NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 KA 0396

STATE OF LOUISIANA

VERSUS

BRANDON NYCOLE ROBINSON

Judgment Rendered: NOV 05 2018

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket Number 716,974

Honorable David W. Arceneaux, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

GUIDRY, J.

The defendant, Brandon Nycole Robinson, was charged by grand jury indictment with first degree murder, a violation of La. R.S. 14:30.[1] He pled not guilty and, following a jury trial, was found guilty of the responsive offense of second degree murder, a violation of La. R.S. 14:30.1. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On January 17, 2016, the defendant and his brother, Tyren Joseph, walked to Arlington Avenue in Houma to purchase marijuana from Kardale Johnson. Johnson pulled up in a Chrysler 200. After Johnson sold the marijuana to the defendant, the defendant asked him to give them a ride to the store to buy a cigar. Joseph sat in the front passenger seat, and the defendant sat in the backseat, directly behind Johnson. When Johnson stopped at a stop sign on the corner of Tulane Street and Payne Street, the defendant produced a handgun and shot Johnson three times in the head, killing him. As the car veered out of control, Joseph grabbed the steering wheel, and the car drifted into a field off of Payne Street, where it finally rolled to a stop. The defendant and Joseph jumped from the car and ran, eventually going different ways.

A short time later, the defendant, while standing on the street, got a ride with Cierra Harris, who was heading to the store in a black Dodge Charger, which belonged to a friend. The defendant asked her to give him a ride to the west side of Houma. When the Charger was spotted by the police, the police stopped the car on

[1] The defendant's case was severed from the cases of his co-defendants, Tyren Joseph, who was charged with second degree murder, and Cyrus Carter, who was charged with accessory after the fact and obstruction of justice by tampering with evidence. At the time of trial, Joseph's case was still pending. The status of Carter's case was not clear from the record before us.

Grand Caillou Road, near the Daigleville Bridge, and arrested the defendant.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the court erred in denying his cause challenge of a prospective juror, Ariella Chelsky. Specifically, the defendant contends that Chelsky indicated that she could not be impartial.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. State v. Burton, 464 So. 2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So. 2d 570 (La. 1985). 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. A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. State v. Martin, 558 So. 2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So. 2d 318 (La. 1990).

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. La. C.Cr.P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been error warranting reversal of the conviction, the defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. State v. Robertson, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280-81.

Defense counsel raised a cause challenge for prospective juror, Chelsky, which the trial court denied. Chelsky was peremptorily struck by defense counsel and, thus, did not serve on the jury of the defendant's trial. It is undisputed that defense counsel exhausted all of his peremptory challenges before the selection of the twelfth juror.[2] Therefore, we need only determine the issue of whether the trial court erred in denying the defendant's cause challenge of Chelsky.

The defendant asserts in brief that Chelsky indicated she could not be impartial because her brother had died of a drug overdose. At odds with this assertion, however, the defendant further notes that, while Chelsky indicated it (her brother's death) would not affect her ability to be impartial, it would affect her ability to listen.

Louisiana Code of Criminal Procedure article 797, states in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
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> * * * * *
>
> (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[.]

Chelsky, a thirty-year-old environmental scientist, was part of the second panel during voir dire. The trial court explained to the prospective jurors, as a group, in the second panel that the defendant was entitled to the presumption of innocence. When he asked if anyone had a problem with that notion, none of the jurors (except one) responded.[3] The trial court then informed the prospective

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[2] The crime of second degree murder is punishable by life imprisonment at hard labor. La. R.S. 14:30.1(B). Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. La. Const. art. I, § 17(A); La. C.Cr.P. art. 782(A). In trials of offenses punishable necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges. See La. C.Cr.P. art. 799.

[3] The prospective juror who responded was not Chelsky.

jurors of the defendant's right not to testify, asked if they had a problem with that idea, and no one responded.

Defense counsel subsequently addressed the second panel and asked each of the prospective jurors if they had a problem with the prosecution having to prove the elements of first degree murder, to which Chelsky responded, "No." When defense counsel asked if anyone had a loss or a death in the past, the following exchange between defense counsel and Chelsky took place:

> Chelsky: My brother died. I would do my best to be impartial, but I do say that I -- because I've seen my parents lose a child that would be really hard for me to watch personally.
>
> Defense Counsel: Let's state -- let's state what you want to say. When you say that it would be hard for you to listen to do you think that it would affect your ability to be impartial as it relates to --
>
> Chelsky: I don't think so. Like I said, I would do my best to be impartial, but I -- it's really hard for me to watch other people grieving, that's all.
>
> Defense Counsel: And I'm asking the question because I lost my mother Thanksgiving Day and so there are things that I can't deal with, Thanksgiving, you know shows, that kind of stuff.
>
> Chelsky: Yeah.
>
> Defense Counsel: The mother-daughter thing is still kind of -- kind of tender. And when you are looking at impartiality -- if you're not able to -- if it hits you here or here where you can't swallow or can't -- those kinds of things that let you know I'm having a problem with listening to this, do you think that loss will override your ability to make or to listen to the evidence that is coming in or do you think it will affect your ability to make a decision in the jury room?
>
> Chelsky: It may affect my ability to listen. Like I said, I'll do my best to be impartial. I don't really know, but I like -- I don't know, I just find it really hard. I find it really hard, but like I would do my best to not let my personal experiences factor in.
>
> Defense Counsel: Okay. That's fine, I understand. And I am -- and I'm probing and I'm trying to be gentle in my probe, but I am trying to determine -- the Judge is going to -- going to give you information. He is going to talk to you about what your duty is, what your duty as a juror will be if you are chosen and what your responsibility is. And as we all know, as you have heard different people have had different issues, lost family members, friends, parents. The issue then becomes -- you are the best person to know, you are sitting -- my client is

sitting here charged with first degree murder and it is going to be dealing with death and you are going to hear testimony and those kinds of things and I don't know exactly what the prosecutor is going to put on, but as I stand here and you sit there do you think that you can be impartial or do you think the death or the loss will be weighing more heavily on you so that --

Chelsky: Maybe it would be weighing more heavily than on other people. I really -- I'm sorry, I don't know. Like I really would try.

Defense Counsel: And that's all you can do is give me your best guess as to what you think.

Chelsky: But I think maybe I'm less afraid about being impartial, I'm more worried about having to watch that or someone talk about that.

Defense Counsel: You're more afraid about -- I'm sorry.

Chelsky: Having to watch someone talk about loss if it were a child.

Defense Counsel: And would the fact that they will be talking about the loss of a child, would that sway you more to a guilty verdict or would that cause you to --- yeah, that's my main question, would that sway you having to listen to another person talk about this?

Chelsky: I would try not to let it sway me in either direction.

Defense counsel then asked the prospective jurors as a group if they had any problem with making a determination of guilt or innocence after looking at all of the evidence. Chelsky responded "no problem." Defense counsel stated the State may "bring in some issues" related to drugs and asked the prospective jurors if they had an issue with that. The following exchange between defense counsel and Chelsky then took place:

Chelsky: I'm sorry, my brother's death was an overdose so that's my experience.

Defense Counsel: Okay. And the facts, I'm sorry. Knowing that how does that make you feel about the issues that this case may bring in some issues as it relates to drugs because I don't know what they are going to put on but -- is that going to make you -- is it going to make it harder for you to be able to sit and be impartial or can you still be impartial with that as part of the -- some of the evidence that may come out in this case?

Chelsky: I guess it depends on the circumstances, but yeah, I would -- yeah, I don't know, sorry.

Defense Counsel: Okay. And how long ago was that that you lost your brother, I'm sorry?

Chelsky: Two years.

Finally, defense counsel asked the prospective jurors as a group if during deliberations they could stand up to the other jurors who thought the defendant was guilty when they disagreed with those jurors because they thought the State had not proved its case. Chelsky responded, "I would stand by my decision."

At the bench conference, defense counsel challenged Chelsky for cause on the basis that she was emotional because she lost her brother to a drug overdose. Defense counsel stated: "I think that she has some issues with the type of case -- if it's a murder I think that she would do better in another type of case, but I just think that this, the circumstances, the facts of this case, the loss, the death so recent I think that -- that's my basis for my challenge for cause."

The defendant in brief alleges that the State and defense counsel "jointly challenged" Chelsky for cause. We do not agree, however, that both parties cause challenged Chelsky. The prosecutor merely agreed that Chelsky might be emotional. Specifically, the prosecutor stated, in response to defense counsel's cause challenge: "I agree insomuch that I believe Ms. Chelsky probably will have an emotional problem, at least with listening to the victim's mother testify. I do believe she also was -- was honest when she said that she intends to do her best to keep that out of her mind."

In denying the cause challenge, the trial court stated that Chelsky was probably the most educated member of the panel and that it had listened to her responses to the questions "very, very carefully." The trial court continued:

> And she drew a very, very clear distinction, really without any prompting, between the emotion of listening to the evidence and remaining impartial. And she made it very clear to me -- in fact, I noticed in some of her answers it was -- she added it spontaneously. She said remaining impartial would not be a problem, listening to the evidence might be somewhat emotional. I have no doubt that for

> every one of the prospective jurors testimony from the mother of a deceased victim is going to present some -- or evoke some emotion among the members of the jury. I would be very surprised if it didn't, but she was very clear that her impartiality would not be affected by it. So for those reasons I am going to deny the challenge for cause. I don't think what she has explained would rise to a challenge, a valid challenge for cause.

We find no reason to disturb the ruling of the trial court in denying the cause challenge. We agree with the trial court that Chelsky indicated that while listening to some evidence might be emotional, she could remain impartial. Chelsky, while initially suggesting it would be emotional and difficult for her to watch someone grieving, clearly expressed that she would do her best to be impartial; that she could consider all of the evidence, including the lack thereof; and that she would not be averse to voicing her opinion in deliberations if she thought the defendant was not guilty. A prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. See State v. Lee, 559 So. 2d 1310, 1318 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991); State v. Copeland, 530 So. 2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). See also State v. Kang, 02-2812, pp. 6-9 (La. 10/21/03), 859 So. 2d 649, 654-55.

The line-drawing in many cases is difficult. Accordingly, the trial judge must determine the challenge on the basis of the entire voir dire, and on the judge's personal observations of the potential jurors during the questioning. Moreover, the reviewing court should accord great deference to the trial judge's determination and should not attempt to reconstruct the voir dire by a microscopic dissection of the transcript in search of magic words or phrases that automatically signify the jurors' qualification or disqualification. See State v. Miller, 99-0192, p. 14 (La.

9/6/00), 776 So. 2d 396, 405-06, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). See also State v. Dotson, 16-0473, pp. 4-18 (La. 10/18/17), 234 So. 3d 34, 39-45; State v. Lindsey, 06-255, pp. 3-12 (La. 1/17/07), 948 So. 2d 105, 107-13; State v. Juniors, 03-2425, pp. 15-23 (La. 6/29/05), 915 So. 2d 291, 309-13, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

The trial court was in the best position to determine whether Chelsky could discharge her duty as a juror. Upon reviewing the voir dire in its entirety, we cannot say that the trial court abused its discretion in denying defense counsel's cause challenge.

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.