

SUPREME COURT OF ARKANSAS

No. CR11-1270

SAMUEL LEE CONWAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 8, 2012

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CR-10-105-1]
HON. JOHN HOMER WRIGHT,
JUDGEREVERSED AND REMANDED FOR
NEW TRIAL.**KAREN R. BAKER, Associate Justice**

On June 18, 2011, appellant, Samuel Lee Conway, was convicted by a Garland County Circuit Court jury of five counts of capital murder, two counts of aggravated residential burglary, and four counts of theft of property. Conway was sentenced to five terms of life imprisonment without parole and two additional life sentences plus ninety years. Conway raises three points on appeal: (1) the circuit court erred in denying his motion to dismiss a juror; (2) the circuit court erred by failing to follow Arkansas Code Annotated section 16-89-125(e); and (3) the circuit court erred by denying Conway's challenges to the State's striking of three potential jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). This court has jurisdiction over this case pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2012). We reverse his convictions and sentences and remand for a new trial.

Because Conway does not challenge the sufficiency of the evidence against him, only a brief recitation of the facts is necessary. See *Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341

(2010). The judgment and convictions arise from residential burglaries, thefts, and the murder of five individuals in a mobile-home park located in Garland County, Arkansas, in November 2009. Conway appeals from these convictions.

For his first point on appeal, Conway asserts that he did not receive a fair and impartial trial because the circuit court erred when it failed to dismiss a juror, Juror Sheets, despite his informing the court he could not be fair to Conway. During the guilt-innocence phase, Juror Sheets sent a note to the court stating “I don’t think I can be a fair juror anymore.” The circuit court brought Sheets into chambers with counsel present and questioned Sheets regarding his note. Prior to the questioning, counsel for both parties noted that Sheets was visibly upset during the trial. The following colloquy took place between the circuit court, the prosecution, and Conway’s counsel:

THE COURT:	And you sent this note to me through the bailiff, is that right?
JUROR SHEETS:	Yes, sir.
THE COURT:	And it says “I don’t think I can be a fair juror anymore.”
JUROR SHEETS:	Yes, sir.
. . . .	
THE COURT:	What’s that mean?
JUROR SHEETS:	Basically, due to the testimony and the pictures I’ve been seeing, I haven’t been getting any sleep. I’ve basically – I know it’s bad saying this – I’ve basically made up my mind about it. And I’ve gotten to the point to where I’m sleeping with one of my shotguns loaded beside my bed ‘cause of the testimony I’ve been hearing. That’s basically—it’s bad saying it, but I’ve made up my mind about the case already this early.
. . . .	
THE PROSECUTOR:	You’re basing your opinion based on what you’ve heard from the witness stand and the exhibits you’ve been seeing?
JUROR SHEETS:	Yes, sir.

.....

THE PROSECUTOR: Now, do you think that once instructed at the end of this trial that you can render a fair and impartial verdict based on the evidence that you've heard from the witness stand from the exhibits you have seen?

JUROR SHEETS: I don't think so, sir. In my mind, I've made up my choice.

.....

DEFENSE COUNSEL: [S]o you're saying that you don't believe your [sic] fair and impartial right now?

JUROR SHEETS: Not to him, sir.

.....

DEFENSE COUNSEL: [Your] statement for this record [is] that you don't feel like you could be a fair and impartial juror?

JUROR SHEETS: No, sir.

DEFENSE COUNSEL: You don't feel like you could deliberate?

JUROR SHEETS: No, sir.

DEFENSE COUNSEL: You're done?

JUROR SHEETS: I think I'm pretty much solid on this one.

After this discussion, the circuit court sent Juror Sheets back to the jury-panel box. Defense counsel made a motion to dismiss Juror Sheets based on Sheets's inability to be fair and impartial and the prejudice imposed on Conway as he was being deprived of his right to a fair trial. The circuit court denied the motion:

I'm not gonna excuse him because I don't think that he's expressed anything other than the fact he has formed an opinion, which you have acknowledged jurors do then they go in and discuss it. If he reported that he refuses to deliberate once – if he is seated, once the case is submitted, that is another matter. But I do not think that anybody can sit through three days of testimony and not begin the formation of an opinion. That's just contrary to human nature and I think our process envisions that as the evidence is presented a juror assimilates it You know, and I appreciate your dilemma, that you've been informed that a jury has ben [sic] swayed by the State's evidence. But that doesn't disqualify 'em [sic] as a juror.

At the close of the evidence, Conway renewed his motion to dismiss Sheets and replace him with the alternate juror.

DEFENSE COUNSEL:

I want to renew my objection to . . . Sheets -- being allowed to remain on the jury. I observed him closely after our earlier voir dire of him. He is not listening to proof, he is staring blankly at Sam Conway in an abject fashion, he is not taking notes. I think he's biased. It's possible he could taint the jury pool. He should've been excused when he said he could no longer deliberate. So I renew my motion to excuse . . . Sheets as a juror and would ask that our remaining alternate be seated in his place.

. . . .

THE PROSECUTOR:

Your Honor, . . . he can't make a characterization as far as to whether or not that juror is listening or not. . . . [but] I'll give him that he might not take notes.

The circuit court denied the renewed motion to dismiss Sheets and stood "on [its] prior ruling."

Conway asserts that he was prejudiced by Sheets's remaining on the jury. The State argues that the circuit court acted within its discretion and that Conway has failed to demonstrate that he suffered any prejudice.

Whether a juror is impartial is a judicial question addressed to the sound discretion of the circuit court, and an appellant must demonstrate a manifest abuse of that discretion to reverse the circuit court. *McFarland v. State*, 284 Ark. 533, 684 S.W.2d 233 (1985). We give a great amount of discretion to the circuit court because the judge is in a superior position to assess the possibility of prejudice. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. 'A fair trial in a fair tribunal is a basic requirement of due

process.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (internal citations omitted). “Persons comprising the venire are presumed to be unbiased and qualified to serve.” *Cooper v. State*, 324 Ark. 135, 144, 919 S.W.2d 205, 210 (1996) (internal citations omitted). “The burden is on the party challenging a juror to prove actual bias.” *Id.* at 144, 919 S.W.2d at 210.

In *State v. Cherry*, we recognized that a defendant is entitled to a fair trial, not a perfect trial. 341 Ark. 924, 20 S.W.3d 354 (2000). In that case, we held that Cherry was denied a fair trial because jurors had prejudged Cherry’s guilt. *Id.* “For even one juror to prematurely decide a defendant’s guilt before hearing all the evidence and being instructed on the law, deprives that criminal defendant of his right to a fair and impartial jury.” *Id.* at 931, 20 S.W.3d at 359.

Conway asserts that he was prejudiced by Sheets’s remaining on the jury and because of this he did not receive a fair and impartial trial. The State, on the other hand, asserts that Sheets had simply formed an opinion at that point in the State’s presentation, and Conway was not prejudiced by Sheets’s remaining on the jury for the duration of the trial. During oral argument before this court, the State also argued that Sheets’s responses to the circuit court reflected his anxiety about the evidence presented at trial, and the grisly nature of the crimes, and did not demonstrate his inability to serve as a juror.

We do not find the State’s arguments persuasive. Sheets sent the note to the circuit court during the prosecution’s presentation, not after the completion of the evidence. The defense had not made any presentation, but Sheets remained on the jury after he stated he had made a decision, “was solid,” and could not deliberate. During oral argument, the State

further argued that it was acceptable for Sheets to remain on the jury after Conway made his motion to dismiss, because the State only had minimal evidence to present after the motion was made, and Conway presented very little defense. Therefore, the State asserts, it was acceptable for Sheets to remain on the jury for the duration of the trial. We cannot agree with this assessment. The fact that the State had very little remaining evidence to present is not relevant, nor is the amount of evidence presented in Conway's defense. The critical fact is that Sheets unequivocally stated that he could not be fair and impartial and that he could not deliberate, yet he remained on the jury.

The State suggests that we should affirm the circuit court because Sheets had simply formed an opinion after having been swayed by the prosecution's overwhelming evidence, but he remained a fair and impartial juror throughout the trial. However, the record demonstrates otherwise. Sheets did not state the substance of the opinion he had formed. Rather, Sheets stated he could not be fair and impartial and could not deliberate because "in my mind I've made a choice."

The right to a fair and impartial trial is a fundamental guarantee, and Conway was denied that right in this case. We hold that the trial court abused its discretion in failing to dismiss Juror Sheets and reverse and remand for a new trial. Having reversed and remanded for a new trial on this basis, we need not address the remaining points on appeal as they are not likely to arise on remand.

Reversed and remanded for a new trial.

Janice W. Vaughn, Arkansas Public Defender Commission, for appellant.
Dustin McDaniel, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.