NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0634

STATE OF LOUISIANA

VS.

WILLIAM WASHINGTON

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JUDGMENT RENDERED: NOV - 3 2006

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 04 CR8 90976, DIVISION G
PARISH OF WASHINGTON, STATE OF LOUISIANA

HONORABLE LARRY GREEN, JUDGE

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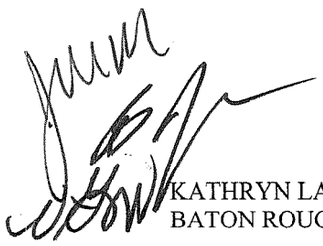

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WILLIAM WASHINGTON

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

The defendant, William Washington, was charged by bill of information with indecent behavior with a juvenile, a violation of La. R.S. 14:81. With counsel present, the defendant pled not guilty. Following a six-person jury trial, the defendant was found guilty as charged. The defendant filed motions for a new trial and post-verdict judgment of acquittal, which were denied. The defendant was sentenced to five (5) years at hard labor, with the sentence to be served consecutively to a sentence the defendant was currently serving. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating three assignments of error. We affirm the conviction, vacate the sentence and remand for resentencing.

FACTS

On April 23, 2004, F.H., the thirteen-year-old victim, took part in a theatre production of the Wizard of Oz at Franklinton Junior High School in Franklinton, Washington Parish. The forty-nine-year-old defendant was a stagehand in the theatre production. At the end of the performance, F.H. was waiting in the wing, along with several other children her age, to make her curtain call. As F.H. waited, the defendant stood behind her and groped her buttocks several times. F.H. became too frightened to speak. When she got on stage to take her bow, she began crying. She informed several people of the incident in the wing. When she got home, she informed her mother, who contacted the police. That same night, F.H. gave a written statement of the incident to Officer Frankie Jones of the Franklinton Police Department. Officer Jones turned the matter over to Detective Harold Varnado of the Franklinton Police Department.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his challenge for cause of prospective juror Regina Baillio. Specifically, the defendant contends that Ms. Baillio could not be fair and impartial because she was a rape victim, and the defendant was charged with a sexual offense.

Defense counsel tried to have Ms. Baillio removed for cause, but the trial court denied the challenge because it found that Ms. Baillio had stated something to the effect that she felt she had put the incident behind her and that she could be fair and impartial. The defendant objected to the trial court's ruling. Ms. Baillio was the fourth peremptory strike used by defense counsel. Thus, Ms. Baillio never served on the jury of the defendant's trial.

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 trial court erroneously denies a challenge for cause and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, 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, 1280-1281. It is undisputed that defense counsel exhausted all six of his peremptory challenges before the selection of the sixth juror.[1] Therefore, we need only determine the issue of whether the trial judge erred in denying the defendant's challenge for cause regarding prospective juror Ms. Baillio.

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:
>
> * * * * *
>
> (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 relevant voir dire is as follows:

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[1] The crime of indecent behavior with juveniles is punishable by a fine of not more than five thousand dollars, or imprisonment with or without hard labor for not more than seven years, or both, provided the defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with La. C.Cr.P. art. 893. La. R.S. 14:81(H)(1). Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors. La. C.Cr.P. art. 782(A). In cases where the offense is not punishable by death or necessarily by imprisonment at hard labor, each defendant shall have six peremptory challenges. See La. C.Cr.P. art. 799.

THE COURT: Okay, ladies and gentlemen, the next question from me is: Have you or any close family members or close friends, been the victim of a crime? . . .

* * * * *

(THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH.)

MS. BAILLIO: When I was 23, I was raped and the charges were dropped.

THE COURT: Where?

MS. BAILLIO: It was in Tennessee, when we lived in Tennessee.

THE COURT: You attorneys want to ask questions?

MR. GATEWOOD [prosecutor]: I don't have any.

MR. BURKE [defense counsel]: Ms. Baillio, I'm sorry to ask you these questions, but I have to -- one of my jobs as an attorney is to try and find jurors that can be fair and impartial jurors on a case. The defendant, Mr. Washington, is charged with indecent behavior with a juvenile, which basically means having unlawful contact with a juvenile. It is considered a sexual offense.

In your case, you were a victim of a sexual offense that was a crime similar in nature. Knowing that, do you think that you could be a fair and impartial juror in this type of case? For instance, if this was a burglary and I had just been the victim of a burglary, I may not be a fair and impartial juror.

MS. BAILLIO: Right.

MR. BURKE: But in this instance you were the victim of a crime of a similar charge being made in which you could be a potential juror.

MS. BAILLIO: I'd like to say that I could. I think since it was such a long time ago that I was 23 I have healed, but I would be worried that if the evidence came up it would affect me emotionally.[2]

MR. BURKE: I can't tell what the evidence is going to be --

MS. BAILLIO: Right.

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[2] It appears from the record that the rape occurred over thirty years ago. When introducing herself during voir dire, Ms. Baillio stated that she had two daughters, nineteen and thirty years old, a son who was twenty-eight years old, and five grandchildren. Also, while it is unclear where the information came from, the trial court indicated Ms. Baillio was fifty-six years old.

MR. BURKE: -- at all. Do you think – and we're kind of putting you in a tough spot, do you think that in your heart that really this isn't the type of case that you would be a fair and impartial juror on?

MS. BAILLIO: If the young girls have to come testify I'd lose it. I would be up there squalling because my heart would go out to them. If you know young girls are going to get on that stand and testify, I'll lose it. I just -- it would be sympathy on my part.

MR. BURKE: The law basically is if you were to be chosen as a juror, the Judge would instruct you at the end of the trial that you can't have any sympathy or compassion, basically for the --

MS. BAILLIO: And if it comes down to facts and feelings and we have to judge on fact and not feeling?

MR. BURKE: Do you think your feelings would sway you in a case of this nature?

MS. BAILLIO: I'd like to say no.

MR. BURKE: Like to say no.

MS. BAILLIO: Exactly. And I have to be honest, that's what it's all about. To be honest again, that's a hard call to say.

MR. BURKE: Would it be fair to say that you would be a more -- a fair or more impartial juror on a different type of case than on a sex --

MS. BAILLIO: Correct, yes.

MR. BURKE: -- sex-type crime offense?

MS. BAILLIO: Correct.

MR. BURKE: Thank you, ma'am.

MR. GATEWOOD: May I ask a question now, Your Honor?

THE COURT: Yes, please.

MR. GATEWOOD: If you were selected to sit on this jury and at the end of the evidence being presented you felt like that the State had not proven its case, you felt like the defendant was not guilty, would you still return a verdict of guilty just because of the type of crime it is?

MS. BAILLIO: No.

MR. GATEWOOD: That's all, Your Honor.

The defendant argues that Ms. Baillio could not be fair and impartial because she had only hoped that she could be fair and that her emotions would not get in the way. Also, the State's one leading question proved only that she was not vindictive or malicious, not that she could put aside her emotions. According to the defendant, Ms. Baillio "merely told the court she had hoped she had healed and she would like to think she would not let her emotions sway her decision."

While Ms. Baillio used less than unequivocal responses like "I'd like to say that I could" and "I'd like to say no," we find the voir dire testimony overall establishes that she could have sat as an impartial juror. While both Ms. Baillio and F.H. were victims of a sexual offense, we agree with the trial court that Ms. Baillio's responses as a whole indicated that she could be fair and impartial. Moreover, there was little similarity between the types of offenses involved in each case. As indicated by the trial court: "And there is a difference, as I understand it, in the charge here and what she experienced in her life; so I'm going to deny cause on that."

The fact that a juror personally has been the victim of a crime will not necessarily preclude that juror from serving on a jury as long as the juror's partiality has been unaffected. This is true even when the crime is similar to the one of which the defendant stands charged. **State v. Robinson**, 36,147, p. 11 (La. App. 2d Cir. 12/11/02), 833 So.2d 1207, 1214.

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). See also **State v. Kang**, 2002-2812, pp. 8-9 (La. 10/21/03), 859 So.2d 649, 655; **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).

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, 405-406, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

While defense counsel was concerned with Ms. Baillio's inability to be fair and impartial, the trial court was in the best position to determine whether Ms. Baillio would discharge her duties as a juror in that regard. Upon reviewing the voir dire in its entirety, we cannot say that the trial court abused its discretion in denying defense counsel's challenge for cause.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in failing to grant a mistrial and/or motion for new trial. Specifically, the defendant contends he should have been granted a mistrial because of a witness's reference to the defendant's post-arrest silence.

On direct examination by the prosecutor, Detective Harold Varnado of the Franklinton Police Department testified that the defendant did not give a statement after being picked up for questioning:

> Q. What did you do after receiving the information from Officer Jones and interviewing [F.H.]?
>
> A. I released her to go about her business, and I spoke -- had Sergeant Gaines bring Mr. Washington to my office. Sergeant Gaines went and picked him up to bring him there for questioning.
>
> Q. Was -- did you direct an arrest to be made in this matter? Is that the job of a detective?
>
> A. Well, my job is to advise to do that. And there are times that I do make direction in that case. And I brought Mr. Washington into the office and advised him of his rights and he refused to make a statement.

At this point, the defendant objected and moved for a mistrial. The trial court removed the jury and heard arguments from the State and the defendant. The trial court denied the motion for mistrial and informed the defendant that it would admonish the jury. The defendant objected to the denial of the mistrial, as well as to the admonition. The defendant felt that any instruction to disregard the officer's remark would only further taint the jurors because it would always be in their minds that the defendant refused to give a statement. The trial court admonished the jury upon its return that no presumption of guilt may be raised or inference drawn from the fact that the defendant did not give a statement. The trial court further ordered the jury to ignore any reference by the officer that the defendant failed to make a statement to the officer.

The United States Supreme Court has held that, because an accused's post-arrest silence is "insolubly ambiguous" and a jury is apt to draw inappropriate inferences from the fact that a defendant chose to remain silent, "the use for impeachment purposes of petitioners' silence, at the time

of arrest and after receiving **Miranda** warnings, violated the Due Process Clause of the Fourteenth Amendment." **Doyle v. Ohio**, 426 U.S. 610, 617 & 619, 96 S.Ct. 2240, 2244 & 2245, 49 L.Ed.2d 91 (1976). This ruling also applies to instances where a defendant does not take the stand. In such a situation,

> there is even less justification . . . for the State to call attention to his silence at the time of arrest than there was in **Doyle**, because the argument cannot be made that he was under cross-examination and thus fair game for impeachment by use of his silence at the time of his arrest.

State v. Montoya, 340 So.2d 557, 560 (La. 1976). See **State v. Stelly**, 93-1090 (La. App. 1st Cir. 4/8/94), 635 So.2d 725, 728, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

Under the authority of article 771 of the Code of Criminal Procedure, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the state, promptly to admonish the jury. In such cases where the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the court may grant a mistrial. See **Stelly**, 635 So.2d at 728.

In the instant matter, the State did not call attention to the defendant's silence at the time of his arrest. The State simply asked Detective Varnado if he directed the arrest in this matter. Detective Varnado's reference to the defendant's post-arrest silence went beyond the scope of the State's question. It does not appear, however, that the reference to the defendant's post-arrest silence was for the purpose of simply calling the jury's attention to it or having the jury make an inappropriate inference. When read in context with the entirety of Detective Varnado's testimony, it is clear that the reference was made in an attempt to summarize the extent of his

investigation, with regard to his minimal questioning of any witnesses or the defendant concerning F.H.'s claim.[3] The reference by Detective Varnado to the defendant's post-**Miranda** silence was minimal. The trial court found that a mistrial was not warranted and was satisfied that the admonition was sufficient to assure the defendant a fair trial. We agree. Under these circumstances, the trial court did not err in denying the defendant's motion for mistrial.[4] See **Stelly**, 635 So.2d at 728-729.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court imposed an excessive sentence. The defendant also argues that the trial court, without justification, ran his sentence consecutive, instead of concurrent, to any other sentence he was serving.

Because we find a reversible patent sentencing error, which requires us to vacate the sentence and remand for resentencing, we do not reach the merits of this assignment of error.

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[3] As indicated by the following colloquies, Detective Varnado's only sources of information with regard to F.H.'s claim were the initial statement given by F.H. to Officer Frankie Jones and the brief interview of F.H. conducted by Detective Varnado:

> Q. Did you see or have you seen at any time the report of this incident that was prepared by the officer?
> A. Yes, I have. I reviewed it.
> Q. Did you prepare a report relative to what was done in this matter?
> A. No, I did not.
> Q. Is there a reason for that?
> A. The officer's report was sufficient and my participation was very limited.
> * * * * *
> Q. Okay. Did you actually take the written statement from [F.H.]?
> A. No, I did not.
> Q. Okay. Had the written statement already been made?
> A. Yes.
> Q. And when you talked to [F.H.], how long was it for?
> A. Very briefly. I read over her statement that she had given and questioned her about that statement and released her.

[4] At the hearing prior to sentencing, the defendant asserted the same argument regarding the reference to his post-arrest silence in his motion for a new trial, which was denied.

PATENT ERROR

Appellate counsel asks that this Court examine the record for patent error. This Court routinely reviews the record for errors patent, whether or not a defendant makes such a request. Under La. C.Cr.P. art. 920(2), we are limited in our patent error review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. **State v. Allen**, 94-1941, p. 11 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1273, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Our review of the record reveals one reversible patent error.

The trial court erred by sentencing the defendant without waiting twenty-four hours after the denial of his motion for a new trial. See La. C.Cr.P. art. 873. Nothing in the record indicates the defendant waived this time period. Prejudice will not be found if the defendant has not challenged the sentence imposed and the twenty-four hour delay violation is merely noted on patent error review. See **State v. Ducre**, 604 So.2d 702, 709 (La. App. 1st Cir. 1992). The defendant has not assigned as error the trial court's failure to observe the twenty-four hour delay. However, the defendant has contested the sentence imposed. In **State v. Augustine**, 555 So.2d 1331, 1333-1334 (La. 1990), the Louisiana Supreme Court has held that a trial court's failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal. Because **Augustine** requires us to vacate the sentence, we find it inappropriate to review the merits of the excessive sentence challenge at this time. See **State v. Claxton**, 603 So.2d 247, 250 (La. App. 1st Cir. 1992).

Therefore, for the foregoing reasons, the defendant's conviction is affirmed, the sentence is vacated, and the case is remanded for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.