

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

LISA JOY FOSTER

Appellant,

v.

Appeal No. CRC 09-00055 APANO

UCN ~~522009CT050715XXXXXX~~

522009AP000055XXXXCR

STATE OF FLORIDA

Appellee.

_____ /

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge John D. Carballo

Lynda B. Barack, Esquire
Appellate Attorney for Lisa Joy Foster

Christopher Klemawesch, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Lisa Joy Foster's appeal from a conviction, after a jury trial, of Driving Under the Influence, a first degree misdemeanor, in violation of § 316.193 Fla. Stat. (2006). After review of the record and the briefs, this Court affirms the judgment and sentence.

Factual Background and Trial Court Proceedings

On March 24, 2009, the Appellant, Lisa Joy Foster, was issued a Florida DUI Uniform Traffic Citation charging her with Driving Under the Influence. The case proceeded to jury trial on August 12, 2009 and Ms. Foster was found guilty of the charged offense by the jury. The trial court adjudicated the Appellant guilty and placed her on a term of probation with the condition she serve sixty (60) days in jail. On August 21, 2009, Appellant filed a Motion for New Trial. On September 8, 2009, Appellant filed a Motion for Reconsideration of Sentence and then on September 11, 2009 filed an Amended Motion for Reconsideration of Sentence. On September 15, 2009, the trial court granted the motion and furloughed the Appellant to the jail diversion program. On September 25, 2009, the trial court conducted an evidentiary hearing on Appellant's Motion for New Trial. On October 30, 2009, the trial court entered its written order denying the Motion for New Trial. On November 4, 2009, Appellant filed her Notice of Appeal.

At jury trial, in the course of selecting the jury, the trial court denied Appellant's proposed cause challenge of prospective juror, Rice. This prospective juror was not ultimately seated on the jury. When the Appellant exhausted her peremptory challenges, her trial counsel moved the Court for an additional peremptory challenge to enable her to strike an additional prospective juror, Ms. Pellerin.¹ The trial court denied the

¹ This court understands that pursuant to the *Busby* and *Trotter* decisions cited below Ms. Pellerin need not have been excusable for cause and that peremptory challenges require no justification, except in limited circumstances. However this court notes that neither party argued that Ms. Pellerin was biased. Instead, Appellant's trial counsel represented to the trial court a professed concern there was a "language issue" with Ms. Pellerin. That concern is not supported by the record. Appellant's trial counsel stated the prospective juror may have difficulty understanding the English language because she didn't seem to totally understand a question asked by the assistant State Attorney. However Appellant's trial counsel could not recall the State Attorney's question and in her questioning after the question had been asked she made no inquiry of the prospective jurors about language issues and asked Ms. Pellerin no questions. In

Appellant's motion for an additional peremptory challenge and the prospective juror Pellerin was seated on the jury. At the conclusion of jury selection and before the jury was sworn, Appellant refused to accept the jury panel which was seated notwithstanding Appellant's objection.

Standard of Review

An appellate court reviews a trial court's decision to deny a cause challenge to a potential juror for an abuse of discretion. *Moore v. State*, 939 So.2d 1116, 1118 (Fla. 3d DCA 2006). The competency of a juror presents a mixed question of law and fact, the resolution of which is within the trial court's discretion and will not be disturbed on appeal without a showing of manifest error. *Mobley v. State*, 774 So.2d 782 (Fla. 2nd DCA 2000); *See Smith v. State*, 699 So.2d 629, 636 (Fla.1997); *Wells v. State*, 766 So.2d 1129 (Fla. 2d DCA 2000). "*Manifest error*" is tantamount to an abuse of discretion. *Johnson v. State*, 969 So.2d 938 (Fla. 2007).

[The Florida Supreme] Court has explained that "[a] trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror competency." *Conde v. State*, 860 So.2d 930, 939 (Fla.2003). "This is because trial courts have a unique vantage point in their observation of jurors' voir dire responses." *Id.* As a result, "this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error." *Id.* The test trial courts employ "for determining juror competency is whether the juror can lay aside any bias or prejudice and

contrast, the assistant State Attorney had asked the entire panel if any of them had "[a]ny problem understanding everything we're saying?" In the responses that followed the record reflects nothing from or discussion with Ms. Pellerin. He had previously asked Ms. Pellerin one question. At the conclusion of a clarification of the difference between reasonable doubt and beyond all possible doubt and the State's burden of proof, he asked "[d]oes anyone here think it should be a higher standard; that we have to prove 100 percent, beyond all certainty, that the defendant is guilty? Does anyone here believe that? And Ms. Pellerin, do you think that's a fair statement?" Ms. Pellerin's answer was "(Indiscernible) be." The Assistant State Attorney then clarified, "Could be? Would be?" Nothing further was said. That was the only direct inquiry of Ms. Pellerin during jury selection. The record contains nothing that suggests Ms. Pellerin had any difficulty understanding the English language. This court would respectfully remind Appellant's trial counsel of the Rules Regulating The Florida Bar, Rules of Professional Conduct. Specifically Rule 4-3.1, *Meritorious Claims and Contentions* and Rule 4-3.3, *Candor Toward the Tribunal*.

render a verdict solely on the evidence presented and the instructions on the law given by the court.” *Kopsho v. State*, 959 So.2d 168, 170 (Fla.2007). “In evaluating a juror’s qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror.” *Parker v. State*, 641 So.2d 369, 373 (Fla.1994). “A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind.”

Banks v. State, --- So3d ----, 2010 WL 2195718, 3 (Fla. 2010). “[I]f the juror declares and the court determines that the juror can render an impartial verdict according to the evidence, a challenge for cause should not be granted. *Dorsey v. Reddy*, 931 So.2d 259, 265 (Fla. 5th DCA 2006). In close cases, any doubt as to a juror’s competency should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality.” *Thomas v. State*, 958 So.2d 1047, 1049 -1050 (Fla. 2nd DCA 2007). While the decision to accept or dismiss a putative juror is considered an exercise in discretion, the seating of a juror as to whom there is a reasonable doubt concerning impartiality is an abuse of discretion and thus “*manifest error*”. *Carratelli v. State*, 961 So.2d 312, 319 (Fla. 2007).

Preserving the Issue for Appeal

When a defendant believes a challenge for cause has been improperly denied there are several procedural requirements to preserve the issue for appeal.

Under Florida law, “[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.” *Pentecost v. State*, 545 So.2d 861, 863 n. 1 (Fla.1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.

Trotter v. State, 576 So.2d 691, 693 (Fla. 1990); *See also Thomas*, 958 So2d at 1049 - 1050.

Appellate Review

When a defendant at trial preserves a cause challenge, he or she must demonstrate on appeal both that the trial court erred in determining the juror's competency and that the denial of the challenge caused prejudice. Where the record demonstrates a reasonable doubt about a juror's ability to be impartial, the trial court abused its discretion in denying the cause challenge. *Carratelli*, 961 So.2d at 319. Having demonstrated error, the defendant must then show that the error requires reversal. The "expenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury." *Busby v. State*, 894 So.2d 88, 96-97 (Fla.2004), *cert. denied*, 545 U.S. 1150, 125 S.Ct. 2976, 162 L.Ed.2d 906 (2005). The juror who served need not have been excusable for cause. A defendant need only show "the same type of harm [peremptory] challenges are intended to cure-the seating of a juror whom the defendant suspects, but cannot prove, is biased." *Id.* at 100-101.

The Present Case

The issue preserved and presented in the present case, is whether the trial court erred in refusing to strike prospective juror, Rice, for cause. Prospective juror Rice clearly stated she would be fair and would follow the instructions on the law. All of the questions posed to and answers received from Ms. Rice in the record before this court demonstrate no reasonable doubt of her ability to be impartial and to follow the

instructions on the law given by the trial court. The record establishes no basis to support the cause strike. The trial court did not abuse its discretion in denying the cause challenge to prospective juror Rice. The Appellant's argument to the contrary, the only issue presented in this appeal, which argument was also made at trial and at the evidentiary hearing on the motion for new trial is without merit.

Conclusion

Based upon the foregoing, this court concludes that the judgment and sentence of the trial court should be affirmed.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is affirmed.

ORDERED at Clearwater, Pinellas County, Florida this 9th day of July, 2010.

Original order entered on July 9, 2010 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable John D. Carballo
Lynda B. Barack, Esquire, Appellate Counsel
Office of the State Attorney