TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00520-CR

Martin Torres, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 274TH JUDICIAL DISTRICT
NO. CR-14-0458, HONORABLE BILL HENRY, JUDGE PRESIDING

NO. 03-15-00690-CR

Martin Torres, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 428TH JUDICIAL DISTRICT
NO. CR-14-0825, HONORABLE BILL HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Martin Torres was convicted of attempted sexual assault of a child and compelling prostitution of a child. In two issues, he argues that he was denied the right to an

impartial jury and that the evidence does not support the compelling-prostitution conviction. We will affirm.

BACKGROUND

I. Facts surrounding the offenses

The jury heard evidence that Torres had contacted A.S., a minor, to arrange a paid sexual encounter for him with another woman. According to A.S.'s testimony, when she informed Torres that she could not make such arrangements, he asked her if she would have sex with him for money. She testified that she initially refused, but he continued to call and text her seeking sex with her. A.S. told her friends, Daer Amador and Eric Cordova, about Torres's proposition. Cordova formed a plan in which A.S. would agree to Torres's proposition, and then Amador, Cordova, and A.S. would rob Torres when A.S. and Torres met.

Torres arrived at the location set by A.S., and A.S. got into his vehicle. A.S. testified that Torres attempted to have sex with her and that she resisted, but he forced himself on her. A.S. explained that Amador and Cordova then approached Torres's vehicle wearing masks and brandishing guns, and she fled the vehicle. Amador and Cordova physically assaulted Torres, stole his belongings, and then Amador, Cordova, and A.S. left the scene. Torres was charged with sexual assault of a child and compelling prostitution of a child.

II. Alleged juror misconduct

During voir dire, the panelists were asked, "Were you or someone close to you a victim of sexual abuse?"[1] One of the panelists, John Spire, who was eventually selected to serve on

[1] The record does not contain a transcript of voir dire, but the parties and trial court agreed, at the hearing on the motion for mistrial, that the question was something "along [those] lines[.]"

the jury, did not respond. After the jury had received the charge but before they had rendered a verdict, defense counsel received information suggesting that Spire had a brother who may have been the victim of sexual abuse.

At a hearing outside the presence of the jury, the trial court questioned Spire regarding the matter. Spire testified that he had heard a rumor that his brother may have been sexually molested many years earlier. Spire confirmed that he did not know whether the allegation was true. The trial court found that Spire did not knowingly withhold information during voir dire and denied Torres's motion for mistrial.

The jury found Torres guilty of the lesser-included offense of attempted sexual assault of a child and of compelling prostitution of a child. The jury assessed punishment at five years' confinement on the former and eight years' confinement on the latter, and the trial court entered judgments accordingly. Torres appealed.[2]

The parties do not dispute the substance of that question on appeal.

[2] J.E. was initially indicted for sexual assault of a child, which was filed under cause number CR-14-0458, and was later indicted for compelling prostitution of a child, which was filed under cause number CR-14-0825. The charges were joined for purposes of trial and designated as Count I and Count II, respectively. The trial court initially entered a separate judgment for each conviction as separate counts under a single cause number—CR-14-0458. J.E. appealed from both judgments under that cause number. Later, on the State's motion, the trial court rescinded its judgment on the compelling-prostitution conviction and issued a new judgment reflecting that conviction under a separate cause number—CR-14-0825. This Court granted J.E.'s motion to consolidate the two cause numbers to preserve his right to appeal from the new judgment under cause number CR-14-0825.

DISCUSSION

I. Juror misconduct

In his first issue, Torres argues that the trial court reversibly erred in denying his motion for a mistrial for alleged juror misconduct. Specifically, he contends that Spire withheld material information during voir dire that his brother may have been the victim of sexual assault, entitling Torres to a new trial.

A. Standard of review

We review a trial court's ruling on a motion for a mistrial for an abuse of discretion, viewing the record in the light most favorable to the trial court's ruling and upholding that ruling if it was within the zone of reasonable disagreement. *See Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). A trial court abuses its discretion in denying a motion for a mistrial only when no reasonable view of the record could support the court's ruling. *Id*.

The decision to remove or retain a juror lies within the discretion of the trial court. *Uranga v. State*, 330 S.W.3d 301, 307 (Tex. Crim. App. 2010). When reviewing a trial court's decision regarding potential juror misconduct, an appellate court should defer to the trial court's resolution of the historical facts and its determinations concerning credibility and demeanor. *See Quinn v. State*, 958 S.W.2d 395, 401 (Tex. Crim. App. 1997).

B. Right to an impartial jury

Criminal defendants have the right to trial by an impartial jury under both the Sixth Amendment of the U.S. Constitution and Article I, Section 10 of the Texas Constitution. *Uranga*,

330 S.W.3d at 304. When a juror withholds material information during voir dire, the parties are denied the opportunity to intelligently exercise their challenges, hindering their selection of a disinterested and impartial jury. *See Franklin v. State*, 12 S.W.3d 473, 477-78 (Tex. Crim. App. 2000) (*Franklin I*); *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Crim. App. 1978). To show juror misconduct, a defendant must show (1) that the juror withheld information during voir dire despite due diligence exercised by the defendant and (2) that the information withheld is material. *Franklin v. State*, 138 S.W.3d 351, 355-56 (Tex. Crim. App. 2004) (*Franklin II*).

Information is "withheld" only if counsel is diligent in asking questions calculated to bring out that information. *Gonzales v. State*, 3 S.W.3d 915, 916-17 (Tex. Crim. App. 1999). "Counsel must ask *specific* questions, not rely on broad ones to satisfy this obligation." *Id.* at 917 (emphasis in original). No error may be found where counsel did not meet that obligation. *Id.*

To demonstrate materiality, the defendant need not show actual bias, but rather must demonstrate that the information "has a tendency to show bias." *Franklin II*, 138 S.W.3d at 356. A juror is biased when an inclination toward one side of an issue rather than to the other leads to the natural inference that the juror will not or did not act with impartiality. *Anderson v. State*, 633 S.W.2d 851, 853 (Tex. Crim. App. 1982).

C. Torres has not demonstrated error

1. Spire did not withhold information at voir dire

We first note that the record does not establish that Spire withheld information. During voir dire, the panelists were asked whether they knew anyone who had been a victim of

sexual abuse. Spire testified, and the trial court found, that he did not believe that information regarding an allegation of sexual abuse was responsive to that question:

> Court: Number one: Did you hear, during the first part of the venire process on Monday, the question along the lines of, "Were you or someone close to you a victim of sexual abuse?" The question is: Did you hear a question like that on Monday?
>
> Juror: Yes, sir.
>
> Court: Okay. And what was your response to that, or did you offer a response?
>
> Juror: I don't think I offered a response at all.
>
> Court: And was that because you did not have a response?
>
> Juror: No, sir, it's not really. I've heard, through my father, my brother might have been sexually molested by someone, years and years and years ago, probably whenever he was younger, probably. I don't know – he was 13, or something like that, at the time, but –
>
> Court: Would it be fair to say that that is not something you know as a fact?
>
> Juror: Yes, sir.
>
> Court: But more something along the lines of scuttlebutt, or rumors, or things of that nature?
>
> Juror: Yes, sir. There has been no fact behind it. I mean, no set-in-stone thing or anything like that, sir.
>
> Court: Having that type of issue, can you still be fair and impartial as a juror in this particular case?
>
> Juror: Yes, sir.
>
> Court: And you can say that without hesitation?
>
> Juror: Yes, sir.

After hearing Spire's testimony, the trial court found that Spire had answered the question honestly and concluded that Spire could serve as a fair and impartial juror:

> State: I ask you to make judicial findings that the juror was, in fact, answering questions honestly, or that you believe he was answering honestly, and can act as a fair and impartial juror.
>
> Court: That finding is, in fact, made. And I have to say, being here in the courtroom, looking at the juror in the eye, it was the Court's conclusion that this juror had no understanding that this was even close to being responsive to the question.

This case is similar to *Parra v. State*, in which this Court decided that a juror did not withhold information during voir dire. No. 03-00-00570-CR, 2001 WL 617242, at *2 (Tex. App.—Austin June 7, 2001, no pet.) (not designated for publication). In *Parra*, the prosecutor recited the names of the complainant and other possible witnesses and asked the panelists if they knew any of them. *Id.* at *1. After the complainant testified, a juror informed the trial court that she recognized the complainant from volunteer work. *Id.* This Court held that the juror "truthfully did not respond because she did not know their names." *Id.* We noted that "[t]he panelists were not asked any questions calculated to reveal their volunteer activities or any connection they might have to victim's services organizations." *Id.* Consequently, we concluded that the record did not establish that the juror withheld information during voir dire. *Id.* at *2.

Here, similarly, defense counsel asked only whether the panelists knew someone who *had been* a victim of abuse. That question was not calculated to reveal whether any of them knew someone who *may* have been a victim of abuse. Spire was truthful in not responding because he did

not know for a fact that his brother had been abused.[3] The trial court thus did not abuse its discretion in concluding that Spire did not withhold information responsive to the question that had been asked at voir dire. *See Armstrong v. State*, 897 S.W.2d 361, 363-64 (Tex. Crim. App. 1995) (holding information not withheld where juror did not reveal at voir dire that she and prosecutor were close friends because panelists were asked only whether anyone knew prosecutor so well that it would affect their ability to be fair and juror testified she did not respond because she believed she could be fair); *Gonzales*, 3 S.W.3d at 916-17 (holding information not withheld where juror answered juror questionnaire incorrectly but counsel failed to inquire about issue with more specific oral questioning at voir dire); *Freeman v. State*, 168 S.W.3d 888, 890-91 (Tex. App.—Eastland 2005, pet. ref'd) (holding jurors did not withhold information where panelists were asked questions about witness but not specifically whether any of them had served on the grand jury that indicted the witness in a related matter).

2. The information was not material

We further conclude that, even if the juror had "withheld" that information, Torres has failed to demonstrate that the information was material.

The trial judge obtained input from the prosecutor and defense counsel in crafting the questions that he posed to Spire at the hearing. After the trial judge concluded his examination, defense counsel declined to ask any follow-up questions:

[3] In fact, defense counsel argued at the hearing that Spire "chose to ignore it because he didn't believe his brother may have been molested, but that's not the point. He didn't disclose that it was a possibility." But defense counsel did not ask the panelists to disclose any knowledge of possible sexual-abuse victims, and the trial court determined that Spire honestly did not know whether his brother had been a victim.

Defense: I don't have any questions, but I do have something to discuss outside the presence of the juror.

Court: I understand. Do you have additional questions to ask him?

Defense: No. I think he's answered enough.

Defense counsel has a duty to ask follow-up questions after uncovering potential bias. *Gonzales*, 3 S.W.3d at 917. Here, counsel did not ask any questions aimed at uncovering any inherent tendency toward bias. The record shows only that Spire was aware of the allegation and was unsure that it was true, and that the alleged abuse occurred "years and years and years ago[.]" Without additional questioning—such as questions about the nature of the allegation, exactly when the alleged abuse occurred, when Spire learned of the allegation, whether he or his father believed the allegation, or how he was affected by the allegation—we cannot conclude that a rumor of sexual abuse constitutes material information on this record. *See Decker v. State*, 717 S.W.2d 903, 907 (Tex. Crim. App. 1983) (familiarity with witness is not necessarily material information absent additional facts establishing nature of relationship).

Torres cites *Franklin v. State* in support of his claim that Spire's knowledge of a rumor of abuse has a tendency to show bias. *Franklin II*, 138 S.W.3d at 355-56. But in that case, the trial court had erroneously denied the defendant the opportunity to question the juror and develop the record to establish materiality. *Id.* at 355. Defense counsel had posed questions that the Court held, if asked, would have been relevant to discovering potential bias. *Id.* Dispositive of the issue was that counsel was not permitted to determine the extent of the relationship *"due to no fault of his own*." *Franklin I*, 12 S.W.3d 478 (emphasis in original). Because of the trial court's error, the Court

concluded that it could not determine that the information was immaterial. *Id*. at 478-79; *Franklin II*, 138 S.W.3d at 354-55. In the present case, by contrast, the trial court questioned the juror based on input from the State and defense counsel and also offered defense counsel the opportunity to further question Spire, but counsel declined to do so. *Cf. id.*; *see also Scott v. State*, 419 S.W.3d 698, 704-05 (Tex. App.—Texarkana 2013, no pet.) (holding no error where defense counsel failed to question juror at hearing on motion for new trial regarding information that could have shown bias and thus failed to demonstrate that the information was material).

Torres next argues that *Norwood v. State*, 58 S.W.2d 100 (Tex. Crim. App. 1933), is factually analogous and requires reversal. In *Norwood*, a sexual-assault case, the jury was asked if they or their family members had ever been sexually assaulted. *Id.* at 135. A juror did not disclose, until a hearing on a motion for new trial, that his sister was involved in a "sexual outrage." *Id.* The record further showed that the juror had initially voted for a sentence that was five times longer than the sentence proposed by other jurors and that "[t]he other jurors would have assessed a lower penalty had it not been for the attitude of" that juror. *Id.* at 135-36.

In the present case, by contrast, Spire had only heard a rumor that his brother had suffered abuse and confirmed that he did not know whether it was true. *Cf. id.* at 135. He also did not provide any detail regarding the alleged abuse, such as describing it as an "outrage." *Cf. id.* Finally, the record does not show any conduct by Spire that would suggest that he was biased, such as lobbying for a disproportionately long sentence. *Cf. id.* at 135-36. *Norwood* thus does not compel reversal in this case.

Torres cites other cases in which jurors withheld material information at voir dire so as to require a mistrial, but they are also distinguishable because the juror misconduct at issue in each of those cases involved a juror knowingly concealing information during voir dire that that the record affirmatively demonstrated had an inherent tendency to show bias or actual bias:

Salazar v. State, 562 S.W.2d 480 (Tex. Crim. App. 1978), involved a charge of sexual assault by a Mexican-American defendant against a young girl. During voir dire, the panelists were asked whether they had ever been a witness in or involved in a criminal proceeding. *Id*. at 481. During trial, a juror admitted that he had withheld information that he had been an eyewitness to a sexual assault of his own daughter by a Mexican-American male and served as a witness for the State in that case. *Id.* at 482.

In *Von January v. State*, 576 S.W.2d 43, 44 (Tex. Crim. App. 1978), the jury panel was asked if anyone knew the murder victim or his family. At a hearing on a motion for new trial, it was established that one of the jurors had knowingly withheld the fact that he had known the victim and his family well for over thirty years. *Id.*

In *Herrera v. State*, 665 S.W.2d 497, 501 (Tex. App.—Amarillo 1983, pet. ref'd), a case involving murder and voluntary manslaughter, a juror withheld the fact that she had been the complaining witness in an assault case just three months earlier. During voir dire, the panelists were asked whether any of them had ever been a complaining witness in a criminal trial, which the appellate court noted "could not have been more on point." *Id.* at 502.

In *Petteway v. State*, 758 S.W.2d 861, 864 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd), the panelists were asked whether there was anything that might prevent them from being

fair, and a panelist selected to serve on the jury answered in the negative. But there was evidence that, before jury selection, the juror knew the defendant and had said that he was "going to get" him and that, during deliberations, he had lobbied for a higher punishment. *Id.* at 865.

The record in the present case, by contrast, does not establish that the juror knowingly concealed information, and the information at issue, without more, does not demonstrate an inherent tendency to show bias. We thus conclude that Torres has failed to establish a claim of juror misconduct on the basis that a juror withheld material information.

3. No showing of actual bias

We further conclude that the record shows that the trial court did not abuse its discretion in finding that Spire was not actually biased against the defense. *See Uranga,* 330 S.W.3d at 306 (applying actual-bias standard in determining whether trial erred in refusing to declare mistrial where no showing that juror withheld material information).

As discussed, after discovering the existence of potential juror bias, the trial court held a hearing on the matter and questioned Spire after obtaining input from the State and defense counsel. Spire confirmed "without hesitation" that he could remain fair and impartial. The trial court found that Spire did not know whether the allegation of sexual abuse was true, that he was not dishonest in his response to the question asked at voir dire, and that he could serve as a fair and impartial juror in the case. *See Quinn*, 958 S.W.2d at 401; *see also Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (trial court, as factfinder, is sole judge of witness credibility). Torres has failed to show that the trial court's findings are unsupported by the record.

4. Juror was not "disabled" so as to require replacement

Torres further argues that the trial court erred in refusing to replace Spire with an alternate juror. He contends that Spire was so prejudiced against Torres that he was "disabled" under Texas Code of Criminal Procedure article 36.29. *See Reyes v. State*, 30 S.W.3d 409, 412 (Tex. Crim. App. 2000) (juror may be "disabled" where his knowledge of defendant may prevent him from "fully and fairly" serving as juror). However, because we have determined that the record supports the trial court's finding that Spire was not prejudiced against Torres, we conclude that the trial court did not abuse its discretion in denying Torres's request to replace Spire with an alternate juror. *See Scales v. State*, 380 S.W.3d 780, 783 (Tex. Crim. App. 2012) ("The trial court has discretion to determine whether a juror has become disabled and to seat an alternate juror.").

Because we conclude that Torres has not shown that he was deprived of an impartial jury or denied a fair trial as a result of any trial-court error, we find that the trial court did not abuse its discretion in denying his motion for mistrial. We overrule Torres's first issue.

II. Sufficiency of the evidence

In his second issue, Torres challenges the sufficiency of the evidence to support his conviction for compelling prostitution under Texas Penal Code section 43.05(a)(2).

A. Standard of review

In determining whether the evidence is sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could

have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We may not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We defer to the jury's resolution of any conflicting inferences from the evidence and presume that it resolved such conflicts in favor of the judgment. *Jackson*, 443 U.S. at 326; *Whatley v. State*, 445 S.W.3d 159, 165 (Tex. Crim. App. 2014).

B. The record supports the jury's finding that Torres compelled the prostitution of a child under Texas Penal Code section 43.05(a)(2)

A person commits the offense of compelling prostitution if he knowingly causes, by any means, a child younger than eighteen years of age to commit prostitution, regardless of whether he knew the child's age at the time of the offense. Tex. Penal Code § 43.05(a)(2). Prostitution is offering to engage, agreeing to engage, or engaging in sexual conduct for a fee, or soliciting another in a public place to engage in sexual conduct for a fee. *Id.* § 43.02(a)(1).

Torres contends that the record contains no evidence of "causation," namely, no evidence that he caused A.S. to engage in prostitution. Rather, he argues that A.S. "was compelled to the scene by her own plan" to rob him and "was not brought to the scene through any compulsion" by Torres.

First, this Court has explained that a person causes prostitution under the statute if he provides an opportunity for a minor to engage in prostitution and influences, persuades, or prevails upon her to do so. *Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no

pet.). The statute does not contemplate the intent of the minor. *See id*. (purpose of statute is to prohibit exploitation of minors regardless of coercion). Therefore, the State was not required to show that A.S. intended to engage in prostitution to establish an offense under section 43.05(a)(2). Rather, the State met its burden by producing evidence that Torres provided A.S. an opportunity to commit prostitution and prevailed upon her to do so. That A.S. may have had other intentions for meeting Torres does not diminish his culpability under the statute. *See* Tex. Penal Code § 43.05(a)(2); *Waggoner*, 897 S.W.2d at 512.

Second, the record does not support Torres's contention that he did not engage in conduct compelling A.S. to the scene of the offense for the purpose of paying her for sex. He argues that he did not meet A.S. to pay her for sex, but had instead met her believing that she had arranged for him to meet someone named "Michelle" whom Torres would pay for sex. But the record does not support his claim. The record contains evidence that Torres had repeatedly asked A.S. to meet him so he could pay her for sex, that he believed that she had agreed to his proposition, and that he arranged a meeting with her for that purpose.

A.S. testified that Torres had asked her, the day of the offense, if she would have sex with him for money:

A.S.: [Torres] said that if – that if I would do it.

State: If you would do what?

A.S.: Have sex with him for money.

She testified that she initially refused his proposal, but he continued to call and text her about "how he liked me and how he wanted to have sex with me." She explained that Cordova used her phone to text Torres and indicate that A.S. would agree "to sleep with him for money." She confirmed that, had Torres not repeatedly called and texted her that day, she would not have met with him. She said that when she arrived at the motel, she saw Torres driving in his truck. When he saw her, he stopped the truck, and she got in. He continued driving and asked her where he could park "[s]o he could have sex with" her. She testified that they then discussed payment:

> State: Before going to park, did you talk to him about money?
>
> A.S.: He mentioned it. He said that he was going to give me money for my mom and that, since I was going to sleep with him, that he was going to give me more money.
>
> State: So he was going to give you a certain money amount for your mom, but, if you had sex with him, he was going to give you more money?
>
> A.S.: Yes.

Contrary to Torres's contention, A.S. repeatedly confirmed, when pressed on cross-examination, that she and Torres had not arranged for Torres to pay "Michelle" for sex on that occasion, but that he had prevailed upon her with his proposition:

> Defense: When you were up in Austin, you said you received phone messages from [Torres]. Did – isn't it true that he didn't – he was asking for a setup with Michelle?
>
> A.S.: He was asking for any female, but, in particular, he wanted me.
>
> Defense: Well, didn't you tell the officer that he wanted a setup with Michelle?

A.S.: No. I said that he said Michelle, previously.

. . . .

Defense: And isn't it true that, when you were – when you came – all the way up until you came to San Marcos, you told the police officer that your intent was to set him up for the robbery, but [Torres] had thought he was coming to meet Michelle?

A.S.: No.

Defense: Isn't it true that you had told Gene Tucker that you had set him up with Michelle?

A.S.: That night, no, but previously, before, yes.

. . . .

Defense: Isn't it true that, as far as Martin Torres knew, he was coming to meet you in San Marcos to hook up with Michelle?

A.S.: No.

In addition to A.S.'s testimony, the record also contains Torres's statements to police after the incident in which he indicated that he intended to have sex with A.S. for money:

Investigator: Why did you decide to have sex with [A.S.] that night for money? This night that this happened?

Torres: I don't know how to tell you that . . . I was just thinking of having sex . . . . How did I decide to have sex? Is that what you were asking? It just seemed easy to have sex with her, that's all[.]

. . . .

Investigator: So how did [A.S.] know you were going to pay her for sex?

Torres: She just told me she'd have sex with me and to give her sixty [dollars.]

Torres further argues that he did not commit an offense because "there is no evidence in the record that [A.S.] ever committed prostitution herself." But both this Court and the Texas Court of Criminal Appeals have clarified that commission of prostitution is not an element of compelling prostitution under Texas Penal Code section 43.05(a)(2). *See Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982); *Waggoner*, 897 S.W.2d at 513.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have found beyond a reasonable doubt that Torres caused A.S. to commit prostitution. *See Waggoner*, 897 S.W.2d at 512-13. (evidence that appellant provided thirteen-year old with contact, condom, and cell phone, negotiated price, and drove child to location was sufficient to support compelling-prostitution conviction); *see also Kelly v. State*, 453 S.W.3d 634, 643 (Tex. App.—Waco 2015, pet. ref'd) (evidence that appellant made phone calls to men interested in sex for money and provided location for prostitution to occur "caused" the minor to commit prostitution). We overrule Torres's second issue.

CONCLUSION

We affirm the judgments of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: August 15, 2017

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