NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	NO. 01-KA-1299
VERSUS	FIFTH CIRCUIT
LARRY HARRIS	COURT OF APPEAL
	STATE OF LOUISIANA

COURT OF APPEAL
FIFTH CIRCUIT
FILED OCT 29 2002

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 00-2434, DIVISION "G"
THE HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

OCTOBER 29, 2002

SOL GOTHARD
JUDGE

Panel composed of Judges Sol Gothard,
Thomas F. Daley, and Marion F. Edwards

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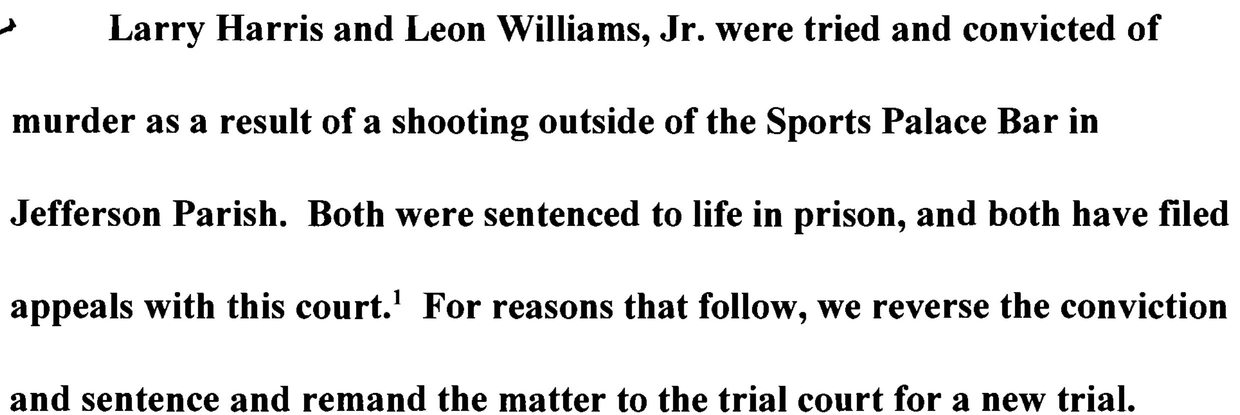
REVERSED AND REMANDED



Larry Harris and Leon Williams, Jr. were tried and convicted of murder as a result of a shooting outside of the Sports Palace Bar in Jefferson Parish. Both were sentenced to life in prison, and both have filed appeals with this court.[1] For reasons that follow, we reverse the conviction and sentence and remand the matter to the trial court for a new trial.

The record shows that Harris and Williams were indicted by a grand jury for first degree murder of Malinda James. Both defendants were tried by a jury and found guilty as charged on March 31, 2001. Although they were tried together, the defendants had separate counsel and the cases were not consolidated in this court. The penalty portion of the trial was held on April 1, 2001, and the jury decided that each defendant should be sentenced to life imprisonment. Each defendant filed a timely appeal with this court.

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[1] **See, *State v. Leon Williams*, Jr., 01-1298 (5 Cir.).**

In brief to this court, Larry Harris assigns seven errors. The fifth error questions the sufficiency of the evidence used to convict defendant of first degree murder. In a related argument in error number four, defendant argues the identification of defendant by one of the victims, Ronald Lewis, should have been suppressed. When the defendant challenges both the sufficiency of the evidence and one or more trial errors, the reviewing court will first review the sufficiency of the evidence, as a failure to satisfy *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) will moot the trial errors. *State v. Hearold*, 603 So.2d 731 (La. 1992); *State v. Cowart*, 01-1178 (3/26/02 La.App. 5 Cir.), 815 So.2d 275.

First degree murder is defined in LSA-R.S. 14:30A(3) as the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm upon more than one person. The standard for review in a case in which the sufficiency of the evidence is questioned is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia, supra; State v. Captville,* 448 So.2d 676, 678 (La. 1984). It is not the function of the appellate court to assess credibility or reweigh the evidence. *State v. Rosiere,* 488 So.2d 965, 968 (La. 1985). In evaluating credibility, the trier of fact, when faced with a conflict in testimony, is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Silman*, 95-0154 (La. 11/27/95), 663 So.2d 27, 35.

The testimony given at trial shows that Vanessa Mack, Malinda James and Ronald Lewis were leaving the Sports Palace Bar at about midnight on February 21, 2000. The two women were cousins who had gone to the bar to play pool together. At the bar they met Ronald Lewis, who is a neighbor of Ms. Mack. The women requested that Mr. Lewis walk them to their car as they were leaving to go home, and he obliged. As they neared Ms. Mack's car two men came out from behind a dumpster in the parking lot of the bar and moved toward them. Ms. Mack recognized both men. One was her former boyfriend, Larry Harris, and his friend, Leon (Williams). After a brief discussion, Harris shot Malinda James and Williams shot Ronald Lewis. Then Harris shot Vanessa Mack twice. Many other shots were fired; however, Ms. Mack was able to get into her car and lay down on the seat. The defendants ran off as patrons of the bar and others in the area heard the shots and became aware that a shooting occurred. As a result of the shooting, Ms. James died at the scene and Ms. Mack and Mr. Lewis were seriously injured and taken to Ochsner Hospital.

Ms. Mack testified that she and her cousin, Malinda James, drove to the Sports Palace Bar to shoot pool. They parked their car on Harding Street, near Jefferson Highway, and walked to the bar because there were no empty slots in the parking lot. While they were playing pool, Ronald Lewis, a neighbor of Vanessa Mack, came into the bar and joined the women for a game of pool. At about midnight the women decided to leave the bar and go home. They asked Mr. Lewis to walk them to their car. The three friends exited the front door of the bar and walked toward the car. At

that time Ms. Mack stated she saw two men run out from behind a dumpster towards the trio. One of the assailants, whom Ms. Mack identified as her former boyfriend, Larry Harris, asked Ms. Mack "what's happening?" She replied, "nothing". Ms. Mack testified that she was not frightened because she also recognized the second man as Harris' friend and helper, Leon. Ms. Mack stated that her relationship with Harris had lasted two years and during that time there was "no trouble." She stated that when she and Harris were dating, Leon would often accompany Harris to her home; however, she could not recall Leon's last name.

Following the verbal exchange, between Ms. Mack and Harris, he pulled out a small black gun and shot Ronald Lewis. Mr. Lewis fell to the ground. Then Leon Williams shot Malinda James. Ms. Mack testified that she was in shock and disbelief as Harris turned the gun on her and shot her twice in the arm. Many other shots were fired as Ms. Mack got to her car. She stated that she laid down on the seat in hope that the shooters would think she was dead. She recalled hearing at least four more shots, but could not see who did the shooting. Ms. Mack was shot five times. She was hit in the arm, breast, back and neck. When the gunfire ceased, Ms. Mack sounded the car horn to get help.

Ms. Mack further testified that shortly after her release from the hospital, she was riding in a car with her sister when she spotted Larry Harris' truck at an Auto Zone store near Royal Street in New Orleans. The two women drove around the corner and recognized Leon sitting in the truck. They followed the truck and called 911, then drove to the Sixth

District Police Station in New Orleans and advised the police of the sighting. Unfortunately, by this time the suspect had left the area. Later that day Ms. Mack again spotted Leon with Harris' truck. She advised Sergeant Angelo Smith of the New Orleans Police Department of this fact, and Sergeant Smith arrested Leon Williams.

Donald Davidson testified that at the time of the shooting he was at Pickle Sports Bar about a block away. Although he did not witness the incident, he heard the shots and called 911.

Shortly after the shooting, Lee Tillman and his girlfriend were driving from New Orleans to Jefferson Parish on Jefferson Highway. Mr. Tillman testified that he did not witness the shooting, but came on the scene shortly after it occurred. He stopped and tried to flag down an ambulance, to no avail. He approached Ms. Mack, who was seated in her vehicle, and told her he had called 911. Shortly afterward an ambulance arrived.

Officer Matthew Schoder of the Jefferson Parish Sheriff's Office was dispatched to the scene in response to the 911 call, and was the first of several police officers to arrive at the scene. Officer Schoder testified that he saw three victims; a female who was unresponsive lying on the ground near the car, a male victim lying face down who was alive, but unable to speak, and a female inside the vehicle who was bleeding and lapsing in and out of consciousness. Officer Schoder spoke to the woman in the car. She identified herself as Vanessa Mack and told the officer that her ex-boyfriend, Larry Harris, shot her. She also gave the officer Harris' address.

Ms. Mack identified the second assailant as "Leon", but told the officer she could not recall Leon's last name.

Ms. Mack and Mr. Lewis were taken by ambulance to Ochsner Hospital. Ms. Mack was treated and remained in the hospital for three days. Mr. Lewis, who was more seriously injured, remained in the hospital for six or seven months.

Dr. Susan Garcia performed an autopsy on Malinda James. Dr. Garcia testified that the body had eight entrance wounds and five exit wounds. Three bullets remained in the body. Dr. Garcia confirmed that Ms. James died of multiple gunshot wounds to the head and torso.

Officer Michael Tucker testified that he went to the hospital shortly after the incident to interview the victims. The officer was unable to interview Mr. Lewis because he was in surgery. Officer Tucker was able to interview Ms. Mack. She was coherent and was able to talk to the officer. Ms. Mack told the officer that her ex-boyfriend, Larry Harris and his friend Leon were the gunmen. She gave the officer Harris' address and a full description of him.

Sergeant Angelo Smith of the New Orleans Police Department testified that Ms. Mack flagged him down on Washington Avenue in New Orleans and told him about the shooting and her spotting of one of the men responsible. She gave Sergeant Smith a description of Leon Williams, a description of the truck, and the license plate number. Sergeant Smith saw a subject who fit the description and interviewed him; however, it was not Williams. Sergeant Smith continued to search the neighborhood and later

found the van and Williams. Sergeant Smith took Williams into custody and turned him over to Jefferson Parish authorities.

The video testimony was taken of Ronald Lewis from his hospital bed. He testified that on the night of February 21, 2000, he was working for Sav-A-Center in a warehouse on Jefferson Highway. When he got off work at about 9:30 that night, he went to the Sports Palace to relax, drink beer, and play pool. He saw Ms. Mack and Ms. James playing pool. Ms. Mack, who was a neighbor, invited him to play a game of pool. After the pool game, Ms. Mack asked Mr. Lewis to escort her and her cousin, Ms. James, to their car and he obliged. Mr. Lewis stated that he heard some sort of altercation. He heard a "pop, pop, pop" and tried to get out of the way. He tried to run but was shot and fell to the ground. He testified that he would never forget the face of the man who shot him and identified him as Larry Harris.

Mr. Lewis stated that he was in the hospital for about six or seven months. Lieutenant Don English came to his home to show Mr. Lewis two photo lineups of suspects in the shooting. In one photo lineup Mr. Lewis was unable to recognize anyone. However, he identified Larry Harris in the second lineup. Because he was unable to write his name, he put a mark on the back of the photo.

Defendant's challenge to the sufficiency of the evidence is based on the lack of physical evidence linking him to the crime and the unreliability of Ronald Lewis' testimony.

A defendant who seeks to suppress identification must prove that the identification itself was suggestive and there was a likelihood of misidentification as a result of the identification procedure. *State v. Biglane*, 99-111 (La.App. 5 Cir. 5/19/99), 738 So.2d 630. Factors to be considered in determining the likelihood of misidentification were first set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and approved in *Mason v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and, (5) the time between the crime and the confrontation. *Id.*

As to the first part of the argument, we find that a rational trier of fact could have found defendant guilty beyond a reasonable doubt using the evidence set forth at trial. The lack of physical evidence notwithstanding, the evidence is legally sufficient. The victims were positive in their identifications. Ms. Mack was well acquainted with Larry Harris and also knew Leon Williams. She told officers on the scene of the accident, as well as in subsequent interviews, that the gunmen were the two defendants herein, and her recounting of the incident remains consistent. There is evidence of ample lighting at the scene, and Ms. Mack had a short conversation with Harris before the shooting. She was also the third victim to be shot; therefore, she witnessed the first two shootings and testified with certainty who fired those shots.

The second part of defendant's argument concerns the testimony and out of court identification of Larry Harris by Ronald Lewis. Defendant argues the extent of the injury to Mr. Lewis' brain was such that his memory was affected and he is not a reliable witness. We are not persuaded by defendant's attempt to discredit Mr. Lewis' testimony. A full reading of Mr. Lewis' testimony shows that, while his injuries are extensive, he is unfaltering in his identification of Larry Harris as the gunman who shot him, thus placing Harris at the scene of the murder with a gun. His account of the incident corroborates that of Ms. Mack. Further, there is no medical evidence to support defendant's assertion that Mr. Lewis was unable to remember who shot him.

A complete reading of the medical testimony shows that, while one of the several shots fired at Mr. Lewis entered his brain and caused serious damage, the part of the brain effected did not control memory. Several health care professionals who treated Mr. Lewis testified about his condition as a result of the shooting. Dr. Edward Connolly, the senior neurosurgeon at Ochsner Hospital, testified that he performed surgery on Mr. Lewis. Dr. Connolly stated that Mr. Lewis suffered a gunshot wound to the left posterior parietal area of the brain. Dr. Connolly testified that, while that could cause some memory problems, that part of the brain controls spatial orientation, an ability to know where the parts of the body are located and it also controls the right sensory portion to the body. This lobe of the brain is not the primary memory center of the brain. Dr. Connolly explained that the

injury may impact temporally the victim's memory; but that there would be recovery over time.

Dr. Mike Saucier, a specialist in rehabilitation medicine, treated Mr. Lewis during his hospitalization. Dr. Saucier testified that Mr. Lewis had profound weakness in all his extremities. He was suffering pain, speech aphasia and "some memory deficits." Dr. Saucier explained that the parietal lobe controls motor function and higher cognition. He distinguished between "verbal memory" problems which involves memory of spoken words. Dr. Saucier distinguished this from "visual memory" problems which concern the recognition of shapes. The doctor also stated that people with head wounds generally improve over time, and he did see an improvement in Mr. Lewis' memory as treatment continued.

Dr. Alvin Rouchell, a psychiatrist, saw Mr. Lewis as a consult. Dr. Rouchell testified that Mr. Lewis had a tracheotomy tube, a feeding tube, was depressed, confused, and agitated. He would neither eat nor sleep. At that time Mr. Lewis had no memory of what had happened to him. However, Dr. Rouchell testified that the area of the brain injured by the gunshot does not control memory. Dr. Rouchell stated he only saw the patient one time, but normally such a patient would show the greatest improvement after the first few months and continue gradual improvement over the next eighteen months.

Defendant cites one part of Mr. Lewis' testimony in which he stated he was told which photo to pick during the photo lineup. While that statement was made, it is apparent from the nature of Mr. Lewis' testimony that he

had great difficulty communicating. The actual statement made in response to the question of whether he was told who to pick was, "No, he, he, he had, had, had to tell me who to pick, pick, pick out cause the person-the person who did me this, I ain't never going to forget him for the rest of my life." His testimony showed that he was unable to speak more than a few words without stuttering and was very emotional when recounting the ordeal he had faced. We believe a reasonable interpretation of the response was that the witness was trying to say that he didn't have to be shown which photo to choose, but due to his medical condition he could not access the words. We have reviewed the entire testimony. There is no doubt that the victim's testimony is that he recognized Larry Harris as the gunman.

Defendant testified at trial. He stated that he was working in New Orleans at the time of the shooting. He explained that he is a self-employed antique furniture handler and went with Leon Williams to pick up a piece of furniture from Neil Auction House that he was to deliver to Folsom the next day. He stopped working about 5:00 p.m. and dropped Leon Williams off at his home. He then went home himself to play with his grandchildren. He went out later that night to his mechanic's house and to a bar in New Orleans. He denied committing the murder.

It is clear from the record that the jurors chose to believe the testimony of the victims and not that of defendant. Given the facts of this case, a reasonable trier of fact could have found defendant guilty of first degree murder beyond a reasonable doubt. These assignments are without merit.

Because we find the evidence sufficient to support the conviction, we will review defendant's remaining assignments of error.

Defendant assigns several errors which relate to the selection of the jury in this case. Because we find reversible error in the trial court's seating of one juror, Merry Miller, we will discuss that assignment and pretermit discussion of other assignments regarding other jurors.

A defendant may challenge a juror for cause on the grounds set forth in LSA-C.Cr.P. article 797, which reads in pertinent part as follows:

> **The state or the defendant may challenge a juror for cause on the ground that:**
>
> **. . .**
>
> **(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;**
>
> **. . .**
>
> **(4) The juror will not accept the law as given to him by the court; . . .**

The defendant in a capital case is entitled to an impartial jury in both the guilt and penal phase of the trial. U.S. Constitution Amends. V1, XIV; *State v. Miller*, 99-0192 (La. 9/6/00), 776 So.2d 396, 400, *cert. denied, Miller v. Louisiana* 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed. 2d 111 (2001), citing *Morgan v. Illinois*, 504 So.2d U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In a capital case a defendant has 12 peremptory challenges. LSA-C.Cr.P. article 799. Prejudice is presumed when a trial court erroneously denies a challenge for cause and the defendant has exhausted his peremptory challenges. *State v. Hoffman*, 98-3118 (La. 4/11/00), 768 So.2d

542,560, *cert. denied, Hoffman v. Louisiana*, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000). An erroneous ruling depriving an accused of a peremptory challenge violates substantial rights and constitutes reversible error. *State v. Hoffman, supra.* When a defendant uses a peremptory challenge after a challenge for cause has been denied, the defendant must show: (1) erroneous denial of the challenge for cause; and (2) use of all peremptory challenges. *Id.*

A trial court has broad discretion in ruling on a challenge for cause. A determination will not be disturbed unless a review of the entire voir dire indicates an abuse of discretion. *State v. Ross*, 92-2208 (La. 9/3/93), 623 So.2d 643, 644; and cases cited therein. A trial court's refusal to excuse a prospective juror for cause is not an abuse of his discretion notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and evidence. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 S0.2d 1278. "[A] challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied." *State v. Hallal*, 557 So.2d 1388, 1389-90 (La. 1990); *State v. Robertson, supra.* 630 So.2d at 1281.

In the instant matter, we find that, although the voir dires of several jurors are problematic, they do not reach the level of reversible error. However, we do find grounds for reversible error in the seating of one juror,

Merry Miller. During voir dire, Ms. Miller volunteered the information that she had been evaluated by Patricia Percy, an expert witness who was hired by the defense. To avoid tainting the entire jury pool by allowing Ms. Miller to voice her complaints against a potential defense witness, the defense moved to question Ms. Miller alone. At this point in the jury selection process, both defendants had exhausted all of their peremptory challenges. The following colloquy ensued:

THE COURT:
Ms. Miller, this person that you don't particularly care for, this expert witness, —

MS. MILLER:
Yeah.

THE COURT:
– if this person were to testify, would you— do you hold any prejudices. —

MS. MILLER:
I think she's a bleeding heart, okay? My ex-husband is a bum, and she put the evaluation so that he could get our child–

THE COURT:
Your husband is not on trial.

MS. MILLER:
I know, but she is so biased, and she has testified in other trials in Jefferson Parish under mitigating circumstances, and basically, – I mean, her testimony is to try to get the death penalty off, and I don't agree with her views. Is she a witness?

THE COURT:
Do you all have any questions you all want to ask?

MR. ARMATO:
With that attitude, I mean, it's obvious, it should be obvious to you at this point, that she is our expert witness, okay, or one of them anyway. So, my question to you is your bias against her such that you would not be able to consider her testimony fairly? Is it to such an extent that you would not be able to fairly consider her testimony?

MS. MILLER:
It'd be really hard to believe –

MR. ROWAN:
But, could you listen when she –

MS. MILLER:
I could listen to her, and as a reasonable person, yeah.

MR. ARMATO:
Would you just –

MS. MILLER:
She just really aggravated me.

. . .

THE COURT:
You know, in your life, you run across a lot of people you don't particularly care for, but it doesn't mean you'd treat them unfairly or—

MS. MILLER:
Oh, She totally —

THE COURT:
No, what I'm saying you know, you don't need to — just because you might not care for one particular person, you would treat them as you would anybody else.

MS. MILLER:
I think her skills as an evaluator are very biased towards—

THE COURT:
Well, this is not going to be an evaluation.

MR. ARMATO:
Could I ask a question –

THE COURT:
Yeah, you can ask questions.

MR. ARMATO:
You've indicated that she was very biased and very unprofessional, I think.

MS. MILLER:
Yeah, very unprofessional.

MR. ARMATO:

And, I mean, starting out –

MS. MILLER:

Didn't show up on some of the meetings, and she still rendered an expert report, and charged Two Thousand Dollars. I thought that was—

MR. ARMATO:

Amazing. Based on that, I mean, and you're in the legal profession as a paralegal yourself, —

MS. MILLER:

Yeah.

MR. ARMATO:

— and that's not normal practices, I would think.

MS. MILLER:

Right.

MR. ARMATO:

Quite fairly, if she were to testify, you would not look favorably on her testimony, would, you?

MS. MILLER:

Well, –

MR. ARMATO:

I mean, honestly, you couldn't do that?

MS. MILLER:

I wouldn't buy into whatever she's selling.

MR. ARMATO:

Okay. And that's based on your personal experience with her?

. . .

MR. ARMATO:

The question is, would you be able to judge her testimony, along with other witnesses, and give it an equal basis with other witnesses? In other words, could you judge her testimony equally with other evidence from other witnesses?

MS. MILLER:

Sure. Yeah, I'd weigh it against other actual witness' testimony.

. . .

I would be very guarded in whatever she said, and I would weigh it.

. . .

MR. MARY:

Let me ask you this, could you wait to hear what the doctor's testimony was, and judge her demeanor on the stand, and all that, before assigning any credibility to what she had to say? Could you listen to what she had to say?

MS. MILLER:

Yeah, I'd listen to what she said.

MR. MARY:

Okay, and then make a determination as to her credibility as an expert? Could you do–

MS. MILLER:

Well, that's the point.

. . .

I don't think she's a very professional – well, I don't know what her degree is in, okay?

MS. BECKER:

But that was in her dealing with you. Will you be able to separate that from what's going to be going on in this trial? You may think that she was unprofessional with her dealings with you, will that have–

MS. MILLER:

That's true.

MS. BECKER:

— will that cause you to not be able to separate it out?

MS. MILLER:

Actually, she was paying more attention to a criminal case going on, than our little divorce case. So, I think she might have been more professional in preparing for the testimony in that trial.

MS. BECKER:

And do you think you can separate out your personal feelings?

MS. MILLER:
Yeah, okay, put it that way.

After the voir dire of Ms. Miller, there was a discussion concerning the likelihood of the expert witness actually testifying for the defense. In that discussion, the trial court made it clear that he questioned the defense attorney's good faith in the voir dire. One of the issues was the fact that one defense attorney stated that Ms. Percy would not be called as a witness in the beginning of the inquiry of the possible bias of Ms. Miller. The defense explained that the statement was made because, at that time the entire jury pool was in the room and he did not want to taint the entire pool. It was not a commitment that the witness, although hired, would not testify. He explained that the actual decision whether to call the expert witness had not been made yet, and would depend on the strategy used at trial. The discussion contains the following colloquy:

THE COURT:
So I hope that this person is going to be a witness, they had better be a witness, and not a ploy to try to get a juror off.

MR. REGAN:
Well, let's assume that everybody is in good faith. But, here's my problem.

THE COURT:
Well, let's assume that.

MR. VAZQUEZ:
Well, I'm an officer of the court, and I'm telling you, Judge, that this woman has been hired as an expert. Now, whether she's going to testify or not, I haven't made that determination yet.

MR. ARMATO:
She done–

MR. VAZQUEZ:
But she's done work on this case. Now, I don't know that I'm obligated to answer Mr. Regan's questions in front of a box of people.

. . .

THE COURT:
If this would be the only reason to grant a cause, and the witness doesn't testify, where are we? We exempt her too, you know, -we excused the juror for no reason.

MR. ARMATO:
I'll tell you the answer to that question. This person — we have the right to put on a defense as we choose, as we see fit.

THE COURT:
Sure you can.

MR. ARMATO:
If we are hampered by a witness' bias, that's stated to the Court ahead of time, and our defense is determined by what this biased witness has said to the Court, then we're not being able to – allowed to put on our defense as we see fit, in a capital case, in the penalty phase.

At this point, the juror was asked more questions in an attempt to rehabilitate her. Ms. Miller indicated she could listen to all of the evidence and make up her mind fairly.

The defense raised a challenge for cause to Ms. Miller. The trial court responded by stating, "Let me tell you, I'll put it this way, I'll grant your cause, but that witness is going to testify." Defense attorneys again explained that the decision hampered their right to handle the case in a manner they considered best for their client. Defense attorneys told the court that the decision made by the court required a defense decision to choose between a cause challenge and defense strategy. The court responded that, although the witness was hired and had worked for the defense, the challenge for cause would be unwarranted if the expert did not

actually testify. Finally, the trial court, in frustration, issued a strongly worded ultimatum to defense counsel to produce the witness at trial or suffer the consequences. The court stated:

> **I'm just saying — if I grant your cause, she's going to testify. If she doesn't testify, your miserable ass is not going to be in this courtroom again, I can tell you.**

We believe it is clear from the trial court's statements that the challenge for cause was not denied because the juror had been rehabilitated. If that were the case, the trial court would not have decided the defense must commit to calling the witness in question to establish a ground for a challenge for cause. Clearly, the trial court found that the potential juror had a bias against the potential witness and should be excused for cause if the witness testified. The trial court placed a demand on the defense that an expert witness hired by the defense must testify before it would grant the challenge for cause. We find this an abuse of the trial court's discretion and reversible error.

For the foregoing reasons, the conviction and sentence are reversed, and the matter is remanded to the trial court for a new trial.

REVERSED AND REMANDED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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THOMAS F. DALEY
MARION F. EDWARDS
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY OCTOBER 29, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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