. was homeless and was staying at Angeline's. On December 7, S.C. spent the night with Arthur Borders at his mother's house. Arthur's sister and his brother Frank also spent the night at the house. The next morning, S.C. left to go to the store. As S.C. was walking near Pratt Park, she saw Frank. Frank asked S.C. if she had a crack pipe. When S.C. said she did not, Frank grabbed S.C. by the throat, dragged her into the men's bathroom, and told her to sit on the toilet. S.C. said that when she tried to push him away, Frank punched her in the head and told her to be quiet. Borders then unzipped his pants and forced his penis into her mouth. As he did so, a bag containing crack cocaine fell out of his pocket. S.C. said that when Borders reached down to pick the bag up, she ran away. S.C. ran to Arthur's mother's house and told Arthur what had happened. Officer Steven Leonard responded to the 911 call.

S.C. told Officer Leonard that Frank Borders choked and raped her in the men's bathroom at Pratt Park. An emergency medical team also responded and transported S.C. to Harborview. The medical technician did not observe any redness or injuries to S.C.'s neck or head. S.C. told

Harborview emergency room physician Dr. Steven Mitchell that her friend's brother choked, slapped, and sexually assaulted her, and that she had neck and back pain. The police located Borders near the park and arrested him.

At Harborview, S.C. told the sexual assault nurse that Borders made her smoke crack and blow on his penis before forcing her to put his penis in her mouth. S.C. told a social worker that as she was walking to the store with Borders, he grabbed her and offered her crack cocaine. S.C. said that when she refused, he punched her in the head and made her smoke crack and blow the smoke on his penis. S.C. said that Borders hit her and choked her before he allowed her to leave, and she felt like killing herself.

S.C. told another social worker, William Bodick, that she had been smoking crack cocaine for two days before the attack.

After S.C. was released from Harborview, the police were unable to locate S.C. for a number of months. In response to a flyer posted at Angeline's in 2009, J.P. contacted the police and identified Borders as the man who attacked her in the summer of 2007 from the booking photo a prosecuting attorney showed her.

The State charged Borders with rape in the second degree of J.P. and rape in the second degree of S.C.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT *SUA SPONTE* EXCUSING JUROR 31 FOR CAUSE.

Borders contends that it was reversible error for the trial court to have failed to excuse juror 31 for cause even though his attorney made no motion to excuse the juror. Borders' claim should be rejected. Actual bias on the part of the juror was not established in *voir dire*. Moreover, the juror's *voir dire* responses, considered as a whole, were largely favorable to the defense, and, given that Borders did not use a peremptory challenge on the juror, it is likely that his experienced trial counsel strategically chose to retain the juror. Under these circumstances, this Court should not find that the trial court had an obligation to act *sua sponte* and dismiss juror 31 for cause.

a. Relevant Facts.

Before beginning *voir dire*, the trial court advised the parties that he would likely excuse jurors for cause without requiring a motion. 3RP[2] 398-99. The court further instructed that any challenges for cause made by the parties should not be in front of the jury panel. 3RP 399.

[2] This brief refers to the verbatim reports as follows: 1RP (12/3 and 12/8/14); 2RP (12/9/14); 3RP (12/15 and 12/17/14); 4RP (1/14/15); 5RP (1/15/15); 6RP (1/20/15); 7RP (1/21/15); 8RP (1/22/15); and 9RP (1/26, 2/27, and 3/20/15).

Before any questioning by the attorneys, the court, among its preliminary questions, asked whether any of the potential jurors had been victims of sexual assault or sexual misconduct. 4RP 436-37, 441. The court explained the reason for the question:

> I have two goals in asking all these questions. You know, first we want people to look within and make sure that they would be a fair juror in this case, not prejudging issues. We don't want anybody who, because of personal experiences, is going to jump to conclusions about the allegations in this particular case. And second of all, my purpose is that I don't want to see anybody on the jury for whom it would be too emotional, too difficult to sit in this case because of personal experiences. So, again, those are – that's the purpose for asking.

4RP 441-42.

The first potential juror to acknowledge having been the victim of sexual assault or misconduct, "Ms. G.," indicated that when she was 15 she had been the victim of someone she had just met. 4RP 442. Then the following occurred:

> THE COURT: And do you think that either of the concerns that I raised would apply to your situation?
>
> JUROR (Ms. G.): **I think it would be hard to be impartial.**
>
> THE COURT: Okay, appreciate it.

4RP 442 (emphasis added). The trial court then excused Ms. G. without further questioning. 4RP 444.

The next potential juror to self-identify as having been the victim of sexual assault or misconduct was juror 31.

> THE COURT: Was there anybody in the box that had a hand up? Okay. Now, in the back there were a couple more hands, and, let's see, I think -- I see not on the front row. And in the second row I get to [juror 31].
>
> JUROR 31: Yes, I was 16, stranger, no criminal charges.
>
> THE COURT: The two concerns that I mentioned, the fairness of the process and your comfort –
>
> JUROR 31: It's hard to know. It's hard to know until –
>
> THE COURT: Yeah.
>
> JUROR 31: -- the proceedings (Inaudible).
>
> THE COURT: Sure.
>
> JUROR 31: However, I don't know if we're going to be asked about this, my proximity to the location. I already feel a certain sense of safety issues in my neighborhood. I'm two blocks -- I live two blocks from one of the situations.
>
> THE COURT: Right. Okay, all right. And there were a couple more hands all the way in the back row, I think.

4RP 442-43. Unlike with Ms. G., the trial court did not excuse juror 31.

After additional general questioning by the court, the court had all potential jurors introduce themselves and provide limited biographical information. 4RP 445-62. The lawyers for the parties then began questioning jurors, starting with one of the two deputy prosecutors

representing the State.[3] 4RP 471. The first question by the State asked potential jurors who had experience with drug addicts to identify themselves. 4RP 472. The prosecutor then spent her entire 20-minute session probing potential jurors' views on how they would assess the credibility of witnesses who are known drug abusers. See 4RP 472-86.

After Borders' attorney's first 20-minute session, the second prosecutor immediately followed up on his co-counsel's focus on prospective jurors' views relating to assessing the credibility of drug users. 4RP 508. Juror 31 said this:

> So this is a really unique situation, this whole room, because the first question that was asked (Inaudible) was how many people here have worked with people who were addicts, and I've never worked with anyone who's an addict, so my typical way that I would approach people was, you know, sort of the until I see that you are doing something wrong, I will assume that you're doing things right. I will not assume that you're not lying to me, but you might be because I don't -- and so now I've heard these what I might consider credible witnesses that have worked with addicts saying, you know, they all lie. **So I'm sitting here in this room listening to people who have the life experience to say, you know, ask someone who's worked with addicts for 30 years, that they lie. So now I'm feeling like my opinion about whether or not I would say the witness were credible or not is a little tainted. So now I'm thinking, well, maybe they're lying.**

4RP 512-13 (emphasis added).

[3] Each side was allowed two 20-minute rounds of questioning. 3RP 397; 4RP 508.

During Borders' attorney's second and final 20-minute session, she asked jurors to identify themselves "if you've been a victim or a close friend or member of your immediate family has been the victim of a violent crime." 4RP 527. Seven jurors, including juror 31, identified themselves. Id. The discussion then focused on the nature of the case, and two potential jurors (45 and 46) expressed significant concerns about sitting as jurors because the trial involved allegations of rape. 4RP 531-32. When Borders' attorney asked whether anyone else had "similar feelings," a third juror (32) raised her hand. 4RP 532. Juror 31 did not respond to the question.

Borders exercised all of his peremptory challenges, but chose not to excuse juror 31. He used two peremptory challenges after juror 31 had been placed in the jury box. 4RP 549-51. Juror 31 served on the jury.

b. The Trial Court Did Not Err By Not Excusing For Cause Juror 31 When Actual Bias Was Not Established And When Borders Likely Strategically Decided To Retain The Juror Who Seemed Inclined To Disbelieve The Testimony Of The Victims.

The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). To protect this right, a juror will be excused for cause if his views would "prevent or substantially impair the performance of his

duties as a juror in accordance with his instructions and his oath." State v Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (quoting Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)). Actual bias is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]" RCW 4.44.170(2).

The Supreme Court has acknowledged the "traditionally broad discretion accorded to the trial judge in conducting *voir dire.*" Mu'Min v. Virginia, 500 U.S. 415, 423, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991). "Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge ... must reach conclusions as to impartiality and credibility by relying on [his or her] own evaluations of demeanor evidence and of responses to questions." Mu'Min, 500 U.S. at 424, 111 S. Ct. 1899 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981)).

A trial court's ruling on a challenge for cause is reviewed for manifest abuse of discretion. State v. Gregory, 158 Wn.2d 759, 814, 147 P.3d 1201 (2006). "The reason for this deference is that the trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror

would be fair and impartial." State v. Gentry, 125 Wn.2d 570, 634, 888 P.2d 1105 (1995). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

In support of his contention that the trial court had an obligation to act on its own, without a motion from counsel, and excuse for cause juror 31, Borders relies heavily on cases that are easily distinguished. State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015), involved the unusual circumstance of neither the defendant nor an attorney for the defendant being present during Irby's trial for aggravated murder. With only the trial court and the prosecutor having participated in *voir dire*, the court of appeals held that it was reversible error for the trial court to have failed to excuse for cause a juror who made an "unqualified statement expressing actual bias." The court stated:

> This appeal from a conviction for aggravated murder is unusual in that defendant Terrance Irby waived both his right to be represented at trial and his right to be present. Irby's absence did not excuse the trial court and the prosecutor from their responsibility to assure that Irby's jury was fair and impartial. One of the jurors said during *voir dire* that she "would like to say he's guilty." There was no inquiry by the court or the prosecutor that might have neutralized the meaning of these words. When a juror makes an unqualified statement expressing actual bias,

> seating the juror is a manifest constitutional error. Irby is entitled to a new trial.

Irby, 187 Wn. App. at 188.

Here, in addition to the obvious difference that Borders was both present and represented by an experienced trial attorney, juror 31's responses simply did not amount to an "unqualified statement expressing actual bias" as required by Irby. Juror 31's response to the issue of the possible impact of her past victimization — "It's hard to know. It's hard to know..." — is an expression of concern or uncertainty, not an unqualified statement expressing actual bias. Likewise, her statement regarding the proximity of her residence to one of the crime scenes was ambiguous and did not establish actual bias. Juror 31's statements are not comparable to the Irby juror's unqualified statement of actual bias: "I'd like to find him guilty."

Notably, the trial court excused prospective juror "Ms. G," who identified herself as a prior sexual assault victim immediately before juror 31 did so. Because of her experience, Ms. G. said: "I think it would be hard to be impartial." 4RP 442. The court excused her without further questioning and without a motion from either party. 4RP 444. That the court did not excuse juror 31, the next juror questioned, is indicative of a clear exercise of discretion. Deference must be given to the trial court,

who was in a position to observe the jurors' demeanors. Gentry, supra, at 634.

Moreover, it was clearly significant to the Irby holding that after the juror's unambiguous statement of bias ("I'd like to find him guilty") there was "a conspicuous lack of response" by the court and prosecutor. Irby, 187 Wn. App. at 196. Neither the trial court nor the prosecutor, who together were solely responsible for insuring Irby a fair trial, attempted to elicit from the juror an assurance that she had an open mind on the issue of guilt. Id. The Irby court rejected the State's argument that the juror's impartiality could be inferred by her lack of response to the prosecutor's general question to the group: "does everybody here think that they can basically make a finding of guilty or not guilty based on the evidence that you hear?" Id. In rejecting the argument that the juror at issue was rehabilitated by her lack of response to this general question, the court pointed out that not a single juror had responded. Id.

Here, unlike the broadest possible general question that Irby rejected as rehabilitative, Borders' attorney followed up more specifically. During her second 20-minute session, Borders' attorney asked the crime victims to again identify themselves. 4RP 527. Juror number 31 was among several who responded. Id. Immediately thereafter, two jurors expressed significant concerns about sitting as jurors because the trial

involved allegations of rape. 4RP 531-32. When Borders' attorney asked whether anyone else had similar feelings, a third juror self-identified. Juror 31, although she had just again identified herself as having been a crime victim, was not one of the three jurors who expressed a concern about serving as a juror on a rape case. Thus, there was a basis for Borders' attorney and the trial court to conclude that, despite her previous response ("It's hard to know. It's hard to know...") to the court's initial questioning, she would not be a biased juror.

In Irby, with the unusual circumstance of the defendant being both absent and unrepresented, there was no possibility that the juror in question was allowed to serve on the jury as a result of a strategic choice by the defense. Here, it is highly likely that Borders' attorney strategically allowed juror 31 to serve. "Counsel is accorded particular deference when conducting *voir dire.* An attorney's actions during *voir dire* are considered to be matters of trial strategy." Hughes v. United States, 258 F.3d 453, 457 (2001). After her initial "It's hard to know" response to the trial court's question, during questioning by the State juror 31 gave a lengthy response stating that she had been affected by the views of other jurors with experience working with drug addicts and that she would therefore have trouble finding a drug addict to be a credible witness. 4RP 512-13. In a case in which both charged victims were drug addicts who had been

using crack cocaine at the time of the offenses, juror 31's response was clearly favorable to Borders. It was after that response that, during questioning by Borders' attorney, juror 31, although otherwise actively participating in *voir dire*, did not indicate that she would have difficulty serving as a juror in a rape case. Far from having actual bias against Borders, given her *voir dire* responses and the fact that counsel did not move to exclude juror 31 for cause or expend a peremptory challenge on her, it is likely that Borders' attorney viewed juror 31 as a potential asset.

Borders also relies heavily on Hughes, supra. In Hughes, the defendant's federal convictions for theft of government property and being a felon in possession of a firearm were reversed on two grounds: (1) ineffective assistance of counsel for the defense attorney's failure to request the dismissal of a biased juror, and (2) for the trial court's having impaneled the biased juror. Hughes, at 464. In *voir dire*, the juror at issue stated that she had a nephew who was a police officer and also that she knew "a couple of detectives" with whom she was "quite close." Id. at 456. The following exchange then occurred:

> THE COURT: Anything in that relationship that would prevent you from being fair in this case?

JUROR: I don't think I could be fair.

THE COURT: You don't think you could be fair?

JUROR: No.

THE COURT: Okay. Anybody else? Okay. Where did we leave off?

Id. at 456. There was no attempt by counsel or the court to rehabilitate the juror and the juror gave no assurances of impartiality. Id. at 459.

It is difficult to imagine a clearer statement of actual bias than that made by the juror in Hughes. In finding ineffective assistance of counsel, the court held that failure to move for the excusal of the clearly biased juror could not be attributed to trial strategy, since doing so would effectively be a waiver of the defendant's Sixth Amendment right to trial by an impartial jury. Id. at 463. In the case at bar, juror 31's statement of concern and uncertainty — "It's hard to know. It's hard to know..." — is qualitatively different than the Hughes' juror's admission that she could not be fair, an express statement of actual bias. As argued above, given juror 31's *voir dire* responses taken as a whole, it is likely that Borders' counsel intentionally retained the juror.

Borders also relies on State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002). In Gonzales, the court of appeals reversed the defendant's convictions, finding an abuse of discretion by the trial court in refusing to excuse a juror for cause after a motion by the defense, distinguishing that case from Irby, Hughes, and the case at bar, in which there were not motions made by the defense. In Gonzales, under questioning by defense counsel, the juror admitted a strong bias in favor of believing police testimony, said that she would presume the testimony of a police officer to be true if it conflicted with testimony from the defendant, and would not give an assurance that she could afford the defendant the presumption of innocence. Gonzales, at 278-79. Gonzales held that it was an abuse of discretion to deny the defendant's motion to dismiss the juror for cause. Id. at 282.

Borders cites State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001), for the proposition that an erroneous decision by the trial court on a challenge for cause is preserved for appeal even if the defendant did not expend a peremptory challenge on the juror at issue. The State, here, does not dispute that point. However, it was important to the holding in Fire that the defendant had at least first moved to excuse the juror for cause.

> [I]f a defendant believes that a juror should have been excused for cause **and the trial court refused his for-cause challenge**, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Fire, 145 Wn.2d at 158 (emphasis added). Here, Borders did not move to exclude for cause juror 31. The only authorities cited by Borders in which the trial court was found to have erred by failing to exclude a juror for cause when the defense had not moved for a for-cause exclusion are Irby, where the defendant was absent and had no attorney at trial, and Hughes, where the federal court held that it had been ineffective assistance of counsel for the defense attorney to have failed to move for a for-cause exclusion of the juror.

Reversal of a conviction for a trial court's failure to *sua sponte* excuse a juror for cause should be limited to extraordinary circumstances, or when the failure to act by the defendant's trial attorney equates to ineffective assistance of counsel. Here, actual bias on the part of the juror was not established, and it was likely that Borders' attorney strategically decided against making either a for-cause or peremptory challenge against juror 31. Under these circumstances, it cannot be said that no reasonable judge would have failed to act *sua sponte* by excusing juror 31 for cause.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Borders' judgment and sentence.

DATED this 21 day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jennifer Winkler, containing a copy of the Brief Of Respondent, in STATE V. FRANK BORDERS, Cause No. 73297-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Jan. 21, 2016

Done in Seattle, Washington