State of New York
Court of Appeals

MEMORANDUM

No. 118 SSM 24
The People &c.,
Respondent,
v.
Rudy C. Patterson,
Appellant.

Submitted by Bridget L. Field, for appellant.
Submitted by Lisa Gray, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed.

The trial court did not abuse its discretion in denying defendant's challenge for cause to a prospective juror pursuant to CPL 270 (1) (b). When defense counsel directly

asked the prospective juror, "if you don't hear from [defendant], you don't hear him speak, are you going to hold that against him," she responded, "I don't believe that I would." This response directly refuted any notion that the prospective juror would "hold" defendant's failure to testify "against him," i.e., that she would be biased in rendering a decision. Viewing this statement "in totality and in context" (see People v Warrington, 28 NY3d 1116, 1120 [2016], citing People v Johnson, 94 NY2d 600, 615 [2000]), the exchange did not, in the first instance, demonstrate "preexisting opinions that might indicate bias" (People v Arnold, 96 NY2d 358, 363 [2001]; cf. People v Bludson, 97 NY2d 644, 645 [2001]).[1] Thus, the trial court was not required to inquire further "to obtain unequivocal assurance that [the juror] could be fair and impartial" (People v Wright, 30 NY3d 933, 934 [2017]; People v Harris, 19 NY3d 679, 685-686 [2012]).

We also reject defendant's challenges to the suppression ruling and the legal sufficiency of the evidence. Defendant's remaining contentions are without merit.

[1] We also note that the trial court had previously instructed all prospective jurors that they could not "draw any inference unfavorable to the defendant" if defendant did not "present any evidence or testify" and, when the prospective jurors were asked whether any of them "might allow the fact th[at] defendant did not testify to influence [them] in [their] deliberations," none gave an affirmative response.

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FAHEY, J. (dissenting in part):

Every litigant is entitled to a neutral, objective trier of fact. Close enough is not good enough. I respectfully dissent.

During questioning of a panel of prospective jurors by defense counsel, the

following colloquy occurred between defense counsel and Prospective Juror No. 3 (PJ 3):

"[Counsel]: Does anybody here need to hear the defendant testify, they must hear Mr. Patterson testify? [Prospective Juror No. 3].

[PJ 3]: Yes.

[Counsel]: Is that important to you that he testify or you would think maybe he's hiding something?

[PJ 3]: I think I would have to remind myself of the parameters that have been set out about proof of A, B and C and judge on those facts that were presented.

[Counsel]: Well, that's something different. The A, B and C is something different.[1]

This is will you need to hear from Mr. Patterson, if you don't hear from him, you don't hear him speak, are you going to hold that against him? And that would be maybe a perfectly natural reaction if you had it.

[PJ 3]: You're asking if I would hold it against him?

[Counsel]: Yes.

[PJ 3]: I don't believe that I would.

[Counsel]: You don't believe that you would, okay. Why - - it's kind of not an assertive answer.

[PJ 3]: Okay.

[Counsel]: Is there any part of you that you believe would need to hear from him? We would need to know that.

[1] During the prosecutor's questioning of the same panel of prospective jurors, the prosecutor asked the panel whether, if the elements of the crime were "A, B, and C," anyone would require proof of "element X," which was not an element of the crime.

[PJ 3]: I think that I would feel like I had more information if I heard from him than if I did not.

[Counsel]: So is that something that you personally would need?

[PJ 3]: Something that I personally believe.

[Counsel]: Yes, okay.

The Court: Now wait a minute. The answer was you would feel more comfortable if you heard, but you didn't say need, did you?

[Counsel]: Is that something you feel you would need?

[PJ 3]: In order to make a decision?

[Counsel]: Uhm-uhm.

[PJ 3]: No.

[Counsel]: Is it something that you feel would be in the back of your mind that you would wonder about, you would wonder why he didn't testify, would you think he's hiding something?

[PJ 3]: I would wonder why he didn't testify, I wouldn't necessarily think he was hiding something."

Defense counsel challenged Prospective Juror 3 for cause. The court trial denied the challenge for cause, noting that "prefer is not need and it wasn't developed sufficiently enough." Counsel then used a peremptory challenge on Prospective Juror 3, and later exhausted her peremptory challenges, thereby preserving this issue for appellate review (see People v Harris, 19 NY3d 679, 685 [2012], citing CPL 270.20 [2]).

A prospective juror may be challenged for cause on the ground that the prospective juror "has a state of mind that is likely to preclude [the prospective juror] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]). "To that end, this Court has consistently held that a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" (People v Warrington, 28 NY3d 1116, 1119-1120 [2016] [internal quotation marks omitted]).

If the trial court fails to "inquire further to obtain unequivocal assurance that [the prospective juror] could be fair and impartial," it is error to deny a challenge for cause (People v Wright, 30 NY3d 933, 934 [2017]; Harris, 19 NY3d at 685-686). "By contrast, where prospective jurors unambiguously state that, despite preexisting opinions that might indicate bias, they will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible" (People v Arnold, 96 NY2d 358, 363 [2001]). Importantly, the link between the prospective juror's "previously articulated bias or state of mind" and the prospective juror's subsequent statement regarding "the ability to render an impartial verdict must be evident, because the very point of the unequivocal assurance of impartiality is to 'allow[ ] a juror to "purge" a previous opinion . . . by expressly declaring that he [or she] will not be influenced by [that] prior opinion' " (Warrington, 28 NY3d at 1120, quoting People v Torpey, 63 NY2d 361, 368 [1984]).

Viewing her statements "in totality and in context" (Warrington, 28 NY3d at 1120), as we must, it is undeniable that Prospective Juror 3 voiced at least a preference, if not a

"need," to hear defendant testify.[2] It is also true that Prospective Juror 3 later stated that she would not need to hear defendant's testimony in "[i]n order to make a decision," i.e., to reach a verdict. Contrary to the Appellate Division's conclusion, however, Prospective Juror 3 never unequivocally stated that she "would not be influenced by defendant's silence" (People v Patterson, 173 AD3d 1737, 1739 [4th Dept 2019]). To the contrary, her statements on that issue were that she did not believe that she would hold his failure to testify against him, that she would wonder why he did not testify, and that she would not necessarily think he was hiding something.

Prospective Juror 3's assurance that she could reach a verdict without hearing defendant's testimony does not equate to an unequivocal statement that the verdict she would eventually reach would not be influenced by defendant's silence. Of course, Prospective Juror 3 could reach a verdict without hearing defendant testify and still hold defendant's silence against him in reaching that verdict. None of Prospective Juror 3's statements provided an unequivocal assurance that she would not draw any adverse inference from defendant's failure to testify, sufficient to "purge" the implication of bias that arose from her previous statements that she needed to hear from him (see Warrington, 28 NY3d at 1120). The fact that the trial court had earlier instructed the entire panel of prospective jurors, before the exchange with defense counsel and Prospective Juror 3, not to draw any inference unfavorable to defendant if he did not testify does not alter the

[2] The Appellate Division found that Prospective Juror 3's initial "yes" response when defense counsel asked whether "anybody here need[ed] to hear the defendant testify" was an "affirmative response," which "indicated that she would 'need' to hear defendant's testimony" (People v Patterson, 173 AD3d 1737, 1739 [4th Dept 2019]).

analysis (see majority mem at 2 n 1). "The jury panel's earlier collective acknowledgment that they would follow the court's instructions was insufficient to constitute [the] unequivocal declaration" that was required from Prospective Juror 3 individually (People v Bludson, 97 NY2d 644, 646 [2001], citing Arnold, 96 NY2d at 363-364). "[N]othing less than a personal, unequivocal assurance of impartiality" was necessary here (Arnold, 96 NY2d at 364).

Prospective jurors may express a perfectly natural desire to hear the defendant testify, and underlying that desire may or may not be the prospective juror's implicit assumption that if the defendant does not testify, the defendant may be hiding something. In that situation, the momentary inconvenience of obtaining an unequivocal assurance that the prospective juror will not be influenced by the defendant's silence is necessary to ensure an impartial jury. If a prospective juror expresses a desire to hear the defendant testify, even if only to gain more information, the trial court must obtain unequivocal assurances. Those unequivocal assurances must be not only that the prospective juror can reach a verdict without the defendant's testimony, but also that the prospective juror's verdict will not be influenced by the defendant's silence.

What was required here was one more question. The court should have asked if Prospective Juror 3 would be influenced by defendant's failure to testify. For the challenge for cause to be properly denied, the answer to that question was required to be an unequivocal "no." "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have

replaced one impartial juror with another" (Arnold, 96 NY2d at 362 [internal quotation marks omitted]).

I agree with the majority with respect to the suppression and legal sufficiency issues. I would modify the Appellate Division order by reversing defendant's conviction of criminal possession of a controlled substance in the third degree and remitting for a new trial on that count.

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On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Fahey dissents in part in an opinion in which Judges Rivera and Wilson concur.

Decided December 17, 2019